NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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APPEAL FROM FLORENCE COUNTY

Court of Common Pleas

George M. McFaddin, Jr., Circuit Court Judge

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Case No. 2020-CP-21-02926

The State,.....Respondent,

Myron Cannon,.....Appellant,

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Notice of Appeal

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Myron Cannon appeals the order of the Honorable George M. McFaddin, Jr, dated January 6, 2025, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on January 6, 2025.

Ola Johnson

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| STATE OF SOUTH CAROLINA<br>COUNTY OF FLORENCE | ) | IN THE COURT OF COMMON PLEAS<br>TWELFTH JUDICIAL CIRCUIT |
| Myron A. Cannon, #296787, | ) | CASE No. 2020–CP–21–2926 |
| Applicant, | ) | |
| v. | ) | **ORDER OF DISMISSAL WITH PREJUDICE** |
| State of South Carolina, | ) | |
| Respondent. | ) | |

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| Presiding Judge: | Hon. George M. McFaddin, Jr. |
| Applicant's Attorney: | Ola A. Johnson, Esq. |
| Respondent's Attorney: | D. Russell Barlow, II, Esq. |
| Trial Counsel: | Grant B. Smaldone, Esq. |
| Date of Hearing: | December 15, 2022 |
| Court Reporter: | Krystal J. Smith |

This matter comes before the Court by way of Myron A. Cannon's (Applicant) application for post-conviction relief (PCR) filed on December 17, 2020. Respondent, the State of South Carolina, submitted its Return and Partial Motion to Dismiss on April 5, 2021, requesting an evidentiary hearing to resolve the claims outlined in the application and amended application. On October 11, 2022, Applicant amended his application through PCR Counsel Ola A. Johnson.

On December 15, 2022, an evidentiary hearing was held at the Florence County Courthouse before the Honorable George M. McFaddin, Jr. Applicant was present and represented by Ola A. Johnson, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented Respondent. Applicant proceeded forward on the claims set forth in his original and amended applications. In support of these claims, Applicant testified on his behalf, and Respondent presented testimony from Grant B. Smaldone, 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.

## PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. During its March 2016 term, the Florence County Grand Jury indicted Applicant for Trafficking Cocaine Base, Possession of Cocaine with Intent to Distribute, Failure to Stop for a Blue Light, and Resisting Arrest (2016-GS-21-0415). Trial Counsel represented Applicant. Deputy Solicitor John C. Jepertinger prosecuted the case.

Applicant's case proceeded to a jury trial September 6–7, 2016, before the Honorable William H. Seals. The jury convicted Applicant as indicted on all counts. Judge Seals sentenced Applicant to concurrent sentences of twenty-five (25) years for Trafficking Cocaine Base, twenty-five (25) years for Possession of Cocaine with Intent to Distribute, five (5) years for Failure to Stop for a Blue Light, and one (1) year for Resisting Arrest.

Applicant filed a timely notice of appeal. Elizabeth Franklin-Best, Esquire, perfected Applicant's appeal and presented the following issues:

> 1. The circuit court judge erred when he denied Cannon's motion for a directed verdict because the State failed to adduce substantial circumstantial evidence to prove that Cannon was guilty of trafficking in cocaine base and possession with intent to distribute cocaine.
> 2. The circuit court judge erred by allowing Officer Nida to testify to the street value of the drugs that were found in the car Cannon was driving because that testimony was irrelevant and was unduly prejudicial to Cannon pursuant to Rule 403.

Following briefing, the South Carolina Court of Appeals dismissed the appeal in an unpublished decision. State v. Cannon, Op. No. 2019-UP-397 (S.C. Ct. App. filed December 18, 2019). The Remittitur was returned to the circuit court on January 8, 2020.

## FACTS GIVING RISE TO THE CONVICTION

Prior to trial, Applicant moved to suppress evidence seized from the car he was driving at the time of his arrest. After hearing testimony from the police officers involved in Applicant's arrest and seizure of the evidence, the trial court denied Applicant's motion. (Trial Tr. pp. 17–27). Applicant then moved to exclude testimony from the State's proposed expert regarding the street value of cocaine and crack, arguing the testimony was irrelevant because the dollar value was not an element of the offenses charged, and it was more prejudicial than probative. The State argued the testimony was relevant to the issue of whether the drugs found in the car were just for personal use. The trial court denied the motion to exclude the expert's testimony, finding the proposed testimony was relevant because the car Applicant was driving was a rental car, and the issue of whether someone other than Applicant left the drugs in the car could arise. (Trial Tr. pp. 27–29).

Tony Drummond (Drummond), a sergeant with the Florence County Sheriff's Office, testified that on September 12, 2015, he attempted to stop a car traveling at a very high rate of speed. Rather than stopping after Drummond activated his blue lights, the driver, subsequently identified as Applicant, continued driving at a high rate of speed with Drummond in pursuit. During the pursuit, Drummond observed Applicant run stop signs and drive erratically. Finally, after Applicant almost caused wrecks with other cars, Drummond struck the rear of Applicant's car, which caused it to run off the road, through a ditch, and into a bean field. (Trial Tr. pp. 40–45).

After the car came to a stop in the bean field, Drummond saw Applicant open the driver's door, jump out, and run away. Drummond determined no one else was inside the car, then pursued Applicant on foot. Applicant refused to stop when Drummond repeatedly ordered him to do so, and Drummond ultimately used a taser to subdue Applicant and get him into custody. When Drummond took Applicant back to his car, another officer told Drummond drugs had been found inside the car, which was determined to be an Enterprise rental car. (Trial Tr. pp. 46–49).

Corporal Brooks Urqhart (Urqhart) of the Florence County Sheriff's Office testified he was the first officer on the scene after Drummond started chasing Applicant on foot. When Urqhart walked up to the car in the bean field, he observed the driver's side door was open, and there were two bags of what appeared to be narcotics in plain view inside, one on the driver's seat and one on the driver's side floorboard. Urqhart did not touch anything in the car but secured the scene until other officers could arrive to seize the drugs. (Trial Tr. pp. 58–60).

Corporal Jason Bazen (Bazen) of the Florence County Sheriff's Office testified he worked narcotics interdictions with an inter-county community team of officers. Bazen was working the night of September 12, 2016, and responded to a call for assistance involving Drummond's pursuit of Applicant. Bazen assisted Drummond in securing Applicant and walked with them back to the vehicle, where he also saw the bags of drugs in plain view inside the car. Bazen secured the narcotics and placed them in evidence bags. Bazen also seized a set of digital scales, several cell phones, and two thumb drives from inside the car. Bazen testified digital scales are used to weigh drugs in the drug business. (Trial Tr. pp. 63–70).

Detective Mitch Hansen (Hansen) of the Florence County Sheriff's Office testified he is the forensic drug chemist for the Office, which includes testing, weighing, and re-packaging seized narcotics. Hansen analyzed the drugs seized from Applicant's rental car and determined one bag

contained 6.92 grams of cocaine powder. The other bag contained 38.19 grams of crack (cocaine base). (Trial Tr. pp. 77–81).

Sergeant William Nida (Nida) of the Florence Police Department testified he had worked with the Department Narcotics Unit for twelve years, which handles anything concerning drugs, including controlled purchases of illegal narcotics. Nida stated his unit averages 480 drug cases annually, and as a result of his involvement in controlled purchases and general experience working with drug cases, he was familiar with the street value of narcotics in Florence County. Over Applicant's relevancy and 403 objections, the trial court qualified Nida as an expert in the field of the retail value of cocaine and crack cocaine in the Florence area, finding the information was beyond the knowledge of an ordinary jury, Nida had the requisite knowledge and skill, and his testimony was reliable. (Trial Tr. pp. 84–87).

Nida testified that one gram of crack or cocaine powder was sold for $100. The amount of cocaine powder and crack found in Applicant's rental vehicle was 45.11 grams, with a street value of $4,511. (Trial Tr. pp. 87–91). Applicant moved for a directed verdict at the close of the State's case, arguing the State presented no evidence that Applicant had dominion and control over the drugs found in the car he was driving. The trial court denied the motion, finding there was evidence Applicant was in the car, he got out of the car and ran, the drugs were inside the car, and no one else was inside the car. (Trial Tr. p. 92).

## CURRENT ACTION BEFORE THIS COURT

In his *pro se* PCR application, Applicant alleges he is being detained unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel:
   a. Counsel was ineffective in failing to object to an instruction to the jury regarding possession of cocaine with the intent to distribute.

b. Counsel was ineffective in failing to request the court to dismiss, Ms. Shavers, and to sit the alternative juror after, Ms. Shavers had become compromised [sic.] by a phone call.
c. Counsel was ineffective when making a motion for a directed verdict based on control and dominion of the cocaine.

2. Violation of Due Process of Law:
   ~~a. Counsels decision to not challenge the indictment prior to the jury being sworn or at any time during the trial was wholly ineffective and as a result [Applicant] was deprived of due process of law under the Fourteenth Amendment to the United States Constitution, the South Carolina Constitution and well established law.~~
   ~~b. [Applicant] further submits that if he were properly notified [because of the wording of the indictment] that he would be treated as a twice convicted trafficker he could have established a proper defense or could have decided to enter a plea.~~
   ~~c. Counsel was ineffective in not challenging the indictment before the jury was sworn and the circuit court for Florence County was without subject matter jurisdiction to act over offense.~~[1]
3. ~~Ineffective Assistance of Appellate Counsel:~~
   ~~a. Appellate counsel was ineffective in failing to raise on appeal the fact that the court acted without jurisdiction over trafficking offense~~.
4. ~~The circuit court was without subject matter jurisdiction to sentence [Applicant] as a third offense trafficker~~.

In Applicant's amended application, he asserted the following allegations:

1. Ineffective Assistance of Trial Counsel
   d. Trial Counsel failed to review discovery with Applicant.
   e. Trial Counsel failed to investigate the case.
   f. Trial Counsel failed to object to juror 131 following the discovery that someone described as "defendant's girlfriend" contacted this juror.
   g. Trial Counsel failed to object to the testimony of Sgt. William Joe Nida regarding the street value of the drugs in question as improper character evidence and failed to preserve the issue for appeal.

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[1] Allegations 2(a), 2(b), 2(c), and 4 were summarily dismissed on Respondent's motion to dismiss. Accordingly, these allegations will not be addressed *infra*. (PCR Tr. pp. 8–9).

As relief, Applicant requests the Court vacate his conviction and sentence.

Before this Court were the Florence County Clerk of Court records regarding the Applicant's convictions and sentences, Applicant's SCDC records, the trial transcript, the entire appellate record, and the records of this PCR action.

## STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act[2] (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 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

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[2] S.C. Code Ann. §§ 17-27-10 to -160.

*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 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 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. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

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), SCRCP (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 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).

***ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL***

**Allegation 1a: Failure to object to jury instruction regarding inference when in possession of over a gram of cocaine.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to the erroneous jury charge on inference when the amount of cocaine is over one gram. This Court finds this allegation is without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if 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.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that

failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

"In reviewing jury charges for error, [the reviewing court] must consider the court's jury charge as a whole in light of the evidence and issues presented at trial." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (quoting State v. Adkins, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003)). "[A] charge is sufficient if, when considered as a whole, it covers the law applicable to the case. State v. Burton, 302 S.C. 494, 498, 397 S.E.2d 90, 92 (1990) (citing State v. Rabon, 275 S.C. 459, 272 S.E.2d 634 (1980)). If the charge "is substantially correct and covers the law [it] does not require reversal." State v. Mattison, 388 S.C. 469, 478, 697 S.E.2d 578, 583 (2010) (citing State v. Foust, 325 S.C. 12, 479 S.E.2d 50 (1996)). "Moreover, '[t]o warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant.'" State v. Marin, 415 S.C. 475, 482, 783 S.E.2d 808, 812 (2016)

(quoting State v. Brandt, 393 S.C. 526, 550, 713 S.E.2d 591, 603 (2011)). An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion. State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 583–84 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)).

***Trial***

At trial, the trial court gave the following jury charge:

> Possession of more than one gram of cocaine creates an inference that the Defendant possessed the cocaine with intent to distribute it. This inference does not relieve the State from proving beyond a reasonable doubt that the Defendant had the intent to distribute. It is simply an evidentiary fact to be taken into consideration along with other evidence in the case and given the weight accordingly. If you find the Defendant did not possess with intent to distribute cocaine, you may find the Defendant guilty of possession of cocaine.

(Trial Tr. p. 124).

***PCR Evidentiary Hearing***

On direct examination, Applicant testified that he remembered there was a jury charge given about an inference to the jury for possession with intent based on possessing over a gram of cocaine. (PCR Tr. p. 10). Applicant testified although he recalled speaking with Trial Counsel about it, Trial Counsel never objected. (PCR Tr. p. 11).

On cross-examination, Applicant testified he believes that the jury instruction prejudiced him at trial. (PCR Tr. p. 11).

On redirect examination, Applicant testified he wanted Trial Counsel to object to the jury instruction, and Trial Counsel did not. (PCR Tr. p. 27).

On direct examination, Trial Counsel testified that he did not think it was necessary to object; however, he now would have objected because it is a "garbage statute." (PCR Tr. p. 33). Trial Counsel further testified it was ridiculous that there was an inference that the defendant had

to prove. Id. Trial Counsel testified that the law still exists today. Id. Trial Counsel testified he did not have a duty to object and create new law. Id.

On cross-examination of Trial Counsel, the following colloquy occurred:

> Q: Mr. Smaldone, the objection or potential objection to the charge regarding an inference when there's a charge -- there's cocaine over a gram, wouldn't it be to your client's advantage if that was not charged to the jury?
>
> A: Well -- okay. That's a hard question to answer because I don't want to say no. Of course, it would. It would benefit him. Yes, that would be a beneficial thing. However, I don't know that it would have made a difference because that wasn't the controlling charge. There was also the trafficking issue. However, certainly for that charge, yes, it probably would have benefited, although I don't -- I don't see a judge, especially that particular judge, granting my objection. But if he did, yeah, I would -- it would have -- probably would have helped, especially because the jury had questions later. So . . .
>
> Q: Okay. Have you ever attempted to object to that before or ever?
>
> A: I don't -- honestly, I don't think it's come up in a while. I haven't tried a drug case in a -- in a while, so I don't think I've had -- I think I've come close, and they've always pled at the last minute. So I don't think I've had the chance to -- to argue that. I look forward to it, though.
>
> Q: Okay. But you didn't do it in this case?
>
> A: I did not do it in this case. In the future, I would argue that it would be an impermissible comment, judicial comment on the facts that the -- that inference and also burden shifting. But . . .

(PCR Tr. pp. 38–39).

***Findings***

This Court finds Applicant has 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 further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any

resulting prejudice from that alleged deficiency. See Butler, *supra*. After a review of the record and the charge given to the jury, this Court finds Trial Counsel cannot be found deficient where when considered as a whole, the jury charge was a correct statement of the law. See State v. Jackson, 297 S.C. 523, 377 S.E.2d 570 (1989) (recognizing that jury instructions must be considered as a whole and if as a whole, they are free from error, any isolated portions that might be misleading do not constitute reversible error). Furthermore, this Court finds any objection by Trial Counsel would not have been meritorious. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs).

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**.

**Allegation 1b:** **Failure to request the trial court to dismiss Juror 131, and to sit alternative juror after compromised phone call between defendant's girlfriend and Juror 131.**

**Allegation 1f:** **Failure to object to juror 131 following the discovery that someone described as "defendant's girlfriend" contacted this juror.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to juror 131 not being excused when details regarding a phone call from Applicant's "girlfriend" were

addressed by the trial court. Applicant also alleges that Trial Counsel should have objected to Juror 131 following discovery that someone described as "defendant's girlfriend."

***Trial***

At trial, the following colloquy occurred concerning Juror 131 as follows:

| | |
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| Clerk: | Your Honor, it was Juror 131, Jannese Shavers. |
| Court: | Okay. |
| Clerk: | When I spoke with Ms. Shavers, she said she got a phone call this morning, and the phone call was from someone she had worked with who said she was the Defendant's girlfriend -- she had worked with the girlfriend's aunt, I believe, if I've got this correctly. The Defendant's girlfriend had called and said the Defendant was her boyfriend, and Ms. Shavers stopped her right there and said that she couldn't talk to her about it but the girlfriend said that she just needed to talk to her. I believe just a few words were exchanged but nothing else was said after she stopped her. She wanted to bring it to my attention, and I told her she did the right thing. I had her sent back into the jury room and told her to please not say anything to the other jurors, but she was concerned. Ms. Shavers was concerned, and I told her it was okay and that is why we have alternates. So what do you want to do? |
| Solicitor: | To hear from her and then the Court decide obviously. She is an honest woman, and she did what you told her to do in my opinion. |
| Court: | That could rise to the level of jury tamp. What would the Defense like me to do? |
| Trial Counsel: | I just – as far as an investigation or anything like that I don't really have any part in that, but as far as asking questions I would agree. We could bring her out and hear from her. |
| Court: | Okay, the motion is to bring her out is granted. Please bring her out. |

(Whereupon, Juror Number 131, Jannese Shavers, was brought into the Courtroom).

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| Court: | For the record, if you would give me your name. |

Juror: My name is Jannese Shavers.

Court: All right, Ms. Shavers. If you would tell me what happened.

Juror: I receive a telephone call and it was unrestricted when I answered it, and then she told me that she was the girlfriend of the Defendant, and I told her you tell me not to discuss this.

Court: Did she say anything else?

Juror: Um, no, sir.

Court: And did you say anything else?

Juror: Well, I told her I cannot discuss this and please don't jeopardize me.

Court: And have you said anything to the other jurors?

Juror: No, sir.

Court: Thank you. Anything you would like me to ask her, from the State?

Solicitor: I would just question how she recognized the voice of the Defendant's girlfriend.

Juror: Well, what she did, she called me, and she said, Miss Jan, and I said, who is this, and then when she said who she was --her aunt used to be my supervisor when I worked for County D.S.S., and that is how I knew her.

Court: Do you still work there?

Juror: No, sir. I'm retired.

Court: All right, and is there anything you'd like to ask?

Trial Counsel: Your honor, I would ask the Court to inquire how this would affect her. and if she could continue to be fair and impartial to my client.

Court: All right, Ms. Shavers, taking that into account, would you have a problem continuing to serve on this jury?

Juror: No.

Court: Do you feel any pressure at all from…

Juror: No, I don't feel any pressure. I try to be a fair person.

Court: All right, and sitting on this jury could you continue to listen to the rest of the case?

Juror: Yes, sir.

Court: And be fair and impartial to the Defendant and the State as well?

Juror: Yes, sir.

Court: Okay, and make a decision based on the law as I give it to you and the evidence you have seen in this Courtroom?

Juror: Yes, sir.

Court: And totally disregard that call?

Juror: Yes, sir.
Court: All right. Anything else from the State?
Solicitor: No, sir.
Court: Anything else from the Defense?
Trial Counsel: If I may speak to my client for just a minute?
Court: Go ahead.
(brief pause)
Court: Thank you, Ms. Shavers.
Juror: Okay.
Trial Counsel: Nothing further from the Defense. I don't have any more questions for her.
Court: Thank you. You may go back in there and we will be with you all in just a moment.
The Court: Do you have any problem with that juror continuing? I don't have a problem with her.
Solicitor: I can't decide, Your Honor, though my inclination is that if she's, that honest, coming forward, and she said she's not going to discuss it, I would kind of trust her. I don't believe I do have a problem exactly with her.
The Court: Mr. Smaldon?
Trial Counsel: I would leave it up to the Court, Judge.
The Court: All right, I'm going to let her sit on the jury. I think she did the right thing. She seems very intelligent as far as the Court is concerned. I think she will do the right thing.

(Trial Tr. pp. 96–101).

***PCR Evidentiary Hearing***

On direct examination, Applicant testified that Juror 131 knew Applicant's "baby mama" and spoke in the middle of the trial. (PCR Tr. p. 12). Applicant testified that Trial Counsel did not object to Juror 131 remaining on the jury. Id. Applicant testified the removal of said juror would have been appropriate. Id. Applicant testified that he does not know about the contact encounter; however, he does know they know each other. Id. Applicant further testified that the encounter happened in the middle of his trial. Id.

On cross-examination, Applicant testified that Juror 131 did not know him, but she knew his "baby mama," his son's mother. (PCR Tr. p. 21). Applicant further testified he remembered

the trial court questioning Juror 131. Id. Applicant testified Trial Counsel had the opportunity to question juror 131 but let the trial court keep the juror on the panel. Id. Applicant testified he asked Trial Counsel to remove Juror 131. Id.

On direct examination, Trial Counsel testified that it was close to the end of trial, and Juror 131 was already seated on the jury panel. (PCR Tr. p. 34). Trial Counsel testified he sensed that things were not going their way. Id. Trial Counsel testified that he figured "a little chaos grenade" might be helpful. Id. Trial Counsel testified his understanding was that Juror 131 was friends with Applicant's girlfriend or child's mother or whatever it was. Id. Trial Counsel testified he found no reason to strike her and believed Juror 131 would be fair and impartial. Id. Trial Counsel further testified not removing the juror or objecting was a strategic move. Id. Trial Counsel testified their defense needed a wild card. Id.

On cross-examination, Trial Counsel testified that from his understanding Applicant's girlfriend called Juror 131, but nothing was discussed because the juror hung up. (PCR Tr. p. 40). Trial Counsel specifically testified that an implication was made, and then that's when the juror hung up. Id. Trial Counsel testified that he did not strike Juror 131 and was on the fence about it. Id. Trial Counsel testified it was a strategic move, and he believed it could help his client's case. Id. Trial Counsel further testified that Applicant and his then-girlfriend were involved romantically at some point, and she was also present at his trial. (PCR Tr. p. 41).

***Findings***

This Court, after a thorough evaluation, finds that the 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 further finds the combination of the record and Trial Counsel's **credible** testimony that

Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Trial Counsel **credibly** testified that it was a strategic decision not to strike the juror because he believed it could benefit Applicant's case. Trial Counsel **credibly** testified he believed that Juror 131 could be fair and impartial. Additionally, the trial court questioned Juror 131 about the call and ultimately concluded that the juror would remain on the jury. Based on the record, this Court finds that any objection to the juror remaining on the jury would have been non-meritorious as the trial court found it did not have a problem with the juror remaining on the jury. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence).

Nevertheless, Applicant avers that this somehow prejudiced his case. This Court is not persuaded by Applicant's conjecture. 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 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**.

**Allegation 1c: Failure to argue Applicant's motion for directed verdict based on knowledge instead of control and dominion.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing to argue dominion and control in the directed verdict motion. This Court finds this allegation is without merit.

When considering a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight. State v. Larmand, 415 S.C. 23, 30, 780 S.E.2d 892, 895 (2015) (citing Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)). The role of the trial court is only to determine "whether the evidence presented is sufficient to allow a reasonable juror to find the defendant guilty beyond a reasonable doubt." State v. Bennett, 415 S.C. 232, 781 S.E.2d 352 (2016). If there is any direct or circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must affirm the trial judge's ruling. State v. Cherry, 361 S.C. 588, 593-94, 606 S.E.2d 475, 478 (2004). "In deciding motions for a directed verdict. . . the evidence and all reasonable inferences which may be drawn from it must be viewed in the light most favorable to the non-moving party." Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 611, 518 S.E.2d 591, 597 (1999).

If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury." Id. "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict . . . must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App.

1986) (citing State v. Fogle, 256 S.C. 149, 181 S.E.2d 483 (1971)). The trial court should grant a directed verdict when the evidence merely raises a suspicion that the accused is guilty. A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. State v. Ladner, 373 S.C. 103, 120, 644 S.E.2d 684, 693 (2007).

***Trial***

At trial, Trial Counsel moved for a directed verdict and argued the following:

> Yes, Your Honor. At this time, I would make a motion for a directed verdict as to all charges. Alternately, and more specifically, on the trafficking charge and possession with intent to distribute charge. Your Honor, I make those motions because there is no evidence from the State that was presented – they have presented no evidence that Mr. Cannon had dominion or control over those drugs. The only evidence that has been presented by them was that he was merely present at the scene with some drugs.

(Trial Tr. p. 92). The trial court noted, "[Applicant] was in the car and he got out of the car and ran, and the drugs were in the car. No one else was in the car." (Trial Tr. p. 92). The trial court denied Trial Counsel's motion. Id.

***PCR Evidentiary Hearing***

On direct examination, Applicant testified that Trial Counsel should have handled it differently. (PCR Tr. p. 14). Applicant testified that he feels that Trial Counsel should have argued that there was no evidence Applicant had knowledge of the drugs. Id. Applicant testified there was no evidence that Applicant exercised dominion and control.

On cross-examination, Applicant testified his rental car crashed. (PCR Tr. p. 23). Applicant testified no one else was in the vehicle with him and that the drugs were found on the floorboard of the rental vehicle. Id. Applicant further testified he did not know that the cocaine was in the vehicle. Id. Applicant testified he felt Trial Counsel could have done more and indicated that Trial Counsel did not represent him adequately. Id.

On direct examination, Trial Counsel testified that he thought knowledge and control covered it. (PCR Tr. p. 35). Trial Counsel testified that he does not know why he would choose control and dominion of the cocaine over knowledge. Id. Trial Counsel testified that he does not think he made a conscious choice and merely thinks he stated the elements and statutes. Id.

***Findings***

This Court finds Applicant has 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 further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. The record in this case provides Trial Counsel made a directed verdict motion with a reasonable argument. This Court finds that even if Trial Counsel had argued that Applicant did not know about the drugs that the trial court would not have granted a directed verdict on that argument either. The evidence in this case was that the drugs were found in the driver's side of the car where Applicant, and Applicant alone, was seated before he wrecked the vehicle and ran. This was sufficient evidence that would lead a reasonable juror to believe Applicant was guilty beyond a reasonable doubt. Thus, even if this Court were to find Trial Counsel deficient, which it does not, Applicant is unable to prove any prejudice from the 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 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**.

**Allegation 1e: Failure to adequately investigate Applicant's case.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to adequately investigate the case. 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 Testimony***

On direct examination, Applicant testified Trial Counsel did not properly investigate his case. (PCR Tr. p. 15). Applicant testified Trial Counsel did not hire a private investigator. Id.

On cross-examination, Applicant testified that he asked Trial Counsel to investigate and hire a private investigator on the situation. (PCR Tr. p. 24). Applicant testified that his case was rushed. Id. Applicant testified within four months of hiring Trial Counsel, his case was called for trial in September, thereby violating his due process. Id. Applicant testified that he wanted the private investigator to investigate the rental car and the whole situation. Id.

On direct examination, Trial Counsel testified he reviewed discovery. (PCR Tr. p. 36). Trial Counsel testified that the cocaine was found in the front seat of the rental car and does not believe that visiting the car or buying a replica of the car would really cover any new ground. Id. Trial Counsel further testified there were no witnesses nor any surveillance. Id. Trial Counsel testified there were no experts he could have hired; it was just about the facts and how to interpret them. Id.

Trial Counsel testified that Applicant was previously represented by Scott Suggs, Esquire, and had received a plea offer for ten (10) years and rejected it. Id. Trial Counsel testified that Solicitor Jepertinger's first offer was always the best offer, and it only went up from there, so his inclination was that a second plea offer would be far worse than the initial offer. Id. Trial Counsel also testified that a plea offer was not an option when he was retained, and the only option was to proceed with trial. Id. Trial Counsel testified this was not a complex "federal RICO case." Id. Trial Counsel testified there was nothing else he could have done on Applicant's case. Id. Trial Counsel testified he was adequately prepared for trial. (PCR Tr. p. 32).

On cross-examination, Trial Counsel testified that he did not recall Applicant asking him to hire an investigator. (PCR Tr. p. 42).

***Findings***

This Court finds Applicant has 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 further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel's testimony on this matter **credible** and **persuasive**. This Court further finds Applicant's testimony **not credible** and **not persuasive**. In support of this claim, Applicant only provided his own self-serving testimony; he did not present the results of any independent investigation and did not present any documentary evidence to establish that any additional investigation would have yielded beneficial information that would have resulted in a different outcome at trial. Trial Counsel **credibly** testified that there was no reason to hire an investigator. Under the

circumstances and facts within the record before this Court, this Court cannot find Trial Counsel deficient in his performance as it was reasonable.

Furthermore, as discussed above, this Court finds Applicant failed to present any evidence to establish what benefit an additional investigation would have yielded. Nevertheless, even if Trial Counsel was ineffective for failing to investigate, where Applicant cannot establish the evidence or testimony that would have been favorable to them at the time of trial, relief will be denied. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993), overruled on other grounds by Brightman v. State , 336 S.C. 348, 520 S.E.2d 614 (1999); See Skeen, 325 S.C. 210 (Supreme Court found applicant failed to meet burden of proof that counsel was ineffective for failing to request a continuance where he offered no evidence as to what benefits additional preparation would have yielded).

Consequently, any assertion by Applicant is merely speculative and does not meet the burden of proof he must establish for relief. See Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)) (finding failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.).

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.**

**Allegation 1d: Failure to review discovery with Applicant.**

Applicant alleges Trial Counsel was constitutionally ineffective for failing review discovery with Applicant. This Court finds this allegation is without merit.

An applicant who alleges his or her defense attorney was ineffective in failing to spend more time preparing or providing a copy of the discovery materials must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. 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)), abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. Id. (citing David 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)).

***Trial***

On direct examination of Jason Bazen (Corporal Bazen), a responding officer in Applicant's case, he was asked whether he ordered any DNA or fingerprint analysis on the drugs, to which he answered he did not. (Trial Tr. p. 68).

On cross-examination, the following colloquy occurred with Corporal Bazen and Trial Counsel:

Q. Right? Your job is to help to prove Mr. Cannon guilty beyond a reasonable doubt? That's what you do when you work for the State and that is okay.
A. I work in law enforcement.
Q. You work for the government?
A. Local government, that's correct.
Q. When you got the cocaine there were no tests done for fingerprints?
A. No, sir.
Q. When you got the cocaine there was no test for touch DNA?
A. No, sir.
Q. When you got the crack, there was no test for fingerprints?
A. No, sir.
Q. When you got the cocaine -- I'm sorry. When you got the crack there was no test done for touch DNA?
A. No, sir.
Q. You could have asked for those tests?
A. I could have.
Q. Okay, and you didn't?
A. No, sir.
Q. All right, because you know . .
A. Well, actually, sir, cocaine and crack cocaine you can hardly get fingerprints off of them.
Q. I'm sorry, the bags.
A. Okay, no, sir.
Q. Right. You never ordered tests on the bag, either bag?
A. No, it is not common practice.
Q. All right, and you didn't do it?
A. No, sir.

(Trial Tr. pp. 72–73).

***PCR Evidentiary Hearing***

On direct examination, Applicant testified that Trial Counsel did not discuss a defense strategy or review evidence with him. (PCR Tr. p. 15). When asked if Trial Counsel ever talked to him about any of the evidence, Applicant testified that it was rushed and they did not strategize. Id.

On cross-examination, Applicant testified Trial Counsel did "not really" review discovery with him. (PCR Tr. pp. 24–25). Applicant testified that he and Trial Counsel spoke the one time

he came to see him. (PCR Tr. p. 25). When asked what evidence he was asserting they did not review, Applicant testified that the State had no DNA evidence matching his DNA. Id. Applicant also testified he was the only person in the vehicle. Id. Applicant testified that if he and Trial Counsel had spent more time going over his case, the outcome would have been different. Id.

On direct examination, Trial Counsel testified that he reviewed discovery with Applicant. (PCR Tr. pp. 30–31). Trial Counsel testified that he had sufficient time to review the evidence with Applicant. (PCR Tr. p. 30).

***Findings***

This Court finds Applicant has 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 further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. This Court finds Trial Counsel's testimony that he reviewed discovery with Applicant and had enough time to review it **credible**. Nevertheless, Applicant avers that the State did not have DNA evidence against him, which is what Trial Counsel did not review with him. This Court is not persuaded by Applicant's argument. Corporal Bazen testified to the fact that there was no DNA evidence collected in Applicant's case. This matter was before the jury, and Trial Counsel adequately and reasonably crossed Corporal Bazen on this matter. Applicant presented nothing further that had Trial Counsel reviewed discovery further with him, the result of his trial would have been different. This Court finds Applicant has failed in his burden of proving Trial Counsel's performance was deficient or any prejudice from the 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 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.**

**Allegation 1g: Failure to object to the testimony of Sgt. William Joe Nida regarding the street value of the drugs in question as improper character evidence and failure to preserve the issue for appeal.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to object to the testimony of Sgt. William Joe Nilda (Sgt. Nida) regarding the street value of the drugs in question as improper character evidence and failure to preserve the issue for appeal. This Court finds this allegation is without merit.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally

supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if 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.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney, and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

When analyzing counsel's performance, the reviewing court will "strong[ly] presume[e] that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than sheer neglect. Yarborough, 540 U.S. at 8 (internal quotation marks omitted); cf. Higgs v. United States, 711 F. Supp. 2d 479, 515 (D. Md. 2010) ("Defense counsel constantly must decide what questions to ask and how much time to spend on a particular witness. These are precisely the types of tactical decisions a court is not supposed to second guess.") (citing Byram v. Ozmint, 339 F.3d 203, 209 (4th Cir. 2003)); Sallie v. North Carolina, 587 F.2d 636, 640 (4th Cir. 1978) (Strickland standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.").

***Trial***

During pretrial motions, the following occurred:

Solicitor: Your Honor, I have informed Mr. Cannon I am putting up Officer Nida as an expert in terms of

value of the cocaine and crack in this community. That motion is based on State versus Jamison, which I have a copy of for the Court.

The Court: All right. Any problems with that from the Defense?

[Trial Counsel]: I have not seen the particular case. I was not informed of this so-called expert witness until an hour or two ago. So, Your Honor, I would ask for about a minute and a half to read the case. I would normally object to relevance, which relevance would be addressed in this case.

(Brief pause)

[Trial Counsel]: Your Honor, I would object to relevance of this particular witness. It is not an element of the crime. There is no element as to dollar value in anything he is charged with.

Solicitor: I would tend to think, Judge, that as the case will rest with the jurors who are not knowing what thirty-six grams or whatever it is charged here -- how much that they would have, you know, and he is charged with the trafficking, Judge. I know that trafficking is based on the weight based on the law. However, they need to know, I think in my mind, what we're dealing with here. Thirty-six Hundred Dollars, a scale in the car and so on and so forth. It is more than perhaps the use of drugs by a person who has it in their possession.

[Trial Counsel]: Again, I haven't heard anything about the elements so I don't know, but I still continue my objection under relevance in this case. Once they hear my defense we might re-visit it, but at this point the dollar value is more prejudicial, and there is no probative value at all. More prejudicial than probative.

The Court: All right. Let me think about it over our lunch and we'll go from there. At this point we will break for lunch.

. . . .

The Court: Ladies and gentlemen, good afternoon, and be seated. I have had a chance to review the case that the Solicitor passed up, the Jamison case, and my instincts tell me that it is going to be

applicable to the case because we have a rental car, and I suspect some of your questions will pertain to maybe somebody else left the drugs in the car, other than the Defendant. If your guy testifies he may say that as well,, and in that case it is something we will take up as to whether or not the case is dead on point. That may not be your defense in any form or fashion anyway. it is probably all in the documents anyway.

(Trial Tr. pp. 27–29).

During direct examination of Sgt. Joseph Nida, the following occurred:

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|---|---|
| Solicitor: | At this time, Your Honor, I would like to have Sergeant Joe Nida qualified as an expert in the field of retail value of cocaine and crack cocaine in the general area. |
| The Court: | Any objections? |
| [Trial Counsel]: | I do object to relevance, and also on Rule 403. |
| The Court: | All right, I'm going to overrule it and find the information needed is beyond that of an ordinary jury. He does have the requisite knowledge and skill. His testimony is reliable. |

(Trial Tr. pp. 86–87).

***PCR Evidentiary Hearing***

On direct examination, Applicant testified he remembered Sgt. Nida. (PCR Tr. p. 17). Applicant testified that Trial Counsel objected to his testimony. Id.

On cross-examination, Applicant testified that Trial Counsel objected to testimony from Sgt. Nida about controlled buys and then again renewed his objection. (PCR Tr. p. 26).

On direct examination, Trial Counsel testified that he objected to testimony about the street value of the drugs. (PCR Tr. p. 37). Trial Counsel testified that he probably should have objected to character evidence but found it to be more of a relevance issue because it concerned the testimony of an officer who had nothing to do with the case and wanted to talk about drug costs in Florence County. (PCR Tr. p. 38).

On cross-examination, Trial Counsel testified that he did not object to Sgt. Nida's testimony based on improper character evidence. (PCR Tr. p. 42). Trial Counsel testified that failing to do so prevented appellate counsel from addressing the issue on appeal. Id. Trial Counsel testified at trial that he did have the option to object based on character evidence and objected based on relevance. Trial Counsel testified Appellate Defense could have argued relevance and does not understand why Appellate Defense argued something he did not object to. Id. Trial Counsel testified it would have been to Applicant's advantage to have every ground for appeal. Id.

***Findings***

This Court finds Applicant has 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 further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. Here, Applicant avers Trial Counsel should have objected to Sgt. Nida's testimony as improper character evidence. This Court, just like the trial court, turns to State v. Jamison, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007), and finds the Jamison case virtually on point with the present case.

In Jamison, the State presented expert testimony regarding the street value of cocaine and crack cocaine. The defendant objected, arguing the proposed testimony was irrelevant and prejudicial. The trial court limited the expert's testimony to the wholesale and retail values of cocaine and crack cocaine for the general area, finding jurors typically do not know the illegal drug industry. The expert testified the drugs found in the defendant's truck had a street value of between $2,750.00 and $9,319.00. Id., 643 S.E.2d at 701-702. The defendant claimed the drugs belonged to someone else, possibly one of his employees who also had access to the truck. In

affirming the admission of the testimony, the Supreme Court found the drugs' value "allowed the jury to better determine whether a person would reasonably leave expensive narcotics unguarded and disguised as trash in a truck allegedly used by numerous people" and if the jury did not believe "an unknown individual left thousands of dollars worth of drugs where other people had access to the drugs and might even throw them away," "it reinforced the State's case that Jamison was knowingly in actual or constructive possession of the drugs at the time of his arrest, a key element of the trafficking charges." Id. at 702.

As in Jamison, Applicant repeatedly claimed the drugs found in the car belonged "to somebody else," and he did not know the drugs were there. (Trial Tr. pp. 38–39, 83, 92, 110–116). According to Sgt. Nida's testimony, the drugs had a street value of $4511. (Trial Tr. pp. 87–89). Given the high monetary value and Applicant's claim someone else left the drugs in the car, the drugs' value was directly relevant to the jury's consideration of whether somebody else would leave thousands of dollars worth of drugs in a rental car where any number of people could access them, and whether Applicant was knowingly in actual or constructive possession of the drugs at the time of his arrest, a key element of the trafficking charges.

This Court finds any objection by Trial Counsel on the basis of improper character evidence would have been overruled and non-meritorious; thus, Trial Counsel cannot be deficient for not making a non-meritorious objection. See Miller v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Moreover, Applicant has failed in his burden of proving any resulting prejudice from the 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 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.**

***ALLEGATIONS RAISED AT THE EVIDENTIARY HEARING***

**Allegation:** **Trial Counsel failed to meet with Applicant a sufficient number of times.**

Applicant alleges Trial Counsel's representation was constitutionally ineffective for failing to meet with him a sufficient number of times. This Court finds this allegation is without merit.

Federal case law holds that there is no constitutional minimum number of meetings between attorneys and their clients to satisfy competency. Campbell v. Polk, 447 F.3d 270, 279 fn.2 (4th Cir. 2006) (no constitutional minimum number of meetings to satisfy competency); United States v. Olson, 846 F.2d 1103, 1108 (7th Cir. 1988) (reciting that there is no constitutional minimum number of meetings between attorney and client and observing that an experienced attorney may get more out of a single meeting than a neophyte). "Brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980) (holding it is not enough to merely show that counsel only met with his client twice before trial as long as counsel devoted sufficient time to insure an adequate defense

and to become thoroughly familiar with the facts of the case and the law applicable to the case, and holding the record revealed that counsel was so prepared.).

South Carolina case law has established that even if Trial Counsel only met with his client very briefly, that alone does not establish that he was unprepared or ineffective at trial. See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) (citing Easter) (finding "Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation."), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

**PCR Evidentiary Hearing**

On direct examination, Applicant testified that he met with Trial Counsel only once. (PCR Tr. p. 24).

On direct examination, Trial Counsel testified that he met with Applicant at least once, and it could have been more, but he could not recall. (PCR Tr. p. 29).

On cross-examination, Trial Counsel testified that he could not recall how long the meeting lasted, but it could have lasted less than an hour. (PCR Tr. p. 42).

**Findings**

This Court finds Applicant has 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 further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. As found *supra*, this Court finds the record reflects Trial Counsel was well-prepared in his defense of Applicant and was familiar with the facts of the case and the law surrounding the charges. Importantly, this Court finds Applicant has failed to present "any evidence of how additional preparation or

communication would have resulted in a different outcome." Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012); see Harris, 377 S.C. at 75, 659 S.E.2d at 145 (finding that, when there is evidence counsel met with a defendant in preparation for trial and there is no evidence additional preparation on the part of counsel would have affected the outcome at trial, counsel cannot be said to have been ineffective). This Court finds Trial Counsel was not deficient in their representation of Applicant, and Applicant has failed to demonstrate how he was prejudiced by Trial Counsel's alleged deficient performance in this matter.

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.**

**|CONCLUSION PAGE FOLLOWS|**

## 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 6 day of January, 2025.**

GEORGE M. MCFADDIN
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina

FILED
2025 JAN 10 PM 2:31
DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC