STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO YORK COUNTY
Court of Common Pleas
The Honorable Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2023-001400

Reginald R. White,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL

1. The PCR court correctly found Counsel was not ineffective for failing to renew his pretrial objection to evidence that Petitioner had distributed crack cocaine to two individuals, where the objection was meritless because that evidence was strongly probative of Petitioner's constructive possession of the cocaine found by police two days later during a search of the house where the distribution occurred.

2. The PCR court correctly found Counsel was not ineffective for failing to object to hearsay evidence that Petitioner was living at the house where the drugs were found because any such hearsay was cumulative to other evidence, including Petitioner's own statement, proving that he stayed at the house.

3. The PCR court correctly found Counsel was not ineffective for failing to object to the "search for the truth" language in the trial court's opening comments because such language had not been held improper at the time of Petitioner's trial and because virtually identical comments have since been deemed harmless by this Court.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018). In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

1. **The PCR court correctly found Counsel was not ineffective for failing to renew his pretrial objection to evidence that Petitioner had distributed crack cocaine to two individuals, where the objection was meritless because that evidence was strongly probative of Petitioner's constructive possession of the cocaine found by police two days later during a search of the house where the distribution occurred.**

On February 26, 2014, pursuant to a search warrant, law enforcement officers searched a trailer at Silver Creek Road in Clover, South Carolina. In an air vent in the back bedroom, they found a glass jar containing a bag of crack cocaine and three bags of powder cocaine. (App.pp.192–93). The crack weighed 5.11 grams, and the powder cocaine weighed 10.77 grams. (App.p.287, lines 8–17).

Petitioner was arrested and questioned. After being informed of his *Miranda*[1] rights, Petitioner gave a statement admitting that he lived at the Silver Creek Road residence. (App.pp.263–65). He also admitted he distributed crack cocaine to two individuals while at that residence on February 24, 2014. (App.p.265, lines 20–25). He told investigators that, if they searched the residence, they would find cocaine, crack, and Oxycodone pills.[2] (App.pp.206–10).

Petitioner was charged with possession with intent to distribute ("PWID") crack cocaine and trafficking cocaine between 10 and 28 grams. Prior to trial, Petitioner's trial counsel, William A. McKinnon ("Counsel"), made a motion *in limine* to exclude the portion of Petitioner's statement in which he admitted giving crack cocaine to two individuals at the Silver Creek Road residence

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[2] In addition to the cocaine and crack found in the air vent, officers also found four Oxycodone pills on a dresser in the Silver Creek Road residence. (App.p.192, lines 13–19).

on February 24, 2014. Counsel argued the statement should be excluded as evidence of prior bad acts that lacked any connection to the drugs found in the search of the residence on February 26, 2014, which were the subject of Petitioner's charges. Counsel also argued the prejudicial effect of the statement far outweighed its probative value because the State could prove intent to distribute from the weight of the drugs alone, without having to introduce any proof of actual distribution. (App.pp.140–41). The trial court denied Counsel's motion. (App.p.149, lines 6–9). Counsel did not renew his objection when the statement was introduced at trial. At the evidentiary hearing before the PCR court, Counsel admitted that his failure to renew the objection "was an error in the heat of battle," but he maintained, "I don't think it would have made any difference. I think Judge Couch is probably right to let it in . . . I think it's hard to argue with Judge Couch's ruling looking back." (App.p.16, lines 16–22; p.36, lines 17–18).

Petitioner now argues Counsel was ineffective for failing to renew his pretrial objection to the admission of Petitioner's statement admitting that he distributed crack cocaine on February 24, 2014. Petitioner contends he was prejudiced by Counsel's omission because the probative value of this evidence "was marginal at best" and was outweighed by the danger of unfair prejudice. This argument is meritless; the primary issue in Petitioner's case was whether he had "constructive possession" of the drug stash found in the air vent, and the probative value of Petitioner's admission that he distributed crack at the Silver Creek Road residence a mere two days before the crack and cocaine stash was found in that same location easily outweighs any potentially unfair prejudice. Therefore, even if Counsel had renewed his pretrial objection, there is not a reasonable probability that the result of Petitioner's trial would have been different.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who

plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR Petitioner alleges ineffective assistance of counsel as a ground for relief, the Petitioner 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 v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the Petitioner 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). 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.

Second, counsel's deficient performance must have prejudiced Petitioner 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. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670. The Petitioner bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

This Court should deny the petition for a writ of certiorari because the PCR court correctly found Petitioner was not prejudiced by Counsel's failure to renew his pre-trial objection as evidence of Petitioner's statement was properly admissible. The central issue in Petitioner's trial was whether the stash of drugs found in the air vent in the Silver Creek Road residence belonged to him. The State's case was based on the theory of constructive possession: in his closing argument, the solicitor explained, "This is a constructive possession case. [Petitioner] did not have the drugs on him on the 26th of February, but the evidence . . . leads to the reasonable logical conclusion that he constructively possessed the drugs in question." (App.p.405, lines 16–21).

Evidence of prior bad acts is not admissible to prove the character of a defendant in order to show action in conformity therewith. Rule 404(b), SCRE. 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. *Id.* This Court has held that evidence of prior crimes has an inherent tendency to suggest a defendant had a propensity to commit the crime charged, and this tendency must be balanced against the probative value of the evidence for its legitimate purpose pursuant to Rule 403, SCRE. *State v. Perry*, 430 S.C. 24, 30–31, 842 S.E.2d 654, 657–58 (2020); *see also* Rule 403, SCRE (providing even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). In *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1973), this Court held that "the acid test" for determining whether such evidence serves a legitimate purpose "is its logical relevancy . . . If it is logically pertinent in that it reasonably tends to prove a material fact in issue, it is not to be rejected merely because it incidentally proves the defendant guilty of another crime." *Lyle*, 125 S.C. at 416–17, 118 S.E. at 807; *see also Perry*, 430 S.C. at 31–34, 842 S.E.2d at 658–59 (discussing the "logical relevancy" test as developed by *Lyle* and its progeny).

"Constructive possession is established where a person is aware of the presence of contraband and has the ability to control its disposition." *State v. Perez*, 311 S.C. 542, 545, 430 S.E.2d 503, 504 (1993). To prove trafficking or possession of illegal drugs based on a constructive possession theory, the State must prove two elements: (1) that the defendant had knowledge of the presence of the drugs and the intent to control their disposition or use, and (2) that he had the right and power to exercise control over the drugs. *See State v. Stewart*, 433 S.C. 382, 387, 858 S.E.2d 808, 810 (2021). Stated in slightly different terms, a defendant has such possession as is necessary for conviction when he has both the *power* and *intent* to control the drugs' disposition or use. *Id.* at 390, 858 S.E.2d at 811–12.

Petitioner's admission that he distributed crack to two individuals from the Silver Creek Road residence was highly probative of both elements.[3] The "logical relevancy" of the distribution to the stash found at the residence is obvious: where a stash of drugs and a distribution of drugs are both discovered at the same location over a short period of time, it is "logical" to infer that the stash was the source of the distributed drugs. Therefore, the fact that the defendant distributed crack on the 24th tends to prove he had both the power and the intent to control the use of the hidden stash of crack found in the same location on the 26th.

Accordingly, Petitioner's statement admitting to the distribution was an important piece of the State's case proving constructive possession. During Petitioner's trial, Counsel argued for a directed verdict on the ground that the State had failed to produce "any evidence at all on dominion and control." (App.p.336, lines 21–23). The solicitor replied that Petitioner was "exercising some

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[3] Petitioner's knowledge of the presence of the stash was amply proved by the portion of his statement where he admitted that, if officers searched the residence, they would find cocaine, crack, and Oxycodone pills, as indeed they did. However, the State still had to prove that Petitioner had the power and intent to control the disposition or use of the stash.

dominion and control over the residence by inviting people over and distributing crack cocaine to them." (App.p.346, lines 1–6). The trial court ultimately denied Counsel's directed verdict motion:

> [Petitioner] admitted having been at the premises two days prior to the search . . . [H]e had had people there at the home with him and he had distributed drugs to those people at that time and at that location . . . The fact that [Petitioner] simply lived there is not determinative of itself, but he did take the liberty of inviting people to that location. He did take the liberty of distributing drugs from that location, which would indicate to me that he was exercising a certain degree of dominion or control.

(App.p.351, lines 3–22). The solicitor also relied on Petitioner's statement in his closing argument:

> [Petitioner] invited two other people over to that house on the 24th and gave them crack cocaine. That is exercising dominion and control over the premises and anything contained therein . . . [Petitioner] said "yeah, I distributed crack cocaine to two other people at that residence on the 24th of February." He also said he stayed there . . . Why does he have crack and drugs there? Because he wants to sell them, and he does sell them. And the fact that he had been selling crack cocaine, one of the two types of drugs that were found during the search, also proves he had knowledge and the ability and intention to exercise dominion and control over the drugs found. Not just the premises, but also the drugs.

(App.p.413, lines 7–10). As both the trial court and the State agreed, the evidence of Petitioner's admission was highly probative of the constructive possession issue.

Petitioner now argues "intent was not an issue" because the weight of the drugs was over the inference level for PWID and Counsel expressly claimed he was not going to argue personal use. This argument is meritless; Petitioner is conflating "intent" as an element of PWID (i.e. intent to distribute) with "intent" as an element of constructive possession (i.e. intent to control disposition or use). Counsel never conceded possession, so the State still had the burden to show that Petitioner had intent to control the disposition or use of the drug stash. In addition, regardless of intent, the State would still have had to prove that Petitioner had the power to exercise control

over the drug stash; the evidence of Petitioner's statement would have been admissible on that element alone, even if the intent element were not in dispute.[4]

Because the evidence was highly probative and logically relevant to the issue of constructive possession, it was admissible, and the renewal of Counsel's pre-trial objection would have been futile. Therefore, Counsel's failure to renew his objection did not affect the outcome of the trial. On that basis, the PCR court correctly found Petitioner had failed to establish prejudice as required by *Strickland*. Because Petitioner has not established any error in the decision of the PCR court, the State asks this Court to deny the petition for a writ of certiorari on this ground.

2. **The PCR court correctly found Counsel was not ineffective for failing to object to hearsay evidence that Petitioner was living at the house where the drugs were found because any such hearsay was cumulative to other evidence, including Petitioner's own statement, proving that he stayed at the house.**

Petitioner further argues Counsel should have objected to the testimony of Officer Walter Beck, who testified that "other people had told us that [Petitioner] was living" at the Silver Creek Road residence in Clover, South Carolina, where the jar of cocaine and crack was found. Petitioner claims he was prejudiced by Counsel's failure to object because the issue of whether Petitioner lived at the residence in question was "seriously contested." This claim is meritless; although

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[4] In addition, "the prosecution is entitled to prove its case by evidence of its own choice, . . . [and] a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it." *Old Chief v. U.S.*, 519 U.S. 172, 186–87 (1997); *see also State v. Hamilton*, 327 S.C. 440, 443–47, 486 S.E.2d 512, 513–15 (Ct. App. 1997) (discussing *Old Chief* and related South Carolina case law and holding that the State could not be forced to accept defendant's offer to stipulate to the "prior burglaries" element of first-degree burglary), *accord State v. Cheatham*, 349 S.C. 101, 109–10, 561 S.E.2d 618, 623 (Ct. App. 2002). The State was not required to withhold probative evidence of Petitioner's intent to distribute merely because Counsel offered to concede that the stash was not for "personal use."

some witnesses denied that Petitioner "lived" at the Silver Creek Road house, there was essentially no dispute that Petitioner frequently stayed there and enjoyed lengthy periods of unsupervised access to the premises during the relevant timeframe. In addition, substantial evidence including Petitioner's own statement proved he lived at the residence.

Admission of hearsay testimony, even when improper, is not reversible error unless it results in prejudice. *State v. Brewer*, 411 S.C. 401, 408–09, 768 S.E.2d 656, 660 (2015). Improper hearsay testimony may be deemed harmless where it is merely cumulative to other evidence before the jury. *Id.* at 409, 768 S.E.2d at 660.

Petitioner claims the question of whether he lived at the Silver Creek Road residence was "seriously contested" at trial, citing the testimony of Jessica Collins, Brenda Lee, and Tralicia White.

Jessica Collins, the mother of Petitioner's children, testified that she lived in the Silver Creek Road residence, and she denied that Petitioner lived there with her. (App.pp.365–66). She further testified that Petitioner "never stayed the night." (App.p.366, lines 9–11; p.375, lines 18–19). On cross-examination, however, she admitted that Petitioner was sleeping at the Silver Creek Road house when she came back from working the late shift at Taco Bell around 3:30 a.m. on February 24th, 2014. (App.pp.376–78). She also testified that she left for work around 2:30 p.m. that same day, leaving the children at the residence with Petitioner. (App.p.381, lines 7–14). She did not return to the house until around 10:00 p.m. (App.p.381, lines 15–24). Collins acknowledged that she initially told investigators Petitioner lived with her, but she explained that she "was nervous and didn't really know what was going on." (App.p.369, lines 4–6). When confronted with her prior statement, she testified that Petitioner "lives wherever he can lay his

head . . . at nighttime I don't know where he was at, because I work the night shift." (App.p.386, lines 7–13).

Collins' testimony was inconsistent and ultimately equivocal on the question of whether Petitioner lived with her at the Silver Creek Road residence. However, she did not deny that Petitioner frequently came to her house to stay with the children while she went to work, including on the afternoon of February 24th, 2014, from 2:30 p.m. until 10:00 p.m.[5] Therefore, her testimony was consistent with the State's theory of the case on the material issue of whether Petitioner had "dominion and control" over the premises and had access to the hiding place where the jar of drugs was found.

Similarly, the testimony of Brenda Lee and Tralicia White merely established that Petitioner stayed "off and on" at Tralicia White's apartment in York, South Carolina. (App.pp.353–56). Neither witness's statement was inconsistent with the State's theory that Petitioner frequently stayed at the Silver Creek Road residence. While there may have been some semantic dispute as to whether Petitioner's frequent periods of unsupervised access to the Silver Creek Road house counted as "living" there, the fact that he did, in fact, have such access was never "seriously contested."

In addition, there was substantial evidence, independent of Officer Beck's testimony, indicating that Petitioner lived at the Silver Creek Road location. Most significantly, Petitioner's

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[5] The search warrant in this case was based on the statement of a witness who claimed she went to the Silver Creek Road location to hang out with Petitioner; she stated Petitioner gave her one or two hits of crack and then pulled her into the bedroom and raped her. (App.pp.661–64). She claimed the distribution of crack and subsequent assault occurred on "the 24th of February . . . around 8pm," and there were "two babies" in one of the bedrooms. (App.pp.661–62). While the witness's statement and the allegation of sexual assault were never presented to the jury, it bears noting that her account is consistent with Jessica Collins' testimony that she left Petitioner at the residence with their two children during the afternoon and evening of February 24th, 2014.

own statement to the investigating officers indicated that he lived there. (App.p.265, lines 10–25). In addition, Petitioner's personal effects were found at the residence, including bank statements with Petitioner's name on them dated February 3rd, 2014, and a prescription pill bottle with Petitioner's name on it (App. p.197, lines 14–17; pp.201–03); a neighbor testified Petitioner lived at the residence with Jessica Collins and their kids, and she would see Petitioner's car there overnight (App.p.271–73);[6] and Jessica Collins admitted she told investigators that Petitioner lived at that location (App.p.369, lines 4–6). Officer Beck's non-specific, off-hand hearsay statement that "other people had told us" Petitioner was living at that residence was merely cumulative to other substantial evidence in the record and, therefore, was patently harmless. *Brewer*, 411 S.C. at 409, 768 S.E.2d at 660.

Therefore, the PCR court correctly found Petitioner had failed to prove he was prejudiced by Counsel's handling of Officer Beck on the stand. Accordingly, the PCR court found Petitioner had not met his burden of proving Counsel's assistance was ineffective. As Petitioner has failed to establish any error by the PCR court as to this issue, the petition for a writ of certiorari should be denied.

3. **The PCR court correctly found Counsel was not ineffective for failing to object to the "search for the truth" language in the trial court's opening comments because such language had not been held improper at the time of Petitioner's trial and because virtually identical comments have since been deemed harmless by this Court.**

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[6] Petitioner claims the neighbor's credibility was "seriously questioned" because she testified Petitioner drove a silver car, while other witnesses testified he drove a green car. However, Petitioner's own witnesses did not agree on the color of Petitioner's car. Brenda Lee testified Petitioner drive a "blue Honda." (App.p.354, lines 11–14). Tralicia White testified Petitioner "had a lot of cars." (App.p.356, line 25).

Finally, Petitioner argues Counsel was ineffective for failing to object to two comments made by the trial court during its preliminary statement to the jury: "What you are engaged in here is a search for the truth. It's an effort to see that justice is done between the parties that are before the court. . . . [S]earching for the truth or trying to do justice is sometimes a slow process." (App.p.160, lines 11–18). Petitioner contends Counsel should have objected to this "search for the truth" language as potentially burden-shifting. This argument is meritless; at the time of Petitioner's trial, there was no authority for objecting to such "search for the truth" language outside the context of jury instructions on reasonable doubt and circumstantial evidence. Even under the current rule prohibiting "search for the truth" language, however, the trial court's comments were harmless.

In *State v. Beaty*, this Court held that trial judges "should refrain from informing the jury, whether through comments or through a charge on the law, that its role is to search for the truth, or to find the true facts, or to render a just verdict." 423 S.C. 26, 34, 813 S.E.2d 502, 506 (2018). However, Petitioner's trial was held in January of 2015, predating *Beaty*.[7] At the time of Petitioner's trial, therefore, the controlling precedent on this issue was *State v. Aleksey*, 343 S.C. 20, 538 S.E.2d 248 (2000). In that case, the Court held that "seek the truth" language would be reversible error if used in jury instructions on reasonable doubt or circumstantial evidence; however, outside of those contexts, there was "not a reasonable likelihood the jury applied the judge's instructions to convict appellant on less than proof beyond a reasonable doubt." *Id.* at 26–29, 538 S.E.2d at 251–53.

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[7] *Beaty* was initially filed on December 29, 2016, and re-filed following rehearing on April 25, 2018.

Here, the challenged comments were made in the trial court's preliminary statement to the jury, not in the jury charge, and they were not connected to reasonable doubt or circumstantial evidence. Therefore, they were clearly distinguishable from the "seek the truth" instructions held to be improper in *Aleksey*. *See Beaty*, 423 S.C. at 34, 813 S.E.2d at 506 ("[T]he disputed comments can be distinguished from *Aleksey* because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or circumstantial evidence charges as was condemned in *Aleksey*."). Under controlling precedent at the time, therefore, the challenged comments were not objectionable. Accordingly, Counsel could not have been deficient for failing to object to them. *See, e.g.*, *Gilmore v. State*, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law . . . ." (citing *Thornes v. State*, 310 S.C. 306, 309–10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes*, 310 S.C. at 309–10, 426 S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Even if the *Beaty* rule were to apply, however, the comments challenged in this case were patently not prejudicial. The trial court's comments were virtually identical to the comments at issue in *Beaty*, which this Court expressly held to be harmless: "This . . . trial . . . is a search for the truth in an effort to make sure that justice is done. Searching for the truth and ensuring that justice is done is often slow, deliberate, and repetitive." *Beaty*, 423 S.C. at 32, 813 S.E.2d at 505.

Petitioner failed to prove either deficiency or prejudice as to this allegation. Therefore, the PCR court correctly found he failed to meet his burden of showing Counsel was ineffective, and this Court should deny the petition for a writ of certiorari on this ground.

CONCLUSION

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

Respectfully submitted,

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