The Supreme Court of South Carolina

James O. Senn, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable R. Lawton McIntosh
Lexington County
Trial Court Case No. 2009-CP-32-01771

ORDER

The request for an extension until May 16, 2012 to serve and file the Return to the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY _____
Clerk

Columbia, South Carolina

April 16, 2012

cc: Tricia A. Blanchette, Esquire
Assistant Attorney General Kaelon E. May

ALAN WILSON
ATTORNEY GENERAL

April 16, 2012

RECEIVED
APR 16 2012
S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: **James O. Senn v. State of South Carolina**
2009-CP-32-1771

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above appeal is due to be served and filed today. However, this is to respectfully request a 30-day extension to serve and file this Return to the Petition of Writ of Certiorari.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and is for good cause.

Sincerely,

Kaelon E. May
Assistant Attorney General

cc: Tricia A. Blanchette, Esquire

LAW OFFICE OF TRICIA A. BLANCHETTE

March 16, 2012
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: James O. Senn v. State

Dear Sir:

For filing in the above referenced case, please find the following:

1. An original, plus six copies, of the Petition for Writ of Certiorari,
2. An unbound original and one bound copy of the two volume Appendix,
3. Proof of service on the Respondent, and
4. A Redaction Certificate.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Kaelon E. May, Assistant Attorney General
James O. Senn

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

The Supreme Court of South Carolina

James O. Senn, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable R. Lawton McIntosh
Lexington County
Trial Court Case No. 2009-CP-32-01771

ORDER

The request for an extension until March 14, 2012 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Healy
Chief Deputy Clerk

Columbia, South Carolina

February 14, 2012

cc: Tricia A. Blanchette, Esquire
Assistant Attorney General Kaelon E. May

LAW OFFICE OF TRICIA A. BLANCHETTE

February 13, 2012
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: James O. Senn v. State

Dear Sir:

The Petition for Writ of Certiorari and Appendix are due to be served and filed today in the above referenced case. I am writing to request my first extension of thirty days for serving and filing the Petition for Writ of Certiorari and Appendix. This request is not made for the purposes of delay, but it is needed to properly compile the Appendix and complete the Petition.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Kaelon E. May, Assistant Attorney General
James O. Senn

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

LAW OFFICE OF TRICIA A. BLANCHETTE

January 13, 2012
VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: James O. Senn v. State

Dear Sir:

Enclosed for filing is a Notice of Appeal for the above PCR case. Also enclosed are the following:

(1) Proof of service on the Respondent.

(2) A copy of the Order of Dismissal and Form Four Order denying the Petitioner's Motion.

This appeal is being filed with the Supreme Court pursuant to Rule 243 (b), SCACR.

I have been retained to represent Mr. Senn on this appeal. I also received the evidentiary hearing transcript from the Respondent prior to the issuance of the Order of Dismissal. Therefore, I request that my time for filing the Petition for Writ of Certiorari and Appendix be set accordingly.

Thank you for your assistance with this matter. Please contact my office with any questions.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Kaelon E. May, Assistant Attorney General
James O. Senn

PO Box 12725 | Columbia SC 29211

p: 803.988.0008 | **f:** 803.988.8070 | **e:** blanchettelaw@gmail.com

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2009-CP-32-1771

James O. Senn,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

James O. Senn, Petitioner, through counsel, appeals the Order of Dismissal issued by the Honorable R. Lawton McIntosh on September 1, 2011, which was filed on September 7, 2011. The Petitioner, through counsel, also appeals the Form Four: Order Denying Motion issued by the Honorable R. Lawton McIntosh on December 2, 2011, which was filed on December 6, 2011. The Petitioner, through counsel, received notice of the entry of the Form Four: Order Denying Motion via mail on December 15, 2011.

Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Petitioner

Other Counsel of Record:

Kaelon E. May
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2009-CP-32-1771

James O. Senn,.....Petitioner,

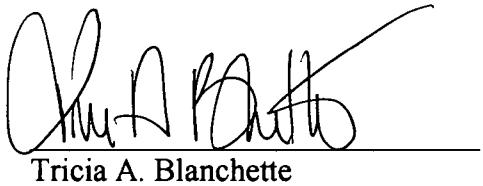
vs.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for the Petitioner, hereby certify that I that I hand delivered this 13th day of January 2012, a copy of a Notice of Appeal, Order of Dismissal and Form Four Order, to Kaelon E. May of the Attorney General's Office, at:

Office of the Attorney General
ATT: Kaelon E. May, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Petitioner

January 13, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP3201771

James O Senn *vs.* State Of South Carolina

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.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 7th day of September 2011, and a copy mailed first class this 7th day of September 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Tricia Blanchette 1330 Lady Street , Suite 209 (29201) P O Box 12725 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

Kaelon E. May Office Of The SC Attorney General P O Box 11549 Columbia, SC 292111549

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

SCRCP APP-24/FORM 4

CPFORM4M

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
	)	2009-CP-32-1771
	)	
James O. Senn, #313954,	)	
Applicant,	)	**ORDER OF DISMISSAL**
	)	
v.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

This matter come before the Court by way of an application for post-conviction relief (PCR) filed February 23, 2009. Respondent made its Return on December 22, 2009. An evidentiary hearing into the matter was convened on January 31, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and represented by Tricia Blanchette, Esquire. The Respondent was represented by A. West Lee of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Additionally, Applicant offered the testimony of Jeffrey Morris Hollifield (Mr. Hollifield) and Robert T. Williams, Sr., Esquire (Mr. Williams), Applicant's trial attorney. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the August 2005 term of the Lexington County Grand Jury for Trafficking in Ice, Crank

or Crack—400 g or more (2005-GS-32-3212). He was represented by Robert T. Williams, Esquire. On February 14, 2006, the Applicant underwent trial pursuant to which he was found guilty as charged. He was sentenced by the Honorable William P. Keesley to confinement for a period of twenty-five (25) years. A timely notice of appeal was filed on the Applicant's behalf, and an appeal was perfected. The South Carolina Court of Appeals subsequently affirmed that Applicant's conviction in an unpublished opinion dated February 12, 2009. (State v. Senn, No. 2009-UP-084).

In his current Application and in an amendment filed January 21, 2011, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel;
   a. "Failure to prepare, conduct an investigation, research the statutory provisions and caselaw, interview or obtain witnesses, consult with or obtain an expert chemist, and provide effective representation at trial."
   b. "Failure to inform the Applicant regarding the mandatory sentence in relation to the plea offers made by the state."
   c. "Failure to preserve issues for appellate review by failing to move to suppress the evidence, make contemporaneous objections, and make proper motions for a mistrial and directed verdict."
      i. "failure to make a viable argument for directed verdict"
      ii. "failure to argue for the lesser-included offense charge"
      iii. "failure to request a simple possession charge"
   d. "Failure to provide Applicant and review with him the complete discovery materials prior to trial."
   e. "Failure to conduct an investigation, specifically but not limited to his failure to determine how the State would derive a weight from the drug evidence."

f. "Failure to ensure Applicant was fully advised regarding the plea offers and to ensure rejection of such offers were knowing and understandably made by the Applicant."
g. "Failure to advise the Applicant regarding the physical statute and the facts that a mandatory sentence would apply."
h. "Failure to make necessary arrangements to get and present the testimony of Timothy Senn, who is the Applicant's cousin."
i. "Failure to file and argue a motion to suppress the drug evidence due to the handling, sampling, and testing of the drug evidence; and/or failure to raise any arguments regarding probable cause for the traffic stop."
j. "Failure to properly cross-examine the State's experts regarding their qualifications and work in this case; and failure to ensure the State's experts adhered to the rulings made by the trial court as to the scope and limit of their testimony."
k. "Failure to effectively handle the admission and explanation of the drug evidence specifically regarding the weight."
    i. "failure to cross-examine the State's witnesses regarding the sampling procedures used and the method for obtaining the weight"
    ii. "failure to make a contemporaneous objection when the State's witness testified regarding the drug amount and the mathematical equations used"
l. "Failure to properly address the court's questions regarding the status of the law and the appropriate interpretation of such law."
m. "Failure to move to have the juror, Mr. Klutz, removed due to his conversations with an extra juror, Mr. Curry."

2. Ineffective Assistance of Appellate Counsel
a. "Failure to address the issue involving the extra juror and trial counsel's motion for a mistrial on this matter."

b. "Failure to address the qualifications and the Court's ruling on the State's expert."

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR EVIDENTIARY HEARING

Applicant's Testimony

At the hearing the Applicant testified that Mr. Williams was appointed to represent Applicant and that Applicant met with Mr. Williams four or five times prior to trial. (Tr. p.16, lines4-6; p. 17, lines 6-8). Applicant testified that at his meetings with trial counsel, Applicant was provided with some of the motions and discovery. (Tr. p.17, lines12-20). Applicant testified that he did not recall being provided with any SLED document nor did counsel review any SLED documents with Applicant prior to trial. (Tr. p.17, line22 – p.18, line2). Applicant testified that counsel did discuss fingerprint issues and reviewed the SLED report prior to trial with Applicant. (Tr. p.18, lines3-8). Applicant testified that counsel reviewed and discussed with Applicant the drug reports indicating methamphetamine had been found but no weight was indicated and that this was a SLED report dated December 8, 2005. (Tr. p.19, lines12-16; p.20, lines20-22). Applicant testified the plea offer that was presented to him was three (3) to ten (10) years, nonviolent, and that counsel advised Applicant not to take the plea because counsel said he should be able to get Applicant 18 months with there being no weight in the report. (Tr. p.21, lines12-24). Applicant testified that counsel advised Applicant there was no way he could be convicted for not having any drugs and that the second plea offer was three (3) to ten (10) years, violent, and that Applicant rejected the offer because counsel said he could win a trial. (Tr. p.22, lines3-7; p.22, line16 – p.23, line24).

Applicant testified that in reviewing the plea offers. Counsel did not discuss with Applicant the specific statutory language for each charge. (Tr. p.23, line25 – p.24, line4). Applicant testified that counsel did not advise Applicant about the mandatory sentence and that the trial court would not have any discretion in sentencing. (Tr. p.24, lines5-9). Applicant testified that prior to the plea offers, Applicant was not aware of any investigation by counsel but that if there had been an investigation undertaken that Applicant would have accepted the plea offer. (Tr. p.24, lines10-18). Applicant further testified that he would have accepted the plea because if Applicant would have got the whole ten (10) years, that was a big difference between that and the twenty-five (25) Applicant received. (Tr. p.24, lines19-23). Applicant testified that had he received the SLED file, had counsel conducted an investigation, and had Applicant been informed of the mandatory sentence, then Applicant would have accepted the plea. (Tr. p.25, lines9-13). Applicant testified that counsel did not discuss with Applicant the motion to suppress dated January 9, 2006, concerning the introduction of evidence seized while Applicant's vehicle was searched prior to trial, but that counsel did discuss with Applicant suppression of the evidence pursuant to search and seizure. (Tr. p.26, lines16-22; p.26, line25 – 27, line3).

Applicant testified that he discussed with counsel witnesses that would potentially testify at trial and that Timothy Senn, Applicant's cousin, was on the witness list and involved in the case because Timothy asked Applicant to drive Timothy's car for him and that the car was Timothy's and not Applicant's. (Tr. p.27, lines16-18; p.28, line19 – 29, line1). Applicant testified that he wanted to Timothy to testify at trial and that Applicant was under the impression Timothy was going to testify at trial (Tr. p.29, lines2-10), but that he did not end up testifying. (Tr. p.31, lines1-3). Applicant testified that on November 9, 2010, he was transported to the Attorney General's Office for a

telephonic deposition of Timothy Senn. Applicant testified that counsel discussed with Applicant the receipt of property taken by the West Columbia Police Department, but that counsel did not ever go see the property or do anything regarding the report. (Tr. p.33, line17 – 34, line7). Applicant testified that a supplemental SLED report dated January 6, 2006, provided the weights of the drug evidence. (Tr. p.38, lines3-8). Applicant testified that counsel did not make a motion on his pre-trial written motion to suppress evidence, did not raise issues of illegal search and seizure, and did not call Timothy Senn for a pre-trial motion, and finally did not raise probable cause issues. (Tr. p.39, lines9-25). Applicant testified that he was pulled over for not using his turn signal but that Applicant knew he used his turn signal because Applicant did not have a license, so Applicant was being extra cautious. (Tr. p.41, lines6-24). Applicant testified that counsel did not request a hearing for the presentation of Applicant's version of events to determine if probable cause existed. (Tr. p.42, lines 8-13). Applicant testified that the incident report (ex. 12) stated Applicant's lights were off which was different from the testimony presented at trial by Officer Jones and that counsel did not question the Officer about that issue. (Tr. p.43, lines12-20).

Applicant testified that counsel did not inform him about the state's experts prior to trial and that counsel questioned Nathan McCoy, chemist, about his lack of experience testifying in court regarding methamphetamine. (Tr. p.44, line18- 45, line6). Applicant testified that counsel objected to the expert qualifications of Officer Stout (Tr. p.45, line25 -46, line8; p.47, lines1-3) and that Applicant did not know about Officer Stout testifying prior to the trial about weight of the drugs. (Tr. p.48, lines10-19). Applicant testified that counsel objected during Officer Stout's testimony regarding his qualifications. (Tr. p.49, line17 – 50, line5) and that counsel objected to the introduction of the two jars reported in the evidence report. (Tr. p.51, lines4-9). Applicant testified

that the trial judge raised the issue regarding the archived statute and that the new statute had passed since Applicant had been charged, but that Applicant was not aware of this until that moment. (Tr. p.53, lines2-11).

Applicant testified that counsel objected to Agent McCoy's testimony because counsel did not receive anything regarding the weight of the drugs in discovery. (Tr. p.56, line19 – 57, line6). Applicant testified that counsel did not discuss with Applicant testimony regarding mathematical calculations during trial. (Tr. p.64, line9-24). Applicant testified that the extra juror issue concerned a juror that was supposed to be in Irmo had been allowed into Applicant's trial juror room and that this was brought to the court's attention. (Tr. p.71, lines3-7). Applicant testified that counsel made a motion for a mistrial but that it was denied, however counsel did properly move for the mistrial and that this was not raised in Applicant's direct appeal. (Tr. p.73, lines14-19). Applicant testified that counsel's motion for a directed verdict was regarding the state of the matter in the jars but not about how the weight was obtained or how the evidence was handled. (Tr. p.74, lines16-20).

Applicant testified that counsel did not discuss with Applicant the state's theory for trial, that counsel requested a lesser included offense charge, that on direct appeal appellate attorney raised the issue regarding the court's failure to give a lesser included offense charge, and that counsel never requested a simple possession charge. (Tr. p.76, line19 -81, line2). Applicant testified that the search conducted on the vehicle Applicant was in was a search done incident to an arrest, as an inventory search. (Tr. p.86, lines14-17). Applicant testified that even though he became aware during trial that there was a mandatory sentence possibility and the state was going to present weight evidence, Applicant did not know if he could ask to go back to the plea offer, but that he did not ask to find out. (Tr. p.87, line21 – 88, line7). Applicant further testified that Timothy Senn asked him to drive

the vehicle and that in Timothy's deposition, Timothy stated that Applicant would not have known what was in the car. (Tr. p.90, lines1-7). Applicant testified that he did not complain to or question counsel during the trial about Timothy Senn not testifying. (Tr. p.91, lines10-13).

Applicant testified that appellate counsel should have addressed the motion for mistrial due to an extra juror in Applicant's direct appeal, as well as the objection to the state's expert's qualifications. (Tr. p.82, lines13-20).

Mr. Hollifield's Testimony

At the PCR hearing, Mr. Hollifield testified that he owns and operates Microanalytical, which is a private forensics lab and that he does work for local, state, and federal law enforcement agencies, attorneys, insurance companies, and looks at contaminants and products for industry, as well as being an adjunct instructor in chemistry and forensic sciences. (Tr. p.92, lines19-25). The PCR Court qualified Mr. Hollifield as an expert in forensic chemistry. (Tr. p.95, lines7-25). Mr. Hollifield testified that he obtained from the Lexington County Clerk's Office a plastic jug with a Gatorade label on it, a large glass jar with lid, both containers were empty, and fifteen photographs taken at the scene of the crime. (Tr. p.96, lines11-17). He testified that he was provided with the trial transcript and was able to review it. (Tr. p.97, lines4-7).

Mr. Hollifield testified concerning the procedures he performed for his analysis of Applicant's case (Tr. p.97 -101): Mr. Hollifield testified that he filled the containers up to the marks indicated with water and measured the volume of water; then used the original samples in the vials, provided by SLED on the worksheets; next calculated what the original weight would have been had the containers been filed to the marks; and subsequently issued a report on April 21, 2010 indicating the weights he obtained. Mr. Hollifield testified that the steps he took in his analysis were not the

same taken by SLED prior to trial. He testified that he had an issue with the fact that the original liquids in the containers were discarded before anybody made any sort of direct measurement of the volumes and weights.

Mr. Hollifield testified that Officer Stout's method of obtaining the samples or the vials he took was typical. (Tr. p.100, lines 2-10). Mr. Hollifield testified that based on the transcript the chemist came up with the weight using a calculation but only regarding the Gatorade bottle, and that they used the density of the original sample vial to do the calculations on how much weight was in the bottle using the label on the Gatorade bottle. (Tr. p.103, line14 – 104, line15). Mr. Hollifield testified that he did not have any problems with the arithmetic used, but that what he did was actually fill the bottle to the mark that the field technician made and then used the same calculation as the chemist did. (Tr. p.105, lines10-19). Mr. Hollifield testified that there was a written amount in the supplemental report which pertained to the vial from the pickle jar and was reflected as 5.84 grams, but that no documentation or testimony reflecting the original weight in the pickle jar. (Tr. p.106, lines14-20). He testified, further explaining, that he used the volume of the water and then used SLED's density of the original vial to then calculate what the original weight would have been. (Tr. p.111, lines7-10).

Mr. Hollifield testified that the results of his analysis showed that in the Gatorade bottle it was 2,335.63 grams as opposed to the testimony at trial of 2,569 grams; and then for the glass jar his results were 2,493.93 grams but that no weight had been offered at trial for this container in the original testimony. (Tr. p.111, lines13-18). Mr. Hollifield testified that the amounts he arrived at were admittedly over 400 grams. (Tr. p.22). He testified that once the density is established, you

multiply the density by the volume to come up with the weight. (Tr. p.116, lines2-5). He testified that if the volume was greater that would make the weight lower. (Tr. p.16, lines16-17).

Mr. Hollifield testified that his measurement of the Gatorade bottle was 3.6 Liters, which was a lesser volume that the label that indicated the volume as 3.78 liters, and that this was why he got a lower weight in his calculations. (Tr. p.117, lines1-9). Mr. Hollifield testified that in any circumstance, both my calculations and SLED's were over 400 grams. (Tr. p.118, lines5-7). Finally, Mr. Hollifield testified that the density sample used and the calculations appear completely valid. (Tr. p.118, lines8-15).

Mr. Williams' Testimony

At the PCR hearing Mr. Williams testified that he was appointed to represent the Applicant and that he filed a discovery motion and explained that discovery is an ongoing process, and that its not unusual to receive some discovery shortly before trial. (Tr. p.122, line24 – 124, line10). Counsel testified that he sent discovery to the Applicant at least three to four times. (Tr. p.124, lines12-13). Counsel testified that he did not intend to call Timothy Senn or James Senn as witnesses at trial (Tr. p.124, lines15-18), because when the police stopped Applicant in the vehicle the officer remarked about a strong odor of ammonia, which is pretty strong, and that counsel did not think he could argue that Applicant did not know the stuff was in the back of the vehicle. (Tr. p.125, lines17-24). Counsel testified that even though Officer Stout indicated his gas mask was not needed because it was well ventilated and the tape had not been lifted, that there is still a difference between being dangerous and being able to be smelled. (Tr. p.128, lines4-13).

Counsel testified that he did not raise the pre-trial motion to suppress based on lack of probable cause for the stop, or a reasonable suspicion anyway, at trial because it was an inventory

search. (Tr. p.129, lines1-18). Counsel testified that he recalled one plea offer of three to ten years and a plea to a gun charge, and that he asked Applicant what he wanted to do, that Applicant stated to counsel he was not pleading guilty because it was not Applicant's methamphetamine. (Tr. p.130, lines8-16). Counsel testified that he was informed by the solicitor's office that counsel had all the SLED files, that when discovery is requested they're supposed to send you their file, but that counsel did not have the technical stuff in the back where the chemist breaks it all down. (Tr. p.131, lines8-21). Counsel testified that he look at every bit of discovery, met and discussed it with Applicant, but did not have anyone to analyze the substance. (Tr. p.133, lines5-8).

Counsel testified that he did not see the need to retain an expert because at the time counsel did not know that they thought it was the first liquid methamphetamine case in South Carolina. (Tr. p.133, lines9-16). Counsel testified they thought the state would not be able to prove the weight was 400 grams, but that that was not an issue because the Applicant said it was not his stuff, that the amount was not a question with Applicant; Applicant said it was not his items. (Tr. p.133, line22 – 134, line5). Counsel testified that he made a motion for a directed verdict after the evidence was in because we knew the evidence was insufficient at that point to prove the case. (Tr. p.135, lines18-21). Counsel testified that he did not know about the experts prior to trial because the state listed the witnesses as police officers and that counsel was not informed one of the experts would be used to show the math utilized to derive the quantities. (Tr. p.135, line22 – 136, line7). Counsel testified that he did not obtain an expert to potentially refute the state's theory and how they were going to get to the amount in this case because counsel did not think that state would be able to or that the judge would buy into the argument that you could use a missing item to prove there was over 400 grams. (Tr. p.136, lines8-16).

Counsel testified that he did not view the containers in person because counsel had pictures of the containers and because they were hazardous materials, but that counsel knew how big the containers were. (Tr. p.137, lines6-14). Counsel testified that he did not hire an investigator to determine the proper values to prove the weight was 2,300 grams of methamphetamine or 2,400 grams of methamphetamine. (Tr. p.137, lines15-21). Counsel testified why would he plead his client to something that the client had told counsel that he is not guilty of. (Tr. p.138, lines22-24). Counsel testified that going into trial he did not know the state would attempt to prove it had over 400 grams of methamphetamine by the mere sample they had, that he did not know the state would say items in the other container was full of methamphetamine and that the state could prove it even though it was not weighed nor was an analysis done. (Tr. p.141, lines4-10). Counsel testified that it would not have been useful to have a scientist at trial to explain to the judge why the procedures followed by the state's experts were flawed from a scientific standpoint because that would result in having to put up an expert witness to testify the amount of methamphetamine was not 2,500 grams but actually 2,300 grams, which is not a good idea. (Tr. p.142, line23 – 143, line8).

Counsel testified that he discussed with the Applicant the statutes concerning the mixtures of methamphetamine prior to trial and that it carried a mandatory sentence. (Tr. p.193, lines14-21). Counsel testified, explaining, that there was a very tactical and good reason why he did not make any motions regarding the lack of documentation provided to support the finding of 400 grams and other discovery issues, and that reason being you do not want to educate the other side about what you suspect as being their weakness in their case. (Tr. p.144, lines18-24). Counsel testified that he was aware prior to trial that Officer Stout's major qualification was as a certified methamphetamine technician and that counsel felt prepared to question Officer Stout because Officer Stout had testified

in methamphetamine cases with counsel in the past and that counsel had experience cross-examining him. (Tr. p.146, lines7-15). Counsel testified that he objected a couple of times to some questions during Officer Stout's testimony regarding the allowed scope of his testimony. (Tr. p.146, line21 – 147, line10).

Counsel testified he did not find any cases or statutes per the judge's request to help with the weight issue, and that counsel moved for a mistrial after discovering a juror called counsel nitpicky. (Tr. p.148, lines1-4). Counsel testified that he did not move to have the juror removed because counsel thought the juror would be conscientious after all that that the juror would go overboard in giving Applicant a fair trial. (Tr. p.148, lines5-11). Counsel testified that the question of whether or not you need to hire an expert depends on the facts of the case and this case did not require an expert. (Tr. p.180, lines16-23). Counsel testified that he would never advise his client to change their testimony or their belief or their story that they are not guilty of this offense. (Tr. p.151, lines4-6). Counsel testified there was no reason to make a pre-trial motion based on the discovery that had been presented in regards to the weight. (Tr. p.152, lines5-12). Counsel testified that he did not request a simple possession charge because the volume indicated it was more than simple possession (Tr. p.155, lines12-18), and that counsel did not feel the jurors were rushed in reaching a decision due to the judge asking about valentine day plans. (Tr. p.156, lines17-25).

Counsel testified that he would have called Timothy Senn to the stand if Applicant had taken the stand because then it is a different situation, if you put your client up you're going to lose closing argument. (Tr. p.158, lines10-14). Counsel testified that expert analysis did not help in this case because that would only prove the weight is more than 400 grams. (Tr. p.160, lines4-8). Counsel testified that during the trial the Applicant and counsel kept a little piece of paper between them and

Applicant would make notes about what he thought was important, and that counsel would make notes to Applicant or answer his questions. (Tr. p.163, lines19-25). Counsel testified that the Applicant informed counsel that Applicant knew there was ammonia in the trunk and that the trunk key was on the key ring. (Tr. p.164, lines18-22).

Counsel testified that even if he had argued the motion to suppress at trial, it would not have made any difference in the outcome of the trial because the Officers would testify at trial to the reason they stopped the Applicant. (Tr. p.167, line21 – 168, line3). Counsel testified that he discussed with the Applicant whether they could get 18 months, but that Applicant would have to take an Alford plea. (Tr. p.168, lines13-22). Counsel testified that he made the argument to the court regarding the problems with the ascertaining of the full weight but that the judge ruled against him. (Tr. p.172, lines9-25). Finally, counsel testified that even he had requested a simple possession charge; the judge would not have granted it and as such would have made no difference. (Tr. p.174, lines16-24).

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application 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, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise

viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

(1) Failure to Adequately Advise and Represent Applicant

Applicant's allegations that trial counsel was ineffective for failure to adequately advise and represent Applicant are without merit; specifically, the Applicant alleges trial counsel was ineffective for failing to inform Applicant regarding the mandatory sentence in relation to the plea offers made by the state; for failing to provide Applicant and review with him complete discovery materials prior to trial; for failing to ensure Applicant was fully advised regarding the plea offers and to ensure rejection of such offers were knowing and understandably made by the Applicant; and for failing to advise Applicant regarding the physical statute and the fact that a mandatory sentence would apply. This Court finds Applicant's testimony is not credible. This Court does find Mr. Williams' to be

credible. Trial counsel testified that he discussed with the Applicant the statutes concerning the mixtures of methamphetamine prior to trial and that the statutes carried a mandatory sentence. (Tr. p.193, lines14-21). Counsel testified that there was one plea offer of three to ten years and a plea to a gun charge, and that counsel asked Applicant what he wanted to do, that Applicant stated to counsel he was not pleading guilty because it was not Applicant's methamphetamine. (Tr. p.130, lines8-16). Counsel further testified that he and the Applicant discussed whether they could get 18 months, but that Applicant would have to take an Alford plea. (Tr. p.168, lines13-22). Counsel explained that he sent discovery to the Applicant at least three to four times and that he and the Applicant discussed the discovery materials together, although counsel did not have anyone to analyze the substance. (Tr. p.124, lines12-13; p.133, lines5-8). Counsel testified that he and the Applicant reviewed the SLED reports, specifically the report without the weight and the later report with the weight of the drugs prior to going to trial. (Tr. p.170, lines1-5). This Court finds and the record reflects the Applicant was fully apprised of the charges against him and the nature of such charges, including the maximum sentences and that such sentences were mandatory. This Court finds that counsel and Applicant reviewed the discovery materials and that Applicant was fully advised regarding the plea offers. This Court finds Applicant rejected the plea offers because the Applicant maintained and still maintains the drugs were not his, that Applicant did not want to plead guilty, and that Applicant's rejections were made knowingly and voluntarily. Applicant has failed to prove that counsel's performance was deficient and thus failed to meet his burden of proof; therefore this Court finds these allegations are denied and dismissed.

(2) Failure to Investigate

Applicant alleges that trial counsel was ineffective for failing to conduct an investigation,

specifically but not limited to trial counsel's failure to determine how the state would derive a weight from the drug evidence; for failing to consult with or obtain an expert chemist; and for failing to research statutory provisions and case-law and/or properly address the court's questions regarding the status of the law and the appropriate interpretations of such law. As to Applicant's allegation that trial counsel was ineffective for failing to determine how the state would derive a weight from the drug evidence, trial counsel testified that he and the Applicant thought the state would not be able to prove the weight was 400 grams, however the weight was not an issue because Applicant maintained the methamphetamine was not his. (Tr. p.133, line22 – 134, line5). Counsel testified that he did not know about the state's experts prior to trial because the state listed the 'experts' as police officers and that counsel was not informed one the of the experts would be used to show the math utilized to derive the weight quantities. (Tr. p.135, line22 – 136, line7). Counsel testified that he did not view the containers in person because counsel had pictures of the containers and because they were hazardous materials, but that counsel knew how big the containers were. (Tr. p.137, lines6-14). Counsel testified that he did not hire an investigator to determine the proper values to prove the weight was 2,300 grams of methamphetamine or 2,400 grams of methamphetamine. (Tr. p.137, lines15-21). Additionally, Applicant alleges that counsel was ineffective for failing to research the statutory provisions and case-law and properly address the court's questions regarding the status of the law and the appropriate interpretation of such law. Counsel testified that he did conduct legal research and did not find any cases or statutes per the judge's request to help with the weight issue. This Court finds that, contrary to Applicant's claim, counsel conducted an investigation into the Applicant's case and the Applicant's assertions are mere speculation. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is

supported only by mere speculation as to the result. Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998). To establish counsel failed to adequately prepare for trial, Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). Here, the Applicant did not present any evidence of what counsel failed to discover or other defenses that could have been pursued had counsel more fully prepared. Applicant further failed to present any case-law or statutes that counsel failed to research. While the Applicant presented testimony of Mr. Hollifield and the results of Mr. Hollfield's testing, this court finds trial counsel conducted a sufficient investigation pursuant to Strickland v. Washington. This Court finds there has been no showing by the Applicant of what counsel could have discovered based upon additional investigation. Id. This Court finds that Applicant has failed to meet his burden of showing that counsel was deficient in his investigation, particularly based on the overwhelming amount of methamphetamine determined to be present from Applicant's own expert witness; therefore these allegations are denied and dismissed.

As to Applicant's allegation that trial counsel was ineffective for failing to consult with or obtain an expert chemist, this Court finds that Applicant failed to meet his burden of proof. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel testified that it would not have been helpful to have a scientist testify at trial to explain to the judge why the procedures followed by the state's experts were flawed from a scientific standpoint because that would result in the expert testifying the amount of

methamphetamine was actually 2,300 grams and not 2,500 grams. Counsel explained that the question of whether or not you need to hire an expert depends on the facts of the case and that Applicant's case did not require an expert. Applicant's expert witness, Mr. Hollifield, testified at the PCR hearing that Officer Stout's method of obtaining the samples or the vials he took was typical, that the density samples used and calculations appeared valid, and that the amounts Mr. Hollifield arrived at were admittedly over 400 grams. Counsel testified that the expert analysis presented at the PCR hearing would not have helped in this case because it only proved the weight is more than 400 grams. Applicant's trial counsel articulated valid strategic reasons for not consulting with or obtaining an expert chemist, and thus this Court finds that Applicant has not shown that counsel was deficient in that choice of tactics. This Court, further, finds the Applicant has failed to show that he was prejudiced as Mr. Hollifield's testimony and testing results presented at the PCR hearing offered nothing more for the defense. Therefore, this allegation is denied and dismissed.

(3) Failure to Interview Witnesses and/or Present Witnesses at Trial

Applicant alleges trial counsel was ineffective for failing to make necessary arrangements to get and present the testimony of Timothy Senn, who is the Applicant's cousin. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). Counsel testified that he did not intend to cal Timothy Senn as a witness at the Applicant's trial because when the police stopped Applicant in the vehicle the Officer remarked about a string odor of ammonia, which counsel explained is very strong, and that counsel did not think he could argue that Applicant did not know the drugs were in the back of the vehicle. Counsel

explained that even though Officer Stout indicated his gas mask was not needed because it was well ventilated and the tape had not been lifted, that there is still a difference between being dangerous and being able to be smelled. Counsel testified that Timothy Senn's testimony at trial would have been that the drugs in the vehicle were his, however counsel explained that Timothy Senn and the Applicant had been stopped shortly before this and found in possession of methamphetamine. (Tr. p.126, lines6-16). Applicant produced a transcript of the telephone deposition of Timothy Senn for this Court. This Court finds that counsel articulated valid strategic reasons for not calling Timothy Senn as a witness at trial, and thus this Court finds that Applicant has not shown that counsel was deficient in that choice of tactics. This Court further finds that the Applicant failed to show that he was prejudiced as Timothy Senn's deposition offered nothing more for the defense. Therefore, this allegation is denied and dismissed.

(4) Failure to Cross-Examine

Applicant alleges trial counsel was ineffective for failing to properly cross-examine the state's experts regarding their qualifications and work in this case; for failing to ensure the state's experts adhered to the rulings made by the trial court as to the scope and limit of their testimony; and for failing to cross-examine the state's witnesses regarding the sampling procedures used and the method for obtaining the weight. At the PCR hearing counsel testified that he was aware prior to trial that Officer Stout's major qualification was as a certified methamphetamine technician and that counsel felt prepared to question Officer Stout because Officer Stout had testified in methamphetamine cases with counsel in the past and that counsel had experience cross-examining Officer Stout. Counsel also testified and the record reflects that counsel objected numerous times during Officer Stout's testimony regarding the allowed scope of the Officer's testimony. Counsel

testified that at trial he argued about the problems with ascertaining the full weight but that the judge ruled against counsel. (Tr. p.172, lines2-25). Applicant's own expert witness testified at the PCR hearing that the procedures employed by the state's experts to derive the weight were valid. This Court finds the nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). This Court finds that the Applicant did not proffer any questions counsel allegedly failed to ask, and did not present any testimony negating the evidence and procedures presented at trial. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Therefore, this Court finds that these allegations are denied and dismissed.

(5) Failure to Object

Applicant alleges trial counsel was ineffective for failing to effectively handle the admission and explanation of the drug evidence specifically regarding the weight and for failing to make a contemporaneous objection when the state's witness testified regarding the drug amount and the mathematical equations used. At the PCR hearing counsel testified that he did object to this evidence based on a discovery issue that the state did not provide the defense with the amount prior to trial. (Tr. p. 144, lines2-9). Counsel testified that it was proper to raise the issues regarding the drug evidence in a directed verdict motion, which counsel did. (Tr. p.148, lines12-24). Counsel testified that at trial he argued about the problems with ascertaining the full weight but that the judge ruled against counsel. (Tr. p.172, lines2-25). This Court finds that the record reflects counsel objected to

the entry of evidence based on a gap in the chain of custody (Trial 2/13/06 Tr. p.85, lines6-8), counsel objected to the scope of Officer Stout's testimony on the grounds only a chemist could testify in regards to identification and detection (Id. p.92, lines15-18), counsel objected to Officer Stout's based on the fact there was no weighted amount of methamphetamine (Id. p.100, lines10-25), counsel objected to the mathematical procedures to be testified to (Trial 2/14/06 Tr. p.21, lines1-13), counsel objected to the testing results of the vials and coffee filters (Id. p. 80, lines16-25), counsel objected to the testimony regarding the volume of one of the containers (Id. p.88, lines1-5), and counsel objected to the results of the calculations (Id. p.90, lines9-11). This Court further finds that the record reflects trial counsel made numerous objections in addition to the objections just provided to the explanation of the drug evidence specifically regarding the weight and mathematical equations used. This Court finds that Applicant has failed to show that counsel's performance was deficient, and further failed to provide any additional objections counsel should have made. This Court finds that Applicant has failed to show that he was prejudiced by counsel's alleged deficiencies; therefore, these allegations are denied and dismissed.

(6) Failure to Challenge Evidence

Applicant alleges that trial counsel was ineffective for failing to file and argue a motion to suppress the drug evidence due to the handling, sampling, and testing of the drug evidence and for failing to raise any arguments regarding probable cause for the traffic stop. At the PCR hearing counsel testified that he did not raise the pre-trial motion to suppress based on lack of probable cause for the stop or reasonable suspicion at trial because it was an inventory search. Counsel also explained under oath that even if he had argued the motion to suppress at trial, it would not have made any difference in the outcome of Applicant's trial because the officers would testify at trial as

to the reason they stopped the Applicant. Counsel testified that he did not make any motion regarding the lack of documentation regarding the weight of the drugs and other discovery issues as a tactical stance because counsel did not want to educate the other side about what he suspected their weakness as being in their case. Counsel testified that there was no reason to make a pre-trial motion based on the discovery that had been presented in regards to the weight. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that trial counsel articulated valid strategic reasons for not challenging the traffic stop and for deciding not to argue the motion to suppress at trial, and that Applicant has not shown that counsel was deficient in that choice of tactics. This Court, further, finds that the Applicant has failed to show that he suffered any prejudice from counsel's alleged deficient performance. This Court finds that Applicant has failed to meet his burden of proof; therefore these allegations are denied and dismissed.

(7) Failure to Remove Juror

Applicant alleges that trial counsel was ineffective for failing to make a motion to have the juror, Mr. Klutz, removed due to his conversations with an extra juror, Mr. Curry. At the PCR hearing counsel testified that he moved for a mistrial after discovering a juror called counsel 'nitpicky,' but that counsel did not make a motion to remove the juror because counsel thought the juror would be conscientious after the lengthy colloquy the judge had with the juror and that juror would actually go overboard in giving the Applicant a fair trial. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective

assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) *and* McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). This Court finds that counsel articulated valid strategic reasons for not making a motion to remove the juror and that Applicant has not shown that counsel was deficient in that choice of tactics. This Court further finds and the record reflects that the trial court conducted a detailed and probing inquiry into the extra juror matter. This Court finds that Applicant failed to show that he suffered any prejudice resulting from counsel's alleged deficient performance. Therefore, this Court finds that this allegation is denied and dismissed.

(8) Failure to Preserve Issues for Appellate Review

Applicant alleges trial counsel was ineffective for failing to make a viable argument for directed verdict; for failing to argue for the lesser included offense charge; and for failing to request a simple possession charge. At the PCR hearing counsel testified that his motion for a directed verdict was based on the fact that the drug evidence was a solution and not in its final form, that the statutory intent did not include lipids, and the state's failure to prove the weight. (Tr. p.148, line18 – 150, line11). Counsel testified that he did not request a simple possession charge because the volume indicated it was more than simple possession and that even if counsel had requested a simple possession charge the judge would not have granted it. This Court finds and the record reflects that counsel requested the lesser included offense of trafficking less than 400 grams and the South Carolina Court of Appeals upheld the denial of this request finding no evidence on the record supporting such a charge. Senn v. State, Op. No. 2009-UP-084 (Filed February 12, 2009). This Court finds that the Applicant has failed to provide any evidence supporting a simple possession claim. Additionally, the Applicant has not provided support for his assertion that counsel's directed verdict

argument was not viable nor did the Applicant offer examples of more viable arguments counsel should have presented for directed verdict. This Court finds that Applicant has failed to show that counsel was deficient in his performance. This Court further finds that the Applicant cannot establish resulting prejudice. This Court finds that these allegations are denied and dismissed.

(9) Ineffective Assistance of Appellate Counsel

Applicant alleges that appellate counsel was ineffective for failing to address the issue involving the extra juror and trial counsel's motion for mistrial on this matter; and for failing to address the qualifications and the Court's ruling on the state's expert. This Court finds that Applicant's allegations that appellate counsel was ineffective are without merit. This Court finds that a defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift, Id. at 537; Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal."

Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id. This Court finds there is nothing in the record to indicate that the alleged ignored issues are clearly stronger than those actually raised. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

V. CONCLUSION

Based on all the forgoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. *See* Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 1st day of September, 2011.

R. Lawton McIntosh
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

FILED
2011 SEP -7 A 11: 22
BETH A. GAMMAGE
CLERK OF COURT
LEXINGTON, SC

FORM 4

ORIGINAL

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009-CP-32-1771

James O. Senn	State of South Carolina
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

FILED
2011 DEC -6 PM 3:21
BETH A. DENNING
CLERK OF COURT
LEXINGTON, SC

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.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ 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: Applicant's motion for rehearing pursuant to Rule 59(a), SCRCP is denied. Applicant's motion to alter or amend pursuant to Rule 59(e), SCRCP is denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC 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

2155
Judge Code

12-2-11
Date

For Clerk of Court Office Use Only

N/A N/A

This judgment was entered on the ~~7th~~ day of ~~Nov., 2011~~ and a copy mailed first class or placed in the appropriate attorney's box on this 14th day of Dec, 2011 to attorneys of record or to parties (when appearing pro se) as follows:

Tricia A. Blanchette P.O. Box 12725 Columbia, SC 29211	Kaelon E. May Office of the SC Attorney General P.O. Box 11549 Columbia, SC 29211
ATTORNEY(S) FOR THE PLAINTIFF(S)	**ATTORNEY(S) FOR THE DEFENDANT(S)**
	Beth Carrigg LC
	CLERK OF COURT

Court Reporter: