THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No.: 2015-CP-40-0653

State of South Carolina,

Respondent,

v.

Christopher Heller,

Appellant.

NOTICE OF APPEAL

Christopher Heller, #332997, appeals the Order of Dismissal denying his Application for Post-Conviction Relief filed May 6, 2019, and the Order Denying Rule 59(E) Motion filed August 13, 2019, issued by the Honorable R. Scott Sprouse, presiding Judge.

August 22, 2019

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Linsdey A. McCallister and Kelly Oppenheimer by depositing a copy of it in the United States Mail, postage prepaid, on August 21, 2019, addressed to their office at:

PO Box 11549
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August 21, 2019

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August 22, 2019

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

via hand delivery

RE: Christopher Heller v. State of South Carolina
Notice of Appeal

Dear Madam Clerk:

Enclosed please find an original and copy of a Notice of Appeal in the above referenced matter. Please return a filed copy with our clerk.

By copy of this letter a copy of the Notice of Appeal is being provided to all parties.

Sincerely,

Christina Metze

Christina Metze
Paralegal

Enclosures

cc: Lindsey A. McCallister
Kelly Oppenheimer
Christopher Heller

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Christopher Heller, Plaintiff, v. State of South Carolina, Defendant.	)	IN THE COURT OF COMMON PLEAS TENTH JUDICIAL CIRCUIT CASE NO.: 2015-CP-40-0653 ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Plaintiff's Motion, pursuant to Rule 59, SCRCP, [1] is DENIED.

AND, IT IS SO ORDERED.

R. SCOTT SPROUSE
Judge, Tenth Judicial Circuit

Walhalla, South Carolina
August 9, 2019

[1] The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015CP4000653

Christopher #332997 Heller	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court

RICHLAND COUNTY FILED 2019 AUG 13 AM 11:10 JEANETTE W. McBRIDE C.C.P., C.S. & F.C.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge _____ **Judge Code** _____ **Date** _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ **day of** _____, **20** _____ and a copy mailed first class or placed in the appropriate attorney's box on this 13 August 2019 to attorneys of record or to parties (when appearing pro se) as follows:

Aimee Jendrzejewski Zmroczek

Lindsey Ann McCallister

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____ **Clerk of Court** Jeanette W. McBride

RECEIVED
AUG 22 2019
SC Court of Appeals

SCRCP Form 4C (10/2011)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	
	)	
Christopher Heller, #332997,	)	Case No.: 2015-CP-40-0653
Applicant,	)	
	)	**ORDER OF DENYING APPLICATION**
v.	)	**FOR POST-CONVICTION RELIEF**
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 30, 2015. Respondent made its Return and Motion for a More Definite Statement on June 28, 2016, requesting the application be amended with more specific facts and allegations. Applicant amended the application on December 12, 2017. On August 30, 2018, Respondent filed a Second Amended Return, Partial Motion to Dismiss, and Motion for a More Definite Statement. An evidentiary hearing into the matter was convened on December 18, 2018, at the Richland County Courthouse before the Honorable R. Scott Sprouse. Aimee J. Zmroczek, Esquire, represented Applicant. Lindsey A. McCallister and Kelly Oppenheimer, Esquires, of the South Carolina Attorney General's Office, represented Respondent.

At the hearing, Applicant testified on his own behalf. Applicant also presented testimony from his aunt, Carolyn Robinson, and a private investigator, Dave Anatra. Gregory Collins, Esquire, Applicant's trial counsel; Robert M. Dudek, Esquire, Applicant's appellate counsel; and Dolly Justice Garfield, Esquire, the lead prosecutor, also testified. At the close of all the evidence, the Court indicated it would take this matter under advisement, and the parties submitted post-trial briefs. This Court now denies and dismisses the application with prejudice.

PROCEDURAL HISTORY

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Richland County Clerk of Court's orders of commitment. The Richland County Grand Jury indicted Applicant at the November 2006 term for murder (2006-GS-40-7464) and assault and battery with intent to kill (ABWIK) (-7466). Gregory Collins, Esquire (Counsel), represented Applicant.

Applicant's case was called for trial on January 26-30, 2009, before the Honorable J.C. "Buddy" Nicholson, Jr. and a jury. The jury found Applicant guilty of both charges as indicted. On January 30, 2009, Judge Nicholson sentenced Applicant to life imprisonment for the murder conviction and twenty years' imprisonment on the ABWIK conviction, to be served concurrently.

Applicant filed a timely notice of appeal, which was perfected by Robert M. Dudek, Esquire (Appellate Counsel). Appellate Counsel raised three issues in Applicant's brief: (1) whether the trial court erred in allowing impeachment of Applicant with his prior drug convictions pursuant to Rule 609(a)(1), SCRE; (2) whether the trial court erred in denying Applicant's motion for a mistrial based on the testimony of Kevin Nails; (3) whether the trial court erred in refusing to hold an *in camera* hearing on the admissibility of voice identification testimony. The Court of Appeals affirmed Applicant's convictions and sentences in a published opinion filed June 13, 2012. See State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012). Applicant filed a petition for rehearing on June 28, 2012, which was subsequently denied by order dated August 27, 2012.

Applicant then filed a petition for writ of certiorari in the South Carolina Supreme Court on November 26, 2012. The State filed its return on March 29, 2012. By order filed May 23,

2014, the Supreme Court granted certiorari as to question two, the denial of a mistrial. Briefs were filed by both Applicant and the State, and the Supreme Court dismissed the writ of certiorari as improvidently granted. State v. Heller, Op. No. 27461. The remittitur was issued October 29, 2014.

SUMMARY OF FACTS ADDUCED AT TRIAL

During the early morning hours of August 25, 2006, while still dark, Neil Schmitz, an ambulance driver and EMT, received a call to go to a mobile home park on Brookhurst Road off Percival Road not far from the Blue Cross/Blue Shield building. The call was in reference to an unknown body. (R. 229-38).

When Schmitz arrived at the location, he found the first victim, Gustavo Hernandez Guzman ("Chino"), lying in the roadway outside the mobile home park. After determining Chino was deceased, Schmitz notified the Sheriff's Office and backed away from the body so as not to disturb the crime scene. (R. 229-38).

Deputy Joe Clark of the Richland County Sheriff's Office responded to the scene within minutes and confirmed the dead body. Clark then entered a mobile home in the trailer park near where Chino's body was found. Clark could see the door was open to this home from where the body was located, and Deputy Clark heard someone moaning and calling for help from inside. Once inside the home, Clark found a second victim, Mary Chavis ("Mary"), lying on the living room floor suffering from numerous stab wounds. (R. 238-46).

Mary had been grievously wounded and was trying to hold her intestines in her body. (R. 241). Schmitz, the EMT, was immediately called inside the mobile home where he began treating Mary. (R. 233-35). Mary was transported by ambulance to the hospital, where after emergency treatment by several doctors, she was able to survive her stab wounds. (R. 234-38,

321, 324-26, 353-73). Mary had to undergo multiple surgeries as a result of the numerous stab wounds to her face, hands, and body. (R. 353-73). Mary remained in the hospital for more than a month as a result of her injuries. (R. 465).

The autopsy on Chino's body determined he died from a direct stab wound to his heart. (R. 596-606). Chino also had four stab wounds to the face, an incised wound to the shoulder, and two defensive wounds to his left hand. (R. 598-99). The pathologist opined at trial that the most likely murder weapon was a pocket knife with a three- to four-inch blade. (R. 601-02).

After the criminal investigation began, police were able to locate a witness who was actually inside Mary's home when Petitioner, Christopher Robert Heller ("Heller"), assaulted Mary and Chino with his knife. (R. 334-35). This witness, Bille Joe Risinger, known as "Tracy," hid under a bed in a bedroom when Heller entered the trailer and brutally stabbed the two victims. During the assault, Tracy heard Mary's screams and calls for help, but because of her fear, Tracy remained under the bed until the assaults were over. (R. 337, 373-405). Police also identified another witness, Kevin Nails, who had been present at the crime scene earlier and had brought Heller to the mobile home earlier in the night before the assaults. (R. 337-40, 415-43).

Tracy testified that she had been smoking crack cocaine with Heller, Mary, and Chino before the assaults occurred. (R. 379). Tracy testified that later, during the early morning hours of August 25, 2006, Mary, the surviving victim, asked Heller to leave the trailer because Heller was "acting weird."[1] (R. 379). Tracy testified Heller left, but he came right back and knocked

[1]Tracy testified Heller gave her "the creeps," was acting like he was "up to something," and tried to follow her out of the trailer on one occasion. (R. 379, 382). She also testified Heller was taking his clothes off and putting them back on. (R. 379). When he did this, she saw several tattoos on him, one of which said "made man" and another that had dollar ($) signs. (R. 392-93).

on the door. (R. 376-383). Tracy testified it was Heller's voice at the door. (R. 380-83). It is clear from Tracy's testimony she sensed something was going to happen, and she told Mary not to open the door; Tracy fled to a bedroom and locked the door. (R. 380-88).

The assaults occurred when Mary opened the front door, and Heller tried to come back into the home. (R. 380-88, 461). Mary placed her hand on Heller's chest, but she could not prevent his re-entry into the home. (R. 461). Heller stabbed Mary numerous times, and he stabbed Chino after Chino tried to come to Mary's aid. (R. 373-405, 449-86, 661-64).[2]

After stabbing Mary and Chino, Heller fled from the crime scene on foot. (R. 663). After the assaults were over and Heller had fled, Tracy left the home and flagged down Kevin Nails who was returning to the home in his car. Nails had left the home earlier, before the assaults, with another friend, Devon Harris ("Devon"), and these two men had gone to the Oasis nightclub, leaving Heller at Mary's home. Nails was returning to the mobile home park to pick up Heller when Tracy flagged him down. Still under the influence of the event, Tracy jumped in Nails' car and told Nails "his boy [Heller] had snapped and was trying to kill everyone." (R. 373-405, 415-43). As a result of Tracy's and other information, police were able to locate and interview Nails. (R. 337-40). Nails confirmed the person he brought to the trailer earlier that night and left there while he and Devon went to the "Oasis," was in fact his cousin, Heller. (R. 337-40, 634-35).

Nails testified when he and Devon left the mobile home park to go to the Oasis nightclub, Heller wanted to remain at the mobile home to have sex with Tracy. Nails testified when he

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Heller admitted at trial he had these tattoos. (R. 807). An investigator also testified to the fact Heller had these tattoos on his body after arrest. (R. 691).

[2]Chino was not in the home when the assault on Mary began; he lived in another mobile home across from Mary's home. (R. 379-80, 386, 452, 460). From the record, it appears Chino came to help Mary when he also heard her screams and cries for help. (R. 384, 386, 661-63, 464).

returned to the mobile home park in an attempt to find his cousin, Tracy jumped in his car and made the excited utterance. Nails also testified at trial that late in the evening following attack, Heller called him and told him he needed a ride back home.[3] Nails testified he went and picked Heller up, at a location not far from the crime scene, and took Heller to another location where Heller got out of Nails' car and got into a car driven by Nails' mother. Nails did not see Heller again. (R. 415-43).

On August 30, 2006, police placed Heller's photograph in a photographic line up, and Mary positively identified Heller as the person who stabbed her numerous times. Mary made the identification in her hospital room while still recuperating from her injuries. (R. 468-69, 640-42). Mary also testified that after she was stabbed, when Chino came in the home, she saw some type of arm movement, Chino ran from her home, and Heller ran after Chino. (R. 464, 471). Also on August 30, 2006, Tracy was also shown a photographic line-up by police. She positively identified Heller as the man Nails brought to the trailer, the man who Mary asked to leave, and as the man who returned and committed the murder and ABWIK. (R. 186-87, 637-39). Based on the information gained through the investigation, police obtained arrest warrants on Heller for murder and ABWIK. (R. 642).

After committing these brutal crimes, Heller eventually fled to his home in the State of Georgia. Through investigation, police were able to determine that Heller was a resident of Appling County. (R. 337-40). Police traveled to Baxley, Georgia, located in Appling County, on August 31, 2006. While there, assisted by the Appling County Sheriff's Office, police

[3]Heller was from Georgia. (R. 642, 797). Heller was in Columbia because he and Nails were supposed to take a trip to Harrah's Casino in Cherokee, North Carolina. (R. 664). After the assaults, which occurred in the early morning hours of August 25, Heller hid in an abandoned mobile home until the sun came up and all of that day. (R. 663). Around 9 p.m., still on August 25, Heller left the trailer and contacted Nails by borrowing a phone from a woman who lived near the abandoned trailer. (R. 663, 790).

obtained a search warrant for Heller's residence. Police searched Heller's home and recovered clothing they believed Heller was wearing when the murder and ABWIK were committed. Heller was arrested later that day in the town of Baxley.

Before returning to South Carolina with investigators, Heller was read his Miranda rights and executed a Voluntary Waiver of Rights Form. Heller was questioned in Baxley by two investigators from the Richland County Sheriff's Office. After executing the Voluntary Waiver of Rights Form, Heller gave police a written confession to the murder of Chino and to the attempted murder of Mary Chavis. (R. 661-65). In his confession, consistent with the other witnesses' statements, Heller admitted he went to Mary Chavis' mobile home with his cousin [Nails] and another black male [Devon]. (R. 661). Heller explained that they were with a white girl [Tracy], and they entered a home where there was a white lady [Mary] and a Mexican man [Chino]. (R. 661). Heller stated that he, Nails, and Tracy started smoking crack. Heller stated after he smoked crack, he was asked to leave the home by the lady [Mary]. (R. 661). Heller stated he told Mary he was just waiting on Nails to come back and pick him up. (R. 661-62).

Heller then admitted to both investigators that he started stabbing people. (R. 662). Heller told police the knife was a fold-up knife with a brown handle, and the knife had about a two- or three-inch long blade. (R. 662). During his confession, Heller was asked by police who he stabbed first. Heller stated he stabbed the lady [Mary] first. (R. 662). Heller stated the man [Chino] jumped on his back inside the trailer. (R. 662).

Heller stated after the stabbings, he ran, found an old empty trailer, and hid there until about dark. (R. 663).[4] Heller stated he then asked another lady if he could use her phone to call

[4]It was dark when the crimes were committed around 3 to 4 a.m. in the morning. As discussed above, Heller fled the crime scene and stayed in an abandoned trailer until the sun came up, all of the following daylight hours, and remained in the abandoned trailer until about 9:00 p.m. on the

someone to pick him up. She allowed him to use the phone, and he called his cousin Nails, and Nails came and picked him up. (R. 663). Heller stated Nails called Nails' mother, Carolyn Robinson, who met them on the interstate, and she took him home to Georgia. (R. 663). Heller stated he threw the knife away somewhere after leaving "the girl's" trailer. (R. 663). Heller told police the reason he was in Columbia on the date of the murder was because his aunt Carolyn was supposed to take him and Nails to the casino in Cherokee, North Carolina. (R. 664). When asked if there was anything else he would like to add to his statement, Heller responded, "No, sir. Everything I told you was the truth." (R. 663).

Heller had an opportunity to review the statement, and he then signed the written confession as true and correct. (R. 663-64). Heller also accompanied investigators back to his mother's home and pointed out additional clothing he claimed he was wearing when he murdered Chino and stabbed Mary. (R. 663, 672-74). Heller waived extradition to South Carolina to face the charges of murder and ABWIK. (R. 675).

On the return trip to Columbia, investigators took Heller by the crime scene. Heller pointed out to investigators where he spent the remainder of the early morning and daylight hours of the 25th following the assault on Mary and Chino. (R. 676). Heller told police he stayed in an abandoned trailer on Percival Road the day following the murder and ABWIK. (R. 676-77). Heller also told police the general area where he threw the murder weapon. (R. 678).

On September 4, 2006, an investigator took Heller back out to the crime scene and surrounding area. (R. 680). Heller was again read his Miranda rights, and Heller again executed a Voluntary Waiver of Rights Form. (R. 682-83). Heller again showed an investigator the path he took from the crime scene after the murder and ABWIK. Heller again showed an

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25th of August. (R. 663-64). He then walked to another residence nearby and asked a lady there if he could use her telephone. (R. 663-64).

investigator where he hid during the early morning hours of August 25, 2006, and during the following day. Heller also attempted to show an investigator where he threw the murder weapon and how he threw it. (R. 681-88). Police searched for the weapon, but were unable to locate it. (R. 688-89). Heller's DNA was forensically matched to a cigarette butt found in an ashtray inside the crime scene. (R. 578).

At trial, over two years after his confession to law enforcement, Heller testified and denied he told police he stabbed anyone. Heller denied he told police he had a two- to three-inch knife or where he threw the knife. Contrary to his signed confession, Heller claimed he left the home before the assaults occurred and did not know who committed the murder or ABWIK. On cross-examination, Heller was impeached with the written confession he signed which set forth clearly his account admitting to the stabbing, which he signed as true, along with the Voluntary Waiver of Rights Form he executed. (R. 794-805). Heller also admitted on cross-examination that when his father called him at the Richland County Detention Center after his arrest and asked him what he had done, he told his father he could not tell him over the phone. (R. 816). Heller also admitted on cross-examination, that before the crimes occurred, he wanted to have sex with Tracy and had an argument with Tracy on the night in question. (R. 786-87). Heller further admitted Mary asked him to leave the home because he was arguing with Tracy. (R. 788). Heller also admitted he went next door and tried to use a telephone to call Nails to come and pick him up at Mary's home. (R. 788). Heller also admitted he stayed in a vacant trailer all of the following day until it was dark or almost dark. (R. 789-90). Heller further agreed, that after he left the abandoned trailer, he called Nails around 9 p.m. and told him he needed a ride. (R. 789-91). Heller further admitted his aunt met him and Nails, and she took him to Georgia. (R. 791-92). Heller also admitted that he, Nails, and his aunt never traveled to

Cherokee, North Carolina, the reason he was in Columbia on the date of the crimes, but he instead returned to Georgia. (R. 792).

ALLEGATIONS

Applicant filed an amended application on December 12, 2017, which contained thirty-two allegations regarding Counsel's alleged ineffective assistance and four allegations regarding Appellate Counsel's alleged ineffective assistance. At the hearing, Applicant ultimately went forward only on the following allegations:[5]

1. Trial was ineffective for:
    a. Failing to quash/challenge statement as a result of an illegal arrest;
    b. Failing to quash/challenge out of state search warrants;
    d. Failing to challenge/require proof of Extradition waivers;
    g. Failing to ask for a continuance regarding late scientific disclosures;
    h. Failing to investigate/call/prepare witnesses;
    i. Failing to prepare for trial including viewing/challenging all physical evidence;
    j. Failing to properly impeach witnesses;
    k. Failing to object/preserve objections for appellate review;
    n. Failing to properly argue/preserve Jackson v. Denno;
    p. Failing to argue/preserve voice identification;
    q. Failing to challenge scientific evidence by either not hiring nor (sic) consulting with an expert;
    s. Failing to investigate/challenge/present telephone record evidence by either not hiring nor consulting with an expert;
    w. Failing to prepare/execute cross-examination;
    y. Failing to present a third party guilt defense;
    z. Failing to limit photo line-up testimony;
    aa. Failing to utilize evidence;
    bb. Failing to move for a mistrial/request curative instructions/ preserve arguments for Appellate review;
    dd. Failure to object to improper solicitor questions eliciting improper testimony and improper closing arguments;
    ee. Failing to request/argue jury charges including, but not limited to, identification, stricken testimony, lesser-included offenses, third-party guilt; permissive inference under Belcher;
2. Appellate Counsel was ineffective for the following did not raise all obvious and meritorious issues on appeal including but not limited to (sic):
    a. Failing to raise and argue the identification argument under Neil v. Biggers[.]

[5] For clarity, the allegations are numbered in the same alphabetical order as they appear in the amended application. If a letter is skipped, Applicant waived that allegation.

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This Court finds all allegations contained in the original application and the amended application, specifically allegations 1(e), 1(f), 1(l), 1(m), 1(o), 1(r), 1(t), 1(u), 1(v), 1(x), 1(cc), 1(ff), 2(b), 2(c), and 2(d), were waived on the record by counsel for Applicant. Those allegations are denied and dismissed.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

As to the remaining allegations of ineffective assistance of trial and appellate counsel, this Court finds they are without merit. This Court has had the opportunity to review the record in its entirety and has heard the testimony at the PCR hearing. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2003).

In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. First, Applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

RSS

"Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Applicant also alleges ineffective assistance of appellate counsel. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is **not** required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . ." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (1999). Thus, in this case, we ask first whether appellate counsel's performance was deficient, and two, whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680

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S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

I. Allegations 1(a), (b), (n), (aa): Failure to properly challenge admission of Applicant's statements confessing his involvement in the crime

Applicant alleges Counsel was ineffective in arguing for suppression of his statements to law enforcement officers because Counsel was not provided with relevant discovery regarding the arrests of his mother and girlfriend, because Counsel was not told of Applicant's claim he did not waive extradition, and because the arrest and subsequent confession were the result of an invalid search warrant. This Court disagrees and find this allegation should be denied and dismissed.

Applicant gave two statements to law enforcement – a written statement taken at the police station in Georgia and an oral statement when he was taken to the trailer to look for the murder weapon. At trial, Applicant requested a Jackson v. Denno hearing at which Counsel argued Applicant's statement was coerced due to the arrests of his mother and girlfriend for harboring a fugitive. In support of this allegation, Applicant introduced arrest records/booking reports for the two women, which Counsel testified were not turned over to him at trial. According to Counsel, if he had seen those records, he would have used them to challenge the admissibility of Applicant's statement.

However, the lead prosecutor, Dolly Garfield (Garfield), testified the records were turned over to the defense on January 22, 2009, and the State introduced a discovery checklist confirming the disclosure was made. Garfield testified the checklist was prepped by her paralegal, and signed by Brie Russell, an employee of the public defender's office. Garfield further noted the booking reports indicated they were printed on January 7, 2009, which is

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consistent with the disclosure date on the discovery checklist. The Court finds Garfield's testimony the records were provided to the defense prior to trial to be credible.

In any event, the fact Applicant's mother and girlfriend were arrested was clearly known at trial and not contested by the State. Applicant and his mother both testified at the pre-trial Jackson v. Denno hearing that Applicant's mother and girlfriend were under arrest at the time Applicant came to the station to turn himself in. Tr. pp. 200-04, 212. Additionally, the State called the two South Carolina investigators, Siniard and Gonzalez, as well as the Appling County (Georgia) Sherriff, Benny DeLoach, who all confirmed the arrests were made. Tr. pp. 39, 180-81, 183, 186. Sherriff DeLoach testified the South Carolina officers had no involvement in the arrest of Applicant's mother and girlfriend. Tr. p. 186. This was confirmed by the South Carolina officers, and in fact, Gonzalez testified he was not even aware of the arrests at the time Applicant gave his statement. Tr. pp. 39, 183. The testimony of Applicant and the officers was also consistent that only the South Carolina officers were involved in questioning Applicant, and no Georgia officers were present. Tr. pp. 22-23, 42-43, 212-13. Although Applicant testified Gonzalez and Siniard told him they would let his mother go if he confessed, the officers denied making that statement. Tr. pp. 49, 214.

The trial court heard all of the testimony outlined above and determined the statement was admissible. Although Counsel testified he must not have had the records because he would have used them if he had seen them, this Court finds Counsel was mistaken as shown by the State's discovery checklist. This Court also finds Applicant has failed to show how the records would have changed the trial court's decision since it was never in dispute that his mother and girlfriend were indeed under arrest at the time Applicant turned himself in and gave a statement.

Therefore, even if Counsel had used the records, they were merely cumulative to the testimony of the officers.

At trial, Counsel called witnesses to support his argument Applicant was coerced by the arrests of his mother and girlfriend. Indeed, the State did not dispute they were in fact under arrest, and Applicant knew that information at the time he gave the statement. Once the trial judge made the decision to admit the statement, Counsel engaged in a thorough and detailed examination of Siniard and Gonzalez about the circumstances surrounding the taking of the statement, including inconsistencies in the timeline and paperwork. Tr. pp. 640-56, 810-853, 856-57. Further, both Applicant and his mother testified in front of the jury as to the arrests, and Applicant testified to the pressure he felt during the interrogation due to his mother being detained. Tr. pp. 875-942. Counsel also vigorously argued the statement was coerced in his closing. Tr. p. 961-63.

Therefore, the Court finds Counsel had all the relevant information to make an argument regarding coercion due to the arrests of Applicant's mother and girlfriend, and he did so capably, and therefore, he was not deficient. Further, this Court finds Applicant has not shown prejudice because the trial judge's decision to admit the statement would be reversed on appeal only if determined to be an abuse of discretion. See State v. Myers, 359 S.C. 40 (2004) (quoting State v. Von Dohlen, 322 S.C. 234 (1996) ("A determination whether a confession was given voluntarily requires an examination of the totality of the circumstances. On appeal, the trial judge's ruling as to the voluntariness of the confession will not be disturbed unless so erroneous as to constitute an abuse of discretion.... The pertinent inquiry is. . . whether the defendant's will was overborne.") (internal quotations and citations omitted).

Here, Applicant presented no evidence of coercion other than his knowledge his mother and girlfriend had been arrested. The officers denied making any statement to Applicant implying the women would be released or let go if Applicant confessed. "Where there is conflicting evidence as to whether defendant's statement is voluntary, it is, in the first instance, the province of the trial court to determine this factual issue by the preponderance of the evidence." State v. Howard, 296 S.C. 481, 492 (1988). Because the trial court's decision was supported by the officers' testimony, it is not reasonably likely the decision would have been reversed on appeal had it been raised.

Applicant also alleges Counsel should have argued the statement was inadmissible due because Applicant allegedly did not waive extradition to South Carolina. Counsel testified had he known about Applicant's claim he never waived extradition (discussed more fully below), he would have used that as another ground for excluding the statement. The statement, however, was made prior to any extradition hearing being held, so a defect in the extradition proceedings has no bearing on the admissibility of the written statement. (R. pp. 23-24.) Further, Applicant himself testified at trial he waived extradition, so there is no way for Counsel to have known to raise that argument, and this Court finds he was not deficient in failing to do so. (R. p. 780.)

Finally, Applicant alleges Counsel should have challenged Applicant's statement because it was the product of allegedly improper out-of-state search warrants. Importantly, Applicant does not challenge the *arrest* warrant, which was issued by a South Carolina magistrate judge on August 25, 2006, and entered into the NCIC database on August 30, 2006 – the day before Siniard and Gonzalez traveled to Georgia to arrest Applicant. Instead, Applicant challenges the *search* warrant executed at his home, which was issued by a Georgia magistrate and served by Georgia officers, although it was based on an affidavit from the South Carolina investigators.

The Court finds Applicant presented no evidence as to why the search warrant is invalid other than Counsel's testimony he found the process "odd." Although Siniard supplied a supporting affidavit for the search warrant, the body of the warrant itself reflects it was applied for by a Georgia police officer, Captain Charles E. Beach. South Carolina officers would necessarily be required to supply information to establish probable cause as the crime occurred in this state. This process is no different than an officer applying for a warrant based on information given to him or her by a reliable confidential informant or obtained through witness interviews – all are based on hearsay. See United States v. Ventresca, 380 U.S. 102, 108 (1965) ("Thus, hearsay may be the basis for the issuance of the warrant, so long as there is a substantial basis for crediting the hearsay.") (quoting Jones v. United States, 362 U.S. 257 (1960), overruled on other grounds by United States v. Salvucci, 448 U.S. 83 (1980)). Additionally, Georgia law requires its governor to apprehend and deliver to "any other state any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in [Georgia]." O.C.G.A. § 17-13-22 (2018).

The Court has reviewed the relevant parts of the trial record, plus the testimony from the evidentiary hearing, and finds Counsel had all the relevant information in the State's possession regarding the circumstances surrounding Applicant's written statement, including the arrest records of Applicant's mother and girlfriend. The Court further finds Counsel strenuously argued the statement was coerced. Therefore, for the reasons stated above, the Court finds Applicant has failed to prove Counsel's handling of the issue of Applicant's statement was deficient in any way. Accordingly, because Applicant has proven either deficiency or prejudice, these allegations shall be denied and dismissed.

II. Allegation 1(d), (k): Failure to challenge extradition from Georgia to South Carolina

Applicant alleges he never appeared in front of a judge for an extradition hearing, nor was he told of his right to contest extradition, and asserts the waiver form, which was signed by the judge instead of Applicant, supports this claim. However, this Court has reviewed the trial transcript and finds it indisputably refutes Applicant's testimony on this issue, which the Court finds not credible.

The trial transcript reflects Counsel questioned Applicant about his extradition to South Carolina, and Applicant then testified he voluntarily waived extradition because he wanted to "clear his name" and do whatever authorities need him to do. (R. p. 780.) Furthermore, Counsel testified at the evidentiary hearing he was never told by Applicant, or anyone, at the time of trial that Applicant had allegedly not waived extradition. Counsel admitted he would not have asked Applicant about it at trial without knowing the answer, implying Counsel and Applicant had discussed the issue, and Applicant told Counsel he waived extradition. Although Counsel testified he should have noticed the error with the signatures and he would have "used it" at trial, it is unclear how or for what purpose Counsel would have been able to do so when Applicant's testimony at the time was that he had voluntarily waived his rights. Finally, Garfield testified she was present at trial when Applicant testified he waived extradition, and Applicant's testimony was consistent with the notes from law enforcement in the State's file. According to Garfield, Holly Siniard, the lead investigator, noted in his report that a hearing took place in front of a magistrate judge in Georgia, and Applicant voluntarily waived extradition.

In any event, Applicant's trial testimony on this issue is dispositive, and this allegation should be denied and dismissed. Applicant testified under oath at trial he waived extradition because he wanted to be cooperative with authorities and do whatever was needed to clear his

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name. There is no evidence he ever told Counsel he did not voluntarily waive extradition; indeed, there is evidence he told Counsel he had. His waiver is consistent with the contemporaneous records in the file – both the investigative notes and the waiver form itself. Although Applicant did not sign that form, it appears to be merely a scrivener's error with judge's signature appearing twice. Therefore, because Applicant voluntarily waived extradition, Counsel cannot be ineffective for failing to challenge it at trial and/or preserve the issue for appellate review. These allegations shall be denied and dismissed.

III. Allegations 1(h), (i), (s), (y): Failure to properly investigate, prepare, and present Applicant's defense

Applicant alleges Counsel was deficient in his preparation and presentation of Applicant's defense, and Counsel should have investigated and presented evidence of third-party guilt. Counsel testified the defense theory of the case was exactly what Applicant testified to at trial – he went to the trailer park with his cousin, Kevin Nails, and Devon, where they smoked crack with Billie Joe Risinger and Mary Chavis; Nails and Devon left first, and Applicant stayed behind because he wanted to have sex with Risinger, but the women then asked him to leave, so he left. Counsel testified the trailer park, and Chavis's trailer in particular, was a hub for drug activity, and anyone could have been watching the trailer for an opportune time to commit a robbery. Counsel testified no drugs were found inside the trailer even though all parties admitted they had been using that night.

Counsel further testified he reviewed the officers' investigative reports and was aware of a second murder committed in the same area on the same night. According to Counsel, police at first believed the two incidents might be connected, but nothing ever panned out, and law enforcement eventually decided they were not linked. Counsel testified he had use of the Public Defender's Office's private investigator on this case, and the investigator went out to the trailer

park to try to locate witnesses who had given potentially useful or favorable written statements, but no one was willing to talk. Counsel explained it is a high crime area, and people did not want to be involved. Counsel further explained the defense theory of the case was that an unknown person came into the trailer after Applicant left and committed the crime, so there was nothing specific for Counsel to follow up on. Counsel testified there was unidentified male DNA found in the trailer which supported this theory.

Applicant alleges Counsel should have more fully investigated the phone records available in this case. Counsel testified he received the records for Kevin Nails' phone and tried to identify as many numbers as possible. However, as Counsel explained, Nails was a drug dealer, and many of the numbers could not be identified. Counsel testified he used the records to corroborate Risinger's testimony she called Nails after leaving the trailer rather than calling 911. He also testified he tried to locate records for a collect call Applicant claimed to have made to Nails, but he was unable to do so. Finally, Counsel testified he spoke with Nails, Applicant's mother, and Applicant's girlfriend, and tried to speak with Applicant's aunt, Carolyn Robinson, but was unable to make contact her.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (citing Moorehead v. State, 329 S.C.

329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003).

Here, the Court finds Counsel reviewed the phone records in an attempt to verify Applicant's version of events, but he was unable to do so. The Court finds Counsel also reviewed the investigative notes from law enforcement regarding a possible connection between the two murders, but law enforcement ruled out any connection, so there was nothing for Counsel to follow up on. Further, the Court finds credible Counsel's testimony he sent an investigator to the trailer park to try to track down witnesses, but no one was willing to cooperate. In fact, Counsel testified Applicant's own girlfriend was not willing to testify for the defense. Accordingly, the Court finds Counsel was not deficient as he investigated as far as he was able and prepared a viable defense based on Applicant's version of the facts and the witnesses available for the defense.

Additionally, the Court finds Applicant has not produced any evidence as to what Counsel would have found had he continued to investigate the phone records or the second murder, so Applicant has not met his burden of proof as to prejudice. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Applicant did not present any evidence he was prejudiced by Counsel's performance as

Applicant did not call any witnesses or present any defense he was unable to present at trial due to Counsel's alleged deficiencies. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1999) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

The Court finds the testimony of Dave Antara, the private investigator, was insufficient to meet his burden of proof because Antara was unable to establish any specific third-party guilt candidate. Indeed, Antara was able to do no more than Counsel, which is to suggest it was "possible" the two murders were connected. Additionally, Applicant did not offer any evidence regarding the identity of unknown numbers in the phone records or regarding the triangulation of Nails' phone. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding an applicant's mere speculation about what witnesses' testimony would have been cannot, by itself, satisfy an applicant's burden of showing prejudice). Although Applicant did call his aunt to

testify at the PCR hearing, her testimony merely confirmed the trial testimony of Applicant and Nails that she drove him back to Georgia from Columbia. The testimony she offered did not constitute an alibi or help advance a third-party guilt defense in any way. Therefore, the Court finds her testimony was also insufficient to establish Applicant's burden of proof as to prejudice.

Finally, although Applicant has alleged Counsel was deficient for failing to view the physical evidence prior to trial, Applicant has not offered any explanation as to how this prejudiced him. Counsel testified he did eventually review the evidence during trial. However, after review the trial record, the Court finds the physical evidence was relatively unimportant in this case given Applicant's confession and the identification of Applicant as the perpetrator by two witnesses. Applicant did not offer any new evidence or testimony he was unable to offer at trial due to Counsel's allegedly deficient conduct in failing to review the physical evidence. Accordingly, this Court finds Applicant's presentation on this issue is insufficient to meet his burden of proof as to the prejudice prong. Therefore, because Counsel was not deficient, nor was Applicant prejudiced, these allegations should be denied and dismissed.

IV. Allegations 1(g), (q): Failure to challenge DNA evidence

Applicant alleges Counsel failed to properly and fully challenge the DNA evidence in the case and failed to retain a DNA expert. Counsel testified he reviewed all of the DNA evidence in the case, and it is undisputed Applicant's DNA was not found on either victim, nor was either victim's blood found on Applicant or anything Applicant owned. Applicant's DNA was found on a cigarette in Chavis's ashtray, but Counsel testified that was consistent with Applicant's version of the facts in which he admitted he had been in the trailer earlier in the night using drugs with Chavis and Risinger. Counsel further testified it was clear Chavis routinely had lots of people in and out of her trailer, so even if he had pursued testing of the unidentified DNA, it likely would

not have advanced a third-party guilt claim. Counsel also testified he argued at trial, based on the evidence presented, the person responsible for the attacks would have been covered in blood, and all of the witnesses who testified stated no blood from the crime scene could be attributed to Applicant. On cross-examination, Counsel acknowledged the DNA evidence, or lack thereof, was helpful to the defense case overall, and there was a risk further testing could tie Applicant to the scene.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland, 466 U.S. at 689.

In this case, the Court finds Applicant has not overcome that presumption. Based on the trial record and Counsel's testimony at the hearing, the Court finds Counsel was not deficient in handling the DNA evidence because he made a reasonable strategic decision not to pursue further DNA testing where the testing already completed by the State was helpful to Applicant's case. Regardless, because Applicant did not present any new DNA evidence or expert testimony on the issue, the Court finds he has not met his burden of proving he was prejudiced by Counsel's decision. See, e.g., Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1999) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen

v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial). Therefore, because Counsel was not deficient, nor was Applicant prejudiced, these allegations should be denied and dismissed.

V. Allegations 1(j), (w), (aa): Failure to properly cross-examine and impeach the State's witnesses.

Applicant alleges Counsel was deficient in his cross-examination of various witnesses, specifically Billie Joe Risinger. However, Counsel testified he was thwarted in his cross-examination of Risinger by the trial judge's rulings regarding the photo-line up (discussed more fully below). Counsel testified Risinger admitted she had been smoking crack on the night of the murder, and although Counsel tried to use this fact to question the reliability of her memory, the trial judge prevented him from exploring that line of questioning because he was unable to show the lineup had been unduly suggestive. Counsel further testified once Risinger admitted to the drug use on direct, he did not see a need to repeat that questioning on cross-examination. Counsel also explained he did not go into detail with Risinger or Chavis about discrepancies in their stories or descriptions of the crime scene because he had the crime scene photos and preferred to tie up any loose ends during his closing argument.

"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.'" Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (citing Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998)). "Ineffective assistance of counsel complaints sometimes allege the failure to adequately follow-up cross-examination answers with more

detailed questions further examining those answers. But a successful ineffective assistance complaint requires more than speculation that additional information would have had an impact on the outcome of the case." Mozee v. United States, 963 A.2d 151, 165 (D.C. 2009).

Here, the Court finds Counsel adequately explained the decisions he made regarding his cross-examination, which are clearly strategic in nature. Additionally, Applicant did not offer anything other than speculation as to how additional cross-examination would have impacted the outcome of the case. Therefore, because Counsel was not deficient nor was Applicant prejudiced, these allegations shall be denied and dismissed.

VI. Allegations 1(p), (z): Failure to properly challenge the voice identification and the photo lineup identification of Applicant

At trial, the State presented multiple identifications of Applicant. Chavis worked with sketch artist to create a composite drawing of her attacker which was introduced into evidence, and Risinger testified she recognized Applicant's voice when he returned to the trailer immediately prior to the attack. (R. pp. 383, 391, 393). Risinger and Chavis both identified Applicant from a photo lineup. (R. pp. 393, 469). Applicant contends Counsel was ineffective failing to limit this testimony.

As to the photo lineup identifications, this Court has reviewed the relevant parts of the trial record and concludes Counsel was not deficient in handling this issue. The record reflects the trial court held a Neil v. Biggers hearing at Counsel's request. During that hearing, Counsel argued the lineup was overly suggestive because officers had the benefit of the composite sketch when putting it together and because Applicant's picture was the only one with a colored background. (R. pp. 150-51.) The State presented testimony from the officer who created the lineup, and he testified he had not seen the composite sketch, was not even aware one had been done when he compiled the lineup, and did not use the composite to prepare the lineup. (R. p.

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139.) The officer also testified he was not given a verbal description of Applicant; he was given a photograph, which he used to match Applicant's features with those of others in the database. (R. pp. 143-44.) The officer also testified he converted the lineup from color photos to black and white in order to minimize the effect of the colored background in Applicant's picture. (R. pp. 139-40.)

Despite the officer's testimony, Counsel argued at trial the investigators were influenced by the composite because they had more than one picture of Applicant available to use in the lineup, and they picked the one that most closely matched the composite sketch. (R. pp. 149-50, 187-90.) Counsel also argued the lineup was suggestive because Applicant's picture was the only one that had no facial hair. (R. pp. 187-88.) Finally, Counsel argued the identification by Risinger should be excluded because she testified she was in the bedroom at the time of the attack and did not actually see it occur. (R. p. 190.) However, the trial court ruled the lineup was not unduly suggestive or tainted by the composite sketch. (R. p. 195-96.) As to Risinger's identification, the trial court granted Counsel's motion and required the State to redact language on the lineup form implying Risinger witnessed the attack and identified Applicant as the attacker, rather than simply as the man who was in the trailer earlier in the night. (R. p. 195.) Therefore, this Court finds Counsel was not deficient in challenging the photo lineup identifications by Risinger and Chavis.

The Court also finds Counsel was not deficient in his handling of the voice identification by Risinger. According to Counsel's testimony at the evidentiary hearing, the first time he became aware of Risinger's claim she recognized Applicant's voice when he returned to the trailer was when she testified to it at trial. Counsel objected on that basis, and the trial court struck the testimony. (R. p. 380.) The solicitor then asked several follow up questions to lay a

proper foundation, and Risinger testified she had talked to Applicant earlier that night, his voice was deep and raspy, and she would recognize it if she heard it again. (R. pp. 381-82.) She then repeated her claim she recognized the person at the door as Applicant by his voice, and Counsel again objected. (R. p. 383.) This time the trial court overruled the objection and allowed the voice identification into evidence. (R. p. 383.) Counsel testified he felt he had made a mistake, however, in failing to request an *in camera* hearing pursuant to Rule 104(c).

The Court finds Counsel was not deficient in failing to request an *in camera* hearing because the State laid an appropriate foundation for the testimony pursuant to Rule 901(b)(5), SCRE, and because Risinger was appropriately testifying based on her personal knowledge. Therefore, the identification was admissible, and Counsel was not deficient in failing to further challenge its admissibility. Counsel's hindsight assessment of his performance is insufficient to meet Applicant's burden of proving deficiency. See Wright v. Hopper, 169 F.3d 695, 707 (11th Cir. 1999) (citing Harris v. Dugger, 874 F.2d 756, 761, fn. 4 (11th Cir. 1989)) ("The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive."); see also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.").

Further, this issue was raised on appeal, and the Court of Appeals reached the same conclusion, finding no authority to support Applicant's contention an *in camera* hearing was necessary to address whether a proper foundation has been laid for a first-time, in-court identification given Applicant did not (and still does not) argue the identification was tainted or unduly suggestive in some way. Heller, 399 S.C. at 177-78, 731 S.E.2d at 323. Because there

was no error on Counsel's part, this Court finds Applicant has failed to meet his burden of proof as to either deficiency or prejudice, and these allegations shall be denied and dismissed.

VII. Allegation 1(bb): Failure to properly preserve Applicant's motion for a mistrial based on prior bad act testimony

Applicant contends Counsel was deficient in failing to preserve Applicant's objection to prior bad act testimony given by a State's witness. During Kevin Nails' direct testimony at trial, Nails volunteered Applicant was on parole in Georgia at the time he came to South Carolina. Counsel immediately objected and moved to strike the testimony from the record. (R. p. 431.) The objection was sustained, and the trial court instructed the jury to disregard the mention of parole. (R. p. 431). The State continued its direct examination before the court directed a fifteen-minute recess for the jury before Counsel's cross-examination. At that time, with the jury out of the room, Counsel moved for a mistrial on the ground the curative instruction to disregard the testimony was insufficient. (R. pp. 434-35.) The trial court found the State did not purposely elicit the testimony and denied the motion. (R. p. 436.) Counsel renewed the motion prior to closing arguments. (R. p. 823.)

This issue was raised on appeal, but the Court of Appeals found it was not preserved because the motion was not made contemporaneously with the instruction to disregard the testimony, which constituted an acceptance of the curative instruction. Nonetheless, the Supreme Court granted Applicant's petition for writ of certiorari as to this issue, and both sides briefed the issue. Counsel testified at the evidentiary hearing everyone was surprised by Nails' testimony, and although he objected and requested a curative instruction, but he did not immediately think to request a mistrial. Counsel testified he made the motion as soon as he had a chance, but the Court of Appeals found it was not preserved. Appellate Counsel testified he thought Counsel had arguably preserved the motion, which is why he raised it. Appellate Counsel characterized

the Court of Appeals' ruling as a "very technical" finding Counsel had accepted the curative instruction.

An issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim."). Therefore, before a post-conviction relief court can grant relief on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

This Court finds Counsel's failure to preserve the issue, despite his best efforts at doing so, did not result in any prejudice to Applicant. In this case, Applicant would have had to show on direct appeal the denial of the motion for a mistrial was an abuse of the trial court's discretion. See State v. Kelsey, 331 S.C. 50, 69, 502 S.E.2d 63, 73 (1998) ("The decision to grant or deny a mistrial is within the sound discretion of the trial judge and will not be overturned on appeal absent an abuse of discretion."). Because the trial court sustained Counsel's objection and gave a curative instruction, it is not reasonably likely Applicant would have prevailed on appeal. "If the trial judge sustains a timely objection and gives the jury a curative instruction to disregard the testimony, the error is deemed to be cured." State v. George, 323 S.C. 496, 510, 476 S.E.2d

903, 911-12 (1996). Additionally, evidence of Applicant's previous criminal history was admitted anyway when Applicant took the stand in his own defense. (R. pp. 815-16.)

Accordingly, because it is unlikely Applicant would have prevailed on this issue on appeal even if it had been found to be preserved, this Court finds Applicant was not prejudiced by Counsel's performance, and this allegation shall be denied and dismissed.

VIII. Allegation 1(dd): Failure to object to solicitor's improper closing argument

Applicant alleges Counsel was ineffective for failing to object to the solicitor's argument in closing when he told the jury one of the investigators on the case had forty years' experience. (R. p. 850.) When asked about this comment, Counsel testified he did not consider it vouching and did not believe it to be objectionable. Counsel also testified he did not think to object as burden-shifting to the solicitor's comment that Applicant's mom and aunt might be willing to lie for him in order to create a defense, and he was not sure what burden-shifting means in that context. R. pp. 856-57.)

"A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004). "The argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Id. at 609-10, 602 S.E.2d at 744. "If a solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs. Undoubtedly, a solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony." State v. New, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) (internal citations omitted). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [defendant] has

the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id.

Here, the Court finds Counsel correctly determined the solicitor's comment regarding the extent of the investigator's experience was based on facts in evidence, as the investigator himself testified to his experience. (R. pp. 617-19.) Further, the Court finds the solicitor's comment about whether Applicant's mother might be willing to lie for her son was a proper comment on both her credibility and Applicant's defense that he was coerced into giving his confession. The Court finds this was a permissible comment for a solicitor to make, as the State has a right to argue its version of the facts and credibility of the evidence. Because neither comment was objectionable, the Court finds Counsel was not deficient.

In addition, neither comment was so prejudicial as to amount to a denial of due process, particularly in the context of the closing argument as a whole. See State v. Rudd, 355 S.C. 543, 550, 586 S.E.2d 153, 157 (Ct. App. 2003) (appellate courts will review the alleged impropriety of an opening or closing argument in the context of the entire record). Petitioner objects to two sentences in a closing argument which spans approximately twenty-four pages of the trial record. In Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court concluded any impropriety in the solicitor's closing argument was not sufficient to grant post-conviction relief where the solicitor's improper use of the pronoun "I" was limited, did not recur throughout his argument, there was overwhelming evidence of the defendant's guilt, and the trial judge instructed the jury not to consider counsels' statements as evidence. Similarly, the trial court in Applicant's case

instructed the jury not to consider any arguments by the attorneys as evidence. (R. p. 862.) He also instructed jurors it was their duty to judge the credibility of witnesses, and in doing so, they could consider whether there might be "some reason why a witness would want to give testimony which would help or hurt one side or the other." (R. p. 863.) In this context of the closing arguments and jury instructions taken as a whole, this Court finds the solicitor's comments were not so prejudicial as to deprive Applicant of due process. Therefore, because Applicant has failed to prove either deficiency or prejudice, this allegation shall be denied and dismissed.

IX. Allegation 1(ee): Failure to request a jury instruction on identification

Applicant alleges Counsel was deficient in failing to request a jury charge on identification and/or mistaken identification, and in his testimony, Counsel opined he should have made that request. However, a review of the trial record shows the trial judge gave an instruction on identification, telling the jury:

> An issue in this case is the identification of the defendant, Christopher Robert Heller, as the perpetrator of the crime charged. The State of South Carolina has the burden of proving identity beyond a reasonable doubt. Identification testimony is an expression, belief, or impression by a witness.
>
> You may consider the opportunity a witness had to observe the alleged offender at the time of the offense to thereafter make an identification. You may also consider the witness's degree of attention. Additionally, you may consider the accuracy of the witness's prior description of the defendant. Finally, you may also consider the level of certainty demonstrated by the witness at the confrontation. It's up to you, the jury, to determine the accuracy [of] the identification of the defendant.
>
> Another issue in this case is the identification of the defendant's voice. The State of South Carolina has the burden of proving identity beyond a reasonable doubt. Again, identification testimony is an expression, belief, or impression by a witness. You may consider whether the witness has a basis for being familiar with the voice, any particularity in the voice, and finally, you may also consider the level of certainty demonstrated by the witness.

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> You must consider the credibility of each identification witness in the same manner as any other witness. You may consider his or her truthfulness, as well as the capacity, the opportunity of the circumstances of the observation of the matters about which he or she testified to.

(R. pp. 867-69.) Although the record does not reflect which side requested the instruction, nevertheless, the jury was properly instructed about the issue of identification and the State's burden to prove Applicant's identity beyond a reasonable doubt. Therefore, this Court finds this allegation should be denied and dismissed as Applicant has proven neither deficiency nor prejudice. See Gibbs v. State, 403 S.C. 484, 495-96, 744 S.E.2d 170, 176 (2013) (finding no prejudice where trial counsel failed to request an alibi instruction "given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt").

X. Allegation 2(a): Failure of Appellate Counsel to raise on appeal the issue of the propriety of the photo lineup

Applicant alleges Appellate Counsel was ineffective because he did not raise on appeal the issue of the propriety of the photo lineup identifications by Risinger and Chavis. Appellate Counsel explained he selects issues by reviewing the transcript and keeping a running list of objections and motions, which he whittles the list down to an issue or issue(s) he believes have the best chance of winning, based on legal research and his years of experience. Appellate Counsel testified he raised the three issues he felt were strongest and gave Applicant the best chance of succeeding on appeal.

Appellate Counsel testified he felt the first issue he raised, regarding the admission of Applicant's prior drug convictions, was the strongest. Appellate Counsel further testified he felt the voice identification was a better issue than the photo lineup identifications. Appellate Counsel explained he considered the fact there was a composite drawing done by two witnesses, the officer who put together the lineup testified he had not seen the composite, and the trial court

made some pretty strong comments to Counsel about the issue. Further, Appellate Counsel testified raising the photo lineup issue would have required Applicant to ask the appellate court to create a *per se* rule, and he felt the court would not do that. Appellate Counsel explained, in his experience, lineup issues are very hard to win, and he believes the appellate court trusts juries on the accuracy of an identification, so it is an uphill battle for defendants on appeal.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is **not** required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. at 754). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (1999). Thus, in this case, we ask first whether appellate counsel's performance was deficient, and two, whether Applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for appellate

counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In this instance, the Court finds Applicant has not proven either deficiency or prejudice. Appellate Counsel testified he reviewed the record and selected the three issues he felt were the strongest and had been preserved. Appellate Counsel offered a valid strategic reason for not raising the photo lineup issue, based on his experience with the appellate courts. Appellate Counsel further testified he considered the issues Applicant pointed out at the evidentiary hearing – the darkness of the scene, drug use by the witnesses – and still felt the other issues were stronger. Because Counsel's decision not to raise the lineup issue was clearly strategic, this Court finds he was not deficient.

Additionally, it is not reasonably likely Applicant would have prevailed on this issue on appeal. The officer who created the lineup testified he had not seen the composite sketch or been given a verbal description of Applicant, and the trial court granted Applicant's motion regarding the suggestive wording on the lineup form, requiring the State to redact the exhibit before it was introduced. (R. pp. 139, 143-44, 195.) This Court therefore finds Applicant has not met his burden of proving prejudice. Because there was no deficiency nor was Applicant prejudiced, this allegation shall be denied and dismissed.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by his representation. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.

R. SCOTT SPROUSE
Presiding Circuit Court Judge
Fifth Judicial Circuit

5-1, 2019