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

S.C. SUPREME COURT

On Petition for Writ of Certiorari to Lexington County
Court of Common Pleas
The Honorable Jocelyn J. Newman, PCR Judge
The Honorable Clifton Newman, Trial Judge
2019-CP-32-02814

Appellate Case No. 2025-002090

JO PRADUBSRI,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUE PRESENTED

Whether the PCR Court erred in finding that trial counsel was not deficient for failing to object to the testimony of a federal agent that the amount of drugs in this case was indicative of drug trafficking?

RESPONDENT'S QUESTIONS PRESENTED

Certiorari is not warranted when deficient performance is not shown when similar evidence was admitted over defense objection that the value of the drugs seized was over \$7600 and not an amount of a "smalltime dealer" based on *State v. Jamison* when defense counsel failed to immediately object to a follow up response that the amount and prepared distribution squares in the bag was consistent with a drug trafficker and a curative instruction was given after a mistrial motion was denied.

Certiorari is not warranted where Sixth Amendment prejudice is not proven: (a) when an appropriate limiting instruction was given pursuant to the South Carolina Rules of Evidence, Rule 704 that none of the witnesses testimony can be construed to infringe upon their role to determine whether or not Petitioner is guilty of trafficking after a mistrial motion was denied and (b) alternately, there is no reasonable probability that the result of the proceeding would have been different when the trial court had overruled an objection on whether the amount was of a "small time dealer" if a similar objection to the lighter clarifying response related the amount to a drug trafficker.

STATEMENT OF THE PROCEEDINGS

This matter comes before this Court by way of a certiorari petition arising from the denial of Petitioner Jo Pradubsri's application for post-conviction relief (PCR) by the Honorable Jocelyn Newman on August 25, 2025. App.p. 662-753. The Petitioner's certiorari petition was filed on February 13, 2026 after a timely notice of appeal. This Return to the certiorari petition follows.

The PCR action commenced on July 5, 2019 by the filing of a *pro se* application for post-conviction relief. App.p. 552-560. Respondent, the State of South Carolina, made its Return on February 21, 2020. App.p. 561-571. Petitioner, through Ola Johnson, Esquire (appointed PCR counsel), submitted an amendment to his application on June 9, 2021, and a second amendment to his application on June 18, 2021. App.p. 576-580, 582-585.

On June 8, 2022, an evidentiary hearing convened before the Honorable Jocelyn Newman. App.p. 585-658. The Petitioner 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, Petitioner testified on his behalf at the evidentiary hearing. Respondent presented the testimony of Dayne Phillips, Esquire (Trial Counsel). Judge Newman denied and dismissed the application as amended in full on August 25, 2025. App.p. 662-753. The Petitioner, through counsel Johnson, timely filed a notice of appeal on October 14, 2025.

PRIOR PROCEDURAL HISTORY

Petitioner is presently incarcerated pursuant to an order of commitment of the Lexington County Clerk of Court. During its February of 2009 term, the Lexington County Grand Jury indicted Petitioner 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).¹

2015 Trial

On January 13, 2015, through January 15, 2015, Petitioner proceeded to a third jury trial on the charges before the Honorable Clifton B. Newman, presiding. The Petitioner 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 Petitioner as indicted on all counts. The trial court sentenced Petitioner 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.²

Direct Appeal from 2015 Trial

Phillips filed a timely notice of appeal. Petitioner 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 Petitioner'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

¹ Petitioner 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, 403 S.C. 270, 275 S.E.2d 98 (Ct. App. 2013). Petitioner's second trial took place in November 2014, ending in a mistrial.

² Petitioner received credit for more than 2,200 days because Petitioner 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 Petitioner's second trial, which resulted in guilty verdicts.

that Petitioner 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 Petitioner and Petitioner's friend, Melisa Martin. (App. 37:25-38:11). The informant provided specific details about Petitioner's vehicle, a silver 2001 Chevy Monte Carlo, guns that would be in the vehicle, and a large amount of cocaine that Petitioner and Martin were transporting. (App. 38:12-18). The informant further alleged that Petitioner and Martin intended to "cook crack at their house" and sell the product in Irmo and Columbia. (App. 38:21-24). The informant also indicated that when Petitioner and Martin were "dealing," Martin generally handled the drugs in the passenger seat while Petitioner drove. (App. 81:5-18). Following this tip Sergeant Finch of the Lexington County Sheriff's Department sent out a BOLO [be on the lookout] for Petitioner's vehicle. (App. 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 Petitioner's vehicle at a Kroger in Irmo. (App. 39:9-12). Sergeant Finch and Sergeant Dale initiated a traffic stop based on the information received from the informant. (App. 168:7-15). Petitioner pulled over around the corner from the Kroger, less than half a mile from Irmo Elementary School. (App. 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 Petitioner as the driver and spotted a firearm, Petitioner's Hi-Point 9mm, inside the car. (App. 169:24-171:11, 176:21-22). Sergeant

Finch instructed Petitioner to exit the vehicle while Master Deputy Blake gave similar instructions to his passenger, Martin. (App. 171:18-173:13). As Martin was exiting the vehicle Deputy Blake observed a plastic baggy sticking out of her waistband (App. 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. (App. 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. (App. 212:11). The white rock substance turned out to be approximately 68 grams of crack cocaine. (App. 246:12-19). After searching the vehicle officers located a second firearm, a .25 caliber pistol belonging to Martin. (App. 176:22-23). Both Petitioner 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.

PCR APPLICATIONS BEFORE THE LOWER COURT

The Applicant made a *pro se* application filed July 15, 2019. On June 9, 2021, Applicant, through PCR Counsel, filed an Amended Application for PCR. For purposes of this certiorari proceeding and the issue presented, in that Application, Petitioner asserted:

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

On June 18, 2021, Petitioner, through PCR counsel Johnson, filed a Second Amendment to Application for PCR. In that Application, Petitioner matters unrelated to the present certiorari petition. The PCR Court, in its written order, denied relief on Ground 18 in its written order at pages 65-71. App.p. 726-732.

STANDARD OF REVIEW ON PCR APPEAL

“Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them.” *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). “We review questions of law de novo, with no deference to trial courts.” *Id.* at 180-81, 810 S.E.2d at 839. In evaluating PCR claims of ineffective assistance of counsel, courts apply the two-step analysis set forth *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* 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.”).

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.”).

³ Notably, “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.*

ARGUMENTS WHY CERTIORARI SHOULD BE DENIED

Certiorari is not warranted when deficient performance is not shown when similar evidence was admitted over defense objection that the value of the drugs seized was over \$7600 and not an amount of a “smalltime dealer” based on *State v. Jamison* when defense counsel failed to immediately object to a follow up response that the amount and prepared distribution squares in the bag was consistent with a drug trafficker and a curative instruction was given after a mistrial motion was denied.

Certiorari is also not warranted where Sixth Amendment prejudice is not proven: (a) when an appropriate limiting instruction was given pursuant to the South Carolina Rules of Evidence, Rule 704 that none of the witnesses testimony can be construed to infringe upon their role to determine whether or not Petitioner is guilty of trafficking after a mistrial motion was denied and (b) alternately, there is no reasonable probability that the result of the proceeding would have been different when the trial court had overruled an objection on whether the amount was of a “small time dealer” if a similar objection to the later clarifying response related the amount to a drug trafficker.

Certiorari should not be granted because the expert opinion testimony from ATF Agent Brian Lovin was admissible opinion evidence under SCRE Rule 704 and *State v. Jamison*, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007) and an appropriate curative instruction remedied any concerns that the testimony invaded the province of the jury. The Petitioner ignores that the fact at the trial, counsel Phillips timely objected to the ATF Agent’s testimony that the amount of drugs did not suggest a “smalltime dealer” which the trial judge overruled based on *Jamison*. App.p. 354, l. 16- p. 355, l. 6. Even though counsel did not immediately object to the additional admissible evidence which related to the repeat of the question with the same response and when the expert witness further clarified and responded that “*the amount* indicated” “a drug trafficker; one who routinely engages in the sale of narcotic,” and the court denied the motion for a mistrial, no prejudice was proven because Judge Newman made a curative and limiting instruction that cured any potential prejudice.⁴ See, App.p. 355, l. 9, - 14, App.p. 356, l. 22- p. 360, l. 24.

⁴ The curative instruction was:

The PCR judge properly concluded that the Applicant failed to prove *Strickland* prejudice based upon the curative instruction which remedied any potential error and that Agent Lovin testimony was not that Applicant was a trafficker,⁵ but that as an expert in the value of narcotics the amount of drugs that were seized (which had a street value of \$7,600) was indicative of drug trafficking. App.p. 730-732. These matters are supported by the record.

“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).

This case is impacted by SCORE Rule 704, which states:

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.

(App. 360:9-25). (emphasis added).

⁵ In his Petition before this Court, Petitioner recognizes that when he states: “ Just because Lovin’s testimony was not literally “ Petitioner is a drug trafficker” does not mean that it did not invade his testimony did not invade the jury's province.” *Petition for Certiorari*, p. 9. The Petitioner ignores that the trial court addressed this with the curative instruction and had already admitted over objection evidence that the amount of drugs did not suggest that it was that of a smalltime dealer. The overruled timely objection concerning “smalltime dealer” was not raised in the direct appeal.

Testimony in the form of an opinion or inference otherwise admissible is *not objectionable because it embraces an ultimate issue to be decided by the trier of fact*.

Rule 704, SCRE 704 (*emphasis added*). Such testimony is admissible, “so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence.” *State v. Commander*, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011).⁶ *See, State v. Prather*, 429 S.C. 583, 604–05, 840 S.E.2d 551, 562 (2020).⁷

Further, at trial, as noted below, the trial court had overruled an objection to the addition of the expert opinion that “value of narcotics on the street” would have been that each square of drugs of .2 grams would have gone for \$20.00 each and that there was a total of 76 grams recovered which would have valued at \$7,600 and with an actual weight of 68 grams would have been valued at \$6, 800 grams. App.p. 356. In admitting the street value evidence, the trial court and the State relied upon the decision in *State v. Jamison*, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007). App.p. 356.

In *Jamison*, the Court of Appeals opined that this type of expert testimony was admissible and relevant because the trial court that jurors typically do not know the current street prices of

⁶ In *Commander*, the Court held that expert opinion evidence by a forensic pathologist that the victim died as a result of a “homicide” evidence was admissible. The Court stated the Rule under SCRE Rule 702 to be as it related to forensic pathologist that so long as the expert does not opine on the criminal defendant's state of mind or guilt or testify on matters of law in such a way that the jury is not permitted to reach its own conclusion concerning the criminal defendant's guilt or innocence. *State v. Commander*, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011).

⁷ In *Prather*, the Court found admissible expert testimony from expert Paul LaRosa who testified there were two personalities present “after the crime.” LaRosa did not directly or indirectly compare Prather's behavior to either of those personalities, and LaRosa did not offer an opinion as to who committed the murder. LaRosa's testimony allowed the jury to reach its own conclusion regarding Prather's state of mind. As noted below, and found by the PCR court Agent Lovin did not testify the Applicant Pradubsri was a drug trafficker, but a person possessing that amount of drugs did not suggest a smalltime dealer (which the Applicant objected to at trial which was overruled), but a drug trafficker who routinely engages in the sale of narcotics (counsel did not immediately object). App.p. 355-356. Order, App.p. 731.

illegal drugs. Grounsell's valuation of the drugs, based on his years of law enforcement experience, allowed the jury to better determine whether a person would reasonably leave expensive narcotics unguarded and disguised as trash in a truck allegedly used by numerous people. *State v. Jamison*, 372 S.C. 649, 653, 643 S.E.2d 700, 702 (Ct. App. 2007).

Similar to the instant case, the valuation of the drugs in *Jamison* were between \$2,750.00 and \$9,319.00. The *Jamison* court relied upon *U.S. v. Gastiaburo*, 16 F.3d 582, 589 (4th Cir.1994) (noting the court has “repeatedly upheld the admission of law enforcement officers' expert opinion testimony in drug trafficking cases.”) and *U.S. v. Johnson*, 54 F.3d 1150, 1156–57 (4th Cir.1995) (holding the district court did not err in qualifying a detective as an expert and allowing the detective to testify about the current street price of illegal drugs). *State v. Jamison*, 372 S.C. 649, 652, n. 2., 643 S.E.2d 700, 702 n.2 (Ct. App. 2007). The Court also relied upon *State v. Matthews*, 720 So.2d 153 (La.Ct.App.1998) (holding an agent from the Drug Enforcement Agency could testify regarding the street value of cocaine where the agent was testifying regarding matters within his personal knowledge and experience as a narcotics officer); *State v. McCoy*, 105 N.C.App. 686, 414 S.E.2d 392, 395 (1992) (ruling a law enforcement officer's testimony on the street value of cocaine was properly admitted in defendant's trial for trafficking cocaine because the testimony was both helpful and relevant in showing the defendant's intent); *Martin v. State*, 823 S.W.2d 726, 728 (Tex.App.1992) (ruling a sheriff's testimony on the price of marijuana was admissible and relevant because it allowed the jury to comprehend the quantity of illegal drugs recovered in terms that are easily understood); *cf. State v. Lawrence*, 264 S.C. 3, 16, 212 S.E.2d 52, 58 (1974) (ruling that testimony as to the black market resale value of prescription drugs when sold without a prescription was relevant to prove motive for the charge of conspiracy). *State v. Jamison*, 372 S.C. 649, 653 n.3, 643 S.E.2d 700, 702 n.3, (Ct. App. 2007).

Respondent submits the evidence challenged in this setting on whether that amount of drugs in their expert opinion would have been the amount possessed by a mere user or a smalltime dealer or trafficker was relevant and admissible evidence arising from his same expertise. In *United States v. Lipscomb*, 14 F.3d 1236 (7th Cir. 1994), the court held a police officers' expert opinion on whether cocaine found on defendant was for distribution rather than his personal use was not excludable as "ultimate issue" opinion since each of the challenged opinions were immediately followed by precise explanation of grounds for opinion and grounds cited made it clear that officers were relying on their knowledge of common practices in drug trade, rather than some special familiarity with workings of defendant's mind. ATF Agent Lovin's

How the Underlying Issue was Presented at Trial

The State called Special Agent Brian Lovin of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to the stand. Agent Lovin expertise was based upon his 19 years of experience in law enforcement, his extensive work in narcotics and the culture that surrounds it, which the defense declared it did not have an objection.⁸ App.p. 350-3542, l. 15. Agent Lovin testified about the two guns seized from Martin and Petitioner 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." (App. 352:4-8). Trial counsel Phillips objected, re-raising the defense's earlier pre-trial motion to exclude expert testimony about the value of the cocaine, the expertise or experience of ATF Agent Lovin. (App. 352:9-12) See App.

⁸ ATF Agent Lovin testified that he had worked in law enforcement for 19 years, the majority in narcotics work. He declared that he had extensive training in narcotics and estimated that he may have worked on one thousand or more vases in that period. This caused him to become intimately familiar with narcotics and the culture that surrounded it. This included crack cocaine and cases involving trafficking crack cocaine. App.p. 350, l. 4-p. 351, l. 25.

138:2-144:19 (pretrial).⁹ The trial court overruled defense's objection and qualified Agent Lovin as an expert in the requested field of "value of narcotics on the street." (App. 352:13-14). The trial judge found that the evidence was admissible under the decision in *State v. Jamison*, 272 S.C. 649, 643 S.E.2d 649 (Ct. App. 2007).

The following exchange between the State and Agent Lovin then occurred concerning the drugs that were 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.

⁹ In the *in camera* proceeding, counsel Phillips sought to exclude expert testimony on the value of crack cocaine. App.p. 138, l. 2-9. This was based upon their expectation from the prior trial that similar testimony would be admitted. Counsel's initial argument was that evidence on "street value was inadmissible under SCRE Rule 401 as not being relevant because the drugs were found in the possession of the co-defendant and she had already pled. App.p. 138. He further contended that the evidence should be excluded because the probative value was outweighed by the (undue) prejudicial effect, citing SCRE Rule 403. App.p. 138. He contended that there would be confusion since all the drugs were located on the co-defendant who testified that she had the drugs but was given the drugs by Pradubsri when they were in the car. App.p. 139. Phillips contended that to add street value would confuse the jury because he contended that the crack addict co-defendant could not have been the drug dealer because of how much crack they were moving and that clearly the driver must be the dealer. Counsel Phillips relied upon *State v. Gregory*, 198 S.C. 98, 16 S.E.2d 532 (1941) (the Court affirmed the trial judge's refusal to permit the admission of relevant evidence which would confuse the jury).

The State, through Assistant Solicitor Bell, responded that under *State v. Jamison*, 372 S.C. 649, 643 S.E.2d 700 (Ct. App. 2007) that expert testimony of law enforcement officer about dollar value of cocaine and crack cocaine was admissible. App.p. 140-141. He stated that jurors typically do not know the current street prices of illegal drugs and having an expert to be able to value those drugs for them helps them in their deliberation. Judge Newman noted that this case stood for the opposite of what defense counsel was asserting. App.p. 141. Counsel sought to distinguish *Jamison* on its facts and asserted this evidence in this setting would mislead the jury. App.p. 143. Solicitor Bell asserted that the Applicant's contention that the co-defendant is the kingpin because she had all the drugs on her is that Pradubsri is innocent. Judge Newman initially indicated that and deferred ruling but indicated that he was not impressed with the defense position and after reviewing *Jamison* did not see a problem for the jury to know the street value of the drugs on a trafficking charge. App.p. 144.

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.

App.p. 352, l. 23-p. 353, l. 13.

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. Okay. **When you look at this, does this say smalltime dealer to you?**

A. No, sir.

Q. What does this —

MR. PHILLIPS: **Objection**, Your Honor. He hasn't -- he wasn't the arresting officer, he was not there. This is just based on his speculation of what he's seeing in a bag that he had no personal experience with.

MR. BELL: Your Honor, he has extensive qualifications in narcotics and law enforcement. He certainly knows how much crack cocaine looks like on the street.

THE COURT: **The Court's qualified him as an expert witness and, I assume, under *State v. Jamison* his testimony is admissible. The objection's overruled.**

MR. BELL: Thank you, Your Honor.

App.p. 354, l. 7- p 355, l. 7 (*emphasis added*).

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.

(App. 355, l. 9-13.)(emphasis added). There was no immediate objection to this second question after a repeat of the first objected question ruled admissible.

The State asked Agent Lovin four (4) additional questions before defense counsel Dayne Phillips interjected with a matter of law. App.p. 356, l. 1-2. The trial court allowed the State to finish their exam before hearing counsel's issue.

Prior to cross-examination of Agent Lovin, the matter was heard *in camera* by the trial judge. App.p. 356-357. Counsel Phillips initially 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. (App. 356:23-357:16). Counsel Phillips indicated that the essence of the comment about the bag of drugs was that he was "trafficking cocaine." App.p. 357, l. 5-6.

The trial court initially qualified that there was no objection to the testimony when the witness characterized this person as being a drug trafficker. App.p. 357, l. 11-14. Judge Newman denied counsel's motion for a mistrial, 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-

(App. 357:17-24).

The prosecutor contended that they did not connect in asking that line of questions with Pradubsri. App.p. 358, l. 4-9. The trial court indicated that the record would speak for itself.

After a recess, Judge Newman return to counsel Phillips's objection that the comment invaded the province of the jury. He explaining his reasoning as follows.

COURT: Now under Rule 704, it says the testimony in the form of an opinion or inference otherwise admissible is not objectionable because it invades the ultimate issue to be decided by the trier of fact. So an expert's testimony is not inadmissible simply because it touches upon an ultimate issue, which is in this case whether the Defendant is guilty of drug trafficking, **but an expert witness cannot render an opinion that goes to the ultimate issue to the extent that it seeks to - it's a close analysis in deciding what opinion an expert can actually give on an ultimate issue, but I think that for the expert to say, well, the conclusion is that he's a drug trafficker, I think it touches or perhaps infringes upon the province of the jury, but the context in which the witness gave this testimony, said this characteristic is one of a trafficker, one who pushes a large quantity of drugs, as opposed to a smalltime personal user, which would be the -- which would reflect the testimony of the previous -- as being the characteristic of the previous witness.**

That having been said; however, out of an abundance of caution I have no problem in giving the jury a cautionary instruction to the effect that though an expert witness can offer opinions, experts cannot offer an opinion that invades upon the province of the jury on an ultimate issue in the case and to the extent that this witness's testimony should not be construed to infringe upon the province of the jury on the ultimate issue and its effect, if I am requested to give that instruction.

App.p. 358-359.

Defense counsel Phillips, then immediately requested the curative instruction. App.p. 360, l. 1-2.

The Curative Instruction

At counsel Phillips's request, the trial 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.*

(App. 360:9-25). (emphasis added).

PCR Evidentiary Hearing Evidence Related to This Issue

On direct examination, Petitioner Pradubsri testified that defense counsel Phillips did not explain to him why they failed to timely object to Lovin's testimony related to the amount of drugs seized being inconsistent with the amount of a general addict or small time dealer would have on him, but indicated "a drug trafficker, one who routinely engages in the sale of narcotics." (App.p. 610; PCR Tr. 26:11).

On direct examination, defense counsel Dayne Phillips testified that while he did find the brief comment objectionable, the State was able to get in more questions before he "chimed in with a matter of law." (App.p. 629; 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. (App.p. 630; 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 Newman had denied all prior motions 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.

(App.p. 630-631; PCR Tr. 46:25-47:6).

On cross examination, Phillips speculates that he could have objected sooner and had he made a contemporaneous objection it was possible the trial 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. (App.p. 646, PCR Tr. 62:3-13).

The Applicant Failed to Prove Deficient Performance

Respondent submits that certiorari is not warranted under the standard of review required in PCR appeal of the findings and conclusion by the PCR court.

As the PCR Court concluded Petitioner 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 Petitioner 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*.¹⁰ App.p. 730.

First, the Petitioner ignore that fact that the testimony that the amount of drugs was not suggesting “a smalltime dealer” was contemporaneously objected to by counsel Phillips. App.p.

¹⁰ The fact that counsel Phillips testified that he “could have made it more contemporaneously,” this comment does not address whether the Applicant proved deficient performance. On occasion, collateral PCR and habeas counsel on collateral review will obtain some acknowledgment from trial counsel that trial counsel was incompetent. Such self-proclaimed admissions have been regarded with skepticism. Counsel’s self-serving statements (I didn’t research the law) need not be accepted as true. *Dows v. Wood*, 211 F.3d 480, 486 (9th Cir. 2000). The question of ineffectiveness is a question for the court to decide so admissions of defective performance by attorneys are not decisive. *Wright v. Hopper*, 169 F.3d 695, 707 (11th Cir. 1999), citing *Harris v. Dugger*, 874 F.2d 756, 761, fn. 4 (11th Cir. 1989). The same analysis was quoted in *Atkins v. Singletary*, 965 F.2d 952, 959-60 (11th Cir. 1992); *See also Edwards v. LaMarque*, 475 F.3d 1121, 1126 (9th Cir. 2007) (en banc) (trial court is not obligated to “accept a self-proclaimed assertion of trial counsel”). *LaGrand v. Lewis*, 883 F.Supp. 451, 461 (D. Ariz. 1995), aff’d. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998). Each case rejected the claims of ineffectiveness. The same result obtained in *Walls v. Bowersox*, 151 F.3d 827, 836 (8th Cir. 1998). A counsel’s admission of ineffectiveness is not determinative said *U.S. v. Eyman*, 313 F.3d 741, 743 (2d Cir. 2000), citing *Chandler v. U.S.*, 218 F.3d 1305, 1316 n. 16 (11th Cir. 2000) (en banc) and repeated in *Gentry v. Sinclair*, 576 F.Supp.2d 1130, 1154 n. 398, reconsideration den., 609 F.Supp.2d 1179 (W.D. Wash. 2009).

354, l. 16-24. However, Judge Newman then overruled the objection based upon the earlier in camera presentation and the trial judge's reliance on *State v. Jamison* and Agent Lovin's expertise. App.p. 355, l. 1-6. ("The Court's qualified him as an expert witness and, I assume, under *State v. Jamison* his testimony is admissible. The objection's overruled.").

When the evidence was again presented whether this was the amount a smalltime dealer would have on him, counsel was under no duty to object as reasonable counsel because the same evidence had just been deemed admissible by the trial judge. Counsel cannot be deemed deficient in failing to object to evidence that he had just objected to and was overruled on. App.p. 355, l. 9-11.

Respondent submits that reasonable counsel when evidence was deemed admissible that the amount was not the amount a smalltime dealer would have, that the evident suggestion that it was an amount a large time dealer would have, i.e. a drug trafficker, was evident from the prior admissible evidence was not deficient. The fact that he did not object to the question and answer related to "what does this amount indicate to you" and the response " "a drug trafficker, one who routinely engages in the sale of narcotics" did not create deficient performance similar evidence had just been presented.

Second, the evidence was admissible under Rule 704. In his petition before this Court, the Petitioner makes much of the fact that Agent Lovin used the term "drug trafficker." As the PCR court found that the characterization of Lovin's testimony was incorrect in his assertion that Agent Lovin was a witness "to be used to establish intent as to the proximity charge." App.p., 730-731.¹¹ However, the PCR Court properly concluded that his qualification as an expert did not

¹¹ In *Alexander v. State*, 589 S.E.2d 857 (Ga. Ct. App. 2003), though not formally tendering police officer as expert witness, state laid proper foundation in prosecution for possession of cocaine with intent to distribute for officer's opinion that amount of cocaine involved was a "dealer" amount by eliciting

suggest that Agent Lovin would only testify on a single issue, and at trial he testified about the chain of custody for the firearms found on Petitioner 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 as the PCR judge properly determined.

testimony about officer's experience in drug enforcement, training in drug interdiction, and knowledge of the customary methods employed in the use and sale of cocaine. In *Glenn v. State*, 251 Ga. App. 336, 553 S.E.2d 323 (2001). Evidence supported finding that defendant had intent to distribute cocaine of which defendant was in constructive possession; amount of cocaine exceeded that a user would normally possess. See also, *Jenkins v. State*, 240 Ga. App. 102, 522 S.E.2d 678 (1999) (Police officers could offer opinion testimony that the amount of cocaine recovered from defendant's jacket evidenced an intent to distribute, even though testimony went to ultimate issue in prosecution for possession of cocaine with intent to distribute, where average layperson would not necessarily know amount of crack cocaine one might generally possess for personal use or amount which might evidence an intent to distribute, and officers' experience and training gave them knowledge of drug use and distribution that was beyond that of the average layperson).

In *People v. Harris*, 2023 IL App (2d) 210697, 475 Ill. Dec. 795, 239 N.E.3d 693 (App. Ct. 2d Dist. 2023), the Court held that the trial court did not abuse its discretion in admitting testimony from expert qualified in field of narcotics that defendant possessed 248.6 grams of substance containing cocaine with intent to deliver, in prosecution for possession of a controlled substance with intent to deliver; expert testified to his extensive experience in the field of narcotics and his opinion that the amount of the contraband was inconsistent with personal use was admissible.

In *Commonwealth v. Johnson*, 410 Mass 199, 571 NE2d 623 (1991), the court held in prosecution for trafficking in cocaine, that the trial court did not err in permitting police officer to give his opinion that amount of seized cocaine, consisting of 71 individual bags and three separate bags amounting to net weight of 31.33 grams, was not consistent with personal use and was consistent with intent to distribute, where detective had been police officer for eight years and narcotics investigator for 2½ years, had undergone special training to qualify as investigator, had participated in at least 100 investigations, and had expressed opinion within his expertise.

But see, *People v. Goodwine*, 177 App Div 2d 708, 576 NYS2d 881(1991, 2d Dept), app den 79 NY2d 920, 582 NYS2d 80, 590 NE2d 1208. (In prosecution for criminal possession of controlled substance, testimony by People's expert witness expressing opinion as to whether possession of more than four vials of crack constituted possession with intent to sell was improper since such testimony invades jury's exclusive province of determining ultimate fact issue).

In *Thomas v. State*, 743 So. 2d 1190 (Fla. Dist. Ct. App. 4th Dist. 1999), an expert in street level narcotics transactions could testify that possessing 4.6 grams of cocaine was inconsistent with personal use, in prosecution for possession of cocaine with the intent to sell or deliver; expert was permitted to testify that particular amount of cocaine was inconsistent with personal use in order to establish defendant's intent to sell or distribute cocaine.

Importantly, as the PCR court reasonably found, Agent Lovin did not expressly testify that Petitioner was a drug trafficker. App.p. 731. Agent Lovin's testimony was essentially that, in his experience as an expert in narcotics, possession of approximately 76 (field) or 68 (actual) grams of crack cocaine with a street value around \$7,600 or \$6800 was indicative of drug trafficking and narcotics sale as compared to a smalltime dealer, including the manner that it was packaged. The Petitioner was charged with trafficking in crack cocaine (28-100 grams). The issue was not whether he was a small-time dealer or a drug trafficker defined by Agent Lovin, but whether he was in possession and control of over 28 grams of drugs which would support the conviction.

Sixth Amendment Prejudice Was not Shown.

Regardless of whether trial counsel's failure to object to the follow-up question that resulted in the testimony about the amount of drugs being consistent with a drug trafficker was arguably deficient performance, Petitioner failed to show prejudice.¹² The trial court still gave the jury a robust curative instruction that directed the jury to disregard the comment by Agent Lovin if it was interpreted that the ATF Lovin's testimony was that Petitioner was, in fact, a drug trafficker; which was 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).

¹² In his certiorari petition, Petitioner asserted without support that the Court of Appeals had previously "observed" that "the evidence against Petitioner was not overwhelming." *Petition*, p. 8, ¶ 1. A review of each of the opinions by the Court of Appeals does not include any prior finding that the evidence was "not overwhelming."

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.”). Herew, the jury was explicitly instructed to disregard any conclusory statements by experts, and trial counsel Phillips testified that it was unlikely that a contemporaneous objection would have resulted in a successful mistrial motion. App.p. 646. In light of overruling the earlier objection under Jamison, there is factual support for the conclusion by Phillips as well as by the PCR judge. Petitioner 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.).

Further, the Petitioner asserts that the Petitioner's failure to immediately object and request a mistrial by Agent Lovin's use of the term “drug trafficker” is misplaced. There is a reasonable showing that the timing of the delayed motion would not have been successful had it been timely made. Counsel had just made a similar objection to “smalltime dealer” evidence that was overruled. Although he did not object or move for a mistrial until a few sentences later did not show a reasonable probability that the result of the mistrial motion would have been successful, as required under *Strickland*.

In *State v. Harris*, 382 S.C. 107, 117, 674 S.E.2d 532, 537 (Ct.App.2009), the court held “A mistrial should only be granted when absolutely necessary, and a defendant must show both error and ... prejudice in order to be entitled to a mistrial.” “The decision to grant or deny a mistrial is within the sound discretion of the trial court. The trial court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law.” *Id.* (internal citations omitted).

“Insubstantial errors that do not impact the result of the case do not warrant a mistrial when guilt is conclusively proven by competent evidence.” *White*, 371 S.C. at 447–48, 639 S.E.2d at 164. “The determination of prejudice must be based on the entire record, and the result will generally turn on the facts of each case.” *State v. Wilson*, 389 S.C. 579, 585–86, 698 S.E.2d 862, 865–66 (Ct. App. 2010).

Respondent asserts, as counsel Phillips recognized in hindsight, and the PCR court agreed, that since the trial judge had just denied a similar motion and found the reference to smalltime dealer admissible, that it was unlikely that had the objection been made and a motion for mistrial at the immediate testimony of “drug trafficker” that the trial judge would not to a reasonable probability granted a mistrial and sustained the objection.

Rather, there is a reasonable probability that the trial judge would have done what he actually did in giving a curative instruction that clarified that Agent Lovin’s testimony was not an expert opinion on Pradubsri’s actual culpability. Instead, it was related to explaining the value and impact of the amount of drugs, not Pradubsri’s actual intent. As noted previously, Judge Newman stated:

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.*

App. 360:9-25). (emphasis added).

Generally, a curative instruction is deemed to have cured any alleged error. *State v. Jones*, 325 S.C. 310, 479 S.E.2d 517 (Ct.App.1996). See also *State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63

(1998) (instruction to disregard inadmissible evidence is usually viewed as having cured the error in its admission); *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996) (if trial judge sustains timely objection to testimony and gives jury curative instruction to disregard testimony, error is deemed to be cured). *State v. Patterson*, 337 S.C. 215, 226, 522 S.E.2d 845, 850–51 (Ct. App. 1999)

Here, the trial court thoroughly and meticulously instructed the jury that “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.” This is consistent with Rule 704 and addresses the concern made in this setting. The PCR Court recognition of the impact of the instruction as remedying any alleged potential error is supported by the record and is a reasonable application to support its finding of the Petitioner’s failure to satisfy the second prong.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari. Should this Court grant the petition, Respondent seeks permission to more fully brief the issues.

Respectfully submitted,

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