

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Maite Murphy, Circuit Court Judge

Case No. 2020-CP-10-00527

Dean Seagers,.....Petitioner,

vs.

State of South Carolina.....Respondent.

NOTICE OF APPEAL

Dean Nelson Seagers appeals the Order of Dismissal issued by the Honorable Maite
Murphy, filed February 20, 2024 and received by counsel on February 26, 2024.

March 1, 2024

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
Dean Seagers, #294406,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
IN THE NINTH JUDICIAL CIRCUIT

Case No.: 2020-CP-10-527

ORDER OF DISMISSAL

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This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Dean Seagers (Applicant) on January 28, 2020. Respondent made its return requesting an evidentiary hearing. An evidentiary hearing convened on October 19, 2023, before the Honorable Maite Murphy. Applicant was present and represented by Elizabeth Franklin-Best, Esquire. Assistant Attorney General Danielle Dixon represented Respondent. At the hearing, Applicant testified on his behalf and called as witnesses Moses Dennis and King Wilson. Respondent called as witnesses trial counsel Cameron Marshall, Esquire, and solicitors Stephanie Bianco Linder, Lauren Mulkey Frierson, and John Whit Sowards. Following a thorough review of the transcript and the testimony and evidence presented at the hearing, this Court finds Applicant did not meet his burden of proof. Thus, this Court denies relief and dismisses this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In November 2012, the Charleston County Grand Jury indicted Applicant for distribution of cocaine base (2012-GS-10-6779). On July 6-9, 2015, Applicant proceeded to a jury trial before the Honorable Kirsti L. Harrington. Cameron Marshall, Esquire, represented Applicant. Assistant Solicitors Whit Sowards and Lauren Frierson prosecuted the case. The jury

convicted Applicant as indicted, and Judge Harrington sentenced him to life pursuant to the recidivist statute.

Applicant filed a timely notice of appeal, which was perfected by Tara Dawn Shurling, Esquire. On appeal, Applicant argued the trial court erred in (1) allowing a detective to identify his voice when the State didn't lay a proper foundation and the detective was not a voice expert, and (2) charging accomplice liability. The Court of Appeals affirmed on the merits. Applicant filed a motion to reconsider, which was denied. Applicant filed a petition for a writ of certiorari in the South Carolina Supreme Court, which was granted on the issue of whether the court erred by charging accomplice liability. The petition was later dismissed as improvidently granted, and the remittitur was sent February 27, 2019.

BRIEF SUMMARY OF TRIAL TESTIMONY

At trial, Robert Drayton testified he worked as a confidential informant for Charleston Police Department, and he arranged to purchase drugs from a home on Ashton Street as part of a controlled buy on June 20, 2012. (Tr. 213). Drayton explained he stood outside while the drugs were lowered by a cup and string from a second-floor window. (Tr. 215-16). During his testimony, the following exchange occurred:

Q. And who did you buy drugs from that day?

A. Baby Dean.^[1]

Q. And did you personally see with your own eyes the man that you call Baby Dean that day?

A. Uh-huh.

Q. Where did you see him that day.

A. In the window.

¹ Drayton stated he knew Applicant by his nickname "Baby Dean." (Tr. 213).

....

Q. And did you see him lower the drugs to you?

A. No.

Q. Did you—

A. I just see the string come down.

Q. And just before you saw the string come down, did you see Baby in the window?

A. Afterward, but—I didn't see who lowered down the string.

Q. Okay.

A. Because there was three people in the house. It was some other people in the house.

Q. Okay. And—but you saw Baby afterwards?

A. (Nods head.)

(Tr. 216-17). Drayton clarified he called Applicant to arrange the purchase. (Tr. 217-18). On cross-examination, Drayton agreed he did not know who lowered the drugs. (Tr. 223). He further agreed he saw Applicant in the window after the drugs were lowered, but it “was a glimpse seeing.” (Tr. 224).

The State also presented testimony that law enforcement recovered a cup and a phone from the Ashton Street home when Applicant was arrested.² (Tr. 277-79, 323-24). The phone utilized the same number that Drayton called on June 20 to arrange the buy; that number was saved in Drayton's phone as “Baby.” (Tr. 270-72, 397). Finally, Detective Charles Grill testified over objection that he was familiar with Applicant's voice, and he recognized Applicant's voice in the

² The cup and phone were recovered during the execution of a search warrant on the Ashton Street home on August 29, 2012. Counsel moved pretrial to suppress evidence found during the search of the Ashton home.

live-wire recording and video of the controlled buy.³ (Tr. 165-69).

CURRENT APPLICATION

On January 28, 2020, Applicant timely filed this PCR application alleging he is being held in custody unlawfully for the following reasons:

- a. Appellate counsel was ineffective for failing to raise issues concerning the arrest warrant that contained false information.
- b. Alternately, trial counsel was ineffective for failing to properly move to suppress any evidence obtained because of the arrest warrant that contained false information.
- c. Appellate counsel was ineffective for failing to raise issues concerning the arrest warrant that contained false information.
- d. Alternately, trial counsel was ineffective for failing to properly argue the search of the phone exceeded the authority of the search warrant.
- e. Trial counsel was ineffective for failing to properly argue Charles Grill should not have been qualified as an expert in narcotics investigations.
- f. Trial counsel was ineffective for failing to properly argue Charles Grill's opinions exceeded the scope of those which should have been testified to by a lay witness or an expert in narcotics investigation.
- g. Applicant's sentence violates the eighth amendment.
- h. Trial counsel was ineffective for failing to properly object to the notice for life without parole and sentence.
- i. Trial counsel was ineffective for failing to object to prior conversations between Grills and Applicant as a violation of Rule 5, SCRCrimP.

³ This video, which was recorded from a camera worn by Drayton, was entered into evidence.

- j. Applicant was denied his right to due process when the state failed to provide all impeachment information concerning the confidential informant.

Respondent filed a return requesting an evidentiary hearing.

On March 14, 2022, Applicant amended his application to allege:

(a). Ineffective assistance of trial counsel:

- (i) Counsel failed to object to the States' admission of multiple instances of inadmissible hearsay.
- (ii) Counsel failed to properly object and preserve the claim that he was improperly denied the right to cross-examine law enforcement about the discrepancies in the funds for confidential informants since this fact related to the integrity of the investigation.
- (iii) Counsel failed to object to the State's introduction of improper character evidence, or 404(b) evidence.
- (iv) Counsel failed to argue that the search of Applicant's cell phone exceeded the authority of the search warrant.
- (v) Counsel failed to argue that the State's expert witness Charles Grill should not have been qualified as an expert in narcotics investigations.
- (vi) Counsel failed to properly argue that Grill's opinions exceeded the scope of those that should have been testified to by a lay witness or an expert in narcotics investigation.
- (vii) Counsel failed to object to Grill's improper vouching of the confidential informant.
- (viii) Counsel failed to object to the entry into evidence of prior conversations between Grills and Application, in violation of Rule 5, SCRCrimP.
- (ix) Counsel failed to move for a mistrial when the CI testified he received a threatening phone call on the morning of his trial testimony and testifying that was

why he changed his testimony.

- (x) Counsel failed to correct Applicant's criminal record, which did not involve federal conviction for guns or drugs. Instead Applicant pled guilty by information to keeping a stash house, a federal crime that carries a maximum sentence of twenty years in prison and therefore cannot be used to enhance Applicant's sentence to life without parole.
- (b) Violation of Applicant's Eighth Amendment Rights: Applicant's Eighth Amendment rights were violated when the Court imposed a life sentence pursuant to the three-strike rule when one of the strikes used by the prosecution to obtain this sentence was a charge that had previously been dismissed in court.
- (c) Violation of Applicant's statutory rights: Applicant was sentenced under the three-strikes law without the trial court or Solicitor's office obtaining certified copies of Applicant's prior convictions which it alleges subjects him to that penalty.
- (d) Ineffective Assistance of Appellate Counsel: Appellate counsel failed to raise the claim that the search and arrest warrants were defective when there was no indication the office supplied information to the magistrate regarding the reliability of the confidential informant.

On June 22, 2023, Applicant filed a Second Amended Application raising the following:

1. Applicant was denied his right to a speedy trial.
2. Trial counsel was ineffective for failing to communicate a plea offer.
3. Trial counsel was ineffective for failing to object to the State's improper vouching during closing argument.
4. The State failed to comply with its own internal policies regarding its use of confidential informants. Trial counsel should have objected.
5. Trial counsel was ineffective by failing to object to the presence of the initial solicitor, Stephanie Bianca, in the courtroom.

6. Detective Burke improperly failed to disclose written notes regarding the case that were kept on his hard drive.
7. Trial counsel was ineffective in failing to object to the State modifying its theory from a hand-to-hand transaction to hand-of-one-hand-of-all.

On August 9, 2023, Applicant filed a Third Amended Application raising the following:

1. Applicant alleges he did not have the opportunity to confront witnesses against him as it relates to the chain of custody of the evidence bag for the drugs Applicant never saw until trial.
2. Applicant alleges the solicitor used false evidence against him during opening and closing arguments as it relates to the cup and phone found on August 29.
3. Applicant alleges the solicitor made derogatory remarks about him during closing arguments, referring to him as a Trap King and how good he was at running a drug operation.
4. Applicant alleges jury misconduct.

At the evidentiary hearing, Applicant proceeded on the allegations of his Amended Applicant, his Second Amended Application, and his Third Amended Application. Applicant also alleged counsel should have called as a witness Dennis Moses. Applicant, however, waived his claim related to ineffective assistance of appellate counsel (allegation (d) of his first amended application). This Court finds Applicant did not present any evidence or argument to support allegation (d) of his first amended application and thus waived this claim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the plea transcript in its entirety and has heard the testimony at the PCR hearing. This Court has further had the opportunity to observe the

witnesses presented at the hearing, closely pass upon their credibility, and weigh their testimony.⁴ After a careful review based on the Strickland standard set forth below, this Court finds Applicant has failed to carry his burden of proof. Below are this Court's findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code (2017).

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 684 (1984); Lomax v. State, 379 S.C. 93, 100, 665 S.E.2d 164, 167 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. (quoting Strickland, 466 U.S. at 686).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. 466 U.S. at 687. First, an applicant must prove counsel's performance was deficient. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (quoting Strickland, 466 U.S. at 688). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688). The proper measure of performance is whether an attorney "provided representation within the range of competence required of attorneys 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

⁴ This Court will reference PCR testimony where relevant below.

judgment.” *Id.* (quoting *Strickland*, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, a PCR applicant must prove that counsel’s deficient performance prejudiced the applicant such that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625.

*Failed to object to hearsay*⁵

Applicant contends counsel was ineffective for not objecting to multiple instances of inadmissible hearsay. This Court finds Applicant did not prove this ground. Initially, this Court finds credible counsel’s PCR testimony that he saved his objections for the strongest issues because the trial court had overruled almost every objection he made while sustaining almost all of the State’s objections. Thus, to the extent any hearsay was not material to the outcome, this Court finds counsel articulated a valid reason for not objecting and was not deficient. More critically, however, Applicant did not point to any specific instances of hearsay he believed counsel should have objected to at the evidentiary hearing or in his application and amended applications. Thus, he did not meet his burden of proving deficiency or prejudice, and this claim is denied.

*Improperly denied right to cross-examine law enforcement*⁶

Applicant contends counsel was ineffective for failing to object to and properly preserve the claim that he was improperly denied the right to cross-examine law enforcement about discrepancies in the funds for confidential informants (CI) since this fact related to the integrity of the investigation. This Court finds Applicant did not prove this ground.

At trial, the following exchange occurred during the cross-examination of Investigator

⁵ This section addresses allegation (a)(i) of the amended application.

⁶ This section addresses allegation (a)(ii) of the amended application.

Michael Burke:

Q: Let's talk for a minute about the handling of funds that are used to pay CIs. And you're—you're familiar, I assume, correct me if I'm wrong, you're very familiar with the policies and procedures that govern the handling of these funds at CPD; is that correct?

A. Yes, sir.

Q. Are you aware of there ever having been issues at City of Charleston Police Department with those funds being improperly handled?

A. I do know that there's an audit and that is done to ensure that there is no problems on the books, but as far as personal knowledge of the books being messed up on the audit, no, I have no knowledge of that. I know an audit's done fairly frequently to ensure that there's no mistakes.

Q. Are you aware that a May 2015–2014 audit found no fewer than seven errors in the handling of those funds?

Mr. Sowards: Objection, Your Honor.

The Court: All right. Counsel approach.

(proceeding held at bench; not reported.)

The Court: I'm gonna sustain that objection, Mr. Sowards. This witness has not been qualified in that area and he indicates he has no basis of knowledge. You may—

Mr. Marshall: Thank you.

The Court: —move on.

(Tr. 308-09).

Here, the State made a valid objection—that Investigator Burke lacked knowledge of the alleged audit—and the Court sustained the objection. This Court finds that the trial court sustaining a proper objection did not deny Applicant the right to cross-examine Investigator Burke; thus, counsel was not deficient for not raising this argument, and it is not reasonably likely any objection would have led to the trial court allowing counsel to further question Investigator Burke about an

audit he did not have knowledge of. Additionally, Applicant did not offer any testimony or argument at the PCR hearing regarding what more counsel should have done to enter this alleged information; thus, Applicant did not prove deficiency. Likewise—and critically—Applicant did not offer any evidence or testimony at the PCR hearing about this alleged audit, leaving this court to speculate about whether any evidence in fact existed. Applicant thus did not meet his burden of proving prejudice from counsel’s handling of this issue, and this claim is denied.

*Failed to object, move for mistrial – Improper character evidence*⁷

Applicant contends counsel was ineffective for not objecting to the State’s introduction of improper character evidence under Rule 404(b), SCRE. He further asserts counsel was ineffective for failing to move for a mistrial when the CI testified he received a threatening call the morning of his testimony, which caused him to change his testimony. This Court finds Applicant did not prove counsel was ineffective in this regard.

During Drayton’s cross-examination, he testified:

A. I remember what I told you here this morning.

Q. Okay. Well, what is it that you said about whether or not anyone, and in particular, Mr. Seagers, sold you any drugs on June 20th of 2012?

A. Okay. Let me clarify that. The reason why I said that this morning because I got a threatening phone call, okay, and they threatened my family.

(Tr. 228). Trial counsel objected, and a bench conference was held. (Tr. 229). Thereafter, the following exchange occurred:

Q. Well, let’s talk about it. . . . [T]his was elicited from you on direct, that—did you say something in court earlier today that was not true while you were under oath?

⁷ This section addresses allegation (a)(iii) and (a)(ix) of the amended application.

A. What was your question?

Q. Well, that's my—

A. It's confusing. You got me confused.

Q. That's—okay. That's my current question. Well, first of all, I'd ask you what is it that you said earlier and you really didn't tell us, but you said that you were scared because you believe a threat had been issued.

A. I got a threatening phone call on my phone this morning.

Q. Okay. Well, not from Dean Seagers, correct?

A. No.

Q. Okay. So what is it that you testified to under oath right in that chair earlier today regarding whether or not you bought drugs on the 20th and whether or not you got drugs from Dean Seagers?

....

A. You asked me . . . what did I did on June the 20th—

Q. Uh-huh.

A. —and I said I did all sorts of things on June the 20th.

....

A. And you asked me something else about Dean and I told you “no” because I was afraid at the moment, you know. I got a threatening phone call.

Q. Okay. So earlier you had said that you didn't get any drugs from Dean, but really if—if I'm understanding you correctly, that's not any different than what you're saying right here this evening, is it? Because you just said it on direct and said it talking to me that you don't know whether Dean Seagers delivered any drugs to your or not; am I correct?

A. You're right.

(Tr. 229-31). At the PCR hearing, Applicant generally testified counsel should have objected to

testimony regarding threats. At the end of trial, Applicant argued this testimony about threats should have been objected to because it improperly interjected 404(b) character evidence into the trial.

This Court finds Applicant did not prove deficiency or prejudice based on counsel's failure to object or move for a mistrial based on Rule 404(b). Pertinently, Drayton clarified the threat did not come from Applicant. Thus, this testimony did not constitute improper 404(b) evidence.⁸ Likewise, Applicant did not prove prejudice from counsel's failure to move for a mistrial. See Earley v. State, 418 S.C. 255, 266, 792 S.E.2d 226, 232 (2016) ("To prove prejudice resulting from counsel's failure to move for a mistrial, an applicant must demonstrate that, had counsel moved for a mistrial, the trial court's denial of the motion would have amounted to an abuse of discretion."). Applicant did not set forth any other basis of objecting or moving for a mistrial and thus failed to meet his burden of proving deficiency or prejudice. This claim is denied.

*Search of cell phone*⁹

Applicant asserts counsel was ineffective for not arguing the search of his cell phone exceeded the authority of the search warrant. This Court finds Applicant did not prove this claim.

Following the controlled buy that was the subject of this trial, law enforcement obtained a search warrant for the Ashton home. (Tr. 105). After executing the warrant, law enforcement recovered eight cell phones and a plastic jar or cup that was used to distribute drugs. One of the phones recovered was the number that the CI had dialed to arrange the June 20 controlled buy, and the CI had identified that number in his phone as "Baby."¹⁰ (Tr. 105-09).

⁸ "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b), SCRE.

⁹ This section addresses allegation (a)(iv) of the amended application.

¹⁰ Testimony at trial established Applicant's nickname was "Baby."

At trial, counsel moved to suppress evidence seized during a search of the Ashton home, first contending the supporting affidavit was insufficient. (Tr. 85-104). Next, counsel asserted Applicant was merely present during the August 29 search, and no evidence other than a screenshot of the CI's phone identifying the number as "Baby" linked Applicant to the recovered cell phone. (Tr. 105). Finally, counsel objected to the search of the cell phone's data. (Tr. 108-09). The Court indicated that although the State could introduce the cell phone itself as evidence recovered from the search of the home, she would need to review the warrant to see if the phone's data was admissible. (Tr. 111). After reviewing Riley v. California, 573 U.S. 373 (2014),¹¹ the court concluded the search warrant was sufficient to search the phone's data. (Tr. 112). At trial, an expert in digital forensics testified to the cell phone's number. However, he was unable to extract any other data from the phone. (Tr. 397-98).

This Court finds counsel *did* raise this issue to the trial court and thus was not deficient. Applicant did not set forth at the PCR hearing what more counsel should have argued on this issue and thus did not prove deficiency. Further, Applicant did not prove prejudice. Initially, the trial court considered this issue and concluded the contents of the phone were admissible, and Applicant did not set forth at the PCR hearing any additional argument that would have likely changed the trial court's decision. Likewise, Applicant did not enter into evidence the warrant itself—leaving this Court to merely speculate about the sufficiency of the warrant and the likelihood that further argument would have changed the outcome. Finally, the only evidence obtained from the phone was the number itself, which merely provided additional circumstantial evidence for the State to link Application to the number the CI called when arranging this buy. This Court finds the State

¹¹ Although the transcript references Bradley v. California, this Court has been unable to find a case entitled Bradley v. California that addresses this issue. Because Riley v. California directly addresses the issue that the Court was considering, this Court finds the reference to Bradley v. California is a scrivener's error.

introduced other evidence to prove Applicant's guilt—including the CI's testimony that he contacted Applicant to arrange the purchase and the CI's phone that had the number identified as "Baby"—such that it is not reasonably the outcome would have been different had the contents of this phone been suppressed. Applicant thus did not prove deficiency or prejudice, and this claim is denied.

*Failed to object to qualification of Charles Grill*¹²

Applicant alleges counsel was ineffective for not objecting to the qualification of Charles Grill as an expert in narcotics investigations. This Court finds Applicant did not prove counsel was ineffective in this regard.

In State v. Robinson, 396 S.C. 577, 722 S.E.2d 820 (2012), *affirmed as modified on other grounds*, the South Carolina Court of Appeals concluded the trial court did not err in qualifying as an expert a narcotics officer with thirty years of experience in narcotics enforcement who had been involved in hundreds of crack cocaine cases. Pertinently, the Court found the method of packaging and selling crack cocaine "is information not commonly known to the average juror." *Id.* at 588, 722 S.E.2d at 825–26.

This Court finds counsel's failure to object to Grill's qualification as an expert was not deficient. Pertinently, Grill testified he had been a member of the Drug Enforcement Agency Task Force since July 2009 and had received specialized training in drug enforcement, drug crimes, undercover techniques, DEA investigations, money laundering, and wiretap investigations. (Tr. 132-39). This Court finds the foregoing sufficient for Grill to be qualified as an expert in narcotics investigations. Likewise, this Court finds Grill's testimony regarding developing informants, controlled purchases, and the use of "trap" or "stash" houses by drug dealers is information not

¹² This section addresses allegation (a)(v) of the amended application.

commonly known to the average juror. (Tr. 139-60). At the PCR hearing, Solicitor Frierson credibly testified the method of distribution here—a pulley system—was somewhat unique, and they qualified Grill as an expert to help the jury “understand the complexities of the drug game” and the use of trap or stash houses by drug dealers. This Court finds such testimony was relevant here where the evidence showed no one (including Applicant) lived in the house. (Tr. 303). Ultimately, Applicant did not set forth a valid argument counsel should have made and did not prove deficiency. Likewise, Applicant did not set forth an argument that would have reasonably excluded this expert testimony and did not prove prejudice. Thus, this claim is denied.

*Failed to object to testimony outside Grill's expertise*¹³

Applicant contends counsel was ineffective for failing to argue that Grill's opinions exceeded the scope of those which should have been testified to by a lay witness or an expert in narcotics investigation. In his application, Applicant did not set forth *what* portion of Grill's testimony counsel should have argued exceeded the scope of his expertise. At the PCR hearing, Applicant's testimony regarding Grill focused on Applicant's belief that Grill was lying when Grill testified he knew Applicant and recognized his voice. To the extent Applicant is alleging counsel was ineffective for failing to object to Grill's testimony as voice identification expert testimony, counsel *did* in fact raise this objection to the trial court. (Tr. 165-67). Thus, Applicant did not prove deficiency. Likewise, Applicant did not set forth what more counsel should have argued that would have reasonably changed this ruling—especially when Grill testified he had conversations with Applicant prior to the day of the controlled purchase and recognized his voice on the live wire and video of the controlled drug buy. (Tr. 168-69). “[A] witness' testimony of identification of a person by having heard his voice has been regarded as legitimate and competent evidence to establish

¹³ This section addresses allegation (a)(vi) of the amended application.

identity in criminal cases.” State v. Smith, 307 S.C. 376, 386, 415 S.E.2d 409, 415 (Ct. App. 1992)) (finding court did not err in allowing 911 dispatcher to testify she recognized defendant’s voice when he came into the office as the person who had called in anonymously earlier that day). Applicant thus did not prove prejudice. Applicant did not set forth any other portion of Grill’s testimony that he believed exceeded the scope of Grill’s expertise as a narcotics investigator. Thus, he did not prove deficiency or prejudice, and this claim is denied.

*Failed to object to improper vouching*¹⁴

Applicant asserts counsel was ineffective for failing to object to Grill’s improper vouching of Drayton, the CI. This Court finds Applicant did not prove this claim.

In the amended application, Applicant does not set forth what portion of Grill’s testimony he believed constituted improper vouching of Drayton. At the PCR hearing, when questioned about improper vouching, Applicant first asserted the State improperly relied on a cup, a phone, a gray car, and Grill’s voice identification, which he did not believe should have been admitted.¹⁵ He maintained he had never spoken to Grill. Regarding Drayton, Applicant stated, “[Grill] said he recognized my voice from being in the backyard talking to the CI, when the CI claims he stated he never talked to me. So if the CI never talked to me, how could he hear my voice through a window?” Applicant further testified,

And then [Grill] said, he learned—he heard my voice in the backyard while I was talking to the CI through the back window, but the CI said he never talked to me. And the CI said, he wasn’t even sure if that was me in the window, because all he got is a glimpse. So with the CI saying that—and the CI ain’t sure he talked to me, and the CI is supposed to know me, which the CI don’t know me, how can the CI not recognize me or know my voice, but Grill recognized me or know my voice. And we never talked.

¹⁴ This section addresses allegation (a)(vii) of the amended application.

¹⁵ The allegation related to the cup, phone, and car are addressed in a subsequent section.

This Court finds the foregoing does not constitute improper vouching of the Drayton by Grill. To the extent Grill's testimony *corroborated* Drayton's testimony that Drayton contacted Applicant to arrange the buy, that does not constitute improper vouching. See Chappell v. State, 429 S.C. 68, 75, 837 S.E.2d 496, 499–500 (Ct. App. 2019) (“Improper bolstering is testimony that indicates the witness believes the victim, but does not serve some other valid purpose.” (internal quotation marks omitted)). Applicant has not pointed to any other portion of Grill's testimony that he avers constituted improper vouching and thus did not meet his burden of proving deficiency or prejudice. Thus, this claim is denied.

*Failed to raise Rule 5 objection*¹⁶

Applicant contends counsel was ineffective for failing to object to evidence of prior conversations between Grills and Applicant, in violation of Rule 5 of the South Carolina Rules of Criminal Procedure. This Court finds Applicant did not prove this claim.

Upon request by a defendant, the prosecution shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the prosecution, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the prosecution; the substance of any oral statement which the prosecution intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a prosecution agent.”

Rule 5(a)(1)(A), SCRCrimP.

Initially, this Court finds credible Solicitor Linder's testimony that she disclosed all Rule 5 evidence to the defense. Further, this Court finds Grill did not offer any testimony as to the *substance* of his prior conversations with Applicant; thus, this voice identification testimony did

¹⁶ This section addresses allegation (a)(viii) of the amended application.

not constitute Rule 5 evidence. See id. Applicant has not pointed to any Rule 5 evidence the State did not disclose and thus did not prove counsel was deficient for not raising a Rule 5 objection.

Finally, Applicant did not prove prejudice from counsel's failure to raise a Rule 5 objection to the voice identification testimony. Specifically, it is not reasonably likely an objection would have led to a mistrial or dismissal of charges; at most, it would have led to counsel having additional time to consider the evidence. See Earley, 418 S.C. at 272, 792 S.E.2d at 235 (“Turning to the issue of whether a mistrial would have been required to redress the Rule 5 violation, we find the prejudice attributable to the State's nondisclosure to be incremental under the facts of this case and would not have compelled the trial court to declare a mistrial. Had counsel brought the nondisclosure to the trial court's attention, it would have been within the trial court's discretion to determine the appropriate redress, if any. Moreover, there is no evidence the State withheld Respondent's Facebook posting in bad faith or that the nondisclosure could not have been cured by other, less drastic means, such as a brief recess or a curative instruction. Accordingly, it was error for the PCR court to conclude a mistrial would have been manifestly necessary had trial counsel so moved.”). Applicant has not shown this nondisclosure would have compelled the court to declare a mistrial. Likewise, he has not shown how additional time would have aided counsel in further attacking this evidence—especially when counsel effectively cross-examined Grill about his voice-identification testimony. (Tr. 171-73). Ultimately Applicant did not prove deficiency or prejudice, and this claim is denied.

*Failed to object to LWOP notice*¹⁷

Applicant contends counsel was ineffective for failing to correct Applicant's criminal record, which did not involve federal convictions for guns or drugs. He asserts he pled guilty by

¹⁷ Due to an overlap in testimony, this section combines allegation (a)(x) and (c) of the amended application.

information to keeping a stash house, a federal crime that carries a maximum sentence of twenty years in prison and therefore cannot be used to enhance Applicant's sentence to life without parole. Applicant further asserts his statutory rights were violated because the trial court or solicitor's office did not obtain certified copies of his prior convictions that were used for enhancement. This Court finds Applicant did not prove this claim.

In PCR actions, the applicant bears the burden of proof. Butler, 286 S.C. at 442, 334 S.E.2d at 814. Likewise, due to the presumption of regularity that attaches to final judgements, "the defendant bears the burden of proof when collaterally attacking a prior conviction which the State seeks to use under a sentence enhancement statute." State v. Payne, 332 S.C. 266, 272, 504 S.E.2d 335, 338 (Ct. App. 1998).

Section 17-25-45 of the South Carolina Code provides:

(B) Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without the possibility of parole if that person has two or more prior convictions for:

- (1) a serious offense;
- (2) a most serious offense;
- (3) a federal or out-of-state offense that would be classified as a serious offense or most serious offense under this section; or
- (4) any combination of the offenses listed in items (1), (2), and (3) above.

"'Serious offense' means: (a) any offense which is punishable by a maximum term of imprisonment for thirty years or more which is not referenced in subsection (C)(1)." § 17-25-45(C)(2). Subsection 17-25-45(C) further enumerates specific crimes that constitute serious and most serious offenses.

“Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given to the defendant and defendants’ counsel not less than ten days before trial.” § 17-25-45(H).

The purpose of § 17-25-45(H) is to assure that a defendant and his counsel have actual notice that the State is seeking a sentence under the recidivist statute at least ten days prior to trial. Accordingly, so long as the defendant and his counsel, at least ten days prior to trial, possess actual notice of the State's intention to seek a sentence under South Carolina's recidivist statute, the statute has been satisfied.

James v. State, 372 S.C. 287, 294–95, 641 S.E.2d 899, 903 (2007).

The solicitor provided written notice of her intent to seek life without parole.

At the PCR hearing, Applicant asserted counsel was ineffective for not challenging the LWOP sentence. Specifically, Applicant contended he did not receive written notice of the State’s intent to seek LWOP, as required by section 17-25-45(H) of the South Carolina Code. However, Respondent entered as State’s Exhibit 2 a Notice of Intention to Seek Sentence of LWOP, dated June 20, 2013. Respondent also entered as part of State’s Exhibit 2 two Acknowledgements of Service of Notice of Intention to Seek Sentence of LWOP; trial counsel Cameron Marshall signed one of the forms and Applicant signed the other.¹⁸ Both forms were signed June 27, 2013. Applicant’s trial began July 6, 2015. Based on the foregoing, the solicitor provided written notice of intent to seek LWOP to both Applicant and counsel more than ten days before trial and thus complied with section 17-25-45. Thus, Applicant did not prove counsel was ineffective for not raising this issue.

Applicant had sufficient prior serious offenses for an LWOP sentence.

Throughout the PCR hearing, Applicant alleged the LWOP sentence was improper because

¹⁸ This Court finds not credible Applicant’s testimony that he did not sign the acknowledgement form.

it was based on a federal crime that could not be used as a qualifying offense. However, the State did not rely on any federal crime in seeking LWOP. The Notice of Intent to Seek LWOP, which was provided to both Applicant and trial counsel on June 27, 2013, sets forth the following qualifying State convictions:

1. Possession of Cocaine with Intent to Distribute within Proximity of Schools - § 44-54-445 (97-GS-10-6620);¹⁹
2. Trafficking Cocaine 10-28 g. – (44-53 375 (2002-GS-10-6222));²⁰
3. Trafficking Cocaine 10-28 g. (2003-GS-10-1647);²¹ and
4. Trafficking Cocaine 10-28 g. (2003-GS-10-1648).²²

At the PCR hearing, Respondent entered sentencing sheets to support these prior convictions. See State’s Exhibit 1. Applicant did not enter any evidence showing these convictions were constitutionally defective or otherwise invalid. Thus, Applicant did not meet his burden. See Payne, 332 S.C. at 272, 504 S.E.2d at 338 (“[C]onsidering the presumption of regularity given to final judgments, . . . the defendant bears the burden of proof when collaterally attacking a prior conviction which the State seeks to use under a sentence enhancement statute.”).

Additionally, each of these convictions constituted a serious offense under section 17-27-45(2)(b). Finally, the charge Applicant was convicted of (Distribution of Cocaine Base, § 44-53-375) was a serious offense because it was Applicant’s second or subsequent drug offense and thus carried a maximum sentence of thirty years.²³ See § 17-25-45(2)(a) (“‘Serious offense’

¹⁹ Offense date September 21, 1997.

²⁰ Offense date June 19, 2002.

²¹ Offense date November 19, 2002.

²² Offense date November 19, 2002.

²³ Although not raised by Applicant in his application, amended applications, or at the PCR hearing (and thus not developed by testimony *or* argument at the hearing), the sentencing sheet contains what appears to be a scrivener’s error. Specifically, in classifying the offense, it cites to section 44-53-375(B)(1). However, the indictment itself is broader in that it cites to section 44-53-375 in its entirety. Ultimately, this was clearly *not* Applicant’s first offense, as shown by the sentencing sheets entered at the PCR hearing of his *seven* prior drug convictions in State court alone—

means: (a) any offense which is punishable by a maximum term of imprisonment for thirty years or more”); § 44-53-375 (providing the penalty for a second offense of distribution of cocaine base is “not less than five years nor more than thirty years”); S.C. Code Ann. § 44-53-470(A)(3), (4) (“An offense is considered a second or subsequent offense if . . . the offender has at any time been convicted of a second or subsequent violation of a controlled substance offense” or has been “convicted within the previous ten years of a first violation of a controlled substance offense provision”).²⁴ Based on the foregoing, Applicant did not prove deficiency or prejudice from counsel’s failure to raise this issue, and this claim is denied.

*Eighth Amendment violation*²⁵

Applicant contends his Eighth Amendment rights were violated when the court imposed a life sentence pursuant to the three-strike rule when one of the strikes used by the prosecution to obtain the sentence was a charge that had previously been dismissed. This Court finds Applicant did not prove this claim.

Initially, as set forth above, the State set forth the prior offenses used to enhance these sentences, and based upon the sentencing sheets entered at the PCR hearing, the State did *not* rely on a dismissed charge for enhancement. Thus, this allegation is patently without merit.

Further, this Court finds the sentence was not disproportionate and did not violate the Eighth Amendment. At the PCR hearing, Applicant (through counsel) repeatedly averred he was sentenced to life for “merely” two grams of crack-cocaine. However, the life sentence itself was

not including the federal convictions he testified about. (97-GS-10-6620; 2002-GS-10-6222; 2002-GS-10-6223; 2003-GS-10-1647; 2003-GS-10-1648; 2003-GS-10-1650; 2003-GS-10-1651).

²⁴ See also § 44-53-470(C) (If a person is sentenced to confinement as the result of a conviction pursuant to this article, the time period specified in this section begins on the date of the conviction *or on the date the person is released from confinement imposed for the conviction, whichever is later.*” (emphasis added)). According to Applicant’s records from the South Carolina Department of Corrections, which were attached to Respondent’s return and before the PCR court, Applicant was released from his prior incarceration on July 1, 2004. The incident from which this charge arose occurred June 20, 2012—less than ten years after Applicant’s release from confinement for his prior drug convictions.

²⁵ This section addresses allegation (b) of the amended application.

imposed due to Applicant's chronic recidivism. Due to his multiple, prior convictions for drug offenses, the sentence did not violate the Eight Amendment.

South Carolina courts have "determined stiff penalties for drug crimes do not violate the constitutional prohibition against cruel and unusual punishment." State v. Williams, 380 S.C. 336, 347–48, 669 S.E.2d 640, 646 (Ct. App. 2008). "[T]he United States Supreme Court has also held a state is justified in punishing a recidivist more severely than it does a first offender." Id. at 348, 669 S.E.2d at 647 (citing Riggs v. California, 525 U.S. 1114 (1999)). "Under recidivist sentencing schemes, the enhanced punishment imposed for a present offense is not to be viewed as an additional penalty for the earlier crimes, but instead as a stiffened penalty for the latest crime, which is considered to be an aggravated offense because it is a repetitive one." Id. (citing Riggs, 525 U.S. 1114).

In Williams, our Court of Appeals found an LWOP sentence imposed for a conviction of *less than half a gram* of cocaine did not violate the Eighth Amendment. There, the defendant argued the LWOP sentence was grossly disproportionate when (1) the defendant was convicted for distribution of less than half a gram of cocaine and (2) he committed the prior LWOP-qualifying offense as a juvenile. After examining the Eighth Amendment precedent, the Court concluded the sentence did not violate the Eighth Amendment.

Under Williams, Applicant's sentence did not violate the Eighth Amendment—especially when Applicant was convicted of distributing *more than* the amount of drugs at issue in Williams. Ultimately, Applicant was punished more severely due to his chronic recidivism, and his sentence did not violate the Eighth Amendment. Thus, this claim is denied.

*Speedy trial*²⁶

Applicant contends he was denied his right to a speedy trial. At the PCR hearing, Applicant testified the Court had ordered a trial following a March 5, 2014²⁷ hearing, but the solicitor said she did not have records or proper forms. He testified trial counsel never moved to dismiss based on a speedy trial violation, and the trial court questioned counsel about why he did not move for a speedy trial. This Court finds Applicant did not prove this claim.

“The United States Supreme Court has identified four factors to consider in determining whether a criminal defendant's right to a speedy trial has been violated: (1) length of the delay; (2) reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant.” State v. Reaves, 414 S.C. 118, 129, 777 S.E.2d 213, 219 (2015). “[T]he determination that a defendant has been deprived of this right is not based on the passage of a specific period of time, but instead is analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense.” Id. at 129–30, 777 S.E.2d at 219 (quoting State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007)).

Applicant's primary contention is that counsel did not move to dismiss based on a speedy trial violation. This contention, however, is incorrect. Prior to trial, counsel *did* move to dismiss based on a speedy trial violation, and he relayed he had filed a speedy trial motion in March 2014.²⁸ (Tr. 7,16). The parties agreed the case had appeared on the trial roster in February 2015, but the court agreed not to call the case because trial counsel had a federal trial that week. (Tr. 8-9, 11). The Court questioned trial counsel and the solicitor regarding the four factors considered when determining whether a defendant's right to a speedy trial has been violated. (Tr. 7-18). Ultimately,

²⁶ This section addresses allegation (1) of the second amended application.

²⁷ Applicant did not testify to the year, but at trial, trial counsel told the court he had appeared before Judge Young on March 5, 2014.

²⁸ According to the public index, the motion was filed March 24, 2014.

the Court denied the motion. (Tr. 18). This Court finds Applicant did not set forth what additional argument counsel should have made (other than to move for dismissal, which counsel did) and thus did not meet his burden of proving deficiency or prejudice. Thus, this claim is denied.

*Failed to communicate plea offer*²⁹

Applicant contends counsel was ineffective for not communicating a plea offer that was extended by the State. This Court finds Applicant did not prove this claim.

At the PCR hearing, Applicant testified he did not know a plea had been offered until after trial. He claimed that after he was convicted, trial counsel told him there had been a seven-to-ten-year plea offer on the table, but he did not believe Applicant would have taken it.

In contrast, trial counsel testified he met with the judge and the solicitor the morning of trial and discussed a plea to a seventeen-to-twenty-year range. He testified he would have relayed any offer to Applicant as part of his general practice. Counsel testified Applicant did not want to plead guilty. Solicitor Linder testified that, in April 2013, she offered a plea to second offense and she informed trial counsel that, if Applicant did not accept it, she would serve LWOP. Linder stated that according to her notes, Applicant appeared before Judge Young on June 27, 2013, and rejected the plea offer. Linder stated Applicant signed the acknowledgement of receipt of LWOP notice that day (this was entered as State's Exhibit 2).

This Court finds Applicant's testimony that he was not aware of a plea offer until after trial not credible. Likewise, this Court finds credible both counsel and Linder's foregoing testimony about the offers. Based on this testimony, Applicant rejected a plea offer on the record in April 2013 and likewise did not want to accept a plea offer to seventeen-to-twenty years the morning of trial. This Court finds Applicant did not prove counsel was deficient for not relaying a plea offer.

²⁹ This section addresses allegation (2) of the second amended application.

Likewise, based on counsel and Linder's credible testimony, this Court finds Applicant did not prove he would have accepted this offer but for any alleged deficiency. Thus, this claim is denied.

*Failed to object – improper vouching during closing and false evidence*³⁰

Applicant contends the solicitor used false evidence against him during opening and closing argument as it relates to the cup and phone found during the execution of a search warrant on August 29. He likewise contends counsel was ineffective for not objecting to the State's improper vouching during closing argument. This Court finds Applicant did not prove this claim.

Initially, this Court finds the cup and phone were not false evidence; rather, the State properly introduced them as evidence found during a search of the Ashton home. Notably, counsel moved to suppress this evidence pretrial based on an allegedly deficient warrant affidavit and Applicant's "mere presence" at the Ashton home, but his objections were overruled. (Tr. 85-114). Applicant has not set forth any other valid argument counsel should have raised against the admissibility of the cup and phone and thus did not prove deficiency or prejudice in this regard.³¹

Further, in his amended applications, Applicant did not set forth what portion of the State's closing argument he believed constituted improper vouching. At the PCR hearing, when questioned about improper vouching, Applicant asserted the State improperly relied on a cup, a phone, and a gray car during closing argument. The State's reliance on this properly admitted evidence did not constitute improper vouching during closing. Applicant has not met his burden

³⁰ Due to an overlap in the testimony, this section addresses allegation (3) of the second amended application and allegation (2) of the third amended application.

³¹ Applicant also referenced testimony about a gray car at the PCR hearing. At trial, Investigator Grill testified he surveyed the area where the controlled purchase would occur and saw a gray Dodge Charger that "we knew that the Defendant was driving" near the Ashton Street home. Counsel cross-examined Investigator Grill about why he did not mention the gray car in his report. Later, trial counsel cross-examined Investigator Burk about whether he was aware of the gray Dodge Charger; Investigator Burke testified Applicant did not own that car and he did not consider it relevant to the investigation. (Tr. 312-13). During closing, Counsel referenced the gray car and Investigator Grill's failure to document it when attacking Grill's credibility. (Tr. 437-38). This Court finds Applicant did not prove counsel was ineffective in handling evidence about the gray car.

of proving deficiency or prejudice from counsel's failure to object to the State's closing argument on the basis of improper vouching, and this claim is denied.

*Internal policies*³²

Applicant contends counsel was ineffective for not objecting to the State failing to comply with its own internal policies regarding its use of CIs. Applicant did not prove this claim.

At the PCR hearing, Applicant entered as Petitioner's Exhibit 3 the City of Charleston Police Department Policy and Procedure Manual. Applicant asserted the police department violated policies 39.5 and 39.6, which require the department to maintain confidential files on informants. The policies specifically provide the information will be placed in a sealed envelope and stored in a secure location. At the PCR hearing, Applicant asserted the CI, Robert Drayton, was a prolific CI, and trial counsel should have obtained "any information related to other payments" Drayton received as a confidential informant. Applicant acknowledged, however, that he had not obtained any additional records for the PCR hearing.

Initially, Applicant has not shown any violation by the police department of its internal policies. Even if the department did violate its internal policies, this Court finds this allegation, in and over itself, does not set forth a cognizable PCR claim. This Court likewise finds Applicant did not prove counsel was ineffective in this regard. Critically, Applicant did not introduce any of these purported records at the PCR hearing, leaving this Court to speculate as to whether Drayton had in fact received any other payments as a CI. Further, counsel *did* cross-examine Detective Grill and Investigator Burke extensively about whether the department complied with its internal policies in documenting the funds Drayton received as a CI. (Tr. 175-83, 300-03). Counsel raised this very issue before the jury, and Applicant did not set forth any additional evidence or argument

³² This section addresses allegation (4) of the second amended application.

that reasonably would have changed the outcome. Applicant thus did not prove deficiency or prejudice, and this claim is denied.

*Failed to object to Solicitor Linder being in the courtroom*³³

Applicant contends counsel was ineffective for not objecting to the presence of the initial solicitor, Stephanie Bianca Linder, in the courtroom. Applicant did not prove this claim.

At the PCR hearing, Applicant testified Solicitor Linder was at the scene of his arrest when the warrant was served on the Ashton street home. He asserted she was in the courtroom during his trial, leading the State's witnesses and "making sure they say all the same things together."

Linder testified she supervised the narcotics unit at the solicitor's office and sometimes went to the scene after law enforcement served a warrant. However, she clarified she had did not go to the scene *with* law enforcement and did not go onto the scene until after it was cleared. She also stated she did not interview witnesses at the scene. Linder recalled going to the Ashton Street home after police executed the warrant. She also recalled being in court during Applicant's trial although she was not the attorney prosecuting the case. Linder explained she often attends trials as part of her role as supervisor. She testified trial counsel had listed her as a potential witness, but he told the judge before trial that he did not intend to call her as a witness. Linder clarified she was not called to testify in Applicant's case.

This Court finds Linder's foregoing testimony *credible*. Likewise, this Court finds *not* credible Applicant's testimony that Linder was telling witnesses what to say during trial. This Court further finds that Applicant did not set forth a valid objection that would have reasonably precluded Linder from attending the trial and thus did not prove deficiency. Likewise, because Linder was not a witness, this Court finds it is not reasonably likely Linder's presence in the

³³ This section addresses allegation (5) of the second amended application.

courtroom had any impact on the outcome of the proceeding. Applicant did not prove deficiency or prejudice, and this claim is denied.

*Law enforcement did not disclose notes*³⁴

Applicant avers, “Detective Burke improperly failed to disclose written notes regarding the case that were kept on his hard drive.” Prior to trial, counsel questioned Investigator Burke about a report of a debriefing he had with Drayton; Burke testified the “report is on a hard drive in my police cruiser at the Indianapolis Metropolitan Police Department.” (Tr. 41). Counsel questioned why it had not been produced, and Investigator Burke replied, “I never printed it up and turned it in. It was just kept for my file so I could reference it.” (Tr. 41). When asked whether that procedure complied with CPD policies, Investigator Burke replied, “I’m not sure. I’d have to look at the policies.” (Tr. 41).

At the PCR hearing, Applicant framed this as an allegation that counsel was ineffective by failing to obtain these notes. (PCR 26-27). This Court finds Applicant did not prove counsel was ineffective in this regard. Initially, Applicant did not enter into evidence this document that was allegedly on Detective Burke’s hard drive, leaving this Court to merely speculate about the likelihood that the disclosure of this document would have changed the outcome. Likewise, Applicant did not articulate a legal objection counsel should have raised and thus did not prove deficiency. Applicant did not show the record was material or a reasonable likelihood the outcome would be different had Investigator Burke disclosed the document. Thus, this claim is denied.

*Failed to object to State’s modification of its theory*³⁵

Applicant contends counsel was ineffective for not objecting to the State modifying its theory from a hand-to-hand transaction to hand-of-one-hand-of-all. At the PCR hearing, Applicant

³⁴ This section addresses allegation (6) of the second amended application.

³⁵ This section addresses allegation (7) of the second amended application.

averred he did not have adequate time to prepare when the State modified its theory. He explained he had been defending himself against a hand-to-hand distribution sale. However, Applicant did not set forth a valid, legal objection that counsel should have raised on this issue in his application or at the PCR hearing and thus did not prove deficiency or prejudice. Thus, this claim is denied.

*Chain of custody*³⁶

Applicant contends he did not have the opportunity to confront witnesses against him as it related to the chain of custody of the evidence bag for the drugs Applicant never saw until trial. At the PCR hearing, Applicant averred Officer Tugis was part of the chain of custody for the drugs, but Tugis was not available at trial for him to confront. He further asserted the drugs “somehow turned from cocaine to crack.” Applicant testified he wanted to confront Tugis about how the drugs changed. This Court finds Applicant did not prove this claim.

Critically, counsel *did* object to the introduction of the drugs based on the chain, and this objection was overruled. (Tr. 374). Further, this Court finds Applicant did not establish any defect in the chain or a violation of the confrontation clause based on Tugis not testifying. At trial, Investigator Burke testified he monitored the controlled buy and received the drugs from Drayton, which presumptively tested positive for the presence of cocaine. (Tr. 275). He stated based on his experience and the consistency of the drugs, he believed it was cocaine rather than cocaine base. (Tr. 275-76). Investigator Burke testified he bagged and sealed the drugs, logged it into the evidence computer, and placed it in a locked mailbox. (Tr. 276-77). On cross-examination, Investigator Burke testified the handwriting on the label appeared to be his partner Officer Tugis’ handwriting. (Tr. 319). He clarified the label would have been filled out before he placed the drugs in the bag, and “it’s not uncommon for somebody to fill out a sticker for you.” Investigator Burke

³⁶ This section addresses allegation (1) of the third amended application.

testified he would have verified the accuracy of the information before putting the drugs in and sealing the bag. He agreed Tugis' name was not on the label but stated he recognized his handwriting from working with him. (Tr. 320). Thereafter, the chain was established through evidence custodians Lori Roe and Susan Payne. (Tr. 342-44, 355-57). Renee Hilton, a forensic chemist, testified she tested the drugs and concluded it was 2.03 grams of cocaine base. She stated she would not have tested the drugs if she had seen any evidence of tampering. (Tr. 372-73).

This Court finds the State sufficiently established the chain of custody for the drugs. See, e.g., State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011) (“[W]e have consistently held that the chain of custody need be established only as far as practicable, and we reiterate that every person handling the evidence need not be identified in all cases.”). This Court further finds Applicant's due process and confrontation clause rights were not violated by Tugis's absence from trial. Finally, this Court finds Applicant has not shown counsel was deficient or any resulting prejudice. Thus, this claim is denied.

*Solicitor's comments*³⁷

Applicant alleges the solicitor made derogatory remarks about him during closing arguments, referring to him as a Trap King and how good he was at running a drug operation. This Court finds Applicant did not prove counsel was ineffective in this regard.

“A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury.” Vasquez v. State, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010) (citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). “The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence.” Id. “A solicitor has a right to state his version of the testimony and to comment on the

³⁷ This section addresses allegation (3) of the third amended application.

weight to be given such testimony.” Id. However, “[s]olicitors are bound to rules of fairness in their closing arguments.” Id.

“On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is overwhelming evidence of the defendant's guilt.” 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.” Id. “The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Id.

During closing argument, the solicitor argued,

I'll give it to the Defendant. He's good. He is good at what he does. He tried to distance himself. He didn't do a hand-to-hand deal on the street. No, he's better than that. He used this unique method of distribution; lowering a cup on a string from a second-story window in the back of a house not occupied by anyone, a trap house. The vehicles and phones you've heard mentioned in this investigation, they don't come back to him. Perhaps he's a trap king, but we are not in the courtroom today to reward someone for being good at dealing drugs.

(Tr. 460). This Court finds the foregoing, which is the only reference to a trap king in the solicitor's closing argument, is a reasonable inference from the facts presented at trial and is not objectionable. Thus, counsel was not deficient for failing to object. Further, even if this comment was improper (which this Court does NOT find), this brief passing comment did not so infect the trial with unfairness as to violate due process. See Darden v. Wainwright, 477 U.S. 168, 181, 183 (1986) (finding prosecutor's improper comments—which included statements such as “He shouldn't be out of his cell unless he has a leash on him” and “I wish that I could see him sitting here with no face, blown away by a shotgun”—did not “so infect[] the trial with unfairness as to

make the resulting conviction a denial of due process”). Applicant did not prove deficiency or prejudice, and this claim is denied.

*Jury misconduct*³⁸

Applicant alleges jury misconduct. This Court finds Applicant did not prove this ground.

A new trial based on juror concealment is required when the court finds a juror *intentionally* concealed information that would have supported a challenge for cause or been a material factor in the other party’s use of peremptory challenges. State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 245 (2014). In contrast, when a juror’s nondisclosure is unintentional, “the moving party has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party’s exercise of peremptory challenges.” Id. at 329, 764 S.E.2d at 246.

At the PCR hearing, Applicant testified Mary Stewart, one of the jurors, was the mother of someone he used to date. He testified he “never knew it, because [he] never really met her mother, and me and her stopped dealing for our certain reasons, which wasn’t good.” According to Applicant, Stewart told his sister and brother “that she went back and told whoever that she knows the family, and they told her she can still go ahead and be a juror.” Applicant testified he told trial counsel about it. He testified, “Come to find out that they knew that Miss Mary was one of the jurors, but I never knew. And I should have had the opportunity to strike her down, because nobody don’t know we be feeling on bad terms or what.” He also testified that when Stewart was asked whether she had ever had a criminal case, she said “no” even though her son had drug-related charges. On cross-examination, Applicant clarified he had never met Stewart.

This Court finds Applicant’s testimony on this issue self-serving and not credible. Further,

³⁸ This section addresses allegation (4) of the third amended application.

Applicant has not met his burden of showing any intentional nondisclosure by Stewart that would constitute the basis of a new trial. Specifically, Applicant did not call Stewart as a witness or present any credible evidence that she made an intentional nondisclosure during voir dire. Finally, Applicant did not meet his heightened burden of showing any unintentional nondisclosure indicated Stewart was biased. Ultimately Applicant offered only his self-serving testimony on this issue, which this Court finds not credible. Applicant did not prove counsel was deficient for failing to raise this issue, nor did he prove resulting prejudice. Thus, this claim is denied.

Failed to call witness³⁹

At the PCR hearing, Applicant testified counsel did not call Moses Dennis to testify as a defense witness. Counsel testified he spoke to Moses before trial, who had provided a statement that Applicant had nothing to do with the drugs. Although he could not recall specifically why he decided not to call Moses, he explained the State's case was weak and calling Moses could cause the jury to infer Applicant's guilt by association. He testified he ultimately did not believe it was necessary to call Dennis.

Dennis testified he had a connection to the Ashton Street home, but he did not know Applicant was dealing drugs from the house. He stated there was furniture in the house and he believed people lived there, although the home was being renovated at the time. On cross-examination, he acknowledged he was claiming ownership of drugs that were found in the home on August 29, 2013.

Initially, this Court finds Dennis's testimony that he was unaware Applicant was dealing drugs and he believed people lived in the Ashton Street home not credible. This Court likewise finds Dennis's testimony was not material to Applicant's guilt or innocence and would not have

³⁹ Although this allegation was not raised in any of Applicant's amended applications, Applicant raised it at the PCR hearing and had Dennis Moses testify.

reasonably changed the outcome. Notably, although Dennis claimed ownership of drugs found in the home on August 29, Applicant's charge arose from a controlled buy on June 20. Based on the overall weakness of Dennis's testimony, counsel articulated a valid reason for not calling Dennis based on his concern that the jury could infer guilt by association. Likewise, based on the overall weakness of Dennis's testimony, counsel's decision to not call Dennis was reasonable under prevailing professional norms and not deficient. Finally, it is not reasonably likely the outcome would have been different had Dennis testified at trial, and this claim is denied.

CONCLUSION

Based on the foregoing, this Court concludes Applicant has not established any constitutional violations that would require this Court to grant relief. Thus, this application is denied and dismissed with prejudice.

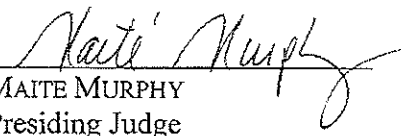
Should Applicant wish to secure appellate review, he must file and serve a notice of appeal within thirty days of receipt by counsel of written notice of entry of judgment. See Rule 203, SCACR. Applicant has the right to an appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). If Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on applicant's behalf. Rule 71.1(g), SCRCP. Attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for PCR is denied and dismissed with prejudice; and
2. Applicant shall be remanded to and remain in the custody of the State.

AND IT IS SO ORDERED THIS 14 day of Feb., 2024.

Summerville, South Carolina


MAITE MURPHY
Presiding Judge
Ninth Judicial Circuit