STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2020-000093

GEORGE N. MOSES,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases:

United States Supreme Court Cases:

Other State and Federal Cases:

Statutes and Acts:

Other Authorities:

STATEMENT OF ISSUE ON CERTIORARI

"Did the circuit court err in finding Petitioner failed to meet the requirements of section 17-28-40(C) of the South Carolina Code (2014), which enumerates the required contents of the DNA testing application, rather than the requirements of section 17-28-90(B) of the South Carolina Code (2014), which specifies the factors to proven at the hearing on the DNA testing application?"

COUNTER-STATEMENT OF ISSUE ON CERTIORARI

Are Moses's current appellate arguments concerning various reversible errors allegedly committed by the circuit court judge in his order denying the application for post-conviction DNA testing properly preserved for appellate review when those arguments were never raised to or ruled upon by the circuit court judge, which had to occur before those arguments could properly be presented or addressed on appeal? Moreover, regardless of any issue preservation problems, did the circuit court judge abuse his broad discretion by denying Moses's application seeking testing of a swab collected from one of the pockets of a pair of shorts covered in the victim's blood and of clippings collected from the victim's fingernails when—just as the circuit court judge recognized and found—Moses failed to establish the result of his trial would probably be different if the test results proved to be exculpatory due to the fact even exculpatory results from the testing sought could not have had any conceivable impact on the outcome of Moses's case when the low potential significance of those results is considered in conjunction with the other evidence of Moses's guilt presented during trial, which included multiple incriminating admissions that came directly from Moses himself?

STATEMENT OF THE CASE

In January of 2017, Petitioner George N. Moses—while serving two sentences of life without parole following his February 2009 convictions for voluntary manslaughter and armed robbery—submitted an application for post-conviction forensic DNA testing pursuant to the Access to Justice Post-Conviction DNA Testing Act ("the Act").[1] In response, a hearing was conducted on the matter on August 28, 2019, in the Orangeburg County Court of General Sessions with the Honorable Edgar W. Dickson, circuit court judge, presiding. Subsequent to the hearing, the circuit court judge issued an order on December 16, 2019, denying Moses's application. Moses then timely initiated an appeal following receipt of the order.

On appeal, Moses filed a petition for a writ of certiorari in the Court of Appeals. Through that petition, Moses presented the following lone question for review:

> Whether the court erred in denying Petitioner's application for post-conviction DNA testing where the court misinterpreted the factors for post-conviction DNA analysis set forth in the plain language of S.C. Code Ann. § 17-28-90 by improperly relying on Petitioner's statements and trial testimony that he had been in a physical altercation with the victim as the basis for denying the application?

On June 16, 2021, the Court of Appeals granted Moses's petition and, in doing so, requested briefing solely on the following question:

> Did the circuit court err in finding Petitioner failed to meet the requirements of section 17-28-40(C) of the South Carolina Code (2014), which enumerates the required contents of the DNA testing application, rather than the requirements of section 17-28-90(B) of the South Carolina Code (2014), which specifies the factors to be proved at the hearing on the DNA testing application?

[1] Based on his prior conviction for the "most serious" offense of voluntary manslaughter, Moses's life sentences were imposed pursuant to Section 17-25-45 of the South Carolina Code of Laws. (App'x pp. 585-586; pp. 588-589; p. 591; p. 598; p. 601).

STATEMENT OF FACTS

Summary of Moses's Crimes and the Evidence Discovered During the Ensuing Investigation of Them

A little before 6:00 a.m. on the morning of September 29, 2006, law enforcement officers were dispatched to the residence of fifty-seven-year-old Harry Livingston ("Victim") after receiving a report indicating he had been observed on the kitchen floor of his trailer. (App'x pp. 127-129; pp. 135-136; pp. 138-139; pp. 342-343). Upon arriving, the officers found Victim's home in disarray, noticed the kitchen was "in shambles" with numerous broken objects scattered about, and detected signs of an obvious struggle. (App'x p. 141; p. 143; p. 161; p. 165). They also found Victim, who was bleeding profusely and covered in blood, on the kitchen floor as described with his large—but docile and uninjured—dog nearby. (App'x pp. 141-142; p. 160). By that point, Victim was already deceased. (App'x pp. 144-145; p. 165). In response to those discoveries, officers secured the scene, Victim's brother secured the dog, and an investigation into Victim's suspicious death was initiated.[2] (App'x p. 141; pp. 144-145; p. 164)

Through their investigative efforts, the officers quickly obtained information establishing Moses was with Victim at the trailer just a few hours before Victim's death was discovered. (App'x pp. 211-212; p. 345). Based on that information, Moses was rapidly tracked down and taken into custody that same day. (App'x p. 345; pp. 348-349). Following that, Lieutenant James Shumpert of the Orangeburg County Sheriff's Office attempted to interview Moses, and, after waiving his rights, Moses agreed to speak with the lieutenant. (App'x p. 345; pp. 348-349). During the ensuing conversation, Moses initially denied any knowledge regarding Victim's death. (App'x p. 349). However, as the conversation progressed, Moses altered his version of

[2] Victim's brother had been alerted of the situation by an individual named Lloyd Bowman, who first spotted Victim's body through one of Victim's home's windows shortly after 5:00 a.m. on the date of the incident. (App'x pp. 125-129).

events, admitted he went to Victim's trailer earlier that morning, and claimed he did so along with "some important people" in order to buy drugs. (App'x p. 349). Significantly though, Moses maintained Victim was fine when he subsequently left Victim's home.[3] (App'x p. 350).

As the investigation into Victim's death continued, Lieutenant Shumpert ascertained Moses's vehicle had been observed parked outside the home of an individual named Jeffrey Conner around 3:00 a.m. on the date of the incident. (App'x pp. 217-218; p. 282; pp. 289-290; pp. 351-352). In response, he spoke with Conner and obtained consent for a search of Conner's residence. (App'x p. 227; p. 353). During the search, he located a pair of jean shorts that had been hidden in an opening in the steps leading up to Conner's door. (App'x pp. 167-169; pp. 227-228; pp. 353-354). Significantly, that clothing item appeared to be covered in blood and, as a result, was collected as evidence. (App'x pp. 169; p. 355). Beyond that, a recent pay stub with Moses's name on it was found in Conner's living room. (App'x pp. 170-172).

Meanwhile, on the same date, Dr. Janice Ross, an expert forensic pathologist, conducted Victim's autopsy. (App'x pp. 253-256). Through the autopsy, Dr. Ross discovered numerous injuries establishing Victim had been both beaten with an object and stabbed multiple times. (App'x p. 258; pp. 260-262). Dr. Ross also found signs of defensive wounds to Victim's fingers, hands, and arms. (App'x p. 263). Ultimately, Dr. Ross determined the stab wounds were non-fatal and Victim died as a result of acute respiratory insufficiency caused by the blunt force trauma he sustained from blows to his head. (App'x p. 263; p. 270; pp. 271-272).

On the following day, Lieutenant Shumpert again interviewed Moses, and Deputy Roman Rodriguez of the Orangeburg County Sheriff's Office assisted by writing down Moses's

[3] In addition to providing a statement, Moses also provided the clothing he claimed to have been wearing earlier that morning to the lieutenant. (App'x p. 350). However, as would later be revealed, that act was purely a ruse. (App'x pp. 425-426).

statement.[4] (App'x pp. 357-361; pp. 364-368; p. 370). During the course of that interview, Moses stated he went to Victim's residence around 2:30 a.m. and alerted Victim he needed some cocaine. (App'x pp. 372-373). However, Moses asserted Victim told him he only had three bags of the substance and rejected Moses's offers to exchange some crack cocaine for it or to come back later with money. (App'x p. 373). At that point, Moses claimed he tried to leave with Victim's cocaine anyway, Victim told him not to do so, and Victim "called" his dog on him. (App'x p. 373). In response, Moses alleged he grabbed a knife from the kitchen, Victim began threatening him with a stick, and he grabbed the stick before stabbing Victim.[5] (App'x p. 374). After that, Moses alleged the two fought with one another, he stabbed Victim again, the two fell onto the floor, Victim's dog attacked him, and he repeatedly punched Victim in the face until Victim lost consciousness. (App'x p. 374). Once Victim was unconscious, Moses stated he took some money Victim had dropped, left Victim's home, went to Conner's residence, borrowed some new pants, hid the shorts he had been wearing in Conner's steps, got "high" with Conner, and then went home and burned the shirt he had been wearing. (App'x p. 375). Following those admissions, Moses was subsequently charged with murder and armed robbery. (App'x p. 8).

Relevant Details from Moses's Trial

During Moses's trial, the State presented evidence and testimony through numerous witnesses detailing the circumstances surrounding Victim's violent demise and the discoveries made during the investigation connected to it. (App'x p. 8; p. 125; p. 135; p. 152; p. 181; p. 203; p. 253; p. 282). Amongst the evidence and testimony presented, multiple witnesses confirmed Moses was alone at Victim's residence with Victim at approximately 2:30 a.m. on the date of the

[4] At the time of the interview, Moses was not exhibiting any visible signs of injuries. (App'x pp. 377-378).

[5] A bloody knife was found underneath Victim's body at the crime scene. (App'x pp. 161-162).

incident. (App'x pp. 186-188; pp. 190-191; pp. 206-208; p. 211). Additionally, Lieutenant Shumpert and Deputy Rodriguez provided the details regarding Moses's strikingly divergent accounts of what occurred during the incident, and Moses's written—and personally signed—statement was introduced into evidence. (App'x p. 345; pp. 348-350; pp. 357-361; pp. 364-379; pp. 623-625). Furthermore, a woman who had previously lived with Moses for a period of time placed Moses's vehicle at Conner's house at around 3:00 a.m. on the incident date. (App'x p. 282; pp. 289-290; p. 292).

In addition to that testimony and evidence, Conner testified for the State and confirmed he spotted Moses outside his residence around 3:00 a.m. on the date of the incident. (App'x pp. 218-219). At that time, Conner stated Moses was going through surplus gear stored on his porch. (App'x pp. 218-219). Conner further indicated Moses apologized for waking him, told him he needed some of the gear because he was going on a "mission," and left for roughly forty-five minutes. (App'x p. 219). When Moses returned, Conner stated Moses, who had no signs of any injuries, asked to use his restroom, went inside it for a few minutes, and came back out wearing only his underwear and a shirt. (App'x p. 220; pp. 222-223; p. 226). At that point, Conner testified Moses borrowed some jeans, the two shared some cocaine that Moses had brought with him, and Moses left within just fifteen to twenty minutes of arriving back at that location. (App'x pp. 223-226). Conner further affirmed he had nothing to do with the shorts subsequently found hidden outside his residence. (App'x pp. 227-228).

Beyond that, evidence was presented concerning the analyses done on various items collected during the investigation into Victim's murder. (App'x p. 152; p. 303). Specifically, Agent Roderick Green, who was an investigator with SLED, explained he processed a knife and broken pieces of a chair found at the crime scene for fingerprints but was unable to find any,

which he explained was not unusual. (App'x p. 152; pp. 175-178). Additionally, Betty Butler, who also worked at SLED, testified she analyzed the pair of shorts submitted as evidence, found blood in several spots on the shorts, and collected two cuttings for further analysis.[6] (App'x pp. 303-309). Furthermore, Dr. Laura Mills, an expert DNA analyst with SLED, discussed the results of the testing she conducted on various pieces of evidence, and, as expected, she confirmed Victim's blood was the blood found on both cuttings collected from the shorts while Victim was a contributor to genetic material found on the knife handle. (App'x pp. 321-322; pp. 325-326; p. 329). Moreover, she noted a swab had been collected from the pocket of the shorts but was never tested, which she explained was not unusual due to the limited nature of available resources. (App'x pp. 337-338). Likewise, Dr. Mills explained she did not find any DNA evidence specifically establishing who had been wearing the shorts, and she directly noted Moses's DNA profile was not located on any of the items tested.[7] (App'x pp. 338-339).

Following the presentation of the State's evidence, Moses elected to testify in his own defense and provide yet another account of the incident. (App'x pp. 399-400). Through his testimony, Moses alleged he went to Victim's residence to buy drugs from Victim's roommate, Victim offered to give him cocaine in exchange for crack cocaine, he traded some crack cocaine to Victim for three bags of cocaine, Victim demanded more crack cocaine, and he refused.

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[6] During her testimony, Butler also explained each piece of evidence submitted to SLED was assigned its own individual item number. (App'x p. 305).

[7] Amongst the items tested, Dr. Mills noted she analyzed a swab collected from a light switch in Victim's home and an "indication of blood" was determined to be present on it. (App'x pp. 165-166; p. 323). Dr. Mills further indicated her analysis showed the major contributor of the DNA present on that swab was an unknown male while Victim could not be excluded as a minor contributor, and she confirmed the mixture could have been made up of both blood and skin cells. (App'x pp. 322-324). Beyond that, Dr. Mills indicated she analyzed some samples collected from a vehicle but was not able to develop any testable profiles from those samples. (App'x p. 319; pp. 324-325).

(App'x p. 400; pp. 406-407). At that point, Moses alleged he tried to leave, and Victim responded by blocking the exit with his dog. (App'x p. 407). Moses claimed Victim then began assaulting him with a stick, he grabbed a knife and swung it at Victim and his dog, Victim knocked the knife away with the stick, and he grabbed Victim, which led to both of them falling onto the floor. (App'x p. 408; p. 441). Once they fell to the floor, Moses asserted he took the stick from Victim and tried to leave, Victim grabbed his leg and ordered the dog to kill him, and he struck Victim with the stick until Victim released him. (App'x pp. 408-409; p. 445). After that, Moses asserted he left with the cocaine and crack cocaine, took the stick as well, tossed the stick from his vehicle as he drove away, went to Conner's house, borrowed some pants, hid the bloody shorts, went home, and burned his bloody shirt. (App'x p. 409; pp. 411-412; pp. 416; pp. 418-424; p. 442; p. 448; pp. 453-454). Thereafter, Moses stated he was apprehended by law enforcement, initially made vague and untruthful statements to them, and provided them with random clothing when asked for the clothes he had been wearing around the time of the incident. (App'x pp. 424-426). Nevertheless, Moses insisted he acted in self-defense during the incident and alleged Victim was alive when he left Victim's residence "to the best of [his] knowledge." (App'x p. 410; pp. 416-417).

At the conclusion of the evidentiary phase of trial, the parties presented their closing arguments to the jury. (App'x pp. 482-536). During defense counsel's closing argument, defense counsel called the jury's attention to the evidence he contended was consistent with the account of the incident presented through Moses's testimony as support for his claim Moses was acting in self-defense in response to an attack initiated by Victim. (App'x pp. 495-496; pp. 499-503; p. 506; p. 511). Likewise, defense counsel pointed out no DNA evidence or fingerprints were found linking Moses to the incident. (App'x pp. 496-497; p. 502). Furthermore, defense

counsel acknowledged Moses admitted to hiding the shorts at Conner's house and argued the fact Victim's blood was found on those shorts was fully consistent with Moses's version of events. (App'x pp. 501-503). Thereafter, the case was submitted to the jury, and the jury ultimately convicted Moses of voluntary manslaughter and armed robbery. (App'x pp. 577-578).

Relevant Details from Moses's Attempt to Obtain Post-Conviction DNA Testing

Nearly eight years later and following a number of unsuccessful attempts to obtain relief from his convictions through a variety of different avenues, Moses filed an application seeking forensic DNA testing pursuant to the Act. (App'x p. 598; p. 601; pp. 603-609; p. 643). Specifically, Moses sought the testing of a swab from the pocket of the jean shorts collected as evidence along with testing of fingernail clippings that had been collected from Victim's body. (App'x p. 605; pp. 643-644). In seeking such testing, Moses alleged it would show he was innocent and demonstrate others actually committed the killing. (App'x p. 604; p. 606).

In response, counsel was appointed to represent Moses, and a hearing was held on the matter. (App'x p. 637; p. 640). Towards the outset of the hearing, appointed counsel indicated he had attempted to verify the items pertinent to Moses's application were still in existence as required by the Act but candidly conceded he had *not* been able to successfully confirm they were, in fact, still available.[8] (App'x pp. 642-643). Appointed counsel further acknowledged Moses consistently maintained he defended himself from Victim during the incident but

[8] Specifically, during the hearing, Moses's appointed counsel candidly asserted: "One of the -- one of the requirements in the application for postconviction DNA testing is that the items still exist. I've sent a couple requests to the clerk's office and I have not received confirmation whether these items still exist or not. That's kind of a nonstarter if the evidence is still in existence. So I wanted to put that on the record. . . . I don't have confirmation. I mean, Judge, that's the very first element for your consideration is whether the items still exist. I just wanted to, you know, put on the record that I don't have confirmation despite my request just to confirm whether it existed or not." (App'x p. 642-643). Recognizing the significance of appointed counsel's concession in that regard, the circuit court judge responded: "Okay. All right. Well, that's number one on the list." (App'x p. 643).

nonetheless maintained the issue of identity was not as "cut and dry as the State believed." (App'x pp. 644-646). Based on that, appointed counsel alleged testing of the fingernail clippings would reveal if Victim had been involved in any "other" altercation while testing of the swab from the shorts could somehow be relevant to identifying the person that had been wearing them despite Moses's admission to placing them where they were found.[9] (App'x pp. 649-650; pp. 657-658). In rebuttal, the solicitor argued identity was not at issue in Moses's case since Moses admitted involvement in the altercation with Victim both before and during trial, and the solicitor similarly noted Moses admitted to leaving the shorts at the location where they were recovered. (App'x pp. 650-653). Furthermore, the solicitor contended testing of the fingernail clippings would not necessarily prove anything regarding the altercation, and he noted Moses was placed at Victim's house on the night of the incident by multiple witnesses. (App'x pp. 652-653; p. 655). Following the solicitor's remarks, appointed counsel expressly urged the circuit court judge to read Moses's statement and trial testimony before issuing his ruling. (App'x p. 657). The circuit court judge then took the matter under advisement. (App'x p. 659).

Subsequently, after considering the matter, the circuit court judge issued an order denying Moses's application for post-conviction DNA testing. (App'x pp. 690-694). Towards the outset of that order, the circuit court judge identified the relevant statutory provisions set out by the Act as Section 17-28-10 of the South Carolina Code of Laws along with the provisions that followed it. (App'x p. 690). Then, while citing a single time to Section 17-28-40, the circuit court judge indicated the Act required an individual seeking testing to, amongst other things, "(a)

[9] During the hearing, Moses personally claimed at one point there must have been two separate pairs of shorts based on the references to the shorts contained in the SLED DNA analysis reports from 2006 and 2008. (App'x pp. 659-660). However, only one pair of shorts—which was designated as SLED item # 8—was actually identified in the SLED documentation related to Moses's case. (App'x pp. 667-668; pp. 670-674; pp. 683-684; p. 687).

demonstrate that identity was a significant issue during the original court proceedings; (b) explain how testing of DNA would provide a substantially more probative result than evidence submitted at trial; and (c) explain how any exculpatory DNA results would constitute new evidence that would probably change the result of [the] defendant's conviction if a new trial was granted." (App'x pp. 692-693). Following that, the circuit court judge analyzed the specific circumstances of Moses's case and initially found Moses failed to show identity was a significant issue while referencing Moses's statement and testimony, which appointed counsel had directly asked him to review before deciding the matter. (App'x p. 657; p. 693). Additionally, the circuit court judge found Moses failed to establish the testing would have provided a substantially more probative result than the evidence presented at trial in light of the fact testing of the identified items could not have had a significant bearing on the case under the circumstances involved. (App'x p. 693). Finally, the circuit court judge concluded Moses failed to establish the requested additional testing would likely have changed the result of the trial if a new one was granted since identity was not at issue, the items sought to be tested would have had no bearing on the key issue of self-defense, and any results would have merely been cumulative to Moses's own testimony about his altercation with Victim.[10] (App'x pp. 693-694).

[10] After the circuit court judge issued his ruling, there is nothing indicating appointed counsel moved for reconsideration, raised any objections, or sought any other relief from the circuit court judge. See Records for George Napoleon Moses, Orangeburg County First Judicial Circuit Public Index, https://publicindex.sccourts.org/orangeburg/publicindex (containing no information suggesting any type of motion for reconsideration was filed prior to the initiation of the appeal of the circuit court judge's ruling).

STANDARD OF REVIEW

The Act provides a procedure by which a defendant in South Carolina can potentially obtain post-conviction forensic DNA testing, and, to date, no published appellate decision in our state has explicitly articulated the applicable standard of appellate review for a ruling made pursuant to it. See Act No. 413, § 1, 2008 S.C. Acts & Joint Resolutions (enacting procedures for post-conviction DNA testing). However, a ruling made pursuant to the Act directly relates to a criminal matter and, in a number of ways, is analogous to a ruling on a post-trial motion for a new trial in a criminal case. See, e.g., S.C. Code Ann. § 17-28-90(A) ("All rules and statutes applicable in criminal proceedings are available to the applicant and the solicitor or Attorney General, as applicable."). Therefore, like in appeals from other criminal matters, an appellate court reviewing a ruling made pursuant to the Act should review the ruling for errors on law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). Moreover, since a ruling under the Act necessarily involves a discretionary decision as to whether the defendant has met his or her statutorily-mandated burden of proof, an appellate court should only reverse such a ruling when it constitutes a clear abuse of discretion. See S.C. Code Ann. § 17-28-90(B) (instructing a circuit court judge should order forensic DNA testing only upon determining the defendant has established a number of factors "by a preponderance of the evidence"); cf. State v. Simmons, 279 S.C. 165, 166, 303 S.E.2d 857, 858 (1983) ("The granting or refusal of a motion for a new trial is within the discretion of the trial judge and will not be disturbed absent a clear abuse of discretion."). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

Moses's current appellate arguments concerning various reversible errors allegedly committed by the circuit court judge in his order denying the application for post-conviction DNA testing are not properly preserved for appellate review because those arguments were never raised to or ruled upon by the circuit court judge, which had to occur before those arguments could properly be presented or addressed on appeal. Moreover, regardless of any issue preservation problems, the circuit court judge did not abuse his broad discretion by denying Moses's application seeking testing of a swab collected from one of the pockets of a pair of shorts covered in the victim's blood and of clippings collected from the victim's fingernails because—just as the circuit court judge recognized and found—Moses failed to establish the result of his trial would probably be different if the test results proved to be exculpatory due to the fact even exculpatory results from the testing sought could not have had any conceivable impact on the outcome of Moses's case when the low potential significance of those results is considered in conjunction with the other evidence of Moses's guilt presented during trial, which included multiple incriminating admissions that came directly from Moses himself.

Moses contends the circuit court judge committed reversible error by denying his application for post-conviction DNA testing. In support of that contention, Moses maintains the circuit court judge committed a number of reversible errors, including by failing to consider the appropriate statutory provision when conducting his analysis and by giving consideration to the statements that were made about the incident, when denying the application. Initially, Moses's appellate arguments are not properly preserved for appellate review because they were neither raised to nor ruled upon by the circuit court judge. As a result, those arguments cannot properly be presented or addressed for the first time on appeal pursuant to South Carolina's well-established issue preservation requirements. However, even assuming Moses's current arguments could somehow properly be considered for the first time on appeal, the circuit court judge did not abuse his discretion by denying Moses's application for post-conviction DNA testing because he correctly determined Moses failed to meet his burden of establishing the result of his trial would probably be different if the test results proved to be exculpatory, which was one of the factors Moses was required to establish pursuant to the Act in order to be entitled to

any testing. The circuit court judge's order denying Moses's application for DNA testing should be affirmed.

A. Absence of Proper Issue Preservation

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the [circuit] court a fair opportunity to rule on the issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Through their enforcement and application, the circuit court is guaranteed a chance "to rule properly after it considered all relevant facts, law, and arguments[,]" and the appellate court is provided with everything needed to properly review whatever ruling is made within the limits of the applicable standard of review. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see Queen's Grant, 368 S.C. at 373, 628 S.E.2d at 919 ("The rationale for the [error preservation] rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error.").

For an issue to be preserved for appellate review pursuant to our issue preservation requirements, the issue must have been: (1) raised to and ruled upon by the circuit court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the circuit court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004). Thus, based on those requirements, an issue cannot ordinarily be raised or considered on appeal unless it was first presented to and ruled upon by the circuit court judge. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005); see State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."). Likewise,

an appellant is precluded from arguing one ground or theory in support of an issue during the circuit court proceedings and then a different ground or theory in support of the issue on appeal. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (instructing a defendant cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal.").

In the case sub judice, Moses contends on appeal the circuit court judge committed reversible error by denying his application for DNA testing pursuant to the Act. As support for that contention and his current requested relief of a remand for further proceedings, Moses has raised a number of different arguments.[11] Specifically, Moses maintains: (1) the circuit court judge allegedly made "no ruling" on the seven factors enumerated in Section 17-28-90, which purportedly required him "to determine whether the items sought to be tested were material to the issue of the identity of the perpetrator of the crimes[;]" (2) the circuit court judge erred as a matter of law by supposedly solely and improperly relying upon the "requirements" of Section 17-28-40 when denying the application; (3) the circuit court judge incorrectly referenced only Section 17-28-40 instead of Section 17-28-90 in the order; (4) the pertinent factors that should have been considered were not even properly discussed during the hearing conducted on Moses's application; and (5) based on the contents of the order, the circuit court judge purportedly improperly "t[ook] into account" Moses's statements about the incident. (Pet. Br. pp. 6-7; pp. 10-12).

[11] Notably, Moses's current request for relief is strikingly different from the relief he previously appeared to contend he was ultimately entitled to in his petition for a writ of certiorari, which contained an assertion the circuit court judge was "required" to grant the application for DNA testing under the circumstances involved. (Pet. for Cert. p. 14).

Significantly, of those various arguments now being advanced on appeal, Moses did not present *even a single one* to the circuit court judge, including after the circuit court judge issued the order Moses now contends was rife with obvious errors demanding appellate intervention and correction. More specifically, Moses did *not* raise any objections to the manner in which the hearing was conducted, did *not* raise any challenges to the circuit court judge's order or the analysis it contained, did *not* argue the wrong statutory provision was referenced and considered, did *not* contend incorrect factors had been discussed and analyzed, and did *not* suggest the circuit court judge's consideration of his statements was improper. Instead of doing so, Moses's appointed counsel did the exact opposite to some extent and specifically asked the circuit court judge to read the portions of the transcript related to Moses's statements. Thus, appointed counsel directly sought—successfully—for the circuit court judge to do one of the things Moses now contends on appeal constituted reversible error while at the same time failing to raise to the circuit court judge any of the other arguments Moses is now relying upon in his attempt to obtain an appellate reversal of the circuit court judge's order.[12] See State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) ("Only matter that has been ruled on below can be reviewed[.]"); State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."); see also State v. Sinclair, 275 S.C. 608,

[12] Beyond that, Moses's appointed counsel conceded to the circuit court judge he had *not* been able to verify whether any of the items Moses was seeking to be tested were still in existence and capable of being subjected to the desired testing, which was one of the foundational requirements *Moses* had the burden of establishing before the circuit court judge could properly grant testing. See S.C. Code Ann. § 17-28-90(B) (explaining "each" of the delineated factors—including the factor requiring proof "the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing"—must be established by a preponderance of the evidence before the requested testing shall be ordered); see also State v. Bryant, 372 S.C. 305, 315-316, 642 S.E.2d 582, 588 (2007) (recognizing a matter conceded in the circuit court cannot subsequently be argued on appeal).

610, 274 S.E.2d 411, 412 (1981) ("Inasmuch as the appellant obtained the only relief he sought, this court has no issue to decide.").

Because Moses did not present any of the arguments he has now raised on appeal to the circuit court judge at any point during the circuit court proceedings, the circuit court judge obviously did not consider or rule upon those arguments and was denied a fair opportunity to do so. See State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) ("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred."); see also Queen's Grant, 368 S.C. at 372-373, 628 S.E.2d at 919 ("Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." (citations omitted)); cf. Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970) ("We have searched the record and agree that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question is not properly before us. This is a court of review."). As a result, the arguments Moses is currently advancing on appeal are simply not properly preserved for appellate review pursuant to well-established South Carolina law, and they must be rejected as procedurally barred because they cannot appropriately be considered or addressed for the first time on appeal.[13] See Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)

[13] Critically, although the mandates of our state's issue preservation requirements require Moses's current appeal to be rejected as procedurally barred, such a result will *not* necessarily prevent Moses from again attempting to obtain DNA testing pursuant to the Act if he still wishes to do so. See S.C. Code Ann. § 17-28-50 ("If the applicant has filed a previous application for DNA testing, the applicant may file a successive application, provided the applicant asserts grounds for DNA testing which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.").

("[E]rror preservation has been a critical part of appellate practice in this State for a long time, serving to ensure . . . that we do not reach issues which were not ruled upon by the trial court. . . . [T]hese rules *must also be applied consistently* and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it." (emphasis added)); State v. Sheppard, 391 S.C. 415, 421, 706 S.E.2d 16, 19 (2011) ("[T]he plain error rule does not apply in South Carolina state courts."); State v. Head, 330 S.C. 79, 87, 498 S.E.2d 389, 393 (Ct. App. 1997) (instructing an appellate court "cannot address unpreserved errors"); cf. Plyler v. State, 309 S.C. 408, 413, 424 S.E.2d 477, 480 (1992) (affirming on procedural grounds when an issue was raised for the first time on certiorari), overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). The circuit court judge's order denying Moses's application for DNA testing should be affirmed.

B. Propriety of the Circuit Court Judge's Decision to Deny Moses's Application

Pursuant to the Act, an individual who has been convicted of a number of different offenses, including voluntary manslaughter and armed robbery, "may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication." S.C. Code Ann. § 17-28-30(A). In order to do so, the individual is required to submit an application that—under the penalty of perjury—must:

> (1) identify the proceedings in which the applicant was convicted or adjudicated;
>
> (2) give the date of the entry of the judgment and sentence and identify the applicant's current place of incarceration;
>
> (3) identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication;

> (4) make a reasonable attempt to identify the physical evidence or biological material that should be tested and the specific type of DNA testing that is sought;
>
> (5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
>
> (6) explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result;
>
> (7) explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching; and
>
> (8) provide that the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-40(C).

Once an application has been submitted, a grant of the requested testing is *not* automatically required. S.C. Code Ann. § 17-28-50; S.C. Code Ann. § 17-28-90; see Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 82 (2009) (Alito, J., concurring) (explaining requests for post-conviction DNA testing are *not* cost-free and noting "the risks associated with evidence contamination increase every time someone attempts to extract new DNA from a sample"). Instead, pursuant to the Act, a circuit court judge may conduct a hearing on the matter, seek further documentation or amendments to the application, or summarily dismiss the application when satisfied the applicant is not entitled to testing and "no purpose would be served by any further proceedings." S.C. Code Ann. § 17-28-50.

In the event a hearing on the matter is conducted, the convicted applicant has the burden of establishing *all* the following factors by preponderance of the evidence:

> (1) the physical evidence or biological material to be tested is available and is potentially in a condition that would permit the requested DNA testing;
>
> (2) the physical evidence or biological material to be tested has been subject to a chain of custody sufficient to establish it has not been substituted, tampered with, replaced, or altered in any material aspect, or the testing itself may establish the integrity of the physical evidence or biological material;
>
> (3) the physical evidence or biological material sought to be tested is material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;[14]
>
> (4) the DNA results of the physical evidence or biological material sought to be tested would be material to the issue of the applicant's identity as the perpetrator of, or accomplice to, the offense notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;
>
> (5) if the requested DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching;

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[14] As to what was intended by the use of the word "material," evidence in a related context has been recognized to be "material" only when there is a reasonable probability its presence would have led to the proceeding ending in a different result. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993); see United States v. Agurs, 427 U.S. 97, 109-110 (1976) ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."); Black's Law Dictionary 1066 (9th ed. 2009) (defining "material" as "[h]aving some logical connection with the consequential facts" *or* as "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential"); see also Evans v. United States, 504 U.S. 255, 260, n. 3 (1992) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (citation and internal quotations omitted)).

> (6) the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, the requested DNA test would provide a substantially more probative result; and
>
> (7) the application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

S.C. Code Ann. § 17-28-90(B). Significantly, if—and only if—the circuit court judge determines the applicant has met the requisite burden of proof in regard to all the necessary factors, testing should be ordered.[15] Id.

In the case at bar, the circuit court judge's order unquestionably contained a citation to Section 17-28-40 instead of Section 17-28-90 at one point in the order. Importantly though, Moses never called that particular matter to the circuit court judge's attention, so it remains entirely unclear whether that *lone* citation was the result of a mere scrivener's error or an actual misunderstanding in regard to which of the statutory provisions was pertinent to the analysis in Moses's case. See Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) ("It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice."); see also Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("*At a minimum*, issue preservation requires that an issue be raised to and ruled upon by the trial judge." (emphasis added)).

[15] Regarding that burden, a preponderance of the evidence means evidence which convinces of its truth and is more convincing than the evidence to the contrary. State v. Scott, 420 S.C. 108, 113, 800 S.E.2d 793, 796 (Ct. App. 2017), aff'd as modified, 424 S.C. 463, 819 S.E.2d 116 (2018); see Black's Law Dictionary 1301 (9th ed. 2009) (defining "preponderance of the evidence" as "[t]he greater weight of the evidence, not necessarily established by the greatest number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other").

However, what is also unquestionable is many of the critical factors contained in those two statutory sections are strikingly similar. Compare S.C. Code Ann. § 17-28-40(C)(7) (mandating an applicant seeking post-conviction DNA testing must in the application "explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching"); with S.C. Code Ann. § 17-28-90(B)(5) (requiring the applicant to establish by a preponderance of the evidence "the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching" in the event "the requested DNA testing produces exculpatory results"). Even more importantly, regardless of which statutory provision was referenced in the order, it is likewise unmistakable the circuit court judge denied Moses's application for DNA testing *only after* specifically finding Moses failed to establish—amongst other things—how any exculpatory DNA results would have constituted new evidence that probably would have changed the result of Moses's convictions if a new trial was granted, which was one of the factors Moses had to establish in order to be entitled to any testing pursuant to the Act. S.C. Code Ann. § 17-28-90(B). Thus, in denying Moses's application, the circuit court judge made a specific determination Moses had failed to establish at least one of the *required* statutory factors that is plainly set out in Section 17-28-90 in a virtually identical manner to how the corresponding factor is articulated in Section 17-28-40. S.C. Code Ann. § 17-28-40(C)(7); S.C. Code Ann. § 17-28-90(B)(5).

Since Moses had the burden of establishing *all* the factors contained in the relevant statutory provision in order to be entitled to DNA testing pursuant to the plain language of the Act, the circuit court judge's finding in regard to that particular factor was dispositive in Moses's

case assuming it was a correct one regardless of whether the circuit court judge referenced—intentionally or mistakenly—the wrong statutory provision.[16] See S.C. Code Ann. § 17-28-90(B) ("The court shall order DNA testing of the applicant's DNA and the physical evidence or biological material upon a finding that the applicant *has established each of the following factors* by a preponderance of the evidence . . . ." (emphasis added)); see also State v. Davis, 278 S.C. 544, 545, 298 S.E.2d 778, 779 (1983) ("[T]he fact that the trial judge gave the wrong ground for his decision does not preclude affirmance upon a proper ground sustained by the record."). Critically, the circuit court judge's finding was, in fact, correct because Moses did not and could not establish—as required—the results of the testing sought would probably change the result of his trial if those results proved to be exculpatory in nature. See S.C. Code Ann. § 17-28-90(B)(5) (requiring the applicant to establish by a preponderance of the evidence "the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching" in the event "the requested DNA testing produces exculpatory results"). That is true because—*just as the circuit court judge recognized and found*—any exculpatory results that could have been obtained from the swab of the shorts pocket or from Victim's fingernail clippings would have been insignificant and could not have had a meaningful impact on the outcome of Moses's trial when considered in conjunction with the other evidence of Moses's guilt that was presented. See State v. Adams, 430 S.C. 420, 438, 845 S.E.2d 217, 226 (Ct. App. 2020) (recognizing there must

[16] Notably, because an applicant is required to establish all the factors set out by the Act in order to be entitled to testing, a circuit court judge need not address each and every factor before denying an application for testing in the event the circuit court judge makes a finding one of the required factors has not been established. Cf. Strickland v. Washington, 466 U.S. 668, 697 (1984) (explaining "there is no reason for a court deciding an ineffective assistance claim . . . even to address both components of the inquiry if the defendant makes an insufficient showing on one" since such a claim can only be established by a showing of both deficiency and prejudice).

necessarily be "outcome-changing facts" when relief hinges on establishing something would probably change the result of trial); see also United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982) ("[D]eterminations of materiality are often best made in light of all of the evidence adduced at trial[.]").

As to the swab of the shorts pocket, nothing was presented suggesting either the absence of Moses's DNA or the presence of someone else's DNA on the pocket would have in any way demonstrated Moses, who admitted to hiding the bloody shorts in the spot where they were recovered, was not wearing the shorts at the time of Victim's killing. See Commonwealth v. Heilman, 867 A.2d 542, 547 (Pa. Super. Ct. 2005) ("In DNA as in other areas, an absence of evidence is not evidence of absence."); see also Osborne, 557 U.S. at 80-81 (Alito, J., concurring) ("DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide 'absolute proof' of anything."). Significantly, based on the nature of DNA itself, Moses's DNA might not have been present on the swab even if he had been wearing the shorts simply because he had not left any behind, and the presence of someone else's DNA would not have meant Moses had not *also* worn the shorts since—as clearly illustrated by Moses's self-admitted act of borrowing someone else's pants on the very date of the incident—an article of clothing can be worn by more than just the specific individual who owns it. See Rivera v. State, 89 S.W.3d 55, 60, n. 20 (Tex. Crim. App. 2002) (recognizing the absence of a defendant's DNA following testing of a sample "would not indicate innocence because it could simply mean none was deposited"). Therefore, even without considering the other evidence of guilt presented during trial, any results of the testing of the swab of the shorts pocket would not have been exculpatory, significant, or outcome-altering under the circumstances involved. See People v. Allen, 880 N.E.2d 223, 228 (Ill. App. Ct. 2007)

(recognizing the absence of a defendant's DNA on an object does not constitute conclusive evidence establishing the defendant did not handle the object and, therefore, concluding evidence establishing Allen's DNA was not on a gun—even assuming it existed—would not in any way have exonerated him).

Likewise, as to the clippings from Victim's fingernails, neither the absence of Moses's DNA nor the presence of some other individual's DNA underneath Victim's fingernails would—without accompanying evidence also specifically demonstrating Victim scratched his assailant during the fatal attack—constitute exculpatory evidence establishing someone other than Moses inflicted the brutal beating that resulted in Victim's death. See Commonwealth v. Smith, 889 A.2d 582, 585 (Pa. Super. Ct. 2005) ("[Smith]'s entire argument depends upon an assumption for which there is no evidence in the record, i.e. that the victim scratched her assailant, thereby acquiring fragments of skin or droplets of blood from the assailant on her fingernails. Based on this assumption, [Smith] contends that the DNA profile obtained by testing the victim's fingernails will identify her assailant. In the absence of supporting evidence, we cannot accept [Smith]'s premise. We have no evidentiary basis on which to infer that any DNA detected on the victim's fingernails was deposited there by her assailant during the fatal attack. Merely detecting DNA from another individual on the victim's fingernails, in the absence of any evidence as to how and when that DNA was deposited, *would not exculpate [Smith] by pointing to a different assailant*." (emphasis added)); see also Osborne, 557 U.S. at 82 (Alito, J., concurring) ("[M]odern DNA testing technology is so powerful that it actually increases the risks associated with mishandling evidence. STR tests, for example, are so sensitive that they can detect DNA transferred from person X to a towel (with which he wipes his face), from the towel to Y (who subsequently wipes his face), and from Y's face to a murder weapon later wielded by Z (who can

use STR technology to blame X for the murder)."). Thus, the testing sought for the fingernail clippings could not have resulted in the discovery of any outcome-altering evidence under the circumstances involved. Cf. Smith, 889 A.2d at 587 ("Given this evidence of record, [Smith]'s argument that his innocence would be established by failure to find his DNA on the victim's fingernails is totally unsupportable.").

Moreover, notwithstanding the fact any additional test results would have been completely insignificant even without giving consideration to any of the other evidence presented during trial, such results—even if they possessed some conceivable exculpatory value—most certainly would not have and could not have had an impact on the outcome of Moses's case when properly considered in relation to the other substantial and compelling evidence of Moses's guilt that was introduced. Critically, through the testimony of multiple witnesses, Moses was placed both at the crime scene and at the location where a pair of shorts covered in Victim's blood were located around the time of Victim's death. Additionally, expert testimony was presented establishing *no* DNA evidence on any kind existed directly linking Moses to the killing of Victim. Furthermore and perhaps most importantly, Moses—by his own admission—was at Victim's home around the time of the killing, pummeled Victim into unconsciousness while there, removed the weapon he beat Victim with from the crime scene, disposed of it, hid the blood-covered shorts he was wearing at the time of the crime exactly where that article of clothing was later found, burned the shirt he was wearing at the time of the incident, and then attempted to steer the investigation into Victim's death off course by making false statements and presenting false evidence to law enforcement. See Arizona v. Fulminante, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against

him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." (citations, internal quotations, brackets, and ellipsis omitted)); State v. McDowell, 266 S.C. 508, 515, 224 S.E.2d 889, 892 (1976) ("As a general rule, any guilty act, conduct, or statements on the part of the accused are admissible as some evidence of consciousness of guilt."). In light of that highly-damaging evidence and testimony, any DNA test results concerning the swab from the shorts pocket and from the clippings taken from Victim's fingernails could not have had any impact on the outcome of Moses's case even if those results—like the other non-incriminating DNA test results that have already once been presented to a jury—did not actually end up connecting Moses to Victim's death. Cf. State v. Ford, 301 S.C. 485, 492, 392 S.E.2d 781, 785 (1990) ("[T]he DNA results are merely cumulative to other evidence presented and as such if a new trial was had, the result would probably not change. Thus, we conclude that Ford failed to establish the requirements for a new trial and accordingly deny his motion."); Rivera, 89 S.W.3d at 60 ("Even if one concluded that negative test results supplied a very weak exculpatory inference, such an inference would not come close to outweighing [Rivera]'s confession."); State v. Hudson, 681 N.W.2d 316, 321 (Wis. Ct. App. 2004) (rejecting Hudson's attempt to obtain post-conviction DNA testing of various items, including fingernail clippings taken from the homicide victim, because Hudson failed to establish a reasonable probability of a different result even assuming the items would lead to the discovery of exculpatory evidence in light of the other evidence of guilt, which included multiple confessions from Hudson, that was presented during trial).

Accordingly, because the circuit court judge's conclusion Moses could not establish at least one of the factors he had to establish in order for post-conviction DNA testing to be warranted was neither incorrect nor lacking in evidentiary support, the circuit court judge did not abuse his broad discretion by denying Moses's application, and there are no proper or compelling grounds upon which to disturb his ruling on appeal. See State v. Wells, 249 S.C. 249, 264, 153 S.E.2d 904, 912 (1967) ("It cannot be said, therefore, that the affidavits must necessarily lead any reasonable mind to the inference that the newly-discovered evidence would probably change the result. Nothing short of this would justify the conclusion that the Circuit Court abused its discretion in refusing the motion." (citation and internal quotations omitted)); see also Osborne, 557 U.S. at 62 ("DNA testing alone does not always resolve a case. Where there is enough other incriminating evidence and an explanation for the DNA result, science alone cannot prove a prisoner innocent. The availability of technologies not available at trial cannot mean that every criminal conviction, or even every criminal conviction involving biological evidence, is suddenly in doubt." (citation omitted)). And, that is particularly true when the grounds upon which Moses seeks for the circuit court judge's ruling to be reversed on appeal were never actually presented to the circuit court judge. See Roche v. South Carolina Alcoholic Beverage Control Comm'n, 263 S.C. 451, 455, 211 S.E.2d 243, 244 (1975) ("[T]he purpose of appeal under our procedure is 'to determine if the lower court did something that it should not have done, or omitted doing something it should have done.' Accordingly, a trial judge will not be reversed for failing to act on a matter that was not submitted to him." (citation omitted)); In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) ("Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review."); cf. State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003)

(finding any issue resulting from the trial judge's failure to take a particular action was not preserved for appellate review because Vang did not ask the trial judge during trial to take the action Vang contended on appeal should have been taken). The circuit court judge's order denying Moses's application for DNA testing should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

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