

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Feb 13 2026

S.C. SUPREME COURT

Certiorari to Lexington County

Honorable Jocelyn J. Newman, Circuit Court Judge

JO PRADUBSRI,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2025-002090

APPENDIX

W. CHANDLER NORVILLE
Appellate Defender

ALAN WILSON
Attorney General

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

DONALD J. ZELENKA
Deputy Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-3737

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

VOLUME II OF II

PAGES 501-759

INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JANUARY 13-15, 2015	1
<i>STATE V. PRADUBSRI</i> , OP. NO. 5499 (HEARD NOV. 9, 2016—FILED JULY 19, 2017)	450
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS	461
RETURN.....	489
ORDER GRANTING CERTIORARI IN PART	515
BRIEF OF PETITIONER	516
BRIEF OF RESPONDENT	536
ORDER DISMISSING CERTIORARI AS IMPROVIDENTLY GRANTED	550
APPLICATION FOR POST-CONVICTION RELIEF	552
RETURN.....	561
<i>PRO SE</i> AMENDMENT TO PCR APPLICATION	571
MOTION FOR CONTINUANCE	573
AMENDMENT TO PCR APPLICATION	576
ORDER OF CONTINUANCE	581
SECOND AMENDMENT TO PCR APPLICATION	582
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JUNE 8, 2022	585
MOTION FOR STATUS CONFERENCE	659
ORDER OF DISMISSAL	662
INDICTMENTS	754

III. The Court of Appeals correctly found the trial court's instruction, when viewed as a whole, did not unconstitutionally shift the burden nor is there a reasonable probability the jury applied the challenged instruction in a way that violates the constitution.

The Court of Appeals correctly found no prejudice existed from the trial court's instructions when read as a whole. Petitioner contends the trial court erred in giving a reasonable doubt instruction which included a definition of reasonable doubt that included it "is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act." He contends using the language "search for the truth" is error and is an incorrect explanation of the burden of proof of reasonable doubt. The trial court properly charged the jury on the State's burden of proof and the included language would not have confused the jury or caused its verdict to be rendered on an incorrect standard.

"An appellate court will not reverse the trial judge's decision regarding a jury charge absent an abuse of discretion." State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010) (citing State v. Pittman, 373 S.C. 527, 647 S.E.2d 144 (2007)). A trial court is required to charge the current and correct law of South Carolina. See State v. Rayfield, 369 S.C. 106, 119, 631 S.E.2d 244, 251 (2006); Sheppard v. State, 357 S.C. 646, 665, 594 S.E.2d 462, 472 73 (2004). A jury charge is correct if it contains the correct definition of the law when read as a whole. See Rayfield, 369 S.C. at 119, 631 S.E.2d at 251; Sheppard, 357 S.C. at 665, 594 S.E.2d at 473; State v. Patterson, 367 S.C. 219, 231, 625 S.E.2d 239, 245 (Ct. App. 2006). "A jury charge is correct if, when the charge is read as a whole, it contains the correct definition and adequately covers the law." Mattison, 388 S.C. at 478, 697 S.E.2d at 583 (citations omitted).

Jury instructions must be considered as a whole and, if as a whole, they are free from error, any isolated portions which might be misleading do not constitute reversible error. State v.

Jackson, 297 S.C. 523, 526, 377 S.E.2d 570, 572 (1989). On review of a jury charge, an appellate court considers the charge as a whole in view of the evidence and issues presented at trial. State v. Lee Grigg, 374 S.C. 388, 406, 649 S.E.2d 41, 50 (Ct. App. 2007).

Regarding a jury charge on reasonable doubt, “[t]he beyond a reasonable doubt standard is a requirement of due process, but the Constitution neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course.” Victor v. Nebraska, 511 U.S. 1, 5 (1994). In a criminal case, a trial judge is only required to instruct the jury on the necessity that the defendant’s guilt be proven beyond a reasonable doubt, and no specific language or wording is required to be used to advise the jury of that burden of proof. Id. In order to meet the requirements of the Constitution, jury instructions as a whole must only correctly convey to the jury the concept of reasonable doubt. Id.

Significantly, this Court has repeatedly recognized trial judges are not required to specifically define reasonable doubt when instructing the jury in criminal cases. See State v. Adams, 322 S.C. 114, 126, 470 S.E.2d 366, 373 (1996) (finding no error in the trial judge’s refusal to define reasonable doubt during the jury instructions). “Jury instructions on reasonable doubt which charge the jury to ‘seek the truth’ are disfavored because they ‘[run] the risk of unconstitutionally shifting the burden of proof to a defendant.’” State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (quoting State v. Needs, 333 S.C. 134, 155, 508 S.E.2d 857, 867–68 (1998)). “The standard for review of an ambiguous jury instruction is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution.” Id. (citing Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)).

Petitioner objects to three statements by the trial court. In the instant case, the trial court charged the jury regarding its role as fact finder and stated: “As jurors then, it is your duty to determine the effect, the value, weight, and truth of the evidence presented during this trial.” (T.413; R. 325). Further, in continuing to define the jury’s role as fact finder and in judging credibility, the court stated: “It becomes your duty as jurors to evaluate the evidence and determine that evidence which convinces you of its truth.” (T.414; R. 326).² Finally, in defining reasonable doubt, the court stated in part: “A reasonable doubt is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act.” (T.418; R. 330). None of these charges, however, alter the burden of proof, shift the burden of proof to Petitioner, or create a reasonable likelihood the jury applied the challenged instructions in a way that violates the Constitution.

None of these charges used the “seek the truth” language which was found to be disfavored by the Court in Needs. Instead, they merely indicated the jury’s role and the type of jurors involved in the trial. The first two charges objected to by Petitioner are not in the reasonable doubt or circumstantial evidence charges where courts have had concerns. In the instant case, the charges are similar to those in Aleksey in which this Court found: “There is not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with

² Any objection to the first two statements raised by Petitioner are not preserved for review as the only objection raised at trial was to the reasonable doubt charge given by the court. (T.427; R. 339). See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) (“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.”); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal). As a result, this Court should not consider the first two statements in its determination of whether the trial court committed reversible error.

the burden of proof beyond a reasonable doubt.” Aleksey, 343 S.C. at 28-29, 538 S.E.2d at 252.³ The jurors were not told to make their decision based on a quest for the truth, but were clearly instructed their decision would be based on whether the State met its burden beyond a reasonable doubt.

Additionally, the objected to statement found in the reasonable doubt charge was not error, especially when considering the instructions as a whole. In State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994), this Court considered a remarkably similar charge to the one given in this case. In that case, the judge charged: “so the State must satisfy you, what, beyond a reasonable doubt, a doubt for you, as a conscientious juror, in seeking the truth, will stop and hesitate, and consider the guilt or innocence of a particular person.” Id. at 395, 440 S.E.2d at 874. Counsel in Hoffman argued the language violated his due process rights. This Court found the language was similar to the “hesitate to act” language approved by the Court and when read as a whole did not place the burden on the defendant.

The reasonable doubt charge in the instant case did not shift the burden to Petitioner, especially when the charge is considered as a whole. Throughout his jury instructions, the trial court reminded the jury that the State had the burden of proof and had to establish guilt beyond a reasonable doubt. (T.414; 415; 416; 417; 418; 419; 420; 421; 422; R. 326; 327; 328; 329; 330; 331; 332; 333; 334). Before trial began the court explained to the jury that Petitioner “cannot be found guilty unless **the State presents evidence which convinces a jury of his guilt beyond a reasonable doubt.**” (T.6; R. 3) (emphasis added). Additionally, his charge on reasonable doubt was a complete and correct statement of the law.

³ In footnote 2 to the opinion, this Court in Aleksey also noted many consistent opinions finding truth language not error and not causing burden shifting when it appears in the portion of the charge related to the jury’s role or their determination of credibility.

He charged:

The Defendant has pled not guilty to the charges alleged against him. **The burden is on the State to prove the Defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent.** I charge you that it is an important rule of the law that the defendant in a criminal trial, no matter the seriousness of the charges, will always be presumed to be innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt.

This presumption of innocence does not end when you begin your deliberations, but it accompanies the Defendant throughout the trial until you reach a verdict of guilt based on evidence satisfying you of that guilt beyond a reasonable doubt. **The presumption of innocence is like a robe of righteousness placed about the shoulders of the Defendant which remains with the Defendant until it has been stripped from the Defendant by evidence satisfying you of the Defendant's guilt beyond a reasonable doubt.** The presumption of innocence is not a mere legal theory, it's not just a legal phrase. **It is a substantial right to which every defendant is entitled unless you, the jury, is satisfied from the evidence of the guilt of the Defendant beyond a reasonable doubt.**

The State must prove the Defendant guilty beyond a reasonable doubt. What is a reasonable doubt in the law? A reasonable doubt is doubt which makes an honest, sincere, conscientious juror in search of the truth to hesitate to act. **Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs. Proof beyond a reasonable doubt can also be described as proof that leaves you firmly convinced of the Defendant's guilt.** Now there are they few things in this world that we know with absolute certainty. In a criminal case, the law does not require proof that overcomes every possible doubt. If based on your consideration of the evidence you are firmly convinced that the Defendant is guilty, then you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt then and find him not guilty.

(T.417-418; R. 329-330) (emphasis added). The jury charge, when read as a whole, did not create a reasonable likelihood the jury applied the instruction in an unconstitutional manner.

Nothing in this charge shifted the burden to Petitioner, and instead the court's charge, when read as a whole, made it perfectly clear the burden of proof was on the State beyond a reasonable doubt. As in Hoffman and Aleksey this Court should find the charges as given were proper statements of the law and did not create a reasonable likelihood the jurors applied the instructions in an unconstitutional manner. Accordingly, this Court should deny the Petition for Writ of Certiorari as to Question III.

- IV. The Court of Appeals correctly found the trial court did not err in admitting the testimony regarding the drug transaction at the Kroger or Petitioner's manufacturing of crack cocaine in his residence as it 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; 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.

The Court of Appeals correctly found the trial court properly admitted the testimony of the drug transaction because it was relevant to prove a material fact. The evidence served as both *res gestae* of the crimes for which Petitioner was charged as well as substantive evidence to prove elements of the crimes. Additionally, even if not properly admitted as *res gestae* or to prove elements of the crimes, the testimony was properly admitted as a prior bad act to prove intent.

In criminal cases, the appellate court sits solely to review errors of law. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The trial judge has considerable latitude in ruling on the admissibility of evidence and his decision should not be disturbed absent prejudicial abuse of discretion." State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895 (2009). An abuse of discretion occurs when the trial court's ruling is based on an error of law. State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008).

Proving an Element of the Crime

First, the testimony regarding Petitioner manufacturing crack cocaine at his home as well as the testimony about the drug transaction at Kroger are evidence supporting elements of the charged offenses of trafficking crack cocaine and distribution of crack cocaine within proximity of a school. "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.

Sweat, 362 S.C. 117, 127, 606 S.E.2d 508, 513 (Ct. App. 2004). Further, “relevant evidence admissible for [purposes other than to attack a defendant’s character] need not be excluded merely because it incidentally reflects upon the defendant’s reputation.” State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980).

In order to prove trafficking, even as indicted based solely on possession, the State had to establish Petitioner actually or constructively possessed the large quantity of drugs. The testimony that he purchased cocaine, brought it back to his home to use to manufacture crack cocaine, and directed the sale of the crack cocaine certainly is relevant evidence tending to prove the element that Petitioner knowingly possessed the drugs even though they were physically found on his former co-defendant, Martin.⁴ The trial court’s ruling made it clear he was admitting the testimony in order to establish the element of possession for the trafficking charge. (T.284; R. 223).

Additionally, to establish the proximity charge, the State had to prove Petitioner distributed, manufactured, sold, or possessed with the intent to distribute the crack cocaine within one-half mile of the school. The testimony indicated Petitioner manufactured the crack cocaine at his residence in the Irmo area, transported the crack cocaine to the Kroger a short distance away, directed his former co-defendant to sell the crack cocaine at the Kroger, and reaped the benefit of the distribution. As the trial court concluded, the testimony establishes the necessary element of intent to distribute within one-half mile of the school for the proximity charge. Accordingly, because the trial court properly found both pieces of testimony were relevant to proving a material fact or element of the crimes for which Petitioner was charged,

⁴ The relevance is highlighted by his motion for a directed verdict in which Petitioner contested the sufficiency of proof by the State of his possession of the drugs and by his former co-defendant’s original claim the drugs were hers. (T.200; R.169).

there was no need to even conduct analysis under Rule 404(b), SCRE. Further, the trial court's determinations were correct and it was not an abuse of discretion to admit the testimony for the purposes cited by the trial court.

Res Gestae

Even if the evidence did not tend to prove the elements of the crime, it formed part of the *res gestae* of the crimes and, therefore, was admissible. Evidence of prior bad acts is admissible when it furnishes part of the context of the crime or is necessary to a full presentation of the case. State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996); State v. Fletcher, 363 S.C. 221, 246, 609 S.E.2d 572, 585 (Ct. App. 2005). "The *res gestae* theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred." Fletcher, 363 S.C. at 246, 609 S.E.2d at 585 (citing State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004)).

This evidence of other crimes is admissible:

when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case and its "environment" that its proof is appropriate in order "to complete the story of the crime on trial by proving its immediate context or the 'res gestae' " or the "uncharged offense is 'so linked together in point of time and circumstances with the crime charged that one cannot be fully shown without proving the other ... '[and is thus] part of the res gestae of the crime charged.' And where evidence is admissible to provide this 'full presentation' of the offense," [t]here is no reason to fragmentize the event under inquiry" by suppressing parts of the "*res gestae*."

State v. Adams, 322 S.C. at 122, 470 S.E.2d at 370-71 (quoting United States v. Masters, 622 F.2d 83, 86 (4th Cir.1980) (citations omitted)). The story in the instant case is Petitioner's

involvement with a significant quantity of drugs when stopped during an investigatory stop. In order to properly tell that story to the jury, the testimony regarding how he acquired the drugs, manufactured the drugs, and directed the sale of the drugs is necessary for a full presentation because it is intimately connected with the underlying charges. The full context of the crime is not presented to the jury if they begin the story only upon the traffic stop after much of Petitioner's involvement with the drugs has already taken place.

Rule 404(b), SCRE

Even if the Court found the evidence was not properly admitted as relevant evidence of elements of multiple offenses for which Petitioner was charged, nor as *res gestae*, the evidence would still be properly admitted under Rule 404(b). Petitioner has changed his argument from his Brief with the Court of Appeals. Initially, he maintained the trial court erred “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.” (App.Br.6; 39). This differs from his current argument in which he maintains the trial court should not have found the testimony necessary to prove an element but instead should have concluded the testimony was improper prior bad act testimony. (Pet.p.22).

First, Petitioner never asked the court to conduct further analysis regarding whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. As a result, any claimed error regarding the trial court’s failure to conduct the balancing test is not preserved for review on appeal. See State v. Jennings, 394 S.C. 473, 481, 716 S.E.2d 91, 95 (2011) (“For an issue to be properly preserved it has to be raised to and ruled on by the trial court.”).

The court held the evidence proved the prior bad acts by clear and convincing evidence: “I don’t believe it’s a prior bad act, but to the extent that it is, I believe her testimony meets that it may be considered by someone as being relevant to this analysis. **I find the testimony to be clear and convincing** and uncontradicted based on what I heard.” (T.283; R. 222) (emphasis added). Petitioner’s statement of issue only contests the lack of a finding and the record clearly demonstrates a finding was made by the trial court. He has never appealed this finding so it is the law of the case.

On the merits, the testimony was properly admitted pursuant to Rule 404(b). Evidence of other bad acts is not admissible to prove the defendant’s guilt except to show motive, identity, existence of a common scheme or plan, absence of mistake or accident, or intent. See Rule 404(b), SCRE; State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Even if the evidence is clear and convincing and falls within a Lyle exception, the trial judge must exclude the evidence if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278-279 (2009).

The trial court properly concluded the testimony of Petitioner’s former co-defendant was clear and convincing. She explained why they were at the Kroger location where they were later found—to conduct a drug transaction. The information was corroborated by the informant’s tip to Sergeant Finch regarding what Petitioner and Martin would be doing. Petitioner was found with drugs, money, and a gun in his possession. The trial court did not abuse its discretion in finding the evidence clear and convincing.

Additionally, the evidence was properly admitted to prove intent, a required element of the proximity charge. The fact Petitioner bought cocaine, used it to manufacture crack cocaine, and sold crack cocaine from the same batch of drugs he was found with shortly later definitely

shows an intent to distribute those drugs as required to prove the proximity charge. The trial court did not err in allowing the testimony to prove elements of the crime, as part of the *res gestae* of the crimes, or as a prior bad act to demonstrate Petitioner's intent. Accordingly, this Court should deny the Petition for Writ of Certiorari as to Question IV.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should deny the Petition for Writ of Certiorari to the Court of Appeals.

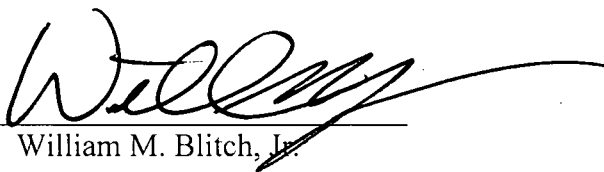
Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

BY:



William M. Blich, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

November 3, 2017

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
 Appeal From Lexington County
 Hon. Clifton Newman, Circuit Court Judge
 Appellate Case Tracking No. 2017-002061

RECEIVED
 NOV 03 2017
 S.C. SUPREME COURT

The State,

Respondent,

v.

Jo Pradubsri,

Petitioner.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
 S.C. Commission on Indigent Defense
 Division of Appellate Defense
 Post Office Box 11589
 Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
 This 3rd day of November, 2017.



ANNE A. MUELLER
 Office of the Attorney General
 Post Office Box 11549
 Columbia, South Carolina 29211
 (803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Jo Pradubsri, Petitioner.

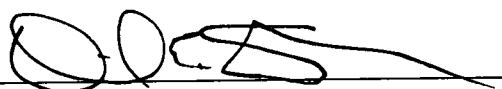
Appellate Case No. 2017-002061
Lower Court Case Nos. 2009-GS-32-00202,
2009-GS-32-00204, 2009-GS-32-00205

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted as to petitioner's question II and denied as to questions I, III, and IV. The parties shall proceed to serve and file the appendix and briefs addressing question II as provided by Rule 242(i), SCACR.

FOR THE COURT

BY



CLERK

Columbia, South Carolina

February 16, 2018

cc:

Alan McCrory Wilson, Esquire
William M. Blich, Jr., Esquire
Samuel R. Hubbard, III, Esquire
Wanda H. Carter, Esquire
The Honorable Lisa M. Comer
The Honorable Jenny Abbott Kitchings

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JO PRADUBSRI,

PETITIONER

APPELLATE CASE NO 2017-002061

BRIEF OF PETITIONER

WANDA H. CARTER
Deputy Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

ISSUE PRESENTED.....1

STATEMENT.....2

ARGUMENT

 The Court of Appeals erred in affirming petitioner’s convictions
by upholding the trial judge’s erroneous ruling that reasonable
suspicion existed to justify a traffic stop of petitioner’s vehicle that
was based on uncorroborated information provided by the informant. 3

CONCLUSION.....14

TABLE OF AUTHORITIES

Cases

<i>Alabama v. White</i> , 496 U.S. 325 (1990)	12
<i>Berkemer v. McCarty</i> , 468 U.S. 420 (1984)	9
<i>Illinois v. Gates</i> , 462 U.S. 213, 103 S.Ct. 2317 (1983)	8, 10
<i>Knight v. State</i> , 284 S.C. 138, 325 S.E.2d 535 (1985)	9
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961).....	10
<i>State v. Butler</i> , 343 S.C. 198, 539 S.E.2d 414 (Ct. App. 2000).....	9, 13
<i>State v. Lesley</i> , 486 S.E.2d 276 (Ct. App. 1997).....	9, 13
<i>State v. Nelson</i> , 336 S.C. 186, 519 S.E.2d 786 (1999).....	9, 10
<i>State v. Pope</i> , 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014).....	10, 11
<i>State v. Pradubsri</i> , ___ S.C. ___, 803 S.E.2d 724 (Ct. App. 2017).....	2, 8
<i>State v. Roberts</i> , 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006).....	11, 12
<i>State v. Willard</i> , 374 S.C. 129, 64 S.E.2d 252 (Ct. App. 2007).....	12
<i>State v. Woodruff</i> , 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001).....	9
<i>United States v. Calandra</i> , 414 U.S. 338 (1974)	10
<i>United States v. Cortez</i> , 449 U.S. 411 (1981)	9, 13
<i>Whren v. United States</i> , 517 U.S. 806 (1996).....	9
<i>Wong Sun v. United States</i> , 371 U.S. 471, (1963).....	10

Constitutional Provisions

U.S. Const. amend. IV	8
U.S. Const. amend. XIV	10

ISSUE PRESENTED

The Court of Appeals erred in affirming petitioner's convictions by upholding the trial judge's erroneous ruling that reasonable suspicion existed to justify a traffic stop of petitioner's vehicle that was based on uncorroborated information provided by the informant.

STATEMENT

On February 9, 2009, the Lexington County Grand Jury indicted petitioner Jo Pradubsri for trafficking in crack cocaine (28-100 grams), possession with intent to distribute crack cocaine within the proximity of a school, and unlawful carrying of a pistol. R. 387.

On January 13, 2015, Petitioner proceeded to a jury trial¹ before the Honorable Clifton B. Newman. Dayne C. Phillips and David M. Mauldin again represented petitioner and Assistant Solicitors Lester M. Bell, Jr. and Casey N. Rankin represented the State. The jury found petitioner guilty as charged. R. 347, ll. 17 - 348, ll. 5. The trial court sentenced petitioner to twenty-five years imprisonment. R. 356, ll. 1-6.

Petitioner filed a timely notice of appeal. Appellate Defender John H. Strom represented petitioner on appeal. Assistant Attorney General William Blitch, Jr. represented the State. The Court of Appeals affirmed petitioner's convictions in a published opinion issued on July 19, 2017. *State v. Pradubsri*, ___ S.C. ___, 803 S.E.2d 724 (Ct. App. 2017).

Petitioner filed a timely petition for rehearing on July 28, 2017. The Court of Appeals denied the petition for rehearing on August 18, 2017. A petition for writ of certiorari requesting review of the Court of Appeals' decision was filed with this Court on October 5, 2017. Per Order of this Court dated February 16, 2018, granting review of Question II from the petition, this Brief of Petitioner follows.

¹ Petitioner previously stood trial on the same charges in February 11, 2010. His convictions were reversed by the South Carolina Court of Appeals in an opinion filed on May 1, 2013. *State v. Pradubsri*, 403 S.C. 270, 743 S.E.2d 98 (Ct. App. 2013).

On November 4-5, 2014, Petitioner stood trial again with the Honorable Donald B. Hocker presiding. David M. Mauldin represented Petitioner. The second trial ended in a mistrial.

ARGUMENT

The Court of Appeals erred in affirming petitioner's convictions by upholding the trial judge's erroneous ruling that reasonable suspicion existed to justify a traffic stop of petitioner's vehicle that was based on uncorroborated information provided by the informant.

On November 9, 2008, petitioner and his girlfriend, Melissa Martin, were stopped while pulling out of the Kroger parking lot in Irmo, South Carolina, by Sgt. John Finch of the Lexington County Sheriff's Department. R. 136, ll. 18 - 137, ll. 24. The stop was the culmination of months of fruitless searching by Finch. Once stopped, Finch stated that petitioner and Martin made "furtive" movements as he and a back-up officer, Deputy Kevin Blake, approached the vehicle. R 69, ll. 7 - 74105, ll. 24. Finch claimed, inconsistently, that either as he was walking up to the vehicle or, after he opened the driver's side door that he saw the handle of a pistol protruding from the gap between the driver's side seat and center console. *Id.* Deputy Blake, who assisted Finch in the traffic stop, stated that when Martin made her exit from the car, it was revealed that she had small packages of crack cocaine in her hand and in the waistband of her pants and in the crotch of her pants. R. 180, ll. 2-24; R 190, l.1 – p. 192, l. 23; R. 179, ll. 16 - 181, ll. 11. R. 193, ll. 16 - 198, ll. 23. Further, law enforcement discovered a pistol in Martin's purse. R. 182, ll. 1-6. After reaching an understanding with the State, Martin repudiated her ownership of the drugs found on her person and would testify at trial that the drugs belonged to petitioner. R. 271, ll. 4 - 274, ll. 23. Petitioner was charged with possession within intent to distribute within close proximity of a school, trafficking in crack cocaine, and unlawful carrying of a pistol.

Prior to trial, petitioner moved to suppress the crack cocaine and guns seized during the traffic stop on the grounds that law enforcement officers did not have reasonable suspicion to justify the stop. R. 79, ll. 20 - 80, ll. 23; (Court's Exhibit No.: 4). Defense counsel stressed that because the

police were completely reliant on the uncorroborated information provided by the informer, they lacked reasonable suspicion that petitioner was engaged in criminal activity. R. 84, ll. 5-15. Counsel argued that no corroboration was attached to the informer's information and that information from the informer was the sole basis for law enforcement's reasonable suspicion to initiate the traffic stop. R. 51, ll. 4 - 64, ll. 24; R 85, ll. 3-24. Petitioner had not committed a traffic violation to justify the traffic stop and any post-stop confirmation of the accuracy of the informer's tip was irrelevant to the existence of reasonable suspicion at the time the stop was initiated. R. 85, ll. 3 - 87, ll. 4.

Sgt. Finch's testimony regarding the informer's reliability was contradictory as he simultaneously claimed that the informer was "totally reliable" while conceding that it took police three months and many failed attempts to locate petitioner based on information provided by the informer. R. 47, ll. 1 - 50, ll. 21. ***Finch was completely reliant on the informer's information when he initiated the investigatory traffic stop.*** R. 6, ll. 25 - 12, ll. 3 (*emphasis added*). Finch conceded that law enforcement had ***conducted no independent investigation into the informer's allegations,*** no attempted controlled buys, and only conducted cursory surveillance of petitioner's residence. R. 63, ll. 18 - 65, ll. 24.

Finch's testimony from the record revealed that in the three months prior to the stop, Finch had been in regular communication with an informer, who had identified petitioner and Martin as drug dealers. R. 47, ll. 5 - 50, ll. 9. Finch said he had used the informer, a prostitute with past drug convictions, "informally" over the past six to eight years. R. 46, ll. 4-25; R. 55, ll. 4-23. ***Based solely on the informer's information,*** Finch had issued multiple "be on the lookout" orders to his deputies and other county law enforcement agencies. R. 47, ll. 5 - 50, ll. 9 (*emphasis added*). Finch alleged that the informer, whom he knew was a drug addict, had personally observed petitioner and

Martin making crack cocaine in their residence. *Id.* Finch further conceded that the informer's telephone calls were the sole basis for his knowledge of petitioner's alleged drug dealing prior to the traffic stop. *Id.*

Despite being provided supposedly detailed information on the location, times of day, and method of sale; law enforcement had been unable to locate petitioner in the three months leading up to the stop. *Id.* Law enforcement never observed any drug sales and police surveillance of petitioner's residence and the same did not yield any incriminating evidence. R. 62, ll. 22 - 64, ll. 24. At trial, Finch candidly admitted, petitioner had committed no traffic violations and the stop was only based on the information supplied by the prostitute informer. R. 66, ll. 2-18.

Finch stated that the informer had been used by law enforcement since 2006 and had never provided false or inaccurate information. R. 43, ll. 2 - 46, ll. 25. He alleged that the informer had help police locate and arrest a series of persons from "Midland's Most Wanted" lists. *Id.* However, Finch was unable to identify those individuals by name or to recall the details of their charges. *Id.* Instead he simply concluded that: "[t]here's been a lot of cases of wanted individuals, especially more special like Midlands Most Wanted-type individuals." R. 44, ll. 16-25.

According to Finch, the informer seemed able to regularly provide police with the same type of information on many different individuals. For example, Finch recollected that the informer had provided information on persons residing at an Executive Inn:

"I've gotten several different people. In that case, let's see, those two different Midland's Most Wanted subjects based on intelligence received from the informant, very specific about the room, the dates and times they would be there, all of the identifiers, you know, everything just matched up perfectly in that case, and that was two at just the Executive Inn alone."

Id. The informer had also apparently provided almost identical information on two different "wanted subjects" residing at a Red Roof Inn and a Motel Six respectively. R. 45, ll. 1-8.

Likewise, the informer had previously told police about “an individual that was wanted for trafficking heroin.” R. 43, ll. 2-17. On this occasion, she allegedly identified a co-defendant, the car being used, and the area and time that the targets sold drugs. *Id.* Oddly given that the informer provided police with the time and area of drug sales, Finch recalled that “I started working on that case. **Subsequently**, we did locate the individuals.” *Id.* (*emphasis added*).

Finch claimed that he received from ten to twenty telephone calls from the informer. R. 42, ll. 17-22. She described petitioner’s car; claimed that petitioner allegedly sold drugs in the Irmo-St. Andrews area of Columbia during nights and evenings; and – incredibly – the informer knew the make, model, and caliber of guns that petitioner and Martin carried. R. 55, ll. 2 - 59, ll. 23.

After stressing that the informer had detailed personal knowledge of petitioner’s alleged drug dealing; on cross-examination Finch became more reticent and skeptical of whether petitioner and the informer had a personal connection. A suddenly less certain Finch demurred, that “I don’t know about how close of a personal relationship it was, but I’m saying that they knew each other on the street.” R. 55, ll. 25 - 56, ll. 18.

When asked what benefits the informer had received from her long association with law enforcement, Finch adamantly denied that informer had received any benefits. He underlined the lack of motive conjecturing that the informer:

“[K]new that if she committed a crime that I would lock her up and then that’s -- you know, she -- she gave me this information voluntarily and willfully. On the street she developed a level of trust with the folks out there and, you know, after a long period of time it was developed with this individual, you know, so she forwards the information to me and I look into it, and everything she’s ever given me has been reliable.

Id. at ll. 5-12. When asked, he again conceded that he never corroborated the informer’s information; never attempted to set-up a controlled buy; never sought a search warrant for

petitioner's residence; and the minimal surveillance conducted did not yield any corroborating evidence of trafficking. R. 63, ll. 22 - 64, ll. 24.

As to reliability, Finch claimed that the informant had always been accurate and reliable in past investigations. R. 44, ll. 14 - 47, ll. 4. However, his testimony on these past instances was conclusory and circular. *Id.* He could not recall the names of those arrested, the dates, or the final disposition of these cases. *Id.*; *see also* R. 30, ll. 5 - 34, ll. 24. All Finch remembered was that on every occasion the informant supplied police with exactly the same quantity of information all of which was "very reliable, very accurate" and the informant never received any benefit for her nearly decade of service to law enforcement. R. 44, ll. 14.

Again, all of this supported petitioner's motion to suppress the crack cocaine and guns seized during the traffic stop on the grounds that law enforcement did not have reasonable suspicion to justify the stop. R. 79, ll. 20 - 80, ll. 23; R. 369. Defense counsel stressed that because the police were completely reliant on the uncorroborated information provided by the informant, they lacked reasonable suspicion that petitioner was engaged in criminal activity. R. 84, ll. 5-15. The trial court denied petitioner's motion to suppress the evidence, ruling that law enforcement had reasonable suspicion based on the past reliability of the informant. R. 87, ll. 16-18.

On appeal, the Court of Appeals found that reasonable suspicion justified the traffic stop, based solely on the information provided by the informant:

We find [the informant's] description of the vehicle, including the color, make, and model; ***the highway and direction the vehicle would be traveling; the location of the vehicle at a specific time;*** and that more than one person was in the vehicle, was ***corroborated by officers*** observing a vehicle matching the exact description, traveling in the specified direction, located in the stated area, and containing more than one person. Furthermore, [the informant] was ***not a confidential informant*** and exposed himself to criminal liability should the information he supplied to officers prove to be false.

Id. at 225, 763 S.E.2d at 814 (*emphasis added*); *see also Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983) (“Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work”).

In affirming petitioner's convictions, the Court of Appeals conceded that “the informant did not provide as much predictive information as the tipster in *White*”² and that the informant first gave information on petitioner three months prior to his arrest. *Pradubsri*, 803 S.E.2d at 728. The Court of Appeals concluded that Finch's characterization of the informant as reliable in prior cases outweighed the three months of uncorroborated tips in Petitioner's case. *Id.*

The Court of Appeals also discounted law enforcement's failure to witness a single drug sale and failure to find evidence of crack cocaine manufacturing at petitioner's residence during their surveillance. *Id.* In concluding reasonable suspicion existed, the Court of Appeals found that the informant's correct description of Petitioner's car in the “small identified area at a time when the informant reported drugs and two specified weapons would very likely be in the vehicle” was sufficient for reasonable suspicion. *Id.*

The Court of Appeals erred in upholding the trial court's determination that reasonable suspicion existed to justify the traffic stop. *Pradubsri*, 803 S.E.2d at 728. The information furnished by the informant was not sufficiently particularized to provide law enforcement with reasonable suspicion to initiate the traffic stop.

The Fourth Amendment to the United States Constitution ensures “the right of the people to be secure. . . [from] unreasonable searches and seizures.” U.S. Const. amend. IV. The “temporary detention” of individuals during an automobile stop by police constitutes a “seizure” within the

² *Alabama v. White*, 496 U.S. 325 (1990).

meaning of the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 809 (1996). Generally, “the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.” *State v. Butler*, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000).

However, if an officer has reasonable suspicion that the occupants of an automobile are involved in criminal activity, the officer may stop and briefly detain them. *Id.*; *Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985); *see also State v. Nelson*, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984)) (“[A] policeman who lacks probable cause but **whose observations lead him** reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.”)(*emphasis added*).

Reasonable suspicion requires “a particularized and objective basis that would lead one to suspect another of criminal activity.” *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Lesley*, 486 S.E.2d 276 (Ct. App. 1997). A court must consider “the totality of the circumstances – the whole picture” when determining whether reasonable suspicion exists. *Cortez*, 449 U.S. at 417; *see also State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) (“reasonable suspicion requires a particularized and objective basis that would lead one to suspect another of criminal activity. . . the whole picture must be considered.”). Reasonable suspicion “entails. . . something more than an inchoate and unparticularized suspicion or ‘hunch,’ but less than the level of suspicion required for probable cause” *Butler*, 343 S.C. at 202, 539 S.E.2d at 416.

The United States Supreme Court created the exclusionary rule³ to safeguard Fourth Amendment rights. *United States v. Calandra*, 414 U.S. 338 (1974). The exclusionary rule prohibits the use of evidence obtained directly or indirectly through an unlawful search or seizure under the fruits of the poisonous tree doctrine. *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *see also State v. Nelson*, 336 S.C. 186, 519 S.E.2d 786 (1999) (evidence not admissible under the "fruit of the poisonous tree" doctrine when police exploit unlawful search to seize evidence that would not have otherwise come to light).

In many respects the informant in the present case was a less precise, less reliable version of the informant in *State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014). In *Pope*, police received a tip from a non-confidential informant that a black Ford Exhibition would be leaving Spartanburg on Highway 176. *Id.* at 224, 763 S.E.2d at 820. In the presence of police officers, the informant called Pope, who was driving the Exhibition. *Id.* at 225, 763 S.E.2d at 820. Pope told the informant that he was passing the "Lighthouse Fish Camp," this was confirmed by a trailing police car. After the phone call, law enforcement initiated the traffic stop. *Id.* The non-confidential informant accurately described the Pope's vehicle. He also accurately predicted the highway, Pope's direction of travel at a specific time; and that more than one person was in the vehicle. *Id.* at 225, 763 S.E.2d at 814 (*emphasis added*); *see also Illinois v. Gates*, 462 U.S. 213 (1983) ("Our decisions applying the totality of circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work"). Nevertheless, it took law enforcement three months to locate petitioner. In many respects the informant in the present case is a less precise, less reliable version of the informant in *State v. Pope*, 410 S.C. 214, 763

³ The Fourteenth Amendment makes the exclusionary rule applicable to the states. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

S.E.2d 214 (Ct. App. 2014). Moreover, when law enforcement finally located petitioner, they did not observe any of the illegal activity the informant attributed to petitioner.

The Court of Appeals further held that Appellant's presence in "the small, identified area" where the informant had previously stated Appellant would be gave police additional justification to stop Appellant. This conclusion that reasonable suspicion existed based solely on the informant's information was an error of law. The Court of Appeals misconstrued "the small, identified area" that the informant predicted petitioner would located in during the three months she was in contact with law enforcement. The informant told police that Appellant lived and sold drugs in the Irmo – St. Andrews area. This description encompasses one entire municipality, Irmo, and a densely inhabited portion of another, Columbia. The area spans two counties and has a combined population of over thirty thousand people.

This informant's vague location information coupled with the three months of unsuccessful efforts by law enforcement to corroborate her allegations and the complete lack of incriminating corroborative details when petitioner was finally located meant that it was an error for the Court of Appeals to conclude that the informant's information was sufficiently particularized to provide law enforcement with reasonable suspicion to initiate an investigatory stop. *Cf. State v. Pope*, 410 S.C. 214, 763 S.E.2d 214 (Ct. App. 2014) (reasonable suspicion existed where informant provided a specific time, road, travel direction, confirmed the location with the defendant, and his information confirmed by law enforcement); *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) (reasonable suspicion existed where informant accurately predicted robbery and police located car matching informant's information after the robbery). The information furnished by this confidential informer was not sufficiently particularized to provide law enforcement with reasonable suspicion to initiate an investigatory stop. Unlike the informant in *Pope*, who provided a specific time, road,

travel direction, confirmed the location with the defendant, and had his information confirmed by law enforcement; the informer in petitioner's case simply alleged that petitioner was selling crack cocaine in the evenings and nights somewhere in the Irmo - St. Andrews area (covering approximately twelve square miles) and about Appellant's working patterns: an approximate area where Appellant sold drugs and the times of day when Appellant usually made sales. Tr. p. 78, ll. 8 - 81, ll. 4. Again, it took law enforcement three months to locate petitioner.

Also, petitioner's case is also distinguishable from *State v. Willard*, 374 S.C. 129, 64 S.E.2d 252 (Ct. App. 2007), and *State v. Roberts*, 368 S.C. 529, 629 S.E.2d 679 (Ct. App. 2006) which were both argued extensively at trial and relied upon by the Court of Appeals. R. 357. In *Roberts*, law enforcement knew that a crime had been committed - based on a police report of a bank robbery - when they initiated the investigatory stop. *Id.* In *Willard*, law enforcement utilized a non-confidential informant to arrange a drug buy via telephone with officers present. 374 S.C. 129, 64 S.E.2d 252. Crucially, Willard also confessed to law enforcement following the traffic stop. *Id.* Likewise, petitioner's case is distinguishable from *Willard and Roberts*,

Moreover, the Court of Appeals' reliance on *Alabama v. White*, is misplaced. 496 U.S. 325 (1990). The informant in *White* provided police with **detailed, current information** regarding White's current location and car and alleged that White was preparing to deliver marijuana to a specific motel. *Id.* at 327-328. Police then **immediately** went to the apartment and observed White leaving from the predicted building, getting into a car matching the description provided by the informant, and driving for four miles on the most direct route to the motel. *Id.* at 331. Despite this informer's and receiving regular updates from the informer, the police were unable to locate petitioner for three months.

Police efforts to corroborate the incriminating details of the informant's information were a complete failure. Despite surveillance and multiple BOLOs, police never found any evidence that Petitioner manufactured crack cocaine at his residence and never saw him make a single drug sale. R. 63, ll. 22 - 65, ll. 24. The only details police corroborated prior to initiating the traffic stop were not overtly incriminating. *Butler*, 343 S.C. 198, 539 S.E.2d 414 (presence of temporary tag on back of car, without more, was insufficient to provide reasonable suspicion that driver was involved in criminal activity). Again, as stated earlier, the Court of Appeals held that reasonable suspicion existed for law enforcement to initiate the traffic stop of petitioner's vehicle based solely on the information provided by a confidential informant, despite the Court of Appeals' concession that "the informant here did not give as much predictive information as" confidential informants had in other cases. Therefore, the informant's record of providing accurate information to law enforcement in unrelated past investigations and her correct information regarding the make and model of petitioner's vehicle, provided a lack of reasonable suspicion.

Also, as stated earlier, reasonable suspicion requires "a particularized and objective basis that would lead one to suspect another of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417 (1981); *State v. Lesley*, 486 S.E.2d 276 (Ct. App. 1997). Reasonable suspicion "entails. . . something more than an inchoate and unparticularized suspicion or 'hunch,' but less than the level of suspicion required for probable cause" *State v. Butler*, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000).

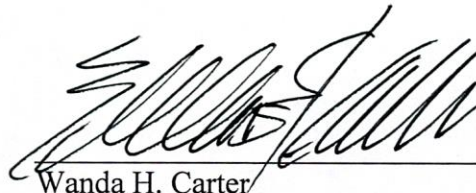
Finally, in determining that reasonable suspicion existed to support the traffic stop, the Court of Appeals ignored that the informant had proven she was unreliable. And, finally, notwithstanding this information, the police were unable to locate Appellant, let alone observe him making any drug sales. Tr. p. 94, ll. 22 - 96, ll. 24. Further, while the informer provided accurate information about

petitioner's car; the car was traveling legally; no citations were issued; there was no evidence of attempted flight; and there was no pre-stop evidence of evasive behavior. *See Butler*, 343 S.C. 198, 539 S.E.2d 414 (presence of temporary tag on back of car, without more, was insufficient to provide reasonable suspicion that driver was involved in criminal activity).

In sum, the information furnished by the informant was not sufficiently particularized or timely so as to provide law enforcement with reasonable suspicion to initiate the traffic stop in this case. Hence, the Court of Appeals erred in affirming the trial judge's denial of the motion to suppress the evidence illegally seized by law enforcement. *See Wong Sun*, 371 U.S. at 484; *see also Nelson*, 336 S.C. 186, 519 S.E.2d 786.

CONCLUSION

Based on the foregoing argument, counsel for petitioner requests that this Court reverse the Court of Appeals' decision affirming petitioner's convictions and sentences based on the above outlined argument.

A handwritten signature in black ink, appearing to read 'Wanda H. Carter', is written over a horizontal line.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of April, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Honorable Clifton Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

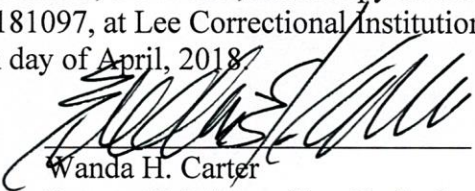
V.

JO PRADUBSRI,

PETITIONER

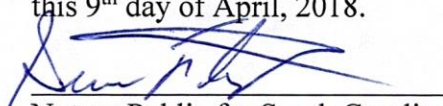
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon William M. Blitch, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on Jo Pradubsri, #181097, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 9th day of April, 2018.


Wanda H. Carter

Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of April, 2018.


Notary Public for South Carolina

(L.S)

My Commission Expires: 10/30/2022



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 09, 2018

William M. Blitch, Esquire
 Assistant Attorney General
 Rembert Dennis Building
 1000 Assembly Street, Room 519
 Columbia, SC 29201

Re: The State v. Jo Pradubsri

Dear Mr. Blitch:

Enclosed are two copies of the Brief of Petitioner in the above entitled case, which I have filed today with the South Carolina Supreme Court.

Please call me if you have any questions.

Sincerely,

Wanda H. Carter
 Deputy Chief Appellate Defender

WHC/sf

Enclosure

**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

April 09, 2018

Mr. Jo Pradubsri, #181097
Lee Correctional Institution
990 Wisacky Hwy.
Bishopville, SC 29010

Re: Your appeal

Dear Mr. Pradubsri:

Enclosed is a copy of the Brief of Petitioner in your case, which I have filed with the South Carolina Supreme Court.

Please contact me if you have any questions.

Sincerely,

Wanda H. Carter
Deputy Chief Appellate Defender

WHC/sf

Enclosure

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lexington County
Hon. Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2017-002061

The State,

Respondent,

v.

Jo Pradubsri,

Petitioner.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar Number 15608

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON CERTIORARI.....	1
STATEMENT OF THE CASE.....	2
STANDARD OF REVIEW	3
ARGUMENT	4
I. The trial court properly found reasonable suspicion supported the stop of Petitioner's vehicle when the information received was corroborated and originated from a reliable informant.	4
CONCLUSION.....	10

TABLE OF AUTHORITIES

Cases

<u>Adams v. Williams</u> , 407 U.S. 143, 92 S. Ct. 1921 (1972).....	8
<u>Alabama v. White</u> , 496 U.S. 325, 330 (1990).....	5, 6, 9
<u>Florida v. J.L.</u> , 529 U.S. 266 (2000)	5, 6
<u>Kaley v. United States</u> , 134 S. Ct. 1090, 1103 (2014).....	5
<u>Navarette v. California</u> , 134 S. Ct. 1683, 1687 (2014)	5, 6, 7, 9
<u>Robinson v. State</u> , 407 S.C. 169, 754 S.E.2d 862 (2014)	3
<u>State v. Alston</u> , 422 S.C. 270, 811 S.E.2d 747, 751 (2018).....	3
<u>State v. Anderson</u> , 415 S.C. 441, 446, 783 S.E.2d 51, 54 (2016).....	3
<u>State v. Butler</u> , 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000).....	4
<u>State v. Groome</u> , 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008)	3
<u>State v. Herring</u> , 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009).....	4
<u>State v. Khingratsaiphon</u> , 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002).....	5
<u>State v. Moore</u> , 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016).....	3
<u>State v. Pope</u> , 410 S.C. 214, 225, 763 S.E.2d 814, 820 (Ct. App. 2014).....	7
<u>State v. Rogers</u> , 368 S.C. 529, 535, 629 S.E.2d 679, 682 (Ct. App. 2006)	6, 9
<u>State v. Vinson</u> , 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012)	5
<u>State v. Willard</u> , 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007)	4, 5
<u>United States v. Cortez</u> , 449 U.S. 411, 101 S.Ct. 690 (1981).....	5
<u>United States v. Sokolow</u> , 490 U.S. 1, 7, 109 S.Ct. 1581 (1989)	5

Other Authorities

S.C. Code Ann. § 16-17-722 (Supp. 2016).....	8
U.S. Const. amend. IV	4

STATEMENT OF ISSUES ON CERTIORARI

- I. The trial court properly found reasonable suspicion supported the stop of Petitioner's vehicle when the information received was corroborated and originated from a reliable informant.

STATEMENT OF THE CASE**Procedural History**

The State agrees with Petitioner's procedural Statement of the Case.

STANDARD OF REVIEW

“On appeal from a motion to suppress on Fourth Amendment grounds, this Court applies a deferential standard of review and will reverse only if there is clear error.” State v. Alston, 422 S.C. 270, 811 S.E.2d 747, 751 (2018) (citing Robinson v. State, 407 S.C. 169, 180-81, 754 S.E.2d 862, 868 (2014)). “In reviewing a challenge under the Fourth Amendment, the Court must affirm if there is any evidence to support the ruling.” State v. Anderson, 415 S.C. 441, 446, 783 S.E.2d 51, 54 (2016). A trial court’s Fourth Amendment suppression ruling must be affirmed if supported by any evidence, and an appellate court may reverse only when there is clear error. State v. Groome, 378 S.C. 615, 618, 664 S.E.2d 460, 461 (2008). “The ‘clear error’ standard means that an appellate court will not reverse a trial court’s finding of fact simply because it would have decided the case differently.” State v. Moore, 415 S.C. 245, 251, 781 S.E.2d 897, 900 (2016).

ARGUMENT

I. The trial court properly found reasonable suspicion supported the stop of Petitioner's vehicle when the information received was corroborated and originated from a reliable informant.

The trial court properly found reasonable suspicion existed to support the stop of Petitioner because Sergeant Finch received information from a known reliable source, which he was able to corroborate, indicating Petitioner and his co-defendant were driving a vehicle containing crack cocaine and weapons. Sergeant Finch has a clear, particularized, and objective basis to believe Petitioner was involved in criminal activity. Accordingly, the trial court did not err in denying the motion to suppress.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..." U.S. Const. amend. IV. The ultimate touchstone of the Fourth Amendment is "reasonableness," and the warrant requirement is subject to certain exceptions. State v. Herring, 387 S.C. 201, 210, 692 S.E.2d 490, 494 (2009). "A warrantless search withstands constitutional scrutiny under the Fourth Amendment if it meets the requirements of one of several exceptions, including the automobile exception." State v. Willard, 374 S.C. 129, 134, 647 S.E.2d 252, 255 (Ct. App. 2007). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. The police, however, may also stop and briefly detain a vehicle if they have a reasonable suspicion that the occupants are involved in criminal activity." State v. Butler, 343 S.C. 198, 201, 539 S.E.2d 414, 416 (Ct. App. 2000) (internal citations omitted).

“‘Reasonable suspicion’ requires a ‘particularized and objective basis that would lead one to suspect another of criminal activity.’” State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621, 629 (1981)). “Reasonableness is measured in objective terms by examining the totality of circumstances. A traffic stop is not unreasonable if conducted with probable cause to believe a traffic violation has occurred, or when the officer has a reasonable suspicion the occupants are involved in criminal activity.” State v. Vinson, 400 S.C. 347, 352, 734 S.E.2d 182, 184 (Ct. App. 2012) (internal citations omitted). “Reasonable suspicion is more than a general hunch but less than what is required for probable cause.” Willard, 374 S.C. at 134, 647 S.E.2d at 255. As the United States Supreme Court has explained:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330 (1990). The United States Supreme Court also articulated: “Although a mere ‘hunch’ does not create reasonable suspicion, the level of suspicion the standard requires is ‘**considerably less** than proof of wrongdoing by a preponderance of the evidence,’ and ‘**obviously less**’ than is necessary for probable cause.” Navarette v. California, 134 S. Ct. 1683, 1687 (2014) (citing *inter alia*, United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989)) (internal citations omitted) (emphasis added). “Probable cause . . . is not a high bar,” Kaley v. United States, 134 S. Ct. 1090, 1103 (2014), so reasonable suspicion, which is “obviously less” than probable cause certainly cannot be very high.

An anonymous tip alone lacks sufficient indicia of reliability to support a reasonable suspicion to conduct a stop. See e.g., Florida v. J.L., 529 U.S. 266 (2000). However, where

sufficient indicia of reliability are present, a stop may be properly conducted based on reasonable suspicion. See e.g., State v. Rogers, 368 S.C. 529, 535, 629 S.E.2d 679, 682 (Ct. App. 2006) (finding reasonable suspicion existed where specific information provided by a known informant who could be held accountable and whose reputation could be assessed). In J.L., the United States Supreme Court (USSC) noted the distinction between an anonymous tip and one from a known informant: “Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” J.L., 529 U.S. at 270.

In Alabama v. White, 496 U.S. 325 (1990), the USSC determined reasonable suspicion existed to stop a vehicle after various facts were confirmed as true prior to stopping the vehicle. The tipster told the police that a woman would drive from a particular apartment building to a particular motel in a brown Plymouth station wagon with a broken right tail light. The tipster further asserted that the woman would be transporting cocaine. Id. at 327. After confirming the innocent details, officers stopped the station wagon as it neared the motel and found cocaine in the vehicle. Id., at 331. The USSC held corroboration of certain details made the anonymous tip sufficiently reliable to create reasonable suspicion of criminal activity. The USSC found “because an informant is shown to be right about some things, he is probably right about other facts that he has alleged, including the claim that the object of the tip is engaged in criminal activity.” Id.

Recently, in Navarette v. California, 134 S. Ct. 1683 (2014), the USSC determined a 911 call provided sufficient indicia of reliability for reasonable suspicion to stop a vehicle for drunk driving. The Court found “[b]y reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed

eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." Id. at 1689. Additionally, details such as the vehicles location were corroborated by the police prior to the stop. Id. Further, the Court found the 911 system provided a means for identifying the informant and holding her accountable for any false information. Id. at 1689-1690. see also, State v. Pope, 410 S.C. 214, 225, 763 S.E.2d 814, 820 (Ct. App. 2014) ("We find Harris' description of the vehicle, including the color, make, and model; the highway and direction the vehicle would be traveling; the location of the vehicle at a specific time; and that more than one person was in the vehicle, was corroborated by officers observing a vehicle matching the exact description, traveling in the specified direction, located in the stated area, and containing more than one person. Furthermore, Harris was not a confidential informant and exposed himself to criminal liability should the information he supplied to officers prove to be false. Therefore, we find the trial court did not err in denying the motion to suppress the evidence seized during the search of the vehicle because law enforcement had reasonable suspicion to justify the traffic stop.").

In the instant case, the informant was an individual known to Sergeant Finch and the Lexington County Sheriff's Department. The informant provided significant information in the past which lead to multiple arrests. (T.74-77; R.43-46). As the United States Supreme Court has stated: "[A]n informant who is proved to tell the truth about some things is more likely to tell the truth about other things, including the claim that the object of the tip is engaged in criminal activity." Navarette, 134 S. Ct. at 1688. Further, the informant gave specific details about the area of town in which Petitioner dealt drugs; who he would be with; the vehicle they would be driving, including a dent on the vehicle; and the type of drugs and weapons they would have in

their possession. (T.78-82; R.47-51). While the informant had provided information on multiple occasions, Sergeant Finch was unable to follow up on many of these reports. (R.58-59).

On the day of the stop, Sergeant Finch received a call from the informant detailing the information Petitioner and his co-defendant would be transporting and dealing drugs. (R.65). Another Officer spotted the vehicle at Kroger in Irmo and relayed its position to Sergeant Finch. (R.66). Significantly, Sergeant Finch corroborated the details of the car and the area of town it was located in prior to making the stop. (T.83; R.52). He also knew both Petitioner and his co-defendant, and knew that his informant was associated with Petitioner. (T.82; 90; 94; R. 51; 59; 63). As a result, the information provided was corroborated and increased the reliability and likely veracity of the information received.

Finally, because the informant was known to Sergeant Finch, the informant could be held accountable for any false information provided. (T.77; R. 46). Under South Carolina law:

(A) It is unlawful for a person to knowingly file a false police report.

(B) A person who violates subsection (A) by falsely reporting a felony is guilty of a felony and upon conviction must be imprisoned for not more than five years or fined not more than one thousand dollars, or both.

S.C. Code Ann. § 16-17-722 (Supp. 2016). The United States Supreme Court has indicated the ability to hold the informant accountable is a significant factor in determining the reliability of the information and in determining whether an officer has reasonable suspicion to conduct an investigatory stop. See e.g., Adams v. Williams, 407 U.S. 143, 146-47, 92 S. Ct. 1921, 1923-24, 32 L. Ed. 2d 612 (1972) (finding "Sgt. Connolly acted justifiably in responding to his informant's tip. The informant was known to him personally and had provided him with information in the past. This is a stronger case than obtains in the case of an anonymous

telephone tip. The informant here came forward personally to give information that was immediately verifiable at the scene. Indeed, under Connecticut law, the informant might have been subject to immediate arrest for making a false complaint had Sgt. Connolly's investigation proved the tip incorrect. Thus, while the Court's decisions indicate that this informant's unverified tip may have been insufficient for a narcotics arrest or search warrant, the information carried enough indicia of reliability to justify the officer's forcible stop of Williams."(internal citations and footnote omitted)); Navarette v. California, 134 S. Ct. 1683, 1689 (2014)(finding the caller's use of the 911 emergency system was "[a]nother indicator of veracity" because the tipster could be identified and held accountable).

Accordingly, this case is similar to the cases of White, Navarette, and Rogers and this Court should find Sergeant Finch's stop of Petitioner's vehicle was properly made and supported by reasonable suspicion.

CONCLUSION

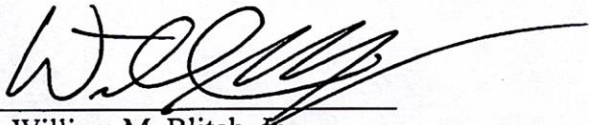
For all of the foregoing reasons, it is respectfully submitted that the decision of the trial court denying Petitioner's motion to suppress should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Assistant Attorney General
S.C. Bar No. 15608

S.R. HUBBARD, III
Solicitor, Eleventh Judicial Circuit

BY: 
William M. Blitch, Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

May 14, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From Lexington County
Hon. Clifton Newman, Circuit Court Judge
Appellate Case Tracking No. 2017-002061

The State,

Respondent,

v.

Jo Pradubsri,

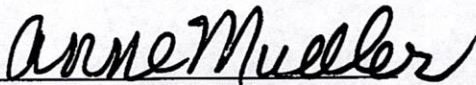
Petitioner.

PROOF OF SERVICE

I, Anne A. Mueller, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.
This 14th day of May, 2018.


ANNE A. MUELLER
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Respondent,

v.

Jo Pradubsri, Petitioner.

Appellate Case No. 2017-002061

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Lexington County
Clifton Newman, Circuit Court Judge

Opinion No. 27890
Heard May 8, 2019 – Filed May 22, 2019

**CERTIORARI DISMISSED AS IMPROVIDENTLY
GRANTED**

Appellate Defender Joanna Katherine Delany, of
Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant
Attorney General William M. Blich, Jr., both of
Columbia, and Solicitor Samuel R. Hubbard III, of
Lexington, for Respondent.

PER CURIAM: We granted Jo Pradubsri's petition for a writ of certiorari to review the decision of the court of appeals affirming his conviction. *State v. Pradubsri*, 420 S.C. 629, 803 S.E.2d 724 (Ct. App. 2017). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

BEATTY, C.J., KITTREDGE, HEARN, FEW, JJ., and Acting Justice Roger L. Couch, concur.

FORM 5-D

STATE OF SOUTH CAROLINA

2019 JUL 5 AM 8:22 IN THE COURT OF COMMON PLEAS

COUNTY OF LexingtonLISA M. COMER
CLERK OF COURT
LEXINGTON, SCTo Pradubsc 181097
Full name and prison number (if any) of Applicant.

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2019-CP-32-Q2814INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lee C.I.
2. Name and location of Court which imposed sentence Lexington Courthouse, 205 E. Main St. Lexington, S.C. 29072
3. Name(s) of co-defendant(s) (if any) NO
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2009-GS-32-0202
 - (b) 2009-GS-32-0204
 - (c) 2009-GS-32-0205
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 1/15/15, 25 years mandatory
 - (b) 1/15/15, 15 years

- (c) 11/15/15, one year
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of appeal
- ii. South Carolina Supreme Court
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. Denied writ
- iii. _____
- (c) the date of each such result:
- i. August 8, 2017
- ii. May 22, 2019
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. State v. Pradubiri 803 S.E2d 724
- ii. Opinion No. 27890
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) N/A
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) _____
 (b) _____
 (c) _____
- See Attachment*

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) _____
 (b) _____
 (c) _____
- See Attachment*

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? No
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No
 (d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
 ii. _____
 iii. _____
 iv. _____
- N/A*

(b) the name and location of the Court in which each was filed:

- i. _____
 ii. _____
 iii. _____
 iv. _____
- N/A*

(c) the disposition thereof:

- i. _____
 ii. _____
 iii. _____
- N/A*

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____ *N/A*
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____ *N/A*
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No*
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____ *N/A*
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____ *N/A*
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____ *N/A*
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? yes
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
 - i. Wayne Phillips
 - ii. John Strom
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
 - i. Trial
 - ii. Appeal
 - iii. _____

19. State clearly the relief you seek in filing this application:

Vacate applicant conviction and sentence

20. Are you now under sentence from any other court that you have not challenged?

No

ATTACHMENT

- 10197 Applicant was denied the right to effective assistance of Counsel by the Sixth and Fourteenth Amendment to the United States Constitution and the corresponding Provision of the South Carolina Constitution
- (b) Applicant was denied the right to effective assistance of Counsel by the Sixth and Fourteenth Amendment to the United States Constitution and the corresponding Provision of the South Carolina Constitution
- (c) Applicant was denied the right to effective assistance of Counsel by the Sixth and Fourteenth Amendment to the United States Constitution and the corresponding Provision of the South Carolina Constitution
- (d) Applicant was denied the right to effective assistance of Counsel by the Sixth and Fourteenth Amendment to the United States Constitution and the corresponding Provision of the South Carolina Constitution

ATTACHMENT

- 11(a) Trial counsel 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 broaden the bases for conviction beyond the charged in the indictment
- (b) Trial counsel ineffective for failing to object to trial judge jury instruction that broaden the bases for conviction beyond the charged in the indictment
- (c) Trial Counsel ineffective for failing to object to state amendment from a first offense indictment to a 3rd offense that increased punishment
- (d) Trial Counsel ineffective for ~~object~~ failing to object applicant being convicted and sentence for a greater and lesser offense that was barred by double jeopardy, where both charges was based upon the applicant possession of 68 grams

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, To Pradybsri, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

To Pradybsri
Applicant

SWORN or affirmed to and subscribed before me this

3 day of July, 2019.
Debra Eastuday
Notary Public

My Commission Expires: 3/3/2024

FILED
2019 JUL 15 AM 9:18
LISA M. CANTER
CLERK OF COURT
TJ 11916180

560

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION

I, To Pradubsi, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

To Pradubsi

SWORN to and subscribed before me this 3
day of July, 2019.

Debra Easton (L.S.)
Notary Public

My Commission Expires: 3/3/2021

FILED
2019 JUL 15 AM 9:18
LISA H. COOPER
CLERK OF COURT
JUL 15 2019

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE ELEVENTH JUDICIAL CIRCUIT
2020 FEB 25 AM 11:00

Jo Pradubsri, #181097, :

LISA M. COMER
CLERK OF COURT
LEXINGTON, SC

Case No.: 2019-CP-32-02814

Applicant,

RETURN

v.

State of South Carolina,

Respondent.

The State (Respondent), making its return to the application for post-conviction relief filed by Jo Pradubsri (Applicant) on July 5, 2019, would respectfully show this Court:

I. Procedural History

Applicant is presently incarcerated according to orders 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, and Assistant Solicitors Lester McGill Bell, Jr., and Casey Rankin Smith, both of the Eleventh Circuit Solicitor's Office, prosecuted the case. On January 13, 2015, through January 15, 2015, Applicant proceeded to a jury trial with the Honorable Clifton B. Newman, presiding. 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.

II. Current Application

Respondent interprets the allegations raised by Applicant in his application for post-conviction relief as follows:

- 1) Trial counsel was constitutionally ineffective for:
 - a) Failing to move for a directed verdict based upon multiple variances in the State's presentation of evidence and/or the State's broadening through argumentation the bases for the conviction beyond those in the indictments;
 - b) Failing to object to the trial court's jury instruction that broadened the bases for the conviction beyond those in the indictment;

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. For purposes of clarity and concision, references to the first trial and first direct have appeal are mostly omitted from this return as they are not relevant to the allegations raised in this application by Applicant.

- c) Failing to object to the State's amendment of the indictment from a first offense to a third offense; and
- d) Failing to object to the conviction and sentence "for a greater and lesser offense that was barred by double jeopardy, where both charges was based upon the applicant possession of 68 grams".

Applicant prays the Court will grant post-conviction relief and vacate his convictions and sentences. Attached to this return and incorporated by reference are the records of the Lexington County Clerk of Court regarding the subject convictions, the transcript from Applicant's second trial, the appellate records from Applicant's second direct appeal, and the application for post-conviction relief. Respondent reserves the right to amend this return upon its receipt of any relevant materials.

III. Response to Applicant's Claims of Ineffective Assistance of Counsel

Applicant argues his defense attorneys were constitutionally ineffective at trial for failing to move for a directed verdict upon certain grounds, failing to object to certain jury instructions given by the trial court, failing to object to the State's motion to amend one of the indictments, and failing to object to the conviction and sentence based upon double jeopardy.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that trial counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625

(1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668. Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney. Id. at 690.

Failure to object to or request specific jury instructions

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) (citation omitted). 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). Respondent submits Applicant likely cannot show that trial counsel should have requested or objected to any particular jury instruction and that there is a reasonable probability the outcome of trial would have been different had they done so, particularly in light of the deference given to a valid trial strategy of trial counsel.

Failure to make specific arguments while moving for a directed verdict

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.* Respondent notes trial counsel moved for a directed verdict in accordance with this aforementioned law, and Applicant likely cannot show that trial counsel should have based its motion upon some other ground and that there is a reasonable probability the outcome of trial would have been different had they done so. Trial Tran. 366-67.

Failure to object to the State's motion to amend an indictment

Applicant argues his trial counsel were constitutionally ineffective for failing to object to the State's motion to amend one of the indictments so as to make it a third-offense crime; however,

the trial transcript does not contain a record of such an amendment and Respondent submits Applicant cannot show the State made such an objection. Perhaps, instead, Applicant misunderstands the discussion between the parties and the Court during sentencing about recent changes in the statutory law regarding sentencing enhancements as a motion to amend the indictment. Trial Tran. 438. Applicant likely cannot show that trial counsel should have objected to a motion on the part of the State to amend an indictment so as to enhance the offense with which Applicant was charged and that there is a reasonable probability the outcome of trial would have been different had they done so.

Failure to object to the convictions and sentences based upon the double jeopardy clauses

The double jeopardy clauses in the United States Constitution and the South Carolina Constitution protects defendants from multiple punishments for the same offense. Harden v. State, 360 S.C. 405, 410, 602 S.E.2d 48, 50 (2004) (citing State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999)). A threshold inquiry in determining whether there are two offenses or only one when the same act or transaction constitutes a violation of two unique statutes is to analyze whether each offense requires proof of a fact that the other does not. Id. (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). In this case, the trial court instructed the jury an element of possession of crack cocaine in proximity to a school with intent to distribute was the defendant's being within a one-half mile radius of a school and his having knowledge of that fact. Trial Tran. 421. The offense of trafficking in cocaine had no such element. As the former offense required the State to prove a fact that the latter did not, the double jeopardy clauses were not violated by Applicant's convictions and sentences. Respondent submits Applicant likely cannot show that trial counsel should have objected to his convictions and sentences based upon the double jeopardy clauses and

that there is a reasonable likelihood the outcome of trial would have been different had they done so.

Respondent submits that Applicant cannot likely cannot show any ground for relief; however, Respondent requests an evidentiary hearing in order to address the questions of fact raised that the record may not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve the matter. See Sharper v. State, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) (holding that an evidentiary hearing is required when an application for post-conviction relief alleges specific instances of ineffectiveness that are not conclusively refuted by the record) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV. Denial of All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

V. Future Amendments and the Discovery Process

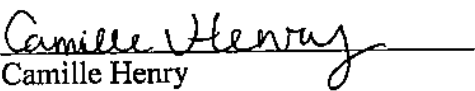
Applicant must specify any claims he intends to raise at the post-conviction relief evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant is represented by counsel, that attorney and not the Applicant is the only individual authorized to file amendments to this application for post-conviction relief. See Rule 11, SCRCP. Pro se filings will not be considered at the evidentiary hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent pursuant to Love v. State, Op. No. 27921 (S.C. Sup. Ct. filed October 2, 2019) (Shearouse Adv. Sh. No. 39 at 14), or, alternatively, Respondent will move for a continuance in the matter. See Love, at 24 (Kittredge, J., dissent) (“If, however, the proposed

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	
	)	2019-CP-32-02814
	)	
JO PRADUBSRI, #181097	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Overture E. Walker, Esquire
Stoney & Walker, LLC
1527 Blanding Street
Columbia, South Carolina 29201**

DATED this 21st day of February, 2020.


Camille Henry
Legal Assistant

amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

VI. Conclusion

WHEREFORE, Respondent requests that an evidentiary hearing be held on Applicant's claims.

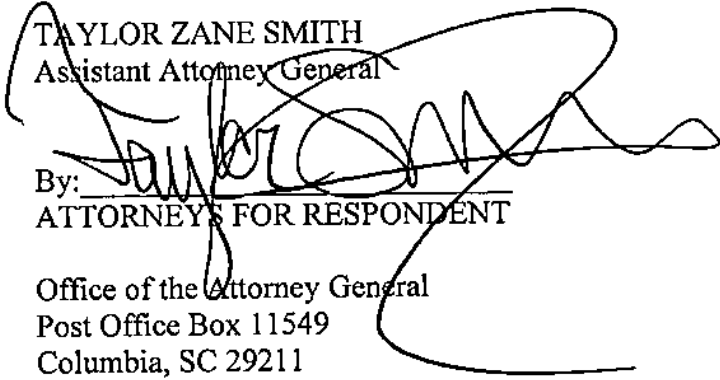
Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

TAYLOR ZANE SMITH
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

February 21, 2020

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
	)	2019-CP-32-02814
	)	
JO PRADUBSRI, #181097	)	
	)	
Applicant,	)	
	)	
vs	)	CERTIFICATE OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent,	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Overture E. Walker, Esquire
Stoney & Walker, LLC
1527 Blanding Street
Columbia, South Carolina 29201

DATED this the 21st day of February, 2019.

 Camille Henry, Legal Assistant
 For Respondent

Date: 3/9/20

Re: Jo Pradubsi v. State of South Carolina
Case No: 2019-CP-32-2814

Dear Clerk

can you please amend the following two issues
to my ~~RE~~ PCR application. I thank you in advance
for your attention in this matter.

Jo Pradubsi
Yours Truly

FILED

2020 MAR 17 PM 12:30

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

CC: Attorney General assistant
Taylor Z. Smith

Lisa M. Comer, Clerk of
Court

ARGUMENT

- 11 (e) Ineffective assistance of counsel for failing to object to the charging of both actual and Constructive Possession when state evidence did not support either theory or Joint Possession.
- (F) Ineffective assistance of counsel for failing to object and state concisely the grounds for the objection due to trial Judge denial to reveal the identity of the alleged informant Violated the applicant right to cross-examine in violation of the Confrontation clause.

FILED
 2020 MAR 17 PM 12:30
 LISA M. COMER
 CLERK OF COURT
 LEXINGTON SC

ORIGINAL 4

573

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

JO PRADUBSRI,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-32-02814

MOTION FOR A CONTINUANCE

NOW COMES the Applicant's appointed counsel Ola Johnson in the above-captioned action, acting who hereby moves to continue the hearing scheduled for the week of December 14, 2020. In support of this motion, counsel for Applicant would show unto this Honorable Court the following.

Counsel was appointed to represent Applicant for his Post Conviction Relief application by the order signed by the Lexington County clerk of court dated January 2nd, 2020. Applicant was placed in quarantine at Lee correctional for a period of 90 days and feels that he needs additional time to prepare for his evidentiary hearing. In addition, Applicant also wants the hearing to take place in person to allow communication between counsel and applicant and currently the hearing is scheduled to be online.

WHEREFORE, having set forth his grounds, the Applicant moves this Honorable Court to issue such order as is just and proper.


OLA JOHNSON
Attorney for Applicant
803-360-8692
olajohnsonlaw@gmail.com

Lexington, South Carolina

This 18 day of November, 2020

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

JO PRADUBSRI,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-32-02814

CERTIFICATE OF SERVICE

FILED
2020 NOV 18 PM 2:33
CLERK OF COURT
LEXINGTON SC

I, Ola Johnson, hereby certify on that on November 18, 2020, I served a copy of the
MOTION FOR A CONTINUANCE on Taylor Smith, Assistant Attorney General by Email and U.S.
Mail to the following address:

Taylor Smith, Asst. Attorney General

SC Attorney General's Office

P.O. Box 11549

Columbia, S.C. 29211

Date

11/18/20


OLA JOHNSON

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
 JO PRADUBSRI,	)	 CASE NO.: 2019-CP-32-02814
	)	
Applicant,	)	
	)	
v.	)	AMENDMENT TO APPLICATION
	)	FOR POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

Applicant, Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief filed July 15, 2019. This amended complaint adopts and includes all grounds in the original application and the amended application filed by Applicant on March 17, 2020. Applicant further alleges as additional grounds regarding these claims and his claim of ineffective assistance of counsel as to Dayne Phillips and David Mauldin as follows:

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), (p 22 line 21 to p23 line 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 applicants Trafficking charge from a 1st to a 3rd offense at sentencing.

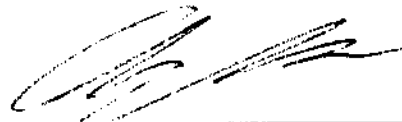
**CLERK IN
ERROR**

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 states 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 Melissa 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 Melissa 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 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 Melissa 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 Melissa 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 Melissa 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).

Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



OLA JOHNSON
 Attorney for Applicant
 P.O. Box 549
 Lexington, SC 29071
 803-360-8692 Phone
 olajohnsonlaw@gmail.com

This 9 day of June, 2021.

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

JO PRADUBSRI,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-32-02814

CERTIFICATE OF SERVICE

I, Ola Johnson, hereby certify on that on June 9, 2021, I served a copy of the AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on Taylor Smith, Assistant Attorney General by Email and U.S. Mail to the following address:

Taylor Smith, Asst. Attorney General

SC Attorney General's Office

P.O. Box 11549

Columbia, S.C. 29211

Date

6-9-21

OLA JOHNSON

**CLOCK IN
ERROR**

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
BILLY JOHN GEISENDORFF,	)	
	)	CASE NO.: 2019-CP-32-02024
Applicant,	)	
	)	
v.	)	
	)	CERTIFICATE OF SERVICE
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

I, Ola Johnson, hereby certify on that on June 7, 2021, I served a copy of the AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on TAYLOR SMITH, Assistant Attorney General by Email and U.S. Mail to the following address:

TAYLOR SMITH, Asst. Attorney General

SC Attorney General's Office

P.O. Box 11549

Columbia, S.C. 29211

Date

6-7-21

OLA JOHNSON

CLERK OF COURT
ELEVENTH JUDICIAL CIRCUIT
JUL 7 2021
JUL 7 PM 3:15

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

JO PRADUBSRI,
JONATHAN HUGHES
BILLY GEISENDORFF
MATTHEW DARAZS
LAKLYN REGISTER

Applicant

vs.

STATE OF SOUTH CAROLINA,
Defendant

ORDER OF CONTINUANCE

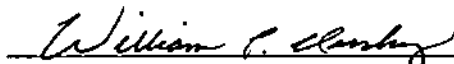
CASE NO. 2019-CP-32-02814
2019-CP-32-04424, 2020-CP-32-01580
2019-CP-32-02024, 2019-CP-32-03166

FILED
2021 JUL -7 AM 11:46
CLERK OF COURT
ELEVENTH JUDICIAL CIRCUIT
LEXINGTON, SC

This matter came before the court on June 22, 2021 upon the motion of Ola Johnson, attorney for the above-named applicants who have been placed on the 11th Circuit Post Conviction Relief Roster for the week of June 28, 2021. Following a communication with counsel for Applicants and counsel for Defendant, Lillian L. Meadows with the South Carolina Attorney General's office, it appears to the court that Ola Johnson has been placed on a trial list in Richland General Sessions court for the week of June 28, 2021. Due to this conflict and with the consent of Defendants counsel these matters will be continued.

IT IS HEREBY ORDERED that these matters will be continued.

IT IS SO ORDERED this 23rd day June, 2021


The Hon. William P. Keesley
Chief Administrative Judge
Eleventh Judicial Circuit

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
JO PRADUBSRI,	)	CASE NO.: 2019-CP-32-02814
	)	
Applicant,	)	
	)	
v.	)	SECOND AMENDMENT TO
	)	APPLICATION
	)	FOR POST CONVICTION RELIEF
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

Applicant, by and through his undersigned attorney, hereby amends his application for Post-Conviction Relief filed July 15, 2019. This amended complaint adopts and includes all grounds in the original application and the amended application filed by Applicant on March 17, 2020. This amended complaint also adopts and includes all grounds in the Amendment to Application for Post Conviction Relief filed June 9, 2021. Applicant further alleges as additional grounds regarding these claims and his claim of ineffective assistance of counsel and denial of Due Process as to Dayne Phillips and David Mauldin as follows:

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), *Bailey 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.

Furthermore, the Applicant requests that he be permitted to Amend his PCR application to conform to the evidence presented at the PCR hearing should any new or unaddressed issues arise during the course of the hearing that have not been specifically addressed in the Application. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

Respectfully submitted,



OLA JOHNSON
Attorney for Applicant
P.O. Box 549
Lexington, SC 29071
803-360-8692 Phone
olajohnsonlaw@gmail.com

This 18 day of June, 2021.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
JO PRADUBSRI,)
Applicant,)
v.)
STATE OF SOUTH CAROLINA,)
Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

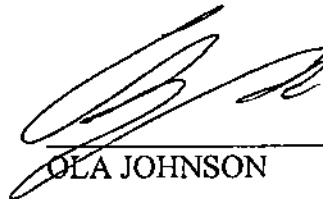
CASE NO.: 2019-CP-32-02814

CERTIFICATE OF SERVICE

I, Ola Johnson, hereby certify on that on June 18, 2021, I served a copy of the
SECOND AMENDMENT TO APPLICATION FOR POST CONVICTION RELIEF on Lillian L.
Meadows, Assistant Attorney General by Email and U.S. Mail to the following address:

Lillian L. Meadows, Asst. Attorney General
SC Attorney General's Office
P.O. Box 11549
Columbia, S.C. 29211

6-18-21
Date


OLA JOHNSON

FILED
2021 JUN 18 AM 9:08
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA) IN THE SOUTH CAROLINA CIRCUIT COURT
COUNTY OF LEXINGTON) C.A. NO. 2019-CP-32-02814

JO PRADUBSRI	)
Plaintiff,	)
versus	)
STATE OF SOUTH CAROLINA	)
Defendant.	)

H E A R I N G

DATE: June 8, 2022
TIME:
LOCATION: South Carolina Circuit Court 11
JUDGE: Jocelyn Newman
TRANSCRIBED BY: Lynda Monroe

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

APPEARANCES:

Ola Johnson, Esq.
Ola Johnson, Attorney at Law
201 W. Main Street, Suite E
Lexington, South Carolina 29072

Attorney for the Plaintiff,

Lillian Meadows, Esq.
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, South Carolina 29201

Attorney for the Defendant.

INDEX

Preliminary Discussion.....					4
Examination of	Direct	Cross	Redirect	Recross	
Jo Pradubsri	15	29	--	--	
Dane Phillips	31	50	65	--	
Jo Pradubsri	71	--	--	--	
Argument by Lillian Meadows					72
Certificate of Reporter.....					74

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL
IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 PROCEEDING

2 THE COURT: All right. Let's do this. Let me start
3 with the Applicant Ms. Johnson.

4 MS. JOHNSON: Your Honor, I think my client wants to
5 make a statement or ask a question of the Court.

6 THE COURT: Yes, sir.

7 MR. PRADUBSRI: Yes, Your Honor. Before we get started
8 I want to clarify a few things. Under what authority this
9 Court's operating under?

10 THE COURT: This is a constitutionally created court.

11 MR. PRADUBSRI: So --

12 THE COURT: Under the Constitution of the State of
13 South Carolina.

14 MR. PRADUBSRI: So when you're saying the constitution,
15 are you speaking of judicial or legislative authority?

16 THE COURT: Have judicial authority under --

17 MR. PRADUBSRI: Are we arguing statutes (inaudible)?

18 THE COURT: Absolutely.

19 MR. PRADUBSRI: Okay. So, well, if we're arguing
20 statutes, Your Honor, I would like to reserve my rights under
21 the UCC-1-306 and recourse and I'm asking this Court to
22 construe statute in accordance with the Constitution.

23 THE COURT: Okay.

24 MR. PRADUBSRI: Common law.

25 THE COURT: What do you mean by that?

1 MR. PRADUBSRI: What I mean under the statute there's
2 my operating under common law. We're under (inaudible)
3 statutes, legislative act.

4 THE COURT: Okay.

5 MR. PRADUBSRI: Yes. And under the UCC that's offering
6 me recourse, it's recourse to have this matter heard and
7 construed under common law as opposed to the legislature.

8 THE COURT: Okay. I hear you. Are you attempting to
9 represent yourself in this matter or are you comfortable with
10 Mr. Johnson's representation?

11 MR. PRADUBSRI: Well, Mr. Johnson is actually
12 representing my artificial person.

13 THE COURT: Okay.

14 MR. PRADUBSRI: I mean, I have no problem with him
15 representing my artificial person but I am a natural person
16 and I'm hear requesting that I be heard under common law.

17 THE COURT: Okay. Which one was - which person was
18 convicted of these crimes? The natural person or the
19 artificial person?

20 MR. PRADUBSRI: Well, I'm held liable for the
21 artificial person.

22 THE COURT: Right. So I'm focused on the conviction of
23 the artificial person.

24 MR. PRADUBSRI: Okay.

25 THE COURT: So we're going to let Jonathan handle that

1 because that's who he represents, right?

2 MR. PRADUBSRI: Okay. But are you going to represent
3 that under which authority? That's what I'm asking. Are you
4 going to construe --

5 THE COURT: I don't know how to --

6 MR. PRADUBSRI: -- are you going to construe the
7 statutes under legislating with him or under common law?
8 That's why I'm asking you that I'm willing to reserve my
9 rights. If we're going to hear this matter, I would like to
10 reserve my rights under UCC-1-103.6 that offers me recourse.

11 THE COURT: Okay. So what we're going to --

12 MR. PRADUBSRI: So all I'm asking the Court is to
13 construe the statute according to the common law.

14 THE COURT: Okay. But what we're here talking about is
15 the artificial person who was convicted, Mr. Johnson
16 represents the artificial person and my concern, today, is
17 the convictions of the artificial person, not the natural
18 person. That, clearly, are separate matter.

19 MR. PRADUBSRI: Okay. (Inaudible), Your Honor. I
20 notice your name is Ms. Newman. Are you any relationship to
21 Mr. Clifton Newman?

22 THE COURT: I am.

23 MR. PRADUBSRI: Are you his wife?

24 THE COURT: No, sir.

25 MR. PRADUBSRI: I mean, well, if you his wife

1 (inaudible), he was the judge that was in my trial.

2 THE COURT: I get that.

3 MR. PRADUBSRI: So I'm not sure if I can have a fair
4 proceeding because I'm making requests and I'm not getting
5 anywhere.

6 THE COURT: Okay.

7 MR. PRADUBSRI: You know, all I'm asking is to construe
8 the statute under common law.

9 THE COURT: And I hear your request.

10 MR. PRADUBSRI: So are you have the authority to do
11 that?

12 THE COURT: I have the authority to decide whether
13 you're entitled to post-conviction relief.

14 MR. PRADUBSRI: Well, I'm not understanding what
15 authority would that be under?

16 THE COURT: And I'm not understanding your question. I
17 don't know how to answer it any differently than I already
18 have.

19 MR. PRADUBSRI: Are you going to rule according to the
20 statute or common law case law?

21 THE COURT: I'm going to rule according to whatever law
22 applies to this matter. I don't know, specifically, what
23 your allegations are but whether that -- I need to look at
24 statutes or case law or common law or some combination of the
25 three. That's what I will do to make my determination.

1 MR. PRADUBSRI: Okay. Well, I'm not -- well, that's
2 what I'm saying. If you can move around under all those
3 different jurisdictions, I'm not understanding which one
4 you're going to apply.

5 THE COURT: Okay.

6 MR. PRADUBSRI: So how can I properly or effectively
7 arm with something if I don't know which jurisdiction you're
8 going to operate in?

9 THE COURT: Well, that's why I asked whether you're
10 representing yourself because I understood that Mr. Johnson
11 is representing you and Mr. Johnson will make arguments on
12 your behalf. We don't have dual representation in this kind
13 of matter.

14 MR. PRADUBSRI: Well, it's not dual representation at
15 all, Your Honor.

16 THE COURT: Well, it is if you're trying to represent
17 yourself and have Mr. Johnson represent you. It's one or the
18 other.

19 MR. PRADUBSRI: Well, he's not representing me
20 (inaudible). He's representing the corporate (inaudible).

21 THE COURT: And that's what I'm focused on here today.

22 MR. PRADUBSRI: Okay.

23 THE COURT: So that's why I need to talk to Mr.
24 Johnson.

25 MR. PRADUBSRI: So -- so if you're going under the

1 corporate (inaudible) then that means you're going to go with
2 the statutes.

3 THE COURT: If you say so.

4 MR. PRADUBSRI: I don't know, I'm asking.

5 THE COURT: Again, I don't know how to answer your
6 question any differently than I already have.

7 MR. PRADUBSRI: Well, Your Honor, if -- I reserve my
8 right under UCC as I stated before. If you don't -- just
9 note my traditional (inaudible) that I will be appealing the
10 decision. All right?

11 THE COURT: Okay.

12 MR. PRADUBSRI: All right. Thank you.

13 THE COURT: Absolutely.

14 Now, let's go back to the State to give me an
15 introduction to this case.

16 MR. JOHNSON: Thank you, Your Honor. May it please the
17 Court. This matter is Jo Pradubsri versus the State of South
18 Carolina, docket number 2019-CP-32-2814.

19 In February of 2009, Mr. Pradubsri was indicted for
20 trafficking in crack cocaine. Dealing in crack cocaine
21 within the proximity of a school and unlawful carrying of a
22 pistol. He was first convicted of these offenses following a
23 jury trial in February of 2010, which was reversed on appeal.

24 He, then, proceeded to trial a second time in November
25 of 2014, which I believe ended in a mistrial. And on January

1 13th through 15th, 2015, Mr. Pradubsri proceeded to a jury
2 trial before Judge Clifton Newman for trafficking in cocaine.
3 (Inaudible) crack cocaine within proximity of a school and
4 unlawful carrying of a pistol.

5 Dane Phillips (phonetically) and David Mauldin
6 (phonetically) represented Mr. Pradubsri and assistant
7 (inaudible) Casey Rankin (phonetically) and Gill Bell
8 (phonetically) prosecuted the case.

9 The jury convicted Mr. Pradubsri and indicated and
10 Judge Newman sentenced him to the mid -- for a minimum of 25
11 years for trafficking, 15 years for (inaudible) within the
12 proximity of a school and 1 year for unlawful carrying of a
13 pistol. His convictions were, then, affirmed on appeal. On
14 July 15th, 2019, Mr. Pradubsri filed a timely application for
15 PCR.

16 He's present today and represented by Mr. Johnson and
17 it's the State's understanding he is going forward on all of
18 the allegations raised in the amended and second amended
19 application which I believe is total 21 claims and we would
20 like to be heard on a motion to dismiss some of those claims
21 at the appropriate time.

22 THE COURT: Okay. Tell me -- if you can tell me by
23 number on the amendments which you're moving to dismiss?

24 MS. MEADOWS: Yes, ma'am. So on the first amended
25 application, allegation number 2, number 3 and then numbers

1 13, 14 and 15 and then the first allegation in the second
2 amended application.

3 THE COURT: Let me hear your motion now.

4 MS. MEADOWS: Yes, ma'am. So allegation number 2 is an
5 allegation that trial counsel was ineffective for failure to
6 state sufficient grounds and to object to the Court's denial
7 of the defense motion to order the State to reveal the
8 identity of the confidential informant and this was on page,
9 I think, 109 of the transcript.

10 Defense counsel did move to reveal the identity of the
11 CI. He made extensive arguments on this issue. I'm not
12 entirely sure what Mr. Johnson means by (inaudible) to state
13 sufficient grounds regarding the Court's denial of the
14 motion.

15 In response to the judge's ruling Mr. Phillips actually
16 state, on page 110, we just stand firm on our argument and
17 written motion that's marked as Court's Exhibit No. 3.
18 Additionally, the Court of Appeals (inaudible) issues
19 preserved and found that Judge Newman probably acted within
20 his discretion and denied the motion. So, essentially, that
21 matter was raised and ruled upon on direct appeal.

22 And similar argument for allegation number 3, which was
23 that counsel was ineffective for failure to properly
24 challenge to stop and search of a vehicle. Again, Mr.
25 Phillips filed a written motion to suppress the drug and he

1 argued the officer did not have reasonable suspicion to
2 justify the traffic stop. Judge Newman found the officer had
3 reliable information provided by the informant such that he
4 had reasonable basis to stop the car. This issue was also
5 raised and rejected on appeal. The Court of Appeals found
6 there was evidence to support Judge Newman signing that. Law
7 enforcement had a reasonable suspicion to make the stop.

8 And then allegations 13, 14 and 15 is that (inaudible)
9 ineffective (inaudible) to renew objections pertaining to
10 testimony that he argued was improper 404(b) evidence and
11 that involved the testimony of Melissa Martin. The specific
12 issues were raised and objected on appeal and, therefore,
13 they were clearly preserved and it's the State's position Mr.
14 Pradubsri cannot establish prejudice on this or any other --
15 any of the other (inaudible) raised on appeal.

16 And then finally as to the first allegation in the
17 second amended application which is failure to object to the
18 jury charge on constructive possession. This particular jury
19 charge was found to be improper in *State v. Stewart*, the case
20 that Mr. Johnson cites and that was issued in 2021, and it's
21 our position is that that the charge was proper back in 2015,
22 when this trial occurred, and under *Strickland*, *Strickland*
23 did not require counsel to be clairvoyant or anticipate
24 future changes in the law to provide effective assistance.
25 So essentially the charge was proper at the time.

1 THE COURT: Got it. Mr. Johnson, let me hear from you
2 as to the motion to dismiss.

3 MR. JOHNSON: Your Honor, well, I'll just start out I
4 think the AG misstated. She was referring to -- she said --
5 I think she said number 3. I think she was arguing number 4
6 for traffic stop.

7 MS. MEADOWS: Yes, that might've been.

8 MR. JOHNSON: Okay. And 3 was, yes, the general
9 clarity.

10 MS. MEADOWS: Oh, yes, I'm sorry. That was number 4.

11 MR. JOHNSON: Okay. So we'll list that as 4 -- 2, 4
12 and then 13, 14, 15. I don't have any additional case law,
13 Judge. I was just, of course, going to go through and
14 testify. I have testimony of my own client and cross-examine
15 the trial counsel and try to support that through that. I
16 have no additional case law, though, for any of those, Your
17 Honor, and it's true that the other issues, once again, I
18 have nothing new to offer but I think except (inaudible) any
19 possible testimony of cross-examination that happens at the
20 hearing and obviously we haven't heard that yet.

21 And for the second amended application number 1, that
22 is case law that came out after the trial but that would be
23 an argument that I wanted to make and I don't have anything
24 additional, Judge, but simply as trial counsel argued that,
25 you know, they should've known that as possible objective.

1 THE COURT: What about the fact that on the first
2 amendment each of these issues was raised and ruled upon as
3 objective direct appeal?

4 MR. JOHNSON: Well, I have no -- nothing to count on
5 that. I would just simply say that if that's the case, I
6 have nothing additional to add to those. (Inaudible). I
7 think that's 13, 14, 15, but I have nothing to add to it.

8 THE COURT: Is it not 2 and 3, as well, or 2 and 4?

9 MS. MEADOWS: 2 and 4.

10 THE COURT: I'm sorry. Thank you.

11 MR. JOHNSON: Well, Your Honor, on 2 -- 2 and 4 would
12 be directed at their argument at trial.

13 THE COURT: All right.

14 MR. JOHNSON: Not necessarily the preservation --

15 THE COURT: Right.

16 MR. JOHNSON: -- with the objections and 13, 14, 15.
17 We're talking about the arguments there. I don't have
18 anything to add as far as case law but that would be a
19 separate argument I think.

20 THE COURT: Right. Yeah, I would agree with you. So
21 as to 13, 14, 15, on the first amendment the motion to
22 dismiss is granted. Those arguments are essentially that
23 these things were -- there was a failure to object and the
24 issues were not on appeal or preserved properly or they
25 couldn't have been preserved for appeal -- they couldn't have

1 been ruled on in the appeal had they not been objected to and
2 preserved at the time of trial and clearly they were because
3 the Court of Appeals addressed those. The motion to dismiss
4 is granted as to 13, 14, 15, and the remainder I'll have to -
5 - I'll withhold ruling on and that includes number 1 on the
6 second amendment. I mean, on its face it seems like a proper
7 argument for dismissal but I need to review the case law
8 myself.

9 MS. MEADOWS: Yes, ma'am.

10 THE COURT: Okay. Mr. Johnson, call your first
11 witness.

12 MR. JOHNSON: I call Mr. Pradubsri.

13 JO PRADUBSRI

14 was called as a witness, and having been first duly sworn,
15 testified as follows:

16 THE COURT: Have a seat and state your full name,
17 please, sir.

18 THE WITNESS: Jo Pradubsri.

19 THE COURT: Your witness.

20 MR. JOHNSON: Yes, ma'am. Thank you.

21 DIRECT EXAMINATION

22 BY MR. JOHNSON:

23 Q. You ready, Mr. Pradubsri?

24 A. Yes, I'm ready.

25 Q. All right, Mr. Pradubsri. Now, just starting out

1 with the amended application, when we went through and you
2 reviewed the transcript of trial starting with the selection
3 of jurors, page 11, lines 17, 18, do you recall that
4 attorneys Dan Phillips and David Mauldin, were those the
5 attorneys that represented you on this matter?

6 A. Yes.

7 Q. Okay.

8 A. They were.

9 Q. Okay. And do you recall that during jury
10 selection there was a juror, Sarah McIntosh, Juror 122,
11 selected and was actually a member or said she was a member
12 of Mothers Against Drunk Driving and they selected -- your
13 counsel did not object or attempt to strike that juror. Do
14 you remember that?

15 A. That's correct.

16 Q. Okay. Is that something you feel they should've
17 done?

18 A. I mean, I -- I don't know how that would've
19 changed but if that's a possibility. If -- if I said yes,
20 that would be only speculation and I'm not here to speculate.
21 If that would've changed anything that they done that or not.
22 But far as the -- them not objecting, I'm -- I'm not sure how
23 that would affect anything.

24 Q. Okay. Moving on to number 2. When referencing
25 this argument or the revealing and identity of the

1 confidential informant pretrial, do you feel like they did a
2 sufficient job in arguing that to try to attain that
3 information from law enforcement?

4 A. No. They -- they -- I -- I feel like they
5 definitely didn't do that because that is -- that is a
6 crucial witness. That was the only witness that could prove
7 my guilt or innocence.

8 Q. And you've never learned the nature of the name,
9 the identity of the confidential informant?

10 A. I never learned anything. I mean, if I have a
11 right to face my accusing, if somebody accusing me of
12 anything or making a statement, I thought I had a right to
13 cross examine them but they intentionally held that from me.
14 They could've gave me some exculpatory information. Who
15 knows. They kept that away from me.

16 Q. And --

17 A. And I believe that was very prejudicial. I mean,
18 I couldn't properly defend myself if I don't have all the --
19 all the evidence and I don't have all the facts.

20 Q. Do you feel like they properly investigated the
21 case or viewed the evidence with you?

22 A. No, no I don't.

23 Q. How many times did they meet with you?

24 A. They -- they met with me from time-to-time. I --
25 I would say maybe two, three.

1 Q. Okay. And did they ever have a private
2 investigator come and talk to you to work on the case?

3 A. No.

4 Q. Did they ever deliver a copy of the discovery of
5 the evidence to you?

6 A. I -- I don't remember the discovery, no. I
7 might've got it in the mail or something.

8 Q. Do you feel like you were able to review all the
9 evidence prior to trial?

10 A. I reviewed it but I haven't -- they haven't
11 reviewed it with me so, at that time, a lot of it I didn't
12 get the understanding of what was going on at that time.

13 Q. Do you feel like you had questions that you were
14 not able to ask? Is that what you're indicating?

15 A. Well, what I'm saying is at that time I wouldn't
16 know what questions to ask.

17 Q. Okay.

18 A. I mean, I felt it was my attorney. They would
19 give me the information that I need.

20 Q. And regarding the issue of the traffic stop and
21 the challenge at pretrial, do you feel like they did a
22 sufficient job there in trying to keep this evidence out and
23 challenge the traffic stop?

24 A. No. I -- I don't think they challenged the stop
25 effectively because, you know, for one, they never

1 established probable cause. They -- they basically stopped
2 on -- on an informant's tip and -- and they never attempted
3 to see how this tip established probable cause or reasonable
4 suspicions. We don't even know what information was provided
5 --

6 Q. All right.

7 A. -- to the authorities for him to even justify the
8 stop. They say -- they say the reason was suspicion but
9 based on what? Based on what information was provided?

10 Q. And do you feel that they advised you improperly
11 about whether or not you should testify?

12 A. Well, far as I -- when I talked with Mr. Phillips,
13 I -- I did tell him that I did want to testify but he talked
14 me out of it and -- and I agree, but knowing what I know now,
15 that had I testified, I could've presented my own evidence.
16 I -- I didn't put anything on the record to contradict
17 anything. No testimony what anybody else said. So I think
18 that kind of prejudiced my case as well.

19 Q. Do you feel like they convinced you would not be
20 to your benefit to testify?

21 A. Right. Exactly. It wasn't -- it wouldn't benefit
22 me because the burden of proof was on them but now I
23 understand that if I don't present anything, there's nothing
24 to contradict or -- or challenge what the State's -- the
25 State's evidence.

1 Q. Moving on to number 6, the amended application.

2 Do you recall they failed to object to enhancement of the
3 trafficking charge from a 1st to a 3rd offense at sentencing?

4 A. Yes. They -- they failed to do that. Clearly, on
5 my indictment, even in the body of the indictment it states
6 clearly that it was a first offense. Whatever -- if they
7 meant to enhance it or whatever they wanted to do, they
8 could've easily went back to the grand jury and -- and
9 enhanced it.

10 Q. All right. And regarding the arguments made, do
11 you feel they failed to properly make a directed verdict
12 motion focusing on what you refer to as material variance?
13 Where there was argument made and jury charge -- later on the
14 jury charge, but an argument made that there will be actual
15 constructive possession as well as joint possession of drugs?

16 A. Hold on one second. You confused me just now.
17 Can you say that, again, now?

18 Q. Just do you feel it's insufficient argument made
19 regarding motion for directed verdict?

20 A. Yes. Far as the directed verdict is concerned?
21 He only moved for directed verdict based on deficiency of the
22 evidence. My whole argument is that he should've moved for
23 direct verdict based on material variance. Everytime that
24 the State has to offer dealt with somebody else. Somebody
25 else committing the crime, somebody else was in possession.

1 All that was coming in my trial.

2 I would like to put on the record, read my indictment
3 into the record so important to get an understanding what it
4 is my issue is with this directed verdict argument.

5 MR. JOHNSON: Judge, I'm going to hand a copy of the
6 traffic indictment if it's all right with the Court to do
7 that?

8 THE COURT: Yes, sir.

9 THE WITNESS: My indictment says that (inaudible) on
10 February 9th, the grand jury of Lexington County presented
11 upon their oath that Jo Pradubsri did, in Lexington County,
12 South Carolina, on or about November 9th, 2008, knowingly and
13 intelligent, willfully and unlawful was in actual,
14 constructive possession or did, knowingly and intentionally
15 attempt to become actual or constructive possession of crack
16 cocaine, a controlled substance under provision 4450310
17 (phonetically) and also in (inaudible) of 28 grams or more
18 but less than 100 grams. In violation of 445337(e)(2)(b)(1).

19 So clearly in the part of the indictment, it's a first
20 offense, but as far as the directed verdict, all the evidence
21 that was presented at trial was someone else committing the
22 crime. All the officers' testimony pertained to someone
23 else. There's nothing on the record. Nobody took
24 (inaudible) that Jo Pradubsri did anything, so my argument is
25 the evidence that they presented at trial was different than

1 what the events in the indictment and this is what I'm basing
2 the trial on. Is what I did, not what somebody else did.

3 Q. Are you referencing Melissa Martin?

4 A. Yes, I am.

5 Q. And her testimony?

6 A. The whole trial is based on Melissa Martin and the
7 drugs she sold. The drugs she had in her possession. So
8 based on my indictment, I'm trying to figure out what this
9 evidence had to do with me.

10 Q. All right. If you've finished your answer, I'll
11 move on.

12 A. Yes, please.

13 Q. Number 8 from the amended application. Mr.
14 Phillips and Mr. (Inaudible), did they fail to (inaudible)
15 court charge to the jury with actual and constructive
16 possession and joint possession, they went beyond the scope
17 of the allegations in the indictment for trafficking?

18 A. Yes. Yes, sir. Number 8?

19 Q. Yes.

20 A. Yes. Number 8. Yeah, they failed to object to
21 the judge erroneous jury instructions on two theories. As
22 far as they (inaudible) the jury on actual possession and
23 constructive possession. Under (inaudible), State versus
24 (inaudible), the Court held that it was an error. It was
25 erroneous to instruct on both theories.

1 I mean, if you making allegations how you allowing him
2 to instruct on two different theories or three theories? In
3 my case it was three -- three theories. He instructed them
4 on actual possession, constructive possession and joint
5 possession.

6 Q. All right. And on number 9, moving to that
7 allegation, do you recall that they failed to file rule 6,
8 objection to the change of custody, demanding presence, chain
9 of custody to the trial?

10 A. Can you repeat that question, again?

11 Q. Do you recall whether or not they failed to file a
12 rule 6 objection demanding the chain of custody witnesses at
13 trial?

14 A. Yeah, I don't recall him doing that.

15 Q. Okay. And just moving to number 10, do you recall
16 if they -- have you any justification why they failed to
17 object to hearsay testimony from Officer Grinstead
18 (phonetically) regarding statement by Melissa Martin that
19 there were "drugs in her pants." Page 222, line 1. There
20 were justified use why they failed to object to that?

21 A. No, he never justified but my -- my question is
22 what that have to do with my case?

23 Q. Um-hum.

24 A. Melissa Martin's -- Melissa Martin's not in my
25 indictment.

1 Q. Okay.

2 A. There's no allegation of a conspiracy.

3 Q. All right.

4 A. So I'm trying to figure out well why she even
5 being mentioned.

6 Q. All right. And moving on to number 11. Do you
7 recall them giving you any justification why they failed to
8 object to the hearsay testimony from Officer Grinstead
9 regarding the statement by Melissa Martin that "rocks had
10 fallen out of the baggie into her pants?" Page 222, line 7
11 and 8.

12 A. You ask me what, now? I didn't --

13 Q. Did they ever justify to you why they filed to
14 object to that?

15 A. No, they didn't. No, they never have.

16 Q. Okay. And moving on to number 12. Did Mr.
17 Phillips or Mr. Moen (phonetically) ever argue or explain to
18 you why they failed to object to testimony that was not the
19 evidence from Ms. Homer, the drug analyst, stating now when
20 you -- "now when you finally open the biscuit and determine
21 it wasn't tampered with, how did you go about testing to that
22 point?" Page 237, lines 18 through 20.

23 So did they ever explain to you why they did not object
24 to the solicitor stating that in a question?

25 A. No. No, they haven't.

1 MR. JOHNSON: And, Judge, at this time I'm going to
2 skip 13, 14, 15, since I believe you ruled on those.

3 THE COURT: Yes, sir.

4 BY MR. JOHNSON:

5 Q. Number 16, did they explain why they failed to
6 renew objection to questions before Melissa Martin? Answer:
7 "Okay, now what were you all doing at that (inaudible)? We
8 went there to make two serves." Page 292, lines 23 through
9 25.

10 Did they ever explain to you why they failed to renew
11 an objection to that?

12 A. No, no, I do not but then, again, what does that
13 evidence right there have to do with me?

14 Q. Right.

15 A. Melissa is making two serve. How do you -- how
16 are you applying that even in my case?

17 Q. And number 17, did they ever explain to you why
18 they failed to object to leading question to Melissa Martin
19 regarding her letter to the solicitor, "You are essentially
20 saying you would tell the truth?" Answer: Yes, sir. Page
21 301, lines 10, 11, 12.

22 Did they ever discuss that with you or explain that to
23 you?

24 A. No.

25 Q. Moving on to 18, did trial counsel Phillips and

1 Moen fail to explain to you why they failed to object to
2 testimony by Brian Love of the ATF? Page 355, lines 12 and
3 13, indicating the amount of drugs were related to "drug
4 trafficker." And this was cited during trial counsel's
5 motion for mistrial. Page 356, line 23 through 25. Because
6 this witness was to be used to establish intent as to the
7 proximity charge. The Court denied the motion and note that
8 counsel had failed to object to the testimony.

9 Did they explain to you why they failed to object to
10 the testimony?

11 A. No, they didn't.

12 Q. That final statement where it says, "The Court
13 denied the motion and note that counsel failed to object to
14 testimony. Page 357, lines 1 through 24.

15 Moving on to the second amendment to application
16 post conviction relief. Do you recall that trial counsel or
17 did they ever explain to you why or do you recall they failed
18 to object to jury instruction during defining constructive
19 possession? Page 420, lines 14 through 16. Saying the
20 defendant's knowledge and possession may be inferred on the
21 substance found on the property under the defendant's
22 control. It says that was found to be improper under the
23 Layer (phonetically) case of 2021. State v Stewart.

24 They ever explain that to you why they failed to raise
25 an objection?

1 A. No, no, they haven't explained that to me. They
2 never have but far as that issue is concerned, they inferred
3 -- can you repeat that question again? I'm sorry.

4 Q. Sure. Did they -- trial counsel Phillips and Moen
5 ever explain they, to you, why they failed to object to jury
6 instructions defining constructive possession? On page 420.
7 "The defendant's knowledge and possession may be inferred
8 when the substance is found on the property, under
9 defendant's control. This having been later found to be
10 something that could not be charged under State v Stewart.

11 Did they explain why, at that time, they did not raise
12 an objection to that charge?

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

20 Q. All right.

21 A. There was no evidence that the drugs was found in
22 the area. The drugs was found on a person.

23 Q. All right.

24 A. That's not on this indictment.

25 Q. All right. And number 2, did they explain why

1 they failed to move for directed verdict based on what was
2 referred to as material variance where in the jury charge for
3 the trafficking in crack cocaine indictment. They had joint
4 possession, on page 420, lines 21 and 22. In addition to
5 actual and constructive possession, they had joint
6 possession.

7 Did they explain that to you why they failed to object
8 to that or include that in the direct verdict motion?

9 A. No, they didn't explain that. I mean, pretty much
10 whatever he instructed you went without any objection. I
11 mean, the only evidence is to support one thing. That
12 somebody else had actual possession.

13 Q. All right.

14 A. I mean, I'm basing this on the evidence in trial.
15 That someone else had possession. Now, there's no conspiracy
16 charge on my indictment. They didn't say I acted with
17 anyone. So why this Melissa Martin's continuously coming up
18 in my case?

19 Q. All right. Well, moving on and relating to that,
20 number 3. Did Mr. Phillips, Mr. Moen, did they discuss with
21 you why they failed to move for directed verdict to object to
22 the State's offer in evidence of, like you said, of
23 conspiracy and manufacturing and other evidence that went
24 beyond the scope of the charges in the indictment?
25 Specifically, the testimony of Melissa Martin. Did they ever

1 offer to you an excuse as to why they or an explanation about
2 why they failed to object to that?

3 A. No, no, they didn't.

4 Q. Okay. Or move for a directed verdict based on
5 that.

6 MR. JOHNSON: Your Honor, I believe that's all the
7 questions I have.

8 THE COURT: Cross-examination.

9 MS. MEADOWS: Just briefly, Your Honor.

10 CROSS-EXAMINATION

11 BY MS. MEADOWS:

12 Q. Mr. Pradubsri, you testified earlier, I believe,
13 that you did not realize that your charge was a third offense
14 until sentencing? You did not know you were being charged
15 for a third offense?

16 A. Right. According to the indictment, yes.

17 Q. Okay. Do you have a copy of the transcript?

18 A. Yes, I have a copy of the transcript.

19 Q. Okay. Could you turn to page 30 --

20 A. Um-hum.

21 Q. -- and 31.

22 A. 30 and 31?

23 Q. Yes.

24 A. Okay.

25 Q. Now, did Judge Newman not kind of go through this

1 with you and state you're found guilty, this would be a third
2 offense and you go through the mandatory minimum of 25 years?
3 So you told him you understood, correct?

4 A. Well, that's what my attorney told me that I was
5 facing but looking at the indictment, the indictment said
6 first offense.

7 Q. Okay. But your attorney had told you that it was
8 a third offense?

9 A. Yes.

10 Q. Okay. And then you also claimed your attorney
11 failed to investigate your case. Could you kind of explain
12 or tell the Court specifically what you believe they
13 should've investigated?

14 A. They should've investigated this informant. They
15 should've investigated finding out -- the informant is the
16 whole key to the case.

17 Q. And then you also claim that your attorney
18 improperly advised you not to testify and convinced you it
19 would not be to your benefit. What would you have testified
20 to that you believe would've helped your case?

21 A. What could've helped my case? I could've stated
22 that it was not mine. It was in her possession. I said
23 didn't even give me an opportunity to rebut anything that
24 Melissa Martin said. I mean, basically her testimony went
25 un rebutted.

1 Q. Okay.

2 MS. MEADOWS: Beg Court's indulgence. Nothing further,
3 Your Honor.

4 THE COURT: Any redirect?

5 MR. JOHNSON: No, Your Honor.

6 THE COURT: All right. You can go sit back next to
7 your lawyer.

8 (Witness excused.)

9 THE COURT: Any additional witnesses, Mr. Johnson?

10 MR. JOHNSON: No witness, Your Honor.

11 THE COURT: All right. From the State.

12 MS. MEADOWS: The State calls Dane Phillips.

13 DANE CHRISTIAN PHILLIPS

14 was called as a witness, and having been first duly sworn,
15 testified as follows:

16 THE CLERK: Have a seat and state your full name,
17 please.

18 THE WITNESS: Dane Christian Phillips.

19 DIRECT EXAMINATION

20 BY MS. MEADOWS:

21 Q. Good morning, Mr. Phillips. How long have you
22 been practicing law?

23 A. Ten years, going on 11.

24 Q. Okay. And how much of that time has been in
25 criminal law?

1 A. The entire time.

2 Q. Okay. And how did you become involved in Mr.
3 Pradubsri's case?

4 A. When I -- kind of the interesting thing. When I
5 was at appellate defense before I started working at the
6 Lexington County Public Defender's Office, I argued Mr.
7 Pradubsri's case before the South Carolina Court of Appeals.
8 That was, ultimately, overturned on a cross-examination 6th
9 Amendment issue.

10 The case went back to the Public Defender's Office.
11 During that time I transitioned from appellate defense over
12 to the Public Defender's Office. During his second trial,
13 David Mauldin (phonetically) was trying that case. If I
14 remember right there was a mistrial because the indictment,
15 the original indictments that had the word guilty written on
16 them were sent back to the jury.

17 Mr. Mauldin was so kind to ask me to first chair the
18 third trial and that's how I got involved.

19 Q. Okay. And so you were pretty familiar with this
20 case before you started, correct?

21 A. Yes.

22 Q. Okay. And would you mind giving the Court kind of
23 a brief explanation the facts of this or how these charges
24 arose?

25 A. Ultimately, the State's theory was that the police

1 had been doing an investigation. They had a confidential
2 informant, which there were a lot of pretrial issues related
3 to the confidential informant, which they said was a mere
4 tipster. We argued it was an active participant based on our
5 motion to reveal the identity. Ultimately, that didn't shake
6 out but with that basically they had a tip from this
7 informant who they end up conducting a traffic stop. We
8 challenged that at trial but, ultimately, the police conduct
9 a traffic stop. Ms. Martin is in, if I remember correctly,
10 in the passenger seat, Mr. Pradubsri is in the driver's seat.
11 The officer, if I remember correctly, testified that there
12 was affirmative (phonetically) movement which piqued his
13 suspicion or something to that nature which I challenged as
14 well.

15 But, ultimately, she gets out of the car and she says
16 something along the lines of all the drugs are mine. The
17 drugs are found, ultimately, in her underwear. She later
18 sends a letter to the solicitor's office that says she's
19 willing to do anything that needs to be done. Something to
20 that effect. I believe those were, like, the first words of
21 my opening statement since she was, ultimately -- she
22 received a very favorable deal. Got out of jail very quickly
23 and everything was, in my opinion, like an incentivized
24 witness the way it worked out and, ultimately, the jury
25 didn't agree with that argument.

1 The State's theory was that what Ms. Martin said was
2 true. That the drugs were in Mr. Pradubsri's possession but
3 during the commission of the traffic stop. That Mr.
4 Pradubsri handed her the drugs. Told her to hide the drugs
5 so she stuffed the drugs into her underwear and because he
6 would be getting in more trouble essentially based on his
7 prior record, that was -- the State's theory was that he had
8 the drugs. As they were getting pulled over by the police,
9 he handed the drugs over to her so she could claim them.

10 Q. Okay. So your trial strategy was essentially that
11 they were Ms. Martin's drugs and they belonged to her?

12 A. Yes. We hammered that pretty aggressively based
13 on my memory of the trial.

14 Q. Okay.

15 A. That they were solely her drugs.

16 Q. Right. And then do you recall, you know,
17 approximately how many times you met with Mr. Pradubsri
18 through the course of your representation?

19 A. We met with him numerous times. I can't remember
20 the exact number. I've, since, obviously, left the Public
21 Defender's Office. We do have the full banker's box full.
22 In looking at the notes I know we had multiple meetings and I
23 know Mr. Mauldin had plenty of meetings for the other two
24 with him prior to the other two trials and we had the two
25 transcripts from the prior two trials as well.

1 So it was one of those cases where we had a lot of
2 testimony ready for impeachment as far as the preparation. I
3 remember one specific time we met with him and we did a real
4 deep dive. Mr. Mauldin and I were there for a long time at
5 the jail going through all, of course, his constitutional
6 rights as well as just trial preparation.

7 Q. Okay. And then did you see any basis for
8 challenging any of the indictments?

9 A. At the time, no. I mean, unless there's something
10 presented to me otherwise. We raised a lot of pretrial
11 motions during the suppression hearing.

12 Q. Okay.

13 A. But there wasn't anything specific.

14 Q. Okay. But it was your understanding, from the
15 beginning, that this indictment was for a third offense, not
16 a first, correct?

17 A. That's correct.

18 Q. Okay. And then --

19 A. And had it said third we would've asked that that
20 be redacted if it was going to be read to the jury because it
21 would --

22 Q. Correct.

23 A. -- prejudice him.

24 Q. So it normally doesn't say which number offense --

25 A. It does not.

1 Q. -- in the indictment?

2 A. It's not supposed to.

3 Q. Okay. All right. And Mr. Pradubsri alleges he
4 fell to investigate his case and, you know, this situation's
5 a little bit different because it had been tried twice
6 previously. Did you do any additional investigation?

7 A. Any specific investigation, no. There wasn't
8 anybody that was provided to us that we felt was critical to
9 conduct a reasonable investigation.

10 Q. Okay. So you didn't believe there was anything
11 further you needed to investigate?

12 A. No. I'm trying to remember what was testified to
13 here in his direct as far as who he wanted us to speak with
14 but....

15 Q. (Inaudible) state the confidential informant?

16 A. Yeah. We -- we argued to reveal that strenuously.

17 Q. Okay. And then he also alleges you were
18 ineffective for failing to strike juror 122, Sharon McIntosh,
19 who she did not state she was a member, she stated she had
20 contributed, financially, to the organization of Mothers
21 Against Drunk Driving and that was on, let's see --

22 A. Did she, ultimately, make the panel?

23 Q. She did, but did --

24 A. You said 122?

25 Q. Yes. That's her juror number.

1 A. Yeah. Got female juror number 4.

2 Q. Did you consider striking her or did you think
3 possibly that her contribution to Mothers Against Drunk
4 Driving would hurt Mr. Pradubsri's case?

5 A. So I have my notes here that I actually have MADD
6 written out and circled, so I definitely took it under
7 consideration.

8 Q. Okay. All right. And then Mr. Pradubsri alleges
9 you were ineffective for failing to state sufficient grounds
10 and to object to the fourth denial of the defense motion to
11 order the State to reveal identity of the confidential
12 informant. Now, you file a written motion to reveal the
13 identity of the CI, correct?

14 A. Right, and argued it in pretrial.

15 Q. Okay. Do you have some (inaudible) what your
16 argument was?

17 A. Well, ultimately, what the case law is that when
18 you have a confidential informant under -- you have kind of
19 two cases. The United States Supreme Court cases Rosario,
20 United States versus Rosario, and then the State case is
21 State v Diamond.

22 But you've got to show the distinguish between what's
23 considered an active participant. Somebody that would fully
24 participate in it versus just a mere tipster. We argued that
25 it was somebody that was an active participant that,

1 ultimately, needed to be disclosed.

2 Q. Okay. And you had extensive arguments on that
3 particular issue, correct?

4 A. If I -- if I remember correct I argued and
5 objected and made so many arguments. I think towards, one
6 point of the trial, Judge Newman said that the constitution
7 needed to be written on the wall over there because I
8 mentioned it so many times.

9 Q. Okay. And Judge Newman, ultimately, denied your
10 motion, I believe, because he found the CI was not an active
11 participant nor a material witness. Is that your
12 recollection?

13 A. Yes. And I believe that was raised on direct
14 appeal if I --

15 Q. Correct.

16 A. I -- I wasn't the appellate defender, obviously,
17 who -- I think it was John Strohman --

18 Q. Okay.

19 A -- I believe it was raised on direct appeal.

20 Q. Okay. And then Mr. Pradubsri also alleges you
21 were ineffective for failing to properly challenge the stop
22 and search of a vehicle and I believe you also filed a
23 written motion challenging the stop, correct?

24 A. We did, and we argued pretrial during the
25 suppression hearing that there wasn't reasonable suspicion to

1 conduct the traffic stop because there's two reasons that an
2 officer pull a car over. There's probable cause of a traffic
3 violation, a reasonable suspicion of criminal activity.

4 Q. Okay. And, again, there are arguments on this
5 issue, correct?

6 A. Yes, and they were denied.

7 Q. Okay. And now did you discuss with Mr. Pradubsri
8 his right to testify or right to remain silent?

9 A. We did and, certainly, you know, I'll be pretty
10 direct on that. There was no threats or coercion. He
11 knowingly voluntarily and intelligently made his decision
12 whether to waive that right to testify and we went through it
13 extensive as far as strategic risks, you know, benefits to
14 testify and he made that choice.

15 Q. Okay. So that was, ultimately, his decision,
16 correct?

17 A. It was.

18 Q. Okay. And then he also alleges you were
19 ineffective for failing to file a Rule 6 motion objection to
20 the introduction of the State's drug analysis or chain of
21 custody being introduced by the report and I believe that's
22 on page 194. And during your cross-examination of Sergeant
23 Finch, you asked him about a form B, Rule 6 chain of custody
24 form, correct? I can show you the transcript.

25 A. Yeah, I'd have to see it.

1 Q. Okay.

2 A. Did we try this in '15 or '14? '15 I think.

3 Q. '15.

4 A. All right. What lines?

5 Q. I don't have lines written down but it's on page
6 194. I believe you asked him about this form?

7 A. Yes. So line 23, I say, now you also signed
8 what's considered a form B, Rule 6, what you all were talking
9 about the chain of custody forms and he said, yes, sir.

10 Q. Okay. So what's the purpose of the form B?

11 A. Well, ultimately, when you challenge chain of
12 custody you're saying that, and the case law is not great for
13 a criminal defendant, that in order to prove the integrity of
14 the evidence that it hasn't been materially altered or
15 destroyed or fabricated. That every person who comes in
16 contact with that evidence, there must be a list. A list of
17 people who touched it and how they handled it and that's your
18 chain of custody and whether you would have each one of those
19 people come into the trial and testify about their handling
20 of the evidence.

21 Q. Okay. And in light of that form being filled out
22 and everything, did you see any basis to challenge the chain
23 of custody?

24 A. Off the top of my head I don't believe there was
25 any issues that I saw where we would have made those -- you

1 know, made those arguments. I know the relevant cases, like
2 *State v Hatcher* or something of that nature, if we --

3 Q. Right.

4 A. -- if either David or I would've saw a chain of
5 custody issue, would've raised it.

6 Q. Okay. And, let's see, Mr. Pradubsri also raises a
7 couple allegations. That you failed to object to testimony
8 from Officer Andrew Grinstead regarding two alleged hearsay
9 statements made by Ms. Martin and I believe the first one's
10 on page 221.

11 A. Okay. And the statements were?

12 Q. Well, the (inaudible) did you (inaudible) and then
13 she answers -- I believe the line that Mr. Pradubsri is
14 claiming was hearsay was voir. She said, "I went ahead and
15 put gloves on," and she did tell me that there were drugs in
16 her pants.

17 A. Yeah, I mean, that -- that's -- well, I mean, we
18 wouldn't have objected to that because that's the whole
19 State's theory in the sense that she -- what one -- she
20 actually was caught with drugs in her pants. She testified
21 so you have a statement against interest. There wasn't going
22 to be really a hearsay problem for me because she's
23 testifying to that information. Our whole argument's that
24 the drugs are actually in her pants. So I don't see how what
25 -- yeah.

1 Q. Okay.

2 A. Our argument's is that the drugs were in her
3 pants.

4 Q. Okay. All right. And then also the second
5 statement's on page 222 and this is line 7 through 8. I
6 believe this is where she said, the bag was open, a lot of
7 the rocks had fallen out into her pants which she told me,
8 and then she goes on how we tried to shake her pants out, et
9 cetera.

10 Again, did you see any reason to object to that line of
11 testimony?

12 A. No. The same thing. Our whole argument was that
13 she was in actual possession of the drugs. That essentially
14 our defense was that Mr. Pradubsri was merely present of the
15 vehicle. Did not have knowledge. Was not in constructive
16 possession of those drugs.

17 Q. Okay. And one of Mr. Pradubsri's allegations is
18 also that you failed to properly state a directed verdict
19 motion and, you know, I'm not entirely sure what his argument
20 on that is but you did move for a directed verdict at the
21 appropriate time, correct?

22 A. Yeah. Do we know what the -- what it --

23 Q. I don't know. That's just what the allegation
24 says, but --

25 A. If I -- if I moved for it, I'm good.

1 Q. Okay. And then on page 237 I believe is the next
2 allegation. He states you were ineffective of failing to
3 object to this list or stating testimony that was not in
4 evidence for Emily Homer, the drug analyst, who stated that
5 now when you finally open the test kit and determine it
6 wasn't tampered with, how did you go about testing at that
7 point? And I believe prior to that, on page 236, she stated
8 she examined the field to make sure it wasn't tampered with.
9 She notated that on her report that the seal was intact.

10 In light of that testimony, did you see any basis to
11 object to (inaudible) question?

12 A. In the next question I see that that you say now
13 when you finally open the test kit (inaudible). At that
14 point?

15 Q. Yes.

16 A. Are they asking a follow-up question on 238?

17 Q. 237.

18 A. Yeah, that exact line?

19 Q. Yes.

20 A. No, I don't find that objectionable.

21 Q. Okay. All right. And then, let's see, on page
22 292 he also alleges you failed to renew your objection. When
23 (inaudible) asked Ms. Martin what she and Mr. Pradubsri were
24 doing at the Kroger together and, again, I believe this was a
25 404(b) issue that you raised at that point.

1 A. Right. So I see on 292, line 23, it says now,
2 what were you all doing at the Kroger store together? She
3 says, we went there to make two serves. I contemporaneously
4 object and renew prior motion and the Court overruled it.

5 Q. Okay. All right. And then on page 301, he
6 alleges you failed to object to the solicitor's question to
7 Ms. Martin regarding her letters that she wrote to the
8 solicitor's office. On page 301 where he asks, "You were
9 essentially saying you would tell the truth." Did you
10 believe that question was improperly leading?

11 A. Yeah, looking at it now I mean maybe I could've
12 objected about telling the truth issue but I remember on
13 cross -- as far as leading, sure, but I don't -- I didn't see
14 it's going to be overly prejudicial based on my cross. I had
15 a real aggressive cross of her. If I remember right I had
16 her explain that she had testified under oath, you know,
17 sworn, you know, with the Bible and she admitted she's a liar
18 if I remember right. At some point in the cross-examination
19 she says yes, I've lied in these other instances but I'm not
20 lying about this issue.

21 We attacked her credibility and truthfulness pretty
22 hard in cross-examination if I remember right.

23 Q. Okay. And then Mr. Pradubsri also alleges you
24 were ineffective for failing to object to testimony from the
25 ATF Agent Bryant Lovin (phonetically). I think this is on

1 page 355 where he, let's see -- well, first of all, Agent
2 Lovin handled testing of the two guns that were found in the
3 vehicle, correct?

4 A. I'd have to go back and look.

5 Q. Okay. But you did make a pretrial motion to
6 exclude testimony on the street value of the crack cocaine,
7 correct?

8 A. I did.

9 Q. Okay. And Judge Hammond denied your motion?

10 A. Yes.

11 Q. Okay. And Agent Lovin, who is ultimately
12 qualified as an expert on the street value of narcotics.

13 A. Yeah, which I still believe was improper, but....

14 Q. Okay. Now, on page 355, the solicitor asked him
15 "What does this amount of crack cocaine indicate to you?"
16 And he answers, "A drug trafficker. One who routinely
17 engages in the sale of narcotics." And then on page 356, I
18 believe you moved for a mistrial based on his testimony and
19 argued that it invades the province of the jury.

20 So I believe -- I'm sorry.

21 A. I'm just going to go ahead and enter, so I do -- I
22 do find that objectionable, you know, continuing objection
23 from what my previous arguments had made. It looks like they
24 got in a few other questions before I chimed in with a matter
25 of law and then, ultimately, argued for the -- is it a

1 mistrial?

2 Q. Yes.

3 A. And, you know, could -- could I have made it more
4 contemporaneously? Absolutely.

5 Q. Okay. Let's see, and then I believe you requested
6 Judge Newman give a curative instruction that he discussed on
7 page 358, correct? Just I think it was a curative on expert
8 testimony, (inaudible) expert witnesses.

9 A. Right. It looks I made several different
10 arguments and it says cautionary instruction. Do you have
11 where I asked for the curative?

12 Q. No. I just have that Judge Newman offered to give
13 that curative -- that cautionary instruction to you
14 (inaudible).

15 A. Yeah, ultimately for air preservation, for
16 appeals, when you make a motion for a mistrial if the judge
17 ultimately denies your request for a mistrial, you have to
18 ask for a curative and then basically say that the curative
19 would not cure the prejudice basically. You can't unring a
20 bell of argument where it's not preserved. It's a little bit
21 of a shell argument that I can't stand, personally.

22 Q. Okay. But at that point, did you believe that
23 that was kind of all you could do to adequately address that
24 concern about the drug trafficker testimony?

25 A. Yes. I wish I would've objected immediately.

1 However, I don't think that changed the Court's ruling. I
2 mean, to be fair Judge Newman had denied all the prior
3 motions that went to the heart of this issue and I -- and I
4 object a few lines later and as far as the transcripts
5 concerned and make the motion outside the presence of the
6 jury, in camera, for the mistrial.

7 Q. Okay. And then on page 420, Mr. Pradubsri alleges
8 that you failed to object to the jury instruction on
9 constructive possession which states, "The defendant's
10 knowledge and possession may be inferred where the substance
11 found on property under the defendant's control." And he
12 cites to the 2021 State v Stewart opinion which I believe
13 found the instruction improper and allowed the jury to find
14 the defendant guilty of trafficking without proving knowledge
15 and intent. But that was decided after this case, correct?

16 A. Right. This was 2015 when we had Mr. Pradubsri's
17 trial. The case you're citing is 2021. I'd have to review
18 the case. I know when we came here last time it got
19 rescheduled. I took a look at the case and there was
20 something I could've added to it.

21 Q. Okay. But it was your understanding, at the time,
22 that the charge on the constructive possession was correct?

23 A. Yes. That was my -- yeah, that was my belief at
24 the time.

25 Q. Okay.

1 A. Had I known otherwise or been clairvoyant enough
2 for that case I would've objected.

3 Q. Okay. And then what is also on page 420, he
4 alleges you failed to object to the Court charging the jury
5 with actual constructive and joint possession. It was beyond
6 the scope of the allegations in the indictment. You failed
7 to move for a directed verdict or object to the jury charge
8 that enlarged the trafficking in crack cocaine indictment
9 through a material variant by adding joint possession.

10 Now is joint possession a form of constructive
11 possession or how did that kind of factor in to the
12 constructive --

13 A. Well, I mean, ultimately that's the State's
14 theory. Again, if I'm wrong I think I'll find that on cross-
15 examination from Mr. Johnson, but the law allows for more
16 than one person to possess an item and that was charged to
17 the jury. I think that was the State's theory. There was
18 certainly evidence of that based on Ms. Martin's testimony.

19 Q. Okay. These all the drugs were found on her,
20 correct?

21 A. Yes.

22 Q. Okay. So did you see any basis to object to the
23 charge on joint possession?

24 A. I did not. You know, I -- it was one of those
25 where that charge, obviously, is highly detrimental to the

1 case but at the time I didn't feel that I had any legal basis
2 to object.

3 Q. Okay. And then he finally alleges that you failed
4 to move for a directed verdict or object to the State
5 offering evidence of conspiracy and manufacturing other
6 evidence that went beyond the scope of the charge in the
7 indictment. I'm not sure specifically what he's referring to
8 but if you look on page 374, during the charge conference, I
9 believe you talk about how this case was originally indicted
10 in 2009, and that the statute did not include the language in
11 the current statute regarding aiding and abetting,
12 manufacturing, et cetera.

13 A. And just to make sure, your last question and this
14 question were like bleeding through directed verdict and jury
15 charges so help me -- I don't want to say anything that's not
16 accurate. So keep me on point. Are we talking about
17 directed verdict or jury instructions?

18 Q. So we're talking about directed verdict but this
19 is regarding, I guess, the State offering evidence of
20 conspiracy and manufacturing but I'm referring to the
21 language that's in the new statute that discusses
22 manufacturing but I believe the solicitor agreed, on page
23 387, that when you asked the Court to exclude all that
24 additional language, correct?

25 A. Yeah. And I don't -- that wasn't included, right?

1 Q. Okay. I was going to ask you, on page 419, if you
2 could confirm that the judge did not include any of that
3 language.

4 A. No, I see the definitions for actual and
5 constructive possession, mere presence, the two or more
6 persons joint possession.

7 Q. But nothing about the aiding and abetting, et
8 cetera?

9 A. I do not see that.

10 Q. Okay. All right.

11 MS. MEADOWS: Nothing further from the State.

12 THE COURT: Mr. Johnson.

13 MR. JOHNSON: Thank you, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. JOHNSON:

16 Q. Mr. Phillips, is there anything helpful about
17 having the MADD contributor on the jury? Does that help with
18 the defense or do you prefer --

19 A. The fact that -- no. So in and of itself, no, in
20 a vacuum but there's more than -- to that juror I'm sure than
21 that person being a contributor of MADD. I don't have any
22 recollection of why I made the strategic decision but there
23 was, obviously, a reason I made the decision. It wouldn't
24 have been because of MADD because I'm looking at my jury
25 selection notes and I do have number 122 and MADD circled.

1 So it's something that I knew and still made the decision to
2 push for --

3 Q. Okay.

4 A. -- or select.

5 Q. And your arguments ultimately failed to get the
6 State to reveal the identity of this informant. You made
7 that argument at trial. That ultimately failed, correct?

8 A. Yes.

9 Q. Okay. And the investigation of the case, did you
10 ever have an investigator come talk to Mr. Pradubsri?

11 A. No.

12 Q. Okay. And --

13 A. Do you have any specific witnesses that you know
14 of?

15 Q. Did you have any witnesses interviewed?

16 A. No, but did he tell me any specific witnesses to
17 interview?

18 Q. I'll ask you. Did he tell you?

19 A. No.

20 Q. Okay. But you had none interviewed?

21 A. No.

22 Q. Okay.

23 A. Because there were none.

24 Q. Okay. So this lady that testified that was co-
25 defender with the drugs in her pants, did you try to talk to

1 her?

2 A. So actually that part you are correct. We could
3 have hired an investigator to go speak with Ms. Martin. We
4 did not do that.

5 Q. Okay. Was there a reason for that?

6 A. Because she had testified -- again, I'm coming in
7 on the third trial. Because she had testified in two prior
8 trials, I didn't see the need, at that point. I doubt her
9 testimony would be any different than the other two times she
10 testified under oath.

11 Q. Okay. And, ultimately, when you challenged the
12 traffic stop, that was not a successful challenge of the
13 search of the vehicle (inaudible)?

14 A. It -- it -- it wasn't. However, I -- I agree. I
15 believe it was a very suspicious traffic stop. I don't -- I
16 was very adamant about that and believe it was an improper
17 stop.

18 Q. Okay. Did you advise Mr. Pradubsri not to
19 testify?

20 A. I'll have to go back through. I can't remember
21 specifically if I said yes, no, but we definitely go -- every
22 trial I've ever had we go through the rights that it's
23 absolutely a defendant's decision. I'm sure in the trial
24 transcript Judge Newman did a colloquy with him, as well.
25 Again, I -- there are always a point when it's a credibility

1 case and we're arguing mere presence and our whole defense
2 has already been laid out, through cross-examination, that
3 there would've been clearly risks to Mr. Pradubsri to testify
4 that if his testimony was not 100 percent believable by the
5 jury if we would have created the reasonable doubt and during
6 the State's case-in-chief, that ultimately his testimony
7 would -- could ultimately could cause him to get convicted.

8 On the other side of the coin, it's true. And if he
9 testified he could have convinced the jury to believe him and
10 that's always a risk that you run either way. It's a tough
11 decision in every case because, you know, when you have a
12 credibility argument mere presence.

13 Q. Okay. Did you -- do you think you advised him it
14 would not be to his benefit to testify or you don't know?

15 A. I don't remember but potentially. I mean, it was
16 one of those cases where I -- I certainly could see myself
17 doing that.

18 Q. Did you fail to object to the enhancement of the
19 trafficking charge from 1st to the 3rd in sentencing?

20 A. I don't -- I don't believe there's any objection
21 if I remember right. I know he got significantly less time
22 at the end of this trial than he did from his original trial.

23 Q. Okay. Do you know why you failed to object or
24 what the reason was?

25 A. Nothing specific off the top of my head.

1 Q. Did you think of objecting to that?

2 A. At the time -- like I said I can't recall being
3 seven years later.

4 Q. Okay. On a directed verdict motion -- how you
5 stated the directed verdict motion, is it possible when you
6 look at the trafficking indictment, for example, that you can
7 review it and you can make a motion based on the fact that as
8 Mr. Pradubsri testified to you, there was nothing in here
9 about conspiracy and that they presented evidence going
10 outside the scope and enlarging the indictment, can you
11 object and make a directed verdict motion based on that?

12 A. Well, directed verdict motion doesn't have
13 anything to do with the indictment. It's about the evidence
14 presented during the State's case-in-chief. The indictments
15 are noticed document under Gentry, State v Gentry. The
16 directed verdict stage, as you know, is whether the State has
17 presented substantial circumstantial evidence or direct
18 evidence during their case-in-chief.

19 Q. All right. And you felt that was sufficient, the
20 motion you made was sufficient?

21 A. Yes.

22 Q. Okay. The -- when you had the jury charge and why
23 did you fail to object to the charge of actual in
24 constructive possession but also joint possession since joint
25 possession is not listed in the indictment?

23 Q. Mr. Phillips, do you feel that it's a problem for
24 you to defend your client with something that was not listed
25 in the indictment? It was outside the scope of the

1 indictment?

2 A. I believe under the case law, and I've certainly
3 argued plenty of times, where -- to that very issue. When
4 you have an indictment, unfortunately in the case law, post
5 State v Gentry, is essentially that it's a notice document.
6 Is to put you on notice. If I remember correct, the
7 indictment alleges that he is in possession of the narcotics.
8 Does it say actual possession on the (inaudible).

9 Q. Well, I can hand it to you. Do you want to see
10 the indictment?

11 A. Please. Thank you.

12 Okay. So it does say actual or constructive
13 possession because I was going to say I definitely would be -
14 - I definitely would've argued if it didn't say constructive
15 because that was the State's theory. So it says constructive
16 possession. That's the State's theory. Again, I think we're
17 back to where I was before.

18 Q. Right.

19 A. Thank you.

20 Q. You've answered the question.

21 Did you see the benefit or any benefit in failing
22 to file a Rule 6 objection and getting them -- forcing them
23 to bring in all chain witnesses? What was the benefit of
24 that?

25 A. So ultimately, again, I don't recall whether there

1 was anything -- we didn't have any knowledge that the
2 evidence had been tampered with, altered or destroyed,
3 fabricated in that manner. The entire defense was based on
4 mere presence that the drugs were in Ms. Martin's actual
5 possession. That he -- you know, they weren't his drugs,
6 they weren't constructively possessed by him and from a
7 strategic position if you end up bringing in all these other
8 witnesses that are kind of contrary or inconsistent with your
9 defense and cross examine them on them, I think you'd lose
10 the jury in many respects because it dilutes your defense.

11 Q. Okay. But if -- just saying what if. If you'd
12 filed it and they were unable to bring in a chain witness,
13 would that be to your client's advantage? They would not be
14 able to proceed to prosecute the case? Is that possible?

15 A. Sure. I mean, any -- you know, I could've made
16 other arguments that maybe.

17 Q. Okay. The No. 10 referencing the objection
18 Officer Grinstead the drugs saying hearsay objection, drugs
19 in her pants, you indicated that that wasn't (inaudible) but
20 it was for a strategic reason. Because this was co-defendant
21 and your defense was the drugs were in her pants. Those were
22 her drugs?

23 A. About the officer's statement?

24 Q. Yeah. Related to that -- yeah.

25 A. Yes.

1 Q. Okay. And the same thing regarding No. 11. The
2 officer's statement by Melissa Martin. The rocks had fallen
3 out of the baggie into her pants. Your answer's the same.
4 You feel that was part of your strategy?

5 A. Right. I mean, ultimately he's merely present.
6 They're her drugs. Whether they're falling out of her
7 panties, that doesn't make any difference to our defense.

8 Q. Okay. And No. 12. The statement solicitor's
9 stating testimony was not in evidence from Ms. Homer, the
10 drug analyst. Now, when you finally open the basket and
11 determined it wasn't tampered with. Wouldn't it have been
12 best for the defense to object to that since she was
13 supplying the answer to the witness to try to shut that down
14 and object?

15 A. What specific? Say that again.

16 Q. This was -- okay. I'll repeat it. This was
17 objection to solicitor or no objection to solicitor stating
18 testimony that was not in evidence from Ms. Homer, drug
19 analyst, stating to the analyst, "now when you finally open
20 the test kit and determine it wasn't tampered with, how did
21 you go about testing at that point?" That's page 237. I can
22 bring it to you if you'd like.

23 A. Oh, no, I got it. Give me one second.

24 Q. Lines 18 through 20. Now when she testified prior
25 to that, that it wasn't tampered with?

1 Q. Well, I believe that this was just her
2 spontaneously saying this, you know, in a leading question to
3 the witness and I -- and I --

4 A. Right. That's the question from the --

5 Q. Right.

6 A. -- prosecutor but I'm looking back through where
7 they go through qualification, they go through the test kit.
8 There's a lot of questions asked about it. I think that's
9 where he kind of jammed in that. If that question was asked
10 about any of the leading -- the many questions leading into
11 it then I absolutely agree that that could've been
12 objectionable but, yeah, she said, on 236, "I first examined
13 the seal to make sure that the seal is not tamper proof but
14 it's tamper evidence. If someone had tampered with it, I
15 wouldn't have analyzed it. If the seal's intact then" -- she
16 goes through and explains that it had not been tampered with
17 and that was just the reunification and the question. I
18 guess what they call looping.

19 I think Prosecutor Bell was just trying to loop in --

20 Q. Okay.

21 A. -- additional facts.

22 Q. Okay. And, let's see, moving to 16 on the amended
23 application. Is it possible to renew the objection to
24 question (inaudible). Okay. Now, what were you all doing at
25 that Kroger? We went there to makes two serves. Was there

1 some advantage to not renewing the objection to that? That's
2 on page 292, line 23 through 25.

3 A. When you say not renew it like I object
4 immediately.

5 Q. Okay. You objected immediately to that?

6 A. Yes.

7 Q. You did not renew the --

8 A. So if you -- right here on 292, line 23. "Now,
9 what were y'all doing at the Kroger store together?" Line
10 25. "We went there to make two serves." Line 1, 293.

11 Literally the next page. "Objection, Your Honor. Renew
12 prior motion." The Court: "It's overruled."

13 Q. Okay. Did you have -- on number 17, failure to
14 object to leading question to Melissa Martin regarding her
15 letter to the solicitor. You were essentially -- "You were
16 essentially saying you would tell the truth?" Answer: "Yes,
17 sir." That's page 301. Did you fail to object to that?

18 A. I did not object to that.

19 Q. Okay. Was there a reason or did you -- do you
20 know why you did not object?

21 A. I could have objected I believe because I knew
22 what cross-examination I was about to conduct, which was
23 attacking her credibility, and that was pretty much the
24 entire cross-examination; attacking her credibility.

25 Q. Well --

1 A. And she admitted she was a liar on cross.

2 Q. Okay. Number 18, when ATF Officer Love
3 (phonetically) testified "did you fail to object to that
4 testimony" on page 355 indicating the amount of drugs
5 relating to a drug trafficker?

6 A. Yes. There's no contemporaneous objection. That
7 I do make the objection after -- on the next page, line 1,
8 356. I say, "Your Honor, I have a matter of law," and then I
9 make a motion for a mistrial. It looks like there was a
10 couple of questions that were asked right after that before I
11 make the (inaudible) for the in-camera -- for the jury to
12 step out so I can make a motion for mistrial. I could've --
13 I could've objected sooner.

14 Q. Okay. And on page 357, lines 1 through 24, isn't
15 it true the Court actually denied the motion for mistrial and
16 cites their failure to allow you to object to the testimony?

17 A. Yeah. The -- basically he's saying because it
18 wasn't objected, contemporaneously objected to, that -- yeah,
19 I believe that's what he was doing. Yeah, he and I were
20 going back and forth there in this trial pretty good and I
21 think that was one issue that, as far as the issue
22 preservation -- yes, that's -- I think his -- he says there
23 was no objection to the testimony. The witness characterized
24 this as a person being trapped or that the testimony was
25 unobjected to. It's on 357.

1 And then I'll argue with him (inaudible) of the jury.

2 So, yes, that was the Court's ruling.

3 Q. Okay. So if you had actually objected, is it
4 possible, if you'd objected at the right time, then the Court
5 could have granted a mistrial motion in favor of the defense?

6 A. Potentially.

7 Q. Okay.

8 A. I mean, if you want me to elaborate, I don't
9 believe he would --

10 Q. Okay.

11 A. -- would have in that case based on our arguments
12 that we had tried to argue against that the entire time. But
13 I have no reason to believe he would've granted a mistrial.

14 Q. Okay. Moving on to the second amended application
15 filed, Your Honor. In this one, number one, I don't believe
16 the Court rules on this one. This was --

17 MR. JOHNSON: If I'm correct, Judge, I don't think he
18 ruled on it yet.

19 THE COURT: That's correct.

20 BY MR. JOHNSON:

21 Q. When there was a jury instruction defining
22 constructive possession, page 420, "the defendant's knowledge
23 of possession may be inferred when a substance is found in
24 the property under defendant's control." Of course, this
25 comes out of a case, the ruling, about that being improper.

1 Can later, after the trial, but isn't possible, with your
2 experience and knowledge, looking at the facts of the case,
3 that you could've raised an objection? Not having a crystal
4 ball but being able to at least say that should've --

5 A. This was my first jury trial.

6 Q. Okay. Do you feel like it would be an objection
7 you would've raised if you had more experience?

8 A. I definitely think had I been able to be
9 clairvoyant of that case that I -- I agree that they -- there
10 shouldn't be an inference based on property. I believe State
11 v Stewart is correct. I didn't have any reason to believe,
12 at that time. I will say although -- even though this was
13 like my first first chair jury trial, at that point I'd dealt
14 with murder trials prior to law school with John Delgado,
15 after law school with John Delgado, I'd done over 100
16 appeals, criminal appeals, including murder cases that, on
17 appeal-wise, appellate defender. So I was well versed in
18 criminal law but as far as first chairing this level of
19 general session, this was my first jury trial.

20 Q. Okay. Number 2 on the second amended application
21 going into the language and the reference to material
22 variance and joint possession or the expansion during -- I
23 think you've already answered this, but isn't it possible you
24 could've objected to in going beyond the scope of the
25 indictment into either conspiracy that was not in the

1 indictment or to joint possession since it did not say joint
2 possession in the indictment?

3 A. I -- I see the argument that's being presented. I
4 -- I think had there not been the two prior trials and given
5 indictments being a notice document (inaudible) I -- I don't
6 see it unfortunately.

7 Q. Okay. And, well, number 3, basically what I just
8 stated. Isn't it possible you could've raised that for
9 directed verdict or objected to the State offering evidence
10 of conspiracy and manufacturing? That was not listed in the
11 indictment.

12 A. Well, like -- so I think my prior answer was
13 indictments are different than directed verdict. Directed
14 verdicts, whether the State presented substantial
15 circumstantial evidence or direct evidence during their case-
16 in-chief.

17 Q. And you could've objected, though. Just during
18 the presentation of evidence you could've objected during the
19 trial saying --

20 A. No. Objections to indictments must happen before
21 the jury's sworn.

22 Q. No, I'm saying objecting to evidence is not
23 contained in that scope of the indictment. You could've said
24 well, this is joint possession. Your -- you've not -- that's
25 not in the indictment so we can object to suppress it if it

1 comes up at trial. Not talking about directed verdict motion
2 or specifically quash the indictment but to say this evidence
3 does not contain -- this is exceeding or expanding the scope
4 of the indictment?

5 A. Could that argument have been made?

6 Q. Yes.

7 A. Yes, I -- I could have raised that argument.

8 Q. Okay.

9 MR. JOHNSON: That's all I have, Your Honor.

10 THE COURT: Any redirect?

11 MS. MEADOWS: Just briefly, Your Honor.

12 REDIRECT-EXAMINATION

13 BY MS. MEADOWS:

14 Q. And, Mr. Phillips, I believe just a question about
15 the traffic stop. Now, there were only two people in the
16 car, correct?

17 A. Yes.

18 Q. Okay. And then back to Mr. Pradubsri's claim
19 about his right to testify. Do you believe the State
20 could've impeached him with those previous trafficking
21 conviction? Had each of them take the stand?

22 A. Yes. I mean, like, obviously someone's prior
23 criminal history is part of the -- you know, probably the
24 biggest nexus of what you talk about connection when they run
25 the risk of if they testify, that someone could be

1 (inaudible). It, ultimately, character could be put in, your
2 criminal history could be put in depending on, again, the
3 testimony and that there's a -- always a big risk, if that
4 comes through, that that would taint the jury and be overly
5 prejudicial and essentially goes to the heart of propensity
6 evidence.

7 Q. Okay. Is that something you discussed with Mr.
8 Pradubsri?

9 A. As far as impeachment evidence?

10 Q. Yes.

11 A. Yeah. We would -- we would have absolutely
12 reviewed any potential impeachment during that trial
13 preparation at the jail.

14 Q. Okay. Okay. And then back to the claim about
15 enhancement from first offense to third offense at
16 sentencing, I believe you testified, on direct, that this
17 charge was a third offense and that it is improper to include
18 that in the indictment?

19 A. Right. You don't have -- because some judges send
20 the indictments back to the jury, some don't, but they still
21 have to read the indictment, even at the beginning, to the
22 jury panel. With that being said, you don't have the actual
23 enhancement number because it's overly prejudicial.

24 Q. Okay.

25 MS. MEADOWS: Nothing further, Your Honor.

1 THE WITNESS: It's propensity evidence.

2 THE COURT: Anything further?

3 MR. JOHNSON: Nothing further, Your Honor.

4 THE COURT: All right. You can step down. Thank you.

5 THE WITNESS: Good to see you.

6 (Witness excused.)

7 MS. MEADOWS: The State rests at this time.

8 MR. JOHNSON: Your Honor.

9 THE COURT: Yes, sir?

10 THE DEFENDANT: Yes, Your Honor --

11 THE COURT: Well, I was talking to Mr. Johnson.

12 MR. JOHNSON: I'm sorry. Judge, he wanted to -- I
13 guess he wants to address the Court.

14 THE COURT: Okay. Yes, sir.

15 THE DEFENDANT: Judge, we're not done with the issue.
16 My attorney left out what issues that I need to put on the
17 record.

18 THE COURT: Okay.

19 THE DEFENDANT: I have a double-jeopardy issue that I
20 need to address.

21 MS. MEADOWS: Your Honor, I object on the basis of
22 hybrid representation.

23 THE COURT: Yeah.

24 THE DEFENDANT: Your Honor, I don't understand that. I
25 got it in my application where my lawyer ain't put it in his

1 amendment. Like I said the artificial person --

2 THE COURT: Hold on.

3 THE DEFENDANT: -- that he chose not to -- I need to
4 address this issue.

5 THE COURT: Right. Hold on a second.

6 MS. MEADOWS: Your Honor, may Mr. Phillips be excused?

7 THE COURT: Absolutely.

8 MR. PHILLIPS: Thank you, Your Honor.

9 THE COURT: All right, Mr. Johnson, are you looking to
10 recall your client to the stand?

11 MR. JOHNSON: Your Honor, at this time to address --
12 just for the sole purpose of that one issue. If they would
13 consent to us going forward on that one issue and having
14 testimony about it.

15 MR. PHILLIPS: I can run back up there. I got to be
16 first up on two bond hearings in general sessions
17 (inaudible).

18 MR. JOHNSON: Just the one question. The double-
19 jeopardy issue so if Your Honor --

20 THE COURT: Oh, you want Mr. Phillips back up here?

21 MR. JOHNSON: Well, I would call -- if you're going to
22 allow Mr. Pradubsri to testify, I would -- (inaudible) if
23 they want to call him but I would -- I would call my witness
24 back.

25 THE COURT: Right.

1 MS. MEADOWS: And, Your Honor, I would object to Mr.
2 Pradubsri being recalled on this double-jeopardy issue
3 because he is limited to reply testimony.

4 MR. JOHNSON: There was discussion by Mr. Phillips of
5 double jeopardy. They did talk about it briefly.

6 MS. MEADOWS: I -- I don't --

7 THE COURT: I don't recall that but I am going to allow
8 it on that limited issue.

9 MR. JOHNSON: Yes, ma'am.

10 THE COURT: Only because it's in the original
11 application.

12 MR. JOHNSON: Yes, ma'am.

13 THE COURT: Oh, wait, not you.

14 MR. PHILLIPS: No?

15 MR. JOHNSON: No, Mr. --

16 MR. PHILLIPS: I can go?

17 THE COURT: You can go.

18 MR. PHILLIPS: Thank you.

19 THE COURT: Right. It's Mr. Pradubsri.

20 MR. JOHNSON: Thank you, Judge.

21 THE COURT: Yes. Give me one second. Okay. Your
22 witness.

23 JO PRADUBSRI

24 was recalled as a witness, and having been previously first
25 duly sworn, testified as follows:

1 DIRECT EXAMINATION

2 BY MR. JOHNSON:

3 Q. Mr. Pradubsri, please explain. Do you have an
4 allegation you'd like to make regarding double jeopardy and
5 what should've been done in your defense regarding that?

6 A. Yes. Yes. I have a claim for double jeopardy of
7 being convicted twice for the same narcotics. I was
8 convicted of trafficking and possession of the same drug and
9 -- and we're here there wasn't any objections.

10 Q. Okay. And that's in your original application?

11 A. That's in my original application.

12 Q. Where's that at? Do you have that?

13 A. No, I got it (inaudible).

14 Q. Can I bring it up to you?

15 A. Yes.

16 Q. All right.

17 THE COURT: We can -- off the record for two seconds.

18 (Off the record.)

19 THE WITNESS: Yes, that's my claim of trial counsel
20 ineffective.

21 MR. JOHNSON: Back on the record, Judge?

22 THE COURT: Yeah, we're back on the record. Go ahead.

23 THE WITNESS: Yes, I have a claim for trial counsel
24 ineffective for failing to object to the Applicant being
25 convicted and sentence for a greater and lesser offense that

1 was brought on by double jeopardy where both charges were
2 based on the Applicant's possession of 68 grams. That's on
3 the record. And the solicitor, she didn't state it on the
4 record, that this is not a possession case. So if it's not a
5 possession case then how did I get convicted for both crimes?
6 For one act?

7 BY MR. JOHNSON:

8 Q. All right. And you're saying there was no
9 argument by your counsel to --

10 A. There was no argument --

11 Q. -- regarding that issue?

12 A. -- any objection.

13 Q. All right.

14 A. Anything and if you need to see the transcript,
15 the transcript page on everything is on the record that the
16 solicitor's office clearly stated that this is not a
17 possession case. That the case was based on the weight. So
18 if the weight is 68 grams, how you find me guilty of anything
19 under 10 grams?

20 Q. All right.

21 A. But that jury convicted me of both; the lesser and
22 the greater offense under *State versus Mountain*
23 (phonetically.)

24 Q. All right. Thank you, Mr. Pradubsri.

25

1 MR. JOHNSON: No more questions, Your Honor.

2 THE COURT: Any cross-examination on this issue?

3 MS. MEADOWS: No, Your Honor. I can reply in just an
4 argument. I don't know if you want me to do that now or --

5 THE COURT: That's fine. Yeah, you can go back and sit
6 next to your lawyer.

7 (Witness excused.)

8 MS. MEADOWS: So just briefly, it is the State's
9 position that one of the elements of possession of crack
10 cocaine in proximity of the school in attempt to distribute
11 was him being within one-half-mile radius of the school and
12 the offense of trafficking in cocaine has no such element.
13 So it is our position that because there's an element of the
14 offense of trafficking within or possession within proximity
15 of a school, not including trafficking, so does not violate
16 double jeopardy.

17 THE COURT: Mr. Johnson?

18 MR. JOHNSON: Your Honor, we just stated on the record.

19 THE COURT: All right. Will take it under advisement.

20 Will let you all know.

21 MR. JOHNSON: Thank you, Judge.

22 THE COURT: Thank you.

23 MS. MEADOWS: Your Honor, we would just bring you our
24 motion to dismiss that last -- that claim about State v
25 Stewart.

1 THE COURT: I'll decide that in writing once I've
2 reviewed the case law.

3 MR. JOHNSON: Thank you, Judge.

4 THE COURT: Okay?

5 MS. MEADOWS: Yes, ma'am.

6 THE COURT: Thank you. Also, I do not have the
7 complete transcript. I have the record on appeal which is
8 excerpts of the trial transcript.

9 MS. MEADOWS: Okay.

10 THE COURT: So most of the pages that you referred to I
11 have but not all of them.

12 MS. MEADOWS: Just give you mine.

13 THE COURT: Okay. All right. That concludes this
14 matter.

15 MR. JOHNSON: Thank you, Judge.

16 MS. MEADOWS: Thank you, Your Honor.

17 THE COURT: Thank you.

18

19

20

21

22

23

24 (THERE BEING NO FURTHER QUESTIONS, THIS HEARING IS CONCLUDED

25 AT 2:18 p.m.)

CERTIFICATE OF TRANSCRIBER

I, Lynda Monroe, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in trial of the captioned case, relative to appeal, in the South Carolina Circuit Court 11, Lexington County, South Carolina, on the 8th day of June, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

October 21, 2024

Lynda Monroe

Lynda Monroe, Transcriber

STATE OF SOUTH CAROLINA **FILED**

2024 OCT 30 PM 12: 53 IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON LISA M. COMER ELEVENTH JUDICIAL CIRCUIT
CLERK OF COURT
LEXINGTON SC

JO PRADUBSRI

CASE NO.: 2019-CP-32-02814

Applicant,

v.

MOTION FOR STATUS CONFERENCE

TO SET DEADLINE OR RE-OPEN PCR

STATE OF SOUTH CAROLINA,

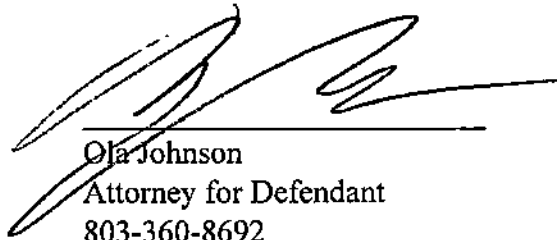
Respondent.

The Evidentiary hearing for this Post-Conviction Relief application was held in 2022 and the state has failed to produce a final order of dismissal.

Counsel for Applicant now requests that the court schedule a status conference to set a deadline for the state to produce this order or to order that this Post-Conviction Relief matter be re-opened to allow another evidentiary hearing for the Applicant.

Wherefore, the Defendant prays the relief requested be granted.

Respectfully submitted,



Ola Johnson
Attorney for Defendant
803-360-8692
olajohnsonlaw@gmail.com

STATE OF SOUTH CAROLINA **FILED**

2024 OCT 30 PM 12:53

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

LISA H. COPIER
CLERK OF COURT
LEXINGTON SC

ELEVENTH JUDICIAL CIRCUIT

JO PRADUBSRI,

)

CASE NO.: 2019-CP-32-02814

)

Applicant,

)

)

)

CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,

)

)

Respondent.

)

)

I, Ola Johnson, hereby certify on that on October 30, 2024, I served a copy of the

MOTION FOR STATUS CONFERENCE TO SET DEADLINE OR RE-OPEN PCR on Donald

Zelenka, Dep. Attorney General by Email and U.S. Mail to the following address:

Donald Zelenka, Dep. Attorney General

SC Attorney General's Office

Rembert Dennis Building

PO BOX 11549

Columbia, SC 29201

Date

10-30-24

OLA JOHNSON

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), SCRCF (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)).

PCR Evidentiary Hearing

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?

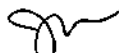
(Tr. 114:4-115:4).

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



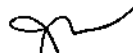
investigative stop following a tip from a confidential informant. In pertinent part, the Court concluded:

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).

PCR Evidentiary Hearing



Page 26 of 92

Jo Pradubsri | Order of Dismissal | 2019-CP-32-02814

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.

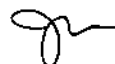
Trial

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.


Page 59 of 92

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 agree, 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?


Page 86 of 92

[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

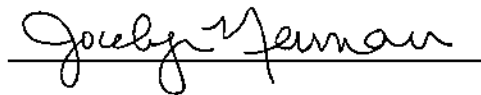
Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED** and **DISMISSED** with **PREJUDICE**.

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

754

WITNESSES

Lexington County Sheriffs Department

John Finch

Law Enforcement Case #:

DMS

ARREST WARRANT NUMBER

J847717

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 2-9-09

VERDICT

Guilty

Foreperson of Petit Jury

Date: February 12, 2010

Guilty *1-15-15*

DOCKET NO. 2009-GS-32-0202

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2009

THE STATE

vs.

Jo Pradubsri

CDR #: 0148

Indictment for

Trafficking Crack Cocaine
(28 grams - 100 grams)

§ 44-53-0370(e)(2)(b)

DONALD V. MYERS, SOLICITOR

A TRUE COPY
Lex. Co. C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

INDICTMENT FOR
Trafficking Crack Cocaine (28 grams - 100
grams)

§ 44-53-0370(e)(2)(b)

At a Court of General Sessions, convened on FEBRUARY 2009, the Grand Jurors of Lexington County present upon their oath:

That **Jo Pradubsri** did in Lexington County, South Carolina on or about November 9, 2008 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.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

John Finch

Law Enforcement Case #:

DMS

ARREST WARRANT NUMBER

J847718

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 2-9-09

VERDICT

Guilty

Foreperson of Petit Jury

Date: February 12, 2010

Guilty: 1-15-15

DOCKET NO. 2009-GS-32-0204

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2009

THE STATE

vs.

Jo Pradubsri

CDR #: 0108

Indictment for

PWID Crack Cocaine
within Proximity of a School

§ 44-53-0445(B)(2)

DONALD V. MYERS, SOLICITOR

ATRUE COPY
Lex. Co. C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)

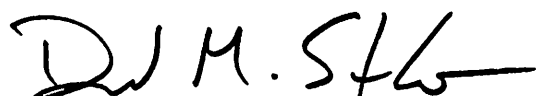
INDICTMENT FOR
PWID Crack Cocaine within Proximity of a
School

§ 44-53-0445(B)(2)

At a Court of General Sessions, convened on FEBRUARY 2009, the Grand Jurors of Lexington County present upon their oath:

That **Jo Pradubsri** did in Lexington County, South Carolina on or about November 9, 2008 distribute, sell, purchase, manufacture, or unlawfully possess with intent to distribute a quantity of Crack Cocaine, 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 education center; or a public or private college or university to wit: Irmo Elementary School, in violation of § 44-53-445 (B)(2), Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Lexington County Sheriffs Department

John Finch

Law Enforcement Case #:

DMS

ARREST WARRANT NUMBER

J847720

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date: 7-9-09

VERDICT

Guilty

Foreperson of Petit Jury

Date: February 12, 2010

Guilty: [Signature] 1-15-15

DOCKET NO. 2009-GS-32-0205

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

FEBRUARY TERM 2009

THE STATE

vs.

Jo Pradubsri

CDR #: 0044

Indictment for

Unlawful Carrying of a Pistol

§ 16-23-0020; 16-23-0050(A)

DONALD V. MYERS, SOLICITOR

ATRUE COPY
Lex. Co. C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

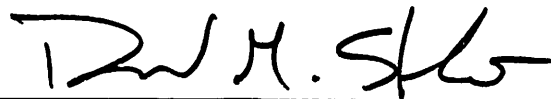
INDICTMENT FOR
Unlawful Carrying of a Pistol

§ 16-23-0020; 16-23-0050(A)

At a Court of General Sessions, convened on FEBRUARY 2009, the Grand Jurors of Lexington County present upon their oath:

That **Jo Pradubsri** did in Lexington County, South Carolina on or about November 9, 2008 knowingly and willfully carry about the person or was in actual or constructive possession of two pistols, whether concealed or not, without the proper legal authority to do so, to wit: (1) a Hi-point 9mm Luger handgun, Model #C-9, serial #P1395780, and (2) a Bauer .25 caliber handgun, serial #072811, in violation of Section 16-23-20 of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR