THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Brian M. Gibbons, Circuit Court Judge

Case No.: 2017-CP-40-7548

Brandon Berry, 352671, Petitioner,

vs.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Brandon Berry, Petitioner, appeals the Order of Dismissal issued by the Honorable Brian M. Gibbons on April 19, 2021, which was filed on May 10, 2021. Petitioner, through counsel timely filed a Rule 59, SCRCP, Motion. Thereafter, the Court issued an Order Denying Motion on November 29, 2021, which was filed on December 9, 2021. Petitioner, through counsel, received notice of the entry of the Order on December 14, 2021.

Respectfully submitted,

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

January 11, 2022

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Brandon Berry, #352671, Applicant, v. State of South Carolina, Respondent.	)	2017-CP-40-7548 **ORDER DENYING MOTION**

This matter comes before the Court by way of Applicant's Motion pursuant to Rule 59(a) & (e) filed on May 25, 2021. A hearing was scheduled on November 22, 2021, at the Richland County Courthouse before the undersigned. Applicant was present and represented by Tricia A. Blanchette, Esquire. Assistant Attorney General Yasmeen E. Klein respresented Respondent. Applicant and Respondent provided arguments supporting their respective positions. After reviewing all argument and submissions, the Court's notes, and the lower court record, this Court respectfully **denies** Applicant's motion, the Order of Dismissal dated May 10, 2021, shall stand.

AND IT IS SO ORDERED this _____ day of 11/29 **, 2021.**

BRIAN M. GIBBONS
Presiding Judge
Fifth Judicial Circuit

_____, South Carolina

STATE OF SOUTH CAROLINA) COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Brandon J. Berry, SCDC # 352671, Applicant, v. State of South Carolina, Respondent.	C. A. No. 2017-CP-40-7548 **ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 25, 2017, by Brandon J. Berry (Applicant). The State (Respondent) filed a Return on May 8, 2018, making a motion for a more definite statement and requesting an evidentiary hearing. Through counsel, Applicant filed an amended application on October 4, 2019. An evidentiary hearing into the matter convened October 30, 2019, at the Richland County Courthouse before the undersigned. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esquire. Assistant Deputy Attorney General Lindsey A. McCallister of the South Carolina Attorney General's Office represented Respondent.

Applicant testified on his own behalf. Aimee J. Zmrocek, Esquire, Applicant's trial counsel (Trial Counsel) and Lara M. Caudy, Esquire, Applicant's appellate counsel (Appellate Counsel), also testified. This Court had before it a copy of the records of the Richland County Clerk of Court, records from the South Carolina Department of Corrections, the PCR application, Respondent's Return, the trial transcript, and Applicant's appellate records. After a review of the record and all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof, denies relief, and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Richland County Clerk of Court. On July 29, 2014, law enforcement officers with the Richland County Sheriff's Department arrested Applicant following traffic stop and subsequent car and foot chase between Applicant and officers. Following an investigation, the Richland County Grand Jury indicted Applicant for attempted murder, attempted armed robbery, unlawful conduct toward a child, resisting arrest, and unlawful carrying of a pistol (2015-GS-40-015, -017, -018, -020, -062).

On November 30, 2015, Applicant proceeded to a jury trial in the Richland County Court of General Sessions with the Honorable Howard P. King presiding. On December 4, 2015, the jury convicted Applicant as indicted. The trial court sentenced Applicant to concurrent terms of imprisonment of twenty years for attempted murder, twenty years for attempted armed robbery, one year for resisting arrest, one year for unlawful carrying of a pistol, and a consecutive term of five years of imprisonment for unlawful conduct towards a child, for an aggregate term of twenty-five years' imprisonment.

Applicant filed a timely notice of appeal, and an appeal was perfected on his behalf. Appellate Defender Lara M. Caudy with South Carolina Commission on Indigent Defense-Office of Appellate Defense represented Applicant on appeal. Megan Harrigan Jameson of the South Carolina Attorney General's Office represented the State. On appeal, Applicant argued the following issues: (1) whether the trial court erred by finding Applicant did not have a reasonable expectation of privacy in the apartment leased by his girlfriend and the mother of his child to challenge the warrantless search of the home; and (2), whether the trial court abused its discretion in finding Applicant's girlfriend voluntarily consented to a search of her apartment. Following

briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion without oral argument. State v. Brandon Berry, Op. No. 2017-UP-380 (Ct. App. filed Oct. 18, 2017). The Remittitur was issued on November 3, 2017.

SUMMARY OF FACTS ADDUCED AT TRIAL

In the early morning hours of July 29, 2014, Michael Keith was returning home from an evening of working two jobs—first as a promoter of "Knuckle Up," a local boxing event, and then as the host of an official after party for the event. Tr. pp. 221, 227. Keith, a lifelong resident of the Columbia area, worked a variety of jobs, including as a bus monitor for Richland 2 School District, an employee at a local shoe store, a disc jockey for a radio station, and a host and promoter at various local nightclubs and events. Tr. pp. 220, 226-27, 238-39. Keith was routinely paid in cash when hosting or promoting at events or clubs and therefore, often returned home late at night or early in the morning with large amounts of cash. Tr. p. 226-28. Because of this, Keith had a heightened awareness of his surroundings when returning home from events and had a routine to ensure his safety. Tr. p. 228.

In accordance with his routine, Keith backed his car into the parking lot of his apartment complex when returning home that morning. Tr. p. 228. He exited his car and reached back into his car to retrieve a small bag. Tr. p. 229. Keith then shut the car door and noticed a man dressed all in black, including in a black face mask, black shoes, and black clothing, standing behind him. Tr. p. 229. The man pointed a gun at Keith and demanded Keith's car keys and money. Tr. p. 229. Keith tried to joke with the masked man to ease the tension, but the man again demanded money and threatened to kill Keith if he did not comply by the time he finished counting down. Tr. p. 229. The man started counting, and upon reaching zero, Keith tried to run away. Tr. pp. 229-30. The

masked man chased Keith and the two ran around Keith's car in circles until the man jumped on top of the car. Tr. p. 230. Keith threw a bottle of Minute Maid beverage at him and ran. Tr. p. 230.

While Keith ran, the masked man fired his weapon in Keith's direction, narrowly missing him. Tr. p. 230. Keith dropped to the ground and the man hovered over him, continuing to threaten him and demanding Keith's keys and money. Tr. pp. 230-31. The man tried to remove Keith's pants, and when Keith resisted, he shot Keith in the leg. Tr. p. 231. The man then put the barrel of the gun against Keith's head. Tr. p. 231. At that moment, Keith's girlfriend, awakened by the commotion, looked out the balcony and saw the man with a gun to Keith's head. Tr. p. 222. She came out to the balcony and asked what was happening. Tr. pp. 221, 231-32. Keith yelled at her to go inside, and while the man was distracted, Keith punched him in the stomach. Tr. pp. 221, 231-32. The masked man fled, jumped over a fence, and got into a waiting car that sped off. Tr. pp. 256-57.

Keith and his girlfriend were able to get Keith into their apartment and called emergency services for assistance. Tr. pp. 224, 233-34. Several other neighbors also heard the commotion and shooting and called 911. Tr. pp. 255-60, 495, 546-47. Before medical care arrived, Keith and his girlfriend briefly spoke with responding officers and gave a description of the suspect. Tr. pp. 211-18. Keith was transported by ambulance to the hospital, where he underwent emergency surgery for his injuries, including a fractured tibia. Tr. pp. 224-25, 234, 250-54, 350-56.

While Keith was being treated, officers from the Richland County Sheriff's Department arrived and processed the scene. Tr. pp. 263-76. Officers collected two nine millimeter shell casings and documented the scene. Tr. p. 268. Keith's car was towed to the Sheriff's Department forensic garage for processing, where investigators were able to lift numerous fingerprint and

footprint impressions. Tr. pp. 277, 408-18. Investigators were later provided with a bullet that had punctured a neighbor's car during the incident. Tr. pp. 496-97.

Approximately six hours later, Richland County Sheriff's Deputy Brandon Pennington was patrolling the Broad River Road area of Columbia when he observed a vehicle with two occupants—driver Nickilous Wallace and passenger Applicant—without seatbelts fastened. Tr. pp. 295-97. Deputy Pennington activated his blue lights, initiated a traffic stop, and called dispatch to request back-up assistance. Tr. p. 297. Deputy Pennington approached the vehicle and asked for Wallace and Applicant's driver's licenses; both Applicant and Wallace were visibly nervous and shaking. Tr. p. 297-98. Additionally, Applicant's two-year-old daughter was unrestrained and freely moving around the backseat. Tr. p. 300. Deputy Pennington took Wallace and Applicant's information and returned to his patrol car. Tr. p. 298.

As Deputy Pennington checked for any outstanding warrants for Applicant and Wallace, Deputy Owens arrived to provide back-up support for Deputy Pennington. Tr. p. 298. Deputy Owens spoke with Applicant and Wallace and similarly noted the extreme nervousness of both men. Deputy Owens also noticed possible marijuana residue and tweezers, which he recognized as a tool commonly used when smoking marijuana. Tr. pp. 311, 236, 386. Deputy Owen observed Applicant fidgeting with a black bag in the back seat. Tr. p. 121. When Deputy Pennington returned to the car, he asked Wallace to step outside the vehicle and Wallace voluntarily exited the vehicle. Tr. pp. 298-99. Deputy Pennington asked for permission to search Wallace's person and the vehicle and Wallace gave consent. Tr. p. 299. While Deputy Pennington was searching Wallace, Applicant moved from the passenger seat to the driver seat and fled into a nearby apartment complex with his two-year-old daughter still unrestrained in the backseat of the vehicle. Tr. pp. 299-300. Applicant drove a short distance before abandoning the car and fleeing on foot. Tr. p.

300. During this commotion, Applicant's daughter was still in the vehicle, which Applicant did not place in park and which continued to move after he had exited. Tr. p. 300. Deputy Pennington pursued Applicant on foot throughout the apartment complex and was able to apprehend Applicant as he attempted to climb over a fence. Tr. pp. 300-01. Applicant resisted arrest and Deputy Pennington required assistance from several other officers to apprehend Applicant. Tr. p. 306. During the foot pursuit, Applicant discarded two bags: a diaper bag containing a 9 millimeter Glock handgun and an additional bag containing two black masks, zip ties, gloves, and shirts. Tr. pp. 300, 307-09.

Applicant's girlfriend, Kayla, lived in the apartment complex where he fled and quickly arrived at the scene. Tr. pp. 365-67, 554-55. She tended to Applicant's daughter and called the child's mother, Lourisa Katio, to come retrieve the child. Tr. pp. 141, 365-67, 554-55. Katio immediately left work and arrived at the scene shortly thereafter. Tr. pp. 363-67. When Katio arrived, she spoke with Investigator Carwell from the Richland County Sheriff's Department. Tr. pp. 134-35. Investigator Carwell informed Katio that her daughter had been involved in a serious situation and that a loaded weapon was located in her daughter's diaper bag. Tr. pp. 134-35. Katio was upset about the dangerous conditions to which her child had been exposed, as well as the presence of Applicant's girlfriend. Tr. pp. 366-67, 555. Katio called several family members, including her stepfather and sister who arrived on the scene shortly thereafter to assist her. Tr. pp. 135, 150-51, 367.

Katio told Investigator Carwell that Applicant had come to her apartment that morning to watch their daughter while she was at work after spending the evening out with Wallace. Tr. p. 555. She told Investigator Carwell that Applicant did not live with her, but did spend some nights at her apartment. Tr. pp. 364, 373. Investigator Carwell indicated he was concerned about the

child's welfare and wanted to inspect the living conditions before releasing the child to Katio. Tr pp. 373, 555. Katio agreed to let officers inspect her home and signed a written "Consent to Search" document. Tr. pp. 369, 373, 555-56.

Once Katio let Investigator Carwell into the apartment, she identified the items in the apartment that belonged to Applicant, including black jeans in her bedroom closet, Nike shoes outside the closet, and a black zip tie similar to those found in Applicant's bag that Investigator Carwell seized; the jeans and shoes had reddish stains. Tr. pp. 369-71, 558-61. Katio also gave a written statement describing Applicant's return to her apartment that morning and that the seized items belonged to Keith. Tr. pp. 367-68. Katio's grandmother, who was the only other person listed on her apartment lease, was at the home when Investigator Carwell searched the apartment. Tr. p. 373. Investigator Carwell did not find any weapons in the home and determined it was a safe environment for Katio's daughter. Tr. p. 562.

Investigator Carwell requested rapid DNA testing on Applicant's jeans and shoes collected from Katio's apartment. Tr. pp. 463-65, 473-74, 651-55. DNA analysts from the Richland County Sheriff's Department DNA laboratory tested the items and established the reddish stain on both items was blood. Tr. pp. 455-56, 463-64, 473-74, 651-65. The blood sample on the shoes was too weak to determine a DNA profile, but the blood on the jeans matched Keith's DNA profile. Tr. pp. 463-65, 473-74, 651-65. Based on the results of the rapid DNA testing, Investigator Carwell obtained arrest warrants against Applicant. Tr. pp. 564-65.

Prior to trial, forensic examiners with the Richland Country Sheriff's Department forensics laboratory tested the projectiles and shell casings collected from the scene and concluded Applicant's weapon fired the shots. Tr. pp. 498-509. Latent print analysts with the Richland County Sheriff's Department also analyzed the various fingerprint and footprint impressions taken

from Keith's vehicle. Tr. pp. 412-15, 519-25. Applicant's shoes were consistent in shape, size, and design of impressions found on Keith's car. Tr. p. 437.

While in pre-trial detention at the Alvin S. Glenn Detention Center, Applicant made numerous phone calls to his girlfriend, Kayla, implicating himself in the crime. Tr. pp. 531-59. Additionally, Applicant called Wallace using another inmate's personal identification code (presumably to disguise his identity) and advised Wallace not to testify for the State. Tr. pp. 531-59.

At the outset of trial, Trial Counsel moved to suppress the items seized from Katio's apartment on the grounds that Katio's consent to search was involuntary due to alleged threats to call DSS purportedly made by Investigator Carwell. The trial court conducted an *in limine* hearing on the matter. Tr. p. 70. During the hearing, the State presented testimony from Investigator Carwell, Deputy Pennington, and Deputy Owens. Investigator Carwell testified he arrived at the scene of the traffic stop at approximately 11:30 a.m. after receiving a call from Deputy Owens. Tr. p. 71. He testified Katio was already present when he arrived and made contact with her. Tr. pp. 72-73. He testified Katio informed him Applicant had been out the previous evening with Wallace and had returned to her home around 5 a.m. that morning. Tr. p. 73. Investigator Carwell further testified Katio told him she lived at the apartment with her daughter, but her grandmother's name was on the lease. Tr. p. 74. He testified Katio volunteered to let him search the apartment and signed a consent form memorializing her consent. Tr. pp. 73-75. He stated he did not make any threats or promises to obtain Katio's consent. Tr. pp. 75, 80. Investigator Carwell testified Katio drove herself and her daughter to her apartment, and he followed behind in his vehicle. Tr. p. 75. Once at the apartment, Katio let Investigator Carwell inside and remained in the apartment while

he searched it. Tr. p. 75. Investigator Carwell testified that Katio provided a three page written statement following the search. Tr. p. 77.

Following Carwell's testimony, the State argued Applicant did not have a reasonable expectation of privacy in Katio's home, and therefore could not challenge the warrantless search of the apartment. Tr. p. 87. Trial Counsel responded that Applicant had a child-in-common with Katio and often stayed at the apartment, kept personal belongings there, and paid apartment-related bills. Tr. p. 88. In support of these arguments, Trial Counsel presented testimony from Katio and Katio's sister Destiny.

Katio testified she received a call from Applicant's girlfriend Kayla informing Katio that her daughter was with the police, and Katio needed to come to get her. Tr. pp. 133, 141. She testified she immediately left work and drove to the scene. Tr. p. 134. She explained she spoke with Investigator Carwell, who informed her that her daughter had been involved in a serious situation, and investigators found a gun in her diaper bag. Tr. pp. 135, 143. Katio further testified Investigator Carwell told her he needed to be sure her daughter lived in a safe place before she could leave with her daughter or he would call DSS. Tr. p. 135. Katio testified she called her sister and stepfather, who came to the scene. Tr. p. 135. She testified Investigator Carwell asked where she lived, if Applicant lived with her, and if Applicant kept anything at her apartment. Tr. p. 135. She stated Investigator Carwell told her she would be allowed to take her daughter once she established the home was safe. Tr. p. 135. Katio testified she told Carwell she was willing to let officers inspect her home because she had nothing to hide. Tr. pp. 135, 137-38, 143-44. Katio testified Investigator Carwell let her drive herself and her daughter to the apartment. Tr. pp. 135-36.

Katio testified Applicant "sometimes" stayed at her apartment depending upon their relationship status, which fluctuated. Tr. pp. 142, 147. Katio further testified Applicant spent the evening and early morning of the shooting out with Wallace and did not return to her apartment until approximately 5 a.m. that morning. Tr. pp. 140-41. She testified Applicant occasionally had a key to her apartment, but she did not specify if he had one on the day of his arrest. Tr. p. 136. She explained Applicant kept some personal items in her house, but his name was not on the lease. Tr. pp. 136-37, 143. She testified Applicant had friends over at the apartment on rare occasions, but it was not a regular occurrence. Tr. p. 146-47. Katio testified Investigator Carwell looked for additional weapons at the apartment, and the search took approximately fifteen minutes. Tr. pp. 137-38. She stressed multiple times she was willing to let officers search her home. Tr. pp. 138, 141-42.

Katio's sister Destiny also testified at the hearing. She testified Applicant did not live at her sister's apartment, but he sometimes stayed there depending on their relationship status. Tr. p. 150. Destiny testified Applicant helped pay bills "when he could." Tr. p. 150. She also testified she went to the scene to assist her sister, who she described as "very frantic." Tr. p. 151. Destiny testified law enforcement told Katio she would be allowed to take her daughter unless she consented to a search of her apartment. Tr. p. 151. She testified her sister calmed down significantly when Destiny arrived on scene. Tr. pp. 154-55.

Following the witnesses' testimony, the State argued Applicant did not reside at the apartment and did not have a reasonable expectation of privacy there. Tr. pp. 159-62. The State further argued Katio voluntarily gave law enforcement consent to search the apartment. Tr. pp. 159-62. In response, Trial Counsel argued the incriminating evidence discovered in Katio's apartment should be suppressed because Katio's consent to search was coerced by threats of DSS

involvement and not being allowed to take her daughter home. In support of that contention, Trial Counsel asserted Applicant had a reasonable expectation of privacy in Katio's home, and Katio's consent was involuntary. Tr. pp. 162-69.

After taking the matter under advisement and holding a recess, the trial court denied Applicant's motion to suppress. Specifically, the trial court found Applicant had no reasonable expectation of privacy in Katio's apartment. Tr. pp. 185-86. Furthermore, the trial court found Applicant's argument that Katio's consent was coerced by law enforcement to be without merit, specifically finding the testimony of Katio and her sister was not credible as to purported threats of DSS involvement. Tr. pp. 186-87. In summation, the trial court noted it found "[Katio's] consent was freely and voluntarily given and not as a result of any attempts to intimidate her by threatening the use of DSS to take her child." The trial court therefore ruled the evidence seized from the Applicant's apartment would be admitted. Tr. p. 187.

Subsequently, at the conclusion of trial, the jury convicted Applicant as indicted. Tr. p. 713-17. Following the verdict, the trial court sentenced Applicant to an aggregate twenty-five-year term of imprisonment.

ALLEGATIONS

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

1. Ineffective Assistance of Trial Counsel
    a. Failure to properly prepare and investigate prior to trial; and
    b. Failure to utilize evidence and witnesses for the defense.
2. Ineffective Assistance of Appellate Counsel
    a. Failure to raise all meritorious issues on appeal.

Through counsel, Applicant amended his application to include the following allegations:

1. Trial counsel rendered ineffective assistance for failing to properly handle witnesses and call necessary witnesses at trial;

2. Trial counsel rendered ineffective assistance for failing to ensure that Applicant was aware of the State's evidence prior to the on-the-record rejection of the plea offer;
3. Trial counsel rendered ineffective assistance for failing to move to continue, move to suppress and/or effectively object and argue the recorded phone calls admitted at trial and the unavailability of the witness Wallace;
    a. Ineffective assistance of appellate counsel for failing to raise issues related to the phone calls and availability of witness Wallace on appeal;
4. Trial counsel rendered ineffective assistance for failing to object to the court's instruction to the jury to "search for the truth;"
5. Ineffective assistance of appellate counsel for failure to raise all meritorious issue on appeal, including the issue(s) listed above.

At the hearing, PCR counsel for Applicant stated Applicant wished to proceed on the issues raised in the amended application, with the exception of issue number one, which Applicant withdrew. Any relief as to that issue is therefore denied. Additionally, counsel for Applicant submitted to this Court a memo summarizing Applicant's arguments and case law (Court's Exhibit 1). Without objection, Applicant also entered into evidence a CD of jail phone calls (Applicant's Exhibit 1) and a copy of the jury note (Applicant's Exhibit 2).

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

Counsel testified she has been a member of the bar practicing as a criminal defense attorney since 2008. Counsel testified she was retained to represent Applicant on these charges, and she recalled her representation of him. Counsel stated the Solicitor's Office provided discovery in this case in piecemeal fashion, as is normal.

Counsel explained the State originally extended a plea offer with a sentence of thirty years, which Applicant rejected. Counsel testified she approached the State again just before trial in an attempt to negotiate a more favorable plea offer. Counsel testified she and Applicant discussed making a counteroffer, particularly because the solicitors had informed her they had discovered additional jail calls made by Applicant using another inmates PIN, which were not beneficial to Applicant's case. Counsel testified, at some point right before trial, the solicitors provided a CD

with over 600 of Applicant's phone calls from jail. Counsel stated she did not review the phone calls with Applicant because he was in the detention center.

Counsel testified the State then offered a sentence in the range of fifteen-to-twenty years, which Applicant rejected on the record before the trial judge. Counsel further testified one of the solicitors emailed her copies of the new jail call files later that evening, and when they returned to court the next morning, Applicant again declined the State's fifteen-to-twenty year plea offer, and the State revoked it. Counsel agreed she did not ask the trial court for a continuance or request to have the offer remain open until she had a chance to review the additional jail calls. Counsel testified, in hindsight, she felt she should have asked for a continuance once she had a chance to listen to the phone calls. Counsel also testified she usually speaks with clients about reevaluating a plea offer when she receives new evidence, but she did not have a chance to do so this time because she received the evidence at the same time the State withdrew its offer. However, Counsel testified Applicant rejected the offer knowing the State had the three phone calls it wanted to enter into evidence. Counsel testified although Applicant had not heard the calls, he knew of their existence, he was aware the State claimed the calls were not good for him, and he never told her he did not make those calls. Additionally, Counsel acknowledged that at least one of the phone calls was made directly from Applicant's account. Counsel explained all of the phone calls warned Applicant of the recording at the beginning of the call, but nevertheless, the statements Applicant made on the calls were admissions or acknowledgments of guilt. Counsel further testified although he did not know which calls were going to be used or that the State had found the calls made with someone else's PIN, theoretically, he knew the content of the calls because he had made them. Counsel stated she cannot force a client to accept a plea offer, and in this case, Applicant wanted a very specific offer.

Counsel testified after Applicant rejected the offer and the State withdrew it, the State then informed the trial court that one of its planned witnesses, Applicant's codefendant Wallace, was now planning to invoke his Fifth Amendment right against self-incrimination. Counsel explained the State informed the trial court it had recently discovered a phone call between Applicant and Wallace in which Applicant directed Wallace not to testify. Counsel stated she had not been provided with that phone call at that point, but she could not point to anywhere in the record where she informed the trial court she was lacking that discovery. Counsel explained the trial court deferred its ruling on the issue until later in the trial, and the parties agreed to proceed to opening statements without mentioning Wallace. Counsel testified she did not believe agreeing not to mention Wallace in opening statements hurt the defense case.

Counsel then explained the parties revisited the issue of Wallace's testimony later in the trial, and the State wanted to proffer Wallace's testimony. Counsel testified, by this point in the trial, she had been able to review the taped phone call between Applicant and Wallace, and, in her opinion, there was no evidence of witness intimidation during the call. Counsel stated she believed if Wallace invoked the Fifth Amendment, the State would then have foundational issues with the jail call recording. Counsel further testified she also believed and argued if Wallace invoked the Fifth Amendment on any issue, he had to invoke it as to all issues, or else she felt she would lose her ability to fully cross-examine him. Counsel explained she argued Wallace should not be allowed to pick and choose which questions he wanted to answer and invoke his right selectively, even though she knew that by arguing this, it might render Wallace totally unavailable as a witness. Counsel explained she felt there were two issues with the calls: (1) the discovery was turned over late in the process; and (2) because the call was made on another inmate's PIN, the State needed to prove whose PIN it was and who was talking on the recording. Counsel testified she felt she

made an objection to the calls generally on the basis of a lack of foundation, although she may not have articulated it to the court as two separate issues.

Counsel testified the phone call between Wallace and Applicant occurred immediately before trial, which is partly why the State did not disclose it until shortly before the trial began. Counsel testified she did not know why she did not move for a continuance to review the calls, and now that she knows what is contained on the calls, she believed doing so would have been effective.

Counsel explained Wallace originally was cooperating with the State, and she expected him to testify he had loaned his car to Applicant on the night of the armed robbery. When Wallace changed his mind and indicated he was not going to cooperate, the State wanted to get the call into evidence to explain why he chose to invoke his Fifth Amendment rights. Counsel explained she felt Wallace had to invoke his Fifth Amendment rights as to his complete testimony or none at all, and that is what she argued. She stated Wallace's testimony, had he testified, was not exculpatory for Applicant, although she expected Wallace to be vague and for him to do his best to not to get Applicant in trouble.

Counsel explained that after the trial court ruled the calls were admissible, the parties addressed her "foundational issues." An officer from the detention center testified as to how calls are placed and recorded at the detention center and that inmates often use each other's PINs to place calls. The officer confirmed the three calls were placed from Alvin S. Glenn, and the recordings were made and kept in the regular course of business. The trial court then ruled the calls would be admitted over the defense's previous objections. Counsel testified she was hoping the jury would not be able to identify who was speaking on the calls, and she felt she had raised the authentication or foundation issue sufficiently to preserve it. She stated if it was not raised

explicitly on the record, then it could have been done in a bench conference. Counsel also testified although there is a reference in the transcript to her providing the trial court with a brief outlining her arguments, she could not recall if she had done that, as it would not have been filed, but simply handed up to the trial court.

Counsel stated when the State reached the point of wanting to admit the calls, the parties again made further arguments. Counsel testified part of the arguments took place in a bench conference, and ultimately, the parties only argued as to the admissibility of two out of the three phone calls. Counsel testified she argued hearsay as to the phone call between Wallace and Applicant's girlfriend, Kayla, because although Wallace's statements were admissible as he had invoked his Fifth Amendment rights, she believed Kayla's statements were not. Counsel explained she also made arguments regarding the prejudicial nature of the contents of one of the calls in which Applicant discussed speaking with a lawyer, based on Doyle v. Ohio. Counsel noted she also argued relevance. Counsel testified she was trying to argue anything she could think of, and she did not feel she had to limit herself to any particular argument. Counsel further testified she thought she had already sufficiently raised and argued the foundational issue, as well as the confrontation issue, although she did not know what effect Wallace invoking the Fifth Amendment had on her argument.

Counsel explained the State conceded the phone calls were not all made from Applicant's PIN and called the lead investigator to testify Applicant called Wallace the day before trial started. Counsel testified she did not object to this testimony because, at that point, she felt she had established her objection. Counsel also agreed at least portions of the phone calls were relevant and admissible; she testified she felt the only other objection she could have made was identification of the voice as Applicant's on the call not made from his account or PIN, and she

did not believe she adequately preserved that argument. Counsel testified in the phone call between Applicant and his girlfriend, they discussed throwing the bags, and Applicant made statements clearly admitted to the State's version of the facts. Counsel further testified Applicant never claimed it was not him on the calls, and she did not feel she could ethically make that argument in closing.

Counsel testified, eventually, she conceded Applicant made the phone calls because she wanted to argue the State was only selecting calls they felt were helpful to them, when in reality, there were hundreds of calls not played for the jury. Counsel testified she intended to concede Applicant had made the phone calls because she wanted to lessen the blow of damaging evidence. Counsel explained she asked for the opportunity to discuss Applicant's statements in the phone calls about amount of time have agreed to accept in plea deal because she wanted to get that range into evidence and tie it to her argument regarding how selective the State was as to which calls were entered. Counsel further explained she was concerned the State put the call into evidence as back-door way of making Applicant look like a bad guy, since there was a significant amount of foul language on the calls. Counsel testified she did not specifically make a bad-character argument, but framed it as a relevance argument instead.

Counsel also explained there was substantial evidence against Applicant in addition to the phone calls. Counsel explained Applicant was originally stopped for a seat belt violation, but he fled from police, with his young daughter in the back seat. When Applicant bailed out of the car and ran, officers giving chase saw him discard two items which were a diaper bag, in which a gun was found, and a second bag which contained zip ties, masks, and gloves. Counsel stated these two bags were what first tied the traffic stop and car chase to the armed robbery, which had occurred earlier that morning. Counsel explained Applicant's child's mother, who testified at trial,

eventually gave permission for officers to search her apartment, where investigators found shoes and bloody. Counsel stated the blood matched the armed robbery victim, and the shoes were consistent with prints taken from the hood of the robbery victim's car. Counsel further explained she challenged the admission of this evidence, including the consent to search the apartment which was raised on appeal, but the trial court admitted all of this evidence.

Counsel testified, after Applicant was convicted, she moved for a new trial based on all of her prior motions and objections. Counsel stated, however, she focused on the phone calls in particular because the jury had sent out a note asking for transcripts of the calls and ultimately re-listened to the recordings. Counsel testified she was not abandoning her other objections or motions, but she felt it was important to focus specifically on the phone calls.

Finally, Counsel testified she did not have a strategic reason for failing to object to the judge's use of "search for the truth" language in the jury charge. She stated she simply was not focused on it at the time, but she agreed the language is objectionable. Counsel testified the trial judge was clear, in the charge as a whole, as to the State's burden of proof, although he included seek the truth language in the reasonable doubt portion. Counsel acknowledged this trial took place before the Supreme Court decision in Beatty was published, although she stated she was aware of the concern with "speak the truth language" before that decision was issued.

Appellate Counsel testified she has practiced law since 2012 and has worked at the Office of Appellate Defense since August 2013. Appellate Counsel explained her process for selecting issues to include in her briefs. Appellate Counsel testified she reads and summarizes the transcript, looking for objections that were made. She also reviews all exhibits introduced. She testified she then conducts legal research on the issues and selects the arguments to raise.

Appellate Counsel testified she reviewed the issue of Wallace's proffered testimony and his invocation of the Fifth Amendment, and she did not see any issue she could have raised. She further testified she also analyzed the issue of the phone calls, which was more complication. Appellate Counsel stated the record is confusing and not always clear which call is being referred to or discussed. She also stated it appears some objections were raised during bench conferences, but since those are not on the record, it limits or prevents her from being able to raise those issues. Appellate Counsel stated she did not believe the authentication issue was preserved, but Counsel preserved relevance and prejudice, but Appellate Counsel did not think those were meritorious arguments.

Appellate Counsel testified she believed the search of the apartment was preserved and had merit. Appellate Counsel testified, in her opinion, Applicant had standing to challenge the search, and she believed the consent was not voluntary due to the officer's threat to involve the Department of Social Services.

Applicant testified he recalled receiving the State's first plea offer of thirty years, but he decided to reject it based on the evidence he knew about at the time. Applicant testified he was not aware the State had turned over 600+ phone calls, nor did Counsel give him a summary of the contents. Applicant testified if he had known the contents of the calls, he would have accepted the State's second plea offer before trial. Applicant testified he would have wanted Counsel to request a continuance to review the calls or extend the plea offer, so she could advise him whether to accept the plea offer. Applicant admitted he was the person speaking on the calls.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This Court viewed the evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, evaluated their credibility, and weighed the testimony and

evidence accordingly in its discussion below. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's appellate records, and the legal arguments made by the attorneys. This Court finds the combined record of the trial transcript and the testimony from the evidentiary hearing establishes Applicant received effective assistance of counsel, and this application should be denied. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

In a post-conviction relief action, the 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 application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 300 S.C. 115.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

This Court finds Applicant has failed to prove his trial or appellate counsel's performance was deficient in any way, nor was Applicant prejudiced. This Court finds, despite multiple plea offers from the State, Applicant ultimately chose to proceed to trial and contest the State's versions of events. Therefore, for the reasons stated below, the Court denies relief and dismisses the allegations with prejudice.

Ineffective assistance of counsel for failing to ensure Applicant was aware of the State's evidence prior to the on-the-record rejection of the plea offer

Applicant argues Counsel was constitutionally ineffective for failing to ensure Applicant was sufficiently aware of the State's evidence before he rejected the second plea offer, immediately prior to the start of the trial. The evidence Applicant asserts Counsel failed to adequately review and discuss with him is a series of three phone calls made from and recorded by the detention center between Applicant and Kayla, his girlfriend, and Applicant and Wallace. Applicant does not deny he is the person speaking on the recordings. Nonetheless, Applicant claims he was not sufficiently apprised of the content of the recordings to make a decision as to whether to accept or reject the plea offer, and Applicant testified at the evidentiary hearing that he would have accepted the offer had he known what was said on the calls.

This Court has reviewed the trial transcript and heard the testimony of the witnesses at the evidentiary hearing and finds this allegation is without merit. Applicant was present in the courtroom and participated in a lengthy discussion between the trial court, Counsel, and the solicitors regarding the plea offer and the State's recent discovery of an additional phone call it intended to introduce at trial, which the State specifically noted was made by Applicant using another inmate's PIN or account. Tr. pp. 189-95. Applicant claims he did not have sufficient time to review the new evidence with Counsel before determining whether to reject or accept the offer. However, the record reflects Applicant was at least on notice of the State's intention to use the newly discovered call at the time he rejected the second fifteen-to-twenty year plea offer. Tr. pp. 189-92. Additionally, Applicant has never denied he is in fact the person speaking on the call. Tr. p. 575. Despite having the opportunity to speak directly to the trial court, he never informed the court he needed more time to make his decision, that he had not heard the call or calls and wanted the opportunity to do so before deciding whether to accept or reject the offer, or that he felt Counsel had not properly advised him on this issue. Tr. pp. 191-92.

Moreover, the State has the right to withdraw its plea offer at any time, absent a showing of detrimental reliance on the offer by Applicant, which is not the issue in this case. Reed v. Becka, 333 S.C. 676, 690, 511 S.E.2d 396, 404 (Ct. App. 1999) ("We adopt the rule the State may withdraw a plea bargain offer before a defendant pleads guilty, provided the defendant has not detrimentally relied on the offer."). "[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced. However, a defendant has no constitutional right to plea bargain." Id. at 685, 511 S.E. 2d at 401. Thus, the State was under no obligation to hold the offer open, or even to make any offer at all. Applicant was aware of the State's offer and of the fact the State had just discovered

at least one phone call the State considered beneficial to its case and which it would use against him, should Applicant choose to proceed to trial. As Applicant admitted at the evidentiary hearing he made all three of the phone calls ultimately admitted, Applicant clearly had knowledge of their content at the time the State extended the offer and he rejected it.

Accordingly, the Court finds Applicant's testimony he would have accepted the offer had he known the content of the call to be not credible. The Court further finds Applicant has failed to meet his burden of proof as to either deficiency or prejudice and denies relief. This allegation shall be dismissed with prejudice.

Ineffective assistance of counsel for failure to move for a continuance or move to suppress or to effectively object to phone calls admitted at trial and unavailability of witness Wallace

Applicant asserts Counsel failed to properly handle the issue of the phone calls and the decision of Applicant's co-defendant, Wallace, to invoke his Fifth Amendment right and choose not to testify. Specifically, Applicant argues Counsel should have moved for a continuance to have more time to review the phone calls, or she should have argued more effectively to keep the phone calls out of evidence. Applicant asserts Counsel failed to properly argue the issue of authentication of the Wallace phone call, which was made from another inmate's account.

Based on this Court's review of the transcript, it appears the parties initially expected Wallace to testify for the State. However, the night before trial, Wallace and his attorney notified the parties of Wallace's intention to invoke his Fifth Amendment right against self-incrimination. The State then discovered a phone call between Applicant and Wallace from the previous day in which Applicant asked Wallace to invoke the Fifth Amendment in order not to testify against him. Tr. p. 195. The parties agreed not to mention Wallace in opening statements or until they figured out what he was going to do, and Counsel testified she did not feel this decision prejudiced the defense.

The State proffered Wallace's testimony in camera, arguing the testimony it was seeking was not incriminating, but Wallace invoked the Fifth Amendment on the basis that requiring him to admit he was with Applicant would potentially open him up to additional grounds for revocation of his probation. Tr. p. 332-33, 335-38. Counsel argued Wallace could not selectively invoke the Fifth Amendment because allowing him to do so would hamper the defense's ability to cross-examine him, particularly if the State was allowed to enter the post-Miranda statement he had previously given to law enforcement. Tr. pp. 337-38, 340-42, 450. The trial court, however, disagreed and indicated it understood the law to be that the witness was allowed to determine what questions or information he deemed incriminating and decide when to assert the privilege, although the State could not call him to the witness stand simply for the purpose of having him invoke his right in front of the jury. Tr. pp. 344-45, 449. The State further asserted Wallace's decision was based on his conversation with Applicant, in which Applicant encouraged Wallace not to testify against him. The trial court then requested a transcript of the call and indicated the parties would listen to the call together the next morning prior to the jury arriving for the day, and the trial court would rule on Wallace's right to invoke the Fifth, as well how the State would be allowed to use the phone calls. Tr. p. 346.

Counsel testified at the evidentiary hearing that although she anticipated Wallace would have been a friendly witness for the defense, his expected testimony was not exculpatory for Applicant. She also testified she realized the argument she was making regarding Wallace's ability to selectively invoke the Fifth Amendment, if successful, would render Wallace totally unavailable as a witness, but she felt it was important to prevent the defense from being thwarted on cross-examination. Ultimately, Wallace did not testify in front of the jury, and the court found the phone call between Wallace and Applicant was admissible. Tr. pp. 2-4, 11, 542. Counsel testified, and

stated on the record at trial, that she agreed portions of the phone calls were relevant and admissible. Tr. p. 454.

Before the State introduced the phone calls, the parties made further arguments to the trial court. Counsel objected to the admission of the Wallace call on hearsay grounds, but the trial court ruled hearsay was inapplicable because Wallace was unavailable as a witness. Tr. pp. 532-33. Counsel did not object to a four-minute phone call between Applicant and his girlfriend, Kayla. However, she objected to portions a fifteen-minute phone call between Applicant and Kayla on the grounds of relevance and prejudice, particularly Applicant's statement about needing to consult an attorney. Tr. pp. 534-37. The State argued the statements were an admission or an acknowledgment of guilt. Tr. p. 535. The trial court ruled the entire call was admissible. Tr. pp. 538-39. All three phone calls were admitted and played for the jury. Tr. pp. 542-43, 546.

The record reflects at least one of the phone calls – the one between Applicant and Wallace – was not made from Applicant's PIN or account, but from another inmate's. Tr. pp. 190, 575-76. The State introduced the recordings through a witness from the detention center, who testified the recordings were made and kept in the jail's regular course of business. Tr. pp. 540-543. Applicant argues, however, since the Wallace call was not made from his account, Counsel should have further argued "authentication" or that the State did not prove it was Applicant on the call.

Again, Applicant admits he is the other person on the phone call with Wallace. Moreover, Counsel testified she felt, ethically, she could not make the argument it was not Applicant on the call, and ultimately, the defense conceded it was him in an effort to lessen the damage to the defense's case. The Court finds this testimony credible.

This Court has had the opportunity to listen to the recordings and finds Counsel's decision not to challenge the identity of the second person as Wallace was reasonable. As the investigator

testified at trial, it is clear Applicant and Wallace are discussing the facts of this case during the phone call. Tr. p. 593. This Court finds the statements Applicant makes in the phone calls are admissions or acknowledgments of guilt admissible as statements against interest. Rule 804(b)(3). Moreover, it was uncontested at trial that at least one of the phone calls to Kayla was made by Applicant from Applicant's PIN or account, and Applicant not argued *that* phone was not properly authenticated. The jury could therefore authenticate or identify Applicant's voice themselves by comparing that call to the others. See State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972) (comparison between recorded phone call and recording of defendant's voice made during trial sufficient for identification); Rule 901(b)(3) (comparison by trier of fact sufficient for authentication or identification).

Accordingly, this Court finds Counsel was not deficient for not objecting or not properly preserving her objection, nor was Applicant prejudiced by Counsel's performance, as to authentication because the call at issue – the Wallace call – was properly authenticated by the combination of the testimony of the officer from the detention center and the comparison to at least one other call which was undisputedly made by Applicant. Counsel cannot be deficient for failing to make a non-meritorious objection, nor can Applicant be prejudiced by such a "failure." Additionally, the Court finds Counsel was not deficient for not moving for a continuance as such a motion was unlikely to be successful where the record reflects Counsel had at least two days before the phone call was introduced into evidence to listen to it, and a transcript of the call was prepared for the parties and the Court to review as well. This Court therefore denies relief and finds this allegation shall be dismissed with prejudice.

Ineffective assistance of counsel for failing to object to "search for the truth" language in jury instruction

Applicant contends Counsel was ineffective for failing to object to the trial court's use of "search for the truth" language in its reasonable doubt jury instruction. Applicant points to the trial court's instruction that "[a] reasonable doubt is a doubt which makes an honest, sincere, conscientious juror in search of the truth hesitate to act." Tr. p. 674. As support Applicant cites State v. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018), although that case was decided several years after Applicant's trial. Counsel acknowledged she was on notice as to the objectionable phrasing before Beaty, but she testified she was simply not focused on this issue and missed the objection.

This Court finds, although the "searching for the truth" language was objectionable, Applicant has failed to prove he was prejudiced by Counsel's missed objection. Immediately following this sentence, the trial court gave the correct instruction defining reasonable doubt as "proof which leaves you firmly convinced of the Defendant's guilt." Tr. p. 674. Moreover, the trial court repeatedly emphasized throughout the instructions that the State has the burden of proof beyond a reasonable doubt, and any reasonable doubt should be resolved in the defendant's favor. Tr. pp. 670-95. As the Supreme Court explained in State v. Aleksey, "[j]ury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to a defendant.'" 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (internal citations omitted). However, jury instructions are also to be "considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error. The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution." Id. at 27, 538 S.E.2d at 251. In reaching this holding, the Supreme Court cited to multiple cases in which nearly identical language was found

not to have unconstitutionally shifted the burden of proof the defendant. See id. at 29 n. 2, 538 S.E.2d at 252 n. 2 (listing cases in which "search for the truth" or "seek the truth" language was found not to be reversible error because it did not shift the burden of proof). Accordingly, this Court denies relief and finds this allegation should be dismissed with prejudice.

Ineffective assistance of counsel for failing to raise issues with admission of phone calls on appeal and failing to raise all meritorious issues on appeal

Applicant contends Appellate Counsel was constitutionally ineffective for failing to raise all meritorious issues on appeal, and specifically, any issues regarding the admission of the jail phone calls. This Court finds Appellate Counsel was not deficient, nor was Applicant prejudiced by her representation and denies relief.

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

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland, 337 S.C. at 616, 524 S.E.2d at 836 (1999). Thus, in this case, we ask

first whether Appellate Counsel's performance was deficient, and two, whether Applicant was prejudiced by Appellate Counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, an applicant must show that, but for Appellate Counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Here, Appellate Counsel testified she reviewed the trial transcript and took note of any objections made, then conducted legal research to determine which issues to present on appeal considering whether the objection was preserved and whether she felt the issue ultimately had merit. Appellate Counsel testified, in her opinion, the only preserved objections regarding the phone calls were the relevance and prejudice objections as to the fifteen-minute call with Kayla. Appellate Counsel testified, however, she did not believe that was a meritorious issue to raise on appeal. Instead, Appellate Counsel chose to raise the issue of the search of the apartment where Applicant's clothes were found with the victim's blood on them. Appellate Counsel testified she believed this was a good issue to raise because of the officer's references to DSS involvement if permission was not given. The Court of Appeals found this issue to be preserved and ruled on the merits of the claim.

Accordingly, this Court finds Applicant has failed to prove either deficiency or prejudice. As discussed above, this Court agrees the phone calls were admissible, and therefore, Counsel was limited as to what objections she could make. Appellate Counsel reviewed the transcript and conducted legal research before deciding to pursue the search issue rather than the issue of the phone calls. Thus, Appellate Counsel was not deficient. Applicant has not established the phone calls were inadmissible, and therefore, he was not prejudiced. This Court denies relief on these grounds and finds they should be dismissed with prejudice.

CONCLUSION

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

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, post-conviction relief counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this _____ day of 4/19, 2021.

BRIAN M. GIBBONS
Presiding Judge
Fifth Judicial Circuit