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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
Jennifer B. McCoy, Post-Conviction Relief Judge
J. Ernest Kinard, Jr., Trial Judge

Appellate Case No. 2020-001077

ANTONIO COLLINS, PETITIONER,

vs.

STATE OF SOUTH CAROLINA, RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Whether the lower court erred in failing to rule on the issues as raised and find that Petitioner was entitled to a new trial due to the representation provided by trial and appellate counsel regarding matters related to the DNA evidence?

RESPONDENT'S ISSUE PRESENTED

I. Whether the PCR Court properly addressed all of the issues raised in its Order of Dismissal?

a. Whether the PCR Court properly found that Petitioner had failed to meet his burden in proving prejudice where Petitioner failed to show that had defense counsel properly renewed her objections related to the DNA evidence the trial court would have sustained it and an appellate court would have upheld the ruling on appeal?

b. Whether the PCR court further properly found Petitioner failed to prove prejudice as it relates to appellate counsel where Petitioner failed to show any issues that would have been meritorious had then been raised on appeal or any issues that were properly preserved that counsel failed to argue?

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

STATEMENT OF CASE

On December 15, 2011, the Beaufort County Grand Jury indicted Petitioner for murder, burglary 1st degree, kidnapping, and possession of a weapon during a violent crime (2011-GS-07-2279, 2378, 2379 & 2403). Petitioner was represented on the charges by Trasi Campbell and Arie Bax, Esquires. Petitioner proceeded to a jury trial from October 21-24, 2013 before the Honorable J. Ernest Kinard, Jr. Circuit Court Judge. At the trial's conclusion, the jury found Petitioner guilty of murder, burglary 1st degree, and possession of a weapon during a violent crime. Judge Kinard sentenced Petitioner to thirty-three years confinement for murder, thirty-three years for burglary 1st degree, and five years for possession of a weapon during a violent crime. The sentences on each indictment were ordered to run concurrently.

A Notice of Appeal was filed and the appeal was perfected by Rita Metts, Esquire, and Robert Dudek, Chief Appellate Defender. Petitioner raised the following issues on appeal: (1) The trial judge allowed the admission of improperly obtained DNA and/or blood evidence, and erred in denying the Petitioner's motions to exclude the improperly obtained DNA and/or blood evidence, (2) The trial court committed reversible error when it admitted DNA and/or blood evidence, despite conflicting testimony which demonstrated improper sample collection and a tainted crime scene, which demonstrated probable tampering or altering of the samples, and (3) There was no probable cause for the arrest of the Petitioner. On April 5, 2017, the South Carolina Court of Appeals affirmed the lower court. State v. Collins, 2017-UP-151 (S.C. Ct. App. filed April 5, 2017). The Remittitur was issued on April 21, 2017.

On July 17, 2017, Petitioner filed an application for post-conviction relief. In response, Respondent served its return and motion for a more definite statement on October 23, 2017. On July 25, 2018, Petitioner filed an amendment alleging the following:

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.
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.
3. Ineffective assistance of appellate counsel for failure to properly raise issues with citation to 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.

On August 26, 2019, an evidentiary hearing was convened before the Honorable Jennifer B. McCoy. Petitioner was present and represented by Tricia Blanchette, Esquire. Respondent was represented by Assistant Attorney General Benjamin Limbaugh. Petitioner, Trasi Campbell, Esquire, Arie Bax, Esquire, and Rita Metts, Esquire all testified at the hearing. The record was left

open to obtain the testimony of Robert Dudek, Chief Appellate Defender. On September 26, 2019, a subsequent hearing was held to obtain the testimony of Robert Dudek.

Judge McCoy request proposed orders from both Petitioner and Respondent. On May 20, 2020, the Honorable Jennifer B. McCoy issued an Order of Dismissal, which was filed on May 26, 2020. On June 12, 2020, Petitioner filed a Motion Pursuant to Rule 59(a) & (e), SCRCP. Petitioner argued the PCR Court failed to make findings as to trial counsel's representation as to the DNA evidence, representation offered on the contamination argument, and the testimony of Dr. Meehan. On July 1, 2020, the Honorable Jennifer B. McCoy issued an Order Denying Motion to Reconsider, which was filed on July 6, 2020. This appeal follows.

STATEMENT OF FACTS

On the night of June 22, 2009, Petitioner 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. (App. 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. (App. 175-201, 224-27, 253-54).

As Miles arrived in the victim's back yard, he saw two (2) men standing near the back door of the victim's residence, and they appeared to be fidgeting or nervous. Miles had never seen the two (2) men before. Miles hollered at the two (2) men. The two (2) men turned and walked toward Miles. As the two (2) men approached Miles, one (1) of the men [Collins] drew a pistol. Miles immediately fell down on the ground and begged Collins not to shoot him. Collins and the other man patted Miles down for weapons. Miles was unarmed. (App. 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. (App. 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. (App. 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) relative of the victim, who lived nearby, had already called 911 as soon as the gunshots were fired. (App. 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. (App. 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. (App. 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. (App. 245-49).

The following day, approximately sixty 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 bloody shoe impressions on Seabrook Road and from the discarded *.40* caliber pistol for later D.N.A. testing. (App. 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. (App. 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. (App. 224-26, 191-94).

Several months later, police developed a suspect in the case, Petitioner 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 Petitioner 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. (App. 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 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. (App. 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. (App. 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. (App. 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 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. (App. 444-66).

SLED also subsequently developed a D.N.A. profile from the buccal swabs taken from Petitioner 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 Petitioner Antonio Collins. (App. 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. (App. 603).

ARGUMENT

The PCR Court properly addressed all of the issues raised in its Order of Dismissal and (a) properly found that Petitioner had failed to meet his burden in proving prejudice where Petitioner failed to show that had defense counsel properly renewed her objections related to the DNA evidence the trial court would have sustained it and an appellate court would have upheld the ruling on appeal; (b) the PCR court further properly found Petitioner failed to prove prejudice as it relates to appellate counsel where Petitioner failed to show any issues that would have been meritorious had then been raised on appeal or any issues that were properly preserved that counsel failed to argue

Petitioner argues that the PCR court failed to properly address all of the issues raised during the evidentiary hearing and erred in finding Petitioner was not entitled to a new trial due to the representation provided by trial and appellate counsel regarding matters related to the DNA

evidence. However, the PCR court properly addressed all of the issues raised in its Order of Dismissal and properly found that Petitioner had failed to meet his burden in proving prejudice where Petitioner failed to show that had defense counsel properly renewed her objections related to the DNA evidence the trial court would have sustained it and an appellate court would have upheld the ruling on appeal; the PCR court further properly found Petitioner failed to prove prejudice as it relates to appellate counsel where Petitioner failed to show any issues that would have been meritorious had then been raised on appeal or any issues that were properly preserved that counsel failed to argue.

a. The PCR Court properly found that Petitioner had failed to meet his burden in proving prejudice where Petitioner failed to show that had defense counsel properly renewed her objections related to the DNA evidence the trial court would have sustained it and an appellate court would have upheld the ruling on appeal

First, Petitioner alleges the PCR court failed to properly address all of the issues raised at the evidentiary hearing in its Order of Dismissal. However, the PCR court properly addressed all of the issues raised in its order. The PCR court properly addressed all of the issues raised in the section entitled "Findings of Fact and Conclusions of Law." (App. 1168). Petitioner argues specifically that the PCR failed to address the issues in their entirety, failed to conduct a Cronic analysis, and only addressed the merits of the unpreserved and improperly presented arguments on appeal. The lower court addressed in the Order of Dismissal all of the issues raised, although in a different organizational style than raised in Petitioner's amended application, including a finding as to Petitioner's argument pursuant to Cronic. The PCR court addressed Petitioner's allegations in four separate sections of the Order of Dismissal. (App. 1183-1185). Although not organized in the same manner as Petitioner's amended application, the PCR court properly addressed all of the issues within the aforementioned sections of the Order of Dismissal. The PCR court also clearly considered Petitioner's allegation under both Strickland and Cronic, specifically finding that

Petitioner "has failed to show prejudice resulting from appellate counsel's deficiency or such occasion to find presumed prejudice under Cronic." Therefore, the PCR court properly addressed all of the issues raised and Petitioner's request that this matter be remanded back to the PCR court for further findings is without merit.

Second, Petitioner argues the PCR court erred in denying Petitioner relief as it relates to both trial counsel and appellate counsel, under either a Strickland analysis or a Cronic analysis. However, the PCR court properly denied relief under both Strickland and Cronic as it relates to the allegations against both trial and appellate counsel. The PCR court undertook the proper legal analysis of Petitioner's numerous allegations as it relates to trial counsel's failure to preserve or challenge the admission of the DNA evidence. The PCR court analyzed Petitioner's allegations using the framework outlined in Milledge v. State, 422 S.C. 366, 375, 811 S.E.2d 796, 801 (2018) and McHam v. State, 404 S.C. 465, 746 S.E.2d 41, 47 (2013).

> In particular, the State contends that, even if defense counsel had renewed his objection when the evidence was presented, the trial court would have denied it, and an appellate court would have upheld the ruling on appeal. Thus, while the State does not contest the PCR court's findings regarding the first prong of Strickland—that Milledge's defense counsel was deficient in failing to object to the evidence when it was entered—the State contends Milledge suffered no prejudice because the search conducted by the deputies was lawful under the Fourth Amendment. We agree the appropriate inquiry is whether the search conducted by the deputies was lawful under the Fourth Amendment, as that issue would have controlled the outcome on direct appeal. We further agree with the State that the search was supported by the deputies' reasonable, articulable suspicion, and thus Milledge was not prejudiced by counsel's failure to contemporaneously object. Milledge v. State, 422 S.C. 366, 375, 811 S.E.2d 796, 801 (2018).

Here, as in Millidge's case, the issues involve trial counsel's failure to challenge and preserve evidence acquired as a result of a search. The PCR court properly used this framework in evaluating Petitioner's allegation relating to trial counsel's failure to preserve issues for appellate review.

Further, the PCR court properly found that Petitioner's case did not fall within the framework enumerated in Cronic as to his allegation against appellate counsel, as well as Petitioner's allegations against trial counsel. (App. 1187). Petitioner argues his case "was a complete breakdown in the adversarial process that takes this case outside the precedent set forth in Anderson and McHam, which is why Petitioner asked the Court to analyze his claims under United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984). However, as noted above, the PCR court analyzed Petitioner's claims using the proper legal framework and did not need to conduct a full Cronic analysis where Petitioner's case does not fall within the types of cases contemplated in Cronic.

> The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry ... is not worth the cost." Strickland, 466 U.S. at 692, 104 S.Ct. 2052 (citing Cronic, 466 U.S. at 658, 104 S.Ct. 2039). In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998). Nance v. Ozmint, 367 S.C. 547, 551–52, 626 S.E.2d 878, 880 (2006).

As outlined above, Cronic set forth three specific instances in which prejudice can be presumed: a defendant is completely denied counsel, a defendant has been constructively denied counsel, and instances where even completely competent counsel would not be able to provide effective assistance. Petitioner's case, even considering the assistance provided by appellate counsel, does

not fall within the aforementioned instances where prejudiced should be presumed. Petitioner was not denied counsel at any stage of his proceeding. Petitioner was not constructively denied counsel, even at the appellate stage, as appellate counsel did not have any meritorious issues that could have been raised had they been properly preserved. Finally, Petitioner's case does not meet the extraordinary circumstances of prong three, as cited from Powell v. Alabama. In Powell, the defendant was not appointed counsel even in light of "the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives." Powell v. State of Ala., 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 158 (1932). Petitioner had the assistance of two attorneys during his trial and the assistance of counsel on his appeal, Petitioner's case does not meet the standards for analysis under Cronic on its face. As this Court found: "Absent these narrow circumstances of presumed prejudice under Cronic, defendants must show actual prejudice under Strickland." Nance v. Ozmint, 367 S.C. 547, 552, 626 S.E.2d 878, 880 (2006). The PCR properly evaluated Petitioner's claims using the Strickland analysis and found that Petitioner had failed to meet his burden. Therefore, as far as Petitioner argues his case should be reversed for the Court's brief or lacking analysis under Cronic, Petitioner's Writ of Certiorari should be denied.

Third, Petitioner alleges generally that trial counsel was ineffective for failing to properly present and preserve issues pertaining to the suppression of the DNA evidence. However, as addressed above, the PCR correctly analyzed Petitioner's allegations using the framework in McHam and found that Petitioner had failed to prove that had the issues been preserved they would have been meritorious on appeal and would have resulted in a reversal. As the PCR court properly

found, Petitioner would have to "show that the trial court committed clear error in allowing the DNA evidence from the 1st Buccal swab in at trial." (App. 1175). "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 (1946); Zap v. United States, 328 U.S. 624 (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 (1973); Bumper v. North Carolina, 391 U.S. 543 (1968); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001). Whether a defendant voluntarily consents to a search is a question to be determined by the trial judge based on the totality of the circumstances. United States v. Mendenhall, 446 U.S. 544, 558-59 (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. (APP 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 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.

In light of the above case-law, the facts of Petitioner's case, and the evidence presented during the evidentiary hearing, the PCR court properly found Petitioner "failed to show that the failure to preserve the suppression of the first Buccal swab at trial would have been a meritorious

issue on appeal." (App. 1177). Further, Petitioner would have needed to 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). 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 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);[1] United States v. Ventresca, 380 U.S. 102, 108 (1965)(same); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967)(same); United States v. Weiebir, 498 F.2d 346 (4th Cir. 1974).

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 (internal citation omitted). Eyewitnesses and non-confidential informants are often given a higher level of credibility when supplying information to support probable cause to search. 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; State v. Geer, 391 S.C. 179, 705 S.E.2d 441 (Ct. App. 2012), quoting Texas v. Brown, 460 U.S. at 742, quoting Brinegar v. United States, 338 U.S. at 176. "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 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 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 different guns* found at the scene in *two 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 black males* involved and *one* of them stated before getting in a car and leaving the area that he had been shot in the leg. The investigator testified to the *identification of the car* involved in the crime as being a beige or crème colored *Cadillac Deville* by witnesses in the area of the crime. The investigator testified to the discovery of the *blood drops* at the crime scene, *on the road leading away from the victim's residence*, on the *.40* caliber *pistol* found in the grass where the blood trail ended, and in the *Cadillac Deville* recovered in Jasper County, and how police determined the shooter/perpetrator was wounded during the exchange of gunfire with the victim, from the blood drops, the blood trail, and the blood in the car. *She testified to the fact samples from the above described locations were taken and forwarded to SLED for D.N.A. analysis.* She testified to the fact it was determined through D.N.A. analysis that the *same individual* left the blood drops at the crime scene, on the road leading away from the victim's residence, on the *.40* caliber pistol, and in the back seat of the Cadillac Deville. The investigating officer testified how police identified Antonio Collins, as a suspect in this case, from interviewing a named federal informant, Gussie Goldwire, who was related to Collins, and knew him by Antonio Wilson, and witnessed Collins and Jeremy Murphy arrive at Goldwire's residence in Jasper the night of the murder in *Murphy's Cadillac* and Collins had *recently been shot in the leg and was being helped from the car* and into the residence. Goldwire also informed police Collins was from Florida. The investigating officer testified how police also interviewed Jeremy Murphy, *the owner of the car* [the Cadillac Deville from which blood stains were found], who informed police Collins had his car the night of the murder. Murphy knew Collins as Antonio from Florida. The investigating officer testified to her further investigation and research and how she identified

Collins as the person both the named informant [Goldwire] and Murphy identified and were referring to was in fact appellant Antonio Eugene Collins by using the names of relatives of Collins whose names Goldwire had provided to the investigator and those same relatives names showed up in Collins' police intelligence reports. The investigator also testified to the fact Collins was determined to be a resident of Florida, as Murphy had informed police, and he was located in the Miami – Dade County jail and that Miami police approached Collins and obtained a buccal swab from him, that swab was sent to SLED, and it matched the DNA of the blood found on the victim's front porch, on the road leading away from the crime scene, on the gun found near the end of the blood trail, and in Murphy's Cadillac Deville. And, she testified to the scars she saw on Collins' legs in photos taken by Miami police which could be attributable to a gunshot wound. (R. pp. 620-41).

Therefore, the PCR court found Petitioner failed to prove that had the issue been properly preserved it would have been meritorious on appeal. (App. 1181)

Petitioner further argues that the DNA samples were fruits of the poisonous tree and would not have been inevitably discovered. Petitioner would have to show 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.

As previously set forth, law enforcement had probable cause to obtain a Schmerber order to obtain Collins' D.N.A. even without the results of the 1st buccal swab based on the information developed by police during the investigation of this murder including the statements from two (2) named individuals, Gussie Goldwire and Jeremy Murphy, which had been corroborated by physical evidence, and their follow up investigation which determined the person Goldwire and

Murphy were referring to was appellant Antonio Eugene Collins. As a result, the 1st buccal swab would have been 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, he had already been arrested for murder, a dangerous and violent crime. (Arrest Warrant). He had also been indicted by the Beaufort County grand jury. The 2nd buccal swab was taken after the Schmerber hearing. In Maryland v. King, the United States Supreme Court recognized that when police take a buccal swab from a defendant arrested for a dangerous felony, the search is no different than police taking the fingerprints of an arrested subject or taking a booking photograph. It is a lawful search incident to arrest, and individualized suspicion is not necessary. As a result, the taking of the 2nd buccal swab did not violate the Fourth Amendment. Id. Finally, Collins' DNA would have been inevitably discovered. Id. The United States Supreme Court decided Maryland v. King, *supra* on June 3, 2013. Collin's trial did not begin until October 24, 2013. As a result, the State would have inevitable discovered Collins' DNA in any event. Id.; Nix v. Williams, 467 U.S. 431 (1984); United States v. Allen, 159 F.3d 832 (4th Cir. 1998). *See* S.C. Code Ann. Section 23-3-620 (effective January 1, 2009).

In light of the above case-law, the facts of Petitioner's case, and the evidence presented at the evidentiary hearing, the PCR court properly found Petitioner failed to prove the issue would

have been meritorious on appeal had it been properly preserved. Therefore, Petitioner's Writ of Certiorari should be denied.

Fourth, Petitioner alleges the PCR court erred as it relates the handling of a DNA expert in relation to suppression of the DNA evidence. However, Petitioner has wholly failed to present any evidence that would prove he was prejudiced by the expert's testimony. "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 Canroodv. State. 338 S.C. 103, 1 10, 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). "[Decisions 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." Abnev 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).

Petitioner argues in a conclusory manner that simply because the expert witness was rigorously cross-examined as to his involvement in another case that trial counsel was deficient in calling the witness and that prejudice resulted. However, Petitioner presented no argument other than the cross-examination to prove both deficiency and prejudice. Therefore, Petitioner failed to meet his burden in proving either and this Court should deny Certiorari as to this issue.

b. **The PCR court further properly found Petitioner failed to prove prejudice as it relates to appellate counsel where Petitioner failed to show any issues that would have been meritorious had then been raised on appeal or any issues that were properly preserved that counsel failed to argue**

Fifth, Petitioner alleges the PCR court erred in finding Petitioner failed to meet his burden in proving prejudice as a result of the representation by appellate counsel. However, the PCR court properly found Petitioner failed to meet his burden where Petitioner failed to elicit any testimony as to what meritorious issue could have been raised by appellate counsel.

Petitioner's appeal was dismissed pursuant to Rule 220(b) for failing to cite to supporting authority. The PCR court made appropriate remarks in the Order of Dismissal concerning the testimony elicited during the evidentiary hearing from both appellate counsel and Robert Dudek. The PCR court stated it was "highly concerned with the efficacy and practices of the Appellate Practice Project." (App. 1186). The PCR court further stated that the "lack of oversight in this area is of grave concern to this Court." (App. 1186). However, the PCR court properly found that Petitioner failed to meet his burden in proving that he prejudiced by the deficiency of appellate

counsel. In evaluating allegations of ineffective assistance of appellate counsel the South Carolina Supreme Court explained that the lower court should "ask 1) whether appellate counsel's performance was deficient, and 2) whether Petitioner was prejudiced by appellate counsel's deficient performance." Bennett v. State, 383 S.C. 303,309, 680 S.E.2d 273, 277 (2009). Here, as noted by the PCR court, Petitioner failed to present any testimony or evidence of any preserved issues appellate counsel could have raised that were meritorious. Petitioner, understandably so, focuses entirely on appellate counsel's failure to file a proper brief, but fails to address any prejudice that resulted from the actions of appellate counsel. The PCR court properly found Petitioner failed to meet his burden in proving both deficiency and prejudice. Therefore, this Court should deny Certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues herein.

Respectfully submitted,

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