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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2020-CP-19-00086

Timothy W. Wheeler, #371128, ... Petitioner,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

Applicant, Timothy W. Wheeler, appeals the order of the Honorable Kristie F. Curtis, filed on or about September 29, 2025.

September 29, 2025

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STATE OF SOUTH CAROLINA COUNTY OF EDGEFIELD	)	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
Timothy Wayne Wheeler, SCDC #371128, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2020-CP-19-0086 ORDER OF DISMISSAL

This matter comes before this Court by an application for post-conviction relief commenced by Timothy Wayne Wheeler (Applicant) on March 23, 2020. The Respondent State of South Carolina made a Return and Motion for a More Definite Statement on November 12, 2020. On April 20, 2020, Ashley A. McMahan was appointed to represent the Applicant. On March 22, 2023, Counsel filed an amended application for post-conviction relief.

On April 3, 2023, the matter was convened in Lexington Couty for an evidentiary hearing. The Applicant was present and represented by appointed Counsel McMahan. The Respondent was represented by Assistant Attorney General Taylor Smith. Testimony was received from the Applicant and his trial Counsel Robert Thuss.

This Court has reviewed the records and transcripts of the trial, the PCR hearing transcript, and the appellate court records. In light of its review, this Court concludes the application must be denied and dismissed in its entirety.

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Edgefield County Clerk of Court. During its April 2016 term,

the Edgefield County Grand Jury indicted Applicant for three counts of possession of an unlawful firearm (2016-GS-19-0245, -246, -247); one count of possession with intent to distribute (PWID) a schedule IV controlled substance (2016-GS-19-02444); one count of trafficking methamphetamine (2016-GS-19-0251); one count of PWID marijuana (2016-GS-19-0250); three counts of receiving stolen goods (RSG) (2016-GS-19-0255, -0256, -0258). Applicant was subsequently indicted for two additional counts of RSG (2017-GS-19-0074, -0075) during the Edgefield County Grand Jury's January 2017 term.

On January 17, 2018, Applicant proceeded to a jury trial before the Honorable Eugene C. Griffith, Jr. Robert R. Thuss, Esquire (Counsel) represented Applicant. Assistant Solicitors Ervin J. Maye and Douglas W. Fender, II, prosecuted the case.

A. Pre-Trial

Prior to trial, Counsel moved for a continuance and to be relieved as Counsel due to a potential conflict with representing both Applicant and his co-defendant, Heather Hall (Hall). (ROA 301–08). During a pre-trial chambers discussion about the motion, the circuit court inquired about any pending plea offers, and the solicitor indicated the State had offered Applicant a negotiated sentence of twenty-two years, and Hall a negotiated sentence of five years. Counsel informed the court Hall wanted to take the plea offer, but she was "tied" to Applicant, who did not want to accept the plea offer. The solicitor then indicated a stand-alone plea deal with Hall would be contingent on her testifying against Applicant at trial.

The solicitor informed the court the State was ready to proceed with Applicant's case alone if the court determined there was a dual representation conflict, and Hall's testimony was not required for the trial to go forward. The court then asked Counsel if he was ready to proceed on Applicant's case, and give Hall an opportunity to obtain independent Counsel. Counsel stated

he had discussed the situation with Applicant, but had been unable to communicate with Hall. He also stated he was not previously aware about the contingency with Hall's plea offer, and he was concerned about Hall for several reasons, including her relationship with Applicant, and he did not know "how well she can exercise judgment at her age." (ROA 8–13).

Based on the discussion, the court ultimately relieved Counsel as Counsel for Hall, and stated Hall could either get a private attorney or a new attorney would be appointed for her. The court also gave Counsel an opportunity to talk to Applicant about whether he wanted to proceed with the trial. When court reconvened, Counsel did not indicate Applicant had any concerns about proceeding with the trial, and stated they were prepared to proceed. After jury selection, the court informed Hall, who was seated at the defense table with Applicant and Counsel, that Counsel had been relieved as her Counsel, and she would have the opportunity to obtain another retained Counsel, or the court would appoint one for her. (ROA 12–17, 42–43).

B. Summary of Evidence Adduced at Trial

During his opening statement, Counsel stated Applicant did not live at the residence where the contraband (drugs and illegal weapons) was found, but he was present when law enforcement executed a search warrant and seized the contraband. He also stated Applicant was in a relationship with Hall, who lived at the residence with her step-father (David Coon), and Applicant was at the residence just to help Hall care for Coon, who had serious health issues.[1] (ROA 65–68).

Brian Wade ("Wade") testified he stole vehicles and traded them for drugs at the residence where Applicant, Hall and Hall's step-father lived. He also testified he entered into an

[1]Coon pled guilty to trafficking methamphetamine and various other charges the week before Applicant's case was called for trial, and was sentenced to twenty-five years incarceration.

agreement with Applicant and Coon in December 2015 for them to front him methamphetamine, which he would sell and return the profit to them in exchange for increasing amounts of methamphetamine, and Applicant was the one who gave Coon the methamphetamine who then gave it Wade. (ROA 80). He also saw multiple firearms at the residence, a surveillance system, and was told explosives were planted around the perimeter of the property in case anything happened. (ROA 69–80, 85–90). Counsel vigorously cross-examined Wade about the details of his testimony, as well as his own criminal conduct and his dealings with law enforcement in connection with the case. (ROA 90–107).

Jennifer DeWitt ("DeWitt") testified she stayed at the residence with Applicant, Hall and Coon off and on over a period of months prior to December 2015, and was present when law enforcement executed the search warrant at the residence. During the time she stayed at the residence, she personally observed Applicant meeting with people who came to purchase drugs, and heard Applicant and Coon discussing the price of a kilo of drugs, as well as some bad drugs they had purchased. (ROA 189–98).Counsel then vigorously cross-examined her about prior inconsistent statements she gave to law enforcement, her own criminal activities and her reasons for cooperating with law enforcement. (ROA 199–203).

At the close of the State's case, Counsel moved for a directed verdict on all charges, arguing the State failed to prove Applicant ever had dominion and control over the firearms, drugs and stolen property found at the residence. The court denied the motion, finding there was sufficient evidence to submit the case to the jury. (ROA 204–210).

Coon testified as a defense witness that he was responsible for everything found in the residence, and Applicant and Hall had nothing to do with it. He admitted on cross-examination that he originally told law enforcement he had never seen the seized contraband or stolen

property found at the residence, but if anyone was going to take the fall for it, he would because he had cancer and did not care. (ROA 212–13).

D. Verdict & Subsequent Proceedings

On July 18, 2017, the jury convicted Applicant as indicted. Judge Griffith sentenced Applicant to concurrent terms of twenty-five years' imprisonment for trafficking meth, three years for each RSG charge, three years for PWID marijuana, five years for each weapons charge, and five years for PWID a schedule IV controlled substance.

Applicant filed a timely notice of appeal. Appellate Defender Taylor Gilliam perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

> I. Whether the trial court reversibly erred by failing to hold an on-the-record colloquy with Applicant to determine whether Applicant knowing, intelligently, and freely waived his right to conflict free representation where Applicant and his co-defendant were represented by the same retained attorney.

Following briefing, the Court of Appeals affirmed Applicant's convictions and sentences. *State v. Wheeler*, 2019-UP-307 (S.C. Ct. App. filed August 28, 2019). In its unpublished order, the Court of Appeals stated the following:

> Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Justus*, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011) (stating a defendant has the Sixth Amendment right to the assistance of Counsel); *Thomas v. State*, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) ("To establish a violation of the Sixth Amendment right to effective Counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance."); *State v. Gregory*, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) ("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants."); Id. at 152-53, 612 S.E.2d at 450 ("The mere possibility defense Counsel may have a conflict of interest is insufficient to impugn a criminal conviction."); *Fuller v. State*, 347 S.C. 630, 634, 557 S.E.2d 664, 666 (2001) (finding no conflict in trial Counsel's prior representation of one of the co-defendants); *Langford v. State*, 310 S.C. 357, 359-60, 426 S.E.2d 793, 795 (1993) (concluding Counsel did not actively represent competing interests because there was no evidence Counsel "advised either co-

> defendant to plead guilty in order to obtain more favorable consideration for the other" and "[t]he mere fact that [the co-defendant] would be available to testify against [the defendant did] not establish an actual conflict of interest").

State v. Wheeler, No. 2017-000152, 2019 WL 4052476, at *1 (S.C. Ct. App. Aug. 28, 2019).

The case was remitted back to the circuit court on September 13, 2019. Applicant commenced this PCR action on March 23, 2020.

II. ALLEGATIONS

In his initial *pro se* application, the Applicant did not include any allegations. Instead, he stated "unable to properly answer without legal assistance." Applicant requested relief as follows:

> "Unsure legally what I can and cannot do. Also there has been significant changes/modifications to drug trafficking sentences as of July 19, 2019 by Atty Gen Office."

In the first amended application dated October 4, 2022, the Applicant alleged:

I. Ineffective Assistance of Counsel:

a. Failure to object to the Solicitor's closing statement to the jury on page 269, lines 17-25.
b. Failed to adequately discuss the conflict issue between representing Mr. Wheeler and his codefendant.
c. Failure to fully explain constructive possession /conspiracy/hand of one is the hand of all.

In the second Amended application by appointed Counsel dated March 22, 2023, the Applicant alleged the following:

I. Ineffective Assistance of Counsel:
a. Failure to adequately cross-examine investigator about items seized from the home, especially regarding testimony about a brown jar that actually was a green vase. See Tr.p. 153, lines 20-25.

In Fishburne v. State, 427 S.C. 505, 512, 832 S.E.2d 584, 587 (2019), the Supreme Court in ruling on a PCR application, "[t]he [PCR] court shall make specific findings of fact, and state expressly its conclusions of law, ***relating to each issue presented***." (emphasis added) S.C. Code Ann. § 17-27-80 (2014). The South Carolina Rules of Civil Procedure apply to PCR matters. See Id.; Rule 71.1(a), SCRCP. Rule 52(a) provides in pertinent part, "In all actions tried upon the facts without a jury ..., the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a), SCRCP. "The PCR court's general denial of all claims not specifically addressed in the PCR court's order 'does not constitute a sufficient ruling on any issues since it does not set forth specific findings of fact and conclusions of law.'" Simmons v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016) (quoting Marlar v. State, 375 S.C. 407, 409, 653 S.E.2d 266, 266 (2007)).

In the amended application, PCR Counsel indicated that it would seek to amend the application to conform the evidence presented at the PCR hearing to any new or unaddressed issues during the course of the hearing that had not been addressed in the written application. See October 4, 2022 amended application.

During the PCR hearing, PCR Counsel raised through the PCR testimony the following claims and additional allegations of ineffective assistance of Counsel:

- Counsel failed to object to the Solicitor's closing reply statement at ROA 269, 17-25 related to explosives and "huge bags of drugs."
- Counsel failed to adequately discuss the conflict of interest issue involving the joint representation of Wheeler and his girlfriend Heather Hall.
- Counsel failed to adequately explain the concepts of constructive possession, mere presence, conspiracy and accomplice liability of hand of one, hand of all.
- Failure to adequately cross-examine investigator about items seized from the home, especially regarding testimony about a brown jar that actually was a green vase. See ROA 153, lines 20-25.
- Counsel failed to adequately review the plea offers with the Applicant.
- Counsel failed to adequately review discovery with the Applicant.
- Counsel failed to adequately meet with the Applicant to prepare for trial and make

a strategy for the trial.

- Counsel failed to adequately cross-examine Jennifer DeWitt about her inconsistent statements and change in testimony.
- Counsel failed to adequately cross-examine Brian Wade about his testimony and impeach him related to the testimony that Wheeler gave a bag of drugs to Coon and that Wade and Applicant and Coon shot weapons together.
- Counsel failed to adequately cross-examine Investigator Roosevelt Young about the amount of money seized at the residence its location and the amount seized from the Applicant's wallet. Counsel failed to point out that there was no photograph showing $7337.
- Counsel failed to object to the Solicitor's opening statement related to explosives and drugs at ROA 60, 62.
- Counsel failed to object to Counsel's initial closing statement at Tr.p. 245 and 247 related to " heavy narcotics, methamphetamine, crack, heroin, hard narcotics," " a bag of human misery" and explosive and narcotics and stolen motorcycles.
- Counsel failed to bring up that his fingerprints were not found on the ammo box that included the methamphetamine.
- Counsel failed to locate and present that the Applicant's cellphone and his mother's last will and testament were missing and not in the chain of custody.
- Counsel failed to adequately show that the house was not his residence by failing to point out that he did not receive mail at that address.
- Counsel failed to challenge evidence that the green flower vase that some money was in was not a jar or a brown jar, See ROA 153-154.
- Counsel failed to adequately impeach DeWitt or Wade based upon their prior criminal records.
- Counsel only briefly interviewed David Coon before putting him on the witness stand.
- Counsel never investigated mitigating evidence.

DOCUMENTS BEFORE THE COURT

This Court has before it the Edgefield County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; the Final Brief of Appellant, the Final Brief of Respondent and Opinion by the Court of Appeals and the records of the current PCR action, including the transcript of the PCR hearing of April 3, 2023.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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, 104 S.Ct. 2052 (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

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

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.").

SPECIFIC FINDINGS

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, including the transcript of the PCR hearing. 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:

SUMMARY OF PCR TESTIMONY

TIMOTHY WHEELER

The Applicant, Timothy Wheeler testified that he was arrested on December 22, 2015 and tried in January 2017. He stated that he was denied bond four (4) times. (PCR 6-7).

Wheeler testified that he retained Robert Thuss a couple of months after his arrest. He met him at the detention center each time because he was never bonded out. In that initial meeting, he recalled that they spoke about the charges a little bit, but more in later meetings. He said that neither he nor Counsel knew what sentence he was facing.

Wheeler stated that there was a later back and forth with the Solicitor who had spoken with Thuss about potential sentencing. Counsel stated to him the solicitor stated initially it was 5 years for Heather Hall (his co-defendant), 10 years for him, and 17 years for David Coon.

Applicant stated that later it was 22 or 25 years. (PCR 8-9).

When asked about discovery, the Applicant claimed that he did not see it all. He said Counsel brough to him the parts he thought were pertinent. These included pictures of the drugs and the drug box. He stated that he did not recall all the guns, but that he owned a couple of guns legally. (PCR 9). Wheeler confirmed that this was a home where drugs were being sold. (PCR 9, l. 17-19).

Applicant testified that he was dating David Coon's daughter, Heather Hall. He also claimed that he did not live at that home. (PCR 9). He claimed that he was living in Aiken, while Coon and Heather lived in Edgefield. (PCR 10).

The Applicant claimed the plea offers of 10 for him, 5 for Heather, and 17 for Coon were not set in stone. He thought this offer was what the Solicitor had told Counsel Thuss and was in passing. (PCR 10). He declared that he really did not talk about it with Counsel. He stated a second offer was made about ten (10) minutes before the trial began for about 22 or 25 years. (PCR 11). Applicant stated that Counsel agreed with him to not take the plea offer. (PCR 11).

Applicant testified that co-defendant Coon was tried in January 2017 the week before Applicant's trial. (PCR 11). He felt like he did not have much notice. (PCR 11-12).

Applicant testified that he met with Thuss four or five times prior to the trial. Since he was also representing Heather, some of the meetings occurred with Heather and some with him only. (PCR 12). Heather was out on bond, while Applicant remained in custody, so she was able to meet with Counsel when Applicant could not. In the meetings, they spoke about what they faced. (PCR 12).

Concerning conflict of interest, the Applicant stated that he did not understand it when it was brought up before the trial. (PCR 13). He stated that Counsel was unsure about it and the

court ruled to have someone appointed for Heather and her trial to be separate. (PCR 13). Applicant stated that he was not really familiar with a "conflict of interest." He stated that Thuss had earlier presented a document explaining to him about a conflict that he signed willingly. (PCR 14); (see ROA 42-43, 301-308).

Concerning Counsel's closing reply argument, the Applicant was pointed to ROA pages 269, l.17-25. The Applicant claimed that the solicitor made reference to huge bags of drugs, buried explosives and C-4. (PCR 14). Applicant complained that no one testified about any explosives being buried on the property. (PCR 15). He did acknowledge that witness Brian Wade testified he had seen explosives and C-4. The Applicant complained that Maye interviewed Wade for the warrant, but there were no explosives found on the property. (PCR 15).

Related to "constructive possession", "hand of one" and his involvement with Heather, the Applicant testified that he had discussions with Counsel, but not big discussions. (PCR 16). He understood "hand of one" meant to him "because he was there he was guilty" and claimed that was how Counsel explained constructive possession to him. (PCR 16).

He testified that he never met with Wade. He just learned about Wade's statement when it was provided discovery.

Concerning Jennifer DeWitt, another co-defendant in the case, Applicant complained that Counsel did not adequately cross-examine her. (PCR 18). Applicant stated that he knew DeWitt for a few months and that they did not have a close relationship. (PCR 19). Applicant argued that DeWitt was not truthful in her testimony. Applicant argued her testimony stating she watched vehicles come down the driveway on a TV monitor was an impossibility because there were no security cameras covering that area. He claimed there was only one over the front door that you could see a little off the steps. (PCR 18). He only complained that he was not at the

house all the time except frequently during the holidays.

The Applicant testified that he told Counsel he did not know Wade. He said that most of their discussion was about Coon. (PCR 19). He stated Wade brought him up at one point that Applicant handed a bag to Coon when he was in the house that week. Wheeler also stated that Wade lied when he said that they fired weapons together. (PCR 19, l. 12-17).

Applicant argued trial Counsel failed to address most of Investigator Roosevelt Young's inconsistent testimony regarding where money was found. (PCR 20). Investigator claimed he found money in a locked brown box and found around $300 in Heather's green vase in room number 2, which was her bedroom. Applicant complained that he did not know anything about a sealed brown box. He further stated that Counsel failed to address Heather's green flower vase which may have been referred to as a round bottle or jar that had money in it. (PCR 20).

Applicant testified that his prints were not found on the green box or the drug box. He was told that another set of prints was found, but Counsel did not present that in court during cross-examination. (PCR 21).

Applicant complained that Maye's opening statement, referenced massive explosives, crack, and heroin, but the State found none of these items nor was he charged with possession of any of them. He complained the State continually brought it and it seemed highly prejudicial. (PCR 21). He asserted trial Counsel failed to object. (PCR 22).

Concerning inconsistency in the money, he testified that the state asserted over $7,200 was found in the wallet. Wheeler questioned how that amount of money could fit in a wallet and that it was illogical. He also stated that investigator Roosevelt Young's testimony was also incorrect about the amount. (PCR 22-23). (See ROA Tr. 153-155). According to Applicant he never saw a picture showing $7,200 dollars. He only saw a picture in discovery showing his

wallet containing a couple twenty-dollar bills, ten-dollar bills, and others. (PCR 31).[3]

As to Applicant's complaint about chain of custody, he complained that he was missing his phone and his mother's last will and testament. (PCR 23). He claimed that he had those items with him at the house because he had recently received them. (PCR 23).

Concerning his presence in the house, Applicant asserted that Counsel did not argue he did not receive mail at the house. Instead, Counsel only relied on "mere presence." (PCR 24). [Counsel's closing pointed out no mail showed that was his residence. ROA 263, 21-23]

Applicant argued Counsel failed to object to Maye's statement about guns throughout the house and the house being a mess. (PCR 25); (See ROA 250); (But see ROA 223 (Coon), 130-131 (Morris), ROA 82 (Wade); Exhibit State 4 (multiples of weapons in home that day); State Exhibit 5, 7 (shotgun); State Exhibit 8 (photos of drugs brought out by Applicant that day); ROA 105, 300 (testimony related to guns laying around house to defend); ROA 105-106 (pistols in every room he went into); ROA 107 (Thuss question Wade whether he ever saw Applicant shooting the other weapons that were laying throughout the house); ROA 124 (Morris testified they seized all the weapons laying the scene as shown State Exhibit 4); ROA 78 (Wade) (fired sawed-off shotgun).

Applicant also complained about not objecting to statements about the money found in jar or green flower vase and not a sealed jar in Heather's bedroom. (PCR 26).

Applicant asserted that Counsel should have emphasized Heather's meth convictions and Wade's felony convictions. (PCR 26). But See. ROA 42 (Wade admits using meth and marijuana); ROA 73 (state vehicles to pay to get drugs); ROA 74 (arrested for possession of

[3] But see, ROA 250, 255 (reference to bill fold and $7300); ROA 130 (billfold); ROA 152-153) ($7337 found in billfold in room 21, ROA 155 (Thuss cross of Roosevelt Young explaining stack of bills); ROA 267 (defense closing re: wallet and money].

stolen vehicle, grand larceny, receiving stolen goods, escape); ROA 84 (Wade went to prison); ROA 88 (convicted of giving false information to law enforcement) ROA 91 (Thuss brings out false information conviction, receiving stolen goods, possession of stolen vehicle, financial transactions theft, and criminal domestic violence).

Appellant argued Counsel failed to object to the state referencing him stealing motorcycles. Applicant explained that he was not aware that the motorcycle he placed his license on while his motorcycle was being prepared was a stolen motorcycle. (PCR 27).

He complained that Counsel had no legitimate trial strategy to pursue the inconsistences of the state witnesses. He complained that Counsel only interviewed David Coon briefly for 10 minutes or less before he put him on the witness stand. (PCR 28); (ROA 212-237). He complained that while Counsel brought up "mere presence" in his closing, it was not effectively argued. (PCR 28); (But see, ROA 264, l. 1-9) (Applicant only a guest there); ROA 266 (drugs not in room where the Applicant stayed); ROA 267 (owner of property did not know who Wheeler was); ROA 267 (none of documents Wheeler's have the address to that residence).

Applicant also contended that Counsel failed to investigate mitigation evidence. He only thought he spoke with Edgefield County. (PCR 28).

On cross-examination, Applicant confirmed that he did not want to take the plea offers. (PCR 29-30). As in direct, he noted the offers were made in passing and did not consider them. He felt he was innocent. (PCR 30).

COUNSEL ROBERT THUSS

Counsel Thuss testified he was referred to Applicant's case. (PCR 31-32). He stated that the Applicant and Heather Hall both wanted him to represent them. He met with Applicant at the detention center about seeking to review his bond.

Counsel stated that Applicant had been arrested in December 2015 when the police raided David Coon's house. During the raid, Coon's daughter, Heather Hall, and Ms. DeWitt were present. Coon was at a hotel in Aiken at the time, but they had a warrant for his arrest. Drugs and weapons were found on Coon at his Aiken arrest. They found around 730 grams of Methamphetamine at the house, as well as a number of weapons. (PCR 33).

Concerning a potential conflict in representing both Wheeler and Heather, Counsel investigated whether he could ethically represent both and reviewed current caselaw and determined that there had to be a written document waiving a conflict and explaining it. (PCR 34). He stated he drafted a conflict waiver document anticipating the issues after reviewing the case. (PCR 34).

In that document, he set out the provisions having to treat both equally, disclose what one said to the other and if a dispute arose between the two, Thuss would have to resign. After reviewing and reading the document, Applicant and Hall agreed to the plan and signed the document in his presence. (PCR 35-37). Counsel opined that they understood. (PCR 36).

Trial Counsel testified that he met with them both individually and together. He stated he shared information with both when he met outside their presence. (PCR 36).

Trial Counsel testified he met with Applicant twice the amount of 4 or 5 times he. He took Applicant to her bond at least three times because, in the first few months, it was indicated that the case may be tried in federal court. (PCR 38). Subsequently, they learned that ATF and the Feds decided it would not be a federal case. (PCR 38).

Counsel stated they received information about the confidential informant in mid-December and matters heated up. He stated he worked on a motion to be relieved once Applicant saw and asked for a continuance. He asserted that he met with them at least eight times. (PCR

39).

Counsel stated he went over discovery with Applicant and explained the significance. He stated there were around 300 photographs turned over. (PCR 39). He received these before Ms. Hall was released on bond and went over them on his computer at the detention center. (PCR 39).

Counsel stated he also discussed mere presence, constructive possession, and defenses. (PCR 40). He stated that there was an issue related to suppression due to staleness of the warrant that they discussed throughout. Counsel thought they discussed the fact about money being removed from his wallet.

As to the mere presence, Counsel advised Applicant that it was a "constructive possession" case because it was not his residence. He was involved with Coon's daughter and was staying there as a guest. It was their defense that he was not involved in the offense. It was mere presence to the constructive possession. (PCR 40-41).

Counsel stated he discussed accomplice liability and conspiracy may have come up generally in those discussions. (PCR 41).

Concerning the solicitor's closing argument referencing heavy narcotics, methamphetamine, and heroin, Counsel confirmed that he did not object. He believed it was not objectionable. He found the comment to be a general statement about Edgefield County. (PCR 41-42).

Counsel could not recall whether there was evidence about explosives. After referring to ROA p. 269, he recalled that there were allegations that the place was boobytrapped based upon an informant's claims related to the warrants, but he did not recall it as an issue during the trial.

In reference to the comment by Solicitor Maye in the reply closing regarding whether

Applicant would have been able to dispose of the evidence before the officers entered the home, Counsel thought some of it was objectionable. He recalled the comment Maye made that Counsel did not object to related to a question whether there was time for someone to dispose of the drugs by flushing them in the house when they knew the police were outside. (PCR 43). Counsel stated that they had already established DeWitt testified that the police came and knocked on the door and that she went and got Wheeler and Hall up, they took their time to get dressed and then answered the door. (PCR 43); (ROA 201) (DeWitt testified she noticed the police outside, woke up Tim and Heather, they got on their clothes, waited a while, and she did not observe them take any action to dispose or flush the drugs). Counsel stated that he argued to the jury why someone in that position would have flushed the drugs if they had time to do so. PCR 43–44. (See ROA 262, l. 10-20).

In hindsight, he thought it was something he should have objected to but did not. PCR 44. When asked what the objection would have been, Counsel testified that he thought it had already been established that there were several minutes between when the police knocked on the door before they entered the house and that Maye's comment was basically saying something to the jury on whether they would believe SWAT would have waited that long before they entered. PCR 44.

Respondent's Counsel referred Trial Counsel to ROA 201 concerning DeWitt's testimony related to the actions while the police were waiting. PCR 44-45. He stated that he had a conversation with Applicant about the strategy in the matter. Counsel stated that he sat through Coon's earlier trial the week before and had been preparing a suppression motion. The public defender who represented Coon made a similar motion and Counsel heard the State's response to the similar argument that he was going to make. Counsel stated that he did not make that

argument because it was lost the week before in the Coon trial.

Counsel stated that it was going to be a constructive possession and mere presence case. It was their strategy to establish that he was not a resident there and that the drugs were found in a different room than where he spent his time. The further strategy was to cross-examine and impeach DeWitt and Wade, and to call Coon, who they believed would testify that all the drugs were his which he dId. PCR 45. See ROA 213-214 (Coon accepts full responsibility for all the drugs , the guns and stolen vehicles).

Counsel stated he does not recall if he discussed this with Coon before he testified.[4] (PCR 45). However, Counsel stated that they knew Coon was going to do this for several months.

As to any issue on whether the cash was found in a jar or vase, Counsel stated that he did not feel that this was a substantial issue. (PCR 46).

As to the fingerprints, Counsel stated that they had been waiting to see what sort of results came back. Counsel stated that they considered putting in that evidence. However, after the State rested its case, he talked with Applicant about taking the stand, but he was not comfortable in doing it, so he did not testify. (PCR 47);[5] *See* ROA 47. 234-235. Counsel stated that they did not find the Applicant's fingerprints . PCR 47, l. Counsel did not recall cross-examining any fingerprint expert at trial.[6]

Counsel testified that the Applicant never indicated that he wanted to plead guilty. PCR 47. In the fall, Counsel received information that the State was going forward after the federal government was deciding what they would do. He stated that there were not any plea offers from

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[4] During the trial, Counsel indicated that he spoke with Coon prior to his testimony and told him that he was going to ask Coon about his plea and the statement that he gave. (ROA 210, l. 15-21.
[5] During the same time, Counsel initially indicated that the Applicant would testify. ROA 210, l. 15-16.
[6] The record shows that no expert was presented by the state on fingerprint analysis.

Solicitor Maye. He later learned after the fact that Coon was offered a 15 or 17 year sentence, but Coon never accepted it. He stated that Solicitor Maye offered Applicant a 17 year sentence after that. Counsel stated initially Solicitor Maye thought that Coon was the principal with the drugs, but stated that later he came to believe that Wheeler was more involved. In thinking the State was going to offer Applicant that and when Counsel mentioned it to him, Applicant rejected it. Counsel stated that maybe we could start with that and work it down to a 10 year sentence. However, Applicant felt that Coon was going to take full responsibility for the charges and provide him relief. Applicant never indicated that he wanted to take the offer. (PCR 48-49). Then while Coon was being tried, Counsel inquired of Maye about it and he offered 22 years and Wheeler did not accept it. (PCR 49).

On cross-examination, Counsel testified that from the beginning our defense was constructive possession, mere presence and that Coon was going to take responsibility on the charges. He also felt that Ms. DeWitt was going to be a favorable witness. He stated that he did not know that she had changed her testimony before trial. (PCR 50). Counsel also stated that they did not know about Wade's potential testimony until a couple of weeks before the trial. (PCR 50). Counsel stated that he believe d that Wade and DeWitt testified in Coon's trial. (PCR 50).

Counsel stated that he called Coon as a witness in their defense. He acknowledged that this did not preserve his right to last argument. (PCR 50). Counsel agreed that he did not bring up that Wheeler's fingerprints were not on the box that had the drugs and did not call anyone to testify about what was found on the green ammo box where most of the drugs were found. Counsel confirmed that there were not huge bags of drugs laying around the house and that the methamphetamine was found in the green ammo box. (PCR 52). Counsel confirmed he did not object to the comment about the huge bags of drugs and bags of human misery. (PCR 52).

As to the motion to suppress the drugs, Counsel acknowledged that there was a different judge than the judge in Coon's trial, but rejected the assertion that it was likely that Judge Griffith would have made a different ruling if it was presented to him. (PCR 52). He stated based upon what the public defender argued and the State's response to the argument in Coon he felt the motion related to the delay in the search warrant would not have been successful. (PCR 52-53).

As to the comments about explosives, Counsel stated that he did not recall any testimony about explosive being buried or boobytrapped around the yard. Counsel stated that he did not know whether he should have objected to the reference. (PCR 53).[7]

Counsel stated the significant issues or part of the discovery, Counsel stated that when the case began there were issues as to whether the state could prove that those were Applicant's drugs and whether he had been trafficking. Counsel stated that they knew drugs were found in

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[7] Brian Wade testified that he was told there were multiple firearms including rifles, assault rifles, handguns, sawed off shotguns and pistols. (ROA 77, l. 11-12). He also testified that he learned about measures they had in place including surveillance, booby traps which he related to Investigator Jimmy Smith of Edgefield County. (ROA 77, l. 13-16). He specifically related that since there was C-4 planted around the perimeter of the property, if something happened, they needed to get away. *Id.*

The property owner, Chris Harmon, was asked whether he knew that his residence was full of guns, explosives and drugs, which he denied. (ROA 113-114). Investigator Jimmy Smith of Edgefield County testified that he spoke with Wade and told he had seen large quantities of guns, methamphetamines, heroin, and C-4 explosives all located in the residence of David Coon, Heather Hall and a male called Biker Tim. (ROA 116, l. 8-14).

Officer Curtis Morris worked on the crime scene pursuant to the search warrant, along with ATF, SLED, SWAT, and the Edgefield Sheriff's Department. Officer Morris testified that he found weapons throughout the residence and located an explosive blasting cap in the common area of the residence. (ROA 124). ATF Agent Ricardo Prince testified he was on the scene with the bomb squad, cleared the house, and saw the blasting cap located therein and noted it was a form of an explosive. (ROA 177, l. 4-13).

the house, they knew who was in the house, and knew where things were. Counsel was aware of the physical layout, including where Tim and Heather were staying, Coon's room and what was in his room, and the DeWitt's statement. Counsel stated that they went over the statements and found that DeWitt's first statements were favorable to Applicant. (PCR 54). This changed when she changed her story in December and was also charged with trafficking for the first time. (PCR 54). Counsel stated that he questioned her about a deal. (PCR 55).[8] Counsel stated that he later learned that she was sentenced. He stated he did not make a specific motion to reveal the deal prior to her testimony. (PCR 55).

When questioned again about the plea offers, Counsel stated Maye's view about the case changed over time. When asked if Applicant was approached by Maye about testifying against Coon or anyone else . Counsel appeared to speculate whether Maye would have asked Wheeler to testify against Coon. However, he noted that Ms. Hall did not testify against Wheeler (after Counsel was removed from the case) at trial, and he thought she ended up taking plea but did not recall the specific sentence. (PCR 56).

Concerning the waiver of a conflict document, Counsel testified he went over each paragraph of the Agreement with Applicant but did not recall when. (PCR 56-57). Counsel testified he discussed the dual representation issues with Applicant prior to him signing the waiver. (PCR 57). (ROA p. 301- 308); (Court Exhibit 1).[9] Counsel stated that he did not learn

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[8] The record reveals that the State questioned DeWitt about whether she had been made any direct promise as to what was going to happen with her charges and she responded no. (ROA 197). It was also pointed out that she was in a jumpsuit because she had been arrested the week before because there was a bench warrant for her arrest. (ROA 197-198). Counsel Thuss did cross-examine DeWitt about her inconsistent statements, the new trafficking charge prior to this trial, and that she was fearful of losing her children from a probation violation. (ROA 202-203).

[9] In the Motion, Counsel noted that Deputy Solicitor Maye made a plea offer which favored one client over another. (ROA 303 ¶ 9).

any information from Heather that would have been detrimental to Applicant. Counsel stated that if there had been a possibility that she would have been a witness at Wheeler's trial they would have discussed it. Counsel stated that Wheeler and Heather had the same defenses of constructive possession, and mere presence. They both alleged the drugs were not theirs. Counsel stated that Brian Wade ended up being the confidential informant in the case. (PCR 57). Counsel stated that he knew early on that it was someone in Aiken County Detention Center who gave law enforcement a tip. Counsel stated that he discussed the possibilities with Applicant and Heather. (PCR 58).

On re-direct, Counsel stated that he withdrew the suppression motion because he heard the argument the week before. (PCR 60-61). He felt if he had the chance to make the argument without the state knowing it was coming it may have been different. But Counsel was able to hear how the affiant who gave the affidavit with the oral testimony testified, it would not be a winner. (PCR 61).

FINDINGS AND CONCLUSIONS RELATED TO THE SPECIFIC ALLEGATIONS

REPLY CLOSING ARGUMENT ISSUE.

In the Applicant's first amended allegation, he contends that Counsel was deficient in failing to object to the following portion of the State's reply closing argument, particularly ROA 269, l. 17-25:

> In this case, this box over here in the corner of the house, they said oh, he wasn't doing anything wrong in this case, you ought to find him not guilty because he didn't know anything about this, he would have gotten up out of the bed there with all those officers around and he would have just gotten rid of all this stuff. All these *big old huge bags of drugs*, they've *got drugs and stolen goods* and items, how big of a toilet would it take to flush away all that evidence that was throughout that house and scattered right and left and up and down? Drugs everywhere in the house. All this here, but scattered.
>
> *Look at the photographs of the underside of the bed up there where he*

> *was; drug paraphernalia, sawed-off shotgun, explosives, weapons. How's he gonna get rid of any of that? He wouldn't have had time to turn around backwards in this case. And, ladies and gentlemen, it's quite a stretch to think that the SLED SWAT team and ATF and the sheriff's department would have let them get rid of a thing in this case or do one thing where they could pick up a weapon or hurt somebody in this case.*

(ROA 269, l. 11-25) (emphasis added); (*See also* ROA 268, l. 17-24) (reference that "they were going out there to serve a search warrant on people with explosives, booby traps and sawed off shotguns ….). No objection was raised concerning these matters at trial.

In this allegation, Applicant contends that Trial Counsel should have objected to references in the State's reply argument to huge bags of drugs, weapons, and explosives because he claims that there was no evidence to support those assertions. This Court is constrained to find that Applicant failed in his burden of proof to show either deficient performance or prejudice under Strickland.

In order to prove Counsel was ineffective, the Applicant must show Counsel's performance was deficient and the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). Prejudice under the Sixth Amendment test is whether there is a reasonable probability that absent Counsel's deficient performance that result of the proceeding would have been different.

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it. State v. Cooper, 334 S.C. 540, 514 S.E.2d 584 (1999). A solicitor has a right to state his version of the testimony and to comment on the weight to be given to such testimony. Id. Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the Applicant has the burden of proving he did not receive a

fair trial because of the alleged improper argument. Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998). The relevant question is whether the solicitor's comments infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. (citations omitted); Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002).[10]

A review of the trial record reveals the following testimony related to these issues. Brian Wade testified that he was told by David Coon there were multiple firearms including rifles, assault rifles, handguns, sawed off shotguns and pistols. (ROA 77, l. 11-12). He also testified that he learned about measures they had in place including surveillance and booby traps which he relayed to Investigator Jimmy Smith of Edgefield County. (ROA 77, l. 13-16). He specifically told Investigator Smith that since there was C-4 planted around the perimeter of the property, if something happened, they needed to get away.

The property owner, Chris Harmon, denied knowledge of guns, explosives and drugs in his home. (ROA 113-114). Investigator Jimmy Smith testified that Wade told him that he had seen large quantities of guns, methamphetamines, heroin, C-4 explosives located in David Coon, Heather Hall, and Biker Tim's residence. (ROA 116, l. 8-14).

Officer Curtis Morris worked on the crime scene along with ATF, SLED, SWAT, and the Edgefield Sheriff's Department. He testified that he found weapons throughout the residence. (ROA 124). Officer Morris also located an explosive blasting cap in the common area of the residence. ATF Agent Ricardo Prince testified that he cleared the house and saw the blasting cap located therein and noted it is a form of an explosive. (ROA 177, l. 4-13).

This Court is cognizant that this complaint addressed the State's reply argument to the defense's closing statement. Trial Counsel Thuss opened his closing argument with the following

[10] Darden v. Wainwright, 477 U.S. 168 (1986).

comment:

> You've heard — well, let me go back. There was a search warrant executed on December 22nd and Mr. Wheeler was present along with two other people. Why didn't he flush the meth -- if he knew that police were outside, as Ms. DeWitt testified she told him, and he woke up and he had time to put on his clothes and wait before the police to come in, if he knew these drugs were there in Bedroom Number 3, why didn't he dispose of them? Wouldn't anybody in that position have tried to dispose of that? It's a crystal substance they can flush right down the toilet. It wouldn't take quite a minute.

(ROA 263, l. 5-16); (See also ROA 201 (Thuss cross of DeWitt about not observing Applicant attempt to dispose, flush, or destroy any evidence after she woke Applicant up when the police arrived)).

Related this issue, Trial Counsel's testimony was inconsistent. Trial Counsel testified that he thought some of it was objectionable. He recalled Maye's comment that Counsel did not object to a question whether there was time for someone to dispose of the drugs by flushing them in the house when they knew the police were outside. (PCR 43). Trial Counsel stated that they already established DeWitt testified that the police knocked on the door and that she got Wheeler and Hall up, took their time to get dressed, and then answered the door. (PCR 43). (ROA Tr.p. 201). Counsel stated that he argued to the jury why someone in that position would have flushed the drugs if they had time to do so. (PCR 43–44); (See ROA 262, l. 10-20).

In hindsight, Trial Counsel thought it was something he should have objected to but did not. (PCR 44). When asked what the objection would have been, Counsel testified that he thought it had been established that there were several minutes between when the police knocked on the door before they entered the house and that Maye's comment was basically saying something to the jury on whether they would believe SWAT would have waited that long before they entered. (PCR 44); (See also PCR 52- 53).

This Court must find that Counsel's hindsight concession that he should have objected is not binding to this Court on either deficient performance or prejudice under Strickland. "Admissions of inadequate performance by trial lawyers are not decisive in ineffective assistance claims. Ineffectiveness is a question for the courts, not Counsel, to decide." Walls v. Bowersox, 151 F.3d 827, 836 (8th Cir. 1998) (internal citation omitted); see also Robertson v. Pichon, 849 F.3d 1173, 1188 (9th Cir. 2017) ("Trial Counsel's post-hoc explanation that his decision was based on a legal error is not dispositive, because Strickland 'calls for an inquiry into the objective reasonableness of Counsel's performance, not Counsel's subjective state of mind.'") (quoting Harrington v. Richter, 562 U.S. at 110). Cf. Chandler v. United States, 218 F.3d 1305, 1315 n.16 (11th Cir. 2000) (because the ineffective assistance inquiry is objective, Counsel's admission of deficient performance "matters little"). Such self-proclaimed admissions have been regarded with skepticism. Reviewing an attorney's performance under Strickland involves an objective analysis. The Supreme Court has stated that:

> Although courts may not indulge "post hoc rationalization" for Counsel's decision making that contradicts the available evidence of Counsel's actions, neither may they insist Counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that Counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." After an adverse verdict at trial even the most experienced Counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of Counsel's performance, not Counsel's subjective state of mind.

Richter, 562 U.S. 86, 109-10 (internal citations omitted).

This Court finds that Counsel was not deficient in failing to object to this identified portion of the reply argument. The State's reply was responsive to defense's closing argument which suggested that Wheeler's failure to dispose of evidence in the period between having knowledge of law enforcement's presence suggested his innocence because he did not dispose

of the evidence in his room and the house before the police entered. Further the prosecutor asked the jurors to review the photographs presented in evidence. Although huge bags of drugs may be viewed as a rhetorical flourish, the photographs showed of the extent of drugs and weapons located at the scene and located within Applicant's control. Applicant further failed to show what appropriate objection reasonable Counsel would have made to the responsive argument. This Court must find that Counsel's failure to object was not deficient.

This Court must also find that Strickland prejudice was not proven by Trial Counsel's failure to object. In light of the evidence and testimony before the jury, this Court must find that the Applicant failed to show "that a prosecutor's improper comments amount to a constitutional violation if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' Darden, 477 U.S. at 193. These challenged comments, if objectionable, did not undermine confidence in the verdict. Prejudice requires that the Applicant prove that had Counsel objected, there is a reasonable probability that the result of the proceeding would have been different. Applicant failed to meet that burden where the prosecution directed the jury to consider the evidence and photographs before the Court. In light of the evidence, the jury was free to make its own assessment of whether the bags of drugs were "huge" or not. Similarly, the blasting cap, an explosive was presented in evidence. (ROA 117, 124); State Exhibit 13, 14. This ground must be dismissed.

STATE'S CLOSING ARGUMENT ISSUE

Applicant, also asserted an ineffective assistance of Counsel issue during the State's initial closing argument which concerned "heavy narcotics, methamphetamine, crack, heroin," "a bag of human misery," explosives and stolen motorcycles. (ROA 245-247). A review of the record supports that relief is not required because Applicant did not prove deficient performance

or prejudice under Strickland.

In the State's closing argument, Deputy Solicitor Maye described the development of the Edgefield Courthouse:

> ... Edgefield has got history of where people would get into disputes with one another and they'd take up pistols and duel and shoot each other dead. It hasn't been long ago that men stood on battlefields and hacked each other to death with swords, eyeball to eyeball, so I doubt we're any meaner than we once were, but back then a sheriff and a chief deputy and that was it for everybody that lived here.
>
> You know what's the difference? It's not more people and I doubt people are ever even meaner than they once were. ***Heavy narcotics; methamphetamines, crack, heroin, hard narcotics. Right there, a bag of human misery***. The kind of substance that will have people go out and scour the countryside. Y'all saw here folks coming up here and testifying. Where were they all from? In case you can't recall, some of them came from Aiken, some came from houses in Columbia. These are people throughout this whole area who were hardworking people, who one guy came here and wanted to move to South Carolina to get away from crime so he could restore a house. A mechanic who thought that his son was teasing him when he said your camper's gone. These are hardworking folks that lost are so addicted to what's in that ***bag of human misery*** that they forgo everything that they have, they lose everything they have and they would roam the countryside cutting locks, breaking in buildings, going up under people's sheds and taking their camper, stealing their truck, **stealing motorcycles from their friends.** Anything they could get their hands on to steal and what were they doing with it?
>
> Well, there's one thing for sure. On December the 22nd of 2015 all of those stolen goods had accumulated out there at the residence of Mr. Coon, Mr. Wheeler and Ms. Hall, and I guess on a sometimes basis Ms. DeWitt, who was a hanger-on there. All because somebody or several somebodies were so selfish and so mean and **had such black hearts that they would dispense this human misery at the expense of other people,** and that's what this case is all about. Because seated over there at the defense table in this case, Mr. Wheeler, who was happy and healthy over there, **is a person who would dispense human misery that cost so many people so much. They had all these stolen goods there that day**. And we're not saying who stole anything because who knows, but we know all of those stolen goods ended up here in Edgefield County out at that residence and we know from Brian Wade how they got there because we know what was going on. It wasn't a secret. Everybody knew; Ms. DeWitt, Mr. Wade. . . .

(ROA p. 244-24). (emphasis added).

Applicant complained that Counsel should have objected because of similar reasons as to

the State's reply argument. This Court recognizes its role in viewing these arguments both from the prosecutor's perspective and defense Counsel's perspective in making this assessment. As stated by the Supreme Court:

> The 'consistent and repeated misrepresentation' of a dramatic exhibit in evidence may profoundly impress a jury and may have a significant impact on the jury's deliberations. Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence, do not reach the same proportions. Such arguments, like all closing arguments of Counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. *While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.*

Donnelly v. DeChristoforo, 416 U.S. 637, 646–47 (1974) (emphasis added).

Applicant challenges the failure to object to the highlighted statements because he disagrees with them. Counsel Thuss testified he did not find Solicitor Maye's comments objectionable. (PCR 41-42). This Court agrees that he was referring to the impact of drugs generally and that Edgefield County had been affected by it. This rhetorical device was not suggesting that Applicant was the root of all drug misery in the County.

Courts have held similar and more pointed rhetoric to not be error. Three primary arguments for permitting prosecutorial use of drug-related rhetoric hinge on the prosecutor's need to urge the jury to perform its duty. First, some courts have permitted such rhetoric because the rhetoric appropriately reminds the jury to serve as the conscience of the community. In United States v Magee, 821 (F.2d) 234 (5th Cir. 1987),[11] for example, the Fifth Circuit found the

[11] The prosecutor argued that "it's common knowledge that we got a drug problem in this United States. ... [W]hen are they going to do something about this drug smuggling? ... [H]ave your foreman sign a guilty verdict. That's the way to do something about drugs." Id at 242.

drug-related rhetoric of the prosecutor proper, holding that the comments were simply a "suggestion by the prosecutor that the jury fulfill its role as the conscience of the community." Id. At 242

A second justification for the use of drug-related rhetoric is that the rhetoric emphasizes the gravity of the defendant's alleged narcotics crime. This rationale underlies the Seventh Circuit's decision in United States v Ferguson, 935 F.2d 1518 (7th Cir. 1991). In Ferguson, the prosecutor argued:

> [N]obody has to tell you about the scourge of drugs in our society today and the effect it is having on the social fabric today. ... You may hear that people, individual people, don't have a chance to make a difference in the fight against drugs. ... Detective Boyle, a fine law enforcement officer, stopped it. Here is your chance to do something.

The Seventh Circuit held this comment was proper, describing the rhetoric as a mere comment to the jury on the "gravity of this country's drug problem." Third, some courts have permitted the drug-related rhetoric as a plea to the jury to enforce the law. For example, in Martinez v State, 826 S.W.2d 807 (Tex. App. 1992), the prosecutor stated about the police: "They're fighting the war on drugs and they're working hard. ... They're our first line of defense in this war on drugs." Id. At 808. The Texas court found no error because the prosecutor was "making a plea for law enforcement," and it held that such a plea can permissibly describe the "respective parts played in that drug war by the police, prosecutors, court and jury." *Id.* Several other state courts have also relied on this rationale. See, State v Crenshaw, 852 S.W.2d 181, 187 (Mo. Ct. App. 1993) (stating that "the Prosecutor alluded to the 'drug war' in the United States, [and] the efforts of police to catch the culprits 'on the battlefields of our streets[.]'"); People v. Peterson, 618 N.E.2d 388, 395 (Ill. App. 1993) (stating that "[t]he prosecutor's remarks relating to the war on drugs was permissive comment on the evils of crime and fearless administration of

justice and, therefore, did not constitute prosecutorial misconduct"); People v. Loferski, 601 N.E.2d 1135, 1145 (Ill. App. 1992); State v Plummer, 860 S.W.2d 340, 351 (Mo. Ct. App. 1993); State v Hatcher, 835 S.W.2d 340, 344-45 (Mo. Ct. App. 1992).

A fourth justification for allowing some prosecutorial comments about drugs is that these comments are permissible as a rebuttal to certain defense Counsel arguments. For example, in United States v Bascaro, 742 F.2d 1335 (11th Cir. 1984), the prosecutor asked the jury: "Isn't this case really one about a war? Haven't they invaded our shores?" Id. at 1353. The Eleventh Circuit ruled these comments permissible in light of the defense Counsel's accusation that the government had no legitimate reason to prosecute the defendant.

The South Carolina Supreme Court has addressed the general parameters of permissible closing argument in State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975):

> This Court, on numerous occasions, has held that the duty of a solicitor is not to convict a defendant, but to see that justice is done. At the same time, the solicitor should prosecute vigorously. State v. Davis, 239 S.C. 280, 122 S.E.2d 633 (1961). Closing arguments have been held improper when they have appealed to personal bias, or when they have aroused passion and prejudice. State v. White, supra.
>
> In 23A C.J.S. Criminal Law s 1107, closing arguments, similar to that of the solicitor in this case, are discussed as follows:
>
> 'So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law**; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law**; and he may ask for a conviction, or assert the jury's duty to convict. He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.'
>
> The test of granting a new trial for alleged improper closing argument of

> Counsel is whether the defendant was prejudiced to the extent that he was denied a fair trial.
>
> Id. at 92-93, 212 S.E.2d at 590-91 (emphasis added)

The solicitor also tied his comments to witnesses' drug use. Brian Wade acknowledged his use of drugs as a teenager and after his return from the military and admitted to stealing vehicles. (ROA p. 72-73). In fact, he testified that drugs made his criminality worse. (ROA 94). Jennifer DeWitt admitted to being a meth addict. (ROA p. 192-193, 198).

This Court must find that Counsel was not deficient in failing to object to the solicitor's comment about "[H]eavy narcotics; methamphetamines, crack, heroin, hard narcotics. Right there, a bag of human misery" consistent with Durden. These comments were not inconsistent with the fact that there were evils in drug use and it had an impact upon the community. This Court finds that Counsel acted reasonably under the mandates of criminal law in not objecting. Further, this Court must find that these comments did not undermine confidence in the verdict under *Strickland* as Applicant failed to prove deficient performance and prejudice.

Applicant argued that Counsel failed to object to the State referencing stolen motorcycles. He argued that he did not steal a friend's motorcycle but merely used it with his license tag while his was being repaired. (PCR 23-24). However, Applicant did not testify at trial that he only borrowed rather than stole the motorcycle. The State's theory, however, was that the motorcycle was stolen based upon the evidence presented, including Applicant's license tag was on the stolen motorcycle. (ROA 239-241). While the defense may have had a factual argument on whether the State proved the motorcycle was stolen, there was not a valid objection to be made during the State's closing argument. Counsel was not deficient in failing to object. A solicitor has the right to state his version of the testimony, its reasonable inferences and to comment on the weight to be given such testimony. State v. Caldwell, 300 S.C. 494, 504, 388

S.E.2d 816, 822 (1990). Since these comments arose from the record, Counsel was not deficient in failing to object and further prejudice has not been shown.

Further, Applicant argued Counsel failed to object these comments:

> …and had **such black hearts** that they would dispense **this human misery** at the expense of other people, and that's what this case is all about. Because seated over there at the defense table in this case, Mr. Wheeler, who was happy and healthy over there, is a person who would **dispense human misery** that cost so many people so much. **They had all these stolen goods there that day**.

(ROA 246-247). The reference to "black heart" is rhetoric related to wickedness. In dispensing "human misery" was clearly a reference to selling the drugs which had an effect on the individual they sold it to. As noted above, there was evidence in the record about the assertion that "they " sold drugs. Further, there was evidence in the record that there were many stolen items in the home when it was searched. (ROA 79-80, 96) (Wade described receiving the meth from Wheeler); (ROA 122-133) (evidence of matters seized during search later identified as stolen); (ROA 140-141, 144-146, 183-185) (stolen motorcycles identified); (ROA 187-188) (stolen weapon identified). Further, Coon testified that all the guns found were stolen. (ROA 226).

Counsel was not deficient in failing to object because this comment was supported by evidence in the record and its reasonable inferences. Further, Sixth Amendment prejudice has not been shown. Applicant's allegations related to Trial Counsel's failure to object to the State's closing argument must be denied.

THE STATE'S OPENING STATEMENT ISSUE

Applicant contends Counsel was deficient in failing to object to the State's opening statement related to explosives and surveillance. In particular, he argued Trial Counsel failed to object to this statement:

> Now you're gonna hear that Brian Wade laid out for them you ought to be careful when you go over there because **they've got surveillance, they've got cameras on the driveway** so that when somebody comes down the driveway they know somebody's coming. **They've got explosives**. They've got all sorts of things as countermeasures for somebody coming in trying to, A, rip them off and steal their dope or law enforcement coming in**.**

(ROA 60). (emphasis added).

> In addition, Appellant argued Counsel failed to object to this statement:
> Now they got SLED and they got ATF, they got everybody under the sun to go down there and help them because **they were worried about explosives, they were worried about booby traps, they were worried about surveillance**, so they went down there ready to deal with the situation.

(ROA 62).

He claimed that explosives were not, he was not charged with anything related to explosive possession and suggested that this was highly prejudicial. As noted previously in this order, Counsel Thuss recalled that the warrant stated that the home was booby trapped, but he did not recall it being an issue at the trial. Counsel stated that he did not know whether he should have objected to the references. (PCR Tr. 53).

Regarding surveillance, Applicant complained that Jennifer DeWitt was not being truthful claiming that it was impossible for her to have a view of the driveway because there was no security camera showing a view of the driveway. (PCR 18).

"The opening statement serves to inform the jury of the general nature of the action and the issues involved so they can better understand the evidence presented." State v. Kornahrens, 290 S.C. 281, 284, 350 S.E.2d 180, 183 (1986). "The solicitor is permitted in opening statement to outline the facts the [S]tate intends to prove." Id. "As long as the State introduces evidence to reasonably support the stated facts, there is no error." Id. "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument."

Brown v. State, 383 S.C. 506, 516, 680 S.E.2d 909, 915 (2009) (quoting Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002)). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. (quoting Humphries, 351 S.C. at 373, 570 S.E.2d at 166).

In Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018), the Supreme Court found Counsel was not deficient for failing to challenge solicitor's comment in opening statement that police saw the defendant charged with robbery at the scene of the crime. The assessment is analogous to the instant situation. The Court found trial Counsel was not deficient for failing to challenge solicitor's comment in opening statement that police saw the defendant at the scene of the crime. The Court, reviewing the later trial record found that the crime scene investigator testified that he was directed by officers who reported that they were chasing a suspect and observed him throw or dispose of a plastic bag which was later found to hold money from the robbery, and the robbery's victim testified he told the police they could intercept the robber at the same location where officers saw him try to dispose of the plastic bag.

The Supreme Court stated, referring to the Court of Appeals finding that trial Counsel could have addressed the comments either by objecting or by pointing out in the defense closing statement that the State had failed to prove the assertion made in the opening statement, stated:

> We certainly agree with the court of appeals that these are two of the options Counsel has to deal with a misstatement by the State in opening. *However, the simple fact trial Counsel does not respond to an incorrect statement made during opening does not render trial Counsel's performance deficient.* Under certain circumstances, it may be reasonable for trial Counsel to simply ignore the misstatement. Such a decision could be based on Counsel's assessment the point is minor and inconsequential; perhaps it is debatable whether there is evidence to support the statement; or perhaps the circumstances of the trial—as perceived by trial Counsel—unfold in such a way that pointing out the misstatement would no longer be beneficial.

Smalls, 422 S.C. at 186–87, 810 S.E.2d at 842.

The trial evidence supports a finding that explosives were on the property. Further, although no officers found evidence that the home was boobytrapped, officers did find C-4 explosive within the house. (ROA 101, 104, 113-116, 124, 176-177). As with the closing argument issue concerning similar comments, this Court must find that Counsel was not deficient in failing to object to those portions of the opening statement related to explosives and surveillance.

Similarly, there was evidence about the surveillance at the property. Brian Wade testified about the live camera feed and indicated it to Investigator Smith. (ROA 77). Jennifer DeWitt described her role in monitoring the house cameras to see who was pulling up. (ROA 191-192).

In addition, Applicant failed to prove prejudice and deficient performance by Tiral Counsel's failure to object. As with Smalls, and Kornahrens, there was evidence and reasonable inferences from the evidence at trial. This Court finds that if an objection been made to the opening statement and more clarity consistent with the actual evidence been presented, the Court finds that there is a not a reasonable probability that the result of the proceeding would have been different. This case was about drug possession. His claim about the opening statement and Counsel's failure to object must be denied.

CONFLICT OF INTEREST DISCUSSION ISSUE

In his amended application, Applicant contends that Counsel failed to adequately discuss the conflict issue between representing Applicant and his co-defendant. This Court finds that reviewing the record and testimony Applicant failed to prove deficient performance and prejudice. Counsel's discussion was within the standards of competence demanded of lawyers practicing criminal law.

Prior to the beginning of the trial, Trial Counsel represented Applicant and his girlfriend, Heather Hall. The Court removed Trial Counsel from representing Hall when the State offered her a plea offer contingent upon her testifying against Applicant. Applicant claimed that issues related to a possible conflict of interest in the dual representation were not adequately discussed with him and he claimed Counsel was deficient, since prior to Trial Counsel was relieved from representing Hall. This Court finds that the Applicant has failed to prove deficient performance or prejudice.

In the direct appeal of his conviction, the following issue was raised in appeal as the Applicant's Statement of Issue on Appeal:

> I. Whether the trial court reversibly erred by failing to hold an on-the-record colloquy with Applicant to determine whether Applicant knowing, intelligently, and freely waived his right to conflict free representation where Applicant and his co-defendant were represented by the same retained attorney.

In its Final Brief of Respondent, the State restated the issue as follows:

> The circuit court's pre-trial removal of Appellant's Counsel as Counsel for a co-defendant removed any actual or potential conflict of interest by dual representation, and nothing in the record indicates Counsel's representation of Appellant at trial was in any way impacted by his prior representation of the co-defendant.

Following briefing, the Court of Appeals affirmed Applicant's convictions and sentences. State v. Wheeler, 2019-UP-307 (S.C. Ct. App. filed August 28, 2019). In its unpublished order, the Court of Appeals stated the following:

> Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: State v. Justus, 392 S.C. 416, 418, 709 S.E.2d 668, 670 (2011) (stating a defendant has the Sixth Amendment right to the assistance of Counsel); Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001) ("To establish a violation of the Sixth Amendment right to effective Counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance."); State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005)

("An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendants."); Id. at 152-53, 612 S.E.2d at 450 ("The mere possibility defense Counsel may have a conflict of interest is insufficient to impugn a criminal conviction."); Fuller v. State, 347 S.C. 630, 634, 557 S.E.2d 664, 666 (2001) (finding no conflict in trial Counsel's prior representation of one of the co-defendants); Langford v. State, 310 S.C. 357, 359-60, 426 S.E.2d 793, 795 (1993) (concluding Counsel did not actively represent competing interests because there was no evidence Counsel "advised either co-defendant to plead guilty in order to obtain more favorable consideration for the other" and "[t]he mere fact that [the co-defendant] would be available to testify against [the defendant did] not establish an actual conflict of interest").

State v. Wheeler, No. 2017-000152, 2019 WL 4052476, at *1 (S.C. Ct. App. Aug. 28, 2019).

Prior to trial, Trial Counsel moved to be relieved as Counsel for Hall due to a potential conflict with representing both Applicant and Hall and requested continuance. (Court's Exhibit 1 (Memorandum in Support of Motion to be Relieved as Counsel and for a Continuance); (ROA 301-308). During a pre-trial chambers discussion about the motion, the solicitor indicated the State offered Applicant a twenty-two year negotiated sentence, and Hall a five year negotiated sentence. Trial Counsel advised the court Applicant did not want to accept the offer, but Hall did, and stated "but they're tied." He also advised the court he discussed the issue with Applicant, but had not been able to discuss it with Hall, and he was not aware Hall's offer was contingent on her testimony against Applicant until the solicitor said it in chambers. He expressed concern over Hall's state of mind, and her ability to exercise her judgment under the circumstances. (ROA 10-13).

The solicitor then indicated Hall's plea deal would be contingent on her testifying against Applicant. (ROA l. 7-11).

The solicitor informed the court the State was ready to proceed with Applicant's case if the court determined there was a dual representation conflict, and Hall's testimony was not required for the trial to go forward. The court then asked Trial Counsel if he was ready to

proceed on Applicant's case, and give Hall an opportunity to obtain independent Counsel. Trial Counsel stated he had discussed the situation with Applicant, but had been unable to communicate with Hall.

Based on the discussion, the court ultimately relieved Trial Counsel from representing Hall, and stated Hall could either get a private attorney or a new attorney would be appointed for her. The court also gave Trial Counsel an opportunity to talk to Applicant about whether he wanted to proceed with the trial. When court reconvened, Trial Counsel did not indicate Applicant had any concerns about proceeding with the trial, and stated they were prepared to proceed.

After jury selection, the court informed Hall, who was seated at the defense table, that Trial Counsel had been relieved as her Counsel, and she would have the opportunity to obtain other Counsel. (ROA. 12-17, 42-43).

During the PCR proceeding, Counsel Trial Counsel testified that he met with Applicant and Heather Hall and discussed the possible conflict with them at the beginning of his representation. He testified that he reviewed the current caselaw to determine whether he could ethically represent both clients. He prepared a written waiver of a conflict of interest document relying upon the supreme court's decision in anticipation potential issues. The document, State Exhibit 1, was provided to and reviewed with both Wheeler and Hall. (PCR 34-35). The Waiver of Conflict of Interest and Fee Agreement (State Exhibit 1) dated February 25, 2016, read as follows:

> Dear Mr. Wheeler and Ms. Hall,
>
> It is my understanding that you wish for me to represent both of you in this general sessions matter, where you each have identical or nearly identical trafficking and possession of unlawful drugs charges, several receipt of stolen goods charges, and unlawful possession of weapons charges.

At your request, I agreed to represent you both for the purpose of obtaining an immediate circuit court bond review, which did occur. At the bond review, you indicated to the presiding judge that you each waived conflict of interest. Now, I am pursuing discovery at your request, and first and second appearances are scheduled in early April, and the court considers me the attorney of record. I am not advising you or recommending you enter into joint representation.

My retainer and fixed fee for this matter is ~~$15,000~~, $12,000 which is nonrefundable and earned when this agreement is made. South Carolina Rules of Professional Conduct for lawyers require me to obtain your informed consent to retain me to represent both of you and to confirm that consent in writing. In deciding whether you wish to consent to my representation of you, please consider the following:

1 . Because 1 will be representing both of you, my ethical obligation is to treat you equally, not favoring one of you over the other. I will raise for mutual discussion any issue that I think is material to either of you. I have an obligation to provide each of you with complete information relating to my representation. You must understand that any information you share with me is not confidential as to the other party, and I will disclose all material information I receive from either of you to the other.

2. If a dispute develops between the two of you, I must withdraw from representation of one or both of you. Additionally, although neither of you have expressed anything to me that would lead me to believe you have an existing conflict of interest, a conflict of interest could arise in the future as the case progresses. For example, at some point in the future, the solicitor could offer a plea to one or both of you that would create a conflict period the solicitor could offer such a plea on the condition that one of you incriminate or give a statement or testimony harmful to the other period there could be an offer where one of you accepts A lesser sentence and the other.

In criminal defense, an actual conflict of interest occurs when a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client. So, it is understood that I will not pursue efforts where one of you would incriminate the other. I will not take any action to compare the involvement of one of you to the involvement of the other to gain leniency for one at the expense of the other.

Also, if a dispute between you arises, any communications among us will probably be admissible in evidence and not subject to a claim of attorney-client

privilege.

Once it becomes clear an actual conflict has arisen, then, you agree and consent for me to continue to represent Mr. Wheeler, and that I shall withdraw from representation of Ms. Hall. At that point, Ms. Hall may apply for a public defender. The public defender is representing Mr. Coon, and to avoid a conflict, a private attorney will be appointed. Or, Ms. Hall may retain a private attorney herself. Or, in the alternative, you both may execute a new waiver covering the specific conflict that has arisen, and based on a new waiver, I may be able to continue the representation, although some conflicts are not waivable.

3. If you do not encounter serious disagreements, multiple representation can minimize legal fees and expenses, and in this case, permit you both to have private Counsel at a cost considerably less than customary fees. However, if a conflict develops, and I am required to withdraw, one or both of you will be forced to retain separate Counsel unfamiliar with the matter. As a result your legal fees may well increase if you elect to retain paid private Counsel.

4. If you wish me to represent you despite the risks that I have outlined, I am willing to do so. I will inform you if I believe that a conflict of interest has developed. If you understand the risks involved and consent to my representation, please sign this letter, and keep a copy. Your consent will also be inferred if by your conduct you indicate that you are authorizing me to proceed with representation.

Sincerely,
Written signature
Thuss Law Office LLC by RR Thuss

We have been advised of your right to separate Counsel and of the risks of multiple representation. We hereby consent to Thuss Law Office LLC representing both of us with full knowledge of the possible risks that can flow from such representation.

Tim Wheeler (signed) Heather Hall (Signed)

PCR Respondent Exhibit 1.

At the PCR hearing, Trial Counsel confirmed that he went over each provision with them, including that he would tell anything that one client told the other and if a dispute arose that he would withdraw from representation. He stated that after the discussion they decided to move forward with Trial Counsel's representation. He felt that Applicant and Hall understood the

provisions before Applicant signed the document. (PCR 36).[12] He clarified that the dual representation issue was discussed with each of them before the day the document was signed. (PCR 58-59). Counsel also testified that he did not learn any information from Hall that was detrimental to Wheeler's defense. He stated that he went over a number of scenarios with them. He stated that both had the same defense as it related to mere presence, constructive possession and that the drugs were not theirs. (PCR 59).

Counsel confirmed that he met with Hall or Wheeler outside of the other's presence, but also with both of them together. (PCR 36). He stated when the other was not present, Counsel would share the information with the other person.

This Court finds that Applicant failed to prove deficient performance related to the conflict that evolved. This Court finds that Trial Counsel was credible about his conflict of interest discussions with his client. There has been no showing that Hall or Applicant had conflicting defenses. The issue of a conflict arose when the State offered Hall a plea deal contingent on her testifying against Applicant immediately prior to the trial. This was consistent with the information Applicant received at the time he and Hall agreed to the dual representation as something that could terminate the joint representation. See Exhibit 1, p. 1 §2. At that point, Trial Counsel was faced with the conflict due to the inability to advise Hall on whether to accept the deal and testify against Applicant. See Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir.1990);

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[12] *Matter of Anonymous Member of S.C. Bar*, 315 S.C. 141, 142–43, 432 S.E.2d 467, 468 (1993) ("a lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client and each client consents after consultation. Rule 407, SCACR, Rule 1.7. Once the conflict is determined to be subject to client consent, the lawyer must obtain consent only after consultation. Rule 1.7. Written consent, although not required by the rules, is preferable.").

Thomas v. State, 346 S.C. 140, 144, 551 S.E.2d 254, 256 (2001) ("Although petitioner initially waived a conflict of interest, once it became clear an actual conflict existed due to the plea bargain, Counsel should have either withdrawn from representing one or both of them or acquired another waiver covering this specific conflict").

This Court finds that, Applicant failed to show 6th Amendment prejudice. Heather Hall did not testify at the trial for either the state or the defense. Counsel's discussions and advice concerning the potential risks were correct.

PLEA OFFER DISCUSSION ISSUE

Applicant contended Trial Counsel was ineffective in failing to advise him why he should not take a plea offer prior to the trial, he learned from Counsel that his initial offer from the Solicitor was ten years for him, five years for Heather, and seventeen years for Coon, but the offers were not set in stone and were stated in passing. (PCR 10). He stated that the State offered twenty-two or twenty-five years just before the trial started. (PCR 11). Applicant stated that him and Trial Counsel did not have much conversation about the offer but they agreed not to take it. (PCR 12). However, he claimed Trial Counsel did not tell him why not to take it. (PCR 11). During cross-examination, Applicant confirmed that he did not want to take the plea offer because he felt that he was innocent. (PCR 30).

Trial Counsel testified that the Applicant did not indicate any desire to plead guilty. (PCR 47). Counsel indicated that initially Deputy Solicitor Maye did not make Applicant any plea offers, but later learned that the State offered Coon fifteen or seventeen years. After Coon's offer, the State initially offered Applicant seventeen years. Trial Counsel indicated that that Applicant rejected that offer and Trial Counsel suggested he'd try to work toward a ten year offer. However, Applicant felt that Coon was going to take full responsibility for the drugs and

did not want to take the offer. (PCR 48-49). While Coon was being tried, Maye indicated that he offered twenty-two years, but Applicant did not accept it. (PCR 49). Counsel stated that Deputy Solicitor Maye's view about the Applicant file changed over time. (PCR 56).

At the outset of the trial, the trial judge inquired if there were any plea negotiations. (ROA 10). Deputy Solicitor Maye indicated that he offered Applicant twenty-two years and offered Hall five years. (ROA 10-11). Trial Counsel indicated that Applicant did not want the offer, but that Hall dId. However, as noted previously, the solicitor then indicated that her offer was contingent on testifying against him. (ROA 11).

This Court finds that the Applicant failed to show deficient performance on the part of Counsel related to the plea offers.

The United States Supreme Court has held that "defense Counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." Missouri v. Frye, 566 U.S. 134, 145 (2012); Collins v. State, 422 S.C. 250, 261, 810 S.E.2d 871, 876 (2018).

"Claims of ineffective assistance of Counsel in the plea bargain context are governed by the two-part test set forth in Strickland." Frye, 566 U.S. at 140. To establish ineffective assistance of Counsel, a petitioner must prove: (1) his Counsel was deficient in his representation; and (2) he was prejudiced as a result. Strickland, 466 U.S. at 687. For the first factor, the petitioner must show that "Counsel's representation fell below an objective standard of reasonableness." Id. at 688, 104 S.Ct. 2052. To show prejudice in this context, petitioners must demonstrate a reasonable probability that (1) "they would have accepted the earlier plea offer had they been afforded effective assistance of Counsel," and (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the

authority to exercise that discretion under state law." Frye, 566 U.S. at 147; See Walters v. Martin, 18 F.4th 434, 442 (4th Cir. 2021).

Based on the record and Counsel's credible testimony, this Court finds that Counsel was not deficient related to the plea offers. Applicant may be suggesting Counsel was deficient for failing to convince Applicant to take the offers, but this Court does not find Counsel deficient. This Court finds that Counsel properly communicated each plea offer to Applicant. This Court further finds that Applicant knowingly chose to reject each offer based upon his belief that Coon would take responsibility for the drugs if he went to trial to support his defense. Applicant failed to show that Counsel's communication related to the offers was lacking in any respect. This ground raised at the hearing must be denied.

CONSTRUCTIVE POSSESSION AND HAND OF ONE HAND OF ALL AND MERE PRESENCE DISCUSSIONS

Applicant contended that Counsel failed to fully explain constructive possession, conspiracy and "hand of one hand of all" during their discussions. At the PCR proceeding, Applicant testified that he had discussions with Counsel about these concepts, but not "big discussions." (PCR 16). Applicant indicated they discussed hand of one hand of all , but at this time he did not remember what it meant other than the fact that he was there made him guilty. (PCR 16). Trial Counsel testified that they discussed mere presence, constructive possession, and other defenses. (PCR 40). Counsel stated that it was a constructive possession case and the defense was that it was not his residence and he was only there as a guest of Hall. Counsel stated it was their defense that he was not involved in the offense and was merely present. (PCR 40-41). Counsel also stated that he may have had discussions with Applicant about accomplice liability ("hand of one hand of all") and conspiracy generally in the discussions. (PCR 41). Counsel stated that it was their strategy to establish that he was not a resident and that the drugs

were found in a different room than where he spent his time with Hall, in addition to calling Coon as a witness to confirm that the drugs were his and not Applicant's. (PCR Tr. 45).

Applicant failed to show how these discussions with Counsel were deficient, as related to the case. Mere presence is insufficient to prove constructive possession. State v. Tabory, 260 S.C. 355, 364, 196 S.E.2d 111, 113 (1973). In order to prove constructive possession, the "State must show a defendant had dominion and control, *or the right to exercise dominion and control over the [illegal substance].*" State v. Halyard, 274 S.C. 397, 400, 264 S.E.2d 841, 842 (1980) (emphasis added). Further, the State may establish constructive possession by either circumstantial or direct evidence. Id. The defendant's knowledge and possession may be inferred if the substance was found on premises under his control. State v. Adams, 291 S.C. 132, 135, 352 S.E.2d 483, 486 (1987); State v. Heath, 370 S.C. 326, 329–30, 635 S.E.2d 18, 19 (2006) ("The State failed to present evidence that Appellant could exercise dominion and control over the area where the crack was found. Appellant lived in the home where the crack was found. However, the home is owned by Appellant's mother. As a result, it is arguable that Appellant merely had a right to access the area where the crack was found, not actual dominion and control of the property."). Applicant's strategy was to urge that Applicant did not have dominion or control over the area where the drugs were found. Although evidence presented by the State challenged the defense's theory, it cannot be stated that Counsel was deficient.

Further, this Court does not find that Sixth Amendment prejudice was shown. The allegation must be dismissed.

INADEQUATE CROSS-EXAMINATION OF INVESTIGATOR ROOSEVELT YOUNG ABOUT ITEMS SEIZED

In the March 22, 2023 amendment, Applicant asserted that Counsel failed to adequately cross-examine the investigator about items seized from the home, especially regarding

testimony about a brown jar that was actually a green vase. This Court finds that Applicant failed to prove deficient performance or prejudice on this ground.

During the trial, Investigator Roosevelt Taylor testified about search warrant results. In its pertinent part related to this claim, he testified on cross-examination about $7,373 being recovered in the search as listed on the return. (ROA 153, 11. 9-13). The following then occurred:

> Q. And on the return this is the search warrant return after everything was inventoried. There is something about some money in a jar.
>
> A. Yes, sir.
>
> Q. Do you know how much money was in that jar?
>
> A. It's a brown colored antique jar, glass jar. No, sir, because you would have to break it to actually get into it to count the denominations of money and coins and we haven't done that yet.
>
> Q. Okay. Oh, so it was a sealed
> A. Yes, sir.
>
> Q. --- a sealed jar?
>
> A. Yes, sir. Yes sir it was.

(ROA 153, l. 15-154)

In the PCR hearing, Applicant contend that Counsel should have addressed more of the inconsistencies in Investigator Young's testimony, particularly related to where the money was found. (PCR 20). Applicant testified that there was evidence that money was claimed to be found in a locked brown box and that it was Heather's green vase that had around $300 located in their room. (PCR 20). Applicant claimed that there was inconsistency between whether it was a jar or a green flower vase. Applicant claimed he did not know anything about a sealed brown box. Id. He contended that the money was in a green flower vase in Heather Hall's room which

should have been brought out because she was convicted on meth charges. (PCR 25-26).

Applicant asserted that Trial Counsel could have further addressed the inconsistency with the money. Applicant claimed that Counsel did not bring up that the State claimed that over $7,300 was found in his wallet. (PCR 22). Applicant claimed that it was impossible for that amount to be in his wallet, and further stated that Investigator Young admitted to being human and making mistakes. (PCR 22). Applicant only saw a picture of the wallet in discovery with a few bills, and he never saw a picture that showed $7,300. (PCR 31).

At trial during cross-examination, the following occurred related to the money and the wallet based upon Investigator Young review of the return to the search warrant after acknowledging that he did not fill out the return:

> Q. Right. And I did have a -- a photograph showing the stack of bills a stack of bills here.
>
> A. Yes, sir. You can see a couple hundreds right there. It should be the 358.
>
> Q. Okay. But from this picture you can't tell, can you?
>
> A. No, sir. No, sir.
>
> Q. So based on the information in the return, there was money found in here with the ammo can?
>
> A. Yes, sir.
>
> Q. And then there was certain amount of money in the wallet?
>
> A. Yes, sir.
>
> Q. But do you know with a degree of certainty that this is all correct or could there have been some mistake in how much money was where?
>
> A. No, sir.
>
> Q. Can you explain then?

A. $7,337 was in the wallet unless he just forgot to put it on there. We had so many people and so much stuff going on, but I'm pretty sure he's got it on there somewhere.

Q. So so somebody could have made a mistake then?

A. I mean, it's possible, we are human, but it's in the pictures and everything.

MR. THUSS: Thank you. No further questions.

(ROA 155); (See also ROA 250, 255) (reference to the billfold and $7,300, ROA 130 (billfold); (ROA 152-153) ($7,337 found in billfold in Room 2)).

In the defense closing, Trial Counsel addressed the money found at the scene in the following manner:

> And you heard- you heard the testimony, you heard it, Mr. Wheeler had money in his wallet, but I questioned Investigator Young because I've got money laying – of money that was found in this box, an indeterminant amount of money, showing hundred dollar bills on top and then there's money laying around on the floor and **then there's an amount of money in Mr. Wheeler's wallet, and it looks like it's a thick wad of money**, but because the money I have questions about the- how the total amount of money that they're trying to attribute to Mr. Wheeler was come up with because it's clear that **there it appears that they're saying that all the money was Mr. Wheeler's, but it's clear that there were sums of money that were found with these drugs.**
>
> Mr. Wheeler . . . it's admitted into evidence, Mr. Wheeler's documents, none of them that none of them that have addresses here, but there's one in particular, a green receipt, that showed that Mr. Wheeler was making child support payments. Well, if Mr. Wheeler couldn't keep large sums of money in the bank because he was afraid it was gonna . . . But there are other reasons why a person could have large sums of money . . . on their person.

(ROA 267-68) (emphasis added).

During the trial, evidence was presented about the cash and money in addition to the material above. State Exhibit 16 shows money, among pills and scales. A photograph of the wallet of the Applicant was shown containing cash that was in bedroom 2. (ROA 125-26). In State Exhibit 32, a close up of the wallet was shown with the visible money. State Exhibit 18 was

described as a photograph under the bed showing more cash money among other items. State Exhibit 63 was another photograph of the Applicant's license found with the wallet in Bedroom 2. (ROA 126), State 62 and 68 showed the wallet containing money with the Applicant's license found in Room 2. (ROA 152).

At the PCR hearing, Trial Counsel indicated that his recollection was that whether cash was found in a jar or vase was not a big issue at trial. (PCR 46).

Counsel's decisions about "whether to engage in cross-examination, and if so to what extent and in what manner, are ... strategic in nature." United States v. Nersesian, 824 F.2d 1294, 321 (2d. Cir. 1987), cert. denied, 484 U.S. 958 (1987). "[T]he conduct of examination and cross-examination is entrusted to the judgment of the lawyer, and an appellate court on a cold record should not second-guess such decisions unless there is no strategic or tactical justification for the course taken." United States v. Luciano, 158 F.3d 655, 660 (2d Cir. 1998). Here, it is apparent that Petitioner was defended very ably and effectively by trial Counsel and there is no basis for a conclusion that Counsel's performance was objectively unreasonable. See United States v. Eisen, 974 F.2d 246, 265 (2nd Cir.1992) (finding no ineffective assistance despite defendant's claim that lawyer had failed to thoroughly impeach prosecution witnesses because decisions as to nature and extent of cross-examination are strategic); Matthews v. Workman, 571 F.3d 1065, 1081 (10th Cir. 2009) (finding cross-examination properly limited to avoid opening up unfavorable evidence); Phoenix v. Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) (finding choice of emphasis in cross-examination is prototypical example of strategy); Henderson v. Norris, 118 F.3d 1283 (8th Cir. 1997) (a delicate task entrusted to the professional discretion of Counsel).

"[D]eciding what questions to ask a prosecution witness on cross-examination is a matter of strategy." United States v. Jackson, 546 F.3d 801, 814 (7th Cir. 2008). To show that Counsel's

cross-examination was deficient under the first prong of the Strickland test, a defendant must overcome the "strong presumption that Counsel's conduct falls within the wide range of reasonable professional assistance." United States v. Rodriguez, 53 F.3d 1439, 1448 (7th Cir. 1995) (quotation marks omitted). And to show prejudice, the defendant must "explain[ ] ... what [the witness's] responses to further cross-examination might have revealed" and "how those responses might have affected the result." Id. at 1449; see Rodriguez, 53 F.3d at 1448 ("Based on his trial Counsel's cross-examination of [the witness, in which he attempted to challenge her recollection, motivation for testifying, and her ability to recognize the defendant], we refuse to conclude that the defendant's attorney's performance fell below par.").

Applicant failed to overcome the strong presumption from Strickland that Trial Counsel conduct was reasonable. Applicant's suggestions that further questions should have been asked of Investigator Young were not constitutionally required and the relevant points of Investigator Young was presented. On direct-examination, Investigator Young, the supervisor of narcotics, described the purpose of the December 22, 2015 search was to collect suspected narcotics at the scene. (ROA 147). His direct examination focused on the location of drugs seized, including the ammo box (State Exhibit 23); (ROA 150). He was shown on direct State Exhibit 62 and 63 which were described as photographs of the wallet revealing the Applicant's drivers license and asserted that $7,337 was recovered from the billfold which was located in Bedroom 2 and an additional $358 from the ammo can (from Bedroom 3) for a total of $7,731. (ROA 152). In cross-examination, Trial Counsel immediately asked Investigator Young about the money and the existence of the unaccounted for money in the sealed jar, which Investigator Young described as brown. (ROA 153). The challenge made on cross-examination was whether the jar identified in the return to the warrant had money in it that was accounted for in the amount of

$7,337 which Young indicated it did not because the jar remained sealed. There is no other reference at trial about the jar other than what Counsel presented on cross-examination.

Applicant suggests that the item was misidentified as brown and he claims that Counsel should have challenged it because he claims it was actually a green vase. Applicant failed to show the significance as to whether it was a brown jar or a green vase. The item Investigator Young referred to was sealed and the money was not counted in his calculations. There was no assertion the jar or vase contained drugs. Trial Counsel credibly testified that whether it was a jar or vase was not a big deal. (PCR 46).

This Court finds Applicant failed to show Trial Counsel was deficient in challenging Investigator Young through cross-examination whether the sealed item was a brown jar or a green vase. Applicant failed to show the impact of the difference toward the charges since it did not involve the drugs. Applicant's claims that the green vase was Hall's property and unconnected to him would have only limited impact because it still was located in the room he shared with her. This Court finds that the record demonstrates that rather than focus on potential minute differences in testimony, Counsel on cross-examination was focused on amount of documented money might not be correct. This Court finds that Applicant failed to show that Counsel was deficient in questioning related to the jar.

Similarly, Applicant has failed to show Counsel was deficient in failing to show the amount of money attributed to his wallet as being $7,337 was incorrect. As noted above, there was evidence of photographs of the wallet and money. In addition in defense Counsel's closing, he acknowledged that "there's an amount of money in Mr. Wheeler's wallet, and it looks like it's a thick wad of money" referencing the photograph and questioned the amount of money being attribute to the Applicant. (ROA 267). This Court finds that Counsel was not deficient in his

approach related to the money and the wallet.

The Court further finds that Sixth Amendment prejudice has not been shown. There is no reasonable probability the result of the proceeding would have been different if Counsel suggested that sealed item with money that had not been accounted for was a green flower vase as opposed to a brown colored antique jar. This was a purely collateral matter that could have had no effect on the actual matter that he was charged with. Similarly the Court finds that prejudice has not been shown because Counsel did not seek to impeach whether that amount of money attributed to the wallet could actually fit in the wallet. Applicant's Counsel in his closing argument implicitly made that suggestion. The jury had the photographs that Counsel was referring to as it related to the "thick wad of money." This case, however, was about dominion and control of the drugs. The jury had the ability to make the assessment based upon the inquiry made of Investigator Young by the defense, as well as the photographs presented to the jury as to whether the money could have been in the wallet or elsewhere at the scene and in Bedroom 2. This allegation must be dismissed

CROSS-EXAMINATION AND IMPEACHMENT OF BRIAN WADE

Applicant argued that Counsel failed to adequately cross-examine and impeach Brian Wade related to the fact that Applicant gave the bag of drugs to Coon and that Wade and Applicant had previously gone shooting together. He also contends that Counsel should have more effectively impeached him about his criminal record.

During his PCR testimony, Applicant initially contended that he never met with Brian Wade and first learned about him when the defense received his statement Wade gave the solicitor after being the disclosed confidential informant was disclosed. (PCR 16-17, 19). Applicant claimed that it was not true that he had fired weapons with Wade and Coon on some

occasion and further denied giving Coon a bag of drugs in Wade's presence. (PCR 19).

Trial Counsel testified that before the State disclosed that Brian Wade as a confidential informant, they were trying to figure out who gave the State the tip who had been known by either Applicant or Heather Hall.

The trial record reflects that Trial Counsel thoroughly sought to impeach Wade's testimony. (ROA 90-104, 107). Trial Counsel initially restated and developed Wade's criminal history including giving false information to police, receiving stolen goods, possession of stolen vehicles, criminal domestic violence, assault and battery, possession of meth, escape, grand larceny, and receiving stolen goods when he was arrested for the drug charge. (ROA 90-93). He developed that Wade admitted he had a drug problem and admitted having a lifestyle of drugs and crime since 2007. (ROA 94). Trial Counsel developed that Wade's relationship began with Coon two months prior to the incident. (ROA 85-96). Wade denied meeting with Applicant in Wade's earlier drug purchases because he stayed outside and his girlfriend went in for purchases. (ROA 96). Counsel also developed that DeWitt had done drugs before with him. (ROA 97). Counsel further developed that SLED Agent Daquan Smith had contacted the local investigators to meet with him at Wade's own request. (ROA 98).

On further cross-examination, Counsel developed that Wade was aware in going through the house about the firearms and testified that Applicant opened the door in that meeting with a firearm and asked Wade if he would like to shoot and "[he] did one with, him too." (ROA 98). However, Wade denied that it was shooting at the van at the time when it was just Wade and Coon shooting. (ROA 98). Wade initially claimed on inquiry that it was never mentioned who owned the guns, though a number of firearms were located in Coon's bedroom. (ROA 99). Wade clarified that Coon told him that he owned some of the firearms. (ROA 99). However when

Wade identified the gun as the one Coon got from his room and he shot, he stated that Coon had not identified who owned that weapon. (ROA 99-100). Upon examination, Wade admitted he was under the influence of drugs when he went to Wade's house and was a daily meth and marijuana user, but denied using pills or alcohol. (ROA 101). Wade denied that he gave the information to the police in the hopes of receiving favorable treatment, and claimed that he was not aware that his case could be reviewed. (ROA 101-102).[13] Wade confirmed that he had already pled guilty to the escape, and drugs and that law enforcement had not given him the belief that he would receive favorable treatment in his cases. He stated that after the plea, the next meeting was a couple of weeks before this trial when he was asked if he would testify. At that time, he was made aware of the statute that could help him if he testified and that he could receive a lighter sentence. (ROA 103).

This Court finds that Counsel acted within the standards of competence in his cross-examination. Applicant has only made conclusory assertions. The record shows that Counsel sought to impeach Wade about the prior record and his hopes of having his sentence reviewed under the "substantial assistance" statute. See S.C. Code Ann. § 17-25-65 (2014). The Applicant failed to identify other matters of impeachment that Counsel failed to use.

Applicant further complains that Wade testified that he had met Applicant prior to the December 6 incident and that he had gone shooting with him.[14] Trial Counsel's examination of

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[13] Wade testified on direct examination that he hoped when he gave the information initially that it would help him. ROA 87. The Solicitor then pointed out to Wade that there was now a method that if he testified that his sentence could be reviewed for assistance that he gave previously. ROA 87-88. However, he denied that any specific promises had been made to him. ROA 88. Wade confirmed that the source of the drugs that he received on December 6 were fronted by Wheeler and that he actually saw Wheeler hand the drugs to Coon and then they were provided to him. ROA 88-89.

[14] In direct examination, Wade testified that he had gone shooting with Coon previously. He identified one incident when he and Coon shot sawed off shotguns at a broken down van in the

Wade, as noted above, touched upon those areas and subjected his credibility to the jury's consideration. There was no testimony in the State's direct examination that Applicant had shot guns with Wade, only that Coon had. However, Applicant has not indicated how this would have been otherwise addressed in the cross-examination when there was no other evidence to dispute it to use to support the Applicant position. In direct examination, Wade testified that he was aware of Applicant, known as "Biker Tim" lived there. (ROA 79). It is unclear when this was stated on cross-examination as a passing comment that reasonable defense Counsel could have done anything except emphasize it which would not necessarily be to his client's benefit. This Court must conclude that Counsel was not deficient.

Applicant also failed to show prejudice related to Wade's cross-examination. Although Applicant disagrees with Wade's testimony related to his knowledge of Applicant and whether they jointly fired weapons. There is no reasonable probability that the result of the proceeding would have been different if this Court could have found deficiency in that area. Applicant's strategy was to call David Coon who was going to admit the drugs were his own, but would also acknowledge that Applicant and his daughter were dating and she frequently was there and had a room to stay in. However, Coon claimed that they did not live there. (ROA 223). Coon admitted at one point he had stated Applicant was his brother but admitted that he was a friend of his and he had known him for around one year. (ROA 224, 228).

CROSS-EXAMINATION AND IMPEACHMENT OF JENNIFER DEWITT

Applicant argued that Trial Counsel should have more effectively addressed Jennifer DeWitt's testimony because he felt that she was lying. (PCR 18). Applicant acknowledged that

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driveway. ROA 78. On cross-examination, Wade denied that Wheeler was involved in the particular shooting. ROA 98.

he knew DeWitt for a few months but questioned the accuracy of her testimony related to her ability to perform surveillance of the driveway on a TV monitor because he claimed that there were no security cameras covering that area. (PCR 18). He also complained that her testimony stating he was at the house all the time was inaccurate. (PCR 18-19). In addition, Applicant also argued that DeWitt's testimony was inconsistent, and Trial Counsel failed to adequately impeach her using her prior record.

During the PCR Hearing, Trial Counsel indicated that DeWitt's testimony that she was present when the police arrived and knocked on the door, she got Applicant up, dressed and that they took their time answering the door was not contested at the trial. (PCR 44). Counsel confirmed the strategy he discussed with Applicant was to impeach Wade and DeWitt, have Coon testify to admit the drugs were Coon's, and present that the drugs were found in different rooms. (PCR 45-46, 49-50). Trial Counsel recalled that Wade and DeWitt had testified at Coon's earlier trial. It was his earlier opinion that DeWitt was going to be a favorable witness for Applicant, but they learned that she had changed her testimony a couple of weeks before trial from her original statements. (PCR 50). DeWitt's statements changed in December when she was charged with trafficking in meth for the first time about a month before trial. (PCR 54). Trial Counsel stated that he inquired whether she was getting a deal to testify though the state denied there was one. (PCR 55).

During trial, DeWitt testified that she was at home the day of the search. (ROA 191). She stated that there were cameras in the house. She stated that her role was to watch the cameras to see who was pulling up, when they knocked on the door, she would determine whether they wanted to speak with Wheeler or Coon, then, she would take them to one of the bedrooms and bring them to the kitchen table to speak with them, and make the purchases. After that they

would frequently hang out. She admitted that she was a drug addict and sometimes got high with them from the drugs they purchased with people who had been there before. (ROA 192). She described that Applicant had a green box that he carried around with him when people came over. She stated that he sold methamphetamine in Ziploc bags. She stated that she and Heather Hall would go to the grocery and buy the Ziploc bags. (ROA 194). She described hearing Coon and Applicant discussing drug prices and the quality of the batches as well as paying $16,000 per kilo. (ROA 195). She testified that she had been arrested and was initially charged with possession with intent to distribute. (ROA 197). She testified that it was upgraded to trafficking the same as the others and also charged with stolen guns and vehicles. (ROA 197). He denied anyone had made direct promises to her about what was going to happen with her charges. (ROA 197-98). She stated that she was in jail clothing that day as a result of a bench warrant for not showing up to court. (ROA 198). She also confirmed that in July 2015, she was convicted on possession of meth in Aiken County and was on probation. The direct examination closed with her confirming that she had been addicted to meth for a long time, which was why she was at the house. (ROA 198).

On cross-examination, Trial Counsel developed that she had been arrested on December 22, 2015, the day the warrant was served and spoke with ATF and Edgefield County Law Enforcement. She confirmed that she gave them an oral statement and claimed nothing had been done in front of her. (ROA 200). She stated in the statement that she had never bought meth from Applicant and that Applicant tried to help her get straightened out. (ROA 200). Importantly for the defense strategy, Counsel was able to get DeWitt to acknowledge that she was the first one who noticed law enforcement outside. She confirmed that she told them that she woke up Applicant and while they waited did not see Applicant take any action to dispose of any drugs.

(ROA 201). She stated that she had recently received the trafficking charge. (ROA 201-02). When she gave the initial oral statement to the police on December 22, 2015, she was charged with the same charge as the others, except for trafficking. (ROA 202). When asked if she was changing her "truthful" statement that she gave, the solicitor objected to the opinion about it being truthful. (ROA 202). The Court then acknowledged, after sustaining the objection that "she's given conflicting statements. The jury can hear the testimony." (ROA 202, l. 10-17).

The defense continued and then questioned her about her prior record for possession of meth, although she denied it was a felony. (ROA 202). She admitted that she was on possession. Finally, she admitted that she had stated in her December 22 statement that she was fearful of losing her children and of a probation violation. (ROA 203).

However, on re-direct she confirmed that she told officers who lived at the residence Applicant rode the black motorcycle and red truck, and that Applicant carried the green box. (ROA 204).

The Court finds that the Applicant failed to prove deficiency related to Counsel's examination of DeWitt. Trial Counsel was able to develop evidence in support of their theory that he did not seek to destroy any drugs when he was aware that law enforcement was at the home. Further, he impeached her with previous inconsistent statements. Applicant has not shown that Counsel omitted any specific statement during cross-examination that would have aided Applicant's defense. Although Counsel did not seek to contradict or challenge DeWitt's testimony about how often Applicant was there, she had claimed in direct that Applicant was Heather Hall's boyfriend, and she described the room Heather and Applicant stayed in. (ROA 193, l. 7-10). However, Applicant failed to show how the witness could have been further impeached related to how often Applicant stayed there. Similarly, as to the cameras used for

surveillance, Applicant failed to show Counsel was deficient related to this collateral issue.

Applicant failed to show Sixth Amendment prejudice under Strickland. There was evidence in the record for a jury to understand that DeWitt made inconsistent statements and a change occurred after she was charged with trafficking. Further, Trial Counsel presented her prior record during cross-examination. Other than Applicant's testimony, Applicant failed to show that there was only one camera at the house, and it was not showing the driveway. Nevertheless the number of cameras at the home was not a critical fact. It is undisputed that DeWitt was monitoring at least one camera and was aware that law enforcement arrived that morning. The Court finds that there is no reasonable probability that the result of the proceeding would have been different if Applicant successfully presented there was only one camera or more fully presented evidence from the inconsistent statements. It must be dismissed.

FAILURE TO ADEQUATELY MEET AND REVIEW DISCOVERY TO PREPARE FOR TRIAL

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) 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) ("First, there is no question that Counsel met with [Applicant] on several occasions prior to the first trial. Even if the meetings were brief, this fact alone is not indicative of inadequate trial preparation"). Mere speculation and conjecture is insufficient to substantiate allegations that Counsel's deficient performance was prejudicial. See Harris v. State, 377 S.C. 66, 659 S.E.2d 140 (2008), abrogated by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018).

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. 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. Harris, 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)).

At the outset of the trial, the State indicated that Judge Hayes directed them to try Applicant's case during the January 17, 2015 term. The State indicated that they exchanged discovery with Applicant's Counsel on December 16 and contended that the only new material was Jennifer DeWitt's statement given prior to coming in and testifying in Coon's trial. Solicitor

Maye indicated Trial Counsel had a copy of the statement within an hour of it being made. He also indicated that Trial Counsel was present during Coon's trial. (ROA 10).

Applicant argued Trial Counsel failed to meet with him sufficient times or go over the discovery with him. He testified that in his initial meeting with Trial Counsel he spoke about the charges, and he later claimed that he did not see all the discovery. Applicant testified that he retained Trial Counsel a couple months after his arrest and that Counsel only provided him the parts of the discovery that he deemed pertinent. (PCR 7-9). He admitted that Counsel showed him the pictures of the drugs and the drug box. He had advised Counsel that he owned a couple of the guns but did not recall all of the guns. (PCR 8-9). He stated that they reviewed Coon's and the arresting officer's statements. (PCR 9). He claimed that he only met with Counsel four or five times and since Counsel was also representing Hall, some of the meetings were with both of them. (PCR 12).

Counsel testified that he initially met with Applicant in the detention center and believed that he met with Applicant at least eight times. (PCR 31-32, 38-39). Counsel noted he made a number of motions, including bond motions. He testified that they developed information about the confidential informant in mid-December, some of which was included in his motion to be relieved. (PCR 38).

Counsel and Applicant reviewed, and Counsel explained the significance of the discovery. (PCR 39). He recalled reviewing around 300 photographs and the electronically received file. (PCR 39). Some of the discovery he received was before co-defendant Hall was released on bond. He stated that he brought his computer to the detention center to review discovery with Applicant and Hall together. (PCR 39-40).

Counsel discussed constructive possession, mere presence and defenses, including a

staleness claim related to the search warrant. (PCR 40). They discussed that he was not a resident and was only in a relationship with Hall but was not involved in the offense. (PCR 40). Counsel indicated a significant issue in the discovery was whether the government could prove the discovered drugs were Applicant's and whether he had been drug trafficking. Counsel was aware of the drug's location and the house's layout, including where Applicant, Hall, and Coon stayed. Counsel also indicated that in the meeting they went over the statements from the discovery, particularly noting DeWitt's initial statements were favorable to Applicant. (PCR 54).

This Court finds that the Applicant failed in his burden of proof as it relates to the number of meetings or review of discovery. This Court finds Counsel's testimony credible as it relates to the amount of meetings and the fact that they reviewed all of the discovery. Applicant failed to identify an item or piece of evidence that he was not aware of which he believes should have been presented at trial or that Counsel failed to disclose to him. This Court finds that Counsel spent an adequate amount of time with Applicant prior to trial and that Counsel was not deficient.

In addition, Applicant failed to show prejudice because he has suggested no relevant evidence that Counsel failed to disclose to him from discovery or what other defenses Counsel could have pursued. An Applicant must show how the new evidence or defenses would have resulted in a different outcome to a reasonable probability. Applicant has not done so on this allegation. It must be dismissed.

FAILURE TO PURSUE MOTION TO SUPPRESS EVIDENCE FROM THE SEARCH WARRANT BASED UPON ALLEGED STALENESS

Applicant argued that Counsel should have pursued his motion to strike the testimony related to the evidence received pursuant to a search warrant. The motion argued that the warrant

was stale and, therefore, the fruits of the search would have been inadmissible at trial. This Court finds that Counsel was not deficient, and Sixth Amendment prejudice was not proven. Applicant asserted that Counsel should have pursued the motion to suppress, even though the judge in Coon's trial denied the motion.

> At the outset of the trial, the following occurred related to the search warrant:
>
> MR. MAYE: And may it please the Court, Your Honor? I don't know if they're gonna move -- it may be strategy not to move to suppress the search warrant, so if they don't want to take that up pretrial, you know, I - - that's what we did last week. I'm not trying his case for him. If that's not part of their strategy, I'll stand aside, but we do have a search warrant.
>
> THE COURT: All right.
>
> MR. THUSS: Yes, Your Honor. I was here and I was able to hear the hear the argument in court. It was a search warrant that was supported by sworn oral testimony and within the four corners of the search warrant it looked like there could be issues and those issues were presented by Mr. Drylie, but then after hearing Investigator Smith's testimony concerning the oral testimony that he gave to the magistrate, I don't believe that there's - -that there's an issue here that I would want to present on the search warrant especially in light of what we're dealing with the constraints on time.
>
> THE COURT: Okay.
>
> MR. MAYE: No worries about that. I just wanted to make sure it was strategy and …we do have a search warrant and I understand there'll be no contesting it. Thank you.
>
> THE COURT: Mr. Thuss for the record, this case does, as I'm informed, involve the results of the search of a piece of property based on a search warrant and that issue was presented to Judge Hayes last week via the affidavit from the magistrate as well as sworn testimony from the investigator. Mr. Thuss was present during the entire trial and observed that he is making an informed decision that the search warrant appeared after considering everything to be sufficient and probable cause was found to have a search presented.
>
> MR. THUSS: Yes, your honor. Because the real issue was reliability of the confidential informant and whether there was any corroboration investigation and the supplemental oral testimony addressed those.

(ROA 43, l. 12-44, l.24.).

Trial Counsel testified in the PCR hearing that he had been prepared to make a suppression argument. However, while he sat through Coon's trial, Coon's public defender made the same argument Trial Counsel intended to make and he was able to hear the State's response to the suppression motion. (PCR 52-53, 60-61). He stated he did not make the motion and argument in Applicant's case because it was not successful in Coon's case. (PCR 45). Counsel acknowledged that there was a different judge in Coon's trial than he had in his trial but rejected the assertion that it was likely that Judge Griffith would rule differently if it was presented to him. (PCR 52). He felt a motion to suppress based on the delay in the search warrant would not have been successful. After he heard the testimony of the officer who gave the affidavit, Counsel stated he knew it would not be a winner. (PCR 61).

This Court finds that Applicant failed to meet his burden of proof to show deficient performance. This Court finds Counsel decision not to pursue a suppression motion at trial was not the result of neglect or ignorance but an informed decision. Counsel prepared a motion which he represents was similar to the motion Counsel for Coon presented at the earlier trial. Counsel was present at the Coon trial when that similar motion was presented and learned that the Investigator Smith's testimony concerning was presented to the magistrate addressed the portion of the search warrant that Counsel was going to argue was defective. See State v. Weston, 329 S.C. 287, 290, 494 S.E.2d 801, 802 (1997) ("A search warrant that is insufficient in itself to establish probable cause may be supplemented by sworn oral testimony."). However, "sworn oral testimony, standing alone, does not satisfy the statute." State v. McKnight, 291 S.C. 110, 352 S.E.2d 471 (1987). This Court does not find Counsel was deficient in seeking to pursue a similar argument that was unsuccessful a week before.

This Court further finds that Applicant failed in his burden of proof under Strickland to show prejudice. Applicant failed to present any information or evidence to the Court that had Counsel made the motion that there is a reasonable probability that the evidence would have been suppressed and the result of the proceeding would have been different. As evident in the trial record, as well as Counsel's credible PCR testimony he would have made the same argument as was presented in Coon's trial. It is also undisputed that the earlier judge denied the motion to suppress. The Supreme Court has addressed in a similar setting why the Applicant here would fail in his presentation. The touchstone of an ineffective-assistance claim is the fairness of the adversary proceeding, and "in judging prejudice and the likelihood of a different outcome, '[*a] defendant has no entitlement to the luck of a lawless decisionmaker.*'" Nix, 375 U.S. at 175. (quoting Strickland, 466 U.S. at 695); (emphasis needed); Lockhart v. Fretwell, 506 U.S. 364, 370, 113 S. Ct. 838, 843, 122 L. Ed. 2d 180 (1993). Applicant made no showing or presentation that Judge Griffith would had ruled differently than Coon's Trial Judge. Strickland's burden is upon the Applicant not the State to show prejudice. Applicant failed in his burden of proof under Strickland.

COUNSEL'S STRATEGY WAS NOT INEFFECTIVE

Applicant generally argued that Counsel did not have a trial strategy. Trial Counsel credibly testified that the strategy was that they would present a defense that he was not a resident of the home where the drugs were seized, was merely present and did not have constructive possession of the drugs. Counsel argued that the drugs were found in a different room than the room where Applicant and Heather Hall shared. (PCR 45). Counsel planned to impeach Brian Wade and DeWitt based upon her changed statements and to call David Coon to indicate that all the drugs were his. (PCR 45). Counsel also indicated that when he made the

decision to call Coon, that he was aware that he was losing the right to last argument. (PCR 50). Counsel initially indicated that Applicant would testify; however, after the state rested, Counsel spoke with Applicant about taking the stand and decided not to testify. (ROA 47, l. 8-10).

DAVID COON ISSUE

At the outset of the trial, Counsel advised the court that he had subpoenaed David Coon but he had not been able to talk with him yet. He stated he had not made a decision to put him up because at the end of Coon's trial he gave a statement indicating all the charges were his and the other people were not culpable. (ROA 13-14). Solicitor Maye advised Counsel that Coon was available for Counsel to talk to him. Later in the trial, after the directed verdict was denied, Trial Counsel indicated he had spoken with Coon and that he was going to call him. (ROA 210). During Coon's testimony, Trial Counsel indicated he had spoken with Coon for five minutes that morning. (ROA 212). During his testimony, Coon indicated that he eventually pled guilty to all the charges, indicating the drugs, the stolen goods, camper, the Harley Davidson motorcycle, the Red Chevy pickup truck, the saw-off shotguns, and the Mossburg shotgun were all his. (ROA 213). Coon confirmed that he told the court that he accepted full responsibility for everything inside and outside his house. (ROA 214). He concluded his direct examination by indicating that that the co-defendants "didn't have nothing to do with it, that everything there was mine." (ROA 214, l. 18-19).

Applicant argued Counsel was deficient because he only met with Coon for less than ten minutes. (PCR 28). This Court finds that Applicant failed to show Counsel was deficient in the strategy and his limited discussions with Coon. Since Coon did testify as expected, prejudice has not been proven.

Strickland itself refers to Counsel's strategic choice, 466 U.S. 668, 699, 104 S.Ct. 2052, 2070, and, in fact, also establishes a presumption that the challenged action of Counsel might be considered sound trial strategy. Id. at 689, 104 S.C. at 2065; see also Cullen v. Pinholster, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 577 (2011) (the presumption was established to avoid the temptation to second-guess Counsel's performance).

APPLICANT'S MAIL ISSUE AND RESIDENCE ISSUE

This Court finds that Counsel was not deficient in his preparation, decisions, and strategy based upon his investigation and knowledge of the case. Applicant claimed that Counsel should have specifically pointed out that he did not receive mail at Coon's home address to support his assertion that it was not his residence. The State admitted evidence at trial that bills, Applicant's mail, and Applicant's clothing was located at Coon's residence to support the State's position that Applicant lived there. (ROA 63, 128-130); State Exhibits 64-69. This mail had various addresses for Applicant in Aiken, North Augusta, and Graniteville. (ROA 128-129). There were other private papers of Applicant's also found in the bedroom. Counsel's closing argument, stated, "there's no mail, there's nothing that showed that [Applicant]… was a resident." (ROA 263, l. 22-23). This Court must find that Counsel covered what he now claims to be a deficiency. Counsel adequately addressed the argument with the use of the evidence presented. The Court does not find Counsel deficient as it related to the mail issue.

Similarly, Counsel was not deficient in attempting to show that it was not his residence. Applicant claimed that he lived in Aiken, whereas Coon and Heather Hall lived in Edgefield. (PCR 10). In addition to pointing out the mail recovered at the scene was not addressed to Coon's home, Counsel attempted to show Applicant's residence was in Aiken. In his opening statement, Counsel stated that Applicant had been a resident of Aiken for several years. (ROA

67). Evidence was presented that Applicant is not on the lease and the owner of Coon's house was not familiar with him. (ROA 112-113). Evidence also indicated that law enforcement knew it was Coon's principal home. (ROA 120-121). In his direct examination of David Coon, Counsel claimed the co-defendants had nothing to do with the crime and all the evidence was his. Applicant has failed to present any credible evidence that Counsel should have presented that Applicant did stay or live with Coon. Absent this evidence, Applicant has not shown Counsel was deficient.

However, the issue was not whether this was his official residence, but whether he had sufficient access to Coon's residence to have either actual or constructive possession of the drugs. DeWitt claimed that Applicant was Heather Hall's boyfriend. (ROA 190). Hall claimed that she and Applicant stayed in one of the rooms in Coon's residence. (ROA 193). During Coon's cross-examination, he stated that Applicant lived in Aiken, but he was not aware of the Applicant's address. (ROA 227-228). In bedroom 2 where Applicant and Hall were purported to stay, officers found Applicant's wallet, insurance papers for a 2004 vehicle in the Applicant's name, and men's clothing. (ROA 131-132).

Since the Applicant has not presented credible evidence of what Counsel should have presented, the Court must find that Applicant failed to show Sixth Amendment prejudice. It must be dismissed.

FINGERPRINT ON AMMO BOX ISSUE

Applicant argued that Counsel erred in not presenting evidence that a fingerprint found on the green ammo box that had the drugs was not his fingerprint. (PCR 52).

Counsel testified that they had considered putting in the evidence about the fact that the fingerprint found on the ammo box was not Applicant's and that Counsel was aware the results

were that the fingerprint that officers found on the box did not belong to Applicant. Counsel testified he did not bring it up in the case in chief, did not bring it up when Mr. Coon testified, and that he did not call anyone as a witness who made the fingerprint determination. (PCR 51).

This Court finds that Counsel was not deficient in failing to show that the green box did not have Applicant's fingerprint at the time it was seized. The record of the trial shows that there was no testimony about the fingerprint during the trial by the state or defense witnesses. This Court finds that this was a strategic decision on Counsel's behalf and not the product of neglect or ignorance.

Even if this Court was to find deficient performance, this Court finds that there was no prejudice under Strickland for failing to present the fingerprint results. The record shows that the green ammo box was not located in the room Applicant stayed with Hall. (ROA 149-150). State Exhibit 23. Officers found $358, marijuana, methamphetamine, and other pills in the box. (ROA 151-152, 154); State Exhibits 23. At trial, DeWitt claimed that she saw Applicant carrying around the green box before. (ROA 193-194, 204).

However, at trial, the green box was not the only item that connected Applicant to the crimes. Importantly, the green box was located in the room where the puppies were and all the occupants had access to the room, not just the Applicant, so the fact his print someone else's print was on the box did not preclude Applicant having prior possession when he still had constructive possession at the time of the search on December 22, 2025. As stated previously, Wade testified that he had been fronted meth by Applicant and Coon. (ROA 79). Wade testified that he was talking to Coon and Applicant went back to his room and brought back Ziploc bags with the drugs on December 6. (ROA 80, 84). Wade indicated that he was absolutely certain that the source of the drugs he was fronted that day was Applicant's. (ROA 88). However, Wade

never indicated that Applicant was holding the ammo box. He was not identified as carrying the green box with him at the time of the distribution to Coon who then gave it to Wade. (See ROA 265) ("I don't believe that we heard any testimony that [DeWitt] or Mr. Wade saw him taking drugs out of this box and we don't know what was in this toolbox when she saw him carrying it around because we didn't have specific testimony about when she saw him carrying it around").

Defense presented the testimony of Coon who claimed responsibility for all the crimes. The issue before the jury was whether Applicant had constructive possession of the drugs – not whether he touched the ammo box. In addition to the drug charges, Applicant was also charged with the possession of unlawful firearms and receiving stolen goods. These charges were unrelated to the green ammo box.

In addition, Coon indicated that he owned the green ammo box and that he sold drugs from it. (ROA 224-225, 230-231).

The State's theory was that all the co-defendants were involved in the trafficking - not just Applicant. As to the weapons, Wade testified that Applicant showed off the weapons and claimed ownership. (ROA 98-100). Wade also claimed that weapons were all around the scene and Applicant was holding a weapon on that day when he was fronted the drugs. (ROA 104). He claimed everyone had access to the weapons. (ROA 106). Wade claimed that he shot a sawed off shotgun that day. (ROA 83-84). Wade further identified the camper and the red truck that were at the scene when he went there in December. (ROA 84-85). Wade identified State Exhibit 9 as the motorcycle that Coon rode. (ROA 84). Wade stated Applicant told him that some of the firearms in his room were his. A shotgun was seized during the search and guns were found throughout the house. (ROA 122-123. 131-132). Most of the weapons were located in Coon's room. (ROA 136-137).

As to each of the items which resulted in the convictions it is overwhelming that the State had shown either actual or constructive possession. Even with the fingerprint evidence presented, the Applicant failed to show a reasonable probability that the result of the proceeding would have been different, including the drug charges. Confidence in the outcome has not been undermined by the lack of evidence that his fingerprint was not identified as the print on the ammo box. Despite the defense's evidence from Coon that he was responsible for all the crimes, there was enough evidence in the record for the jury to determine had constructive possession of the drugs and stolen items and an active participant in the criminal activity.

Further, this Court finds that Counsel's failure to point out that none of Applicant's mail included Coon's address was not adequate to satisfy Sixth Amendment prejudice under Strickland. There is no reasonable probability that the result of the proceeding would have been different under a review of the record.

SUFFICIENT NOTICE OF TRIAL

Applicant argues that he had insufficient notice of the trial. (PCR 11-12). On December 20, 2014, Applicant and Counsel received notice that Applicant's trial was added to the January term. (ROA 302, ¶7). During a previous term of court, Judge Hayes told the parties to try the case during the January term. Applicant continually moved for release on bond. Solicitor Maye noted that the U.S. Attorney's Office decided before the last term of court that they were not going to try Applicant in federal court, which left the state charges. (ROA 10). The record shows that Counsel moved for a continuance primarily based upon DeWitt's changed statement. (ROA 303-304).

This Court finds that Applicant failed to show deficient performance. The Court incorporated by reference the portion of this order above related to Counsel's alleged failure to

adequately meet and review discovery with Applicant. Counsel competently moved for a continuance to the next term of court. The record shows, that notice was given on December 20, 2016, and the trial began on January 17, 2017. This was nearly notice for one month. It appears that Counsel was diligent in his trial preparation, including sitting through the co-defendant's trial and learning the strength of the State's case as it related to Coon. This allegation must be denied.

COUNSEL FAILED TO INVESTIGATE MITIGATING EVIDENCE

Applicant argued that Counsel failed to investigate mitigating evidence. (PCR 28). He stated that Counsel only spoke with Edgefield County Law Enforcement. (PCR 28). Applicant failed to present any mitigating evidence that he claims Counsel should have pursued. Because of the failure of this, Applicant failed to prove deficient performance and prejudice. As stated previously, an Applicant must also show how the new evidence or defenses would have resulted in a different outcome. 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. Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995).

This Court would note that Counsel made a plea in mitigation of sentence. Due to the trafficking conviction, the potential sentence rested between 25 to 30 years. Counsel argued that his only record was a prior misdemeanor for unlawful possession. He stated Applicant was 54 years old at that time and was honorably discharged from the military in 1987. (ROA 295). Counsel advised the court that Applicant's mother had died a couple of years before and his father died while he was incarcerated. Although divorced, he had two working sons and had

remaining family in Pennsylvania. (ROA 296). Counsel indicated that he had no mental health background.

In response to the trial court's request for allocution, Applicant stated and claimed innocence of the charges:

> THE COURT: Mr. Wheeler, how did you get involved with this stuff?
>
> THE DEFENDANT: I was in the wrong place, sir. There's no question. A huge mistake. I've never trafficked or sold a drug in my life I did do recreational there for about a year, that was a mistake, but I've never trafficked a drug in my life. **I didn't know the drugs were present *at that amount.*** It doesn't matter now, but I don't know what else to say.

(ROA 296, l. 12-18. (emphasis added).

This Court further finds that Applicant failed to show prejudice under Strickland. This assertion does not support a claim for relief.

CHAIN OF CUSTODY AND MISSING PERSONAL PAPERS

Applicant argued that the chain of custody was incorrect. He claimed his cellphone and mother's last will and testament were present at the scene, and neither were listed on the return to the search warrant nor in any law enforcement paperwork. (PCR 23, 30). He asserted these items were beside the nightstand in the room. He stated he received the will not too long before his arrest. Applicant presented further information, but he claims he has never recovered either of these items.

This Court finds that Counsel is not deficient based upon this allegation. These matters were a two-edge sword if Counsel would have pursued it further. In particular the mother's last will and testament in his possession at the Coon home would further support the State's theory of his dominion and control of items at the home and support state theories of at least a part time residence.

Nevertheless, his complaint about the thoroughness of the State's records related to the do not establish Sixth Amendment prejudice. His allegation is dismissed.

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. His claim of newly discovered evidence must fail because he failed to show a manifest injustice from his entry of a free and voluntary guilty plea and sentence within the negotiated range. Therefore, this application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies 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 9th day of September 2025.

THE HONORABLE KRISTI F. CURTIS
Presiding Judge
Eleventh Judicial Circuit

Edgefield, South Carolina