

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Aug 22 2024

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable H. Steven DeBerry, IV

Case No. 2020-CP-26-04318

Desmond S. Collins,

Petitioner,

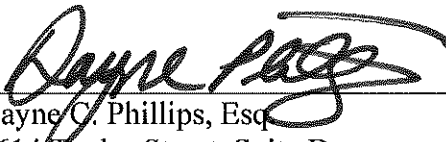
v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner Desmond S. Collins appeals the Honorable H. Steven DeBerry IV's Order Denying his Application for Post-Conviction Relief filed on **July 30, 2024**, and the Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **August 12, 2024**, and received by the undersigned Counsel via email on **August 21, 2024**.


Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

ATTORNEY FOR PETITIONER

August 22, 2024

Other Counsel of Record:

D. Russell Barlow II, Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211

cc:

Renee Elvis, Horry County Clerk of Court

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Desmond S. Collins,)
Applicant,)

vs.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS

ORDER

2020-CP-26-04318


The Respondent, Desmond S. Collins, requests the Court to reconsider the Order filed on July 30, 2024, in the Horry County Clerk of Court's office.

Having duly considered the motion of the Respondent, this Court has determined that its original ruling of July 30, 2024, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion is therefore DENIED.

AND IT IS SO ORDERED.

Florence, South Carolina

Dated: 8/9/2024


H. Steven DeBerry, IV
Presiding Circuit Court Judge

RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC
2024 AUG 12 P 12:57
FILED
HORRY COUNTY



State of South Carolina
The Circuit Court of the Twelfth Judicial Circuit

H. Steven DeBerry, IV
Judge

181 North Irby Street
Ste. 3600
Florence, SC 29501-3456
Phone: (843) 665-3020
Fax: (843) 665-3078
hsdeberryj@sccourts.org

August 9, 2024

The Honorable Renee Elvis
PO Box 677
Conway, SC 29528-0677

Re: Desmond Collins v. State

Dear Ms. Elvis:

Enclosed is an Order in the above-referenced case, signed by Judge DeBerry. Please file the Order, copy the parties and let us know if you should need anything further.

Thank you for your assistance.

Sincerely,

A handwritten signature in cursive script that reads "Stacey R. Minton".

Stacey R. Minton
Administrative Assistant

Enc.

FILED
HORRY COUNTY
2024 AUG 12 P 12:57
RENEE N. ELVIS
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Desmond S. Collins, #265060,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
)

) CASE No. 2020-CP-26-4318
)

) **ORDER OF DISMISSAL**
) **WITH PREJUDICE**
)

Presiding Judge: Hon. H. Steven DeBerry, IV
Applicant's Attorney: Dayne C. Phillips, Esq.
Respondent's Attorney: Chelsey F. Marto, Esq.
Trial Counsel: Timothy K. Truslow, Esq.
Date of Hearing: December 2, 2022
Court Reporter: Natalie Dahl

This matter comes before this Court by way of Desmond Collins' (Applicant) post-conviction relief application filed July 27, 2020. Respondent, the State of South Carolina made its Return on May 26, 2021, requesting an evidentiary hearing to resolve the claims as outlined in the application.

On December 2, 2022, an evidentiary hearing convened before the Honorable H. Steven DeBerry, IV, at the Horry County Courthouse. Dayne C. Phillips, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent. In support of these claims, Applicant testified on his own behalf, and Respondent presented testimony from Timothy Kirk Truslow, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

FILED
2022 JUN 30 10:02 AM
Horry County
Clerk of Court
Natalie Dahl

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its September 2016 term, the Horry County Grand Jury indicted Applicant for trafficking heroin (2016-GS-26-03956). Applicant was represented by Trial Counsel. Fifteenth Circuit Assistant Solicitor W. Grayson Ervin prosecuted the case.

On November 13-15, 2017, Applicant proceeded to trial before the Honorable Benjamin H. Culbertson and a jury. Applicant was found guilty as charged. Judge Culbertson sentenced Applicant to twenty-five (25) years imprisonment and ordered Applicant to pay a \$200,000 fine.

Applicant filed a timely Notice of Appeal on November 20, 2017. Trial Counsel perfected the appeal, raising the following issue:

The trial judge erred when he failed to conduct a full hearing on the evidence before ruling that an over 400-page cell phone report – which was not disclosed to defense counsel until after the start of trial – had not exculpatory value.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Collins, Op. No. 2019-UP-387 (Ct. App. filed Dec. 18, 2019). The Remittitur was returned to the circuit court on January 8, 2020.

FACTS GIVING RISE TO THE CONVICTION

Jeremy Crews, a former officer of the Myrtle Beach Police Department, was contacted by Officer Camacho, who smelled marijuana coming from a vehicle near where he was pumping gas and wanted Crews to initiate a stop. (Trial Tr. pp. 115 – 16, 175 – 76). After witnessing several traffic violations, Crews stopped the vehicle driven by Applicant. (Trial Tr. pp. 116 – 17). Upon approaching the vehicle, he immediately smelled marijuana. (Trial Tr. p. 117).

After detaining Applicant and a passenger, Crews began a vehicle search. During the

search, he located a bag containing a little over \$3000 in cash, a bag containing a light tan powdered substance, and small marijuana blunts on either side of the vehicle's interior, as well as a scale and two cell phones. (Trial Tr. pp. 119 – 21, 135 – 37, 177). The powdered substance would have been right where Applicant's feet were as the driver. (Trial Tr. p. 122). After being Mirandized, Applicant told Crews to "put it all on me." (Trial Tr. p. 121). The powdered substance tested as heroin. (Trial Tr. pp. 160, 244 – 45).

Both Crews and Camacho testified nothing was done with the cell phones. Later, during the trial, the State learned some files were obtained from one of the cell phones. (Trial Tr. p. 194). The State turned over a thumb drive containing the files. (Trial Tr. pp. 202 – 03). The trial court found the State could not use anything found on the cell phone and found no violation in failing to turn it over because nothing was found to be material to Applicant's guilt. (Trial Tr. pp. 208, 215).

CURRENT ACTION BEFORE THIS COURT

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

1. Ineffective Assistance of Trial Counsel
 - a. "The South Carolina Court of Appeals found that Trial Counsel failed to preserve for appellate review the issue of whether the Trial Court erred in failing to conduct an evidentiary hearing before ruling a 400-page cell phone report did not have any exculpatory value. Specifically, the Court of Appeals found that Trial Counsel failed to make this argument at trial or request an evidentiary hearing. See State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); State v. Policao, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) ("The general rule of issue preservation is if an issue was not raised to and ruled upon by the trial court, it will not be considered for the first time on appeal." (quoting State v. Porter, 389 S.C. 27, 37, 698 S.E.2d 237, 242 (Ct. App. 2010)); State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (2003) ("For an

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- appellate court to review an issue, a contemporaneous objection at the trial level is required.").
- b. The South Carolina Court of Appeals also found that Trial Counsel failed to move for a continuance to allow him an opportunity to review the 400-page cell phone report and that Counsel stipulated at trial that the 400-page cell phone report was not relevant. Consequently, the Court of Appeals found that Counsel waived Applicant's right to challenge this issue on direct appeal. See State v. Benton, 338 S.C. 151, 156-57, 526 S.E.2d 228, 231 (2000) (providing when a party concedes an issue at trial and argues the issue on appeal, the issue is procedurally barred).
 - c. Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the 400-page cell phone report.
 - d. Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the identity of a material witness until a week before trial. In the event a discovery violation did not occur, then Trial Counsel failed to file a motion to compel specifically requesting disclosure of the passenger's identity in a timely manner prior to trial.
 - e. Trial Counsel failed to properly raise, argue, and preserve for appellate review the issue of whether the Trial Court erred in prohibiting him from cross-examining the officer about the Solicitor's Office dismissing the officer's DUI charge prior to trial. See U.S. Const. amends. V, VI, XIV.
 - f. Trial Counsel failed to properly raise, argue, and preserve appellate review the issue of whether the Trial Court erred in denying his motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure). See U.S. Const. amends. IV, XIV."
 - g. Trial Counsel failed to properly raise, argue and preserve for appellate review whether Applicant voluntarily provided a statement to law enforcement. See U.S. Const. amends. IV, V, VI, XIV; Jackson v. Denno, 378 U.S. 368 (1964).
 - h. Trial Counsel failed to challenge the admissibility of the drug evidence based on the police officer's handling and chain of custody of this evidence. Specifically, the police officer field tested the drug evidence numerous times, which could have affected the reliability and accuracy of the subsequent analysis.

- i. Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Trial Counsel failed to hire an independent forensic examiner to review all the evidence seized by the police and failed to investigate the defense of Third-Party Guilt. See Wiggins v. Smith, 539 U.S. 510 (2003); Lounds v. State, 380 S.C. 354, 360 (2008); McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004); Hicks v. State, 314 S.C. 280, 443 S.E.2d 907 (1994); Reeves v. State, 415 S.C. 366, 782 S.E.2d 747 (Ct. App. 2015).
- j. Trial Counsel failed to adequately prepare for trial by not interviewing witnesses who could have testified regarding Applicant's good character and reputation when it was reasonable and necessary to present this evidence at trial and request a jury instruction on good character and reputation. See State v. Harrison, 343 S.C. 165, 539 S.E.2d 71 (Ct. App. 2000); Cf. Stalk v. State, 383 S.C. 559, 681 S.E.2d 592 (2009)."
- k. Trial Counsel pursued an unreasonable trial strategy during his opening statement: 'if you do your job and you do it diligently, you find my client guilty, I'm gonna shake everybody's hand . . . When this trial is over, I go home: we all go home. Presumption of innocence means that from the day they charged him all the way up through this trial until and unless after everything, you do your job and you go by the law and you find him guilty . . . I'm talking about a football field where Mr. Ervin [Prosecutor] is marching down with this evidence, he comes all the way down to the 20 yard line, 10 yard line, five yard line, end zone: he scored; he's guilty . . . Who drives for people that are dealing drugs? The drug dealer or the heroin addict to get his heroin. The heroin addict to get his heroin . . . I'm sitting at that table, I'm presumed innocent. In my head, I'm presumed guilty; that's what I think . . . I ask you please, please, go by the law. Keep this system strong. And if you do that and find him guilty, great; you did your job.' See Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)(finding 'counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and were counsel articulates a strategy, it is measured under an objective standard of reasonableness'); Stacy v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986)(finding that 'labeling counsel's actions as 'trial

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strategy' does not automatically immunize an attorney's performance from sixth amendment challenges.').

- l. Trial Counsel failed to properly raise and argue the defense of mere presence.
 - m. Trial Counsel pursued an unreasonable trial strategy in his closing argument: 'Then you got other people that shoot it up their arms, killing themselves, overdosing, doing things that would ordinarily never think that they would do. I can't imagine one people when they're 8, 10, 12-year old saying I want to grow up to be a heroin addict or drive a drug dealer around . . . I'm asking you as a defense lawyer, a magician who's gonna trick you, to look at the facts . . . Now, if I go through that and you convict him, there's nothing else I can do, but that's what we're here for, the facts . . . [i]f you want to get to the truth or as close you can . . . my guess is a person with limited means was driving a drug dealer around, should probably get the three grams, if he's responsible for anything. And I'm not conceding that he is . . . You know, these people are smart. They're selling junk to people, they're giving junk to people so that they'll drive them around so they don't get busted, because that person needs that drug.'
 - n. Trial Counsel improperly shifted the burden of proof during his closing argument by imploring the jury to 'get to the truth' based on the facts of the case 'I'm asking you as a defense lawyer, a magician who's gonna trick you, to look at the facts . . . Now, if I go through that and you convict him, there's nothing else I can do, but that's what we're here for, the facts . . . [I]f you want to get to the truth or as close you can.' See generally State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), State v. Daniels, 401 S.C.251, 737 S.E.2d 473 (2012).
 - o. Trial Counsel pursued an unreasonable trial strategy by essentially arguing the defense of mere presence when he also implied Applicant was the driver for a drug dealer (i.e. an aider and abettor who participated in the drug dealer's criminal activity).
 - p. Trial Counsel pursued an unreasonable trial strategy by requesting that the Trial Court instruct the jury on the lesser-included offense of possession of heroin."
2. Ineffective Assistance of Appellate Counsel
- a. "Appellate Counsel failed to raise and argue the issue of whether the Trial Court erred in denying his motion for a continuance to investigate the discovery issue regarding the identity of a passenger in Applicant's car.
 - b. Appellate Counsel failed to raise and argue the issue of

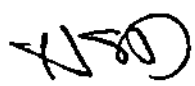
- whether the Trial Court erred in refusing to dismiss or, in the alternative, declare a mistrial based on the untimely discovery issue regarding the 400-page cell phone report.
- c. In the event Trial Counsel preserved the issue of whether the State committed a discovery violation by violation by failing to disclose the 400-page cell phone report, Appellate Counsel failed to raise and argue this issue on appeal.
 - d. In the event Trial Counsel preserved the issue of whether the trial court erred in prohibiting him from cross-examining the police officer about the Solicitor's Office dismissing the officer's DUI charge prior to trial, Appellate Counsel failed to raise and argue this issue on appeal.
 - e. In the event Trial Counsel preserved the issue of whether the trial court erred in denying Counsel's motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure), Appellate Counsel failed to raise and argue this issue on appeal. See U.S. Const. amends. IV, XIV.
 - f. In the event Trial Counsel preserved the issue of whether Applicant voluntarily provided a statement to the police. Appellate Counsel failed to raise and argue this issue on appeal."

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act¹ (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available

¹ S.C. Code Ann. §§ 17-27-10 to -160.



under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. Rogers v. State, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in Strickland v. Washington to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. 466 U.S. 668, 687 (1984). To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. Id. at 687–88; accord Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be

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said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable." (citation and internal quotation marks omitted)).

Regarding the deficiency prong of the Strickland analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for rebutting that presumption "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 384 (1986); cf. Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation).


Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, make every effort "to eliminate the distorting effects of hindsight," and "evaluate the conduct from counsel's perspective at the time" in light of then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Accordingly, counsel's performance will be considered deficient only when it was objectively incompetent under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if

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professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To meet this burden, counsel's deficient performance must have prejudiced the applicant to such an extent, there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625; see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112.

Finally, the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold



issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

INITIAL FINDINGS

This Court further finds applicable the strong presumption that at all stages of Trial Counsel's representation of Applicant he rendered adequate assistance and exercised reasonable

professional judgment in her representation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing Strickland, *supra*). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689; see Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Applicant has alleged multiple claims of ineffective assistance of Trial Counsel and asserts that as a result of Trial Counsel's purported errors, he is entitled to a new trial. This Court finds Applicant has failed to meet his requisite burden of proof as to each allegation. Each allegation is addressed below:

Allegation 1a: Trial Counsel failed to preserve for appellate review the issue of whether the trial court erred in failing to conduct an evidentiary hearing before ruling that the 400-page cell phone report had no exculpatory value.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to preserve the issue of whether the trial court erred in ruling that the 400-page Cell Phone Report (CPR) had no exculpatory value without an evidentiary hearing. This Court finds this allegation is without merit.

To show prejudice where counsel fails to preserve an issue, an applicant must show the trial court would have sustained an objection, and the unpreserved issue would have been successful on appeal. Milledge v. State, 422 S.C. 366, 811 S.E.2d 796 (2018). A PCR court must view the trial court's ruling on an issue through the same lens applied on appeal, giving appropriate deference to the trial court's findings. Milledge, 422 S.C. at 380, 811 S.E.2d 804.

PCR Evidentiary Hearing

On direct examination, Applicant testified when the CPR came out at trial, the court recessed to give the parties a chance to go over the report. (PCR Tr. p. 12). Applicant testified he contacted Trial Counsel afterward to see what was going on, but Applicant could not contact him, and they never discussed the CPR. (PCR Tr. p. 12). Applicant testified he never saw the report. (PCR Tr. p. 13).

On cross-examination, Applicant testified the CPR was not entered into evidence at trial, and it was not presented to the jury. (PCR Tr. pp. 29-20). Applicant testified Trial Counsel made a motion to dismiss based on the CPR. (PCR Tr. p. 30).

On re-direct examination, Applicant testified that he had not seen the CPR yet. (PCR Tr. p. 33).

On direct examination, Trial Counsel testified he recalled receiving the CPR in the middle of trial. (PCR Tr. p. 38). Trial Counsel testified neither of the parties had the opportunity to review the entire CPR. (PCR Tr. p. 38). Trial Counsel testified he made a motion to dismiss and possibly a motion for mistrial based on the CPR, but they were not successful. (PCR Tr. p. 39). Trial Counsel testified that over his objection, the trial court determined the CPR contained no exculpatory evidence, and the State was not going to use the CPR, but the Court of Appeals interpreted his response to the trial court as a stipulation. (PCR Tr. p. 39).

On cross-examination, Trial Counsel testified the CPR was on a jump drive that was not easily accessible. (PCR Tr. pp. 46 – 47). Trial Counsel testified he learned about the CPR after the prosecution argued they had not pulled an extraction from a particular phone, but one of the law enforcement officers stated that was not correct. (PCR Tr. pp. 47 – 48). Trial Counsel testified that in hindsight, he should have made the record clear, but the trial judge was upset, found the

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CPR was not exculpatory, and managed to get Trial Counsel to stipulate even though that was not his intention. (PCR Tr. pp. 48 – 49).

On re-direct examination, Trial Counsel testified he believed he acted reasonably at the time, and he did what he thought he should have done concerning the CPR. (PCR Tr. p. 62).

Applicant's Trial

At trial, on November 14, 2017, the Solicitor informed the trial court she became aware of cell phone data extraction that possibly contained exculpatory evidence, but she did not know of the existence of the CPR until that day and did not know what was in the extraction. (Trial Tr. p. 194). The trial court instructed the prosecution to check the extraction for exculpatory evidence. (Trial Tr. p. 194). The Solicitor informed the trial court she received the extraction from Melinda Shadoan, an evidence technician at Myrtle Beach Police Department, and the extraction was not turned over to Trial Counsel because the prosecution had just received the report. (Trial Tr. p. 195). The trial court gave a ten-minute recess so the prosecution could ascertain how long law enforcement had the report and what was in the report. (Trial Tr. pp. 196 – 97).

After the recess, the prosecution informed the trial court that law enforcement obtained a search warrant and conducted an extraction of the cell phone. (Trial Tr. p. 198). The trial court ordered the prosecution to turn over the search warrant and report to Trial Counsel and recessed the court until 9 AM the following day. (Trial Tr. p. 198).

On November 15, 2017, the prosecution informed the court they had turned over the search warrant and the report to Trial Counsel. (Trial Tr. p. 202). The prosecution informed the trial court that an extraction was done solely on Applicant's phone, and Officer Curry was prepared to testify to the technical data extracted from the phone. (Trial Tr. p. 203). The prosecution stated they did not intend to use the data from the cell phone extraction as the cell phone was not admitted

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into evidence. (Trial Tr. p. 203). The prosecution gave the trial court a summary of what they observed on Applicant's phone, as follows:

The other phone, we were able to get into and it is clear to the State and it should be clear to the Court that it is Mr. Collins' phone. There are multiple pictures of himself and his family on there. There are music files. There X-rated files on there and that's all that the State saw. There was possibly some inculpatory pictures on there of the Defendant. Again, the State does not intend to use any of that.

(Trial Tr. p. 204, ll. 3-10). The prosecution further represented to the trial court that the extraction did not show incoming and outgoing calls, and there were no text messages they could glean. (Trial Tr. pp. 204 – 05).

In response, Trial Counsel stated he overheard Officer Curry tell the prosecution he gave them a summary of the extraction, but there were files he had not turned over and requested to call Officer Curry to the stand. (Trial Tr. p. 205). The trial court denied Trial Counsel's request, and the prosecution represented to the trial court that they turned over everything they had to Trial Counsel. (Trial Tr. pp. 205 – 06). Trial Counsel moved the court to dismiss Applicant's case or declare a mistrial, arguing that some of the photographs looked exculpatory because they could reveal Lawyer, the passenger, was the owner of the drugs. (Trial Tr. pp. 207 – 10). The prosecution argued that the possible evidence Trial Counsel sought was not material to the charges against Applicant, and the evidence in the extraction was not favorable to Applicant. (Trial Tr. pp. 212 – 13). The trial court denied Trial Counsel's motion and found there was nothing exculpatory in the extraction. (Trial Tr. p. 215).

Findings

This Court finds Applicant has failed to establish Trial Counsel was deficient and resulting prejudice from Trial Counsel's performance. The Court of Appeals ruled Trial Counsel failed to preserve this issue for appellate review, but that does not automatically establish Trial Counsel

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was deficient or that Applicant suffered prejudice. At trial, the trial court instructed the State to ascertain whether there was any exculpatory evidence on the extraction, and the State informed the trial court they found no exculpatory evidence but found potentially *inculpatory* evidence on Applicant's phone. This Court will not find Trial Counsel deficient for failing to preserve an issue that likely would have been more harmful than helpful to Applicant.

Additionally, Applicant cannot show he suffered resulting prejudice. First, it is evident from the record the trial court would not have sustained Trial Counsel's objection. Additionally, the State did not enter the cell phone into evidence nor use the data from the extraction in their case against Applicant at trial. At Applicant's trial, Trial Counsel moved the trial court to dismiss the case or declare a mistrial, arguing the existence of potentially exculpatory evidence. The trial court was not convinced by Trial Counsel's argument and denied his motion for a mistrial. Applicant is now attempting to receive a new trial on the same basis, the *potential* existence of *potentially* exculpatory evidence contained in the CPR. Applicant presently has the extraction in his possession and presented no actual exculpatory evidence to this Court, only pure conjecture. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice). Like the trial court, this Court is not convinced by Applicant's argument. Furthermore, this Court cannot ignore that the extraction was conducted on Applicant's phone, and if his phone contained exculpatory evidence, Applicant would be the one who would have knowledge of it.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or

NSD

omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1b: Trial Counsel failed to move for a continuance to allow him an opportunity to review the 400-page cell phone report and that Trial Counsel stipulated at trial that the 400-page cell phone report was not relevant.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to move for a continuance to allow him an opportunity to review the 400-page cell phone report and that Trial Counsel stipulated at trial that the 400-page cell phone report was not relevant. This Court finds this allegation is without merit.

Where the PCR applicant fails to establish what evidence he could have procured had counsel moved for a continuance, he fails to establish how he was prejudiced by counsel's preparation. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997); Bozeman v. State, 307 S.C. 172, 175, 414 S.E.2d 144, 146 (1992) (trial courts denial of a continuance does not constitute reversible error where applicant cannot point to any other evidence that could have been produced had a continuance been granted).

PCR Evidentiary Hearing

On direct examination, Applicant testified there was never a discussion about requesting a continuance based on the CPR. (PCR Tr. p. 13).

On direct examination, Trial Counsel testified he did not see a reason to move for a continuance. (PCR Tr. p. 40).

On cross-examination, Trial Counsel testified in hindsight he should have moved for a continuance but noted the trial judge recessed to give the parties time to review the CPR. (PCR Tr. p. 50).

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Trial

At trial, after the prosecution notified the trial court of the existence of the CPR, the trial court ordered the prosecution to turn over the search warrant and CPR to Trial Counsel and recessed the court until 9 AM the following day. (Trial Tr. p. 198). Additionally, the trial court instructed the prosecution to check the extraction for exculpatory evidence. (Trial Tr. p. 194). After reviewing the CPR, the prosecution represented that the CPR did not contain exculpatory evidence to the trial court, and informed the trial court they did not intend to use the CPR in their case against Applicant even though it contained inculpatory evidence. (Trial Tr. pp. 203 -- 05).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. Trial Counsel testified that at trial, he saw no reason to request a continuance regarding the CPR and testified the trial court recessed till the next day so the parties could review the CPR. The record provides that the trial court allowed the parties to review the CPR, and no exculpatory evidence was found. Additionally, Applicant did not present evidence to this Court of what Trial Counsel could have discovered had he requested a continuance to review the CPR more fully. See Skeen, *supra*.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1c: Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the 400-page cell phone report.

Allegation 1d: Trial Counsel failed to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the identity of a material witness until a week before trial. In the event a discovery violation did not occur, then Trial Counsel failed to file a motion to compel specifically requesting disclosure of the passenger's identity in a timely manner prior to trial.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the 400-page cell phone report. Applicant also alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review whether the State committed a discovery violation by failing to disclose the identity of a material witness until a week before trial. In the event a discovery violation did not occur, then Trial Counsel failed to file a motion to compel specifically requesting disclosure of the passenger's identity in a timely manner prior to trial. This Court finds these allegations are without merit.

The United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83 (1963). The South Carolina Supreme Court has found: "A Brady claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." Sheppard v. State, 357 S.C. 646, 659, 594 S.E.2d 462, 470 (2004). "Impeachment or exculpatory evidence is material only if there is a reasonable probability

that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." State v. Davis, 420 S.C. 50, 62, 800 S.E.2d 138, 144 (Ct. App. 2017), citing State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996); Kvles v. Whitley, 514 U.S. 419, 434 (1995) ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.").

"The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." United States v. Aeurs, 427 U.S. 97, 109 – 10 (1976); Cone v. Bell, 556 U.S. 449, 491 (2009) ("It simply is not sufficient, therefore, to claim that 'there is a reasonable possibility that . . . testimony might have produced a different result [Petitioner's burden is to establish a reasonable probability of a different result.]" (quoting Strickler v. Greene, 527 U.S. 263, 291 (1999))).

CELL PHONE REPORT

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel mentioned the discovery violation during trial, but he never raised the issue. (PCR Tr. p. 13). Applicant testified when the CPR was brought up at trial, he pressured Trial Counsel about it, and Trial Counsel mentioned a possible Brady violation but did not go into detail about it. (PCR Tr. pp. 13 – 14).

On cross-examination, Applicant testified the CPR was not entered at trial, but Trial Counsel received the report and reviewed it. (PCR Tr. p. 30). Applicant testified that the CPR was not given to the jury, and Trial Counsel requested a mistrial based on the lateness of receiving the CPR. (PCR Tr. p. 30).

On re-direct examination, Applicant testified that he knew nothing else about the CPR other than Trial Counsel received it at trial. (PCR Tr. p. 33).

On direct examination, Trial Counsel testified he recalled receiving the CPR in the middle of trial. (PCR Tr. p. 38). Trial Counsel testified that when he was given the CPR he overheard the officers attempting to tell the prosecutor there was additional "stuff" on a drive. (PCR Tr. p. 38).

On cross-examination, Trial Counsel testified that the CPR was on a jump drive, and the prosecution stated they saw parts of the CPR. (PCR Tr. p. 46). Trial Counsel testified he argued the trial court could not find the CPR did not contain exculpatory evidence as it had not been fully reviewed. (PCR Tr. p. 46). Trial Counsel testified that he could not recall whether he received a copy of everything, and it all happened very quickly. (PCR Tr. p. 47). Trial Counsel testified he does not believe he received everything because he heard two law enforcement officers talking about two phones, but the solicitor stated an extraction was only done on one phone. (PCR Tr. p. 47). Trial Counsel testified that he believed an officer tried to correct the solicitor, and he mentioned this on the record before the trial court. (PCR Tr. pp. 47 – 48).

Trial

At trial, after the prosecution notified the trial court of the existence of the CPR, the trial court ordered the prosecution to turn over the search warrant and CPR to Trial Counsel and recessed the court until 9 AM the following day. (Trial Tr. p. 198). Additionally, the trial court instructed the prosecution to check the extraction for exculpatory evidence. (Trial Tr. p. 194). After reviewing the CPR, the prosecution represented to the trial court that the CPR did not contain exculpatory evidence, and informed the trial court they did not intend to use the CPR in their case

against Applicant even though it potentially contained inculpatory evidence. (Trial Tr. pp. 203 – 05).

Trial Counsel argued that the CPR contained photographs, including selfies of Applicant and images that looked like paperwork. (Trial Tr. pp. 207 – 08). Trial Counsel argued the images could be ledgers containing names, possibly listing the name of the owner of the drug. (Trial Tr, p. 208). In response, the trial court stated, "How is that exculpatory to your client in a trafficking in heroin, where the drugs are in the vehicle that he's driving." (Trial Tr. p. 208, ll. 9-11). Trial Counsel continued to argue the existence of possible exculpatory evidence but ultimately failed to preserve the issue for appeal. (Trial Tr. pp. 208 – 15).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court finds 1) No Brady violation occurred with which Trial Counsel could have reasonably objected to and been successful; 2) Trial Counsel attempted to garner a mistrial for the lateness of the CPR being provided and was unsuccessful; 3) Even if Trial Counsel has preserved the issue for appeal, the Court of Appeals would not have reversed and remanded Applicant's case for a new trial on this issue; and 4) Applicant failed to demonstrate to this Court that the evidence in the CPR was favorable to him nor that it was material to his guilt or punishment.

Notably, the record before this Court provides that the CPR contained potentially inculpatory evidence, and this Court will not find deficiency on Trial Counsel's part for not further pursuing something that was potentially detrimental to Applicant. Thus, Applicant has failed to overcome his burden in proving any prejudice flowing from Trial Counsel's alleged deficiency.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

IDENTITY OF THE PASSENGER

PCR Evidentiary Hearing

On direct examination, Applicant testified the name of the passenger is Darrin Lawyer (Lawyer). (PCR Tr. p. 16). Applicant testified that he asked Trial Counsel to find Lawyer, but at the time, Applicant knew Lawyer by his nickname, and they only received his full name during a pretrial hearing. (PCR Tr. p. 16). Applicant testified that Lawyer's nickname was Little D. (PCR Tr. p. 17). Applicant testified Trial Counsel learned the passenger's full name by pressuring the Solicitor to give it during pretrial. (PCR Tr. p. 17).

On cross-examination, Applicant testified the drugs found in the vehicle belonged to Lawyer. (PCR Tr. p. 27). Applicant testified that Lawyer sold drugs, and that day Applicant was not driving Lawyer around but taking him someplace and dropping him off. (PCR Tr. p. 27). Applicant testified Lawyer was not selling drugs at that time, and he did not know Lawyer had drugs on him. (PCR Tr. pp. 27 – 28). Applicant testified he knew Lawyer sold drugs, but he was not taking him to sell drugs. (PCR Tr. p. 28). Applicant testified Lawyer was not present at the evidentiary hearing to testify. (PCR Tr. p. 29).

On direct examination, Trial Counsel testified he was given a week's continuance by Judge John because of discovery issues related to the passenger's identity, and Judge John ordered the

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State to provide Trial Counsel with the passenger's name. (PCR RT. P. 40). Trial Counsel testified he was not sure if the identity of the passenger would have been helpful to his case, and if the passenger had been present at Applicant's trial and denied ownership of the drugs, it would have been hurtful to Applicant's case. (PCR Tr. p. 41).

Trial

At trial, Trial Counsel argued the State failed to disclose the identity of the passenger in a timely manner and asked for a continuance based on the late disclosure. (Trial Tr. pp. 25 – 29). The State informed the trial court they did not have possession of the identity of the passenger as he was not charged based on Applicant's claim of ownership over the drugs, and the passenger's information was not on the police report. (Trial Tr. p. 30). The State informed the trial court that after the hearing before Judge John, they called the arresting officer the week before trial to obtain the passengers' information, and once they had the information, they relayed it to Trial Counsel. (Trial Tr. p. 30).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to show Trial Counsel was deficient or resulting prejudice from his performance. This Court further finds 1) Trial Counsel cannot be deficient for failing to file a motion to compel when the identity of the passenger was unknown to the State and Applicant only knew his street name; 2) No Brady violation occurred with which Trial Counsel could have reasonably objected to and been successful; 3) The record provides the State did not have possession or knowledge of the identity of the passenger, and once the State learned this information, they shared it with Trial Counsel; 4)



Applicant failed to show how the identity of the passenger was material to the constructive possession case against him, where Applicant had claimed ownership of the drugs to law enforcement; and 5) Applicant failed to demonstrate to this Court that Lawyer would have provided favorable testimony in his case.

Further, Trial Counsel credibly testified the passenger's absence at trial left room for doubt as to Applicant's guilt as he was not present to deny ownership of the drugs. Trial Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (finding "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis— and the analysis by the appellate court— is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks.").

Notably, Applicant failed to present testimony from the passenger, Lawyer, at the evidentiary hearing. See Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (holding that to show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence.). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render

reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1c: Trial Counsel failed to properly raise, argue, and preserve for appellate review the issue of whether the Trial Court erred in prohibiting him from cross-examining the officer about the Solicitor's Office dismissing the officer's DUI charge prior to trial.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve the issue of whether the Trial Court erred in prohibiting him from cross-examining Officer Crews about the Solicitor's Office dismissing his DUI charge prior to trial. This Court finds this allegation is without merit.

Evidence that a witness has been convicted of a crime punishable by one-year imprisonment or more shall be admitted to attack a witness's credibility if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect. See Rule 609(a)(1), SCRE. "For the purposes of Rule 609, SCRE, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)." Rule 609(a), SCRE; see Michelson v. United States, 335 U.S. 469 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.").

Where a party seeks to impeach a witness on cross-examination of specific instances of conduct that do not constitute a criminal conviction, the inquiry must be *clearly* probative of the

witness's character for truthfulness or untruthfulness. Rule 608(b), SCRE; See State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000) (The inquiry into specific instances of a witness's misconduct is limited to those instances which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement).

A witness may also be impeached for bias by examination or other evidence, but determining the admissibility of testimony concerning bias is a matter within the trial court's discretion, as questions attempting to prove bias are not always proper. Rule 608(c), SCRE; State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012) (The Supreme Court will not disturb a trial court's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion.); See State v. Burgess, 408 S.C. 421, 759 S.E.2d 407 (2014) (Trial court did not abuse its discretion in drug prosecution in prohibiting defendant from cross-examining arresting officer, the only law enforcement officer who testified to seeing defendant in actual possession of crack cocaine that was discovered lying on the ground, about that officer's personnel records in order to impeach his credibility and demonstrate bias; officer's disciplinary incidents and removal from Narcotics Enforcement Team occurred after defendant's arrest and did not involve defendant, and officer's hostile actions were directed at co-workers rather than at subjects of criminal investigations.).

Trial

At trial, the State moved to suppress Trial Counsel from questioning Officer Crews about his DUI arrest and noted Officer Crews was not convicted of DUI, and the charge was dismissed against Officer Crews. (Trial Tr. p. 33). In response, Trial Counsel argued that the fact the charge against Officer Crews was dismissed prior to trial by a prosecutor in the Fifteenth Circuit Solicitor's Office goes to the credibility of Officer Crews before a jury, and the jury should be able to consider



it. (Trial Tr. p. 35). The trial court granted the State's motion, noting the DUI did not constitute a prior bad act. (Trial Tr. pp. 36 – 38).

PCR Evidentiary Hearing

At the evidentiary hearing on direct examination, Applicant testified that he believed Trial Counsel was ineffective for failing to properly object to the trial court's order prohibiting Trial Counsel from cross-examining Officer Crews based on his DUI. (PCR Tr. p. 14).

On cross-examination, Trial Counsel testified that before trial the State moved to prevent Trial Counsel from questioning Officer Crews about his DUI arrest. (PCR Tr. p. 51).

Findings

At trial., Trial Counsel objected and argued that he should not be prohibited from cross-examining Officer Crews on his DUI arrest as the jury should be allowed to weigh the arrest in assessing Officer Crews's credibility. The trial court disagreed and limited Trial Counsel's cross-examination of Officer Crews. Directly following the trial court's ruling on the State's motion in limine, Officer Crews testified. State v. Wiles, 383 S.C. 151, 156, 679 S.E.2d 172, 175 (2009) (Generally, a motion in *limine* is not a final determination; a contemporaneous objection must be made when the evidence is introduced. However, there is an exception to this general rule where a ruling on the motion in *limine* is made "immediately prior to the introduction of the evidence in question." This exception is based on the fact that when a trial court's ruling is not preliminary, but instead is clearly a final ruling, there is no need to renew the objection.); see also State v. Forrester, 343 S.C. 637, 642-43, 541 S.E.2d 837, 840 (2001). Therefore, Trial Counsel cannot be deficient for failing to argue and preserve for appeal whether the trial court erred in limiting the cross-examination of Officer Crews.

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Additionally, Trial Counsel did preserve this issue for appeal. Assuming, *in arguendo*, Trial Counsel had failed to argue and preserve the issue, evidence of Officer Crews's arrest is not admissible impeachment evidence as it does not constitute a prior bad act, go to his truthfulness, or show bias. Moreover, the trial court has broad discretion in limiting cross-examination, and the trial court's ruling will not be disturbed on appeal absent a manifest abuse of discretion. Here, the trial court reasonably limited the scope of Trial Counsel's cross-examination of Officer Crews, and the trial court's decision would likely not have been reversed on appeal.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1f: Trial Counsel failed to properly raise, argue, and preserve for appellate review the issue of whether the Trial Court erred in denying his motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure).

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review the issue of whether the trial court erred in denying his motion to suppress the evidence seized by the police pursuant to an illegal search and seizure (no probable cause to support the traffic stop seizure). This Court finds this allegation is without merit.

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"The Fourth Amendment does not proscribe all contact between police and citizens, but is designed 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" State v. Corley, 383 S.C. 232, 679 S.E.2d 187 (Ct. App. 2009), aff'd as modified, 392 S.C. 125, 708 S.E.2d 217 (2011), citing INS v. Delgado, 466 U.S. 210, 215 (1984). "[T]he decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren v. United States, 517 U.S. 806, 810 (1996).

"A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is involved in criminal activity." State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). "If the officer's suspicions are confirmed or further aroused, the stop then may be prolonged and the scope enlarged." Corley, 383 S.C. at 240, 679 S.E.2d at 191. "Additionally, a minor traffic violation arrest will not be rendered invalid by the fact it was 'a mere pretext for a narcotics search.'" Id., (quoting Arkansas v. Sullivan, 532 U.S. 769, 772 (2001)).

In Corley, the officer stopped Corley for failure to use a turn signal. Corley, 383 S.C. at 236, 679 S.E.2d at 191. While the officer detained Corley, he observed that Corley was nervous, short of breath, avoided eye contact, and appeared fidgety. Id. The officer asked Corley to step out of the vehicle based on safety concerns, and questioned Corley, and Corley provided the officer with untrue information. Id. at 236-37. The officer advised Corley he knew Corley was being dishonest and that he had observed Corley leave an area with high drug activity; upon further questioning, Corley revealed he was in possession of crack cocaine, and the officer seized it. Id.

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The Court of Appeals noted that "it is undisputed Officer Futch acted lawfully in stopping Corley's automobile for the traffic violation." Id. at 240.

Trial

At the pretrial hearing, Trial Counsel argued his motion *in limine* where he moved "to suppress any evidence gleaned from the stop of the vehicle, and to include but not limited to the detention of [Applicant], any statements made and any and all drug contraband or evidence to be used." (Trial Tr. p. 38). Trial Counsel argued law enforcement did not have probable cause to stop Applicant based on the language of the statute.² (Trial Tr. pp. 38 – 40). In addition to the traffic violations, Officer Jeremy Alan Crews (Officer Crews) testified that he and another officer smelled the odor of marijuana emanating from the vehicle Applicant was driving. (Trial Tr. pp. 45 – 47; 49). Officer Crews testified that after he ran Applicant's information, he had Applicant step out of the vehicle, and they searched the vehicle. (Trial Tr. pp. 49 – 51). Officer Crews testified the search revealed a large plastic sandwich bag with heroin on the driver's side floorboard. (Trial Tr. p. 52).

PCR Evidentiary Hearing

On direct examination, Applicant testified there were no discussions concerning challenging the evidence seized during his traffic stop. (PCR Tr. p. 11). Applicant testified that Trial Counsel mentioned raising the issue of the evidence of his own accord to the trial court, but there were no discussions about it. (PCR Tr. pp. 14 – 15).

On direct examination, Trial Counsel testified he discussed the trial strategy with Applicant before trial, and that strategy would depend on what was suppressed. (PCR Tr. p. 35). Trial

² Law enforcement stopped Applicant for Unlawful Turning and Failure to Signal, in violation of S.C. Code Ann. § 56-5-2120.

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Counsel testified the basis for the stop was a traffic situation and an officer stating he smelled weed in the car at a gas station before the stop. (PCR Tr. p. 37). Trial Counsel testified he challenged the stop based on probable cause, but he did not recall his suppression argument. (PCR Tr. pp. 37 – 38).

On cross-examination, Trial Counsel testified that in his suppression argument, he referenced the statute and made a probable cause argument, but he did not cite any case law. (PCR Tr. p. 52). Trial Counsel testified that he should have argued the trial court erred in denying his motion to suppress the evidence from the traffic stop based on the officer's statement as hearsay. (PCR Tr. p. 53).

Findings

As an initial matter, while this Court does not have the bodycam or dashcam videos entered into evidence at trial, this Court does have the record, and the record provides Applicant committed two traffic infractions before being pulled over: 1) a right turn on a red light with a sign that indicated no turn on red³; and 2) unlawful turning by moving from the far outside lane to the far inside lane without signaling.⁴ (Trial Tr. pp. 39 – 41). That in and of itself provided probable cause to conduct a traffic stop. Then, after approaching the vehicle, Officer Crews smelled the odor of marijuana, and that provided probable cause to search the vehicle. (Trial Tr. p. 49). From the record, this Court cannot reason any legal basis for suppression of the traffic stop or search of the vehicle.

³ The record provides Applicant did not stop at the red light—he kept moving through it. (Trial Tr. p. 40).

⁴ Of note, Applicant pled guilty on July 18, 2016, to the traffic violations prior to trial that he now contends there was no probable cause to even conduct the traffic stop. (Trial Tr. pp. 40; 42).

150

Nevertheless, Applicant's disputation arises from how Trial Counsel argued his motion. This Court is not persuaded and finds Trial Counsel's performance in this matter was reasonable under the circumstances. As noted *supra*, this Court cannot ascertain a legal basis that could be argued to suppress the evidence acquired from the legal traffic stop or the legal vehicle search. Even so, Trial Counsel still derived an argument—albeit an unsuccessful argument. This Court finds Applicant has failed to overcome his burden in proving Trial Counsel's performance was deficient.

Likewise, Applicant has failed to overcome his burden of proving any prejudice flowing from the alleged deficiency. This Court cannot ascertain any colorable argument that would have been successful in suppressing the evidence based on the legal traffic stop and legal search.

Additionally, whether this issue was preserved for appeal or not, it is clear from the record that the issue was preserved. Officer Crews had probable cause to stop Applicant for his traffic violations and had reasonable suspicion to search the vehicle based on the smell of marijuana coming from the vehicle. Upon conducting a search, Officer Crews discovered a transparent plastic bag on the driver's side with heroin. The trial court denied Trial Counsel's motion to suppress the evidence, and the Court of Appeals likely would have upheld the trial court's ruling as they did in Corely.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

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Allegation 1g: Trial Counsel failed to properly raise, argue and preserve for appellate review whether Applicant voluntarily provided a statement to law enforcement.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to properly raise, argue, and preserve for appellate review whether Applicant voluntarily provided a statement to law enforcement. This Court finds this allegation is without merit.

"The process for determining whether a statement is voluntary, and thus admissible, is bifurcated; it involves determinations by both the judge and the jury. First, the trial judge must conduct an evidentiary hearing, outside the presence of the jury, where the State must show the statement was voluntarily made by a preponderance of the evidence." State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (Ct. App. 2007), quoting Jackson v. Denno, 378 U.S. 368, 376 (1964). "Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). "A statement obtained as a result of custodial interrogation is inadmissible unless the suspect was advised of and voluntarily waived his or her rights under." Arrowood, 375 S.C. at 366, 652 S.E.2d at 442. Volunteered statements of any kind are not barred by the Fifth Amendment. Miranda, 384 U.S. at 436; United States v. Rhodes, 779 F.2d 1019, 1032 (4th Cir.1985) ("Miranda does not protect an accused 'from a spontaneous admission made under circumstances not induced by the investigating officers or during a conversation not initiated by the officers.'").

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not discuss the possibility of challenging his statements made to law enforcement. (PCR Tr. p. 11). Applicant testified there

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was no discussion with Trial Counsel about a possible "Denno hearing." (PCR Tr. p. 15). Applicant testified he wanted Trial Counsel to challenge the admissibility of his statements. Id.

On cross-examination, Applicant testified that he had a pretrial hearing. (PCR Tr. p. 31). Applicant testified he did not recall having a pretrial hearing on the statement he made, but he recalled one officer testifying. Id. Applicant testified the pretrial hearing concerned the traffic stop and everything that happened. Id.

On direct examination, Trial Counsel testified they had a Jackson v. Denno hearing, but it was not successful. (PCR Tr. p. 38).

On cross-examination, Trial Counsel testified that he believed the issue of the admissibility of Applicant's statements to law enforcement was preserved for appeal. (PCR Tr. p. 53). Trial Counsel testified he challenged the voluntariness of Applicant's statements, but he did not recall specifics. (PCR Tr. p. 54).

Trial

At trial, during the Jackson v. Denno hearing, Trial Counsel moved to suppress any statements made by Applicant during his traffic stop with law enforcement. (Trial Tr. p. 38). Officer Crews testified that once he realized there was a substance in the car, he secured Applicant and the passenger in the back of his patrol car, even though the passenger was not under arrest. (Trial Tr. p. 54). Officer Crews testified Applicant was advised of his rights, he understood his rights, he was not coerced or threatened, and he did not ask for an attorney. (Trial Tr. pp. 54 – 55). Officer Crews testified that while he was listing the contraband he found in the vehicle to Applicant, Applicant responded, "It's all mine, put it on me." (Trial Tr. p. 55).⁵ Ultimately, after

⁵ Notably, the State presented video from the traffic stop which showed Applicant making this statement. (Trial Tr. pp. 125 – 133; State's Exhibit 1, 2, 3).

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hearing from Trial Counsel and the State, the trial court ruled that Applicant's statements made after he was given the Miranda warnings were admissible, including the statement, "It's all mine, put it on me." (Trial Tr. pp. 89 – 90).

When the State introduced the video wherein Applicant made the inculpatory statements, Trial Counsel objected to the admission of the videos based upon his pretrial motion objections. (Trial Tr. pp. 125; 130 – 32).

Findings

As an initial matter, this Court finds this issue was preserved for appellate review. Trial Counsel objected during the Jackson v. Denno hearing and contemporaneously as the evidence was entered at trial based on the same objections made at the Jackson v. Denno hearing. Thus, this Court finds Applicant's contention that the issue was not preserved is without merit.

Additionally, this Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. Applicant has failed to overcome his burden in proving Trial Counsel was deficient and any resulting prejudice from Trial Counsel's performance. The record provides that there was a pretrial Jackson v. Denno hearing concerning Applicant's statements and Trial Counsel argued for the suppression of the statement. Ultimately, the trial court denied the motion. Additionally, Trial Counsel objected to the introduction of the evidence of Applicant's statements when the State admitted it, preserving the issue for appeal. Therefore, this Court cannot find Trial Counsel deficient in his performance.

The record provides that Applicant was advised of his Miranda rights before making the statement that the drugs were his and to "put it on" him. Miranda does not protect defendants when they have waived their right to remain silent and make voluntary statements. Furthermore, this

Court cannot find that the trial court's ruling would have been disturbed on appeal. Thus, Applicant cannot establish prejudice.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1h: Failure to challenge the admissibility of drug evidence based on chain of custody.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to challenge the admissibility of the drug evidence based on chain of custody issues. Specifically, Applicant asserted there was an officer who field-tested the evidence numerous times. (PCR Tr. p. 15). This Court finds this allegation is without merit.

The burden of preserving an item of real demonstrative evidence intact and free from alteration is upon the party offering the item into evidence. Sligh v. Johnson, 288 S.C. 364, 342 S.E.2d 620 (Ct. App. 1986). The chain of custody rule, however, does not require that every person associated with the procedure be available to testify or be identified personally, depending on the facts of the case. South Carolina Dept. of Social Services v. Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005). While proof need not negate all possibility of tampering, the party offering the evidence must establish, as far as practicable, a complete chain of custody. State v. Williams, 297 S.C. 290, 376 S.E.2d 773 (1989). Whether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case. Cochran, 364 S.C. 621, 614 S.E.2d 642.

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Where the identity of the person who handled the evidence is established, the Court had found evidence regarding its care goes only to the weight of specimen as credible evidence—in other words, where there is a weak link in the chain of custody, not missing link, the question is only one of credibility and not admissibility. State v. Hatcher, 392 S.C. 86, 708 S.E.2d 750 (2011); State v. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001) (Court held the evidence of a discrepancy in the contents of the blood and saliva sample kit did not render the blood sample inadmissible but went only to its weight as credible evidence, where all custodians of the blood testified, and defendant had the opportunity to cross-examine each of them regarding care of the blood).

PCR Evidentiary Hearing

On direct examination, Applicant asserted there was a field officer who tested evidence numerous times, and there were potential issues with the chain of custody. (PCR TR. p. 15). Applicant testified that Trial Counsel never discussed the field testing done on the evidence and never mentioned the chain of custody. (PCR Tr. pp. 15 – 16).

On direct examination, Trial Counsel testified he did not recall challenging the admissibility of the drugs based on handling of the chain of custody. (PCR Tr. p. 45). Trial Counsel testified he did not know if challenging the evidence based on chain of custody would be successful. Id.

On cross-examination, Trial Counsel testified he did not recall a chain of custody issue or argument at trial. (PCR Tr. p. 54). Trial Counsel testified he always goes through the chain of custody because he has had success with it in the past. (Trial Tr. pp. 54 – 55). Trial Counsel testified he would have looked over the chain of custody in Applicant's case and he did not recall any chain of custody issues. (PCR Tr. p. 55).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Trial Counsel was not deficient and Applicant has failed to establish resulting prejudice from Trial Counsel's performance. This Court finds Trial Counsel's testimony **credible** in that he always goes through the chain of custody, and he did not recall any issues with it. Furthermore, this Court cannot ascertain any legal basis Trial Counsel would have had to object to the chain of custody.

Additionally, in support of his contention, Applicant merely offered speculation that there was a chain of custody issue based on the handling and testing of the evidence by an officer. Applicant did not provide the name of the officer he alleges conducted the field testing, resulting in the alleged chain of custody issues, nor what specific issues there were with the chain of custody that would have affected the outcome of his trial. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1i: Failure to conduct a reasonable investigation and develop all reasonable available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to conduct a reasonable investigation and develop all reasonable available, relevant, and admissible or mitigating evidence in preparation of Applicant's defense. Specifically, Applicant contends Trial Counsel failed to investigate the passenger of the vehicle and the defense of third-party guilt. This Court finds this allegation is without merit.

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Id.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more

prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

PCR Evidentiary Hearing

On direct examination, Applicant testified Trial Counsel never prepared for trial because he believed he could get Applicant to plea, but Applicant did not wish to plea. (PCR Tr. p. 11). Applicant testified there were no discussions related to trial. Id. Applicant testified he asked Trial Counsel to investigate the passenger of the vehicle he was driving. (PCR Tr. p. 16). Applicant testified he asked him to find Lawyer, but at the time, he only knew Lawyer by his nickname, "Little D." (PCR Tr. pp. 16 – 17). Applicant testified they discovered Lawyer's full name during pre-trial. (PCR Tr. p. 17). Applicant testified that the main reason he hired Trial Counsel was to investigate Lawyer. Id. Applicant testified that Trial Counsel pressured the solicitor during pre-trial to give the passenger's name, and that's how they got it, but he does not believe there was any additional investigation. Id. Applicant testified he had never seen anything about Lawyer or know anything about him. Id.

On cross-examination, Applicant testified he was driving Lawyer around, and he knew him from the neighborhood, and that Lawyer sold drugs. (PCR Tr. pp. 27 – 28).

On direct examination, Trial Counsel testified that law enforcement allowed Lawyer to leave after stopping the vehicle and did not take his full name, but that opened up the defense for Applicant that the drugs were Lawyer's and not his. (PCR tr. p. 36). Trial Counsel testified Lawyer was not charged with anything based on Applicant saying "put it on me" when stopped by law enforcement, and Trial Counsel argued at trial that Applicant was merely covering for Lawyer and not taking ownership. (PCR Tr. pp. 36 – 37). Trial Counsel testified he discovered the passenger's identity a week before trial, and he attempted to contact Lawyer through his family and friends, but he did not hire an investigator. (PCR Tr. p. 40). Trial Counsel testified he did not know if Lawyer would have been helpful to Applicant's case because he could have denied ownership at trial, and his absence made it easier to cast doubt concerning Applicant's ownership. (PCR Tr. pp. 40 – 41). Additionally, Trial Counsel testified he never considered investigating a defense of third-party guilt, as he could not locate Lawyer in time for trial. (PCR Tr. p. 42).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court finds Trial Counsel adequately prepared for trial and conducted a reasonable investigation into Applicant's case. This Court finds Applicant's testimony in this matter generally **not credible**. Contrary to Applicant's testimony, this Court finds Trial Counsel **credibly** testified that he investigated the passenger's identity and attempted to locate him. Trial Counsel **credibly** testified he contacted family and friends to locate Lawyer but could not locate him. Additionally, Trial Counsel **credibly** testified that Lawyer's absence at trial made it easier to cast doubt on Applicant's ownership of the drugs, whereas if Lawyer had been present, he could have denied ownership. *Underwood v. State*, 309 S.C. 560,

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562, 425 S.E.2d 20, 22 (1992), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective.").

Regarding the defense of third-party guilt, Trial Counsel credibly testified he did not consider investigating the defense as he could not locate the passenger. Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective."); See, e.g., State v. Gregory, 198 S.C. 98, 16 S.E.2d 532, 534 (1941) ("[E]vidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible ... [B]efore such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party") (emphasis added). This Court finds a third-party guilt defense would not have been viable as Lawyer was not charged in connection to the crime and was not present at trial.

Moreover, Applicant's assertion Lawyer would have been helpful to his case is pure conjecture. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice). Applicant testified he did not own the drugs and that Lawyer did. This Court was not persuaded by this testimony and as found *supra*, Applicant's testimony here was not credible. Notably, as Trial Counsel testified, had Lawyer testified at trial, he could have denied ownership and negatively impacted Applicant's defense. Further, Applicant

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did not present testimony or other evidence providing what Lawyer's testimony could have been or what Trial Counsel could have discovered from Lawyer had he more thoroughly investigated. See Harris, supra (An applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared.).

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 1j: Failure to interview witnesses that could have testified regarding Applicant's good character and reputation, do Trial Counsel could request jury instruction on good character and reputation.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to interview witnesses that could have testified regarding Applicant's good character and reputation, do Trial Counsel could request jury instruction on good character and reputation. This Court finds this allegation is without merit.

To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing, or their testimony must otherwise be presented, consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

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"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. See, e.g., Smith v. State, 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); Glover, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was not deficient by failing to call alibi witnesses when two witnesses who testified at PCR hearing did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. See, e.g., Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may have corroborated, or bolstered defendant's credibility so that the findings at trial could have been favorable to the defendant); Thomas v. State, 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

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The South Carolina Supreme Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony per the rules of evidence at the PCR hearing to establish prejudice from the witness' failure to testify at trial. See Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not discuss calling witnesses to testify about his good character. (PCR Tr. pp. 17 – 18).

On cross-examination, Applicant testified he wanted Annette Grant and Teresa Collins to testify at trial and verify his character. (PCR Tr. p. 32). Applicant testified he told Trial Counsel he wanted people to testify, but he did not provide Trial Counsel with names. Id. Applicant testified Trial Counsel never told him he could not call witnesses. (PCR Tr. pp. 32 – 33).

On direct examination, Trial Counsel testified he did not recall discussing potential character witnesses with Applicant. (PCR Tr. p. 41). Trial Counsel testified he does not ordinarily call character witnesses, and his strategy to close last may have affected that decision. (PCR Tr. p. 42).

On cross-examination, Trial Counsel testified he and Applicant did not discuss potential character witnesses, but had he presented character witnesses he could have requested a jury instruction on good character. (PCR Tr. p. 55).

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Findings

As an initial matter, while Applicant named some people that could have testified to his character, he failed to present any of them or offer any of their testimony at the PCR evidentiary hearing. Failure to present purportedly favorable witnesses or evidence at the evidentiary hearing precludes a finding of prejudice. See, e.g., Martin v. State, 427 S.C. 450, 455, 832 S.E.2d 277, 279–80; Glover, supra.

Moreover, while no testimony was provided at the evidentiary hearing on this, this Court would be remiss if it did not point out that calling character witnesses and placing Applicant's character at issue would have opened the door for the State to introduce his prior convictions. The record provides that Applicant's prior convictions include 1) Assault and Battery of a High and Aggravated Nature in 2007; 2) Burglary-2nd Degree in 2009; 3) FTC Fraud; 4) MDP Crack in 2010; 5) Criminal Domestic Violence in 2011; 6) Possession of Marijuana in 2012; 7) Strong Arm Robbery in 2012; and 8) Receiving Stolen Goods in 2015. (Trial Tr. p. 304).

This Court finds that Trial Counsel was not deficient and Applicant failed to establish resulting prejudice from Trial Counsel's performance. Notably, Trial Counsel testified his strategy was to not present a defense and close last. Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992), citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective."). Applicant also failed to prove any resulting prejudice where Applicant failed to present the witnesses he alleged would have testified favorably on his behalf and show how their testimony would have affected the outcome of his trial. Therefore, Applicant's "mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, 318 S.C. at 498–99, 458 S.E.2d at 540.

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Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

- Allegation 1k:** Trial Counsel pursued unreasonable trial strategy during opening statement.
- Allegation 1m:** Trial Counsel pursued unreasonable trial strategy in his closing arguments.
- Allegation 1n:** Trial Counsel improperly shifted burden of proof in closing argument by imploring the jury to get to the truth based on the facts of the case.
- Allegation 1o:** Trial Counsel pursued unreasonable trial strategy in arguing Applicant was the driver for the drug dealer who participated in the drug dealer's criminal activity.

Applicant alleged Trial Counsel was constitutionally ineffective when he employed an unreasonable trial strategy in his opening and closing arguments. Specifically, Applicant asserted Trial Counsel employed an unreasonable trial strategy by stating he was a heroin addict, was driving around drug dealers, and by imploring the jury to seek the truth. This Court finds these allegations are without merit.

"The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6 (2003); see also Murphy v. Davis, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude

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that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Id. at 688– 89; cf. id. at 693 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." Dunn v. Reeves, 594 U.S. 731, 739 (quoting Harrington, 562 U.S. at 106– 107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." Id. (quoting Harrington, 562 U.S. at 108).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied Strickland's deferential standard.

OPENING STATEMENT

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel stated in his opening argument that Applicant was guilty by stating to the jury "If you do your job and do it diligently,

you find my defendant guilty, I'm going to shake everyone's hand." (PCR Tr. p. 18). Applicant testified that Trial Counsel made an analogy to a football field to explain to the jury what the State had to do to show Applicant was guilty. (PCR Tr. p. 19). Additionally, Applicant testified Trial Counsel put a question to the jury that characterized Applicant as a heroin addict. Id. Applicant testified these comments by Trial Counsel shifted the burden of proof. (PCR Tr. pp. 19 – 20).

On direct examination, Trial Counsel testified he does not recall his trial strategy in opening, but that he is certain he addressed his overall theory of the case and attempted to bolster Applicant's defense in opening. (PCR Tr. p. 43). Trial Counsel testified he was attempting to argue in opening that there was another person there who was a drug dealer. Id. Trial Counsel testified that he would not intentionally try to give a prosecutor an opening statement. (PCR Tr. p. 44).

On cross-examination, Trial Counsel testified that he has learned with juries it is important to remind them of the importance of their duty. (PCR Tr. p. 56). Trial Counsel testified he likes to bond with juries and express that he is not here to do a magic trick and that he is operating according to the rules and doing his job, and that's where Trial Counsel's comments in closing came from. Id. Trial Counsel testified that in hindsight, he would have removed some comments from his opening. (PCR Tr. p. 57). Trial Counsel testified he does not know if his comments diluted the burden of proof. Id. Trial Counsel testified he does not know if he needed to discuss his opening argument with Applicant, and he was attempting to make a distinction between Applicant and the passenger in his closing argument. (PCR Tr. p. 59).

Trial

At trial, in his opening argument, Trial Counsel stated the following:

You're gonna hear evidence in this case and I've tried to get to the bottom on it, I work hard on my cases. Somebody is missing in this

750

trial. There's an individual, you'll hear testimony and questions and answers about, by the name of Lawyer. Now, this is not a, you pick-a-card type thing. And before I go on, let me tell you this too, I make a vow to you, I'm gonna do my job to the best of my ability. The only thing I ask you to do is the same thing. You have nobody, nobody to reward, to punish. *If you do your job and you do it diligently, you find my client guilty, I'm gonna shake everybody's hand. If you find him not guilty, I'm gonna shake everybody's hand, okay. That's your job.*

All I ask is that you listen to the legal terms and go by them. There's two terms I want to talk about just really briefly and we'll get started. One is *the presumption of innocence*... The State has the burden in this case and in every criminal case, to leave you firmly convinced of somebody's guilt. I'm not gonna get into the law now because the Judge will explain it to you.

(Trial Tr. pp. 103, l. 14 – 104, l. 4; 11. 17-20) (emphasis added). Trial Counsel then explained what the presumption of innocence means and beyond a reasonable doubt. (Trial Tr. p. 105 – 08). Additionally, Trial Counsel highlighted the missing passenger, characterizing the passenger as a drug dealer and Applicant as a heroin addict. (Trial Tr. pp. 109 – 11).

Findings

This Court finds Applicant has failed to meet his burden of proving Trial Counsel was deficient and that the alleged deficiency prejudiced him. See Butler, supra. The record provides Trial Counsel's opening statements, when read in its entirety, did not state to the jury that Applicant was guilty or shift the burden of proof; rather, he explained to the jury their duty under the law and important legal principles. At the evidentiary hearing, Trial Counsel credibly testified he makes it a practice to explain to the jury their duty under the law and bond with them, so they don't view him as someone trying to trick them. Trial Counsel credibly testified he was attempting to make a distinction between Applicant and the missing passenger, and the bulk of Trial Counsel's opening characterized the passenger as a drug dealer who was culpable for the crime. This Court finds

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Trial Counsel articulated a reasonable strategy as to his purpose in his opening statement. This Court finds Trial Counsel's performance was not deficient and he did not shift the burden of proof.

Turning to Applicant's contention that Trial Counsel characterized him as a heroin addict, this Court finds Trial Counsel never directly stated Applicant was a heroin addict. Further, when read in full (Trial Tr. p. 109), it is evident that the context of Trial Counsel's statement is that Applicant was driving the drug dealer so the heroin addict could get his heroin. In other words, Applicant was driving the drug dealer around while he conducted his drug dealing business from the car. This Court cannot find Trial Counsel characterized Applicant as a heroin addict.

Furthermore, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). This Court finds Trial Counsel has reasonably satisfied Strickland's deferential standard.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance.



Accordingly, this Court finds Applicant has failed to establish any deficiency by Trial Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED**.

CLOSING ARGUMENT

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel's statements in his closing arguments shifted the burden of proof to Applicant. (PCR Tr. p. 20). Applicant, referencing the trial transcript, testified that Trial Counsel stated to the jury that to find Applicant guilty, the State would have had to present more evidence. (PCR Tr. p. 21). Applicant testified that Trial Counsel stated Applicant was doing drugs and driving around drug dealers, and he never discussed those things with Trial Counsel. (PCR Tr. pp. 22 – 23). Additionally, Applicant testified Trial Counsel implored the jury to seek the truth. (PCR Tr. p. 23).

On direct examination, Trial Counsel testified that his trial strategy in closing was to explain reasonable doubt and then point out the presence of another person in the vehicle, the passenger. (PCR Tr. p. 44).

On cross-examination, Trial Counsel testified he did not know if he needed to discuss his opening argument with Applicant, and he was attempting to make a distinction between Applicant and the passenger in his closing argument. (PCR Tr. p. 59). Trial Counsel testified that his statements concerning getting to the truth were made to let the jury know that sometimes you cannot find the truth and the focus is on if the State proved someone did something, not finding every missing piece of information. Id. Trial Counsel testified his comments in closing about drugs were to support the defense Applicant did not claim ownership of the drugs. (PCR Tr. p. 60).

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Trial

At trial, in his closing arguments, Trial Counsel stated the following:

Mr. Ervin is telling you I'm a great lawyer; I hope he believes that. *I think what that means is that don't believe me, that defense lawyers try to trick people or play games. I'm not playing a game here. I told you from the very beginning I was gonna be straight with you.* Is there anything I've done in here today that would lead you to believe otherwise? I'm dealing with the facts. The last thing he just told you is accountability starts here today. Convict him because he said put it on me. That's just what he told you, convict him, give him what he wants. *That's not how you convict people. I know that sounds absurd, put it on me. Why not? Well, how about because he's not guilty.* That's a good reason for one. Okay?

(Trial Tr. p. 273, ll. 11-23) (emphasis added).

Then you got other people that shoot it up their arms, killing themselves, overdosing, doing things they would ordinarily never think that they would do. I can't imagine one person when they're 8, 10, 12-years-old saying I want to grow up to be a heroin addict or drive a drug dealer around. Unfortunately, some of these people can get in that position. Unfortunately, that drug takes precedence. Now, I don't think you should convict my client because he showed you a bag of heroin. I think it's a evil despicable thing. It's killing people. That didn't start today; it's been killing people for a long time, that drug and many others. I'm asking you as a defense lawyer, a magician who's gonna trick you, to look at the facts. *And you know with the evidence and facts in this case and any criminal trial come from right here, and I'm not gonna talk about anything except for what came from right here.* Now, if I go through that and you convict him, there's nothing else I can do, but that's what we're here for, the facts.

(Trial Tr. pp. 274, l. 10 – 275, l. 2) (emphasis added).

He's charged with 14 to 28. He's not charged with 4 grams to 14; it's 14 to 28. *That's why they're doing that, but I continue to try to point out to you, there was two bags.* One was 12-something and the other was like 3 grams. Okay. My guess is a person with limited means was driving a drug dealer around, should probably get the three grams, if he's responsible for anything. *And I'm not conceding that he is,* but you now, three grams, that's usually the person that's got to have the heroin. The guy in the passenger seat walked away, got to pick his phone, probably because he didn't do heroin. You

XSD

know, these people are smart. They're selling junk to people, they're giving junk to people so that they'll drive them around so they don't get busted, because that person needs that drug.

(Trial Tr. pp. 278, l. 18 – 279, l. 6) (emphasis added).

I just ask you to use your common sense. We've got a lot of rules and procedure. *I can give you my theory of what I think happened, what I think I know happened. All I can do is try to point out things to you that leads you to have the same theory as me and I'm trying to the best I can because this is an important case.* My client, Desmond Collins, he's a real person. He looks pretty good today, too. This is about 18 months later, you know... I pointed out things to you. I've shown you some things because you know what? Nobody can prove a negative. It's an impossibility. There's no way I've had a case yet that was like Matlock on T.V. where by the end - - I would love one of those too, by the way -- where I wind up not only convincing you that it wasn't him, but I'll show you who it was. I kinda try to do that, but I can't really do that, you know. But I can't prove that he's innocent and how could I possibly do that unless I had a video tape of everything they talked about, everything that happened, I can't. That's why we have this system. Because before in this country, unlike the countries I told you about before, we do - - what happens to people after this part if they're found guilty, we require a lot. We require that the State and the State alone come in here and let you sleep good at night and give you everything you need to know that you were firmly convinced that my client is guilty, firmly convinced. And when I told you how important you are, I meant it. You're like a backstop. Nobody can do anything after this; it's on you. What you say, what you come up with; that's it. That's pretty important because we have nowhere else to turn.

(Trial Tr. pp. 280 – 81) (emphasis added).

I mean, talk about it, please, at least. *Please remember reasonable doubt, firmly convinced and please remember you have nobody to, to reward or punish.* You just need to do that. And oh, I remember the third thing and I'll sit down. *When we talked about it's your job to find the facts, I always say this because sometimes I fear that it makes you think that we've got to do something, you know.* The point is if you can't get there; you can't get there. If you're not firmly convinced, you're not firmly convinced. You are not under a requirement to come out and tell us exactly what happened and I think that's important to point out to you. *Sometimes you can't. Therein lies the point. You have to firmly convinced.* If you can't, then you're not.

(Trial Tr. p. 285, ll. 2-15) (emphasis added).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, resulting in prejudice from Trial Counsel's alleged deficiency. Butler, *supra*. This Court further finds Trial Counsel's closing argument, when read in its entirety, does not shift the burden of proof or prompt the jury to "seek the truth." Rather, Trial Counsel stated multiple times that the State had failed to meet its burden, went through the evidence and suggested possible scenarios to the jury that did not point to Applicant's guilt. Trial Counsel **credibly** testified his comments were intended to create reasonable doubt.

Turning to Applicant's contention Trial Counsel characterized him as a heroin addict in closing argument—this Court cannot find any such comment in the records before it. Trial Counsel never directly stated Applicant was a heroin addict.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 11: Failure to properly argue defense of mere presence.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to argue the defense of mere presence. This Court finds this allegation is without merit.

The law to be charged to the jury is to be determined by the evidence presented at trial. State v. Lee, 298 S.C. 362, 380 S.E.2d 834 (1989). A charge of mere presence to a jury is proper where the facts indicate a defendant was present during the commission of the crime in question and asserts the mere presence of the defendant at the scene is insufficient to show his or her guilt. § 2-31 Mere Presence - Accomplice Liability/Aiding and Abetting, Anderson, S.C. Requests to Charge - Criminal, § 2-31. Concerning possession of controlled substances, mere presence is insufficient to prove constructive possession. State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). The State must prove actual or constructive possession, coupled with knowledge of the presence of drugs. State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980).

To prove constructive possession, the State must show the defendant had dominion and control over the substance, and such possession can be established through direct or circumstantial evidence. Halyard, 274 S.C. at 400, 264 S.E.2d at 842; State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976); See Brunson v. State, 324 S.C. 117, 119, 477 S.E.2d 711, 713 (1996) ("Mere presence instructions are required when evidence supports the conclusion that the defendant was merely present at the scene where drugs were found and it was questionable whether the defendant had a right to exercise dominion and control over them."); See also Lee, 298 S.C. at 365, 380 S.E.2d at 836 ("[M]ere presence was not an instruction supported by the evidence presented by the State at trial...Lee's testimony was that the officers knew he was not involved and were framing him, not that he just happened by when someone dropped the bag of cocaine or that he was standing by while others used or possessed cocaine." (internal quotation omitted)).

"Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." State v. Hudson, 277 S.C. 200, 203, 284 S.E.2d 773, 775 (1981). "Knowledge can be proven by the evidence of acts, declarations, or conduct of the accused from which the inference may be drawn that the accused knew of the existence of the prohibited substances." State v. Hernandez, 382 S.C. 620, 624, 677 S.E.2d 603, 605 (2009).

PCR Evidentiary Hearing

On direct examination, Applicant testified there was no discussion with Trial Counsel about asserting the defense of mere presence. (PCR Tr. p. 20). Applicant testified he believes that mere presence would have been a viable defense. Id.

On cross-examination, Applicant testified that when he was stopped by law enforcement, he was "delusional" and told the officers to pin the drugs on him because he smokes weed. (PCR Tr. p. 27). Applicant testified they were not his drugs but the passengers, and they were the passengers because he sells drugs. Id. Applicant testified the passenger was not selling drugs when he drove him around, and he did not know about the drugs even though they were found on his seat. (PCR Tr. pp. 27 – 28). Applicant testified he knew the passenger from his neighborhood and knew he sold drugs. (PCR Tr. p. 28). Applicant testified he recalled Trial Counsel arguing the drugs belonged to the passenger and Applicant was merely driving. (PCR Tr. pp. 28 – 29).

On direct examination, Trial Counsel testified he did not consider the defense of mere presence, and he did not believe he asked for a mere presence charge. (PCR Tr. p. 42). Trial Counsel testified that the facts of Applicant's case would have fit a charge on mere presence, and the trial court might have given the charge, but he is not certain. (PCR Tr. pp. 42 – 43). Trial Counsel testified he does not know if mere presence would have been successful. (PCR Tr. p. 43).

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On cross-examination, Trial Counsel testified that his argument at trial was essentially one of mere presence. (PCR Tr. pp. 55 – 56). Trial Counsel testified that he did not have a strategy in not requesting a mere presence charge. (PCR Tr. p. 56). Trial Counsel testified that in hindsight, he would have asked for a jury instruction on mere presence. Id.

Trial

At trial, the State presented evidence that Applicant was stopped for multiple traffic violations. (Trial Tr. p.p. 116 – 17). Applicant was driving the vehicle. Id. Officer Crews testified he smelled marijuana coming from the driver's window, so he had Applicant and the passenger step out and conducted a search of the vehicle. Officer Crews discovered a bag containing over \$3,000 in cash, a bag containing a powdered substance, small marijuana blunts on either side of the vehicle interior, and a scale and two cell phones. (Trial Tr. pp. 119 – 21; 135 – 37; 177). The transparent bag with the powdered substance tested positive for heroin and was found on the driver's side at Applicant's feet. (Trial Tr. pp. 122 – 22; 160; 244 – 45).

Trial Counsel argued at trial that Applicant was not the actual possessor of the heroin, and that the passenger, a known drug dealer, was the actual possessor. Trial Counsel argued Applicant was merely driving the vehicle. However, the passenger was not charged with anything, and he was not a witness and could not be located in time for trial.

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, resulting in prejudice from Trial Counsel's alleged deficiency. Butler, *supra*. Notably, this Court finds the State's evidence in this

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case overwhelmingly supported constructive possession, as Applicant was driving the vehicle, the heroin was in a clear bag at his feet, and he made a voluntary statement of ownership of the drugs to law enforcement. Trial Counsel cannot be deficient for failing to request a charge that is far removed from the facts presented at trial.

Moreover, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Strickland, 466 U.S. at 689; see Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996) (declining "to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial"). While Trial Counsel testified that in hindsight, he would have asked for this charge, this Court is required to "eliminate the distorting effects of hindsight," and evaluate Trial Counsel's conduct at the time of trial. This Court finds Trial Counsel has reasonably satisfied Strickland's deferential standard.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED and DISMISSED WITH PREJUDICE**.

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Allegation 1p: Failure to request lesser included offense.

Applicant alleged that Trial Counsel was constitutionally ineffective for failing to request a charge of the lesser included offense, possession of heroin. This Court finds this allegation is without merit.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel discussed requesting a charge on possession of heroin a few minutes prior to the jury being charged. (PCR Tr. p. 24).

On direct examination, Trial Counsel testified he believed he requested a jury charge on the lesser included offense. (PCR Tr. p. 44). Trial Counsel testified he requested a charge on the lesser included offense because there were two separate amounts of heroin seized, and one of the amounts did not meet the weight for trafficking. Id.

Trial

At trial, Trial Counsel requested the jury be charged on the lesser included possession with intent to distribute on the basis that there were two occupants in the vehicle and two bags of heroin and that one could belong to each of them. (Trial Tr. p. 259). The State argued State v. Raffaldt⁶ and State v. Grandy⁷ precluded the trial court from charging the lesser included because the weight of the drugs exceeded the minimum amount for trafficking. Id. The trial court took it under advisement to review the case law and ultimately denied Trial Counsel's request. (Trial Tr. pp. 261 – 63).

⁶ State v. Raffaldt, 318 S.C. 110, 456 S.E.2d 390 (1995).

⁷ State v. Grandy, 306 S.C. 224, 411 S.E.2d 207 (1991).

Findings

This Court finds Applicant failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, resulting in prejudice from Trial Counsel's alleged deficiency. Butler, *supra*. The record provides that Trial Counsel requested the lesser included offense be charged and the trial court denied Trial Counsel's request.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

ALLEGATIONS RAISED AT THE EVIDENTIARY HEARING

Allegation: Failure to advise Applicant about his right to testify.

Applicant alleged that Trial Counsel was constitutionally ineffective for failing to advise him of his right to testify. This Court finds this allegation is without merit.

"The decision to testify or not is a perilous one. If a defendant does not testify, he foregoes the opportunity to tell the jury his version of events. [However], if a defendant chooses to testify, he subjects himself to cross-examination, including possible impeachment with prior convictions." Brown v. State, 340 S.C. 590, 594, 533 S.E.2d 308, 310 (2000). "If a defendant chooses not to take the stand in his own defense, the trial judge must, if requested, instruct the jury that the defendant's failure to testify cannot be held against him or considered by the jury in any manner

during its deliberations." Id. "A defendant's decision to testify or not must be made with knowledge of the consequences of either choice." Id.

PCR Evidentiary Hearing

On direct examination, Applicant testified there was no discussion with Trial Counsel about his right to testify at trial. (PCR Tr. p. 11).

On cross-examination, Applicant testified he had considered testifying, but he had not been given guidance concerning testifying. (PCR Tr. p. 32). Applicant testified he was confused, and no one had advised him how testifying would help or hurt him. Id. Applicant testified he did not believe testifying would have hurt him. Id.

On re-direct examination, Applicant testified the passenger owned the drugs and he was merely taking the passenger from one location to the other. (PCR Tr. p. 33). Applicant testified he would testify to the same at trial. (PCR Tr. p. 34).

On cross-examination, Trial Counsel testified that he believed he discussed Applicant's right to testify with him. (PCR Tr. p. 58). Trial Counsel testified there were issues with Applicant's record, and he recalled thinking it was not worth it for Applicant to testify. Id. Trial Counsel testified his strategy was to close last, and he does not recall whether he expressed his strategy to Applicant. Id.

Trial

At trial, the following colloquy occurred between the trial judge and Applicant:

THE COURT: All right. Sir, your name is Desmond Sharmaine Collins?
APPLICANT: Yes, sir.
THE COURT: All right. Mr. Collins, at this time, I'm going to explain to you certain rights that you have. If you do not understand anything I say, please let me know, and if you want me to explain anything in

4180

more detail, please let me know. Do you understand that?

APPLICANT: Yes, sir.

THE COURT: Okay. We've now reached the stage of the trial where you may present your defense. You have the right to claim the protections given to you by the Fifth Amendment to the United States Constitution, which states in part that no person shall be compelled in any criminal trial or in any criminal case to be a witness against himself. This means that you cannot be required to testify in this case. You have the right to testify on your own behalf. However, no one can make you testify. This is a personal right and no one can waive this right except for you. If you decide to testify, you will be subject to the same rules that govern other witnesses and you may be examined and cross examined on any relevant issue in this case. In addition, if you have any convictions involving dishonesty or false statement or for crimes punishable by imprisonment for more than one year and this Court determines that the probative value of admitting the evidence, outweighs its prejudicial effect to you, the Solicitor will be able to introduce your record to attack your credibility. Now are there any prior convictions that the State intends to use to attack his credibility, if he testified?

MR. ERVIN: There is, Your Honor.

THE COURT: All right. What is that?

MR. ERVIN: There is a 1999 grand larceny; 2009 financial transaction card fraud; and a 2015 receiving stolen goods.

THE COURT: All right. So, Mr. Collins, if you testify, they will be able to introduce these three convictions against you to attack your credibility. Okay?

APPLICANT: Yes, sir.

THE COURT: All right. Now, if you decide to testify, this decision on your part, must be freely, voluntarily, and intelligently made with knowledge of the protections given to you by the Fifth Amendment of the United State Constitution and the consequences of your decision to testify. If you decide not to testify, I will instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever and that there is to

be no, absolutely no prejudice to you because you did not testify. It is left entirely up to whether or not you testify. You may talk with your attorney, your family and friends, or anyone else, but the final decision will be left entirely up to you. Now, also if you testify, they will be able to introduce your record to attack your credibility but there will also be a charge to the jury that says that they cannot consider those prior convictions as to your guilt or innocence in this case. They can only consider them as to your credibility when you testify. Now, do you understand what I've explained to you?

APPLICANT: Yes, sir.

THE COURT: Do you have any questions about what I've explained to you?

APPLICANT: No, sir.

THE COURT: All right. Have you discussed this with your lawyer and anyone else you want to discuss whether or not you wish to testify?

APPLICANT: Yes, sir.

THE COURT: Okay. Do you need to discuss it further with your attorney or with anyone else?

APPLICANT: No, sir.

THE COURT: Okay. Do you wish to testify in this case?

APPLICANT: No, sir.

THE COURT: Okay. Is that your decision?

APPLICANT: Yes, sir.

THE COURT: Has anybody forced you into that decision?

APPLICANT: No, sir.

(Trial Tr. pp. 254, l. 11 – 257, l. 9).

Findings

This Court finds the record wholly refutes this allegation and Applicant has failed to overcome his burden and establish Trial Counsel was deficient, and any resulting prejudice from Trial Counsel's alleged deficiency. Butler, *supra*. The record provides Trial Counsel advised Applicant of his right to testify, and Applicant was aware it was his decision whether or not to testify and elected not to. Additionally, even if Applicant had not been advised by Trial Counsel, the error was cured by the colloquy between Applicant and the trial court. The record provides

that the trial court advised Applicant of his right to testify, advised Applicant of the consequences if he chose to testify and that it was his decision solely whether he wanted to testify. Further, Applicant informed the trial court he had discussed testifying with Trial Counsel, that he did not need to discuss it further with Trial Counsel, and that he did not want to testify.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation: Failure to move for a continuance to investigate the issue of the identity of the passenger.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to move for a continuance to investigate the issue of the identity of the passenger. This Court finds this allegation is without merit.

PCR Evidentiary Hearing

At the outset of the evidentiary hearing, Applicant raised the issue that Trial Counsel was ineffective for failing to move for a continuance to investigate the identity of the passenger, Lawyer. (PCR Tr. p. 9).

On direct examination, Applicant testified that Trial Counsel asked for a continuance to investigate the identity of the passenger, and it was denied. (PCR Tr. p. 29). Applicant testified Lawyer was not present at the hearing to testify. Id.

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Findings

As an initial matter, this Court finds the record wholly refutes this allegation and establishes Trial Counsel did move for a continuance, and the trial court denied his motion. (Trial Tr. p. 32 – 33). Thus, this Court finds Applicant has failed to overcome his burden and establish Trial Counsel was deficient, and any resulting prejudice from Trial Counsel's alleged deficiency. Butler, supra.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that he was prejudiced by Trial Counsel's performance. Accordingly, this allegation is **DENIED** and **DISMISSED WITH PREJUDICE**.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396-97 (1985) (citing Douglas v. California, 372 U.S. 353 (1963)). "However, appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745 (1983)). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 752-53 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Tisdale v. State, 357 S.C.

TSD

474, 476. 594 S.E.2d 166, 167 (2004) (quoting Jones v. Barnes, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy"))).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the courts apply the Strickland test just as they would when analyzing a claim of ineffective assistance of trial counsel: an applicant must show that appellate counsel's performance was deficient and that he or she was prejudiced by the deficiency. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Smith v. Robbins, 528 U.S. 259, 288 (2000) (citing Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)).

- Allegation 2a:** Failure to raise the issue of whether the trial court erred in denying Trial Counsel's motion for a continuance to investigate the identity of the passenger in Applicant's car.
- Allegation 2c:** Failure to raise the issue of whether the State committed a discovery violation by failing to disclose the 400-page cell phone report.
- Allegation 2d:** Failure to raise the issue of whether trial court erred in limited cross-examination of Officer Crews.
- Allegation 2e:** Failure to raise the issue of whether trial court erred in denying Trial Counsel's motion to suppress evidence seized by law enforcement.
- Allegation 2f:** Failure to raise the issue of whether the trial court erred in determining Applicant's statement to law enforcement was voluntary.

Applicant alleges Appellate Counsel was constitutionally ineffective for failing to raise various issues on appeal. This Court finds these allegations are without merit.

PCR Evidentiary Hearing

On direct examination, Trial Counsel testified that he raised on appeal the glaring issue in his mind that he left with from Applicant's trial. (PCR Tr. p. 41). Trial Counsel testified he may have looked at other issues, and believes Applicant asked him to raise certain issues, but Trial Counsel decided to keep it simple and assert the issue he believed was good. Id. Trial Counsel testified he believed the issue he raised on appeal was the best issue. Id.

On cross-examination, Trial Counsel testified there were other issues he could have raised on appeal, and he does not recall his thought process in not raising other issues on appeal. (PCR Tr. p. 51). Trial Counsel testified he put all his eggs in one basket on appeal because it seemed like the best issue, but it was not preserved. (PCR Tr. p. 53). Trial Counsel testified that in hindsight, he would have raised other issues on appeal. (PCR Tr. pp. 50 – 53; 60 – 62).

Findings

This Court must first look at the issue raised on appeal and compare it to the viable issues raised by Applicant at the PCR evidentiary hearing to determine whether the pled issues are stronger than the one raised on appeal. This Court finds that because the issue raised on appeal was not preserved for appeal, then any other issue that could have been raised on appeal would have been a stronger issue than the one raised on appeal. Thus, this Court finds Trial Counsel's performance on this matter was deficient. However, a finding of deficiency only satisfies Strickland's first prong.

Turning to prejudice, this Court must determine whether the issue or issues, if raised, would have been successful on appeal. This Court finds Applicant was not prejudiced by Trial Counsel's deficiency. This Court further finds none of the issues pled at the evidentiary hearing regarding trial court error or the Brady violation would have been reversed on appeal. (Discussed *supra* in

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Allegation⁸ 1c, 1d, 1e, 1f, 1g). State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 847-48 (2006), citing State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) and State v. Frank, 262 S.C. 526, 533, 205 S.E.2d 827, 830 (1974) ("[T]he admission or exclusion of evidence is a matter addressed to the sound discretion of the trial [court] and [its] ruling will not be disturbed in the absence of [a] manifest abuse of discretion accompanied by probable prejudice."). Based on a review of the record, the trial court's rulings had evidentiary support and were not erroneous as a matter of law. Thus, Applicant has failed in his burden of proving and prejudice from Trial Counsel's deficiency.

Accordingly, this Court finds Applicant proved Trial Counsel was deficient in this matter, however, Applicant failed to establish any prejudice flowing therefrom. Thus, these allegations must be **DENIED** and **DISMISSED WITH PREJUDICE**.

Allegation 2b: Failure to raise the issue of whether the trial court erred in refusing to dismiss or declare a mistrial based on untimely discovery regarding the 400-page Cell Phone Report.

Applicant alleged Trial Counsel was constitutionally ineffective for failing to raise on appeal the trial court's denial of his motion for a mistrial based on the untimely discovery regarding the 400-page CPR. This Court finds this allegation is without merit.

As discussed in the previous allegation, Trial Counsel's performance in this matter was deficient as this was a preserved issue and the issue he raised on appeal was not a preserved issue.

Non-frivolous

⁸ The allegation concerning the denial of Trial Counsel's motion to continue to investigate the identity of the passenger is the second allegation addressed *supra* in **Allegation 1b**.

As addressed in **Allegation 1c**, Trial Counsel moved for a mistrial based on the State's failure to timely provide the CPR and the trial court denied his motion. (Trial Tr. pp. 211 – 15). Importantly, the CPR was not used in the State's case against Applicant.

Turning to prejudice, this Court must determine whether the issue or issues, if raised, would have been successful on appeal. This Court finds Applicant was not prejudiced by Trial Counsel's deficiency. This Court further finds this issue, even if raised on appeal, the lower courts ruling would be upheld. See State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998) (finding "In order to receive a mistrial, the defendant must show error and resulting prejudice."); see also State v. Galbreath, 359 S.C. 398, 402, 597 S.E.2d 845, 847 (Ct.App.2004) (requiring the defendant to show a prejudicial abuse of discretion (citing State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69– 70 (Ct. App. 2000))). A mistrial is only proper where there is " manifest necessity", and whether a mistrial is manifestly necessary is a fact specific inquiry. State v. Rowlands, 343 S.C. 454, 539 S.E.2d 717 (Ct. App. 2000). Based on a review of the record, this Court finds Applicant has failed to show error by the trial court and any resulting prejudice that would have warranted a mistrial.

Accordingly, this Court finds Applicant proved Trial Counsel was deficient in this matter; however, Applicant failed to establish any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED WITH PREJUDICE**.

[CONCLUSION PAGE FOLLOWS]

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CONCLUSION


Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 26th day of July, 2024.



THE HONORABLE H. STEVEN DEBERRY, IV
Presiding Judge
Fifteenth Judicial Circuit

Florence, South Carolina