

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas, Non-Jury

Honorable Deadra L. Jefferson, Circuit Court Judge

Case Number: 2012-CP-07-4095

Turuk Saunders.....Appellant

v.

State of South Carolina.....Respondent

NOTICE OF APPEAL

The Appellant, Turuk Saunders appeals the judgment of the Circuit Court, the Honorable Deadra L. Jefferson presiding, denying his Application for Post Conviction Relief. The Order of Dismissal was signed on March 5, 2014 and received by counsel for Appellant on March 21, 2014. An Order denying Appellant's Rule 59 Motion to Alter or Amend Judgment was issued on May 22, 2014 and received by Appellant's counsel on June 3, 2014.

Law Office of Scott W. Lee, PA

Scott W. Lee

Scott W. Lee
Attorney for Appellant
Post Office Box 2124
Beaufort, South Carolina 29901
(843) 986-9030

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S.C. SUPREME COURT

Opposing Counsel of Record:
Ashleigh R. Wilson
SC Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211

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PROOF OF SERVICE

Counsel for Appellant Turuk Saunders hereby certifies that he has prepared and served a Notice of Appeal this 6th day of June, 2014 upon the State, as specified by South Carolina Appellate Court Rule 203(b)(1) by depositing a copy of same, postage pre-paid in the United States Mail addressed to opposing counsel of record.

Law Office of Scott W. Lee, PA



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Beaufort, South Carolina 29901

(843) 986-9030

Opposing Counsel of Record:

Ashleigh R. Wilson

SC Attorney General's Office

Post Office Box 11549

Columbia, South Carolina 29211

Ad
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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TURUK SAUNDERS #199803,

Applicant

vs.

STATE OF SOUTH CAROLINA,

Respondent.

) IN THE COURT OF COMMON PLEAS
) THE FOURTEENTH JUDICIAL CIRCUIT

) CASE NO: 2012-CP-07-4095

) **ORDER DENYING APPLICANT'S
) MOTION TO ALTER AND AMEND
) JUDGMENT**

Presiding Judge:
Applicant's Attorney:
Respondent's Attorney:
Trial Counsel:
Date of PCR Hearing:
Court Reporter:

Hon. Deadra L. Jefferson
Scott W. Lee, Esquire
Ashleigh R. Wilson, Esquire
Cory H. Fleming, Esquire
August 27, 2013
Susan "Mia" Perron

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CLERK OF COURT
BEAUFORT COUNTY, S.C.

This matter is before the Court on the Applicant's Motion to Alter and Amend Judgment, filed with the Beaufort County Clerk of Court on April 2, 2014 and received by this office on April 1, 2014. The Respondent filed a Return and Motion to Dismiss Applicant's Motion to Alter or Amend with the Beaufort County Clerk of Court on April 7, 2014, which was received by this office via email on April 3, 2014. The Applicant filed an Amended Motion to Alter or Amend with the Beaufort County Clerk of Court on April 8, 2014 and received by this office on April 8, 2014 in order to address issues raised by the Applicant in his initial, *pro se* application for post-conviction relief. The Respondent filed a Return and Motion to Dismiss the Applicant's Amended Motion to Alter or Amend with the Beaufort County Clerk of Court on April 15, 2014, which was received by this office on May 22, 2014. The Applicant moves this Court to reconsider its Order of Dismissal dismissing the Applicant's application for post-conviction

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ADMINISTRATIVE INSTRUCTIONS

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relief (PCR), signed March 5, 2014 and filed with the Beaufort County Clerk of Court on March 10, 2014. For the reasons set forth below, this Court denies the Applicant's Amended Motion to Alter and Amend Judgment. This Court finds and concludes as follows.

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52, SCRCF. The trial judge presiding over an Applicant's PCR hearing must issue a supplemental order setting forth specific findings of fact and expressly stating conclusions of law, which order becomes a final judgment in the Applicant's PCR case. See S.C. CODE ANN. § 17-27-80 (2013). The trial court's failure to specifically rule on the issues presented at the PCR hearing in its order precludes appellate review of the particular issues. See Marlar v. State, 375 S.C. 407, 408, 409, 653 S.E.2d 266, 266-67 (2007) (citing Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992)). Appellate review of a PCR order is provided by writ of certiorari under the South Carolina Appellate Court Rules. See S.C. CODE ANN. § 17-27-100 (2013). The Applicant's PCR "counsel has an obligation to review the order and file a Rule 59(e), SCRCF, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by [S.C. CODE ANN.] § 17-27-80 [(2013)] and Rule 52(a), SCRCF." Pruitt, 310 S.C. at 256, 423 S.E.2d at 128. Accord Hall v. Catoe, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004).

"The purpose of Rule 59(e), SCRCF, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172-73, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 1720 (1988)). "Our supreme court has made it abundantly clear that, where a PCR court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule

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59(e) [, SCRCPP] motion requesting the PCR court make specific findings of fact and conclusions of law on the allegations.” Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012); McCray v. State, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991).

In his Amended Motion to Alter or Amend Judgment, the Applicant enumerates fourteen (14) grounds in support of his motion:

1. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of probable cause for issuance of the search warrant.
2. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves’ testimony under State v. Lyle, SCRE Rule 404(b), or under any other theory.
3. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of the Applicant’s prior record for impeachment purposes.
4. The Court incorrectly found that trial counsel had fully discussed the potential benefits and pitfalls of the Applicant testifying because he did not obtain a ruling on the admissibility of prior convictions, thereby preventing the Applicant from making a fully informed decision about whether or not he would testify.
5. The Court incorrectly found that trial counsel had properly argued, made a proper record of, and preserved the issue of the admissibility of Witness Reeves’ testimony.

6. The Court incorrectly found that trial counsel was not deficient in failing to request a jury instruction regarding the limited purpose of admissibility of testimony admitted under State v. Lyle.
7. The Court erred in finding that trial counsel's failure to challenge the search warrant was a valid trial strategy.
8. The Court erred in finding that trial counsel was not ineffective in failing to request Judge Kinard's recusal from the case.
9. The Court erred in finding that trial counsel was not ineffective in failing to object to the State's reference to the Applicant as "Big T" during the State's closing argument.
10. The Court erred in finding that trial counsel was not ineffective for failing to inquire further into the facts of a juror who knew one of the State's witnesses, Robert Jenkins.
11. The Court erred in finding that trial counsel was not ineffective for failing to inquire further into the facts of a juror who knew one of the State's witnesses, Robert Jenkins.
12. The Court erred in finding that trial counsel was not ineffective in failing to object to evidence going back to the jury that was not properly admitted during trial.
13. The Court failed to address all issues raised by the Applicant's original *pro se* PCR Application.
14. The Court erred in failing to address the cumulative effect of the above errors committed by trial counsel.

15. The Court erred in finding that trial counsel's performance was not deficient, and that such performance did not result in unfair prejudice to the Applicant during the trial, and for appellate purposes.

In its Return and Motion to Dismiss Applicant's Amended Motion to Alter or Amend, the Respondent argues this Court's Order contains the requisite findings of facts and conclusions of law. See S.C. CODE ANN. § 17-27-80 (1976); Rule 52(a), SCRPC; McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991).

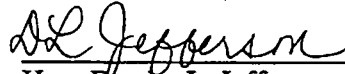
This Court finds that the Applicant has outlined no sound reason for this Court to alter or amend its judgment. The Defendant's Motion raises no new issues, nor proffers any arguments not considered by the Court during the Applicant's hearing and in the Court's Order. Moreover, the Court fully addressed each of the Applicant's grounds for relief and made specific finds of fact and conclusions of law on each ground in its Order. Additionally, in its Order, this Court found that any allegations raised in the Applicant's applications for post-conviction relief that were not addressed in the order were waived by the Applicant by failing to present any evidence regarding such allegations. Moreover, in its Order, this Court found that holistically, the Applicant's trial counsel was not deficient in any regard; cumulatively, counsel rendered reasonably effective assistance under prevailing professional norms; and the Applicant was not unduly prejudiced by trial counsel's performance. See Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 2065 (1984); Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989); Fraiser v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

Having fully considered the Applicant's Motion to Alter or Amend Judgment, the evidence presented at the PCR hearing, the Respondent's responses, as well as having fully reviewed the record and the various interests balanced by the Court at the time of the ruling, the

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Applicant's Motion to Alter or Amend Judgment is hereby **DENIED** pursuant to Rule 59, SCRCP.¹


IT IS SO ORDERED.



Hon. Deadra L. Jefferson
Presiding Judge

May 22, 2014
Charleston, South Carolina
At Chambers

¹ This motion is disposed of without the necessity of a hearing and decided on the record, briefs, and motions submitted by the parties. See Rule 59, SCRCP. Pollard v. County of Florence, 314 S.C. 397, 401-402, 444 E.2d 534, 536 (1994).

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STATE OF SOUTH CAROLINA)
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COUNTY OF BEAUFORT)
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Turuk Saunders, #199803,)
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Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)

IN THE COURT OF COMMON PLEAS
2012-CP-07-4095

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CLERK OF COURT
BEAUFORT COUNTY S.C.

ORDER OF DISMISSAL

Presiding Judge: Hon. Deadra L. Jefferson
Applicant's Attorney: Scott W. Lee, Esquire
Respondent's Attorney: Ashleigh R. Wilson, Esquire
Trial Counsel: Cory H. Fleming, Esquire
Date of Hearing: August 27, 2013
Court Reporter: Susan "Mia" Perron

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 30, 2012. The Respondent made its Return on February 25, 2013. An evidentiary hearing on the matter was convened on August 27, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Scott W. Lee, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Present to testify at the hearing was Cory Fleming, Esquire the Applicant's trial counsel, Tyece Brown, Akeem Saunders, and Andre Benjamin. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South

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Carolina Department of Corrections, the Applicant's application, the Respondent's Return, the appellate records, and the exhibits and case law submitted by the parties at the hearing.¹

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the March 2007 term of the Beaufort County Grand Jury for Possession with Intent to Distribute (PWID) Marijuana (2007-GS-07-0505),² PWID Cocaine (2007-GS-07-0506),³ PWID Ecstasy (2007-GS-07-0507),⁴ Trafficking Cocaine, 10-28 grams (2007-GS-7-0508),⁵ and Possession of a Weapon During the Commission of a Violent Crime (2007-GS-07-0509).⁶ He was represented by Cory Fleming, Esquire.

The Applicant proceeded to trial and was found not guilty of Possession of a Weapon during the Commission of a Violent Crime, but was found guilty of all the other charges. On May 26, 2010, the Applicant was sentenced by the Honorable Ernest Kinard to twenty (20) years for PWID Marijuana and PWID Ecstasy and twenty-seven (27) years for PWID Cocaine and Trafficking Cocaine. The sentences are to be served concurrently.

¹ State's Exhibit 1 is a copy of a signed affidavit of Andre Benjamin which was attached to the Applicant's application for post-conviction relief.

² Possession with Intent to Distribute Marijuana, third or subsequent offense, is a felony punishable by twenty (20) years imprisonment or up to a twenty-thousand dollar (\$20,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(2) (2012).

³ Possession with Intent to Distribute Cocaine, third or subsequent offense, is a serious felony punishable by thirty (30) years imprisonment or up to a fifty-thousand dollar (\$50,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(1) (2012).

⁴ Possession with Intent to Distribute Ecstasy, third or subsequent offense, is a serious felony punishable by thirty (30) years imprisonment or up to a fifty-thousand dollar (\$50,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(2) (2012).

⁵ Trafficking Crack, 10-28 grams, third or subsequent offense, is a violent, serious felony punishable by a mandatory minimum term of imprisonment for twenty-five (25) years, maximum imprisonment for thirty (30) years, none of which time may be suspended, nor probation granted, and a fifty-thousand dollar (\$50,000) fine. See S.C. CODE ANN. § 44-53-375(c)(1) (2012).

⁶ Possession of a Weapon During the Commission of a Violent Crime is a felony punishable by a mandatory, minimum five (5) years imprisonment. See S.C. CODE ANN. § 16-23-490 (2010).

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A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Nicole Mace, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Saunders, Op. No. 2012-UP-456 (S.C. Ct. App. July 25, 2012). The Remittitur was issued August 10, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Failure to object to inadmissible hearsay and character evidence.
 - b. Failure to object to the court allowing evidence to go back to the jury that was never properly admitted.
 - c. Failure to properly inquire into the facts of a juror who knew a witness who was due and did testify.
 - d. Failure to object to the prosecutor's continued reference to the Applicant as "Big T".
 - e. Failure to ensure that all issues raised were preserved for proper review.
2. Ineffective assistance of appellate counsel.

The Applicant amended his application on August 26, 2013 to allege the following:

1. Ineffective assistance of counsel.
 - a. Trial counsel failed to properly challenge the issue of probable cause for issuance of the search warrant which led to the State's discovery of the drugs for which the Applicant was charged.
 - b. Trial counsel failed to properly argue against the admissibility of testimony of Witness Reeves with regard to State v. Lyle and SCRE Rule 404(b), or under any other theory.
 - c. Trial counsel failed to argue and obtain a ruling on the admissibility of Defendant's prior record for purposes of impeachment.
 - d. Trial counsel failed to fully discuss the benefits and pitfalls of Applicant's testifying because he did not obtain a ruling on the admissibility of the Applicant's prior convictions, thereby preventing Applicant from making a fully informed decision about whether or not he would testify.
 - e. Trial counsel failed to call exculpatory witnesses who would have refuted testimony offered by the State, despite their ability, availability and willingness to testify.

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- f. Trial counsel failed to properly renew and preserve the issue of the admissibility of Witness Reeves' testimony, thereby procedurally barring and preventing same from being considered on appeal.
- g. Trial counsel failed to request a jury instruction from the Court regarding the limited purpose of admissibility of testimony admitted pursuant to State v. Lyle.

At the hearing, the Applicant proceeded solely on the allegation of ineffective assistance of trial counsel. This Court finds the allegation of ineffective assistance of appellate counsel was abandoned by the Applicant and is hereby dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

Summary of the Testimony

Cory Fleming, Esquire, testified at the evidentiary hearing that he was retained to represent the Applicant at trial. He testified he also filed a Notice of Appeal for the Applicant and remained on the case until he received the trial transcript. Counsel testified he has been practicing law for nineteen (19) to twenty (20) years and has practiced criminal law regularly. He testified he met with the Applicant many times prior to trial.

Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the discovery materials with the Applicant. He testified he discussed with the Applicant the elements of the charges he was facing and the State's burden of proof. He testified he discussed with the Applicant his version of the facts and possible defenses at length and met with

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the Applicant as much as necessary. Counsel testified he had ample time to prepare for trial. Counsel testified, although the Applicant complained that a juror knew Robert Jenkins, he gave the trial judge the names of his witnesses during *voir dire* "out of an abundance of caution" and did not recall any problems with jurors during trial. He testified he and the Applicant participated in *voir dire* and selection of each juror. Counsel further testified that he reviewed all evidence that was sent back to the jury during deliberations and that no evidence was sent back to the jury that was not admitted in the record.

Counsel testified the Applicant's case was the classic drug investigation involving the drug task force and complaints about drug activity at a trailer. Counsel testified the task force set up observation of the trailer and followed a car leaving the trailer. He testified the task force stopped the car and, based on the information they received from the car's occupants, obtained a search warrant for the trailer and found drugs.

Counsel testified he investigated all leads given to him by the Applicant. He further testified that he spoke with all witness prior to trial except Reeves and Jenkins but that he was given time to speak with Jenkins and Reeves was made available to him right before his testimony at trial. He testified that he was able to successfully challenge Reeves' credibility on cross basically establishing that he would say "anything" to save himself. He further testified that he was able to use Reeves' statements to effectively impeach him. He further testified that he got a receipt book late or last as Jenkins had just found it and wished he had received it sooner however this did not affect his trial preparation. Counsel further testified that he was able to cross examine Jenkins regarding the receipts and did not feel that his testimony was particularly damaging to the case.

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Counsel also testified the Applicant provided him no alibi witnesses. Counsel testified that each of the Applicant's co-defendants were represented by legal counsel. He further testified that all witnesses needed for his trial purposes were present whether subpoenaed or not. Counsel testified that the Applicant "fully" participated in his defense.

Counsel testified the Applicant was charged with multiple drug offenses. He testified the evidence at trial showed the Applicant was leaving the trailer as the raid team entered and was seen throwing down marijuana. He testified no drugs were found on the Applicant. Counsel testified his strategy at trial was to argue a mere presence defense and that the Applicant was not linked to the drugs found in the trailer, but was only present during the raid. Counsel testified there were so many people at the home and it was clear the Applicant did not live there. He testified his ability to defend the case was based on one witness' testimony identifying the Applicant as the drug dealer. He further testified there was a belief that the Applicant was the "ring leader" however there was no direct testimony of that.

Counsel testified he originally intended to challenge the search warrant, but ultimately decided against it. He testified he believed the Applicant did not have specific standing to suppress the search, but he wanted to challenge the search nevertheless. He testified in response to this position that the trial Court had indicated that if he challenged the search warrant, he would be judicially estopped from arguing his client lacked dominion and control over the home, which would jeopardize his trial strategy. He testified he thought he had the right to challenge the search warrant, but decided not to do so based on the Court's guidance as he could not argue two factually inconsistent positions. He testified he made a strategic decision not to challenge the search warrant, since the judge advised he was "warning [him] away from it." He further testified that while the probable cause for the warrant was "shabby" because of the veracity of

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the State's witness based on the "totality" and "ongoing" nature of the investigation ultimately probable cause existed. He further testified that he felt even if he challenged the search warrant there was sufficient evidence in the record and he felt the trial Court would have found there was probable cause.

Counsel testified the challenge of the search warrant was not particularly strong and he felt the Applicant's mere presence defense was stronger without having Reeves' testimony. Counsel testified he did not want the State to be able to assert that the Applicant had control. He testified he also did not want to box himself in on what he thought was his best defense in light of the evidence. He testified that at trial he was operating under the assumption that Reeves would not be present. Counsel testified no direct testimony supported the theory that the Applicant was the "ring leader" and, ultimately, his defense was that the Applicant did not have control over the house and was merely a visitor.

Counsel testified even if the search warrant for the trailer was valid, the veracity of the witnesses was "shabby" and no evidence proved the Applicant was involved with the large quantity of drugs found. He testified, based on the "ongoing" nature of the investigation, he thought the police had enough probable cause to obtain the search warrant of the trailer, which conclusion he felt the court would also reach. Counsel testified he is familiar with the law on standing to challenge the validity of a search warrant under the Fourth Amendment and a defendant's reasonable expectation of privacy. He testified, although he received the rent receipts last, he was able to cross examine Robert Jenkins on how he received payment for the trailer. Counsel testified he originally intended to challenge the search warrant, but ultimately decided against that challenge.

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Counsel testified Reeves was the State's key witness. He testified that Reeves' statement was the basis of the search warrant for the trailer and that his testimony was the single most important evidence in the case. Counsel testified he did not know prior to trial if Reeves would be present to testify but that he reviewed Reeves' statement prior to trial. He testified he was aware that Reeves' testimony at trial was different from his testimony in the warrant and was able to cross-examine Reeves at trial about the inconsistency. He testified he was able to get Reeves to admit he lied to the police about certain things. Counsel testified a Delaware v. Franks⁷ hearing could have been part of a package deal, but that he chose not to request one for the same reasons he chose not to challenge the search warrant.

Counsel testified he was concerned about Reeves' testimony about the Applicant participating in previous drug activity. He testified he made a timely objection to Reeves' testimony based on Rule 404(b), SCRE and the fact that the Applicant was not charged with direct distribution and was not actively participating in drug transactions. Counsel testified that, although he did not state State v. Lyle⁸ specifically, it was clear that the trial court was performing a Lyle and Rule 404(b), SCRE-based analysis. He testified he objected to Reeves' testimony before he was called as a witness. Counsel testified he did not remember if he renewed his objections at the directed verdict stage.

Counsel testified he did not file a motion to determine the admissibility of the Applicant's prior convictions. He testified he raised the issue in passing to the court during housekeeping matters and said that he may raise the issue later after the Applicant made a decision on whether he would testify. Counsel further testified both he and the court advised the Applicant of his right to testify. He testified he would have requested a ruling on the admissibility of the Applicant's

⁷ See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

⁸ See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

prior convictions had the Applicant decided to testify. Counsel testified the request was premature at the time he originally mentioned it to the court. Counsel also testified he told the Applicant it was likely the court would exclude his prior drug convictions. Counsel testified it was the sole decision of the Applicant not to testify based on Counsel's advice of the strong possibility of impeachment, not based on the admissibility of his prior convictions. Counsel testified that he fully advised the Applicant of his right to testify and his options. He further testified that the Applicant never told him he desired to testify.

Counsel testified he did not call any witnesses to testify at trial. He testified that several of the witnesses he considered calling were the Applicant's co-defendants. He testified he was told by the attorneys who represented the Applicant's co-defendants that they did not want to testify and that their testimony would not have been helpful to the Applicant. He testified all the Applicant's co-defendants had retained counsel so he was not sure what they would testify to and that the Applicant's co-defendants pled guilty in "short order" around the time the Applicant went to trial. Counsel testified the potential witnesses were not credible and the Applicant's case looked better without their testimony. Counsel testified he discussed his decision not to call any witnesses with the Applicant and the Applicant agreed. He testified he was able to challenge the testimony of the State's witnesses without calling any witnesses and that the strategy of calling witnesses but not calling the defendant to testify sends a bad signal to the jury. He testified he was also able to successfully show that the co-defendants were guilty without the co-defendants testifying at trial. Counsel testified he successfully challenged Reeves' credibility at trial by using his statements to impeach him. Counsel testified all the witnesses he needed were present and he was able to preserve last argument to the jury.

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Counsel testified he saw no problem with the trial judge having knowledge about the case prior to trial and there was no basis for a request to Judge Kinard to recuse himself from the trial. Counsel also testified he made a motion to preclude the State from referring to the Applicant as "Big T." He testified Reeves established the Applicant's identity as "Big T" during his testimony and the "Big T" reference during the State's closing was "problematic but not objectionable" and was a fair statement of the evidence in line with the judge's previous ruling on the issue. Additionally, Counsel testified he renewed all motions at the end of trial. He testified the Applicant was a smart participant in his trial, understood the court system, and participated fully in his defense. Finally, he testified that he and the Applicant made many crucial decisions together, including plea offers and calling witnesses to testify.

Also present and testifying was Tyece Brown. Brown testified she lives at 27 Big Road in Beaufort, South Carolina. She testified the Applicant was her boyfriend at the time of the incident and trial and that they lived together at 145 William Campbell Road at the time of the incident and since 2002, which residence was twenty (20) to twenty-five (25) minutes away from the site of the incident. She testified she spoke with trial counsel and gave him a copy of their lease. She testified she was listed as a witness at trial and sequestered. Lastly, Brown testified she was not called as a witness, but would have testified that the Applicant lived somewhere else had she been called.

Akeem Saunders, the Applicant's younger brother, also testified at the hearing. He testified he was present during the raid at the time of the search warrant execution and arrests and was also charged with a drug offense. Saunders testified he pled guilty prior to the Applicant's trial and served one and one-half (1 ½) years of a three (3) year sentence in prison. Saunders testified the Applicant was not present when Reeves said the Applicant was at the

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trailer. He testified the night before the search warrant was executed the Applicant was not at the trailer when Reeves was present. Saunders further testified he lives at 11 Bay Pine Road and that the Applicant had not lived there for three (3) to four (4) months, but was simply visiting at the time of the raid. He testified he did not know why he was not called to testify at trial. Saunders testified he was represented by counsel and was "locked up" at the time of trial at Beaufort County Detention Center. Lastly, Saunders testified he wanted to testify on the Applicant's behalf at trial even though doing so would have implicated himself and he would have effectively forfeited a favorable plea offer.

Finally, Andre Benjamin testified at the evidentiary hearing. Benjamin testified he went to 11 Bay Pine Road with his wife, Reeves, and Reeves' girlfriend. He testified he went in to see Akeem Saunders about some ladies. He testified Reeves stayed in the car and when he went into the house, Reeves drove off. Benjamin testified he returned to the car to get money from Reeves to buy marijuana. Benjamin testified the Applicant was not present when he purchased marijuana. He further testified Reeves did not enter the trailer with him. Benjamin further testified that he signed an affidavit dated October 26, 2012 and given to the Applicant's counsel (Lee) for the PCR hearing stating Reeves did go inside the home with him to purchase drugs. Benjamin testified he did not know exactly what the affidavit said. However, line two (2) of the affidavit states that he and Reeves went in the trailer together.

The Applicant testified on his behalf at the hearing and alleged a juror knew the witness Jenkins; however, the Applicant could not identify the juror, nor could he produce evidence that the juror was seated on the panel. The Applicant testified that Counsel failed to preserve multiple issues on appeal, specifically Counsel's renewed motion for directed verdict, the juror issue, and the allegation that reports not in evidence went back to the jury room during deliberations. The

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Applicant also claimed Counsel failed to investigate additional witnesses who could have provided his alibi, testified that he did not live at the premises in question, and discredited Reeves' testimony. The Applicant claimed that Judge Kinard was biased and should have recused himself because he took the Applicant's co-defendants' guilty pleas and possessed knowledge of the facts of the case and the Applicant's history. The Applicant testified that his attorney did not advise him of his right to testify. He testified that the decision not to testify was not his own but that counsel made the decision for him. However, on cross examination, the Applicant admitted that the trial court advised him of his rights and that his decision to testify was solely his own.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)).

Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must

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overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds trial counsel's testimony is credible. This Court finds the testimony of the Applicant's witnesses Tyece Brown, Akeem Saunders, and Andre Benjamin not credible. Specifically, this Court finds the testimony of Andre Benjamin, whose testimony at the hearing was contradictory to his testimony in a signed affidavit attached to the Applicant's application, particularly lacks credibility. The Court finds most persuasive on the issue of Benjamin's credibility his testimony at the hearing that his testimony in the signed and sworn affidavit was untruthful.

This Court finds that trial counsel has extensive experience in the practice of criminal law and has been practicing law for almost twenty (20) years. This Court finds that Counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that Counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed

the received discovery with the Applicant. This Court finds that Counsel discussed with the Applicant the elements of the charges against him, what the State was required to prove, his constitutional rights and range of penalty. This Court finds that Counsel discussed the Applicant's version of the facts and possible defenses with the Applicant. This Court further finds trial counsel adequately conferred with the Applicant and was thoroughly competent in his representation.

I. Rule 404(b), SCRE Evidence and State v. Lyle.

The Applicant alleges Counsel failed to fully and properly argue State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807-810 (1923) and Rule 404(b), SCRE as a basis for his objection to the testimony of William Reeves.⁹ This Court finds Counsel adequately challenged the admissibility of Reeves' testimony that the Applicant sold drugs in the trailer at trial. The record reflects trial counsel moved to exclude Reeves' testimony on the basis of 404(b) and argued the prior bad act that Reeves would testify to was not encompassed within the charges the Applicant was on trial for. (Tr. Vol. III 6:2-14). This Court finds Counsel's argument was properly aligned with Lyle. The rule of law is that, for prior bad acts evidence to be admissible, "[t]he record must

⁹ The Applicant's review of the trial transcript leads him to believe the Solicitor's response to trial counsel's motion raised the "identity" exception under Rule 404(b), SCRE and State v. Lyle. See Tr. Vol. III 6:1-15. The Applicant asserts the trial court made only a "cursory" ruling, relying solely on the temporal proximity of the prior bad act evidence and the execution of the search warrant. See Tr. Vol. III 7:4-13. Applicant further asserts that trial counsel failed to object to the limited nature of the court's ruling and the exception upon which it was relying and failed to request a more detailed ruling on this issue, including the necessity of a Rule 403 balancing test, in order to properly preserve the issue for appeal. The Applicant additionally asserts the court's sole reliance on the time between the acts is a legally insufficient basis and finding under Rule 404(b), SCRE.

The Applicant specifically argues that trial counsel was ineffective for failing to request a full, or at least a more comprehensive, analysis under Rule 404(b), SCRE and for failing to renew his objection at the directed verdict stage of the trial. The Applicant argues that trial counsel's failure to properly object to the trial court's summary denial of his Rule 404(b), SCRE motion, without conducting a sufficient Rule 404(b), SCRE analysis, including but not limited to, an on-the-record balancing test under Rule 403, SCRE, caused the issue not to be properly argued and preserved for direct appeal purposes. Stated differently, the Applicant alleges that trial counsel's failure to press the trial court into articulating specific reasons for denying his Rule 404(b), SCRE motion, however "uncomfortable" it may have been to do so, was absolutely necessary and appropriate, and caused the record to be incomplete, thus preventing a meaningful opportunity for subsequent review by the PCR and appellate courts. The Applicant asserts that the court's ruling did not even cite which exception it believed the proffered evidence satisfied under Rule 404(b), SCRE and Lyle, and that trial counsel's failure to even inquire into this basic fact prevented him from being able to properly respond to the court's ruling.

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support a logical relevance between the prior bad act and the crime for which the defendant is accused.” State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). This Court finds it is also clear from the State’s response to the Applicant’s motion that Reeves’ testimony went to the identity exception (Tr. Vol. III 6:15–20) and the Court’s ruling (Tr. Vol. III 7:4–6) that the Court properly performed an analysis pursuant to Lyle and Rule 404(b).

II. Preserving Error for Appeal.

The Applicant alleges Counsel failed to preserve the issue of the admissibility of Reeves’ testimony for appeal.¹⁰ This Court finds that Counsel adequately preserved this issue for appellate review. To preserve an issue for review on appeal, a party must raise the issue and obtain a ruling. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733–34 (1998) (citing Creech v. S.C. Wildlife & Marine Res. Dep’t, 328 S.C. 24, 33–34, 491 S.E.2d 571, 576 (1997)). Typically, counsel must make a contemporaneous objection in order to preserve issues for appellate review. See Sea Cove Dev., LLC v. Harbourside Community Bank, 387 S.C. 95, 108 n.5, 691 S.E.2d 158, 165 n.5 (2010). However, where the judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party need not renew the objection and the objection is preserved. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001).

This Court finds and the record reflects Counsel raised the issue of the admissibility of Reeves’ testimony immediately prior to Reeves’ testimony (Tr. Vol. II 6:2–14) and the Court ruled the testimony was admissible (Tr. Vol. II 7:4–6, 12–13). Furthermore, the trial court is not

¹⁰ The Applicant specifically asserts that trial counsel failed to properly preserve the 404(b), SCRE/Lyle issue because he did not renew his objections at the directed verdict stage of the proceedings, did not ask the court for a more complete basis or explanation of the ruling at that time for record purposes, and that such failure resulted in a procedural waiver of his ability to challenge the trial court’s ruling on direct appeal.

obligated to hear, nor is counsel obligated to make argument on an objection. Counsel is required to cite the basis of the objection and the Court may hear argument to aid in making its decision. See Rule 18, SCRCrimP. Counsel sufficiently preserved error by objecting to the impermissible character evidence prior to the witness' testimony. This Court further finds that the record is clear that the trial court made a contemporaneous ruling and the trial judge performed the necessary evidentiary balancing test. The record lacks any indication that the trial court judge failed to perform a full and thorough analysis on this issue. Although whether Counsel renewed his objection at the directed verdict stage is unclear, the record is clear that the trial judge was aware that Reeves' testimony was objectionable at the time he denied Counsel's motion for directed verdict. (Tr. Vol. III 35:1-8). This Court finds no merit to Applicant's argument that the issue of the admissibility of Reeves' testimony was properly preserved for appellate review.

III. Limiting Instruction.

The Applicant alleges Counsel failed to request a limiting instruction for Reeves' testimony. "The general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered." State v. Johnson, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991). "[A] limiting charge is unnecessary where evidence of other crime is admissible on the main issue or where the evidence admitted to show motive or intent is of acts which may well be supposed to have been done in furtherance of such motive or intent." State v. Nix, 288 S.C. 492, 497-98, 343 S.E.2d 627, 630 (Ct. App. 1986) (citing 23 C.J.S. *Criminal Law* § 1032(3) (1970)).

This Court finds a limiting instruction following Reeves' testimony was unnecessary because his testimony that he went to the trailer with his brother in law to purchase cocaine from

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the Applicant was directly related to the crime for which the Applicant was on trial. Cf. Nix, 288 S.C. at 497-98, 343 S.E.2d at 630 (where prior crime was means to accomplish present crime for which accused was on trial, evidence was admissible on main issue at trial and no limiting instruction was necessary). Based on Reeves' testimony, the State was able to obtain a search warrant of the trailer which resulted in the Applicant's arrest. This Court finds the Applicant has failed to carry his burden of proving Counsel provided ineffective assistance of Counsel with regard to Counsel's handling of Reeves' testimony at trial. Moreover, based on the record and unique facts presented in this case, this Court cannot discern any unfair prejudice resulting from the admission of Reeves' testimony. See State v. Johnson, 306 S.C. 119, 125, 410 S.E.2d 547, 551 (1991) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991)); Rule 403, FRCP).

IV. The Applicant's Prior Record.

The Applicant alleges Counsel was ineffective for failing to obtain a ruling on the admissibility of the Applicant's prior record for impeachment purposes, had the Applicant chosen to testify at trial. This Court finds Counsel had no obligation to request a ruling on the admissibility of the Applicant's criminal record before the Applicant decided whether or not he would testify. This Court finds it unlikely the admissibility of the Applicant's prior record greatly impacted the Applicant's decision not to take the stand, since Counsel provided credible testimony that he advised the Applicant that it was unlikely his prior drug convictions would be admissible for impeachment purposes.¹¹ This Court also finds Counsel provided credible

¹¹ The Applicant's prior record is as follows: The Applicant was convicted of Possession of Marijuana with Intent to Distribute and Driving While License Suspended or Revoked, a misdemeanor offense, on January 26, 2005 in Bleckley County, Georgia. The Applicant was convicted of Sale or Distribution of Marijuana, Possession of Crack Cocaine with Intent to Distribute-First Offense, Possession of Crack Cocaine-First Offense, on November 8, 1993 in Beaufort County, South Carolina. The Applicant was convicted of Distribution of Marijuana, Distribution of Cocaine, and Possession of Cocaine, on December 1, 1993 in Beaufort County, South Carolina. The Applicant was convicted of Shoplifting on June 1, 1995 in Beaufort County, South Carolina. The Applicant was convicted of two

testimony that he discussed with the Applicant his right to testify and gave him the option to make his decision based strongly on his advice prior to trial. (Tr. Vol. III 35:11-16). This Court finds and the record reflects the Applicant was also advised by the trial court of his right to testify. (Tr. Vol. III 35:11-20). Moreover, the trial court was not obligated to rule on the admissibility of the Applicant's prior record at the beginning of trial expending time on what may well have been a moot issue. This Court finds the Applicant was adequately informed of his right to testify and his decision not to testify was freely and voluntarily made. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective.

V. Witness Testimony.

The Applicant alleges Counsel was ineffective for failing to call exculpatory witnesses. This Court finds Counsel was not ineffective for failing to call Tyece Brown, Andre Benjamin, and Akeem Saunders as witnesses at trial. With regard to Akeem Saunders, this Court finds most persuasive Counsel's testimony that he spoke with the attorneys of the Applicant's co-defendants and none of the co-defendants could offer testimony beneficial to the Applicant. This Court finds it is also unlikely that Saunders would have risked losing a beneficial plea offer from the State to testify on the Applicant's behalf.

This Court also finds Counsel's decision not to call Andre Benjamin as a witness was beneficial to the Applicant in light of the incredible testimony that Benjamin provided at the post-conviction relief hearing. During the hearing, Benjamin admitted to lying in a sworn

(2) counts of Possession of Crack Cocaine with Intent to Distribute-First Offense and Sale and Distribution of Crack Cocaine on September 20, 1995 in Beaufort County, South Carolina. The Applicant was convicted of three (3) counts of Sale/Distribution of Unlawful Drugs, Crack Cocaine on September 27, 1995. The Applicant was convicted of Possession of Other Controlled Substance, Schedule I-V-First Offense on February 12, 2002 in Beaufort County, South Carolina. The Applicant was convicted of Open Container of Beer/Wine, Speeding, and Driving Under Suspension, on November 13, 2002. The Applicant was convicted of Failure to Surrender Driver's License when Required on January 30, 2004 in Beaufort County, South Carolina. The Applicant was convicted of Manufacturing, Possessing Schedule I, II, III Substance, Marijuana, with Intent to Distribute-Third or Subsequent Offense on June 13, 2004 in Georgia.

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statement which he signed. (See State's Exhibit 1). This Court finds credible Counsel's testimony that there was some concern about the credibility of the witnesses' testimony. See State v. Stokes, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (when trial counsel articulates valid reasons for employing a particular strategy, such as declining to call certain witnesses who lack credibility and provide no information likely to have changed the outcome of the trial, no ineffective assistance of counsel results).

With regard to calling Tyece Brown, the Applicant's girlfriend, this Court finds it unlikely the jury would have given Brown's testimony any considerable weight or credibility considering her relationship with the Applicant. This Court further finds no prejudice resulted from Counsel's decision not to call Brown because, even without Brown's testimony, Counsel was able to adequately challenge the Applicant's control of the trailer during his cross-examination of Robert Jenkins. Furthermore, this Court finds credible Counsel's testimony that he fully discussed these matters with the Applicant and the Applicant agreed with his strategic decisions not to call certain witnesses. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to call these witnesses at trial. This Court finds in light of the testimony presented at the hearing, it is unlikely prejudice resulted from the omission of these witnesses' testimony at trial.

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VI. Probable Cause and Search Warrant.

The Applicant alleges Counsel was ineffective for failing to challenge the probable cause for the search warrant of the trailer where the Applicant was arrested.¹² This Court finds Counsel was not ineffective for failing to challenge the probable cause for the search warrant of the trailer. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

This Court finds Counsel's decision not to challenge the search warrant was based on a valid trial strategy. Counsel provided credible testimony that he originally intended to challenge the search warrant, but ultimately decided against it. He testified he was aware the Applicant did not have specific standing to suppress the search, but he wanted to challenge the search nonetheless. Counsel testified that in response to this position, he was told by the court that he could not challenge the search warrant and then argue that the Applicant lacked control of the drugs without jeopardizing his trial strategy. This Court finds most persuasive Counsel's testimony that based on the court's guidance he chose not to challenge the search warrant. Further, it is clear from the trial court transcript and the colloquy what Counsel would have argued; therefore, no proffer was necessary. (Tr. Vol. I 34:8-37:13). This Court finds that

¹² The Applicant asserts that trial counsel would not have been judicially estopped or prevented from asserting a mere presence defense at trial if his motion *in limine* to suppress the search warrant was denied pretrial. The Applicant argues that he had a reasonable expectation of privacy at the property, and a concomitant right to challenge the search warrant, and, further, that such right was not mutually exclusive of his right to argue a mere presence defense at trial. In other words, the Applicant asserts that counsel "had nothing to lose, and everything to gain," by proceeding on a motion to suppress the evidence found at the trailer as "fruit of the poisonous tree," and that such a decision to refrain from doing so is error and not a legitimate strategic decision.

Counsel's trial strategy was valid and that it was reasonable and wise for counsel to seek the court's guidance in deciding whether to challenge the warrant based on the court's opinion.

Additionally, the Applicant argues that Counsel was ineffective for failing to request a Delaware v. Franks¹³ hearing to challenge the search warrant. Although Counsel could have challenged the validity of the search warrant and attacked the validity of Reeves' attestation by impeachment, Counsel did successfully impeach Reeves on the stand. This Court finds that from the record it appears the search warrant was valid and that Counsel's decision not to request a formal Delaware v. Franks hearing was a valid strategic decision. This Court can discern no basis for a successful challenge, even if made, and that the failure to request a formal hearing in no way prejudiced the Applicant.

This Court also finds the Applicant has failed to carry his burden of proving prejudice resulted from Counsel's failure to challenge the search warrant. Counsel provided credible testimony that it was unlikely any challenge to the search warrant would have been successful. This Court finds that Counsel provided reasonable performance with regard to his decision not to challenge the search warrant and his performance did not prejudice the Applicant.

VII. Judge Kinard's Recusal.

The Applicant alleges Counsel was ineffective for failing to request the recusal of Judge Kinard. The Applicant argues Counsel should have requested Judge Kinard recuse himself based on Judge Kinard's judicial knowledge of the case, by virtue of his knowledge of the co-defendants' guilty pleas, prior to the Applicant's trial.

Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from

¹³ See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

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an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge.

State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003). This Court finds the Applicant has failed to show any evidence of actual bias or prejudice constituting grounds for Judge Kinard's recusal. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective and this allegation is wholly without merit.

VIII. "Big T."

The Applicant alleges Counsel was ineffective for failing to object to the State's reference to the Applicant as "Big T" during the State's closing argument. This Court finds the State's reference to the Applicant as "Big T" during the State's closing argument was not objectionable as the State laid the proper foundation to establish the Applicant as "Big T." Prior to the start of trial, trial counsel made a motion *in limine* to preclude the State from referencing the Applicant's street name without laying a proper foundation. (Tr. Vol. I. 38:17-39:1). The State agreed not to refer to the Applicant as "Big T" unless the proper foundation was laid. (Tr. Vol. I 38:2-9). The Court granted the Applicant's motion, but allowed testimony from law enforcement that they were looking for "Big T." (Tr. Vol. I 39:3-14).

During trial, William Reeves testified he went to Bay Pines Road to purchase cocaine from "Big T." (Tr. Vol. III 15:17-19). Reeves then identified the Applicant as "Big T." (Tr. Vol. III 15:20-16:10). This Court finds the State laid the proper foundation through Reeves' testimony to identify the Applicant as "Big T." This Court also finds the State's reference to the Applicant in its closing argument as "Big T" was a proper comment on the facts presented during trial. This Court finds the Applicant failed to carry his burden of proving Counsel was ineffective. This Court also finds that no prejudice resulted from Counsel's performance and this allegation is without merit.

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IX. Jurors and *Voir Dire*.

The Applicant alleges Counsel was ineffective for failing to inquire into the facts of a juror who knew one of the State's witnesses. The record reflects an unidentified juror indicated he knew the State's witness, Robert Jenkins. (Tr. Vol. I 16:3-8). The juror told the Court he and Jenkins were classmates and that he could be fair and impartial if Jenkins testified at trial. (Tr. Vol. I 6-11). This Court finds this juror was adequately questioned by the court about his relationship with Jenkins and that Counsel need not have made any further inquiry. This Court finds the Applicant has failed to carry his burden of proving Counsel should have further questioned the juror. This Court finds no prejudice resulted from Counsel's performance and this allegation is without merit.

X. Evidence in Jury Deliberation Room.

The Applicant alleges Counsel was ineffective for failing to object to evidence going back to the jury that was not properly admitted. The record reflects the court instructed counsel to check the evidence before it was sent back to the jury. (Tr. Vol. III 90:17-18). The State's counsel indicated exhibits number 57, 58, and 59 were not listed as admitted. She indicated she thought that they were admitted, which Counsel confirmed. (Tr. Vol. III 91:14-20; 92: 7-9). The Court allowed the evidence to be admitted and sent back to the jury. (Tr. Vol. III 92:10-19).

The decision to permit the State to re-open its case and present evidence lies within the sound discretion of the trial court. State v. Humphrey, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981); State v. Green, 350 S.C. 580, 586, 567 S.E.2d 505, 508 (Ct. App. 2002) (citing State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978); State v. Harrison, 236 S.C. 246, 113, S.E.2d 783 (1960)). This Court finds no prejudice resulted from Counsel's failure to object to the admission of this evidence after the close of the State's case because the evidence included in the

exhibits was already presented to the jury through the testimony of the analysts. See Hammond, 270 S.C. at 355–56, 242 S.E.2d at 415. This Court finds the Applicant has failed to carry his burden of proving Counsel’s performance was ineffective.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that Counsel’s performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by counsel’s representation. See id. The Applicant’s complaints concerning Counsel’s performance are without merit and are denied and dismissed. Thereby, this Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations occurring before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by

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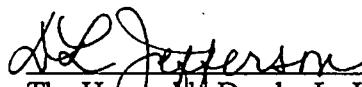
Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

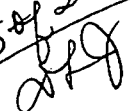
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 5th day of March, 2014



The Honorable Deadra L. Jefferson
Presiding Judge

Charleston, South Carolina.
at chambers.

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FORM 4

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP0704095

Turuk F Saunders

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order: (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 10th day of March, 2014, and a copy mailed first class or placed in the appropriate attorney's box on the 14th day of March, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

Turuk F Saunders #199803 Brci-MLT 2053 4460 Broad
River Road Columbia, SC 29210
Scott Wayne Lee PO Box 2124 Beaufort, SC 29901-2124

Ashleigh Rayanna Wilson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lynn Geren - Staff

Court Reporter

Jerri Ann Roseneau - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
)
 Turuk Saunders, #199803,)
)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2012-CP-07-4095

14 MAR 10 PM 3:12
 BEAUFORT COUNTY S.C.
 CLERK OF COURT

ORDER OF DISMISSAL

Presiding Judge:	Hon. Deadra L. Jefferson
Applicant's Attorney:	Scott W. Lee, Esquire
Respondent's Attorney:	Ashleigh R. Wilson, Esquire
Trial Counsel:	Cory H. Fleming, Esquire
Date of Hearing:	August 27, 2013
Court Reporter:	Susan "Mia" Perron

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed November 30, 2012. The Respondent made its Return on February 25, 2013. An evidentiary hearing on the matter was convened on August 27, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Scott W. Lee, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Present to testify at the hearing was Cory Fleming, Esquire the Applicant's trial counsel, Tyece Brown, Akeem Saunders, and Andre Benjamin. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South

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Carolina Department of Corrections, the Applicant's application, the Respondent's Return, the appellate records, and the exhibits and case law submitted by the parties at the hearing.¹

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the March 2007 term of the Beaufort County Grand Jury for Possession with Intent to Distribute (PWID) Marijuana (2007-GS-07-0505),² PWID Cocaine (2007-GS-07-0506),³ PWID Ecstasy (2007-GS-07-0507),⁴ Trafficking Cocaine, 10-28 grams (2007-GS-7-0508),⁵ and Possession of a Weapon During the Commission of a Violent Crime (2007-GS-07-0509).⁶ He was represented by Cory Fleming, Esquire.

The Applicant proceeded to trial and was found not guilty of Possession of a Weapon during the Commission of a Violent Crime, but was found guilty of all the other charges. On May 26, 2010, the Applicant was sentenced by the Honorable Ernest Kinard to twenty (20) years for PWID Marijuana and PWID Ecstasy and twenty-seven (27) years for PWID Cocaine and Trafficking Cocaine. The sentences are to be served concurrently.

¹ State's Exhibit 1 is a copy of a signed affidavit of Andre Benjamin which was attached to the Applicant's application for post-conviction relief.

² Possession with Intent to Distribute Marijuana, third or subsequent offense, is a felony punishable by twenty (20) years imprisonment or up to a twenty-thousand dollar (\$20,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(2) (2012).

³ Possession with Intent to Distribute Cocaine, third or subsequent offense, is a serious felony punishable by thirty (30) years imprisonment or up to a fifty-thousand dollar (\$50,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(1) (2012).

⁴ Possession with Intent to Distribute Ecstasy, third or subsequent offense, is a serious felony punishable by thirty (30) years imprisonment or up to a fifty-thousand dollar (\$50,000) fine, or both. See S.C. CODE ANN. § 44-53-370(b)(2) (2012).

⁵ Trafficking Crack, 10-28 grams, third or subsequent offense, is a violent, serious felony punishable by a mandatory minimum term of imprisonment for twenty-five (25) years, maximum imprisonment for thirty (30) years, none of which time may be suspended, nor probation granted, and a fifty-thousand dollar (\$50,000) fine. See S.C. CODE ANN. § 44-53-375(c)(1) (2012).

⁶ Possession of a Weapon During the Commission of a Violent Crime is a felony punishable by a mandatory, minimum five (5) years imprisonment. See S.C. CODE ANN. § 16-23-490 (2010).

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A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Nicole Mace, Esquire perfected the appeal. The South Carolina Court of Appeals affirmed the Applicant's convictions and sentences. State v. Saunders, Op. No. 2012-UP-456 (S.C. Ct. App. July 25, 2012). The Remittitur was issued August 10, 2012.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Failure to object to inadmissible hearsay and character evidence.
 - b. Failure to object to the court allowing evidence to go back to the jury that was never properly admitted.
 - c. Failure to properly inquire into the facts of a juror who knew a witness who was due and did testify.
 - d. Failure to object to the prosecutor's continued reference to the Applicant as "Big T".
 - e. Failure to ensure that all issues raised were preserved for proper review.
2. Ineffective assistance of appellate counsel.

The Applicant amended his application on August 26, 2013 to allege the following:

1. Ineffective assistance of counsel.
 - a. Trial counsel failed to properly challenge the issue of probable cause for issuance of the search warrant which led to the State's discovery of the drugs for which the Applicant was charged.
 - b. Trial counsel failed to properly argue against the admissibility of testimony of Witness Reeves with regard to State v. Lyle and SCRE Rule 404(b), or under any other theory.
 - c. Trial counsel failed to argue and obtain a ruling on the admissibility of Defendant's prior record for purposes of impeachment.
 - d. Trial counsel failed to fully discuss the benefits and pitfalls of Applicant's testifying because he did not obtain a ruling on the admissibility of the Applicant's prior convictions, thereby preventing Applicant from making a fully informed decision about whether or not he would testify.
 - e. Trial counsel failed to call exculpatory witnesses who would have refuted testimony offered by the State, despite their ability, availability and willingness to testify.

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- f. Trial counsel failed to properly renew and preserve the issue of the admissibility of Witness Reeves' testimony, thereby procedurally barring and preventing same from being considered on appeal.
- g. Trial counsel failed to request a jury instruction from the Court regarding the limited purpose of admissibility of testimony admitted pursuant to State v. Lyle.

At the hearing, the Applicant proceeded solely on the allegation of ineffective assistance of trial counsel. This Court finds the allegation of ineffective assistance of appellate counsel was abandoned by the Applicant and is hereby dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW


This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing and to closely pass upon his or her credibility. This Court has weighed the testimony accordingly.

Set forth below are the relevant findings of fact and conclusions of law as required by S.C. CODE ANN. § 17-27-80 (2003).

Summary of the Testimony

Cory Fleming, Esquire, testified at the evidentiary hearing that he was retained to represent the Applicant at trial. He testified he also filed a Notice of Appeal for the Applicant and remained on the case until he received the trial transcript. Counsel testified he has been practicing law for nineteen (19) to twenty (20) years and has practiced criminal law regularly. He testified he met with the Applicant many times prior to trial.

Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the discovery materials with the Applicant. He testified he discussed with the Applicant the elements of the charges he was facing and the State's burden of proof. He testified he discussed with the Applicant his version of the facts and possible defenses at length and met with

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the Applicant as much as necessary. Counsel testified he had ample time to prepare for trial. Counsel testified, although the Applicant complained that a juror knew Robert Jenkins, he gave the trial judge the names of his witnesses during *voir dire* "out of an abundance of caution" and did not recall any problems with jurors during trial. He testified he and the Applicant participated in *voir dire* and selection of each juror. Counsel further testified that he reviewed all evidence that was sent back to the jury during deliberations and that no evidence was sent back to the jury that was not admitted in the record.

Counsel testified the Applicant's case was the classic drug investigation involving the drug task force and complaints about drug activity at a trailer. Counsel testified the task force set up observation of the trailer and followed a car leaving the trailer. He testified the task force stopped the car and, based on the information they received from the car's occupants, obtained a search warrant for the trailer and found drugs.

Counsel testified he investigated all leads given to him by the Applicant. He further testified that he spoke with all witness prior to trial except Reeves and Jenkins but that he was given time to speak with Jenkins and Reeves was made available to him right before his testimony at trial. He testified that he was able to successfully challenge Reeves' credibility on cross basically establishing that he would say "anything" to save himself. He further testified that he was able to use Reeves' statements to effectively impeach him. He further testified that he got a receipt book late or last as Jenkins had just found it and wished he had received it sooner however this did not affect his trial preparation. Counsel further testified that he was able to cross examine Jenkins regarding the receipts and did not feel that his testimony was particularly damaging to the case.

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Counsel also testified the Applicant provided him no alibi witnesses. Counsel testified that each of the Applicant's co-defendants were represented by legal counsel. He further testified that all witnesses needed for his trial purposes were present whether subpoenaed or not. Counsel testified that the Applicant "fully" participated in his defense.

Counsel testified the Applicant was charged with multiple drug offenses. He testified the evidence at trial showed the Applicant was leaving the trailer as the raid team entered and was seen throwing down marijuana. He testified no drugs were found on the Applicant. Counsel testified his strategy at trial was to argue a mere presence defense and that the Applicant was not linked to the drugs found in the trailer, but was only present during the raid. Counsel testified there were so many people at the home and it was clear the Applicant did not live there. He testified his ability to defend the case was based on one witness' testimony identifying the Applicant as the drug dealer. He further testified there was a belief that the Applicant was the "ring leader" however there was no direct testimony of that.

Counsel testified he originally intended to challenge the search warrant, but ultimately decided against it. He testified he believed the Applicant did not have specific standing to suppress the search, but he wanted to challenge the search nevertheless. He testified in response to this position that the trial Court had indicated that if he challenged the search warrant, he would be judicially estopped from arguing his client lacked dominion and control over the home, which would jeopardize his trial strategy. He testified he thought he had the right to challenge the search warrant, but decided not to do so based on the Court's guidance as he could not argue two factually inconsistent positions. He testified he made a strategic decision not to challenge the search warrant, since the judge advised he was "warning [him] away from it." He further testified that while the probable cause for the warrant was "shabby" because of the veracity of

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the State's witness based on the "totality" and "ongoing" nature of the investigation ultimately probable cause existed. He further testified that he felt even if he challenged the search warrant there was sufficient evidence in the record and he felt the trial Court would have found there was probable cause.

Counsel testified the challenge of the search warrant was not particularly strong and he felt the Applicant's mere presence defense was stronger without having Reeves' testimony. Counsel testified he did not want the State to be able to assert that the Applicant had control. He testified he also did not want to box himself in on what he thought was his best defense in light of the evidence. He testified that at trial he was operating under the assumption that Reeves would not be present. Counsel testified no direct testimony supported the theory that the Applicant was the "ring leader" and, ultimately, his defense was that the Applicant did not have control over the house and was merely a visitor.

Counsel testified even if the search warrant for the trailer was valid, the veracity of the witnesses was "shabby" and no evidence proved the Applicant was involved with the large quantity of drugs found. He testified, based on the "ongoing" nature of the investigation, he thought the police had enough probable cause to obtain the search warrant of the trailer, which conclusion he felt the court would also reach. Counsel testified he is familiar with the law on standing to challenge the validity of a search warrant under the Fourth Amendment and a defendant's reasonable expectation of privacy. He testified, although he received the rent receipts last, he was able to cross examine Robert Jenkins on how he received payment for the trailer. Counsel testified he originally intended to challenge the search warrant, but ultimately decided against that challenge.

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Counsel testified Reeves was the State's key witness. He testified that Reeves' statement was the basis of the search warrant for the trailer and that his testimony was the single most important evidence in the case. Counsel testified he did not know prior to trial if Reeves would be present to testify but that he reviewed Reeves' statement prior to trial. He testified he was aware that Reeves' testimony at trial was different from his testimony in the warrant and was able to cross-examine Reeves at trial about the inconsistency. He testified he was able to get Reeves to admit he lied to the police about certain things. Counsel testified a Delaware v. Franks⁷ hearing could have been part of a package deal, but that he chose not to request one for the same reasons he chose not to challenge the search warrant.

Counsel testified he was concerned about Reeves' testimony about the Applicant participating in previous drug activity. He testified he made a timely objection to Reeves' testimony based on Rule 404(b), SCRE and the fact that the Applicant was not charged with direct distribution and was not actively participating in drug transactions. Counsel testified that, although he did not state State v. Lyle⁸ specifically, it was clear that the trial court was performing a Lyle and Rule 404(b), SCRE-based analysis. He testified he objected to Reeves' testimony before he was called as a witness. Counsel testified he did not remember if he renewed his objections at the directed verdict stage.

Counsel testified he did not file a motion to determine the admissibility of the Applicant's prior convictions. He testified he raised the issue in passing to the court during housekeeping matters and said that he may raise the issue later after the Applicant made a decision on whether he would testify. Counsel further testified both he and the court advised the Applicant of his right to testify. He testified he would have requested a ruling on the admissibility of the Applicant's

⁷ See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

⁸ See State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

prior convictions had the Applicant decided to testify. Counsel testified the request was premature at the time he originally mentioned it to the court. Counsel also testified he told the Applicant it was likely the court would exclude his prior drug convictions. Counsel testified it was the sole decision of the Applicant not to testify based on Counsel's advice of the strong possibility of impeachment, not based on the admissibility of his prior convictions. Counsel testified that he fully advised the Applicant of his right to testify and his options. He further testified that the Applicant never told him he desired to testify.

Counsel testified he did not call any witnesses to testify at trial. He testified that several of the witnesses he considered calling were the Applicant's co-defendants. He testified he was told by the attorneys who represented the Applicant's co-defendants that they did not want to testify and that their testimony would not have been helpful to the Applicant. He testified all the Applicant's co-defendants had retained counsel so he was not sure what they would testify to and that the Applicant's co-defendants pled guilty in "short order" around the time the Applicant went to trial. Counsel testified the potential witnesses were not credible and the Applicant's case looked better without their testimony. Counsel testified he discussed his decision not to call any witnesses with the Applicant and the Applicant agreed. He testified he was able to challenge the testimony of the State's witnesses without calling any witnesses and that the strategy of calling witnesses but not calling the defendant to testify sends a bad signal to the jury. He testified he was also able to successfully show that the co-defendants were guilty without the co-defendants testifying at trial. Counsel testified he successfully challenged Reeves' credibility at trial by using his statements to impeach him. Counsel testified all the witnesses he needed were present and he was able to preserve last argument to the jury.

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Counsel testified he saw no problem with the trial judge having knowledge about the case prior to trial and there was no basis for a request to Judge Kinard to recuse himself from the trial. Counsel also testified he made a motion to preclude the State from referring to the Applicant as "Big T." He testified Reeves established the Applicant's identity as "Big T" during his testimony and the "Big T" reference during the State's closing was "problematic but not objectionable" and was a fair statement of the evidence in line with the judge's previous ruling on the issue. Additionally, Counsel testified he renewed all motions at the end of trial. He testified the Applicant was a smart participant in his trial, understood the court system, and participated fully in his defense. Finally, he testified that he and the Applicant made many crucial decisions together, including plea offers and calling witnesses to testify.

Also present and testifying was Tyece Brown. Brown testified she lives at 27 Big Road in Beaufort, South Carolina. She testified the Applicant was her boyfriend at the time of the incident and trial and that they lived together at 145 William Campbell Road at the time of the incident and since 2002, which residence was twenty (20) to twenty-five (25) minutes away from the site of the incident. She testified she spoke with trial counsel and gave him a copy of their lease. She testified she was listed as a witness at trial and sequestered. Lastly, Brown testified she was not called as a witness, but would have testified that the Applicant lived somewhere else had she been called.

Akeem Saunders, the Applicant's younger brother, also testified at the hearing. He testified he was present during the raid at the time of the search warrant execution and arrests and was also charged with a drug offense. Saunders testified he pled guilty prior to the Applicant's trial and served one and one-half (1 ½) years of a three (3) year sentence in prison. Saunders testified the Applicant was not present when Reeves said the Applicant was at the

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trailer. He testified the night before the search warrant was executed the Applicant was not at the trailer when Reeves was present. Saunders further testified he lives at 11 Bay Pine Road and that the Applicant had not lived there for three (3) to four (4) months, but was simply visiting at the time of the raid. He testified he did not know why he was not called to testify at trial. Saunders testified he was represented by counsel and was "locked up" at the time of trial at Beaufort County Detention Center. Lastly, Saunders testified he wanted to testify on the Applicant's behalf at trial even though doing so would have implicated himself and he would have effectively forfeited a favorable plea offer.

Finally, Andre Benjamin testified at the evidentiary hearing. Benjamin testified he went to 11 Bay Pine Road with his wife, Reeves, and Reeves' girlfriend. He testified he went in to see Akeem Saunders about some ladies. He testified Reeves stayed in the car and when he went into the house, Reeves drove off. Benjamin testified he returned to the car to get money from Reeves to buy marijuana. Benjamin testified the Applicant was not present when he purchased marijuana. He further testified Reeves did not enter the trailer with him. Benjamin further testified that he signed an affidavit dated October 26, 2012 and given to the Applicant's counsel (Lee) for the PCR hearing stating Reeves did go inside the home with him to purchase drugs. Benjamin testified he did not know exactly what the affidavit said. However, line two (2) of the affidavit states that he and Reeves went in the trailer together.

The Applicant testified on his behalf at the hearing and alleged a juror knew the witness Jenkins; however, the Applicant could not identify the juror, nor could he produce evidence that the juror was seated on the panel. The Applicant testified that Counsel failed to preserve multiple issues on appeal, specifically Counsel's renewed motion for directed verdict, the juror issue, and the allegation that reports not in evidence went back to the jury room during deliberations. The

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Applicant also claimed Counsel failed to investigate additional witnesses who could have provided his alibi, testified that he did not live at the premises in question, and discredited Reeves' testimony. The Applicant claimed that Judge Kinard was biased and should have recused himself because he took the Applicant's co-defendants' guilty pleas and possessed knowledge of the facts of the case and the Applicant's history. The Applicant testified that his attorney did not advise him of his right to testify. He testified that the decision not to testify was not his own but that counsel made the decision for him. However, on cross examination, the Applicant admitted that the trial court advised him of his rights and that his decision to testify was solely his own.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 622, 300 S.E.2d 482, 483 (1983)).

Where the Applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814 (citing Strickland, 466 U.S. at 686, 104 S. Ct. at 2064).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. See Strickland at 690, 104 S. Ct. at 2066. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. See id. The applicant must

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overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. See id. at 117-18, 386 S.E.2d at 625. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Id. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S. Ct. at 2052). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

This Court finds trial counsel's testimony is credible. This Court finds the testimony of the Applicant's witnesses Tyece Brown, Akeem Saunders, and Andre Benjamin not credible. Specifically, this Court finds the testimony of Andre Benjamin, whose testimony at the hearing was contradictory to his testimony in a signed affidavit attached to the Applicant's application, particularly lacks credibility. The Court finds most persuasive on the issue of Benjamin's credibility his testimony at the hearing that his testimony in the signed and sworn affidavit was untruthful.

This Court finds that trial counsel has extensive experience in the practice of criminal law and has been practicing law for almost twenty (20) years. This Court finds that Counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds that Counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed

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the received discovery with the Applicant. This Court finds that Counsel discussed with the Applicant the elements of the charges against him, what the State was required to prove, his constitutional rights and range of penalty. This Court finds that Counsel discussed the Applicant's version of the facts and possible defenses with the Applicant. This Court further finds trial counsel adequately conferred with the Applicant and was thoroughly competent in his representation.

I. Rule 404(b), SCRE Evidence and State v. Lyle.

The Applicant alleges Counsel failed to fully and properly argue State v. Lyle, 125 S.C. 406, 417, 118 S.E. 803, 807–810 (1923) and Rule 404(b), SCRE as a basis for his objection to the testimony of William Reeves.⁹ This Court finds Counsel adequately challenged the admissibility of Reeves' testimony that the Applicant sold drugs in the trailer at trial. The record reflects trial counsel moved to exclude Reeves' testimony on the basis of 404(b) and argued the prior bad act that Reeves would testify to was not encompassed within the charges the Applicant was on trial for. (Tr. Vol. III 6:2–14). This Court finds Counsel's argument was properly aligned with Lyle. The rule of law is that, for prior bad acts evidence to be admissible, "[t]he record must

⁹ The Applicant's review of the trial transcript leads him to believe the Solicitor's response to trial counsel's motion raised the "identity" exception under Rule 404(b), SCRE and State v. Lyle. See Tr. Vol. III 6:1–15. The Applicant asserts the trial court made only a " cursory" ruling, relying solely on the temporal proximity of the prior bad act evidence and the execution of the search warrant. See Tr. Vol. III 7:4–13. Applicant further asserts that trial counsel failed to object to the limited nature of the court's ruling and the exception upon which it was relying and failed to request a more detailed ruling on this issue, including the necessity of a Rule 403 balancing test, in order to properly preserve the issue for appeal. The Applicant additionally asserts the court's sole reliance on the time between the acts is a legally insufficient basis and finding under Rule 404(b), SCRE.

The Applicant specifically argues that trial counsel was ineffective for failing to request a full, or at least a more comprehensive, analysis under Rule 404(b), SCRE and for failing to renew his objection at the directed verdict stage of the trial. The Applicant argues that trial counsel's failure to properly object to the trial court's summary denial of his Rule 404(b), SCRE motion, without conducting a sufficient Rule 404(b), SCRE analysis, including but not limited to, an on-the-record balancing test under Rule 403, SCRE, caused the issue not to be properly argued and preserved for direct appeal purposes. Stated differently, the Applicant alleges that trial counsel's failure to press the trial court into articulating specific reasons for denying his Rule 404(b), SCRE motion, however "uncomfortable" it may have been to do so, was absolutely necessary and appropriate, and caused the record to be incomplete, thus preventing a meaningful opportunity for subsequent review by the PCR and appellate courts. The Applicant asserts that the court's ruling did not even cite which exception it believed the proffered evidence satisfied under Rule 404(b), SCRE and Lyle, and that trial counsel's failure to even inquire into this basic fact prevented him from being able to properly respond to the court's ruling.

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support a logical relevance between the prior bad act and the crime for which the defendant is accused.” State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000) (citing State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996)). This Court finds it is also clear from the State’s response to the Applicant’s motion that Reeves’ testimony went to the identity exception (Tr. Vol. III 6:15–20) and the Court’s ruling (Tr. Vol. III 7:4–6) that the Court properly performed an analysis pursuant to Lyle and Rule 404(b).

II. Preserving Error for Appeal.

The Applicant alleges Counsel failed to preserve the issue of the admissibility of Reeves’ testimony for appeal.¹⁰ This Court finds that Counsel adequately preserved this issue for appellate review. To preserve an issue for review on appeal, a party must raise the issue and obtain a ruling. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733–34 (1998) (citing Creech v. S.C. Wildlife & Marine Res. Dep’t, 328 S.C. 24, 33–34, 491 S.E.2d 571, 576 (1997)). Typically, counsel must make a contemporaneous objection in order to preserve issues for appellate review. See Sea Cove Dev., LLC v. Harbourside Community Bank, 387 S.C. 95, 108 n.5, 691 S.E.2d 158, 165 n.5 (2010). However, where the judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party need not renew the objection and the objection is preserved. State v. Forrester, 343 S.C. 637, 642, 541 S.E.2d 837, 840 (2001).

This Court finds and the record reflects Counsel raised the issue of the admissibility of Reeves’ testimony immediately prior to Reeves’ testimony (Tr. Vol. II 6:2–14) and the Court ruled the testimony was admissible (Tr. Vol. II 7:4–6, 12–13). Furthermore, the trial court is not

¹⁰ The Applicant specifically asserts that trial counsel failed to properly preserve the 404(b), SCRE/Lyle issue because he did not renew his objections at the directed verdict stage of the proceedings; did not ask the court for a more complete basis or explanation of the ruling at that time for record purposes, and that such failure resulted in a procedural waiver of his ability to challenge the trial court’s ruling on direct appeal.

obligated to hear, nor is counsel obligated to make argument on an objection. Counsel is required to cite the basis of the objection and the Court may hear argument to aid in making its decision. See Rule 18, SCRCrimP. Counsel sufficiently preserved error by objecting to the impermissible character evidence prior to the witness' testimony. This Court further finds that the record is clear that the trial court made a contemporaneous ruling and the trial judge performed the necessary evidentiary balancing test. The record lacks any indication that the trial court judge failed to perform a full and thorough analysis on this issue. Although whether Counsel renewed his objection at the directed verdict stage is unclear, the record is clear that the trial judge was aware that Reeves' testimony was objectionable at the time he denied Counsel's motion for directed verdict. (Tr. Vol. III 35:1-8). This Court finds no merit to Applicant's argument that the issue of the admissibility of Reeves' testimony was properly preserved for appellate review.

III. Limiting Instruction.

The Applicant alleges Counsel failed to request a limiting instruction for Reeves' testimony. "The general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered." State v. Johnson, 306 S.C. 119, 126, 410 S.E.2d 547, 552 (1991). "[A] limiting charge is unnecessary where evidence of other crime is admissible on the main issue or where the evidence admitted to show motive or intent is of acts which may well be supposed to have been done in furtherance of such motive or intent." State v. Nix, 288 S.C. 492, 497-98, 343 S.E.2d 627, 630 (Ct. App. 1986) (citing 23 C.J.S. *Criminal Law* § 1032(3) (1970)).

This Court finds a limiting instruction following Reeves' testimony was unnecessary because his testimony that he went to the trailer with his brother in law to purchase cocaine from

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the Applicant was directly related to the crime for which the Applicant was on trial. Cf. Nix, 288 S.C. at 497–98, 343 S.E.2d at 630 (where prior crime was means to accomplish present crime for which accused was on trial, evidence was admissible on main issue at trial and no limiting instruction was necessary). Based on Reeves' testimony, the State was able to obtain a search warrant of the trailer which resulted in the Applicant's arrest. This Court finds the Applicant has failed to carry his burden of proving Counsel provided ineffective assistance of Counsel with regard to Counsel's handling of Reeves' testimony at trial. Moreover, based on the record and unique facts presented in this case, this Court cannot discern any unfair prejudice resulting from the admission of Reeves' testimony. See State v. Johnson, 306 S.C. 119, 125, 410 S.E.2d 547, 551 (1991) (quoting State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146, 149 (1991); Rule 403, FRCP).

IV. The Applicant's Prior Record.

The Applicant alleges Counsel was ineffective for failing to obtain a ruling on the admissibility of the Applicant's prior record for impeachment purposes, had the Applicant chosen to testify at trial. This Court finds Counsel had no obligation to request a ruling on the admissibility of the Applicant's criminal record before the Applicant decided whether or not he would testify. This Court finds it unlikely the admissibility of the Applicant's prior record greatly impacted the Applicant's decision not to take the stand, since Counsel provided credible testimony that he advised the Applicant that it was unlikely his prior drug convictions would be admissible for impeachment purposes.¹¹ This Court also finds Counsel provided credible

¹¹ The Applicant's prior record is as follows: The Applicant was convicted of Possession of Marijuana with Intent to Distribute and Driving While License Suspended or Revoked, a misdemeanor offense, on January 26, 2005 in Bleckley County, Georgia. The Applicant was convicted of Sale or Distribution of Marijuana, Possession of Crack Cocaine with Intent to Distribute-First Offense, Possession of Crack Cocaine-First Offense, on November 8, 1993 in Beaufort County, South Carolina. The Applicant was convicted of Distribution of Marijuana, Distribution of Cocaine, and Possession of Cocaine, on December 1, 1993 in Beaufort County, South Carolina. The Applicant was convicted of Shoplifting on June 1, 1995 in Beaufort County, South Carolina. The Applicant was convicted of two

testimony that he discussed with the Applicant his right to testify and gave him the option to make his decision based strongly on his advice prior to trial. (Tr. Vol. III 35:11-16). This Court finds and the record reflects the Applicant was also advised by the trial court of his right to testify. (Tr. Vol. III 35:11-20). Moreover, the trial court was not obligated to rule on the admissibility of the Applicant's prior record at the beginning of trial expending time on what may well have been a moot issue. This Court finds the Applicant was adequately informed of his right to testify and his decision not to testify was freely and voluntarily made. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective.

V. Witness Testimony.

The Applicant alleges Counsel was ineffective for failing to call exculpatory witnesses. This Court finds Counsel was not ineffective for failing to call Tyece Brown, Andre Benjamin, and Akeem Saunders as witnesses at trial. With regard to Akeem Saunders, this Court finds most persuasive Counsel's testimony that he spoke with the attorneys of the Applicant's co-defendants and none of the co-defendants could offer testimony beneficial to the Applicant. This Court finds it is also unlikely that Saunders would have risked losing a beneficial plea offer from the State to testify on the Applicant's behalf.

This Court also finds Counsel's decision not to call Andre Benjamin as a witness was beneficial to the Applicant in light of the incredible testimony that Benjamin provided at the post-conviction relief hearing. During the hearing, Benjamin admitted to lying in a sworn

(2) counts of Possession of Crack Cocaine with Intent to Distribute-First Offense and Sale and Distribution of Crack Cocaine on September 20, 1995 in Beaufort County, South Carolina. The Applicant was convicted of three (3) counts of Sale/Distribution of Unlawful Drugs, Crack Cocaine on September 27, 1995. The Applicant was convicted of Possession of Other Controlled Substance, Schedule I-V-First Offense on February 12, 2002 in Beaufort County, South Carolina. The Applicant was convicted of Open Container of Beer/Wine, Speeding, and Driving Under Suspension, on November 13, 2002. The Applicant was convicted of Failure to Surrender Driver's License when Required on January 30, 2004 in Beaufort County, South Carolina. The Applicant was convicted of Manufacturing, Possessing Schedule I, II, III Substance, Marijuana, with Intent to Distribute-Third or Subsequent Offense on June 13, 2004 in Georgia.

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statement which he signed. (See State's Exhibit 1). This Court finds credible Counsel's testimony that there was some concern about the credibility of the witnesses' testimony. See State v. Stokes, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) (when trial counsel articulates valid reasons for employing a particular strategy, such as declining to call certain witnesses who lack credibility and provide no information likely to have changed the outcome of the trial, no ineffective assistance of counsel results).

With regard to calling Tyece Brown, the Applicant's girlfriend, this Court finds it unlikely the jury would have given Brown's testimony any considerable weight or credibility considering her relationship with the Applicant. This Court further finds no prejudice resulted from Counsel's decision not to call Brown because, even without Brown's testimony, Counsel was able to adequately challenge the Applicant's control of the trailer during his cross-examination of Robert Jenkins. Furthermore, this Court finds credible Counsel's testimony that he fully discussed these matters with the Applicant and the Applicant agreed with his strategic decisions not to call certain witnesses. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective for failing to call these witnesses at trial. This Court finds in light of the testimony presented at the hearing, it is unlikely prejudice resulted from the omission of these witnesses' testimony at trial.

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VI. Probable Cause and Search Warrant.

The Applicant alleges Counsel was ineffective for failing to challenge the probable cause for the search warrant of the trailer where the Applicant was arrested.¹² This Court finds Counsel was not ineffective for failing to challenge the probable cause for the search warrant of the trailer. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, 466 U.S. at 693, 104 S. Ct. at 2067. Where counsel articulates a valid strategic reason for his action or inaction, based on an objective standard of reasonableness, counsel's performance should not be found ineffective. See Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes, 308 S.C. at 548, 419 S.E.2d at 779.

This Court finds Counsel's decision not to challenge the search warrant was based on a valid trial strategy. Counsel provided credible testimony that he originally intended to challenge the search warrant, but ultimately decided against it. He testified he was aware the Applicant did not have specific standing to suppress the search, but he wanted to challenge the search nonetheless. Counsel testified that in response to this position, he was told by the court that he could not challenge the search warrant and then argue that the Applicant lacked control of the drugs without jeopardizing his trial strategy. This Court finds most persuasive Counsel's testimony that based on the court's guidance he chose not to challenge the search warrant. Further, it is clear from the trial court transcript and the colloquy what Counsel would have argued; therefore, no proffer was necessary. (Tr. Vol. I 34:8-37:13). This Court finds that

¹² The Applicant asserts that trial counsel would not have been judicially estopped or prevented from asserting a mere presence defense at trial if his motion *in limine* to suppress the search warrant was denied pretrial. The Applicant argues that he had a reasonable expectation of privacy at the property, and a concomitant right to challenge the search warrant, and, further, that such right was not mutually exclusive of his right to argue a mere presence defense at trial. In other words, the Applicant asserts that counsel "had nothing to lose, and everything to gain," by proceeding on a motion to suppress the evidence found at the trailer as "fruit of the poisonous tree," and that such a decision to refrain from doing so is error and not a legitimate strategic decision.

Counsel's trial strategy was valid and that it was reasonable and wise for counsel to seek the court's guidance in deciding whether to challenge the warrant based on the court's opinion.

Additionally, the Applicant argues that Counsel was ineffective for failing to request a Delaware v. Franks¹³ hearing to challenge the search warrant. Although Counsel could have challenged the validity of the search warrant and attacked the validity of Reeves' attestation by impeachment, Counsel did successfully impeach Reeves on the stand. This Court finds that from the record it appears the search warrant was valid and that Counsel's decision not to request a formal Delaware v. Franks hearing was a valid strategic decision. This Court can discern no basis for a successful challenge, even if made, and that the failure to request a formal hearing in no way prejudiced the Applicant.

This Court also finds the Applicant has failed to carry his burden of proving prejudice resulted from Counsel's failure to challenge the search warrant. Counsel provided credible testimony that it was unlikely any challenge to the search warrant would have been successful. This Court finds that Counsel provided reasonable performance with regard to his decision not to challenge the search warrant and his performance did not prejudice the Applicant.

VII. Judge Kinard's Recusal.

The Applicant alleges Counsel was ineffective for failing to request the recusal of Judge Kinard. The Applicant argues Counsel should have requested Judge Kinard recuse himself based on Judge Kinard's judicial knowledge of the case, by virtue of his knowledge of the co-defendants' guilty pleas, prior to the Applicant's trial.

Pursuant to Canon 3(E)(1)(a) of Rule 501, SCACR, a judge should disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. It is not enough for a party seeking disqualification to simply allege bias or prejudice. The party must show some evidence of that bias or prejudice. The alleged bias or prejudice must stem from

¹³ See Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674 (1978).

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an extra-judicial source and result in a decision based on information other than what the judge learned from his or her participation in the case as a judge.

State v. Jackson, 353 S.C. 625, 627, 578 S.E.2d 744, 745 (Ct. App. 2003). This Court finds the Applicant has failed to show any evidence of actual bias or prejudice constituting grounds for Judge Kinard's recusal. This Court finds the Applicant has failed to carry his burden of proving Counsel was ineffective and this allegation is wholly without merit.

VIII. "Big T."

The Applicant alleges Counsel was ineffective for failing to object to the State's reference to the Applicant as "Big T" during the State's closing argument. This Court finds the State's reference to the Applicant as "Big T" during the State's closing argument was not objectionable as the State laid the proper foundation to establish the Applicant as "Big T." Prior to the start of trial, trial counsel made a motion *in limine* to preclude the State from referencing the Applicant's street name without laying a proper foundation. (Tr. Vol. I. 38:17-39:1). The State agreed not to refer to the Applicant as "Big T" unless the proper foundation was laid. (Tr. Vol. I 38:2-9). The Court granted the Applicant's motion, but allowed testimony from law enforcement that they were looking for "Big T." (Tr. Vol. I 39:3-14).

During trial, William Reeves testified he went to Bay Pines Road to purchase cocaine from "Big T." (Tr. Vol. III 15:17-19). Reeves then identified the Applicant as "Big T." (Tr. Vol. III 15:20-16:10). This Court finds the State laid the proper foundation through Reeves' testimony to identify the Applicant as "Big T." This Court also finds the State's reference to the Applicant in its closing argument as "Big T" was a proper comment on the facts presented during trial. This Court finds the Applicant failed to carry his burden of proving Counsel was ineffective. This Court also finds that no prejudice resulted from Counsel's performance and this allegation is without merit.

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IX. Jurors and *Voir Dire*.

The Applicant alleges Counsel was ineffective for failing to inquire into the facts of a juror who knew one of the State's witnesses. The record reflects an unidentified juror indicated he knew the State's witness, Robert Jenkins. (Tr. Vol. I 16:3-8). The juror told the Court he and Jenkins were classmates and that he could be fair and impartial if Jenkins testified at trial. (Tr. Vol. I 6-11). This Court finds this juror was adequately questioned by the court about his relationship with Jenkins and that Counsel need not have made any further inquiry. This Court finds the Applicant has failed to carry his burden of proving Counsel should have further questioned the juror. This Court finds no prejudice resulted from Counsel's performance and this allegation is without merit.

X. Evidence in Jury Deliberation Room.

The Applicant alleges Counsel was ineffective for failing to object to evidence going back to the jury that was not properly admitted. The record reflects the court instructed counsel to check the evidence before it was sent back to the jury. (Tr. Vol. III 90:17-18). The State's counsel indicated exhibits number 57, 58, and 59 were not listed as admitted. She indicated she thought that they were admitted, which Counsel confirmed. (Tr. Vol. III 91:14-20; 92: 7-9). The Court allowed the evidence to be admitted and sent back to the jury. (Tr. Vol. III 92:10-19).

The decision to permit the State to re-open its case and present evidence lies within the sound discretion of the trial court. State v. Humphrey, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981); State v. Green, 350 S.C. 580, 586, 567 S.E.2d 505, 508 (Ct. App. 2002) (citing State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978); State v. Harrison, 236 S.C. 246, 113, S.E.2d 783 (1960)). This Court finds no prejudice resulted from Counsel's failure to object to the admission of this evidence after the close of the State's case because the evidence included in the

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exhibits was already presented to the jury through the testimony of the analysts. See Hammond, 270 S.C. at 355–56, 242 S.E.2d at 415. This Court finds the Applicant has failed to carry his burden of proving Counsel’s performance was ineffective.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test specifically that Counsel failed to render reasonably effective assistance under prevailing professional norms. See Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant. The Applicant failed to show that Counsel’s performance was deficient. Therefore, this Court need not address whether the Applicant was prejudiced by counsel’s representation. See id. The Applicant’s complaints concerning Counsel’s performance are without merit and are denied and dismissed. Thereby, this Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

All Other Allegations

As to any and all allegations that were raised in the application in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations occurring before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by

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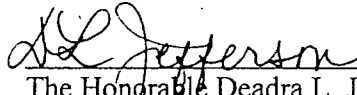
Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

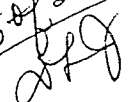
1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 5th day of March, 2014.



The Honorable Deadra L. Jefferson
Presiding Judge

Charleston, South Carolina.
at chambers.

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PCR

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June 6, 2014

Clerk of Court- South Carolina Supreme Court
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Re: Turuk Saunders v. State of South Carolina
C/A#: 2012-CP-07-4095
PCR Appeal

S.C. SUPREME COURT

Dear Clerk:

Enclosed please find for filing in your Court a Notice of Appeal and Proof of Service in the above-referenced matter. Kindly file the original and return a filed copy to my office in the self-addressed stamped envelope provided. By copy of this letter, I am providing Appellate Defense with a copy of the enclosed documents, along with copies of Judge Jefferson's Orders, because Mr. Saunders is currently incarcerated and indigent.

Thank you for your kind assistance in this matter, and please feel free to contact me should you have any questions or require additional information.

Very truly yours,



Scott W. Lee

Encl.

Cc: Beaufort County Clerk of Court (w/ encl.)
Ashleigh R. Wilson- SC Asst. Attorney General (w/ encl.)
South Carolina Commission on Indigent Defense (w/ encl.)

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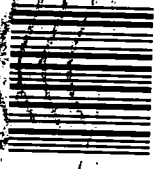
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