THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Jennifer B. McCoy Circuit Court Judge

Case No.: 2017-CP-07-1493

Antonio Collins, 357630, Petitioner,

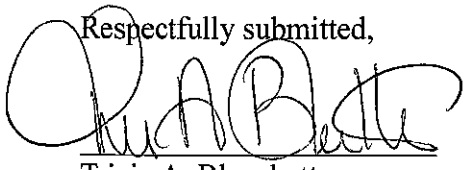
vs.

State of South Carolina Respondent.

NOTICE OF APPEAL

Antonio Collins, Petitioner, appeals the Order of Dismissal issued by the Honorable Jennifer B. McCoy on May 20, 2020, which was filed on May 26, 2020. Petitioner also appeals the Order Denying Motion to Reconsider, which was issued on July 1, 2020 and filed on July 6, 2020. Petitioner, through counsel, received notice of the entry of the latter Order on July 8, 2020.

Respectfully submitted,



Tricia A. Blanchette
S.C. Bar No. 74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

August 5, 2020

STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	IN THE COURT OF COMMON PLEAS FOURTEENTH JUDICIAL CIRCUIT
Antonio Collins, 357630, Applicant, v. State of South Carolina, Respondent.	2017-CP-07-1493 ORDER DENYING MOTION TO RECONSIDER

2020 JUL -6 PM 1:05
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

Applicant filed a Motion to Reconsider with this court on June 12, 2020. "The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits." Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). This court DENIES Applicant's Motion to Reconsider without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401–402, 444 S.E.2d 534, 536 (Ct. App. 1994).

AND IT IS SO ORDERED this 1 day of July, 2020

Honorable Jennifer B. McCoy

Charleston, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT)	
)	
Antonio Collins, #357630)	Case No.: 2017-CP-07-1493
)	
Applicant,)	**ORDER OF DISMISSAL**
)	
v.)	
)	
State of South Carolina,)	
)	
Respondent.)	
)	

2020 MAY 26 PM 12: 36
JERRI ANN ROSEHEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter came before the court by hearing dated August 26, 2019 in Beaufort County upon Applicant's request for Post-Conviction Relief (PCR). A subsequent hearing was held on September 26, 2019 to elicit further testimony. The Applicant, Antonio Collins, made several arguments in support of his claims of ineffective assistance of trial counsel and appellate counsel. Those arguments and the Court's findings on each are discussed below.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Beaufort County Clerk of Court. Applicant was indicted by the Beaufort County Grand Jury on December 15, 2011 for murder, burglary 1st degree, kidnapping, and possession of a weapon during a violent crime (Ind. #s 2011-GS-07-2279, 2378, 2379 & 2403). Applicant was represented on the charges by Trasi Campbell and Arie Bax, Esquires. Applicant proceeded to a jury trial from October 21-24, 2013 before the Honorable Ernest Kinard, Jr., Circuit Court Judge. At the trial's conclusion, the jury found Applicant guilty of murder, burglary 1st degree, and possession of a weapon during a violent crime. Judge Kinard sentenced Applicant to thirty-three (33) years confinement for murder, thirty-three (33) years for burglary 1st degree, and five (5) years for possession of a weapon during a violent crime. The sentences on each indictment

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were ordered to run concurrently. (R. pp. 1, 13-17, 148-51, 174-90, 603, 609-10).

Applicant perfected an appeal. On May 5, 2016 M. Rita Metts (Appellate Counsel), Esquire, filed a brief on Applicant's behalf. On April 5, 2017, the Court of Appeals affirmed the trial court's rulings. State v. Collins, No. 2017-UP-151 (Ct. App. 2017). Remittitur was issued on April 21, 2017.

CURRENT APPLICATION

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
    a. Failure to prepare and investigate
    b. Failure to object and preserve errors for appellate review.
2. Ineffective Assistance of Appellate Counsel
    a. Failure to raise issues on appeal.

Applicant amended his application on July 25, 2018 to include the following allegations:

1. Ineffective assistance of trial and appellate counsel for matters related to the DNA evidence, specifically, but not limited to the following:

    a. Pursuing but not completely developing or preserving a contamination argument.
    b. Failure to preserve all arguments related to the DNA for appellate review by failing to make a motion in limine for suppression, object to the admission of the DNA evidence, and properly renew prior motions and objections.
    c. Failure to properly argue at pre-trial, trial or appeal the following:
        i. Under the totality of the circumstances, to include but not limited to police deception and failure to contact Applicant's appointed counsel, suppression was required since voluntary consent was not obtained for Applicant's swab in Florida.
        ii. Probable cause did not exist to support the Schmerber order issued by the Honorable R. Markley Dennis and later re-examined by the Honorable Stephanie McDonald.
        iii. Suppression of the evidence should have been granted by the Honorable Stephanie McDonald.
        iv. Applicant's DNA samples were obtained as fruit of the poisonous tree and were not a result of inevitable discovery.

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2. Ineffective assistance of trial counsel for failure to present available evidence in support of the defense argument that Applicant did not suffer a gunshot wound. Transcript p. 562, lns. 5-20.
3. Ineffective assistance of appellate counsel for failure to properly raise issues with citation of legal authority and reply to erroneous information in the State's Brief.
4. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

Applicant further amended his application at the subsequent hearing to include for the Court's consideration presumed prejudice under United States v. Cronic, 466 U.S. 648, 660, 104 S. Ct. 2039, 2047, 80 L. Ed. 2d 657 (1984).

STATEMENT OF FACTS ADDUCED AT TRIAL

On the night of June 22, 2009, Applicant Antonio Collins ("Collins") murdered Ronald Coleman ("the victim") during a burglary of the victim's home on Seabrook Road on Seabrook Island in Beaufort County. Collins was assisted by an unknown male; however, Collins was the shooter or trigger-man in the murder. Collins was not from South Carolina but Miami, Florida. (R. pp. 175-201, 241-48, 316-21, 384-91, 415-29, 444-66, 603).

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

As Miles arrived in the victim's back yard, he saw two (2) men standing near the back door

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of the victim's residence, and they appeared to be fidgeting or nervous. Miles had never seen the two (2) men before. Miles hollered at the two (2) men. The two (2) men turned and walked toward Miles. As the two (2) men approached Miles, one (1) of the men [Collins] drew a pistol. Miles immediately fell down on the ground and begged Collins not to shoot him. Collins and the other man patted Miles down for weapons. Miles was unarmed. (R. pp. 175-201; 241-48, 316-21, 384-91, 415-29, 444-66, 603).

Collins put the gun to the back of Miles' head and told Miles that he [Miles] was going to help the two (2) men lure the victim out of his home. Collins then pushed or forced Miles at gun point to the front of the victim's residence and up onto the front porch. The other man stayed on the front porch steps or at the foot of the steps. Collins then tried to get Miles to persuade the victim to come out the front door of the residence, but Miles signaled the victim that danger was afoot. Collins was unaware the victim only used his back door *and* the victim's front door was nailed shut. (R. pp. 175-201; 241-48, 316-21, 384-91, 415-29, 444-66, 603).

Collins then pushed Miles out of the way and kicked the front door of the victim's residence in. Collins stepped into the doorway of the victim's home armed with the handgun and a shot was fired, apparently by the victim. Miles heard a "ping" and someone say: "[A]h." Collins then raised his gun and fired his gun multiple times into the victim's home. The victim returned fire. The victim suffered four (4) gunshot wounds. (R. pp. 175-201; 241-48, 316-21, 384-91, 415-29, 444-66, 603).

Miles fled from the porch during the gunfire but not before seeing the gun Collins was shooting was a semi-automatic with a clip and seeing the two (2) men, including the gunman Collins, flee up Seabrook Road. Miles ran to an aunt's house and told her what had occurred and then ran to another relative's home and asked an uncle for a shotgun to protect himself. One (1)

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relative of the victim, who lived nearby, had already called 911 as soon as the gunshots were fired (R. pp. 175-201; 224-27; 241-48, 316-21, 384-91, 415-29, 444-66, 603).

When police arrived, they found the victim face down, inside his home, but near the front door, with his .45 caliber semi-automatic pistol still in his hand. The victim was dead. He had died from the gunshot wounds inflicted by Collins. Police found blood just outside the victim's bedroom door in the living room. Police also found numerous fired .45 caliber shell casings inside the victim's residence where the victim had returned fire when Collins kicked in the front door and started shooting. These fired shell casings were later forensically matched to the victim's gun. (R. pp. 141-45; 148-51; 159-65, 241-48, 316-21, 384-91, 415-29).

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

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

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

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bloody shoe impressions on Seabrook Road and from the discarded *.40* caliber pistol for later D.N.A. testing. (R. pp. 268-82, 285-93, 368-69, 542-44).

The State Law Enforcement Division (SLED) forensic lab compared the fired *.40* caliber shell casings found at the victim's residence to test casings fired from the *.40* caliber weapon recovered where the blood trail ended on Seabrook Road. It was determined the fired *.40* caliber shell casings from the crime scene were fired by the *.40 caliber* gun found near where the blood trail ended. (R. pp. 415-29).

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

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

Murphy's residence was staked out, and Murphy was stopped in the vehicle as he left his residence. The vehicle, a Cadillac Deville, was similar in color to that described by witnesses who lived near the victim, and the vehicle was seized by police. Police obtained a search warrant for

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the Cadillac and processed it. Inside the car, police located blood stains that had soaked through the back seat of the vehicle into the cushion of the back seat and some into the carpet at the bottom of the seat. Samples were taken from the interior of this car and forwarded to SLED to see if SLED could find human blood and D.N.A. (R. pp. 305-09, 330-37, 369-72, 403, 406, 444-66).

Police interviewed Jeremy Murphy. Murphy informed police he had loaned his car [the Cadillac Deville] to a man named Antonio from Florida and another man named George Savage. According to Murphy, the two (2) men were supposed to just use the car to go buy something illegal, and they would return the car in an hour. According to Murphy, an hour came and went and the vehicle was not returned. Then he noticed the car just appeared back in his yard. He went out to feed his dogs and looked in the car, and there was blood all over the car. Murphy said he later talked to George Savage and Savage said they went to "do a lick" but it went bad. (R. pp. 687-88).

Through further investigation, using names of relatives of Collins provided by Goldwire, including the names of Collins' father and mother, Beaufort County police determined Collins was Antonio Eugene Collins and he was a resident of Miami, Florida. At the time Collins was developed as a suspect, which was months after the murder, Collins was detained in the Miami / Dade County Jail on unrelated charges [burglary, felonious assault/CDV charges]. At the request of Beaufort County authorities, police in Miami requested a D.N.A. sample from Collins [a buccal swab], which he consented to and provided. When Collins was returned to South Carolina for prosecution, another D.N.A. sample [a buccal swab] was taken pursuant to a Schmerber Order. Both of these samples were submitted to S.L.E.D. for D.N.A. analysis. (R. pp. 689, 338-42, 362-63, 412-15, 734, 444-66, Schmerber Order).

SLED's D.N.A. laboratory was able to develop a D.N.A. profile from the blood drops on

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

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

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

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented, which allowed the Court to scrutinize the credibility presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the

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application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "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, 466 U.S. 668; Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a "'reasonably competent attorney.' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities. See generally Id.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that 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 an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "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). The 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 the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors,

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the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "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. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even

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under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Each allegation is addressed fully below:

Allegation: Failure to Develop or Preserve Contamination Argument

Applicant alleges trial counsel was ineffective for failing to fully develop or preserve the defense's argument that the DNA should be excluded due to potential contamination. Counsel

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moved to suppress the DNA evidence by way of pre-trial motion where the contamination issue was argued in camera before Judge Kinard. Numerous officers testified to; responding to the crime scene, preservation of the scene, collection of blood evidence, returning to the scene and collection of further blood samples, recovery and processing of the .*40* caliber firearm, processing of the Cadillac Deville, and the preservation of evidence. (R. pp. 51-102). At the conclusion of the hearing, Judge Kinard denied the motion to suppress finding Collins' arguments went to the weight of the evidence, which he could bring out before the jury and argue, but not its admissibility. Judge Kinard determined the testimony established the collection and preservation of the evidence by Beaufort police was sufficient to allow its admissibility and overruled Collins objection to this evidence on this basis. (R. pp. 102-105). Counsel did not make a contemporaneous objection to the introduction of the DNA evidence at trial, thus failing to preserve the issue for appellate review. However, Applicant has failed to show any resulting prejudice from counsel's failure to preserve the issue for appellate review or developing the argument any further.

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

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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 that Applicant has failed to meet his burden in showing that counsel's failure to preserve the issue for appeal resulted in any prejudice. Here, Applicant would have to show that the trial court would have abused its discretion in denying a timely objection to the introduction of the DNA evidence considering the contamination argument made by counsel. The admission or exclusion of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); State v. Stanley, 365 S.C. 24, 33, 615 S.E.2d 455, 460 (Ct. App. 2005); State v. Patterson, 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999). The testimony concerning DNA evidence complied with the requirements set forth in State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). The Court held: "Any evidence concerning contamination, therefore went to the weight of the testimony, not its admissibility." Ramsey, 345 S.C. at 616. The Court finally noted that the mixture of DNA evidence is not a basis for the exclusion of the DNA testing. Id., *referencing* Oregon v. Lyons, 124 Or. App. 598, 863 P.2d 1303 (1993)(finding the potential for DNA contamination presents an "open field" for cross examination at trial, but does not indicate the PCR method of DNA testing is inappropriate for forensic use).

Under the Rule 702 analysis used by the Court in Ramsey, Collins has not shown that possible contamination or cross-contamination indicates *the method of DNA testing used in this case* is inappropriate for forensic use. *DNA testing* whether PCR or STR is scientifically reliable. *See* Ramsey; Council, 335 S.C. 1, 515 S.E.2d 508; State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

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

Here, the trial judge would have been well within their discretion in overruling any potential objection to the DNA evidence on the contamination ground and thus the issue would not have been meritorious on appeal. There was no evidence presented that the DNA samples were in fact contaminated or that the procedures used by SLED were unreliable. Even if evidence was presented that the samples could have been contaminated, the trial court should allow the evidence to be presented to the jury for their consideration as to how much weight to give that fact. Therefore, Applicant has failed to show how he was prejudiced by counsel's failure to preserve or more fully develop the contamination issue. This Court finds that Applicant has failed to meet his burden and dismisses this allegation with prejudice.

Allegation: Failure to Preserve for Appellate Review all Argument relating to the Suppression of the DNA Evidence

Applicant alleges counsel was ineffective for failing to preserve all arguments concerning the suppression of the DNA evidence for appellate review. Applicant alleges counsel failed to preserve the voluntariness of the buccal swab conducted in Florida, sufficiency of the probable cause to support the Schmerber order, the denial of the suppression motion by Judge McDonald, and the DNA samples being fruits of the poisonous tree that would not be inevitably discovered.

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Counsel failed to properly preserve these issues for appellate review, however, Applicant has failed to show prejudice where these issues would not have been meritorious on appeal if properly preserved.

This Court finds that Applicant has failed to meet his burden in showing that counsel's failure to preserve the issue for appeal resulted in any prejudice. Here, Applicant would have to show that the trial court committed clear error in allowing the DNA evidence from the 1st Buccal swab in at trial. "The standard of review of Fourth Amendment search and seizure issues on appeal is deferential and is limited to determining whether any evidence supports the trial court's finding, with this Court only being able to reverse the ruling of a trial judge where there is clear error. State v. Taylor, 401 S.C. 104, 736 S.E.2d 663 (2013). As a result, if there is any evidence to support the trial judge's ruling as to the validity of a search, with or without a warrant, it will be affirmed on appeal. Id.; State v. Brown, 401 S.C. 82, 736 S.E.2d 263 (2012)."

A DNA buccal swab constitutes a search and under the Fourth Amendment. "Warrantless searches and seizures are reasonable within the meaning of the Fourth Amendment when conducted under the authority of voluntary consent." State v. Pichardo, 367 S.C. 84, 105, 623 S.E.2d 840, 851 (Ct. App. 2005). It is well established that one of the well-delineated exceptions to the search warrant requirement is a search conducted pursuant to a valid consent given by the proper party. Davis v. United States, 328 U.S. 582, 66 S.Ct. 1256 (1946); Zap v. United States, 328 U.S. 624, 66 S.Ct. 1277 (1946); Palacio v. State, 33 S.C. 506, 511 S.E.2d 62 (1999). When the prosecution seeks to rely upon the consent of the defendant to justify the search, they have the burden of proving that the consent was, in fact, freely and voluntarily given. Scheckcloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973); Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788 (1968); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001). Whether a

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

Here, given the totality of the circumstances, Judge McDonald properly found the State had proven Collins had freely and voluntarily consented to the taking of the buccal sample at the Miami/Dade County Jail. (R. pp. 649-709; Court's Exhibit 1 (Consent Form); Order Denying Defense Motion to Suppress Buccal Swabs). Schneckloth v. Bustamonte; United States v. Mendenhall. The credible testimony at the suppression hearing showed Collins was not threatened or coerced by Detective Segovia. Schneckloth. No physical punishment or threat of punishment was used to by Segovia to obtain consent. Id. Collins was not misled by Detective Segovia to get him to give the buccal sample. Segovia testified the only thing he informed Collins of was he was being investigated for a series of crimes. Although police were not required to, Collins was fully informed of his right to deny consent to the buccal swab. Id.; State v. Forrester, 334 S.C. 567, 514 S.E.2d 332 (Ct. App. 1999)(though not required, whether defendant was informed and knew he had the right to deny consent is a factor to be considered in determining if the consent was freely and voluntarily made), *reversed on other grounds*, 343 S.C. 637, 541 S.E.2d 837 (2001); Wallace, 269 S.C. 547, 238 S.E.2d 675 (same); State v. Newman, 261 S.C. 352, 200 S.E.2d 82 (1973)(similar). The meeting between Collins and Segovia lasted six (6) minutes. Schneckloth. Collins reviewed and executed a Voluntary Consent to give his buccal sample. (R. p. 719, Court's

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Ex. 2). Collins was informed in the notice that he had the right to refuse consent [Schneckloth]; but, he did not refuse and signed the waiver form.

Therefore, Applicant has failed to show that the failure to preserve the suppression of the 1st Buccal swab at trial would have been a meritorious issue on appeal. This Court finds that Applicant has failed to show any resulting prejudice from counsel's failure to preserve the issue for appeal.

In order for Applicant to show prejudice resulting from the failure to preserve the objection to the issuance of the Schmerber order he would need to show the trial court lacked a substantial basis for concluding probable cause existed. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). Applicant would also need to overcome the great deference a reviewing appellate court would give the findings of the trial court. State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000).

When determining the propriety of the issuance of a warrant or court order to conduct a search, the duty of this Court is simply to determine whether the issuing court had a substantial basis for concluding probable cause existed. State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495 (2009). In making such a decision, this Court must consider the totality of the circumstances. Jones, 342 S.C. 121, 536 S.E.2d 675 (under this test, a reviewing court considers all circumstances, including status, basis of knowledge, and veracity of informant, in determining whether probable cause existed to issue a search warrant); State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003).

A search warrant or Schmerber Order may issue only upon a finding of probable cause. State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997). The affidavit or testimony at a Schmerber hearing must contain sufficient underlying facts and information upon which the judge may make a determination of probable cause. Dupree, 354 S.C. 676, 583 S.E.2d 437. "[T]he duty

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of a reviewing court is simply to ensure that the magistrate [or circuit court] had a 'substantial basis' for ... conclud[ing] that probable cause existed." Weston, 329 S.C. at 290-91, 494 S.E.2d at 802-03. However, all that is necessary for the issuance of a warrant or Schmerber Order is probable cause. State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009).

Probable cause does not mean absolute certainty. State v. Dean, 282 S.C. 136, 317 S.E.2d 744 (1984). South Carolina has adopted the "totality of the circumstances" test of Illinois v. Gates, in determining whether sufficient probable cause exists to issue a search warrant or Schmerber order. State v. Bellamy, 336 S.C. 140, 143, 519 S.E.2d 347, 348 (1999). The task of the issuing court is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit or testimony before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. Gates, 462 U.S. at 238 (emphasis added); *accord* Herring, 387 S.C. at 212, 692 S.E.2d at 495-96; State v. Johnson, 302 S.C. 243, 395 S.E.2d 167 (1990)(adopting Gates test). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." State v. Bowie, 360 S.C. 210, 600 S.E.2d 112 (Ct. App. 2004), *quoting* Brown, 460 U.S. at 742. In determining whether a warrant or Schmerber order should issue, judges are concerned with probabilities not certainties. Bowie, 360 S.C. 210, 600 S.E.2d 112, *citing* Sullivan, 267 S.C. at 617, 230 S.E.2d at 624.

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

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States v. Weiebir, 498 F.2d 346 (4th Cir. 1974).

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

To determine probable cause exists to obtain nontestimonial identification evidence the State must show there is "(1) probable cause to believe the suspect has committed the crime, (2) a clear indication that relevant material evidence will be found, and (3) the method used to secure it is safe and reliable." State v. Baccus, 367 S.C. 41, 53-54, 625 S.E.2d 216, 222-23 (2006), *quoting* In re Snyder, 308 S.C. 192, 195, 417 S.E.2d 572, 574 (1992); State v. Jenkins, 398 S.C. 215, 224, 727 S.E.2d 761, 766 (Ct. App. 2012). *See also* State v. Register, 308 S.C. 534, 538, 419 S.E.2d 771, 773 (1992). Additional factors to be weighed are the seriousness of the crime and the importance of the evidence to the investigation. Register, 308 S.C. at 538, 419 S.E.2d at 773; State v. Simmons, 384 S.C. 145, 682 S.E.2d 19 (2009). The circuit court is required to balance the necessity for acquiring involuntary nontestimonial identification evidence against constitutional safeguards prohibiting unreasonable bodily intrusions, searches, and seizures. Id. "Probable cause may be found somewhere between suspicion and sufficient evidence to convict. Geer, 391 S.C. at 197; State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). "[T]o show that a suspect's DNA is relevant under the second element of Baccus, the State must show there is other DNA evidence in the case to which it can be compared, or in some other manner clearly

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indicate the relevance of the DNA sought." Jenkins, 398 S.C. at 224, 727 S.E.2d at 766.

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

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in Jasper the night of the murder in *Murphy's Cadillac* and Collins had *recently been shot in the leg and was being helped from the car* and into the residence. Goldwire also informed police Collins was from Florida. The investigating officer testified how police also interviewed Jeremy Murphy, *the owner of the car* [the Cadillac Deville from which blood stains were found], who informed police Collins had his car the night of the murder. Murphy knew Collins as Antonio from Florida. The investigating officer testified to her further investigation and research and how she identified Collins as the person both the named informant [Goldwire] and Murphy identified and were referring to was in fact Applicant Antonio Eugene Collins by using the names of relatives of Collins whose names Goldwire had provided to the investigator and those same relatives names showed up in Collins' police intelligence reports. The investigator also testified to the fact Collins was determined to be a resident of Florida, as Murphy had informed police, and he was located in the Miami – Dade County jail and that Miami police approached Collins and obtained a buccal swab from him, that swab was sent to SLED, and it matched the DNA of the blood found on the victim's front porch, on the road leading away from the crime scene, on the gun found near the end of the blood trail, and in Murphy's Cadillac Deville. And, she testified to the scars she saw on Collins' legs in photos taken by Miami police which could be attributable to a gunshot wound. (R. pp. 620-41).

This Court finds that Applicant has failed to show that had this issue been properly preserved it would have been meritorious on appeal. As noted by the citations to the record above, the trial court had a substantial basis for finding that probable cause existed to warrant the issuance of the order. Therefore, this Court finds that Applicant has failed to meet his burden in showing that had this issue been preserved it would have been meritorious on appeal, thus failing to show any resulting prejudice. This Court dismisses this allegation with prejudice.

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Applicant alleges that counsel was deficient for failing to properly preserve for appellate review whether the DNA samples were fruits of the poisonous tree and would not have been inevitably discovered. To succeed on this issue Applicant would first need to show that the DNA evidence was not properly obtained through the avenues previously examined, that the DNA evidence was in fact fruits of the poisonous tree, and that if properly preserved the issue would have been meritorious on appeal. First, this Court finds that the DNA was properly admitted through the avenues previously examined and thus would not have been a meritorious issue on appeal had it been properly preserved. Second, however, this Court will examine the allegation on its own merits to determine whether Applicant would have been prejudiced had this issue been properly preserved.

This Court previously determined, law enforcement had probable cause to obtain a Schmerber order to obtain Collins' D.N.A. even without the results of the 1st buccal swab based on the information developed by police during the investigation of this murder including the statements from two (2) named individuals, Gussie Goldwire and Jeremy Murphy, which had been corroborated by physical evidence, and their follow up investigation which determined the person Goldwire and Murphy were referring to was Applicant Antonio Eugene Collins. As a result, the 1st buccal swab would have been inevitably discovered. United States v. Whitehorn, 813 F.2d 646 (4th Cir. 1987); State v. Brown, 289 S.C. 58, 347 S.E.2d 882 (1986)(inevitable discovery is an exception to the exclusionary rule); Jenkins, *supra* (remanding to determine if inevitable discovery applied); State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011)(evidence may be admitted "if the government can prove the evidence would have been obtained inevitably.")

Furthermore, the 2nd buccal swab was a lawful search incident to arrest. Maryland v. King, 133 S.Ct. 1958 (2013). When Collins appeared before Judge Dennis for the Schmerber hearing,

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he had already been arrested for murder, a dangerous and violent crime. In Maryland v. King, the United States Supreme Court recognized that when police take a buccal swab from a defendant arrested for a dangerous felony, the search is no different than police taking the fingerprints of an arrested subject or taking a booking photograph. It is a lawful search incident to arrest, and individualized suspicion is not necessary. As a result, the taking of the 2nd buccal swab did not violate the Fourth Amendment. Id. Even if the trial court had not issued the Schmerber order, the State would have inevitably gotten Applicant's DNA through buccal swab as a search incident to arrest. Thus, Collins' DNA would have been inevitably discovered. Id. The United States Supreme Court decided Maryland v. King, *supra* on June 3, 2013. Collin's trial did not begin until October 24, 2013. As a result, the State would have inevitable discovered Collins' DNA in any event. Id.; Nix v. Williams, 467 U.S. 431 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998). *See* S.C. Code Ann. Section 23-3-620 (effective January 1, 2009).

Applicant has failed to show any meritorious basis for objecting to the introduction of the DNA evidence as being fruit of the poisonous tree or that the issue would have been meritorious on appeal had it been properly preserved. Therefore, Applicant has failed to meet his burden in proving that he was prejudiced by counsel's failure to preserve the issue for appellate review. This Court dismisses this allegation with prejudice.

Allegation: Failure to Present Evidence Concerning Gunshot Wound

Applicant alleges counsel was deficient for failing to present evidence in support of the defense's position that Applicant did not in fact suffer a gunshot wound. Applicant introduced a number of exhibits relating to this allegation at the evidentiary hearing: State's motion to obtain x-rays of Applicant, subsequent court order for x-rays, defense motion and order to obtain gun wound expert, x-ray report, and the motion and order for the Beaufort County Public Defender's

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Office to obtain a wound doctor.

"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). "[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.' What motions to file and 'whether to put on evidence so as to preserve the final word in closing argument' are also strategic and tactical decisions to be made by trial counsel." Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (internal citations omitted). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

At trial, counsel argued in closing that there was a gaping hole in the State's case and that

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hole was that there was no evidence of a hole in Applicant's leg. Tr. P. 562, l. 5-8. Counsel continued to argue to the jury that if such evidence existed the State would have presented it during the trial and that the lack of such evidence amounted to reasonable suspicion. Counsel testified that she was unsure whether the State was going to introduce the x-rays of Applicant at trial and felt that they were harmful to the defense. Counsel further testified that she presented the argument to the jury in closing in an effort to introduce reasonable doubt, but that she did not have evidence to introduce during the trial to support the theory.

This Court finds that counsel enumerated a valid trial strategy for not introducing concerning the gunshot wound at trial and instead deciding to argue the issue in her closing argument. Counsel testified that she decided to make this strategic decision in an effort to introduce reasonable doubt to the jury and to avoid potentially detrimental evidence being introduced. Therefore, this Court finds that Applicant has failed to meet his burden in showing any deficiency on the part of counsel or any resulting deficiency. This Court dismisses this allegation with prejudice.

Allegation: Failure of Appellate Counsel to Properly Raise Issues on Appeal

Applicant alleges appellate counsel was deficient for failing to properly raise issues on appeal, resulting in the appeal being dismissed.

Appellate counsel testified at the evidentiary hearing that she did not have a particular reason for failing to cite to the record and that she did not cite to legal authority because she could not find any that supported her positions. Counsel furthered testified that she felt her representation concluded when she filed the brief and that she was not responsible for subsequent replies. Counsel went on to testify about the Appellate Practice Project where she was assigned the case. Following the testimony concerning the Appellate Practice Project, this Court left the record open for

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additional testimony to be elicited from Chief Public Appellate Defender Robert Dudek. Dudek testified generally about the Appellate Practice Project. Dudek testified that the CLE goes over appellate practices and that the attorneys were expected to turn in their appellate filings to be printed. Dudek testified that he was not a supervisor to the attorneys in the project, his office does not make substantial edits to the documents submitted to be printed, and that the attorney was responsible for handling the case. Dudek testified that the appeal was dismissed because the issues were abandoned for failing to cite to legal authority, the issues were not raised in the same manner on appeal as at trial, and that the issues were not properly preserved. Dudek testified that he agreed that the issues were not properly preserved at trial. Dudek testified that he did not recall counsel consulting him concerning potentially filing for rehearing. Dudek testified that since the issues were procedurally barred there would not have been merit in filing for rehearing. Dudek testified that he felt that counsel was deficient in her representation and felt a new trial was the appropriate remedy, however, failed to cite a meritorious issue counsel failed to raise.

First, this Court is highly concerned with the efficacy and practices of the Appellate Practice Project. This Court notes that complex appellate cases are being distributed to attorneys with potentially no experience in area of appellate practice. The lack of oversight in this area is of grave concern to this Court. However, Applicant has failed to show how appellate counsel's deficiency in failing to file an appropriate brief prejudiced Applicant. As indicated by the appellate court in its order dismissed the appeal, none of the issues raised were properly preserved for appellate review. Even if appellate counsel had properly cited to legal authority to support the positions argued the appeal would have been dismissed for lacking in issue preserved for review. Further, Applicant has failed to elicit testimony from appellate counsel or Robert Dudek as to what issues were properly preserved for appellate review that could have been meritorious if raised.

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Applicant speculates that such issues existed and if raised would have been meritorious on direct appeal. This Court finds that Applicant has failed to meet his burden under *Strickland* and *Cronic*. This Court finds that Applicant has failed to show prejudice resulting from appellate counsel's deficiency or such occasion to find presumed prejudice under *Cronic*. This Court therefore dismisses this allegation with prejudice.

CONCLUSION

Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

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.

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IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 20th day of May, 2020.

JMcCoy

JENNIFER MCCOY
Presiding Judge
Fourteenth Judicial Circuit

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