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Nov 18 2022

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Newberry County

Honorable R. Kirk Griffin, Circuit Court Judge

TOABY ALEXANDER TRAPP,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-000283

APPENDIX

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IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings based upon all of the probative evidence presented.

A. Ineffective Assistance of Counsel

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, Applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Applicant must so prove his factual allegations by a preponderance of the evidence. Rule 71.1(e), SCRCP. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate

assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "This does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12 (quoting *Strickland*, 466 U.S. at 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

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. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

1. Failure to communicate all plea offers

Applicant alleges Counsel was ineffective for failing to communicate the terms of a plea offer to Applicant prior to Applicant's trial.

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, ineffective assistance is given "[w]hen defense counsel allow the [plea] offer to expire without advising the defendant or allowing him to consider [the plea]." *Id.* at 145.

When determining prejudice for failure to convey a plea, a case-by-case determination is made "assessing whether but for counsels deficient performance a defendant would have accepted the State's proposed plea bargain and that he would have benefited from the offer.'" *Bell v. State*, 410 S.C.436, 443, 765 S.E.2d 4, 7 (2014). Prejudice is found if applicant "would have taken the plea offer had [he] been afforded effective assistance of counsel", if "the plea would have been entered without prosecution canceling it or the trial court refusing to accept it", and "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Collins v. State*, 422 S.C. 250, 262, 810 S.E.2d 871, 877 (2018) (quoting *Frye*, 566 U.S. 147) (quotations omitted). Presumed prejudice is reserved to limited

situations. *Bell*, 410 S.C. at 443, 765 S.E.2d at 7.

At his evidentiary hearing, Applicant testified he discussed a five year plea offer with Counsel, but Applicant turned down this offer because he did not believe that he would be convicted if he went to trial. On cross-examination, Applicant testified he did not want to plead guilty, but wanted to proceed to trial to challenge the charges.

At the evidentiary hearing, Counsel testified he discussed all plea offers with Applicant. Counsel testified he believes the final plea offer that he received was for three years, however Applicant rejected this offer because Applicant was convinced he was innocent.

Applicant has failed to demonstrate that any plea offers were presented to Counsel that were not conveyed to Applicant. Additionally, Applicant has testified that he did not believe he would be convicted if he went to trial, and he did not want to plead guilty, but instead wanted to challenge the charges against him at a jury trial. Further, Counsel credibly testified he conveyed all plea offers to Applicant, and that Applicant rejected the final plea offer presented to him before trial because Applicant believed he was innocent. We find that Applicant has failed to prove any plea offers were not presented to him, and that Applicant would have plead guilty instead of going to trial. We find Applicant has failed to show how Counsel was deficient, or how Counsel's performance prejudiced Applicant. Therefore this allegation is denied and dismissed with prejudice.

2. Failure to investigate and prepare for trial[3]

Applicant alleges Counsel was ineffective for failing to adequately prepare for trial. Specifically, Applicant alleges Counsel failed to investigate and interview the State's witnesses prior to trial, and Counsel did not have adequate time to review or discuss discovery with Applicant

[3] Applicant's pro se allegation 1c and 1d.

prior to trial. Further, Applicant asserts Counsel was ineffective for failing to request an independent drug test prior to Applicant's trial.

At his evidentiary hearing, Applicant testified he was initially represented by multiple attorneys before he hired Counsel. Applicant testified he hired Counsel in 2014, once he knew his case was going to be called for trial. Applicant testified Counsel informed Applicant that his case was on the trial docket for the month of October, 2014. Applicant testified he did not have a copy of his discovery until he went to prison. Applicant testified he thinks he should have had more time to review discovery with Counsel. Applicant testified counsel did not have enough time to investigate prior to Applicant's trial, because Counsel was hired only twenty-eight days before Applicant's trial date. Applicant testified Counsel moved for a continuance at the start of Applicant's trial, but Judge Griffith denied Counsel's motion due to the age of Applicant's case and Applicant's familiarity with the evidence the State had against him.

Regarding the drugs found in Applicant's house, Applicant testified the drugs appeared to be "brown looking mushy stuff" when they were presented at Applicant's trial. Applicant testified he believes Counsel should have looked into the drugs because of the deterioration of the drugs by the time they arrived at the courthouse. Applicant testified he believes the drugs were tampered with because of the way they looked, along with the delayed prosecution in Applicant's case. Applicant testified Counsel only had twenty eight days between being hired and Applicant's trial, which was not enough time for counsel to investigate anything.

At the evidentiary hearing, Counsel testified he has practiced law for twenty one years, mostly in criminal defense and prosecution. Counsel testified he was retained by Applicant in 2014, shortly before Applicant's case was to be called for trial. Counsel testified did not receive a copy of discovery until the Friday before Applicant's trial. Counsel testified he does not believe

he ever got a complete version of the discovery, as he was missing some photographs which were critical for Applicant's defense. Counsel testified Applicant received a copy of his discovery from his previous counsel Dennis Bolt, Esquire, and Applicant provided Counsel with these documents when he hired Counsel. Counsel testified he met with Applicant the day that he received some of the discovery from the State, and they discussed the documents Counsel received. Counsel testified it was not a very lengthy meeting, as Counsel did not have a full copy of discovery, but he wanted to ensure that he and Applicant were on the same page. Counsel testified he does not believe a meeting with the officers involved in Applicant's case would have been helpful pre-trial because the officers testified consistent with the reports they created during their investigation. Counsel testified he did not receive a trial notice until ten days before Applicant's trial. Counsel testified he wanted more time to prepare for the case because he did not receive parts of discovery until the week before, and he did not receive some photographs until the day of Applicant's trial, he did not receive information regarding the timing of the photographs until the Wednesday before Applicant's trial. Counsel testified he moved for a continuance because of the short period of time he represented Applicant, and Counsels desire to have more time to prepare, however Judge Griffith denied Counsel's motion for a continuance.

Regarding the drug evidence, Counsel testified he did not see the drugs in person until the day of Applicant's trial. Counsel testified he could have challenged the drugs due to the poor condition they appeared to be in, however Counsel testified this is not something that he normally does.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590,

596 (2007) (citing *Strickland*, 466 U.S. 668). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard*, 372 S.C. at 331–32, 642 S.E.2d at 597 (internal quotation marks omitted) (emphasis omitted).

However, our Supreme Court has cautioned reviewing courts not to lose sight of the reasonableness standard regarding counsel's duty to investigate. *See, e.g.*, *id.* at 331, 642 S.E.2d at 597 ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation."). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690–91; *see id.* ("In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.").Thus, in applying the *Strickland* standard to a claim of failure to investigate, counsel's decision not to undertake a particular investigation must be evaluated with heavy deference to counsel's judgment. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 63 (Ct. App. 2014).

To prevail on a claim of ineffective assistance based on failure to investigate or prepare for trial, a PCR applicant must ordinarily present some evidence "that would have affected counsel's advice to [him] to accept the plea bargain offered or that would have caused [him] to decline to

accept it." *Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009); *see, e.g.*, *Jackson v. State*, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998) (reversing the PCR court's grant of relief where the applicant failed to "present any evidence of what counsel could have discovered or what other defenses he would have requested counsel pursue had counsel more fully prepared for the trial").

Applicant has failed to present any evidence of what Counsel could have done further in preparing for Applicant's trial. Though Applicant testified that Counsel did not have time to interview the police officers in Applicant's case, Counsel testified that interviewing these officers would not have been helpful, as the officer's testimony was consistent with their written reports. Additionally, though Counsel testified he believed he did not receive a complete version of the available discovery in Applicant's case until the week of trial, Counsel moved for a continuance so he may have more time to prepare but this request was denied. Counsel credibly testified that he spoke with Applicant regarding the discovery he received, and he had a valid reason for not interviewing the police officers who were involved in the investigation of Applicant. Counsel further testified he had some concerns with the appearance of the drug evidence in Applicant's case, however Counsel was not aware of their condition until the day of Applicant's trial. Counsel testified he could have challenged the drugs however he normally does not challenge drug evidence that has been tested. Lynn Black testified at Applicant's trial that she reviewed the drug evidence in Applicant's case, and it tested positive for crack cocaine. Tr. p. 277, l. 8-17. Lynn Black further testified that drug evidence may change color based on the place that it is stored, or due to the chemicals that they are exposed to through the testing process. Tr. p. 277, l. 18-p. 278, l. 9. Though the color of the drugs, and their condition was concerning at the time of Applicant's trial, Applicant has failed to show how further testing would have produced a different result, or would have

established that the drugs were tampered with. Applicant has failed to show what Counsel could have discovered, or what defenses Counsel could have pursued if he was given more time to prepare for this case. Additionally, Applicant has failed to show how he was prejudiced by Counsel's performance in this case. Applicant hired Counsel less than a month before Applicant's trial, and Counsel made every effort to obtain more time to prepare, yet he was ultimately unsuccessful. Therefore this allegation is denied and dismissed with prejudice.

3. Failure to object to the testimony of Captain Dennis as hearsay[4]

Applicant alleges Counsel was ineffective for failing to challenge the testimony of Captain Dennis. More specifically, Applicant alleges that Counsel was ineffective for not objecting to Captain Dennis testifying on behalf of Officer Spreng, and Investigator Bouknight, who were unavailable at Applicant's trial. Applicant asserts Counsel failed to object to Captain Dennis' testimony as hearsay, because Captain Dennis testified to the reports drafted by Officer Spreng and Investigator Bouknight who were not available to testify at trial. This Court finds this allegation is without merit.

At Applicant's evidentiary hearing, Applicant testified he knew Investigator Bouknight was unavailable to testify at Applicant's trial because he was deceased. Applicant further testified he believed the State should have called someone with knowledge of the chain of custody to testify instead of letting Captain Dennis testify for both Officer Spreng and Investigator Bouknight. Applicant testified he recalls Counsel objecting to Captain Dennis' testimony due to a lack of personal knowledge, however Counsel's objection was overruled.

Counsel testified he raised the confrontation clause issue pre-trial because Officer Spreng and Investigator Bouknight were not available at trial. Counsel testified he also raised the issue

[4] Applicant's *pro se* allegation 1b.

with Officer Spreng and Investigator Bouknight's statements being introduced in trial, however Counsel admits he did not specially reference *Crawford*[5] when making his objection. Counsel testified he knew that Bouknight was deceased prior to Applicant's trial, however he was not aware why Officer Spreng was unavailable to testify at Applicant's trial. Counsel testified he raised the issue of Captain Dennis' testimony at trial because he believed Captain Dennis was testifying beyond the report. Counsel testified he objected to Captain Dennis' testimony during trial on the grounds of lack of personal knowledge, and as hearsay, however Counsel's objections were overruled.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Trial counsel may be deficient for failing to object to hearsay testimony without a valid trial strategy. *Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018). However, trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. *Id.* 423 S.C. at 246, 814 S.E.2d at 493. Relevant considerations are the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object. *Id.* 423 S.C. at 246, 814 S.E.2d at 493-94.

Applicant has failed to demonstrate how Counsel was ineffective for failing to object to the testimony of Captain Dennis. Applicant testified he believed the State should have called somebody to testify who had knowledge of the chain of custody instead of allowing Captain Dennis to testify, however Applicant does not acknowledge that Counsel made this exact objection but was overruled by Judge Griffith. Counsel testified he raised the issue of Applicant's right to

[5] *Crawford v. Washington*, 541 U.S. 36 (2004) (Out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and the defendant had prior opportunity to cross-examine the witnesses.)

confront his accusers at trial, and that Captain Dennis was testifying to facts he had no personal knowledge of. Counsel testified he knew that Investigator Bouknight was deceased and unable to testify, however he was unaware that Officer Spreng would be unavailable. Additionally, Counsel testified he objected to the reports being introduced into evidence due to confrontation clause issues since Applicant did not have the opportunity to cross-examine the witnesses who drafted the reports. However, despite Counsel's objections, Judge Griffith allowed Captain Dennis to testify on behalf of Officer Spreng and Investigator Bouknight while using the reports they prepared. Applicant has failed to demonstrate how Counsel was ineffective for failing to object, or how he was prejudiced by Counsel's failure to object, as Counsel objected to this testimony, but was ultimately overruled. Therefore, Applicant has failed to show how Counsel's performance was deficient, or how he was prejudiced by Counsel's performance. Therefore this allegation is denied and dismissed with prejudice.

4. Counsel gave Applicant bad advice

Applicant alleges Counsel was ineffective for giving Applicant "bad advice" which lead Applicant to not testify at his trial. Specifically, Applicant alleges Counsel was ineffective when advising Applicant that he would be subject to cross-examination on his prior criminal record. Applicant asserts that but for Counsel's advice he would have testified at his trial.

At his evidentiary hearing, Applicant testified he wanted to testify at his trial. Applicant testified he spoke with Counsel before trial and Counsel advised Applicant that he should not testify because the Solicitor might bring up Applicant's prior convictions for drug distribution. Applicant testified Counsel advised Applicant to not testify because the State "might cross him up." Applicant testified despite Counsel's advice he would have testified at trial. On cross-examination, Applicant testified at the time of his trial he agreed to not testify, claiming it was his

first trial and he was trusting Counsel's advice.

Counsel testified he advised Applicant it would not be a good idea to testify in court. Counsel testified he informed Applicant that by testifying he could open the door for the State to introduce the statement Applicant gave to Captain Dennis, as well as Applicant's prior convictions. Counsel testified he did not believe Applicant would benefit from testifying because they were able to gather the testimony they needed regarding other issues through the officers who testified. Counsel testified he and Applicant discussed Applicant testifying before the trial started, and Applicant never indicated that he wanted to testify.

As an initial matter, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland*, 466 U.S. 668).

Though Applicant alleges Counsel provided him with "bad advice" regarding his decision to testify at trial, this Court finds that Counsel's advice was proper. As counsel testified, the State could use Applicant's prior conviction to impeach his testimony at trial. "...evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused..." Rule 609(a) SCRE. "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction..." Rule 609(b) SCRE. "This Court has held that a trial judge must conduct a balancing test to determine whether remote convictions are admissible under rule 609(b)." *State v. Bryant*, 369 S.C. 511, 516, 633 S.E.2d 152, 155 (2006).

Counsel properly advised Applicant that his prior criminal record may be used to impeach his testimony if Applicant chose to testify at trial. Applicant through his testimony, has alleged he

would have proceeded to trial and testified but for Counsel's advice. However, Applicant has failed to present any evidence suggesting Counsel's advice was incorrect, or that Applicant's prior criminal record could not have been used to impeach Applicant if he testified at trial. Therefore, Applicant has failed to show how Counsel's performance was deficient, or how he was prejudiced by Counsel's performance. Therefore this allegation is denied and dismissed with prejudice.

5. Counsel failed to challenge the sufficiency of the chain of custody

Applicant alleges Counsel was ineffective for failing to challenge the sufficiently of the chain of custody for the drugs that were found in Applicant's house. Further, Applicant alleges Counsel incorrectly allowed the State's witness Lynn Black to testify to the entire chain of custody. This allegation is without merit.

At his evidentiary hearing, Applicant testified the evidence that the State had was not properly logged, and that items that were seized were not submitted to SLED for testing. Further, Applicant testified Investigator Bouknight could not testify regarding the chain of custody of the drugs because he was deceased. Applicant testified the State used Lynn Black to testify to the entire chain of custody, Applicant believes that she should not have been allowed to testify regarding the entire chain of custody. However, on cross-examination, Applicant recalls Captain Dennis testifying regarding the chain of custody, followed by Lynn Black, and ultimately one final officer, Ben Chapman who testified about the chain of custody from the time the drugs were returned from SLED to the police station until they were brought to court for Applicant's trial. Applicant testified he believes the State should have called an additional witness with personal knowledge of the whereabouts of the drugs to testify regarding the chain of custody prior to the drugs being send to SLED for testing. Applicant testified he recalls Counsel objecting to Captain Dennis' testimony regarding the chain of custody due to a lack of personal knowledge, however

Counsel's objection was overruled. Applicant testified he had questions about the deterioration of the drugs, and believes that the drugs were tampered with due to the delay in his prosecution.

At the evidentiary hearing, Counsel testified he extensively challenged the chain of custody prior to, and during, Applicant's trial. Counsel testified his challenges required the State to put the entire chain of custody on the record, from the time the drugs were seized until the date of Applicant's trial.

In *State v. Hatcher*, our Supreme Court analyzed cases in other jurisdictions where "[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts." 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011). The Court ultimately held that "the State need not establish the identity of every person handling fungible items in all circumstances; rather, the standard is whether, in the discretion of the trial judge, the State has established the chain of custody as far as practicable." *Id.* at 95, 708 S.E.2d at 755.

This Court finds Counsel credibly testified that he challenged the chain of custody before, and during Applicant's trial. Counsel moved to suppress the drug evidence prior to Applicant's trial due to issues with the chain of custody. Counsel challenged not only the lack of witnesses who would be vital for establishing the chain of custody, but he also addressed Applicant's concern that certain items were seized but never sent for testing. Tr. p. 66, l. 18- p. 109, l. 17. Additionally, Counsel challenged the chain of custody throughout the testimony of Captain Dennis, Lynn Black, and Officer Ben Chapman. Despite Counsel's challenges, the court found the State properly established a valid chain of custody. Applicant has failed to establish how Counsel's performance was deficient in regards to challenging the chain of custody of the drug evidence. Further, this Court finds Applicant has failed to establish how he was prejudiced by Counsel's performance,

where Counsel thoroughly challenged the chain of custody throughout the course of Applicant's trial. Therefore, this allegation is denied and dismissed with prejudice.

6. Counsel failed to challenge the voluntariness of Applicant's statement

Applicant alleges Counsel's performance was ineffective due to Counsel's failure to challenge the voluntariness of Applicant's statement. This allegation is without merit.

At his evidentiary hearing, Applicant testified Counsel failed to challenge the admission of the statement Applicant gave to police. Applicant testified Counsel should have challenged this statement in light of *Miranda v. Arizona*, as Applicant alleges he was not informed of his right to remain silent or his right to have counsel present during questioning.

At Applicant's evidentiary hearing, Counsel testified he spoke with Applicant prior to Applicant's trial and Applicant claimed his statement was not voluntarily given to Captain Dennis. Counsel testified that he challenged the admission of Applicant's statement pre-trial by arguing that the statement was not voluntarily given due to the manner in which Applicant was questioned while handcuffed inside his own home. Counsel testified he also challenged whether there was a statement given by Applicant because there is not documentation of the statement, and there were no witnesses who could corroborate Captain Dennis' claim that Applicant admitted the drugs were his.

"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir.1998). *See also Abney v. State*, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (Pieper, Jr., concurring) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and

how a witness should be cross-examined. What motions to file and whether to put on evidence so as to preserve the final word in closing argument are also strategic and tactical decisions to be made by trial counsel." (internal citations omitted)).

Though Applicant alleges Counsel was ineffective for failing to challenge the voluntariness of Applicant's statement, the record establishes that Counsel challenged the admissibility of Applicant's statement prior to the start of Applicant's trial. Counsel requested a *Jackson v. Denno*[6] hearing prior to the start of Applicant's trial. Counsel argued that Applicant's statement was not voluntary given. Tr. p. 109, l. 20- p. 110, l. 2. During the *Jackson v. Denno* hearing, Counsel questioned Captain Dennis regarding the statement he got from Applicant, whether Captain Dennis documented this statement that Applicant gave during his questioning, or whether Captain Dennis recorded what rights he informed Applicant of in any of his written reports. Tr. p. 117, l. 11- p. 118, l. 22. Further, Counsel questioned Captain Dennis regarding any possible promises or coercion that might have lead Applicant to giving a statement to police. Tr. p. 118, l. 23- p. 119, l. 19. Counsel argued that there is no written record of Applicant's statement, and there is a possibility of coercion that lead Applicant to speak with police. Tr. p. 121, l. 18- p. 123, l. 4. Despite Counsel's attempts to suppress the statement, the court denied Counsel's motion to suppress the statement at trial. Applicant incorrectly alleges Counsel was ineffective for failing to challenge the voluntariness of his statement to police. Counsel moved to suppress the statement, and conducted a *Jackson v. Denno* hearing to assess whether the statement was voluntarily give. Though the motion was ultimately unsuccessful, Counsel attempted to have this statement suppressed, therefore Applicant is unable to establish how Counsel is deficient for failing to challenge the voluntariness of his statement, nor can Applicant establish how he was prejudiced

[6] *Jackson v. Denno*, 378 U.S. 368 (1964).

by Counsel's performance. Therefore, this allegation is denied and dismissed with prejudice.

7. Counsel failed to call Applicant to testify during *Jackson v. Denno* hearing

Further, Applicant alleges Counsel was ineffective for failing to call Applicant to testify during his pre-trial *Jackson v. Denno* hearing. Applicant alleges Counsel should have called him to testify regarding the manner in which he was read his *Miranda* rights prior to Applicant being questioned by police. This allegation is without merit.

At his evidentiary hearing, Applicant testified he was not called to testify at his *Jackson v. Denno* hearing. Applicant testified this was his first time going to trial, so he was unfamiliar with the process and trusted Counsel.

Counsel testified he did not call Applicant to testify at the *Jackson v. Denno*, and Counsel could not explain why he made this decision. Counsel testified he believes they would have discussed whether Applicant would testify during this hearing, however Counsel is unsure why Applicant ultimately did not testify. Counsel testified Applicant claimed he did not give a voluntary statement to police, and Counsel proceeded to raise this argument during the *Jackson v. Denno* hearing. Counsel further testified he challenged whether Applicant even gave a statement to police because there was no documentation, or witnesses, who could confirm what Applicant said, or whether he gave a voluntary statement.

Under Jackson v. Denno, a defendant is entitled to a "reliable determination as to the voluntariness of his [statement] by a tribunal other than the jury charged with deciding his guilt or innocence." *State v. Miller*, 375 S.C. 370, 381, 652 S.E.2d 444, 450 (Ct. App. 2007) (*citing State v. Fortner*, 266, S.C. 223, 226, 222 S.E.2d 508, 510 (1976)). "A defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury." *State v. Miller*, 375 S.C.

at 382, 652 S.E.2d at 450 (*citing State v. Salisbury*, 330 S.C. 250, 271, 498 S.E2d 655, 666 (Ct. App. 1998)). The trial judge must determine if under the totality of the circumstances a statement was knowingly, intelligibly, and voluntarily made. *State v. Miller*, 375 S.C. at 382, 652 S.E.2d at 450 (*citing State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001)). The State bears the burden of showing the statement was voluntary. *State v. Miller*, 375 S.C. at 382, 652 S.E.2d at 450 (*citing State v. Von Dohlen*, 322 S.C. 234, 243, 471 S.E.2d 689, 695 (1996)); *see also State v. Middleton*, 288 S.C. 21, 24, 339 S.E.2d 692, 694 (1986) ("In order to secure the admission of a defendant's statement, the State must affirmatively show the statement was voluntary and taken in compliance with *Miranda*").

Counsel requested a *Jackson v. Denno* hearing be conducted prior to the start of Applicant's trial. Tr. p. 109, l. 21- p. 110. During this hearing, Solicitor Scott called Captain Robert Dennis to testify regarding a confession given by Applicant regarding the drugs. During this hearing, Applicant's counsel thoroughly cross examined Captain Dennis regarding the confession Applicant gave, and whether Applicant was promised anything in return for his confession. Tr. p. 117, l. 11- p. 121, l. 17.

Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland* at 688-89. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.* at 691. "[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. *Sexton v. French*, 163 F.3d at 885. *See also Abney v. State*, 408 S.C. at 48, 757 S.E.2d at 547 (Pieper, Jr., concurring) ("[D]ecisions primarily involving trial strategy and tactics may be

made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined. What motions to file and whether to put on evidence so as to preserve the final word in closing argument are also strategic and tactical decisions to be made by trial counsel." (internal citations omitted)). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.' " *Id.* (quoting *Ingle v. State*, 348 S.C. at 470, 560 S.E.2d at 402).

Though Counsel could not articulate his reasoning for not calling Applicant to testify during the *Jackson v. Denno* hearing, Counsel credibly testified he spoke with Applicant regarding his statement to police, and used the contents of their conversation to challenge the admissibility of Applicant's statement. Though Applicant argues that he should have been called to testify during the *Jackson v. Denno* hearing, Applicant has failed to present any evidence which would suggest that the court's decision would have changed if Applicant were allowed to testify. Counsel raised all possible arguments for suppressing Applicant's statement based on his conversations with Applicant, however Judge Griffith denied Counsel's motion to suppress the statement. Applicant has failed to establish how Counsel's performance was deficient, or how Applicant was prejudiced as a result of Counsel's performance. Therefore this allegation is denied and dismissed with prejudice.

8. Counsel admitted substance found was crack cocaine

Applicant alleges Counsel's performance was deficient where Counsel admitted the substance that was found in Applicant's house was crack cocaine. Applicant asserts Counsel was ineffective and conceded Applicant's guilt by stating the drugs found in Applicant's house were crack cocaine. This allegation is without merit.

At his evidentiary hearing, Applicant testified Counsel should not have conceded that the drugs found inside Applicant's house were crack cocaine. Applicant testified it was harmful to his case because when the drugs were introduced at trial they looked like "brown looking mushy stuff" and nobody could tell if they were crack or not. Applicant testified that Counsel should not have admitted to the jury that the substance was crack cocaine.

Counsel testified he did not see the drugs in Applicant's case until the day of Applicant's trial. Counsel testified he discussed the drugs with Applicant prior to trial. Counsel testified his trial strategy was not to argue the substance was not drugs, but that the drugs were not Applicants. Counsel testified he did not want to deny that the substance was crack cocaine because it would harm their credibility with the jury. Counsel testified their focus was to get credibility with the jury because the law enforcement reports already established that the substance was drugs. Counsel testified the argument they were focusing on was that the drugs did not belong to Applicant.

"[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel." *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis omitted). "The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.' " *Id.* (quoting *Ingle v. State*, 348 S.C. at 470, 560 S.E.2d at 402).

"[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. *Sexton v. French*, 163 F.3d at 885. *See also Abney v. State*, 408 S.C. at 48, 757 S.E.2d at 547 (Pieper, Jr., concurring) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.

What motions to file and whether to put on evidence so as to preserve the final word in closing argument are also strategic and tactical decisions to be made by trial counsel." (internal citations omitted)).

This Court finds that Counsel made a strategic decision in admitting that the substance found in Applicant's house was crack cocaine. Counsel testified that he discussed the drugs with Applicant before trial, and that their focus was to prove that the drugs were not Applicants instead of attempting to show that the substance was not crack cocaine. Though Applicant testified he believes that by admitting the substance was drugs hurt Applicant's case, this Court finds that Counsel made a valid strategic decision by admitting the substance found was crack cocaine. Counsel testified his focus was on maintaining credibility with the jury, and that law enforcement reports would establish that the substance was crack cocaine. Therefore, Counsel made a decision to admit the substance was crack cocaine, but focus on proving that the drugs were not Applicants. This Court finds that Counsel's decision to admit the substance was crack cocaine does not constitute deficient performance, and Applicant has failed to show how he was prejudiced by Counsel's performance. Therefore, this allegation is denied and dismissed with prejudice.

9. Counsel failed to elicit testimony about the timing of photos that were taken

Applicant alleges Counsel was ineffective for failing to elicit testimony about the timing of photos that were taken wherein police located a quantity of crack cocaine in Applicant's bedroom. Applicant asserts the drugs were not on the dresser in Applicant's bedroom when police entered Applicant's home. However, this Court finds this allegation is without merit.

At his evidentiary hearing, Applicant testified Counsel should have challenged the photographs based on the time that they were taken because the State did not present any information regarding the order the photographs were taken in, or what time each photo was taken

at. Applicant testified Counsel should have subpoenaed the camera the police used to determine the exact time each photo was taken at. Applicant testified he believes this subpoena would have shown that the pill bottle containing crack cocaine was not in plain view and would not have allowed police to obtain a search warrant for his house.

Counsel testified he was retained by Applicant in 2014 shortly before Applicant's case was called for a trial. Counsel testified he got discovery late in this case, and did not receive the photos the State relied on until the week of Applicant's trial. Counsel testified his initial discovery packet did not have the photographs from the initial officer who went into Applicant's house. Counsel testified he received a trial notice ten days before Applicant's trial, and he had not received a full copy of discovery at that point. Counsel testified at the start of Applicant's trial he moved for a continuance, however Judge Griffith denied Counsel's request for a continuance due to the age of the case, and Applicant's familiarity with the discovery in his case. Counsel testified he believes he received the photographs on Wednesday, two days before Applicant's trial. Counsel testified he immediately emailed the solicitor regarding the sequencing of the photos he received. Counsel stated he wanted to ensure that the photos he received were in the order that they were taken to further understand the sequencing of the photos. Counsel testified he did not know the timing and sequences of the photos in Applicant's case until the Wednesday before Applicant's trial.

"The validity of counsel's strategy is reviewed under 'an objective standard of reasonableness.' " *Id.* (quoting *Ingle v. State*, 348 S.C. at 470, 560 S.E.2d at 402). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Accordingly, Courts must be wary of second guessing counsel's trial tactics; and where counsel

articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an indepenarardent investigation of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. at 331-32, 642 S.E.2d at 597. However, when counsel vigorously cross-examines the State's witnesses and attacked the accuracy of the evidence, his representation is not rendered deficient. *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991)). When analyzing counsel's performance, the reviewing court will "strongly presume that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Yarborough,* 540 U.S. at 8 (internal quotation marks omitted); *cf. Higgs v. United States,* 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decision a court is not supposed to second guess.") (*citing Byram v. Ozmint,* 339 F.3d 203, 209 (4th Cir. 2003)).

Counsel testified he requested a copy of the photographs the State used during Applicant's trial, and upon receipt of these photos Counsel testified he emailed the solicitor to ask when the photos were taken, and asked about the order of the photographs. Further, during Applicant's trial, Counsel questioned Brad Epps about when he noticed the crack cocaine, and whether it appeared in the photographs taken at the crime scene. Tr. p. 150, l. 4- p. 152, l. 25; p. 170, l. 11- p. 172, l.3; p. 175, l. 12-20; p. 186, l. 22- p. 189, l. 10. Counsel made a reasonable attempt to identify the order in which the photographs were taken. Counsel also questioned Officer Brad Epps, who was present when the drugs were found to determine if they were visible when he initially entered Applicant's

house. Though Counsel was unable to question the officer who took the photographs, as this officer was unavailable to testify at trial, Counsel attempted to elicit testimony regarding the moment the drug evidence was found, as well as raising issues with the evidence being visible in certain photographs, while being missing in other photographs taken on the same date. Applicant has failed to show how Counsel was deficient by investigating, and eliciting testimony about the timing of the photographs. Additionally, Applicant has failed to demonstrate how Counsel's performance prejudiced Applicant, as Counsel questioned Officer Epps regarding the inconsistent photographs from Applicant's house. Therefore, we find Applicant has failed to demonstrate how Counsel's performance was ineffective, and this allegation is denied and dismissed with prejudice.

10. Counsel did not object to the State's opening statement

Applicant alleges Counsel was ineffective for failing to object to the State's opening argument when the Assistant Solicitor referenced the drugs found in Applicant's house. Applicant asserts this information was not in evidence yet, and therefore the Assistant Solicitor should not have referenced it in his opening. This Court finds this allegation is without merit.

"The opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented." *Smalls v. State*, 415 S.C. 490, 499, 783 S.E.2d 817, 821 (2016) (*Citing State v. Kornahrens*, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986)). "The Solicitor is permitted in opening statement to outline the facts the State intends to prove." *Id.* "As long as the State introduces evidence to reasonably support the states facts, there is no error." *Id.* Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Smalls*, 415, SC. 490, 499, 783 S.E.2d 817, 821 (*Citing Brown v. State*, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009)).

At his evidentiary hearing, Applicant failed to present any testimony to support his allegation that Counsel should have objected to the Solicitor's opening statement. Further, Applicant did not present any testimony suggesting that Counsel's failure to object prejudiced Applicant, or had an effect on the outcome of Applicant's trial.

At the evidentiary hearing, Counsel testified he remembers Solicitor Scott referencing the weight of the drugs in his opening statement, however he did not object to this reference. Counsel testified at the beginning of the trial he was unaware that the drugs had liquefied and changed color. Counsel testified that once he discovered issues with the condition of the drugs he objected.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." *United States v. Nguyen*, 379 F. App'x 177, 181 (3d Cir. 2010); *see Humphries v. Ozmint*, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("It is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under *Strickland*.

When analyzing counsel's performance, the reviewing court will "strongly presume that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect." *Yarborough,* 540 U.S. at 8 (internal quotation marks omitted); *cf. Higgs v. United States,* 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decision a court is not supposed to second guess.") (*citing Byram v. Ozmint,* 339 F.3d at 209).

Counsel has credibly testified that he recalls Solicitor Scott referencing the weight of the drugs in his opening statement, but Counsel testified he did not feel the need to object to this

reference. Throughout the course of the trial, the weight of the drugs were not contested. Additionally, Deputy Solicitor Scott questioned Lynn Black of SLED who testified that the drugs weighed 21.3 grams. Tr. p. 281, l. 19- p. 283, l. 11. Though Counsel did not object to Solicitor Scott's reference to the weight of the drugs found in Applicant's house in his opening statement, Solicitor Scott properly introduced evidence to support the reference made in his opening statement. Further, Counsel objected once he noticed issues with the condition of the drugs at Applicant's trial. In a PCR action, Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. at 442, 334 S.E.2d at 814. Applicant has failed to present any evidence or testimony to support his allegation that Counsel should have objected to the reference to the weight of the drugs during Deputy Solicitor Scott's opening statements. Deputy Solicitor Scott properly introduced testimony to support his assertion during his opening statement, therefore we find that Solicitor Scott's comment in his opening statement was not improper, and Counsel had not duty to object to this testimony. Therefore, this Court finds Applicant has failed to establish how Counsel was ineffective, and this allegation is denied and dismissed with prejudice.

11. Counsel did not ensure Applicant was questioned about his right to testify

Applicant alleges Counsel was ineffective for failing to ensure that Applicant was questioned about his right to testify at trial. Applicant asserts he wanted to testify and was not given the opportunity. This Court finds this allegation is without merit.

At his evidentiary hearing, Applicant testified he was not questioned by Judge Griffith about his right to testify at his trial. Applicant testified he did not have to opportunity to weigh the decision to testify, and if he were given this opportunity he would have testified. Applicant testified even though Counsel informed Applicant that he should not testify, Applicant wanted to testify at

his trial but was not given the chance.

Counsel testified he does not recall Judge Griffith questioning Applicant regarding his right to testify on his own behalf. Counsel testified he does not believe that either side formally closed on the record. However, Counsel testified he recalls speaking with Applicant prior to his trial regarding his right to testify. Counsel testified Applicant never indicated he wanted to testify, though Counsel would have recommended Applicant not testify. Counsel testified he informed Applicant that it would not be a good idea for Applicant to testify because he may possibly open the door for the State to introduce his statement to Captain Dennis, along with Applicant's prior criminal record.

In *Brown v. State*, the South Carolina Supreme Court stated "An on-the-record waiver of a constitutional or statutory right is but one method of determining whether the defendant knowingly and intelligently waived that right." *Brown v. State*, 317 S.C. 270, 272, 453 S.E.2d 251, 252 (1994). The Supreme Court in *Brown* further stated "review of this issue is better left to a post-conviction relief proceeding where the facts surrounding the trial can be fully explored." *Id.*

Though the record does not show Applicant was questioned about his right to testify at trial. Counsel credibly testified Applicant never indicated a desire to testify at trial. Further, the record reflects that Applicant never informed Counsel that he wished to testify during his trial. At the start of Applicant's trial, the Court informed the jury "Mr. Trapp has nothing whatsoever to prove or disprove. He may decide not to call any witnesses. He may not testify. That's his decision and his alone. His and his lawyer can decide that." Tr. p. 128, l. 9-12. Following the close of the State's case in chief, and Counsel's motion for a directed verdict, the Court asked Counsel "are you going to put anything up?" to which Counsel responded "No, sir." Tr. p. 320, l. 15-16. Though Applicant now asserts that he wanted to testify at trial, but was denied this opportunity, Applicant

has failed to show this Court that he was deprived of his right to testify at his trial. Applicant has failed to demonstrate how Counsel's performance was deficient, or how Counsel's performance prejudiced Applicant, as Applicant was given the opportunity to testify but ultimately did not testify. Therefore, this allegation is denied and dismissed with prejudice.

B. Newly Discovered Evidence

Applicant alleges he should be entitled to a new trial on the basis of after-discovered evidence of juror misconduct. More specifically, Applicant indicated he received correspondence from Litronda Coleman, a juror during his trial, who stated Judge Griffith entered the jury room and put undue pressure and influence on the jury by requesting the jurors come to a decision while deliberating the charges Applicant was tried for. Having reviewed this statement, along with juror statements submitted by Respondent, this Court finds Applicant's allegation is without merit.

At his evidentiary hearing, Applicant testified he received a statement from Litronda Coleman, a juror during his trial, who indicated she felt pressured when Judge Griffith entered the jury room and requested the jury make a decision. Applicant testified once he received this statement, he reviewed it and attached it to his application for post-conviction relief to show the Court that he believes he should receive a new trial. On cross-examination, Applicant testified he is not sure if an investigator working on Applicant's behalf had an opportunity to talk to the other jurors or the bailiff stationed outside the juror room during deliberations.

Counsel testified Applicant's case was tried in the annex building in Newberry where family court regularly takes place. Counsel testified the trial was not in the family courtroom, and Counsel could see where the jury deliberation room was during the course of deliberations. Counsel testified he does not remember Judge Griffith speaking to the jury during deliberations. Counsel testified he would have seen or noticed someone knocking on the door because they were

in a small courtroom annex and the jury deliberation room was in close proximity to the room Applicant case was being tried in.

During Applicant's evidentiary hearing, Respondent called Matt Ellis of the South Carolina Attorney General's Office to testify. Ellis testified he works for the Attorney General's Office as an investigator in the criminal division. Ellis testified he was asked by the Deputy Attorney General of the Criminal Division to assist in investigating a post-conviction relief claim regarding juror misconduct. Ellis testified he was aware of Litronda Coleman's allegation, and that he was asked to speak with the jurors to determine if they recall the incident that Ms. Coleman alleged. Ellis testified he attempted to speak with all the jurors from Applicant's trial, however, Ms. Coleman and one additional juror would not respond to his requests to speak. Ellis testified he spoke with ten of the jurors from Applicant's trial along with Georgia Wardlaw who was the bailiff stationed outside of the jury room during deliberations. Ellis testified he created questions that he asked the jurors, and made sure to ask each juror the same questions in the same order. Ellis testified he clearly told the jurors he did not want to ask anything about their deliberations, and his questions were limited to the allegation that Judge Griffith entered the jury room during deliberations. Ellis testified he wrote down each jurors answers to each question and submitted these answers to the Attorney General's Office to use as part of Applicant's post-conviction relief case.

An Applicant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not by the exercise of due diligence have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983); *Clark v. State*, 315 S.C. 385,

434 S.E.2d 266 (1993). Before a Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). The credibility of newly discovered evidence is for the trial court to determine. *State v. Porter*, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). It is well established that entering the jury room during deliberations is reversible error for appellate courts. "In death penalty case, trial judge's entering the jury room during guilt phase of trial, accompanied by counsel from both the State and the defense, to answer a question of the jury was reversible error regardless of the presence of counsel and the absence of prejudice." *State v. Elmore*, 279 S.C. 417, 308 S.E.2d 781 (1983). Trial judge's visit to the jury room during the penalty phase of trial, without counsel from either the State or defense, was error. *Id.*

Though Ms. Coleman has alleged the trial court put pressure and undue influence on the jury, the Court has reviewed the statements of ten of the remaining jurors, along with Bailiff Georgia Wardlaw, who was stationed outside of the jury deliberation room and none of these individuals recalled Judge Griffith entering the jury room during deliberations to request the jury make a decision[7]. Though the evidence presented by Applicant has been discovered since the trial, and could not have been discovered before trial, the evidence presented by Applicant would not change the result if a new trial was held. Ten of the jurors in Applicant's case have testified that Judge Griffith did not knock on the door to the jury room during deliberations. Additionally, these ten jurors indicated that nobody complained about the verdict after the jury finished deliberating, though one juror indicated at the start of deliberations that one male juror, and one female juror

[7] One Juror, Ralph Howe, indicated Judge Griffith came into the jury room to dismiss the jury after they provided the court with their verdict.

were against convicting Applicant but they eventually changed their minds. One juror, Elizabeth Hedgepeth specifically indicated the woman who was opposed to convicting Applicant indicated she did not care and she wanted to go home. Additionally the after-discovered evidence presented by Applicant is not material to the issue of guilt or innocence. The overwhelming majority of the jurors in this case, along with the Bailiff who was stationed outside the jury room door, have refuted the allegations made by Applicant and Litronda Coleman. These jurors indicated they do not remember Judge Griffith entering the jury room during the course of their deliberations, nor do they remember any other juror complaining about the verdict after Applicant was found guilty. Applicant has asserted that he received this statement from Litronda Coleman, however Applicant has failed to present any evidence or testimony to corroborate the statement of Ms. Coleman. Counsel credibly testified he does not recall Judge Griffith attempting to enter the jury deliberation room. Counsel testified he would have seen or heard Judge Griffith enter the jury room due to the configuration of the courthouse Applicant's case was tried in. Further, Ellis testified he questioned ten of the remaining jurors and based on the responses given, none of these jurors could corroborate Ms. Coleman's allegations. Therefore, this Court finds Applicant has failed to establish he is entitled to a new trial due to after-discovered evidence of alleged misconduct and this allegations is denied and dismissed with prejudice.

IV. ALL OTHER ALLEGATIONS

As to any and all allegations raised in the application or at the hearing in this matter and not specifically addressed in this order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds those claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

IV. CONCLUSION

Based on all the foregoing, this Court finds and concludes that 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.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel 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), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 14th **day of** February**, 2022.**

R. KIRK GRIFFIN
Presiding Judge
Eighth Judicial Circuit

Sumter, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF Newberry)
STATE VS.)
Toaby Alexander Trapp)
AKA:)
Race: Sex: M Age: 44)
DOB: [redacted] SS#: [redacted])
Address: [redacted] Little Ranches Road)
City,State,Zip: Newberry, SC 29108)
DL#: [redacted] SID#:)
*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 12GS36-0267
A/W#: M481160
Date of Offense: 10/8/2011
S.C. Code § : 44-53-0375
CDR Code #: 0452

SENTENCE SHEET 25 yrs - 30 yrs and 50K

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Drugs / Trafficking in ice, crank or crack - 10 g or more, but less than 28 g -

in violation of § 44-53-0375 of the S.C. Code of Laws, bearing CDR Code # 0452
☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ Mandatory GPS(CSC w/minor 1st or Lewd Act) ☐ §17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST: _____ 100588 _____ _____ _____
Daniel, Taylor | SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is commited to the ☒ State Department of Corrections, ☐ ~~County Detention Center,~~
for a determinate term of 25 ~~days/months~~/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of $ 50,000.00; provided that upon the service of _____ days/months/years and/or payment of $ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____
☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the State Department of Corrections.
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922,it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal Domestic Violence) to ship,transport,possess,or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$ 50,000.00
§ 14-1-206 (Assessments 107.5 %)		$ 53,750.00
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso 47.9 (Public Def/Prob)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$ 150.00
§ 50-21-114(BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
Proviso 90.5 (SCCJA Surcharge)	$5	$ 5.00
3% to County (if paid in installments)		$ 3120.00
TOTAL		$ 107,150.00

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, § 47.12 requires $500 be paid to Clerk during probation.

Clerk of Court/ Deputy Clerk Elizabeth B. Hall
Court Reporter: Joy Watson
Presiding Judge [signature] 2154
Judge Code:
Sentence Date: 10-31-14

SCCA/217 (03/2011)

WITNESSES

Nick Bouknight
Newberry County Sheriff

WARRANT NUMBER

M481160

TRUE BILL

Marie M. Hickman

Foreman of the Grand Jury

Date: 3-16-12

VERDICT

Guilty

Elizabeth A. Hedgepeth

Foreman 10-31-14

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

COURT OF GENERAL SESSIONS

March Term, 2012

Indictment # 12GS36-0267

THE STATE

vs.

Toaby Alexander Trapp

INDICTMENT FOR

TRAFFICKING CRACK COCAINE
44-53-0375C

THE STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

INDICTMENT FOR

TRAFFICKING CRACK COCAINE
44-53-0375

At a Court of General Sessions, convened on the 16th day of March, 2012 the Grand Jurors of Newberry County present upon their oath:

That Toaby Alexander Trapp, did in Newberry County, state aforesaid, on or about the 8th day of October, 2011 willfully, unlawfully, and knowingly traffic in cocaine base (crack cocaine), to wit: that the said defendant(s) did sell, manufacture, deliver, purchase, or bring into this State, or provide financial assistance or otherwise aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was in actual or constructive possession or did knowingly attempt to become in actual or constructive possession of ten (10) grams or more of cocaine base (crack cocaine), in violation of Section 44-53-375 of the South Carolina Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the statute in such cases made and provided.

Solicitor