

NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A
POST CONVICTION RELIEF

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Jocelyn Newman, Circuit Court Judge

Case No. 2019-CP-32-02814

RECEIVED

Oct 14 2025

S.C. SUPREME COURT

The State,.....Respondent,

Jo Pradubsri,.....Appellant,

Notice of Appeal

Jo Pradubsri appeals the order of the Honorable Jocelyn Newman, dated August 22nd, 2025, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on September 17, 2025.



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FILED
STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Jo Pradubsri, #181097,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE SOUTH CAROLINA CIRCUIT COURT
) FOR THE ELEVENTH JUDICIAL CIRCUIT

) CASE NO. 2019-CP-32-02814

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

Presiding Judge:

Applicant's Attorney:

Respondent's Attorney:

Plea Counsel:

Date of Hearing:

Court Reporter:

Hon. Jocelyn Newman

Ola Johnson, Esq.

Lillian Meadows, II, Esq.

Dayne Phillips, Esq. & David Mauldin, Esq.

June 18, 2022

Lynda Monroe

This matter comes before this Court by way of Jo Pradubsri's (Applicant) application for post-conviction relief (PCR) commenced on July 5, 2019. Respondent, the State of South Carolina, made its Return on February 21, 2020. Applicant, through Ola Johnson, Esquire (PCR Counsel), submitted an amendment to his application on June 9, 2021, and a second amendment to his application on June 18, 2021.

On June 8, 2022, an evidentiary hearing convened before the Honorable Jocelyn Newman. The Applicant was present at the hearing and represented by PCR Counsel Ola Johnson. Assistant Attorney General Lillian Meadows appeared on behalf of Respondent. In support of his claims, Applicant testified on his behalf at the evidentiary hearing. Respondent presented the testimony of Dayne Phillips, Esquire (Trial Counsel).

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any

constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice.

PROCEDURAL HISTORY

Applicant is presently incarcerated according to an order of commitment of the Lexington County Clerk of Court. During its February of 2009 term, the Lexington County Grand Jury indicted Applicant for trafficking in crack cocaine (2009-GS-32-0202), the unlawful carrying of a pistol (2009-GS-32-0205), and possession of crack cocaine within proximity of a school with the intent to distribute (2009-GS-32-0204). Applicant was represented by Dayne C. Phillips, Esquire, and David Michael Mauldin, Esquire. Applicant was initially convicted of all charges following a jury trial in February of 2010, which was then reversed on appeal, (State v. Pradubsri, Appellate Case No. 2010-153046). Applicant's second trial took place in November 2014, ending in a mistrial.

On January 13, 2015, through January 15, 2015, Applicant proceeded to a third jury trial before the Honorable Clifton B. Newman, presiding. The Applicant was again represented by Dayne C. Phillips, Esquire, and David Michael Mauldin, Esquire. Assistant Solicitors Lester McGill Bell, Jr. and Casey Rankin Smith, both of the Eleventh Circuit Solicitor's Office, prosecuted the case. At the conclusion of trial, the jury convicted Applicant as indicted on all counts. The trial court sentenced Applicant to imprisonment for one year for the unlawful carrying of a pistol, fifteen years for possession of crack cocaine within proximity of a school with the

intent to distribute, and twenty-five years for trafficking in crack cocaine with a fine of \$50,000, with credit for time served and all offenses running concurrently.¹

Phillips filed a timely notice of appeal. Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense perfected Applicant's appeal, and Assistant Attorney General William M. Blich, Jr., represented the State. Applicant argued on appeal that the trial court erred in (1) refusing to reveal an informant's identity, (2) finding reasonable suspicion existed to justify the traffic stop, (3) giving an erroneous jury instruction on reasonable doubt, (4) denying Applicant's motion for a directed verdict as to the offense of possession of crack cocaine within proximity of a school with the intent to distribute, and (5) allowing a former codefendant to testify that Applicant manufactured crack cocaine in his residence and participated in a drug sale immediately before the traffic stop. State v. Pradubsri, 420 S.C. 629, 633, 803 S.E.2d 724, 726 (2017). The South Carolina Court of Appeals affirmed. Id. The Remittitur was issued on May 22, 2019.

SUMMARY OF FACTS ESTABLISHED AT TRIAL

At some point in late 2008, the Lexington County Sheriff's Department received a tip from an informant with alleged close personal knowledge of Applicant and Applicant's friend, Melisa Martin. (37:25-38:11). The informant provided specific details about Applicant's vehicle, a silver 2001 Chevy Monte Carlo, guns that would be in the vehicle, and a large amount of cocaine that Applicant and Martin were transporting. (Tr. 38:12-18). The informant further alleged that Applicant and Martin intended to "cook crack at their house" and sell the product in Irmo and

¹ Applicant received credit for more than 2,200 days because Applicant was granted a new trial at the conclusion of his first direct appeal, and the sentences noted here were imposed by Judge Newman at the conclusion of Applicant's second trial, which resulted in guilty verdicts.

Columbia. (Tr. 38:21-24). The informant also indicated that when Applicant and Martin were “dealing,” Martin generally handled the drugs in the passenger seat while Applicant drove. (Tr. 81:5-18). Following this tip Sergeant Finch of the Lexington County Sheriff’s Department sent out a BOLO [be on the lookout] for Applicant’s vehicle. (Tr. 71:1-10). On November 9th, 2008, Sergeant Finch received a call from Sergeant Bobby Dale of the Irmo Police Department, alerting him they spotted Applicant’s vehicle at a Kroger in Irmo. (Tr. 39:9-12). Sergeant Finch and Sergeant Dale initiated a traffic stop based on the information received from the informant. (Tr. 168:7-15). Applicant pulled over around the corner from the Kroger, less than half a mile from Irmo Elementary School. (Tr. 187:2-6).

As Sergeant Finch approached the stopped car he observed “scuffling” inside the vehicle, and when he came to the driver’s side door he identified Applicant as the driver and spotted a firearm, Applicant’s Hi-Point 9mm, inside the car. (Tr. 169:24-171:11, 176:21-22). Sergeant Finch instructed Applicant to exit the vehicle while Master Deputy Blake gave similar instructions to his passenger, Martin. (Tr. 171:18-173:13). As Martin was exiting the vehicle Deputy Blake observed a plastic baggy sticking out of her waistband (Tr. 210:18-22). Deputy Blake removed the baggy, which was filled with a “white rock substance,” and observed that Martin also had an unusual bulge in her crotch area. (Tr. 211:12-18). A female officer was called to the scene to perform the search, during which another plastic bag containing more white rocks was found stuffed in Martin’s pants. (Tr. 212:11). The white rock substance turned out to be approximately 68 grams of crack cocaine. (Tr. 246:12-19). After searching the vehicle officers located a second firearm, a .25 caliber pistol belonging to Martin. (Tr. 176:22-23). Both Applicant and Martin were summarily charged with trafficking in crack cocaine, possession of crack cocaine within proximity of a school with intent to distribute, and the unlawful carrying of a pistol.

CURRENT APPLICATION BEFORE THE COURT

In Applicant's original application, filed July 15, 2019, Applicant alleged he was being held unlawfully for the following reasons:

1. Applicant was denied the right to effective assistance of counsel by the sixth and fourteenth amendment to the United States Constitution and the corresponding provisions of the South Carolina Constitution.
2. Trial Counsel was ineffective for failing to motion for a direct verdict based upon several material variances when the state through its presentation of evidence and/or its arguments broadened the bases for conviction beyond the charged in the indictment.
3. Trial Counsel was ineffective for failing to object to trial judge jury instructions that broadened the bases for conviction beyond those charged in the indictment.
4. Trial Counsel ineffective for failing to object to state amendment form a first offense indictment to a 3rd offense that increased punishment.
5. Trial Counsel ineffective for failing to object applicant being convicted and sentenced to a greater and lesser offense that was barred by double jeopardy, where both charges were based upon applicant's possession of 68 grams.

On June 9, 2021, Applicant, through PCR Counsel, filed an Amended Application for PCR.

In that Application, Applicant argued:

1. Trial counsel Dayne Phillips and David Mauldin selected juror 122, Sharon Macintosh, to serve on the jury knowing she was a member of MADD (Mothers Against Drunk Driving), (22:21-23:2).
2. Trial counsel Dayne Phillips and David Mauldin failed to state sufficient grounds and to object to the court's denial of the defense motion to order the state to reveal the identity of the confidential informant in this case.
3. Trial counsel Dayne Phillips and David Mauldin failed to properly investigate this case or review the evidence with Applicant.
4. Trial counsel Dayne Phillips and David Mauldin failed to properly argue a defense motion to challenge the traffic stop or the search of the vehicle.
5. Trial counsel Dayne Phillips and David Mauldin improperly advised applicant not to testify and convinced applicant this would not be to his benefit.
6. Trial counsel Dayne Phillips and David Mauldin failed to object to the enhancement of the applicant's trafficking charge from a 1st to a 3rd offense at sentencing.
7. Trial counsel Dayne Phillips and David Mauldin failed to properly state a Directed Verdict motion during the trial.
8. Trial counsel Dayne Phillips and David Mauldin failed to object to the court charging the jury with actual and constructive possession and joint possession that went beyond the scope of the allegations in the indictment for Trafficking.
9. Trial counsel Dayne Phillips and David Mauldin failed to file a SC R CrimP Rule 6 motion objection to the introduction of the state's drug analysis or the chain of custody being introduced by report at trial.



10. Trial counsel Dayne Phillips and David Mauldin failed to object to hearsay testimony from Officer Andrea Grinstead regarding statement by Melisa Martin that there were "drugs in her pants" (page 222 line 1).
11. Trial counsel Dayne Phillips and David Mauldin failed to object to hearsay testimony from Officer Andrea Grinstead regarding statement by Melisa Martin that "rocks had fallen out of the baggy into her pants" (page 222 lines 7 and 8).
12. Trial counsel Dayne Phillips and David Mauldin failed to object to solicitor stating testimony that was not in evidence from Miss Homer the drug analyst stating, "now when you finally open the best kit and determined it wasn't tampered with how did you go about testing at that point" (page 237 line 18 to 20).
13. Trial counsel Dayne Phillips and David Mauldin failed to renew previous objection to question "where were you getting that crack cocaine to smoke" and the answer "from Joe" (page 288 line 25 to p289 lines 1,2).
14. Trial Counsel Dayne Phillips and David Mauldin failed to request a ruling from the court when they renewed their prior objection, the court answered, "yes sir" (page 289 lines 20 to 22).
15. Trial counsel Dayne Phillips and David Mauldin failed to object to leading question for Melisa Martin "OK now when you say cooked does that mean that he prepared the powder cocaine to crack cocaine" (page 290 line 9 and 10).
16. Trial counsel Dayne Phillips and David Mauldin failed to renew objection to question before Melisa Martin answered, "OK now what were y'all doing at that Kroger together, we went there to make two serves" (page 292 line 23,24,25).
17. Trial counsel Dayne Phillips and David Mauldin failed to object to leading question to Melisa Martin regarding her letter to the solicitor "you were essentially saying you would tell the truth." Answer: "yes sir" (page 301 lines 10, 11, 12).
18. Trial counsel Dayne Phillips and David Mauldin failed to object to testimony by Brian Love, ATF (p 355 line 12,13) indicating the amount of drugs were related to a "drug trafficker" and this was cited during trial Counsel's motion for a mistrial (p 356, line 23 25) because this witness was to be used to establish intent as to the proximity charge. The court denied the motion and noted that counsel had failed to object to the testimony (p357, line 1-24).

On June 18, 2021, Applicant, through PCR Counsel, filed a Second Amendment to Application for PCR. In that Application, Applicant argued:

1. Trial counsel Dayne Phillips and David Mauldin failed to object to a jury instruction defining constructive possession (p.420, Line 14-16) stating "the Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control." This instruction has been found to be improper as it allows a jury to find a defendant guilty of trafficking without proving knowledge and intent. *State v. Stewart, 2021 Opinion No. 28029, p.5-7, State v. Burdette 427 S.C. 490.*
2. Trial counsel Dayne Phillips and David Mauldin failed to move for a directed verdict or object due to a jury charge that enlarged the Trafficking Crack Cocaine indictment through a material variance by adding joint possession. (p. 420, Line 21, 22), *Balley v. State of South Carolina 392 S.C. 422 (2011).*



3. Trial counsel Dayne Phillips and David Mauldin failed to move for a directed verdict or object due to the state offering evidence of conspiracy and manufacturing and other evidence that went beyond the scope of the charges in the indictments.

At the PCR evidentiary hearing Applicant proceeded on allegation 5 from the original application and all allegations raised in the amended and second amended application. At the start of the hearing the State made a motion to dismiss allegations 2, 4, 13, 14, and 15 in Applicant's first amendment, and allegation 1 in the second amendment. After hearing arguments this Court granted the motion to dismiss allegations 13, 14, and 15, but withheld any ruling on allegations 2, 4, and 1. (Tr. 15:3-8).

STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act² (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

² S.C. Code Ann. §§ 17-27-10 to -160.

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).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. See generally S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). 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), SCRPC; 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 to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction. Strickland v. Washington, 466 U.S. 668 at 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; 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 "[without 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 analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); see Harrington v. Richter, 562 U.S. 86, 110, 131 S.Ct. 770, 790 (2011) (instructing the proper analysis "calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind"). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see 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, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the 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. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and not when it simply "deviated from best practices or most common custom." Richter, 562 U.S. at 105; see State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) ("Defense counsel's strategy must have been outside the realm of

legitimate trial strategy so as ‘to make ordinary counsel scoff’ before a conviction will be reversed on the basis of ineffective assistance.” (citations omitted)).

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.”³ Strickland, 466 U.S. at 691. In order for that burden to be met, 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 v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); 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; see Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of counsel through the post-conviction relief action presently before this Court. In analyzing these

³Notably, “a court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice “[i]f it is easier” to do so. Id.

claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. See, e.g., State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."); Clemons v. Mississippi, 494 U.S. 738, 766 (1990) (Blackmun, J., concurring in part and dissenting in part) ("The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire.").

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

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

INITIAL FINDINGS

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



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

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL ALLEGATIONS ON THE MERITS

Allegation 1: Trial counsel Dayne Phillips and David Mauldin selected juror 122, Sharon Macintosh, to serve on the jury knowing she was a member of MADD (Mothers Against Drunk Driving). (Peremptory Challenge Issue).

In the first allegation in the amended application, the Applicant alleged Trial Counsel was ineffective for failing to strike juror 122, Sharon Macintosh, from the jury. See Tr.p. 11:1-19 (*voir dire*), p. 22-23 (selection). This Court finds this allegation to be without merit.

"Absent credible evidence that the failure to strike a juror or challenge them for cause prejudiced the defense, council's actions are not ineffective assistance." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "A criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Id. See also Doyle v. Jones, 452 F. App'x 836, 840 (10th Cir. 2011) (But he has not alleged that any of the selected jurors were not impartial); United States v. Taylor, 832 F.2d 1187, 1195-96 (10th Cir.1987) (defendant failed to show prejudice from failure to exercise peremptory challenges). Moreover, a counsel's failure to exercise peremptory challenges does not give rise to a claim of ineffective assistance of counsel absent a showing that the defendant was prejudiced by his counsel's failure to exercise the challenges. See, e.g., Mattheson v. King, 751 F.2d 1432, 1438 (5th Cir.1985), cert. dismissed, 475 U.S. 1138, 1143 106 S.Ct. 1798, 90 L.Ed.2d 343 (1986) ("[W]hile Mattheson complains that



counsel failed to exercise any peremptory challenges, Mattheson does not identify the juror or jurors that should have been removed by counsel, nor alleges that any were unfavorably disposed to Mattheson.”); Crisp v. Duckworth, 743 F.2d 580, 587 (7th Cir.1984), cert. denied, 469 U.S. 1226, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) (“Crisp has not shown that he suffered any degree of prejudice ... [from defense counsel's failure] to challenge a single juror in a first degree murder trial....”). See Matthews v. Evatt, 105 F.3d 907, 918 (4th Cir. 1997) (in related context of Batson claim, the Court stated that “counsel is entitled to take account of the characteristics of the other prospective jurors against whom peremptory challenges might be exercised; to reevaluate the mix of jurors and the weight he gives to various characteristics as he begins to exhaust his peremptory challenges”). There is no rule that a juror cannot be acquainted in any way with any attorney or witness in a case in order to have a fair trial. See, e.g., United States v. Frank, 901 F.2d 846 (10th Cir.1990) (affirming a trial court's denial of a challenge for cause to remove a juror when that juror acknowledged being acquainted with the prosecuting attorney and a founding member of MADD).

The trial record shows that defense counsel Phillips used four of his available strikes during jury selection. Tr. 20-28. Ms. Macintosh was the fourth juror seated and counsel had used 3 of his peremptory challenges at that time. Tr. 22:21- 23:4.

PCR Evidentiary Hearing

On direct examination, Applicant testified: “I don’t know how [juror 122 being struck] would’ve changed but if that’s a possibility. If- if I said yes, that would be only speculation and I’m not here to speculate. If that would’ve changed anything that they done that or not. But as far as the – them not objecting, I’m – I’m not sure how that would affect anything.” (PCR Tr. 16:18-23).



On direct examination, Dayne Phillips testified that in his trial notes he had “MADD” (Mothers Against Drunk Driving) written and circled and took the information under consideration. (PCR Tr. 37:2-7).

On cross-examination Phillips testified that he did not have specific recollection of his exact strategic considerations for selecting juror 122, but stated he did not select her because she was a contributor to MADD, and the selection was instead likely due to other considerations around the juror. (PCR Tr. 50:19-51:2).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler, supra*. After a thorough review of the record, this Court finds Applicant cannot prove any deficiency or prejudice from the alleged deficiency as no testimony or evidence was presented showing that juror 122's selection prejudiced the defendant, or even how contributing to Mothers Against Drunk Driving would likely prejudice a juror against a defendant facing drug charges. Phillips **credibly** testified that he took juror 122's contributions to MADD into account during jury selection and ultimately made a decision based on various other considerations. The selection of the juror was a strategic decision. Since the record before this Court supports that the juror in the drug case was impartial, Sixth Amendment prejudice has not be proven.

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

reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland—that Trial Counsel’s deficient performance resulted in prejudice against Applicant.

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

Allegation 2: Trial counsel Dayne Phillips and David Mauldin failed to state sufficient grounds and to object to the court’s denial of the defense motion to order the state to reveal the identity of the confidential informant in this case.

Applicant alleged Trial Counsel was ineffective for failing to sufficiently argue the defense motion to reveal the identity of the confidential informant in Applicant’s case, and for failing to additionally object to the denial of that motion. At trial, the facts and circumstances demonstrate the trial court properly refused to require disclosure of the informant. Sergeant Finch and the Lexington County Sheriff’s Department worked with the informant in this case on prior occasions. On those occasions, information supplied by the informant led to multiple arrests. The informant was not set up as a formal confidential informant with the Department. The informant in this case made multiple phone calls to Sergeant Finch with information regarding Appellant and his co-defendant. The informant provided very specific information about the vehicle they drove—a 2001 Chevy Monte Carlo, silver, with a dent on the right front quarter panel. (Tr.p. 78-79). The informant also provided information about the types of drugs involved and where Appellant and his co-defendant would sell the drugs. (Tr.p.79.). The informant indicated Appellant and the co-defendant would have crack cocaine in the vehicle as well as two handguns, a black 9mm Hi-Point



that belonged to Appellant and a silver .25 caliber pistol belonging to his co-defendant. (Tr.p. 81-82). Sergeant Finch indicated the informant was not involved in the distribution or trafficking for which Appellant was charged. (Tr.p. 86; 105). Sergeant Finch specifically testified he had no information indicating the informant was “involved with this crack cocaine in this case.” (Tr.p.105). The trial judge refused to require disclosure of the informant’s identity when the informant was a mere tipster and when Applicant could not offer anything more than mere speculation regarding how the identity would assist in his defense or any testimony the informant could provide relevant to his guilt or innocence. Tr.p. 109-110. The Court of Appeals held on the merits that Applicant was not entitled relief where the trial court order was within the court’s discretion when it denied the request to require the state to reveal the informant’s identity and upheld the conviction. State v. Pradubsri, 420 S.C. 629, 642, 803 S.E.2d 724, 730 (Ct. App. 2017)

This Court finds that the Applicant has not met his burden of proof to show deficient performance or prejudice under Strickland. This Court finds this allegation to be without merit.

Trial

In pre-trial, Phillips made a motion to reveal the identity of the informant whose tip led to Applicant’s traffic stop. (Tr. 35:14-16). A lengthy debate ensued, in which Phillips argued generally that informant’s privilege was not applicable to this case, as there was no formal agreement with law enforcement and that disclosure of the informant’s identity was critical for showing bias, prejudice, or interest in the outcome of the case (Tr. 40:20-42:25).

Specifically, Phillips argued that the informant was more than a mere tipster, and their identity was highly relevant and helpful to the defense. (Tr. 36:5-25, 43:21-45:4). In support of this conclusion, Phillips argued that 1) the specificity of the information provided by the informant was analogous to that in Willard, 2) the informant’s claim of a personal relationship with Applicant



inferred that the informant actively participated in the illegal activity alleged, and 3) the informant's ties to prostitution and drug use inferred their involvement in illegal activity, specifically Martin's prostitution ring. (Tr. 46:1-47:18).

When asked how the two judges from Applicant's prior trials ruled on the matter, Phillips admitted both refused to grant the motion, but argued their positions were in error. (Tr. 49:18-51:20). Phillips then informed the trial court that, if his motion was granted, the defense would request a continuance in order to locate and investigate the informant. The trial court engaged Phillips in a discussion about a piece of case law on anonymous tipsters, which Phillips argued was distinguishable, before asking the State for its argument. (Tr. 60:21-61:21). After another lengthy round of debate the trial court requested to hear from the parties' witnesses before ruling, and Sergeant John Finch took the stand for the State. (Tr. 61-70:18). Phillips extensively cross-examined Sergeant Finch on the informant and the informant's reliability. (Tr. 85:6-98:15). Following a redirect by the State, the trial court ruled that the State did not have to reveal the informant's identity, as the informant was not an active participant in the crime or a material witness and was more comparable to a mere tipster. (Tr. 109:2-110:9).

During a separate pre-trial motion to suppress testimony referencing the informant's tips, Phillips successfully argued that there should be no mention of the tips police received that Applicant was selling crack cocaine. (Tr. 118:22-125:23).

Following Sergeant Finch's testimony at trial, Phillips renewed all of his prior objections and pre-trial motions, specifically the denied motion to reveal the identity of the informant. (Tr. 207:7-11).

PCR Evidentiary Hearing



On direct examination, Applicant testified that he felt Trial Counsel did not do a sufficient job in arguing for the informant's identity to be revealed. (PCR Tr. 17:1-5). Applicant further emphasized that the informant was a crucial witness who could have provided exculpatory information, and Trial Counsel's failure to get the trial court to reveal their identity was highly prejudicial as it prevented him from being able to face his accuser. (PCR Tr. 17:4-19).

On cross examination, Applicant testified that he felt Trial Counsel should have investigated the State's informant. (PCR Tr. 30:14-16).

On direct examination, Phillips testified that he "argued to reveal that strenuously," making extensive arguments in pre-trial on the issue, so much so that at one point, "Judge Newman said that the Constitution needed to be written on the wall over there because I mentioned it so many times." (PCR Tr. 36:16, 38:2-8). Phillips summarized his arguments from trial and testified that while the trial court ultimately denied his motion, the issue was raised on direct appeal. (PCR Tr. 37:12-38:19).

On cross examination Phillips agreed that he failed to convince the trial court to reveal the identity of the informant. (PCR Tr. 51:5-8).

Findings

As an initial matter, this Court finds Trial Counsel's testimony credible and Applicant's testimony generally not persuasive on this matter. This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

This Court rejects the Applicant's testimony that Trial Counsel's motion was insufficient, when he failed to indicate what other arguments could have been made. The record reflects that Phillips diligently and competently argued the motion. In total, debate on Trial Counsel's motion to reveal the identity of the State's informant spanned nearly seventy-four (74) pages of transcript, involved multiple back-and-forths with both the trial court and the State, and was supported by competent case law and skilled arguments. Tr.p. 35-110. This Court finds that Phillips presented multiple arguments in support of the motion and stated sufficient grounds for each.

Regarding Applicant's allegation that Trial Counsel failed to "object to the court's denial," this Court points Applicant to Rule 18 of the South Carolina Rules of Criminal Court, which states that "Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced." See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (concluding trial counsel was not deficient for failing to raise an objection when there was "no statutory law or judicial precedent in this State" supporting the objection); see also Hillerby v. State, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020). Additionally, there was no mention of the informant at trial for Trial Counsel to contemporaneously object to, as Trial Counsel successfully motioned to suppress any mention of the informant during pre-trial, but Trial Counsel did renew their objections and denied pre-trial motions during trial, thereby preserving them. Most importantly, as noted below, the Court of Appeals addressed the merits and did not conclude that there was any preservation issue.

While Applicant testified that the informant's confidentiality was highly prejudicial to him, Applicant failed to present any evidence or testimony demonstrating how the informant's identity could have changed the outcome of his trial. In addition, considering that Applicant raised the issue of the trial court's refusal to reveal the informant's identity on direct appeal and was unsuccessful,

it cannot be said that Applicant's ability to succeed on appeal was prejudiced by Trial Counsel's alleged deficient performance since the appellate court did not find a procedural bar. See *Final Brief of Appellant*, p. 22 -25) . Accordingly, this Court finds that Applicant has not demonstrated any prejudice resulting from Trial Counsel's alleged deficiency.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove deficient performance - the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms.

Further, the Applicant has failed to prove Sixth Amendment prejudice. In the opinion of the Court of Appeals it addressed the confidential informant issue as follows:

As to Pradubsri's argument that the circuit court erred in refusing to reveal the informant's identity, we find the circuit court acted within its discretion. See State v. Humphries, 354 S.C. 87, 90, 579 S.E.2d 613, 615 (2003) (“[I]f the informant is an active participant in the criminal transaction and/or a material witness on the issue of guilt or innocence, disclosure of his identity may be required depending upon the facts and circumstances. On the other hand, an informant's identity need not be disclosed where he possesses only a peripheral knowledge of the crime or is a mere ‘tipster’ who supplies a lead to law enforcement.”); id. at 90, 579 S.E.2d at 614–15 (“The burden is upon the defendant to show the facts and circumstances entitling him to the disclosure.”); id. at 90, 579 S.E.2d at 615 (holding a trial court did not abuse its discretion by failing to require disclosure of an informant's name).

State v. Pradubsri, 420 S.C. 629, 642, 803 S.E.2d 724, 730 (Ct. App. 2017). Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland, that Applicant suffered any prejudice from Trial Counsel's alleged deficient performance.

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



Allegation 3: Trial counsel Dayne Phillips and David Mauldin failed to properly investigate this case or review the evidence with Applicant.

Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly investigate Applicant's case, and for failing to review discovery with Applicant. This court finds these allegations to be without merit.

Strickland makes clear that defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." 466 U.S. at 691. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." Id. "Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Id. "In particular, what investigation decisions are reasonable depends critically on such information." Id.

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



Additionally, an applicant who also alleges his or her defense attorney was ineffective in failing to spend more time preparing or providing a copy of the discovery materials must demonstrate prejudice by showing what evidence could have been discovered or what other defenses could have been pursued. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)), abrogated on other grounds by Smalls, 422 S.C. 174, 810 S.E.2d 836. Furthermore, an applicant must also show how the new evidence or defenses would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

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On direct examination, Applicant testified that he met with Trial Counsel two or three times. (17:23-25). Applicant stated that Trial Counsel did not hire a private investigator. (PCR Tr. 18:1-3). Applicant testified that he did not remember being given a copy of discovery, though he “might’ve got it in the mail or something.” (PCR Tr. 18:4-7). Applicant then clarified that while he had reviewed discovery, Trial Counsel had not reviewed it with him, and so he had not understood the material. (PCR Tr. 18:8-12).

On cross examination, Applicant testified that he felt Trial Counsel should have investigated the informant in his case, because the informant was the “whole key to the case.” (PCR Tr. 30:10-16).

On direct examination, Phillips testified that no information was provided to him by Applicant that would have required an independent investigation. (PCR Tr. 36:3-9). Phillips

testified that he and David Mauldin met with Applicant “numerous times,” but that generally because Applicant’s case had already been tried twice and they had the transcripts, there was “a lot of testimony ready for impeachment,” without contemporaneous preparation. (PCR Tr. 34:19-35:2). Phillips further testified he could recall at least one occasion where he and Mr. Mauldin “did a real deep dive” with Applicant and went through “his constitutional rights as well as just trial preparation.” (PCR Tr. 35:1-6).

On cross examination, Phillips agreed that he could have hired an investigator to look into witness Melisa Martin (who testified that she was Applicant’s girlfriend and addicted to crack cocaine),, but clear that Applicant had not provided any specific information or witnesses for him to investigate or interview. (PCR Tr. 51:16-52:4). Phillips further testified that because this was Applicant’s third trial on the same incident all of the witnesses, including Martin, had already testified in two prior trials, and he did not see any need at that point for further investigation. (Tr. 52:6-10).

Findings

As an initial matter, this Court finds Phillip’s testimony **credible** and Applicant’s testimony generally **not credible or persuasive** on this issue. This Court finds that Applicant has failed to overcome the “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case.” Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel’s representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Phillips **credibly** testified, and record reflects that despite making a strong effort to have the trial court identify the anonymous tipster or informant, Trial Counsel had no way by which to



identify and further investigate the informant in this case. Furthermore, while Applicant testified that Trial Counsel should have further investigated his case, he failed to indicate what new information could have been uncovered. Accordingly, Applicant failed to demonstrate any deficiency or prejudice.

Regarding Applicant's allegation that Trial Counsel failed to review evidence with Applicant, Mr. Phillips credibly testified that he and Mr. Mauldin met with Applicant numerous times to review discovery. More important, this was the third trial concerning the same facts. Counsel had the transcripts and the Applicant had been present at the earlier trials. Moreover, Applicant failed to show this Court what could have been uncovered in discovery had Trial Counsel spent more time reviewing it with him. The Applicant has failed to suggest any additional evidence or witnesses that counsel failed to discuss with him or investigate. It is only the Applicant's unsupported speculation that has been presented to this Court. Accordingly, Applicant failed to demonstrate any deficiency or prejudice.

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

Allegation 4: Trial counsel Dayne Phillips and David Mauldin failed to properly argue a defense motion to challenge the traffic stop or the search of the vehicle.

Trial

During pre-trial, Phillips made a motion to suppress evidence seized during the traffic stop under the Fourth and Fourteenth amendments of the United States Constitution and Article 1 of the South Carolina Constitution. (Tr. 110:20-25). Phillips argued the officers did not have reasonable suspicion of criminal activity, and the seizure was therefore unreasonable as the

information provided by the informant was the sole basis for the traffic stop. (Tr. 110:25-111:13). The trial court stopped Phillips to ask if a traffic violation was necessary for a stop, or if reliable information from a confidential informant alone could be sufficient reason. (Tr. 112:18-113:3). Phillips admitted that there was case law stating reliable information from an informant could justify a stop, but countered that the informant in Applicant's case should not be considered reliable, at which point the court stated:

See, I usually do these motions in about thirty minutes, and you all are gonna take three hours, so I'm trying to narrow it down and I'm trying to figure out why. Are we- are we repeating the same thing over and over? Is there something new and different about this case?

(Tr. 114:4-115:4).

Phillips continued to argue the informant was not reliable and was distinguishable from informants in cases where stops were allowed solely on a tip. (Tr. 116:3-24). The trial court then pivoted to discussing the search of Applicant's car, pointing out that the officer saw a gun on his approach, and so the ensuing search of Applicant's car was reasonable. (Tr. 117:3-10). Phillips emphasized that if the stop itself was improper then anything that occurred after was inherently unconstitutional, at which time the trial court ruled that the informant in Applicant's case was reliable, and the stop based on the informant's tip was therefore reasonable. (Tr. 117:11-118:18).

Following Sergeant Finch's testimony at trial, Phillips renewed all of his prior objections and pre-trial motions, specifically the denied motion to suppress evidence found during Applicant's stop. (Tr. 207:7-11).

Direct Appeal

In his direct appeal, the Applicant raised an issue challenging the traffic stop and its basis on whether reasonable suspicion existed to support the stop. In denying relief of the merits of the claim, the Court of Appeals found that the officer had reasonable suspicion justifying an



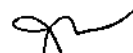
investigative stop following a tip from a confidential informant. In pertinent part, the Court concluded:

Likewise, the evidence here supports the circuit court's finding that police had reasonable suspicion to stop the Pradubsri vehicle. Willard, 374 S.C. at 133, 647 S.E.2d at 255. Finch's in camera testimony revealed the informant provided police with the following information: Pradubsri's and Martin's nicknames were JoJo and Magic, they drove a silver 2001 Chevy Monte Carlo with a dent on the front right panel, they sold drugs "moving up and down Bush River [Road] down to St. Andrews [Road] and then back into the Irmo area," they lived off of Lord Howe Road, they cooked the cocaine into crack at their home, and they were more likely to be dealing drugs at night when Pradubsri was driving and Martin was in the passenger seat. The informant also specified the vehicle would contain crack, a black 9mm pistol, and a silver .25-caliber semi-automatic weapon.

Given these facts, evidence supports the circuit court's decision that under the totality of the circumstances, the police had reasonable suspicion for the traffic stop. See Willard, 374 S.C. at 134, 647 S.E.2d at 255. This case is somewhat unique because the informant here did not give as much predictive information as the tipster in White and because the informant provided her information to law enforcement over some three months before Pradubsri's vehicle was located and stopped. However, given that the informant's identity was known to law enforcement and she had a history of providing reliable information, Finch was justified in making the stop once he saw Pradubsri driving a vehicle matching the informant's description in the small, identified area at a time when the informant had reported drugs and two specified weapons would very likely be in the vehicle. See Adams v. Williams, 407 U.S. 143, 146–47, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (stating an unverified tip from a known informant may not have been sufficient to establish probable cause but carried enough indicia of reliability to justify a forcible stop and frisk); Rogers, 368 S.C. at 535, 629 S.E.2d at 682 (holding reasonable suspicion existed when a police officer stopped a vehicle after receiving information from a **729 known and accountable informant whose reputation could be assessed); Florida v. J.L., 529 U.S. 266, 276, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) ("If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip."). Accordingly, we affirm the circuit court's denial of Pradubsri's motion to suppress the evidence seized during the traffic stop.

State v. Pradubsri, 420 S.C. 629, 637–38, 803 S.E.2d 724, 728–29 (Ct. App. 2017).

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On direct examination, Applicant testified he did not believe that Trial Counsel had sufficiently argued the pre-trial motion challenging his traffic stop. Specifically, Applicant stated:

I don't think they challenged the stop effectively because, you know, for one, they never established probable cause. They basically stopped on, on an informant's tip and they never attempted to see how this tip established probable cause or reasonable suspicion. We don't even know what information was provided. . . to the authorities for him to even justify the stop. They say- they say the reason was suspicion but based on what? Based on what information was provided?

(PCR Tr. 18:24-19:9).

On direct examination, Phillips testified that he argued during the pretrial suppression hearing that there was no probable cause or reasonable suspicion to conduct a traffic stop, but his motion was ultimately denied. (PCR Tr. 38:24-39:6).

On cross examination, Phillips testified that he believed the traffic stop was suspicious and "was very adamant about that." (PCR Tr. 52:14-17).

Findings

As an initial matter, this Court finds Phillip's testimony credible and Applicant's testimony generally not persuasive on this matter. This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra.

Applicant testified that Trial Counsel's motion was insufficient, and that Trial Counsel "never attempted to see how this tip established probable cause or reasonable suspicions." This claim is directly refuted by the record and by Phillips' credible testimony that he did address the



issue of probable cause and reasonable suspicion in arguing his motion. Furthermore, the record reflects that Phillips competently and diligently argued the motion, to the point where even the trial court commented on how lengthy the pre-trial meeting became. This Court finds that Phillips properly argued the motion to suppress evidence, and he properly challenged both the traffic stop and the search of the vehicle. Accordingly, Trial Counsel's performance was not deficient.

Furthermore, regarding Applicant's allegation that Trial Counsel failed to "object to the court's denial," this Court points Applicant to Rule 18 of the South Carolina Rules of Criminal Court, which states that "Counsel shall not attempt to further argue any matter after he has been heard and the ruling of the court has been pronounced." Additionally, Trial Counsel did renew their objections and denied pre-trial motions during trial, thereby preserving them. Most importantly, in the Court of Appeals opinion it addressed the merits of the case and a review of the Final Brief of the Respondent, the State did not assert a procedural bar on any perceived lack of preservation of the issue.

While Applicant testified that the informant's confidentiality was highly prejudicial to him, Applicant failed to present any specific evidence of prejudice. In addition, considering that in his direct appeal Applicant raised the issue of the trial court's refusal to suppress evidence found in the search of Applicant's car and was unsuccessful on the merits, it cannot be said that Applicant's inability to succeed on appeal was at all prejudiced by Trial Counsel's alleged deficient performance. Accordingly, this Court finds that Applicant has not demonstrated any prejudice resulting from Trial Counsel's alleged deficiency.

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

Allegation 5: Trial counsel Dayne Phillips and David Mauldin improperly advised applicant not to testify and convinced applicant this would not be to his benefit.

In his fifth allegation in the amended application, the Applicant alleges Trial Counsel was constitutionally ineffective for improperly advising him not to testify, and improperly convinced Applicant testifying would not be in Applicant's benefit. This Court finds these allegations to be without merit concluding the advice was within the standard of competence demanded of lawyers practicing criminal law. .

Trial

After the State rested and Trial Counsel moved for a directed verdict, which was denied, a colloquy between the trial court and Applicant occurred as follows:

Court: Mr. Pradubsri, at this time I'm gonna explain to you certain of your rights. You have the right to claim the protections given you by the Fifth Amendment to the Constitution and it, in part, states that no witness can be compelled in any criminal case to be a witness against himself. This means that you cannot be required or compelled to testify, but you do have the right to testify if you would like to. No one can make you testify and whether or not you testify is a personal right that you have. No one can waive this right except you. Now if you decide to testify, you will be subject to the same rules that govern other witnesses and you may be examined or cross-examined on any relevant issue in this case. In addition, if you have any convictions regarding dishonestly or false statements or for crimes punishable by more than one year and I determine that the probative value of admitting the evidence outweighs its prejudicial effect to you, the Solicitor then would be able to introduce your record to attack your credibility. If you decide to testify, it must be a free, voluntary and intelligent decision made by you with knowledge of the protections given to you by the Fifth Amendment and the consequences of your decision to testify. Now if you decide not to testify, I would instruct the jurors that they cannot give the fact that you did not testify any consideration whatsoever and there is to be absolutely no prejudice to you because you did not testify. It's left entirely up to you as to whether or not you testify. You may talk to your lawyers, family, friends, or anyone else you may have that you can talk to, but the final decision about whether or not you testify is



your decision, not theirs or anyone else's. Do you understand what I've explained?

Applicant: Yes, sir.

Court: Do you have any questions about what I've explained?

Applicant: No, sir.

Court: You've talked with your lawyers about whether or not you should testify?

Applicant: Your Honor, I would like to speak to them one second.

Phillips: Just a moment, Your Honor.

Court: Sure. Take your time.

(Discussion between Defendant and his counsel.)

Applicant: I choose not to testify, Your Honor.

Court: All right. Have you had enough time to make up your mind that you do not want to testify?

Applicant: Yes, sir.

Court: Do you need any more time to make up your mind or think about it?

Applicant: No, sir.

Court: You're not gonna testify?

Applicant: No, sir.

(Tr. 367:24-370:5).

PCR Evidentiary Hearing

On direct examination, Applicant stated he wanted to testify and present his own evidence but was talked out of it by Phillips. (PCR Tr. 19:12-18). Applicant further testified that he was prejudiced by this because without his testimony he couldn't "put anything on the record to

contradict anything. No testimony what anybody else said. So I think that kind of prejudiced my case as well.” (PCR Tr. 19:12-18).

On direct examination, Phillips testified that he and co-counsel Mauldin did discuss testifying with Applicant. (PCR Tr. 39:9). Phillips further testified that there was “no threats or coercion. He knowingly, voluntarily, and intelligently made his decision whether to waive that right to testify. . .” (PCR Tr. 39: 10-12). Phillips emphasized the decision not to testify was discussed extensively, including the strategic risks it would pose and the potential benefits. (PCR Tr. 39:12-14). Phillips concluded that it was ultimately Applicant’s choice not to testify. (PCR Tr. 39:14-17).

On cross examination, Phillips testified Applicant’s defense of mere presence was essentially a credibility argument. (PCR Tr. 52:25-53:1). Phillips further testified:

[T]here would’ve been clearly risks to Mr. Pradubsri to testify that is his testimony was not 100 percent believable by the jury if we would have created the reasonable doubt and during the State’s case-in-chief, that ultimately his testimony would - could ultimately cause him to get convicted. On the other side of the coin, it’s true. And if he testified he could have convinced the jury to believe him and that’s always a risk that you run either way. It’s a tough decision in every case because, you know, when you have a credibility argument, mere presence.

(PCR Tr. 53:3-12). When asked if he advised Applicant that it would not be to his benefit to testify, Phillips stated he did not remember, but he “certainly could see myself doing that.” (PCR Tr. 53:13-17).

On re-direct, Phillips testified that they certainly would have discussed the possibility of impeachment with Applicant, particularly due to his previous trafficking convictions. (PCR Tr. 65:18-66:13).

Findings



As an initial matter, this Court finds Trial Counsel's testimony credible and Applicant's testimony generally not credible or persuasive on this matter. This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Initially, this Court finds Applicant has failed to show Trial Counsel was ineffective for advising Applicant not to testify at trial. See Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) ("In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application."). Applicant testified that he wanted to testify but did not because Trial Counsel advised him against it. Applicant did not testify that Trial Counsel prevented him from testifying. Additionally, the trial court advised Applicant at length of his Fifth Amendment right and emphasized that it was his decision, and his alone, whether or not to testify.

Moreover, this Court finds Phillips credibly identified and articulated legitimate reasons why testifying would not have been in Applicant's benefit. Phillips emphasized the issue of Applicant's credibility and the possibility of impeachment had Applicant testified, both of which are legitimate considerations that Trial Counsel would arguably have been ineffective for not considering. Accordingly, this Court finds that Trial Counsel's performance was not deficient for advising Applicant not to testify.

Furthermore, Applicant failed to articulate what testimony he could have provided that would have led to a different outcome at trial. Accordingly, this Court finds Applicant failed to demonstrate any prejudice arising from Trial Counsel's alleged deficiency.

Additionally, the Applicant's statement at trial related to his right to testify carry a presumption of verity. Statements made under oath in open court should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Crawford v. United States, 519 F.2d 347 (4th Cir.1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976); Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). In this proceeding the Applicant has failed to a present a cogent reason to this court to undermine the decision.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test - that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. Counsel advised him of his right to testify, gave him advice about possible impeachment and the risks -- which reasonable counsel is required to do. This Court finds that counsel Phillips was credible in his statement that there were no threats or coercion in the decision that led to the Applicant's - not counsel's - decision to not testify.

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

Allegation 6: Trial counsel Dayne Phillips and David Mauldin failed to object to the enhancement of the applicant's trafficking charge from a 1st to a 3rd offense at sentencing.

In his initial application and amended application, Applicant alleged Trial Counsel was ineffective for failing to object to the enhancement of Applicant's trafficking charge to a 3rd offence during sentencing discussions. This Court finds this allegation to be without merit.

Judges have discretion in sentencing within statutory limits. State v. Sidell, 262 S.C. 397, 205 S.E.2d 2 (1974). A sentence is not excessive if it is within statutory limitations and not the result of partiality, prejudice, or corrupt motive. Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Wood v. State, 275 S.C. 179, 184 S.E.2d 702 (1971).

Trial

During pre-trial, the following exchange occurred between Applicant and the trial court:

Court: Mr. Pradubsri, if you'll stand for a moment. You've heard what everyone has said about plea negotiation and all of that. As I understand the charge against you, the -- this would be -- if you were found guilty, this would be a third offense. . . It carries a minimum sentence of. . . twenty-five (25) years. Is that your understanding?
Applicant: Yes, sir.

(Tr. 30:24-31:10).

After the jury returned a verdict of guilty on all charges, the following exchange occurred between the State and the trial court:

State: Your Honor, I'm producing a set of the certified prior convictions on Mr. Pradubsri. That does enhance this to a third offense.

State: Your Honor, those are certified convictions that are within the ranges applicable for enhancement, particularly when this individual was charged there was the -- it was under the original law. Since then we've had an omnibus revision, but there is a savings clause so, therefore, it is preserved. This is a third offense due to those prior convictions, Your Honor.

Court: All right.

(Tr. 437:18-438:8).

PCR Evidentiary Hearing

On direct examination Applicant testified that Trial Counsel failed to object to the enhancement of his trafficking charges. (PCR Tr. 20:1-4). Applicant testified that the body of his



indictment clearly stated that it was a first offense, and if the court wanted to enhance it, they could have gone back to the grand jury and enhanced it. (PCR Tr. 20:4-9)

On cross examination, the State asked whether the trial court had advised Applicant prior to proceedings that if he was found guilty it would be his third offense, and he would go through a mandatory minimum of twenty-five (25) years. (PCR Tr. 29:25-30:3). Applicant answered, "Well, that's what my attorney told me that I was facing but looking at the indictment, the indictment said first offense." (PCR Tr. 30:4-6). Applicant then reaffirmed that Trial Counsel and had informed him it was a third offense. (PCR Tr. 30:7-9).

On direct examination, Phillips testified that from the beginning it was his understanding that the indictment was for a third offense, not a first, and that the indictment did not state which number offense it was, and had it so stated he would have objected, as that would be prejudicial to the defendant. (PCR Tr. 35:14-25).

On cross examination, Phillips testified that he did not recall a specific reason why he did not object, but that he did recall Applicant receiving substantially less time than the potential maximum. (PCR Tr. 53:18-25).

Findings

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

To show trial counsel's performance was deficient under Strickland on this claim, Applicant would have to show trial counsel had a basis to object to the indictment under state law. In South

Carolina, indictments are notice documents, intended to inform the defendant of the charges against him. See State v. Smalls, 613 S.E.2d 754, 756 (S.C.2005) (“The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, i.e., to appraise him of the elements of the offense and to allow him to decide whether to ple[a]d guilty or stand trial.”) (quoting Evans v. State, 611 S.E.2d 510, 517 (S.C.2005)). However, sentence enhancements for subsequent convictions of the same offense are not elements of an offense that must be affirmatively listed in an indictment. See State v. Scriven, 529 S.E. 2d 71, 73 (S.C. Ct. App. 2000) (“Where a statute increases the punishment for a second or subsequent offense, the allegation that the offense charged in the indictment was of that character is unnecessary.”). Therefore, the fact that Applicant was indicted and sentenced under sentencing enhancement subsections of § 44–53–375 provides no basis upon which trial counsel could have objected to the indictment under state law because the sentencing enhancements are not elements of the trafficking charge that must be included in the indictment. Scriven.

Applicant testified that his indictment stated it was his first offense. The record refutes this assertion. Applicant’s indictment did not assert any number for the offense, and Applicant was informed at the start of trial that if he was found guilty it would be his third offense. Tr.p. 30. Applicant told the trial court he understood this fact and testified at his evidentiary hearing that Trial Counsel had also informed him that it would be a third offense were he found guilty, and he would be sentenced accordingly. Following Applicant’s guilty verdict, the trial court followed standard procedure in enhancing Applicant’s conviction, and as Phillips credibly testified, there were no grounds by which Trial Counsel could have objected to the enhancement.

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

reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that Trial Counsel committed either errors or omissions to prove the second prong of Strickland that Applicant suffered any prejudice from Trial Counsel's alleged deficient performance.

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

Allegation 7: Trial counsel Dayne Phillips and David Mauldin failed to properly state a Directed Verdict motion during the trial.

In the initial application and second amended application, Applicant alleges Trial Counsel was constitutionally ineffective for failing to properly state a directed verdict motion during trial. This Court finds these allegations to be without merit because counsel made a reasonable directed verdict motion based upon the law and evidence presented at trial.

When ruling upon a defendant's motion for a directed verdict, the trial court must view the evidence in the light most favorable to the State and is concerned only with the existence or nonexistence of evidence, rather than its weight. State v. James, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (S.C. Ct. App. 2004). A defendant is entitled to a directed verdict if the State does not produce evidence of the defendant's guilt of the charged offense. Id. This Court finds Trial Counsel moved for a directed verdict in accordance with this aforementioned law, and Applicant has failed to show that trial counsel should have based its motion upon some other legally viable ground, and that there is a reasonable probability the outcome of trial would have been different had they done so. See State v. Bennett, 415 S.C. 232, 235, 781 S.E.2d 352, 353 (2016) ("On appeal from the denial of a directed verdict, this Court views the evidence and all reasonable inferences in the light



most favorable to the State.” (quoting State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014)); id. (“The Court’s review is limited to considering the existence or nonexistence of evidence, not its weight.”); State v. Harris, 413 S.C. 454, 457, 776 S.E.2d 365, 366 (2015) (“If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the Court must find the case was properly submitted to the jury.” (quoting State v. Brandt, 393 S.C. 526, 542, 713 S.E.2d 591, 599 (2011))); S.C. Code Ann. § 44-53-370(e)(2) (2018) (“Any person ... who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of: ... ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as ‘trafficking in cocaine’”); State v. Fripp, 397 S.C. 455, 458, 725 S.E.2d 136, 138 (Ct. App. 2012) (“Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found.” (quoting State v. Ballenger, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996))); State v. Pradubsri, 403 S.C. 270, 282, 743 S.E.2d 98, 105 (Ct. App. 2013) (“Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury.” (quoting State v. Muhammed, 338 S.C. 22, 27, 524 S.E.2d 637, 639 (Ct. App. 1999))).

Stated another way, to prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control, over the drug. Constructive possession can be established by circumstantial as well as direct evidence, and *possession may be shared*. State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 676 (1976), citing U. S. v. Bethea, 143

U.S.App.D.C. 68, 442 F.2d 790 (1971). State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978);
State v. Hudson, 277 S.C. 200, 202-03, 284 S.E.2d 773, 774-75 (1981)

Trial

After the State's case in chief, the following exchange occurred:

Phillips: We also move for a directed verdict of acquittal, Your Honor. It's settled that suspicion is not enough, just mere suspicion. We don't believe that the facts in this case rise to the level more than mere suspicion and based on that, Your Honor, additionally the knowing element of the possession of trafficking that the State -- under In Re: Winship, the State has to prove every element of the offense and part of our directed verdict motion would be the State hasn't provided evidence to the element of Mr. Pradubsri's knowledge as to the possession of the drugs or his intent to distribute.

Trial Court: I think based on Ms. Martin's testimony, all elements that -- along with the constructive possession of the drugs and other testimony provided by the witnesses and inferences that can be drawn from that evidence, there is overwhelming evidence from which the jury could find the Defendant guilty as charged and I respectfully deny the motions.

PCR Evidentiary Hearing

On direct examination Applicant testified that he felt Trial Counsel did not make a sufficient argument during the motion for a directed verdict. (PCR Tr. 20:18-20). Applicant testified that Trial Counsel only moved for a directed verdict based on deficiency of evidence, but they should have moved for a directed verdict based on 'material variance.' (PCR Tr. 20:21-23). Applicant then requested to read his indictment onto the record, which he was permitted to do, and argued that "the evidence that they presented at trial was different than what the events in the indictment and this is what I'm basing the trial on. Is what I did, not what somebody else did." (PCR Tr. 21:2-p. 22:2). Applicant clarified that he was referring to Martin's testimony, and expressed confusion about how her testimony was evidence towards his charges. (PCR Tr. 22:3-9).



On direct examination, Phillips testified that he did move for a directed verdict at the appropriate time during trial. (PCR Tr. 42:17-25). On cross examination, Phillips testified that directed verdict motions were based on the evidence presented during the State's case-in-chief, not what is in the indictment, and so the motion he made was sufficient since she possessed the drugs at the time of the arrest. (PCR Tr. 54:4-21).

Findings

As an initial matter, this Court finds Trial Counsel's testimony credible and Applicant's testimony generally not persuasive on this matter. Underlying his claim is that the indictment only had his name possessing the drugs. However, the evidence at trial, primarily from Melisa Martin.

In the Court of Appeals opinion, it found the following findings which are supported by the testimony of Sergeant Finch and Melisa Martin, the girlfriend and passenger in the stopped vehicle:

Around 3:00 a.m. on November 9, 2008, Sergeant John Finch of the Lexington County Sheriff's Department stopped Pradubsri's vehicle on St. Andrews Road in Irmo based on an informant's tip that the vehicle would likely contain crack cocaine and weapons. Finch conducted the stop as Pradubsri's vehicle exited a Kroger parking lot less than half a mile from an elementary school. Pradubsri was driving with his then-girlfriend, Melisa Martin, sitting in the passenger's seat. When Finch approached the vehicle, he saw furtive or shuffling movements and observed a black 9mm semi-automatic pistol on Pradubsri's side of the car. As Finch removed Pradubsri and Martin from the car, another officer saw that Martin had a small baggie in her clinched fist, a baggie in her waistband, and an unnatural bulge in her pants. In total, police found four baggies of crack weighing approximately seventy-five grams on Martin. Police also found a smaller .25-caliber semi-automatic pistol in a purse under a seat.

State v. Pradubsri, 420 S.C. 629, 633, 803 S.E.2d 724, 726 (Ct. App. 2017).

Martin testified that at the time of the stop, Pradubsri reached behind the car seat and handed her a large quantity of dope which indicated to her to hold it. It was in a black zipper bag.

Tr.p. 297-298. She indicated at the time she put the dope down her pants. Tr.p. 298. She claimed to the officer that she claimed it was hers because she did not want Pradubsri to go to jail. Tr.p. 299. She thought if she took the rap for the drugs, Pradubsri would be able to get her out of jail, but that could not happen if they were both arrested. She claimed that pistol found in the car was hers and she had it because she was running an escort service and it made them all feel safer. Tr.p. 300. She stated that she was also aware the Applicant had a pistol on him that night. Tr.p. 303.

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

Applicant alleges that Trial Counsel should have moved for a directed verdict based upon a theory of 'material variance,' and was deficient for failing to do so. However, Phillips credibly testified, and the record so reflects, that Trial Counsel's motion was competent and addressed the relevant legal standard for directed verdicts. The South Carolina Rules of Criminal Court plainly state, "On motion of the defendant or on its own motion, the court shall direct a verdict in the defendant's favor on any offense charged in the indictment after the evidence on either side is closed, if there is a failure of competent evidence tending to prove the charge in the indictment." Trial Counsel's motion properly argued for the non-existence of evidence of Applicant's knowledge of the drugs. Accordingly, this Court finds Trial Counsel's performance was not deficient in their motion for a directed verdict.

Moreover, Applicant failed to identify any viable arguments Trial Counsel could have made that would have overcome the evidence the State presented towards each element of the crimes



charged. Applicant failed to demonstrate any prejudice suffered from Trial Counsel's allegedly deficient performance, particularly in light of the State's strong case against him. See Allegation 8 for further discussion of the State's evidence.

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

Also, in the direct appeal, the Applicant raised an issue related to the directed verdict motion related to the school proximity charge. Although the State in its Final Brief of Respondent asserted that the issue was barred because the State argued it was not specifically preserved at trial for the appeal, *Final Brief of Respondent*, p. 16-17, the Court of Appeal rejected the bar and addressed the merits. The Court of Appeals entered the following ruling:

2. As to Pradubsri's argument that the circuit court erred in refusing to grant a directed verdict on the proximity charge, we find the charge was correctly submitted to the jury. See State v. Cherry, 361 S.C. 588, 593, 606 S.E.2d 475, 477–78 (2004) (“When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight.”); *id.* at 593–94, 606 S.E.2d at 478 (“If there is any direct evidence or any substantial circumstantial evidence reasonably tending to prove the guilt of the accused, an appellate court must find the case was properly submitted to the jury.”).⁷

Ft. 7. Further, we note the version of the statute that governed the proximity charge at the time of Pradubsri's arrest did not contain a knowledge requirement and made it a crime to “unlawfully possess with intent to distribute, a controlled substance while in, on, or within a one-half mile radius of the grounds of a[n] ... elementary ... school....” S.C. Code Ann. § 44-53-445 (2002). The statute was rewritten in 2010 and now requires that a person “have knowledge that he is in, on, or within a one-half mile radius of the grounds of a public or private elementary ... school....” S.C. Code Ann. § 44-53-445(B)(1) (Supp. 2016). However, this

new requirement has no bearing on Pradubsri's case. See State v. Henkel, 413 S.C. 9, 11 n.4, 774 S.E.2d 458, 460 n.4 (2015) (stating a statute that was amended in 2009 was not applicable when the defendant's arrest occurred in 2008).

State v. Pradubsri, 420 S.C. 629, 641, 803 S.E.2d 724, 730 (Ct. App. 2017). Sixth Amendment prejudice has not been shown when the matter was raised on appeal and addressed on the merits.

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

Allegation 8: Trial counsel Dayne Phillips and David Mauldin failed to object to the court charging the jury with actual and constructive possession and joint possession that went beyond the scope of the allegations in the indictment for Trafficking.

Applicant contends that Trial Counsel was constitutionally ineffective for failing to object when the trial court instructed the jury that two or more persons could have joint possession of a drug. This Court finds this allegation to be without merit.

The law as presented to the jury in the trial court's charge must be determined from the evidence present during trial. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). The propriety of a jury charge should be analyzed based upon an examination of the charges in their entirety and not in isolation. Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (citation omitted).

Trial

Martin testified that on the night of the incident that the crack cocaine she sold was "cooked" by Applicant, at the behest of Applicant. (Tr. 289:11-291:1). Specifically, Martin testified that when she went inside the Kroger to sell the drugs Applicant received all of the money she collected, as he always did. (Tr. 294:3-25). Martin also testified that when they were pulled over

Applicant handed her the drugs from behind his seat for her to hide, and that she only told officers the drugs were hers because she feared that if her and Applicant were both arrested, there would be no one to bail her out. (Tr. 297:2-22, 299:15-25). Additionally, Deputy Kevin Blake testified that Applicant was found with a large quantity of cash on the Applicant that night. (Tr. 217:5-10).⁴

The Trial Court ultimately charged the jury thusly:

Possession may be either actual or constructive. Actual possession means that the crack cocaine was in the actual physical custody of the Defendant. Constructive possession means that the Defendant had dominion and control, or the right to exercise dominion or control, over either the crack cocaine itself or the property on which the crack cocaine was found. Mere presence at the scene where the drugs were found is not enough to prove possession. The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control; however, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have. Two or more persons may have joint possession of a drug.

(Tr. 420:6-21).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel should have objected to the court's jury instruction. (PCR Tr. 22:20-25). Specifically, Applicant testified, "I mean, if you making allegations how you allowing him to instruct on two different theories or three theories? In my case it was three- three theories. He instructed them on actual possession, constructive and joint possession." (PCR Tr. 23:1-5).

On direct examination, Phillips testified that he did not feel at the time that there was any legal basis to object to the joint possession charge. (PCR Tr. 48:24-49:2). On cross examination,

⁴ The dollar amount was clarified by the State during opening arguments to be seven-hundred and twenty-eight dollars (\$728). (Tr. 157:2-4).

Phillips testified that he did not object to the jury charge because jury instructions “are based on the evidence presented at trial,” and because Martin had testified that there was joint possession via constructive possession, he did not feel that joint possession was objectionable. (PCR Tr. 55:1-7). PCR Counsel then asked whether Mr. Phillips was aware of any case law that would have allowed him to object to the presentation of evidence beyond that scope of what was alleged in the indictment. (PCR Tr. 55:8-11) Phillips responded that “[y]ou certainly can object if you say that you’re not put on notice,” but because this was Applicant’s third trial and the joint possession theory had been presented without issue twice before, it would have been hard to argue that they hadn’t anticipated it. (PCR Tr. 55:12-17).

Findings

This Court finds that Applicant has failed to overcome the “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case.” Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel’s representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Trial Counsel credibly testified that there was no legal basis by which to object to the court’s charge. See United States v. Gulley, 374 F.2d 55, 60 (6th Cir. 1967) (stating that “[a]s for defendant Morris’ argument that possession cannot be joint, it is so well settled that possession can be joint that no citation of authority is required.”). See also State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 676 (1976), citing U. S. v. Bethea, 143 U.S.App.D.C. 68, 442 F.2d 790 (1971). State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978); State v. Hudson, 277 S.C. 200, 202–03, 284 S.E.2d 773, 774–75 (1981). This Court agrees and finds that Trial Counsel’s performance was not deficient for failing to object to the jury charge on joint possession, as defense attorneys are not



obligated to introduce and advance unsupported or rejected legal theories that are not recognized by South Carolina courts. See Harden v. State, 360 S.C. 405, 408, 602 S.E.2d 48, 49 (2004) (concluding trial counsel was not deficient for failing to raise an objection when there was “no statutory law or judicial precedent in this State” supporting the objection); see also Hillerby v. State, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020) (“Deficiency is judged by whether trial counsel failed to provide reasonably effective assistance under prevailing professional norms.” (citation and internal quotations omitted)); Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (holding that trial counsel was not ineffective for not requesting a charge on battered woman's syndrome when the theory advanced by applicant was not well known at the time and had not been recognized by the South Carolina Supreme Court as relevant to self-defense claims).

Additionally, regardless of whether Trial Counsel’s failure to adopt and act on Applicant’s novel legal theory amounted to ineffectiveness, Applicant is not entitled to relief as he was not prejudiced by the trial court’s charge. The State presented overwhelming evidence in support of Applicant’s constructive possession of the drugs. Martin testified that on the night of the incident she was selling crack cocaine “cooked” by Applicant, at the behest of Applicant, and that Applicant took all of the money she collected, as he always did. This testimony was bolstered by Deputy Blake’s testimony that Applicant was found with a large quantity of money on him. Additionally, Martin’s actual possession and claim of ownership over the drugs did not foreclose Applicant’s constructive possession, as Martin also testified that she only told officers the drugs were hers because she feared that if her and Applicant were both arrested, there would be no one to bail her out.

The jury was charged under the language “To prove possession, the State must prove beyond a reasonable doubt that the Defendant had both the power and intent to control the



disposition or use of the crack cocaine,” and “[c]onstructive possession means that the defendant had dominion and control,” over the cocaine. The state clearly met its burden in support of each element, and the trial court’s comment to the jury about joint possession was proper.

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

Allegation 9: Trial counsel Dayne Phillips and David Mauldin failed to file a SC R CrimP Rule 6 motion objection to the introduction of the state’s drug analysis or the chain of custody being introduced by report at trial.

Applicant alleged Trial Counsel was ineffective for failing to file a Rule 6 chain of custody motion. This Court finds this allegation to be without merit.

Trial

While cross examining Sergeant Finch, Phillips presented the Sergeant with the Rule 6 Form B paperwork he had filled out, stating, “that’s essentially an affidavit certifying about this evidence in this case, correct?” (Tr. 194:23-195:4).

PCR Evidentiary Hearing

On direct examination, Applicant testified that he did not recall Trial Counsel filing a Rule 6 objection demanding the chain of custody witnesses at trial. (PCR Tr. 23:11-14).

On direct examination, Phillips offered an explanation of Rule 6 and Form B and testified that in light of the form he presented to Sergeant Finch being properly filled out, there was no basis by which to challenge the chain of custody. (PCR Tr. 40:7-25). Phillips further testified that had he or Mauldin seen a valid chain of custody issues, they would have raised it. (PCR Tr. 41:1-5).



On cross examination, Phillips testified that he had not seen any benefit to filing a Rule 6 objection, as there was no reason to believe the evidence had been tampered with. (PCR Tr. 56:24-57:3). Phillips argued that their defense was based on Martin's actual possession, and "from a strategic position if you end up bringing in all these other witnesses that are kind of contrary or inconsistent with your defense and cross examine them, I think you'd lose the jury in many respects because it dilutes your defense." (PCR Tr. 57:3-10). Phillips agreed that it was possible that if he had made a Rule 6 motion and the State had failed to bring in a chain witness, it could have benefited Applicant. (PCR Tr. 57:1-16).

Findings

As an initial matter, this Court finds Trial Counsel's testimony credible on this matter. This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Applicant alleged that Trial Counsel was inefficient for failing to file a Rule 6 objection, but failed to indicate what benefit the objection would have had in his case. It was not disputed at trial, and Applicant does not dispute now, that the "white rocks" found on Martin were crack cocaine. As Phillips testified, Applicant's defense at trial was that the drugs were not in his constructive possession, not that the drugs were not drugs at all. Moreover, Phillips credibly testified that not filing a Rule 6 objection was a strategic decision, as it had little to do with the case and would risk confusing the jury with testimony only peripherally related to the matter at issue, Applicant's constructive possession.



Furthermore, Applicant failed to demonstrate any prejudice resulting from Trial Counsel's alleged deficiency. While Applicant's PCR Counsel did imply that it could have benefited Applicant if the State failed to produce a chain of custody witness, this is mere speculation. Importantly, speculation cannot satisfy Applicant's burden of proving prejudice. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (concluding pure conjecture fails to establish prejudice).

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

Allegations 10 & 11: Trial counsel Dayne Phillips and David Mauldin failed to object to hearsay testimony from Officer Andrea Grinstead regarding statement by Melisa Martin that there were "drugs in her pants" (page 222 line 1); Trial counsel Dayne Phillips and David Mauldin failed to object to hearsay testimony from Officer Andrea Grinstead regarding statement by Melisa Martin that "rocks had fallen out of the baggy into her pants" (page 222 lines 7 and 8).

Applicant contends that Trial Counsel was constitutionally ineffective for failing to object to testimony regarding the above hearsay statements. This Court finds these allegations to be without merit.

"An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id.; see Miller



v. Keeney, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both Strickland prongs); U.S. ex rel. Link v. Lane, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from the failure to object unless there is a legally supportable argument for exclusion of the evidence). Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

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

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



Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

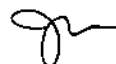
Trial

At trial, Andrea Grinstead, who searched Martin, testified that "[Martin] did tell me also that there was drugs in her pants" and "[b]ecause the bag was open, a lot of the rocks had fallen out of the baggie into her pants, which she told me." (Tr. 221:25-222:8).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain to him why they did not object to the comments, and that he did not understand what Martin's comments had to do with his case, stating "My question is what that have to do with my case. . . ? Melisa Martin's not in my indictment. . . There's no allegation of a conspiracy. . . So I'm trying to figure out well why she even being mentioned." (PCR Tr. 23:21-24:5).

On direct examination, Phillips testified that they did not object because "that's the whole State's theory in the sense. . . she was actually caught with drugs in her pants." (PCR Tr. 41:18-22). Phillips further testified that they would not have objected to that because their argument was that the drugs belonged to Martin, and so there was no reason to object to testimony supporting the fact that the cocaine was found in her pants. (PCR Tr. 41:23-44:3). When asked about Grinstead's second comment, Phillips responded, "Same thing. Our whole argument was that she was in actual possession of the drugs. That essentially our defense was that Mr. Pradubsri was



merely present of the vehicle. Did not have knowledge. Was not in constructive possession of those drugs.” (PCR Tr. 42:12-16).

On cross examination Phillips confirmed that not objecting to Grinstead’s statements was a strategic choice, as the comments were in line with their defense that Applicant was merely present. (PCR Tr. 58:1-7).

Findings

As an initial matter, this Court finds Trial Counsel's testimony credible on this matter. The Applicant appears to contend that Officer Andrea Grinstead testimony about Martin’s inculpatory statements that there were drugs in her pants and that some rocks had fallen out was inadmissible only because Applicant opined it was not relevant to his case. However, Applicant ignores that this was part of counsel Phillips strategy and was relevant to their defense.⁵ This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Applicant testified that Trial Counsel failed to explain why there was no objection to the hearsay testimony, but Phillips credibly testified the statements were not objected to because they supported Applicant’s defense. Under the circumstances, this Court finds Trial Counsel’s strategy was the result of reasonable professional judgement, and did not constitute deficient performance.

⁵ It is unclear what the objection would have been. Martin subsequently testified that she had drugs in her pants as noted above. The declarant’s description of the event of the drugs in her pants and rock falling out may also have been admissible under S. C. Rules of Evidence as a “present sense impression “ under S.C.R. E Rule 803 (1).

See Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland.") Moreover, this Court finds Applicant failed to overcome the strong presumption that Trial Counsel rendered adequate assistance and exercised reasonable professional judgment in his representation. See Ard, supra.

Furthermore, even if this Court were to find Trial Counsel's representation here deficient, Applicant has failed to prove any prejudice flowing from the alleged deficiency. The hearsay statements offered by Officer Grinstead were echoed by Martin herself in her testimony, and, as Trial Counsel pointed out, the statements themselves were helpful to Applicant's defense.

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

Allegation 12: Trial counsel Dayne Phillips and David Mauldin failed to object to solicitor stating testimony that was not in evidence from Miss Homer the drug analyst stating, "now when you finally open the best kit and determined it wasn't tampered with how did you go about testing at that point" (page 237 line 18 to 20).

In his amended application, Applicant alleged Trial Counsel was ineffective for failing to sufficiently argue the defense motion to object to alleged testimony that was not in evidence from the State's drug analyst on whether she had completed a tamper review before she began testing. In particular, he claims that this was a leading question that should have been objected to. This Court finds this allegation to be without merit and counsel was not deficient based upon a reasonable review of the record. .



“It is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland,” Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (collecting cases), and a “failure to object to leading questions and the like is generally a matter of trial strategy as to which we will not second guess counsel.” Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) When it appears that the leading questions could have been simply rephrased, deficient performance and prejudice has not been shown. In any event, assuming there were instances where objections should have been made, the Applicant must show how they likely prejudiced his defense. See, Rushing v. Butler, 868 F.2d 800, 806 (5th Cir.1989) (This Court dismissing defendant's complaint about failure to object to leading questions because “even if we were to surmise that defense counsel's performance was, in fact, deficient ... Rushing's claims of ineffective assistance of counsel must fail under the prejudice prong of the Strickland analysis.”).Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993). U.S. v. Bosch, 914 F.2d 1239, 1246 (9th Cir. 1990) rejected a claim of ineffectiveness from failure to object, noting that the appellant made no claim that the evidence was inadmissible without leading questions so the attorney could allow the leading questions without objecting. Counsel could have refrained from objecting to brief leading questions for practical and humanitarian reasons recited Bonin v. Vasquez, 794 F.Supp. 957, 969 (C.D. Cal. 1992), *aff'd*. 59 F.3d 815 (9th Cir. 1995). See also United States v. Bosch, 914 F.2d. 1239, 1246 (9th Cir. 1990) (appellant failed to show that testimony would not have been admissible if not elicited through leading questions).

Failure to make frivolous objections does not cause counsel's performance to fall below an objective level of reasonableness. “Counsel is not required to make futile motions or objections.” Roberts v. Thaler, 681 F.3d 597, 611 (5th Cir. 2012) (quoting Koch v. Puckett, 907 F.2d 524, 527 (5th Cir. 1990)); see also Murray v. Maggio, 736 F.2d 279, 283 (5th Cir. 1984). “Failure to raise



meritless objections is not ineffective lawyering; it is the very opposite.” Clark v. Collins, 19 F.3d 959, 966 (5th Cir. 1994).

Trial

The State called Lexington County Sheriff’s Department Chemist Emily Homer to the stand, who testified about the analysis she ran on the drugs seized from Martin. Chemist Homer initially described the security measures taken to ensure samples are not tampered with, explaining:

I first examined the seal to make sure that the -- the seal is not tamperproof, but it's tamper evident. If someone had tampered with it, then I wouldn't analyze it. If the seal is intact, then I notate on my worksheet that the seal's intact and I start my work on the evidence.

(Tr. 236:13-18).

Shortly after, Homer was qualified as an expert in chemical analysis. (Tr. 236:23-237:13). Immediately thereafter the State asked,

Q. “Now when you finally opened that BEST kit and determined it wasn't tampered with, how did you go about testing at that point?”

(Tr. 237:18-20). No objection was raised to the question. Chemist Homer then described who then began to describe her review of item 1 describing her initial review that it was a tied plastic bag and whether it looked normal or not. Tr.p. 237:21-25.

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain to him why they did not object to the solicitor’s question to Homer. (PCR Tr. 51:23-25).

On direct examination, Phillips testified that he did not find the solicitor’s question to Homer to be objectionable. (PCR Tr. 43:10-20). On cross-examination, Phillips testified that he did not object because Homer had at that point already explained what the seal was, and that an



intact seal meant the evidence had not been tampered with. (PCR Tr. 59:6-17). Phillips further testified that the solicitor was 'looping in' additional facts with the question. (PCR Tr. 59:17-21).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*. While this Court finds that Trial Counsel could have objected to the solicitor's question on the grounds that it may have assumed facts not in evidence or leading, this Court declines to find Trial Counsel's representation deficient when Trial Counsel's decision to refrain was objectively reasonable under the circumstances.

Phillips credibly testified that Homer's directly preceding testimony describing the seal, it's function, and that she only started her work on a sample if the seal was intact, created an inference that the evidence had not been tampered with as Homer had in fact conducted an analysis on it. Importantly, the "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation." Had counsel objected to the leading question, the prosecutor could have easily ask a non-leading question which would have allowed the evidence in. In fact, the witness essentially described it was not tampered with when she went forward with the test and described the bag as tied. The counsel's actions were not deficient.

Moreover, Applicant failed to prove any prejudice flowing from the alleged deficiency. This Court finds that the result of the trial would not have been different had Trial Counsel objected



to the question, as it would simply have prompted the solicitor to ask a foundation-laying question that would deliver them ultimately back to the same place. Importantly, "[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.

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

Allegations 13, 14, & 15: Dismissed at outset of hearing.

In his amended application the Applicant raised the following allegations:

13. Trial counsel Dayne Phillips and David Mauldin failed to renew previous objection to question "where were you getting that crack cocaine to smoke" and the answer "from Joe" (page 288 line 25 to p 289 lines 1,2).

14. Trial Counsel Dayne Phillips and David Mauldin failed to request a ruling from the court when they renewed their prior objection, the court answered, "yes sir" (page 289 lines 20 to 22).

15. Trial counsel Dayne Phillips and David Mauldin failed to object to leading question for Melisa Martin "OK now when you say cooked does that mean that he prepared the powder cocaine to crack cocaine" (page 290 line 9 and 10).

Allegations 13, 14, and 15 were dismissed by this Court in preliminary arguments. PCR Tr. 12-13, Counsel for respondent argued that the Applicant was renewing testimony related to the issues raised in the direct appeal, particular the admission of evidence from Melisa Martin testimony about the prior drug sale at the Kroger as improper Rulee 404(b) evidence. The Respondent urged that the evidence was properly objected to at trial and clearly preserved. The Respondent therefore was asserting that the Applicant is unable to show prejudice on alleged failure to object since the merits of the admissibility was raised and ruled upon by the Court of Appeals. PCR Tr.p. 12:8-16. Counsel Johnson for the Applicant stated as to the allegations he had

no additional case law to present other asserting what may be presented on testimony of the client cross-examination of defense counsel and he had nothing to add to it. PCR Tr.p. 13:11-p. 14:7.

This Court then concluded as follow in its oral ruling:

THE COURT: ... I would agree with you. So as to 13, 14, 15, on the first amendment the motion to dismiss is granted. Those arguments are essentially that these things were -- there was a failure to object and the issues were not on appeal or preserved properly or they couldn't have been preserved for appeal -- they couldn't have been ruled on in the appeal had they not been objected to and preserved at the time of trial and clearly they were because the Court of Appeals addressed those. The motion to dismiss is granted as to 13, 14, 15, ...

PCR Tr.p. 14:20-p. 15:4.

This Court confirms its ruling that Sixth Amendment prejudice cannot be proven since the Court of Appeals addressed the admissibility of this evidence on the merits. In the Applicant's Question V in the Final Brief of Appellant, he raised the following question:

The trial court erred reversibly in ruling that: (A) former co-defendant, Melisa Martin's testimony alleging that a prior drug sale occurred immediately before the investigatory stop and alleging that Appellant manufactured crack cocaine in his residence, constituted evidence of an element of trafficking; and (B) by refusing to rule whether the State had proved these alleged prior bad acts by clear and convincing evidence, and whether her testimony's probative value was outweighed by its prejudicial effect

Final Brief of Appellant, p. 5-6, 39-43. In denying relief on the merits, the South Carolina Court of Appeals rejected the claims and held :

3. As to Pradubsri's argument that the circuit court erred in allowing Martin to testify about Pradubsri's prior bad acts, we find the circuit court did not abuse its discretion in allowing the testimony. See *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *State v. Sweat*, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004) ("Evidence is admissible if 'logically relevant' to establish a material fact or element of the crime; it need not be 'necessary' to the State's case in order to be admitted.").



State v. Pradubsri, 420 S.C. 629, 642–43, 803 S.E.2d 724, 731 (Ct. App. 2017). Additionally, a review of the *Final Brief of Respondent*, p. 22-27 reveals the State on appeal asserted that the evidence was properly admitted as part of the *res gestae* and under Rule 404(b).⁶

In order to find a Sixth Amendment violation, the Applicant is required to prove but for counsel omissions that there is a reasonable probability that the result of the proceeding would have been different. An in camera hearing was held concerning the admission of Melisa Martin's testimony under Rule 404(b) relating to the prior drug sales. Tr.p. 260-278. Argument was heard from counsel Phillips the evidence was violative of Rule 404(b). Tr.p. 278-280. The trial court held the testimony was admissible to prove trafficking and intent to distracted within the proximity of the school. Tr.p. 284:7-23.

Here, it is undisputed that counsel objected to the testimony of Melisa Martin about "where were you getting that crack cocaine to smoke" and the answer "from Joe" (page 288 line25 to p 289 lines 1,2). [Tr.p. 289, l. 20-21]. Martin then responded after the objection that Joe would go to his connection and buy cocaine and that he would bring it back to cook it. Tr.p. 289, l. 23-25. Although he did not renew the objection to the clarification question for Melisa Martin "OK now when you say cooked does that mean that he prepared the powder cocaine to crack cocaine" (page

⁶ In the Final Brief of Respondent, the State urged in Question V, its position:

V. The trial court did not err in admitting the testimony regarding the drug transaction at the Kroger or Appellant's manufacturing of crack cocaine in his residence as the testimony served as part of the *res gestae* of the case; demonstrated the intent to distribute within the proximity of the school; proved an element of the trafficking charge as well as the distribution charge; and, even if not admitted pursuant to *res gestae* or to prove an element of a crime, it was properly admitted as a prior bad act.

Final Brief of Respondent, p. 22.


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290 line 9 and 10), the matter was already in evidence. Further, based upon Judge Newman's in camera ruling, this evidence was admissible, as noted by the Court of Appeals.

As to these three claims, in light of the Court of Appeals decision admitting this evidence after an *in camera* proceeding, the Court must conclude that the Applicant has failed to prove Sixth Amendment prejudice. The allegations are dismissed.

Allegation 16: Trial counsel Dayne Phillips and David Mauldin failed to renew objection to question before Melisa Martin answered, "OK now what were y'all doing at that Kroger together", and the response was "we went there to make two serves" (page 292 line 23-25).

Applicant alleged Trial Counsel was ineffective for failing to renew an objection to the State's question before Martin answered, "We went there to make two serves." This Court finds this allegation to be frivolous and without merit, as Trial Counsel contemporaneously objected to the question. The Applicant's claim is without merit.

Trial

During direct examination of Melisa Martin, the solicitor asked: "Now what were ya'll doing at that Kroger together?" (Tr. 292:23-24). Martin answered, "We went there to make two serves." (Tr. 292:25). Trial Counsel immediately objected, stating: "Objection, Your Honor. Renew prior motion." (Tr. 293:1-2). The trial court overruled the objection. (Tr. 293:3).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain to him why they failed to object to the question. He argued "but then again, what does that evidence right there have to do with me. . . . Melisa is making two serves. How do you- how are you applying that even



in my case?" (PCR Tr. 25:5-15). The Applicant is asserting that this evidence was not relevant because it only related to Melissa.

On direct examination, Phillips testified that he had contemporaneously objected to the question and renewed a prior 404(b) motion but was overruled. (PCR Tr. 43:21-44:4). On cross-examination, Phillips testified that he did immediately object to the solicitor's question, "Now what were y'all doing at that Kroger together?" (PCR Tr. 60:1-12).

Findings

As an initial matter, this Court finds Trial Counsel's testimony **credible** and Applicant's testimony generally **not credible** on this matter. This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard v. Catoe, supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. *See Butler, supra*.

Applicant alleged Trial Counsel was deficient for failing to renew an objection to the State's aforementioned question. This Court finds that the record directly disputes Applicant's allegation, as Trial Counsel objected contemporaneously but was overruled. Accordingly, Trial Counsel's performance was not deficient.

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

Allegation 17: Trial counsel Dayne Phillips and David Mauldin failed to object to leading question to Melisa Martin regarding her letter to the solicitor "you were



essentially saying you would tell the truth.” Answer: “yes sir” (page 301 lines 10, 11, 12).

Applicant alleged Trial Counsel was ineffective for failing to object to a leading question by the State. This Court finds this allegation to be without merit.

Trial

While discussing the letter Martin sent to the solicitor asking for a lighter sentence if she helped them with the case, the State asked: “You were essentially saying you would tell the truth?” (Tr. 301:10-11). Martin responded “Yes, sir.” (301:12).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain to him why they did not object to the leading question. (PCR Tr. 25:17-24).

On direct examination, when questioned on why he did not object to the leading question, Phillips stated:

Yeah, looking at it now I mean maybe I could’ve objected about telling the truth issue but. . . I didn’t see it’s going to be overly prejudicial based on my cross. I had a real aggressive cross of her. If I remember right I had her explain that she had testified under oath, you know, sworn, you know, with the Bible and she admitted she’s a liar if I remember right. At some point in the cross-examination, she says yes, I’ve lied in these other instances but I’m not lying about this issue. We attacked her credibility and truthfulness pretty hard in cross-examination if I remember right.

(PCR Tr. 44:1-22).

On cross examination Phillips testified that he could have objected but did not because he knew that he was going to aggressively attack Martin’s credibility during cross-examination. (PCR Tr. 60:19-24). Phillips further testified that he was successful in getting Martin to admit she was a liar on cross-examination. (PCR Tr. 61:1).

Findings

As an initial matter, this Court finds Trial Counsel's testimony credible on this matter as to his strategy in not objecting. As noted above, a failure to object to leading questions and the like is generally a matter of trial strategy as to which we will not second guess counsel. Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) When it appears that the leading questions could have been simply rephrased, deficient performance and prejudice has not been shown. In any event, assuming there were instances where objections should have been made, the Applicant must show how they likely prejudiced his defense. This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

Applicant alleged that Trial Counsel was ineffective for failing to object to the State's leading question to Martin. However, Phillips credibly testified that the decision not to object was strategic, as Trial Counsel's goal was to discredit Martin on cross-examination. This Court finds that the record supports this claim, and that while Trial Counsel could have object to the State's question the decision not to do object was objectively reasonable under the circumstances. Therefore, this Court finds Trial Counsel was not deficient in failing to object. See Nguyen, 379 F. App'x at 181 (The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation."); Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland.").

Moreover, the testimony elicited by the State's objectionable question was merely cumulative to the rest of Martin's testimony, as Martin repeatedly asserted that she was telling the truth about the matters of Applicant's case. Importantly, the defense counsel's aggressive cross-examination supports his strategy in not objecting. Example of this follows:

Q. Let me ask the question. At the prior hearing you said you only sold to one person, right?

A. Yes.

Q. And that you didn't know where the other person was or something to that nature?

A. (Nods head.)

Q. Now were you telling the truth then or are you telling the truth today?

A. I am telling the truth now. You know, sometimes -- if I can just say this real quick. Sometimes when you're asked a question and you're put on the spot, sometimes you may not remember or you don't have enough time to really actually think, like you're doing me now, you know, you're just like badgering me a little bit and you're not giving me a second to think. It was a long time ago that this drug incident happened and --

Q. I'll give you all the time you need. You tell me how much time you need because I'm gonna start asking you questions and you tell me when I can ask you a question. How about -- let's make that relationship, okay?

A. How about you go ahead and give me the next question.

Q. Okay. So the question is: Were you lying two and a half months ago or are you lying today?

A. I think I just answered that. I wasn't -- I don't -- I was not lying either time. I just didn't recall the last time you asked me -- not you asked me that question, him.

Q. Two and half months ago you were under oath, put your hand on the Bible, the Holy Bible, you put your hand on this Bible and you swore?

A. Yes.

Q. You swore to tell the truth?

A. Yes.

Q. And you said something differently than you said today?

A. Yes.

Q. Now is that a lie then or is it a lie now?

A. I guess if you want to break it down like that and you keep asking me the question, I guess it was a lie then because I couldn't remember. Now I've had enough time to -- in between this last hearing and this hearing, I've had plenty of time to actually sit down and think about this. I didn't know -- those days that all this happened I thought that was over with. I never even expected to even have to come back in this courtroom and talk about this.

Tr.p. 310:9- p. 312:6 (emphasis added).

This Court finds that counsel had a sound strategic reason for not objecting to the earlier comment on direct examination. It plainly was developed as a sword during his cross-examination of the witness. The Applicant failed to prove deficiency.

The Applicant has also failed to prove Sixth Amendment prejudice. If the objection had been made, defense counsel would still have attacked the decision to testify truthfully based upon her inconsistent sworn testimony by the witness. In order to show that he was prejudiced by Trial Counsel's performance, a PCR applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. T

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

Allegation 18: Trial counsel Dayne Phillips and David Mauldin failed to object to testimony by Brian Lovin, ATF (p 355 line 12,13) indicating the amount of drugs were related to a "drug trafficker" and this was cited during trial Counsel's motion for a mistrial (p 356, line 23 25) because this witness was to be used to establish intent as to



the proximity charge. The trial court denied the motion and noted that counsel had failed to object to the testimony (p 357, line 1-24).

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

Trial

The State called Special Agent Brian Lovin of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to the stand. Agent Lovin testified about the two guns seized from Martin and Applicant on the night of their arrest, and about the street value of the drugs seized. During direct examination the State offered Agent Lovin as an expert in the "value of narcotics on the street." (Tr. 352:4-8). Trial Counsel objected, re-raising the defense's pre-trial motion to exclude expert testimony about the value of the cocaine. (Tr. 352:9-12, 138:2-144:19). The trial court overruled defense's objection and qualified Agent Lovin as an expert in the requested field. (Tr. 352:13-14). The following exchange between the State and Agent Lovin then occurred around the drugs found:

Q: What appears to be in the contents of that package?

A: Crack cocaine. Small squares of crack cocaine.

Q: Okay. Now in your training and experience, does that appear to be a small quantity or a large quantity of crack cocaine?

A: A large quantity.

Q: Are you aware of what the rough weight of that is?

A: I believe the rough weight was about 76 grams, if I remember correctly.

Q: Would you call that a field weight?

A: Yes, sir.

Q: Now how much does a typical addict on the street have on them?

A: Generally what we consider one to two rocks, which is about .2 grams of crack cocaine.

Q: How many uses do you get out of .2 grams of crack cocaine?

A: About two.

Q: [I]s there a name for these little squares that you see in this bag?

A: Typically called dubs or twenties.

Q: Okay. Why are they called dubs or twenties?

A: Generally each square or cube costs approximately twenty dollars.

Q: And do you know roughly how many uses you get out of a dub or a twenty?

A: Depending on the person smoking it, one or two.

Q: Is this how much a smalltime dealer would have on him?

A: No, sir.

Q: What does this amount indicate to you?

A: A drug trafficker, one who routinely engages in the sale of narcotics

(Tr. 352:21-355:14).

The State asked Agent Lovin four additional questions before Trial Counsel interjected with a matter of law. The trial court allowed the State to finish their exam before hearing Trial

Counsel's issue. Trial Counsel made a motion for a mistrial, arguing, "[Agent Lovin] went -- his testimony was as to trafficking. The purpose for the expert testimony as stated by the State was for the purpose of proving intent on the proximity charge," and Agent Lovin's comment invaded the province of the jury. (Tr. 356:23-357:16). The Court denied counsel's motion, noting:

Well, maybe it does, but that's why you're there as the lawyer to object if objectionable testimony comes in and not sit quietly by and then ask for a mistrial that--to the extent that you--you're now objecting subsequent to the testimony. I agree that it's the jury's determination as to whether or not he's a drug trafficker and they will be so instructed with a cautionary instruction--

(Tr. 357:17-24).

At Trial Counsel's request, however, the court provided the jury with corrective instructions, stating as follows:

THE COURT: All right. Mr. Foreman, members of the jury, as I indicated to you earlier, expert witnesses can offer testimony in areas where lay witnesses cannot and expert witnesses can offer opinion testimony where lay witnesses cannot, but an expert witness cannot offer an opinion that infringes upon the ultimate issue to be determined by the jury. **One of the charges against this Defendant is trafficking in crack cocaine, and none of this witness's testimony can be construed to infringe upon your ultimate role and that is to determine whether or not the Defendant is guilty of this offense of trafficking in crack cocaine, and to the extent that a witness may comment or give an opinion on an ultimate issue, it is for you to decide if you should disregard.**

(Tr. 359:9-25).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain to him why they failed to timely object to Lovin's testimony. (PCR Tr. 26:11).

On direct examination, Phillips testified that while he did find the comment objectionable, the State was able to get in more questions before he "chimed in with a matter of law." (PCR Tr. 45:21-25). Phillips admitted that he "could have made it more contemporaneously," and that, recognizing he'd missed his chance to object, Phillips testified that he made several arguments

including asking for a curative instruction so that the mistrial denial would be preserved for an appeal. (PCR Tr. 46:9-21). Phillips went on to testify:

Yes. I wish I would've objected immediately. However, I don't think that changed the Court's ruling. I mean, to be fair Judge Newton had denied all prior motion that went to the heart of this issue and I –and I object a few lines later and as far as the transcripts concerned and make the motion outside the presence of the jury, for the mistrial.

(PCR Tr. 46:25-47:6).

On cross examination, Phillips admitted that had he made a contemporaneous objection it was possible the Court would have granted his mistrial motion, but clarified that he had “no reason to believe [the court] would've granted a mistrial,” based on the court's treatment of the rest of the defense's motions. (PCR Tr. 62:3-13).

Findings

This Court finds that Applicant has failed to overcome the “strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case.” Ard v. Catoe, *supra*. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, *supra*.

As an initial matter, Applicant alleged that Agent Lovin's testimony was improper because Agent Lovin was a witness “to be used to establish intent as to the proximity charge.” This Court notes that this characterization of Agent Lovin's testimony is inaccurate. This Court recognizes that Applicant likely drew that language from Phillip's mistrial argument, where he stated “[t]he purpose for the expert testimony as stated by the State was for the purpose of proving intent on the proximity charge.” However, there is no indication anywhere in the record that Agent Lovin was called to testify for any single issue, and at trial he testified about the chain of custody for the firearms found on Applicant and Martin, street terminology around crack cocaine, and standard

distribution practices for crack cocaine. Furthermore, in denying Phillip's motion the trial court made no mention of the scope of Agent Lovin's testimony, instead focusing on whether his comment invaded the province of the jury.

Importantly, Agent Lovin did not testify that Applicant was a drug trafficker. Agent Lovin's testimony was that, in his experience as an expert in narcotics, possession of approximately 76 grams of crack cocaine with a street value around \$7,600 was indicative of drug trafficking and narcotics sale.

Regardless of whether Trial Counsel's failure to object deficient performance was, Applicant failed to show prejudice as the trial court gave the jury a robust curative instruction that directed the jury to disregard the comment by Agent Lovin if it was interpreted that the testimony was that Applicant was a drug trafficker., the focus of the mistrial motion. There is a presumption that curative instructions cure any alleged error. State v. Dial, 405 S.C. 247, 257, 746 S.E.2d 495, 500 (Ct. App. 2013) ("A curative instruction is generally deemed to have cured any alleged error") (citations omitted); See also State v. Cook, 440 S.C. 308, 317, 891 S.E.2d 35, 39 (Ct. App. 2023), reh'g denied (Aug. 28, 2023), cert. denied (Aug. 13, 2024) (holding that an agent's testimony that the defendant 'caused' the victims' death was sufficiently cured by a curative instruction and was not grounds for a mistrial.)

Trial Counsel's request for a curative instruction, which the trial court gave, remedied any error. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) ("[J]urors are presumed to follow the law as instructed to them."). The jury was explicitly instructed to disregard any conclusory statements by experts, and Trial Counsel testified that it was unlikely that a contemporaneous objection would have resulted in a successful mistrial motion. Accordingly, Applicant failed to prove any prejudice flowing from Trial Counsel's alleged error. See Cherry v.

State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (holding that in order for a petitioner's burden to be met, 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.).

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

Allegation 19: Trial counsel Dayne Phillips and David Mauldin failed to object to a jury instruction defining constructive possession (p.420, Line 14-16) stating "the Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control." This instruction has been found to be improper as it allows a jury to find a defendant guilty of trafficking without proving knowledge and intent. *State v. Stewart*, 2021 Opinion No. 28029, p.5-7, *State v. Burdette* 427 S.C. 490.

In his second amended application, Applicant contends that Trial Counsel was constitutionally ineffective for failing to object when the trial court instructed the jury that knowledge and possession could be inferred when a substance is found on property under the defendant's control. This Court finds this allegation to be without merit because deficient performance was not shown where defense counsel did not anticipate a change in the law that occurred in 2021 at the time of the 2017 trial. The allegation must be dismissed.

The law as presented to the jury in the trial court's charge must be determined from the evidence present during trial. State v. Crosby, 355 S.C. 47, 51, 584 S.E.2d 110, 112 (2003). The propriety of a jury charge should be analyzed based upon an examination of the charges in their



entirety and not in isolation. Todd v. State, 355 S.C. 396, 402, 585 S.E.2d 305, 308 (2003) (citation omitted).

During the trial, the following instruction on constructive possession was given:

The Defendant is charged with trafficking crack cocaine. The State must prove beyond a reasonable doubt that the Defendant knowingly and intentionally, willfully and unlawfully, with an actual or constructive possession of, or did knowingly and intentionally attempt to become in actual or constructive possession of crack cocaine. The State must also prove that the quantity of the crack cocaine was 28 grams or more and less than 100 grams. To prove possession, the State must prove beyond a reasonable doubt that the Defendant had both the power and the intent to control the disposition or use of the crack cocaine.

Possession may be either actual or constructive. Actual possession means that the crack cocaine was in the actual physical custody of the Defendant. Constructive possession means that the Defendant had dominion and control, or the right to exercise dominion or control, over either the crack cocaine itself or the property on which the crack cocaine was found. Mere presence at the scene where the drugs were found is not enough to prove possession. **The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control;** however, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have.

Two or more persons may have joint possession of a drug. . . .

Tr.p. 419-420 (emphasis added). Defense counsel did not object to this portion of the jury charge.

Tr.p. 427.

PCR Evidentiary Hearing

On direct examination, Applicant testified Trial Counsel did not explain to him why they failed to object to the jury instructions defining constructive possession. (PCR Tr. 27:1-3).

Applicant further testified that:

No, they haven't explained that but far as constructive possession is concerned, there's another problem by them charging the jury with actual possession and constructive possession when there's no evidence of constructive possession when someone else had actual possession. So he knew he didn't even have evidence to support a constructive possession instruction.

(PCR Tr. 27:13-19).

On direct examination, Phillips testified that because the Applicant's case took place in 2015, at the time it was his belief that the charge on constructive possession was proper. (PCR Tr. 47:16-24). Phillips further testified that "[h]ad I known otherwise or been clairvoyant enough for that case I would've objected." (PCR Tr. 48:1-2).

On cross-examination, Phillips clarified that while he agreed with the 2021 State v. Stewart ruling, he had not had any reason in 2015 to believe the charge given by the trial court was incorrect. (PCR Tr. 63:8-12).

Findings

In State v. Stewart the Supreme Court held that a jury may not be instructed that it may infer defendant's knowledge or possession of drugs found on property under defendant's control, overruling State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987). State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021). In Adams, the Supreme Court held:

Further, the trial judge charged the jury that articles in a dwelling house "must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary." The jury could have taken this language to require appellant to rebut the State's evidence. This instruction impermissibly shifted the burden of proof to appellant to disprove possession which is an element of the offense charged. State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985); State v. Key, 282 S.C. 413, 319 S.E.2d 338 (1984). Moreover, the error could not be harmless in view of appellant's asserted defense that he had no knowledge of the presence of the drugs and that another person was using his residence in his absence immediately prior to the search.

The trial judge's charge tracks language found in State v. Ellis, 263 S.C. 12, 207 S.E.2d 408 (1974), which is no longer valid. **The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control.** State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981); State v. Brown, 267 S.C. 311, 227 S.E.2d 674 (1976). The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence. State v. Peterson, supra.

State v. Adams, 291 S.C. 132, 135–36, 352 S.E.2d 483, 486 (1987), overruled by State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021). (emphasis added).

The Supreme Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 35, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) (“We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial.” (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993))), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426 S.E.2d at 765 (“This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.”).

If the essence of Applicant’s argument is other attorneys were making an argument against precedent, then counsel was ineffective for not joining in, the Fourth Circuit rejected this argument in Kornahrens v. Evatt, 66 F.3d 1350 (4th Cir. 1995). In that case, a Charleston attorney admitted being aware of an issue on appeal to the United States Supreme Court challenging state law in another case, but the Fourth Circuit rejected an argument that he was ineffective for failing to forecast the change in the law resulting from that other case, holding “the case law is clear that an attorney’s assistance is not rendered ineffective because he failed to anticipate a new rule of law.” *Id.* at 1360. The Fourth Circuit concluded, [b]ased on this clear precedent, we cannot say that, under the facts of this case, [counsel’s] trial performance was constitutionally deficient because he followed a long-standing and well-settled rule of South Carolina criminal law-even when that rule was under attack in the United States Supreme Court at the time of trial. *Id.*



As an initial matter, this Court finds Trial Counsel's testimony credible and Applicant's testimony generally not persuasive on this matter. This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, supra. This Court further finds Applicant has failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra.

At the time of Applicant's trial, State v. Stewart had not been decided and the jury charge given was therefore correct and consistent with State v. Adams. Trial Counsel credibly testified that there were no grounds at the time for an objection. Accordingly, Trial Counsel was not ineffective for not objecting to a jury charge that was at the time good law. See Gilmore v. State, supra.

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

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

Allegation 20: Trial counsel Dayne Phillips and David Mauldin failed to move for a directed verdict or object due to a jury charge that enlarged the Trafficking Crack

Cocaine indictment through a material variance by adding joint possession. (p. 420, Line 21, 22), *Bailey v. State of South Carolina* 392 S.C. 422 (2011).

In his initial application and second amended application, Applicant contends that Trial Counsel was constitutionally ineffective for failing to move for a directed verdict or to object when the trial court instructed the jury that two or more persons could have joint possession of a drug. This Court already addressed the issue of the jury charge in Allegation 8, but construing this allegation charitably the directed verdict contention will be addressed below. This Court finds that allegation to be without merit.

Trial

Martin testified that on the night of the incident that the crack cocaine she sold was “cooked” by Applicant, at the behest of Applicant. (Tr. 289:11-291:1). Specifically, Martin testified that when she went inside the Kroger to sell the drugs Applicant received all of the money she collected, as he always did. (Tr. 294:3-25). Martin also testified that when they were pulled over Applicant handed her the drugs from behind his seat for her to hide, and that she only told officers the drugs were hers because she feared that if her and Applicant were both arrested, there would be no one to bail her out. (Tr. 297:2-22, 299:15-25). Additionally, Deputy Kevin Blake testified that Applicant was found with a large quantity of cash on him that night. (Tr. 217:5-10).⁷

The Trial Court ultimately charged the jury thusly:

Possession may be either actual or constructive. Actual possession means that the crack cocaine was in the actual physical custody of the Defendant. Constructive possession means that the Defendant had dominion and control, or the right to exercise dominion or control, over either the crack cocaine itself or the property on which the crack cocaine was found. Mere presence at the scene where the

⁷ The dollar amount was clarified to be seven-hundred and twenty-eight dollars (\$728) by the State during opening arguments. (Tr. 157:2-4).

drugs were found is not enough to prove possession. The Defendant's knowledge and possession may be inferred when a substance is found on the property under the Defendant's control; however, this inference is simply an evidentiary fact to be taken into consideration by you along with other evidence in the case and to be given the weight you decide it should have. Two or more persons may have joint possession of a drug.

(Tr. 420:6-21).

PCR Evidentiary Hearing

On direct examination, Applicant testified that Trial Counsel did not explain to him why they failed to object, and that the evidence at trial only supported that someone else had actual possession. (PCR Tr. 28:9-12). Applicant further testified that there was no conspiracy charge on his indictment, and so he did not understand why Martin's conduct was evidence in his trial. (PCR Tr. 28:14-18).

On direct examination, Phillips testified that he did not feel at the time that there was any legal basis to object to the joint possession charge. (PCR Tr. 48:24-49:2).

On cross examination, PCR Counsel asked whether Mr. Phillips was aware of any case law that would have allowed him to object to the presentation of evidence beyond that scope of what was alleged in the indictment. (PCR Tr. 55:8-11) Phillips responded that "[y]ou certainly can object if you say that you're not put on notice," but because this was Applicant's third trial and the joint possession theory had been presented without issue twice before, it would have been hard to argue that they hadn't anticipated it. (PCR Tr. 55:12-17).

Findings

This Court finds that Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." Ard v. Catoe, *supra*. This Court further finds Applicant has

failed to overcome his burden in proving Trial Counsel's representation was deficient and any resulting prejudice from that alleged deficiency. See Butler, supra.

Apparently, it is the Applicant's assertion that since the indictment read: that Jo Pradubsri did knowingly, and intentionally, willfully and unlawfully, was in actual or constructive possession of or did knowingly and intentionally attempt to become in actual or constructive possession of Crack Cocaine ..." [Indictment 2009-GS-32-0202] that it was error in instruct the jury that "Two or more persons may have joint possession of a drug." This Court finds that it was not error because the two persons must be shown to have actual or constructive possession as well. It is a manner of showing either actual or constructive possession, not a new theory in lieu of it.

First, this Court is not convinced by Applicant's 'material variance' argument. Applicant cites Bailey v. State, 392 S.C. 422 (2011), where the Supreme Court held that if a particular theory of a crime (ex. death resulting from child abuse) is in the bill of the indictment, a trial court cannot then "enlarge" the indictment to include a wholly different theory of the crime (ex. death resulting from child neglect) in its charge to the jury. In the present case, Applicant would seem to imply that the court's inclusion of joint possession, a well-recognized form of constructive possession, constructively amended his indictment. See State v. Pradubsri, 403 S.C. 270, 282, 743 S.E.2d 98, 105 (Ct. App. 2013) ("Constructive possession can be established by circumstantial as well as direct evidence, **and possession may be shared.**") (quoting State v. Jackson, 395 S.C. 250, 255, 717 S.E.2d 609, 611 (Ct.App.2011)) (alteration by court) (internal quotation marks omitted); See also State v. Hudson, 277 S.C. 200, 202, 284 S.E.2d 773, 774–75 (1981); State v. Brown, 267 S.C. 311, 227 S.E.2d 674, 676 (1976); U. S. v. Bethea, 143 U.S. App. D.C. 68, 442 F.2d 790 (1971); United States v. Gulley, 374 F.2d 55, 60 (6th Cir. 1967) (stating that "[a]s for defendant Morris'

argument that possession cannot be joint, it is so well settled that possession can be joint that no citation of authority is required.”).

However, as addressed earlier in Allegation 8, the jury charge was proper. Trial Counsel credibly testified that there was no legal basis by which to object to the court’s charge. Additionally, regarding the allegation that Trial Counsel should have moved for a directed verdict due to the jury charge, This Court agrees and finds that Trial Counsel’s performance was not deficient for failing to move for a directed verdict, as defense attorneys are not obligated to introduce and advance unsupported legal theories that are not recognized by South Carolina courts. See Robinson v. State, 308 S.C. 74, 78, 417 S.E.2d 88, 91 (1992) (holding that trial counsel was not ineffective for not requesting a charge on battered woman’s syndrome when the theory advanced by applicant was not well known at the time and had not been recognized by the South Carolina Supreme Court as relevant to self-defense claims).

Additionally, regardless of whether Trial Counsel’s failure to adopt and act on Applicant’s novel legal theory amounted to ineffectiveness, Applicant is not entitled to relief as he was not prejudiced by the trial court’s charge. The State presented overwhelming evidence in support of Applicant’s constructive possession of the drugs. Martin testified that on the night of the incident she was selling crack cocaine “cooked” by Applicant, at the behest of Applicant, and that Applicant took all of the money she collected, as he always did. This testimony was bolstered by Deputy Blake’s testimony that Applicant was found with a large quantity of money on him. Additionally, Martin’s actual possession and claim of ownership over the drugs did not foreclose Applicant’s constructive possession, as Martin also testified that she only told officers the drugs were hers because she feared that if her and Applicant were both arrested, there would be no one to bail her out.



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

Allegation 21: Trial counsel Dayne Phillips and David Mauldin failed to move for a directed verdict or object due to the state offering evidence of conspiracy and manufacturing and other evidence that went beyond the scope of the charges in the indictments.

In the second amended application, the Applicant alleges Trial Counsel was constitutionally ineffective for failing to move for a directed verdict or object to the State offering evidence that went beyond the scope of the charges in the indictments. This court finds these allegations to be without merit.

When ruling upon a defendant's motion for a directed verdict, the trial court must view the evidence in the light most favorable to the State and is concerned only with the existence or nonexistence of evidence, rather than its weight. State v. James, 362 S.C. 557, 561, 608 S.E.2d 455, 457 (S.C. Ct. App. 2004). A defendant is entitled to a directed verdict if the State does not produce evidence of the defendant's guilt of the charged offense. Id.

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

standard was not developed "to promote judicial second-guessing on questions of strategy as basic as the handling of a witness").

Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. To establish prejudice, Applicant is required to show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

Relevant Facts

Applicant was charged under S.C. Code Ann. § 44-53-370(e)(2)(b)1, which in 2009 read in its entirety:

(e) Any person who knowingly sells, manufactures, cultivates, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, cultivate, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of: (2) ten grams or more of cocaine or any mixtures containing cocaine, as provided in Section 44-53-210(b)(4), is guilty of a felony which is known as "trafficking in cocaine" and, upon conviction, must be punished as follows if the quantity involved is: (b) twenty-eight grams or more, but less than one hundred grams: 1. for a first offense, a term of imprisonment of not less than seven years nor more than twenty-five years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars.

Applicant's indictment read:

At a Court of General Sessions, convened on February 2009, the Grand Jurors of Lexington County present upon their oath: That Jo Pradubsri. . . knowingly and intentionally, willfully and unlawfully, was in actual or constructive possession of or did knowingly and intentionally attempt to become in actual or constructive possession of Crack Cocaine, a controlled substance under provisions of § 44-53-110, et. Seq. Code of Laws of South Carolina 1976, as amended,

in a quantity of twenty-eight (28) grams or more but less than one hundred (100) grams, in violation of § 44-53-370(e)(2)(b)1, Code of Laws of South Carolina, 1976, as amended.

(Indictment 2009-GS-32-0202)

Trial

Prior to Melisa Martin's testimony for the State, Trial Counsel made a motion to exclude any mention of prior drug sales or how the drugs were made under Rule 404 of the South Carolina Rules of Evidence. (Tr. 260:21-9). A lengthy proffer ensued in which Melisa Martin testified in-camera. (Tr. 261:10-282:14). Ultimately the trial court decided that because the defendant was charged with trafficking cocaine – which encompassed aiding, abetting, manufacturing, selling, and possessing cocaine – Martin's testimony did not go towards the use of prior bad acts to prove propensity and met the clear and convincing standard for admission as relevant to the case. (Tr. 282:15-283:12). Trial Counsel continued to argue against the admissibility, to which the trial court replied:

Part of trafficking is possession and part of possession is ownership and part of ownership is making it. If he cooked it, created it, gotten it, it's his, then she can testify that it was his regardless of whose actual possession it's in. All of that is part of proving trafficking. With regard to the proximity charge, if it's true that she sold it in the bathroom under the circumstances that she said and he got the benefits of it by receiving the value from the transaction, all of that shows that that was intent to distribute within proximity of a school. So all of this testimony is admissible, and that's my order, and I think y'all have put all your arguments on the record and in motions and everything. . .

(Tr. 284:8-20).

During the State's direct examination of Melisa Martin, the State asked "Now do you know how [Applicant] came about that crack cocaine?" (Tr. 289:18-19). Trial Counsel immediately renewed the defense's prior objection. (Tr.p. 289:20-21).

While discussing how the trial court would charge the jury, Trial Counsel argued:

The indictment back- or at least when it was originally indicted many years ago, that indictment's limited and it doesn't have in all that other language. It's really just the actual or constructive possession language that's contained in the indictment. It doesn't have the manufacturing, the aiding and abetting, and we would request that part of the statute be excluded from the jury charges; that the State's theory is that it was his drugs, it was in his possession, not anything beyond that. Certainly nothing beyond the scope of the indictment.

(Tr. 374:9-21)

The State responded thusly:

Your Honor, I think the indictment cites the statute and the statute does include all of that. The indictment's merely a notice document and it puts them on notice that he's in violation of that statute and if they would read it, they would know that it encompasses all of the things we've spoken about.

(Tr. 374:22-375:2).

Trial Counsel continued to push for the charge to be limited to the contents of the indictment and eventually the trial court agreed, noting:

[T]here's testimony that [Applicant] manufactured it and says that he created it and. . . and some of the other things that – many words are listed in the trafficking statute, but if the State intends to argue that he possessed quantity that exceeded a certain limit and that equals trafficking, then that's what I'll charge to jury.

(Tr. 386:17-25).

Trial Counsel responded, "Yes, Your Honor. If the State's theory is just the possession, we would like the exclusion of all the other additional language." (Tr. 387:6-8). The jury was then instructed only on the parts of the statute that were within the bill of Applicant's indictment. (Tr. 419:19-420:22).

PCR Evidentiary Hearing

On direct examination Applicant testified that Trial Counsel never explained to him why they failed to object or move for a directed verdict due to the presentation of evidence beyond the scope of his indictment. (PCR Tr. 29:3-5).

On direct examination Phillips testified that the jury was not charged with anything outside the scope of the indictment. (PCR Tr. 50:1-9).

On cross examination Phillips testified that because indictments are notice documents, and having already been two trials where the State made substantially the same arguments, an objection was unlikely to succeed. (PCR Tr. 64:3-6). Upon prompting, Phillips agreed that he could have potentially objected to the introduction of evidence outside the scope of the indictment. (PCR Tr. 65:5-8). Phillips further testified that he could not move for a directed verdict on those grounds because directed verdicts are about the sufficiency of the evidence presented by the State. (PCR Tr. 64:12-16).

Findings

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

Applicant alleged that Trial Counsel should have moved for a directed verdict or objected due to the introduction of evidence beyond the scope of his indictment. However, Phillips **credibly** testified that directed verdict motions are based on the sufficiency of the evidence presented by the State, and so they could not move for a directed verdict based on the presentation of evidence outside the scope of an indictment. This Court agrees and finds that Trial Counsel was not deficient

for failing to move for a directed verdict on the above grounds, and because a directed verdict motion was highly unlikely to be successful, Applicant also failed to prove any prejudice flowing from the alleged deficiency.

Moreover, this Court finds Trial Counsel was not deficient for failing to object to the introduction of evidence of a conspiracy to sell the crack cocaine or Applicant's involvement manufacturing the cocaine on the grounds that it was outside the scope of Applicant's indictment. Trial Counsel attempted to suppress the evidence through a Rule 404 objection, which was objectively reasonable under the circumstances. See Nguyen, 379 F. App'x at 181 (The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation.").

Furthermore, Applicant failed to demonstrate any prejudice flowing from the alleged deficiency. First, because the State's argument throughout the case was that Applicant was selling the crack cocaine for his sole profit, it is unlikely that Applicant's proposed objection to the evidence would have succeeded. Martin's testimony that Applicant manufactured the drugs and that her actual possession of the drugs was at the behest of Applicant, who instructed Martin to sell the drugs and then took the profits, was used by the State to support Applicant's constructive possession of the drugs. Reviewing the record, it is highly unlikely that the trial court would have agreed to suppress the evidence had Trial Counsel made what would have been essentially a notice argument, particularly in light of the same evidence having been introduced in Applicant's prior trials.

Additionally, because the jury was only charged with the allegations in the bill of Applicant's indictments, it is unlikely the result of the trial would have been different had Trial Counsel objected as Applicant desired. Applicant failed to rebut the presumption that the jury

followed the instructions they were given and convicted him based upon the strong evidence presented by the State in support of his constructive possession of the drugs. See State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (“[J]urors are presumed to follow the law as instructed to them.”). Accordingly, this Court finds Applicant failed to prove any prejudice flowing from Trial Counsel’s alleged deficiency.

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

Allegation 22: Trial Counsel ineffective for failing to object to applicant being convicted and sentenced to a greater and lesser offense that was barred by double jeopardy, where both charges were based upon applicant’s possession of 68 grams.

In the Applicant’s original pro se application, Applicant alleges Trial Counsel was constitutionally ineffective for failing to object to an alleged double jeopardy violation. This court finds these allegations to be without merit, as Applicant’s conviction and sentencing was not a double jeopardy violation.

PCR Hearing

After being recalled to the stand at his own request, the Applicant testified on redirect examination that:

I have a claim for trial counsel ineffective for failing to object to the Applicant being convicted and sentenced for a greater and lesser offense that was brought on by double jeopardy where both charges were based on Applicant’s possession of 68 grams. That’s on the record. And the solicitor, she didn’t state it on the record, that this is not a possession case. So if it’s not a possession case than how did I get convicted for both crimes? For one act?


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[T]he transcript page on everything is on the record that the solicitor's office clearly stated that this is not a possession case. That the case was based on weight. So if the weight is 68 grams, how you find me guilty of anything under 10 grams . . . [b]ut that jury convicted me of both; the less and greater offense under State versus Mountain (phonetically).

(PCR Tr. 70:23-71:23).

The State chose not to cross examine Applicant and instead responded during closing arguments, stating:

So just briefly, it is the State's position that one of the elements of possession of crack cocaine in proximity of the school in attempt to distribute was him being within one-half-mile radius of the school and the offense of trafficking in cocaine has no such element. So it is out position that because there's an element of the offense of trafficking within or possession within proximity of a school, not including trafficking, so does not violate double jeopardy.

(PCR Tr. 72:8-16).

Findings

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

Applicant alleges that Trial Counsel was deficient for failing to object to Applicant's conviction and sentencing of "a greater and lesser offense that was barred by double jeopardy, where both charges were based upon applicant's possession of the same drugs in violation of the Double Jeopardy Clause.

This Court finds that counsel was not deficient in 2015 in failing to object to the convictions and sentences. This Court interprets the Applicant's claim that the convictions and sentences for

trafficking in crack cocaine of twenty-five years and for possession with intent to distribute crack cocaine in the proximity of a school in violation of S. C. Code § 44-53-445 violate the Double Jeopardy Clause of the United States Constitution. See U.S. Const. amend. V (conferring right not to be “twice put in jeopardy” for the same criminal offense). “Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules, prohibiting (1) re-prosecution for the same offense following acquittal, (2) re-prosecution for the same offense following conviction, and (3) multiple punishment for the same offense.” Patton v. North Carolina, 381 F.2d 636, 643-44 (4th Cir.1967).⁸

Applicant has had only one trial, and therefore the third rule is at issue in the instant Application. Applying this rule, it initially must be determined whether the offenses at issue are the “same offense.” If not, then the Double Jeopardy Clause does not apply. The test for determining whether two offenses are the same is as follows: “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Under this test, the two statutory provisions are the same offense because all the elements necessary to convict Applicant if trafficking in crack cocaine (cocaine base) under section 375(C)(2);

(C) *A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section*

⁸ The Applicant may be asserting that he was convicted of trafficking in cocaine and as well as possession with intent to distribute cocaine. However, the verdict was read only stated trafficking in cocaine and possession with intent to distribute crack cocaine within the proximity of a school. Tr. p. 435:17- 436:8.

44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as “trafficking in methamphetamine or cocaine base” and, upon conviction, must be punished as follows if the quantity involved is ...

:

...(2) twenty-eight grams or more, but less than one hundred grams:

...

(c) for a third or subsequent offense, a mandatory minimum term of imprisonment of not less than twenty-five years and not more than thirty years, no part of which may be suspended nor probation granted, and a fine of fifty thousand dollars;

S.C. Code Ann. § 44-53-375. See Tr.p. 442: 17-22. (emphasis added).

And the elements to convict under § 44-53-445 (distribution of controlled substances with the proximity of a school) for a 2008 crime. As noted in the Pradubsri opinion;

(A) *It is a separate criminal offense* for a person to distribute, sell, purchase, manufacture, or to unlawfully possess with intent to distribute, a controlled substance *while in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university.*

~~(B) For a person to be convicted of an offense pursuant to subsection (A), the person must:~~

~~(1) have knowledge that he is in, on, or within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university; and~~

~~(2) actually distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute, the controlled substance within a one-half mile radius of the grounds of a public or private elementary, middle, or secondary school; a public playground or park; a public vocational or trade school or technical educational center; or a public or private college or university.~~

S.C. Code Ann. § 44-53-445 (emphasis added),(current statute struck through). 1995 S.C Acts and Joint Resolutions, Act 83, §55. The 1993 amendment to this statute, which took effect January 1, 1994, replaced the original language of the statute, “It is a separate criminal offense. .” with the language “unlawful.” In 1995 the Legislature again amended the statute to replace the language “unlawful” and restore “a separate criminal offense”; this language became effective January 1, 1996. The crime here occurred on November 9, 2008.

The assumption of the Blockburger rule is that the legislature does not intend to punish the same offense under two different statutes. See Whalen v. United States, 445 U.S. 684, 693, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). This presumption, however, can be overcome if there is a clear indication of contrary legislative intent. See Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983). In essence, “[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Id.*

AS noted above, the legislature clarified its intent when it declared: “it is a separate offense.” “[T]he Blockburger rule is not controlling when legislative intent is clear from the face of the statute or the legislative history” Matthews v. State, 300 S.C. 238, 387 S.E.2d 258 (1990). State v. Brown, 319 S.C. 400, 408, 461 S.E.2d 828, 832 (Ct. App. 1995) [“We wish to emphasize that there is no prohibition against the contemporaneous prosecution by the State for both possession with intent to distribute and distribution of crack cocaine and the related school charges where, like this case, they arise out of the same conduct.”].

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the Strickland test—that Trial Counsel failed to render reasonably effective assistance under prevailing professional norms. The caselaw at the time of the trial and the clear meaning from the legislation revealed that counsel was performing within the standards demanded of lawyers proacting in 2015 when the Applicant’s present claim had been rejected by the appellate courts in S.C. since 1995 and within the amended legislation since 1996.

For the same reasons, the Applicant failed to show 6th Amendment prejudice since the statutory language in 2015 would not, to a reasonable probability provided the relief the Applicant now seeks.

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

CONCLUSION

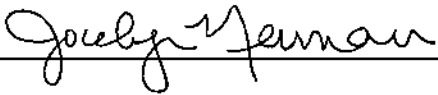
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED** and **DISMISSED** with **PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking 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 22nd day of August, 2025.



THE HONORABLE JOCELYN NEWMAN.

Presiding Judge

Eleventh Judicial Circuit

Columbia, South Carolina