LAW OFFICE OF WILLIAM G. YARBOROUGH, III

522 N. Church St. Greenville, SC 29601 • Office: (864) 331-1612 • wgyarborough@gmail.com

March 6, 2018

The Honorable Daniel E. Shearouse
Clerk of Court of the S.C. Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Petitioner Shondre L. Williams # 00198544, Petitioner v. State of South Carolina, Respondent (Case No. 2015CP4203439)

Dear Mr. Shearouse,

Enclosed for filing is Petitioner's Notice of Appeal in the above-captioned case. Also enclosed are the following:

1. A copy of the Order of Dismissal challenged on appeal
2. Proof of Service that the Notice of Appeal has been served upon the Respondent.

Please do not hesitate to contact my office at the mailing address, phone number, or email address listed above should you have any questions or concerns. Thank you.

Sincerely,

William G. Yarborough

William G. Yarborough III

Enclosures

cc: Assistant Attorney General Valerie Garcia Giovanoli
Office of Appellate Defense
Spartanburg County Court of Common Pleas
Petitioner Shondre L. Williams

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Honorable G. Thomas Cooper Jr., Circuit Court Judge

Case No. 2015CP4203439

Shondre L. Williams # 00198544,.....Petitioner

v.

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

NOTICE OF APPEAL

Petitioner, Shondre L. Williams, by and through undersigned counsel, William G. Yarborough III, appeals the Honorable G. Thomas Cooper Jr.'s Order, dated March 2, 2018 and filed March 5, 2018, dismissing Petitioner's application for post-conviction relief in the above captioned case. The Petitioner received notice of entry of the Order on March 5, 2018. A copy of the Order of Dismissal is attached to this notice.

Respectfully Submitted,

By: William G. Yarborough

William G. Yarborough III, #10271
522 N. Church St. Greenville, S.C. 29601
(864) 331-1612 Fax (864) 370-0022

Greenville, SC
March 6, 2018

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Shondre L. Williams # 00198544,.....Petitioner

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

PROOF OF SERVICE

I, Sandy Ignacio, paralegal to counsel for Petitioner, William G. Yarborough III, certify that I have today mailed for filing the Notice of Appeal and attached documents to the Honorable Daniel E. Shearouse, Clerk of Court, by depositing it in the U.S. Mail with sufficient postage attached, addressed to:

The Honorable Daniel E. Shearouse, Clerk of Court
Clerk of Court of the S.C. Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

I further certify that I have today I served the enclosed Notice of Appeal upon Respondent, Assistant Attorney General Valerie Garcia Giovanoli, by depositing it in the U.S. Mail with sufficient postage attached, addressed to:

Assistant Attorney General Valerie Garcia Giovanoli
South Carolina Attorney General, The Honorable Alan Wilson
P.O. Box 11549
Columbia, South Carolina 29211.

Sworn to before me this 6th
day of March, 2018

Sandy Ignacio

Notary Public for South Carolina

My commission expires: 06-08-2022

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	IN THE COURT OF COMMON PLEAS SEVENTH JUDICIAL CIRCUIT
Shondre L. Williams, #198544 Applicant, v. State of South Carolina, Respondent.	2015-CP-42-3439 **ORDER OF DISMISSAL WITH PREJUDICE**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Shondre L. Williams (Applicant) on August 5, 2015. The State (Respondent) made its return requesting an evidentiary hearing be held. An evidentiary hearing into the matter was convened on November 13, 2017 at the Spartanburg County Courthouse. Applicant was present and represented by William G. Yarborough, III, Esquire. Valerie Garcia Giovanoli, Esquire, of the Office of the Attorney General represented Respondent.

At the hearing, Applicant testified on his own behalf. J. Faulkner Wilkes, Esquire, (Counsel) also testified. This Court had before it a copy of the Spartanburg County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, the PCR application, Respondent's return, and Applicant's supplemental applications.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the August 2012 term of the Spartanburg County Grand Jury for possession with intent to distribute ("PWID") cocaine base (2012-GS-42-5626) and trafficking cocaine (2012-GS-42-

4098). J. Falkner Wilkes, Esquire, represented Applicant. On February 24-27, 2013, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. The jury found Applicant guilty of the lesser included offense of possession of cocaine base and as indicted for trafficking cocaine. Judge Cole sentenced Applicant to imprisonment for concurrent terms of 25 years for trafficking and 10 years imprisonment for possession.

Applicant filed a timely notice of appeal. Carlyle R. Cromer, Esquire and Robert M. Dudek, Esquire, represented Applicant on appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Williams, Op. No. 2014-UP-367 (S.C. Ct. App. filed October 29, 2014). A Petition for Rehearing was filed on Applicant's behalf, which was subsequently denied by the Court of Appeals on December 17, 2014. On January 16, 2015, Applicant filed a Petition for Writ of Certiorari to review the Court of Appeals' opinion. The South Carolina Supreme Court denied the petition in an order dated June 18, 2015. The Remittitur was returned on June 24, 2015.

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

1. Ineffective Assistance of Trial Counsel, in that;
    a. "Counsel failed to object to and preserve for appellate review the trial judge's abuse of discretion to deny the Applicant a constitutional right to a warranted challenge for cause or perempatory [sic] strike;"
    b. "Counsel failed to present and argue overwhelming material evidence which substantiate and proves that the magistrate judge did not have substantial basis for concluding probably cause existed;"
    c. "Counsel allowed the Applicant to be convicted and sentenced based on perjured testimony;"
    d. "Counsel allowed Applicant to be convicted and sentenced based on fabricated evidence;"

e. "Counsel failed to object to and request the trial judge to give a curative jury instruction where Solicitor Holliday provided the jury with unconstitutional and unlawful burden shifting statements during closing arguments;"
f. "Counsel failed to request that the trial court inform the jury of their fundamental right to stand by their independent decision of guilt or innocence of the Applicant irrespective of the majority's decision being to the contrary;"
g. "Counsel incorrectly and erroneously advised Applicant that he would serve 85% of "any sentence" that he would receive for trafficking of cocaine base."

On or about October 9, 2017, Applicant, through counsel, filed a supplemental application[1] alleging:

1. Ineffective Assistance of Counsel for:
   a. failing to admit into evidence and publish to the jury audio recordings of telephone calls between the Applicant and a law enforcement informant which was prejudicial to the Applicant because the audio recordings were essential to the Applicant's entrapment defense; and
   b. failing to object to and move to strike testimony regarding the Applicant's alleged previous and ongoing crack manufacturing which was prejudicial to the Applicant because Applicant was not charged with the manufacturing of crack or cocaine base, and such testimony was irrelevant and essentially acted as prior bad act or character evidence.

FACTS ADDUCED AT TRIAL

On March 2, 2012, Applicant purchased a "quarter kilo" of cocaine from an informant working with the Spartanburg County Sheriff's Office. (Tr. pp. 229-30). This purchase was conducted under surveillance and resulted in the issuance of a search warrant for Applicant's home and the subsequent seizure of 249.71 grams of cocaine and 4.91 grams of cocaine base

[1] Applicant was initially appointed counsel, who filed a form supplemental application with thirty-one vague allegations. Subsequently, Applicant retained Mr. Yarborough. Applicant proceeded on some of his *pro se* allegations in his original application as well as those pled in the supplemental application filed by Mr. Yarborough. Therefore, this court does not consider the form amendment by appointed PCR counsel part of this action.

(crack cocaine) from Applicant. (Tr. pp. 257, 259-60, 291). Ultimately, Applicant was convicted of trafficking cocaine and possession of cocaine base (crack cocaine). (Tr. p. 352).

This entire operation was a reverse buy operation coordinated and conducted under the supervision and surveillance of the Spartanburg County Police Department. (Tr. pp. 25-27). On March 1, 2012, Investigator Travis McJunkin with the Spartanburg County Sheriff's Office assisted officers with the Greenville County Sheriff's Department in a drug search operation in Greenville County regarding an individual named Shondrell Williams. (Tr. p. 25). Subsequent to this operation, Shondrell Williams (hereinafter "Informant") agreed to cooperate with law enforcement and arranged to sell Applicant a quantity of cocaine. *Id.* Informant was a known drug supplier and had sold drugs to Applicant on several prior occasions. (Tr. pp. 226-27).

Thereafter, on March 2, 2012, the Spartanburg County Sheriff's Office supplied Informant with a predetermined amount of cocaine, fixed recording devices on Informant's person, and conducted surveillance on the entire operation. (Tr. pp. 25-26). After receiving cocaine from law enforcement, Informant went to Applicant's home, 815 Old Wynd Court in Spartanburg County, South Carolina, and exchanged the cocaine for $4,000 of U.S. currency with Applicant.[2] (Tr. pp. 229-32). After selling the Applicant cocaine, Informant met with Spartanburg County Sheriff's Office Investigator William Tillinghast and turned over the $4,000. (Tr. p. 26). Subsequently, a search warrant was obtained for 815 Old Wynd Court. (Tr. pp. 42-44). During this search, law enforcement recovered not only the 249.71 grams of cocaine that Informant had sold Applicant, but also an additional 4.91 grams of crack cocaine that was in Applicant's possession. (Tr. pp. 26-27, 291).

[2] Applicant actually purchased $9,000 worth of cocaine from Informant, and Applicant agreed to pay the remaining $5,000 at a later date.

On the day of this operation, March 2, 2012, the Spartanburg County Sheriff's Office developed a coordinated plan to facilitate this reverse buy operation. (Tr. pp. 190-191). This plan was communicated throughout the day amongst the various officers involved so that the proper preparations were coordinated and put in place. *Id.* Upon Informant agreeing to sell the Applicant cocaine, Spartanburg County Investigator Matt Hutchins retrieved cocaine from the Spartanburg County Sheriff's Office's evidence room. (Tr. p. 38). The cocaine was ultimately provided to Informant who sold it to the Applicant. (Tr. pp. 227-30). However, upon retrieving the cocaine, Investigator Hutchins then returned to the Sheriff's Office to complete the search warrant for Applicant's home should the transaction occur. (Tr. p. 38). Throughout that day, Investigator McJunkin kept Investigator Hutchins apprised of the events that were transpiring during this operation so that Investigator Hutchins could accurately prepare the search warrant. (Tr. pp. 30, 39).

In addition, Spartanburg County Investigator William Tillinghast, who followed Informant to and from the cocaine sale at Applicant's house, recovered the money that Applicant paid Informant for cocaine. (Tr. pp. 32-33). Upon receiving this money, Investigator Tillinghast called Investigator Hutchins to inform him that Informant had left the sale and that Applicant had purchased cocaine from Informant in exchange for money. (Tr. pp. 33, 39). After speaking with Investigator Tillinghast, Investigator Hutchins completed the search warrant affidavit and took it before a magistrate to obtain a search warrant. (Tr. pp. 39-40). Investigator Hutchins was not present on the scene for this operation; however, Investigator Hutchins confirmed that everything he placed in the search warrant affidavit had in fact happened before taking the search warrant to the magistrate and swearing the search warrant affidavit. (Tr. pp. 39-40, 45-49). This was accomplished by various personal contact and telephone calls with Investigator McJunkin

throughout the day on March 2, 2012 and at least one phone call with Investigator Tillinghast on that date. (Tr. pp. 30, 33, 47).

Ultimately, a Spartanburg County magistrate signed the search warrant and the Applicant's house was searched. (Tr. p. 43). During this search, Applicant directed Investigator McJunkin to the cocaine Applicant had just purchased from Informant, and this cocaine was recovered from a hiding place near a water heater in Applicant's garage.[3] (Tr. p. 197). Spartanburg County Investigator Dan Swad ultimately recovered this cocaine and sealed it in a tamper-resistant BEST evidence bag. (Tr. p. 257). In addition to the cocaine, Investigator Swad also located a quantity of crack cocaine on top of the cabinets in Applicant's kitchen. (Tr. p. 259). Investigator Swad also recovered this crack cocaine and placed it in the same tamper-resistant BEST evidence bag along with the cocaine. (Tr. pp. 259-60). Investigator Swad did not alter or tamper with either substance at any time. (Tr. pp. 257, 259). Further, upon the completion of the search at Applicant's house, Investigator Swad immediately took the evidence to the evidence room at the Spartanburg County Sheriff's Office and placed it in the evidence locker. (Tr. pp. 260, 264). This occurred on March 2, 2012. (Tr. pp. 260, 264, 275).[4] In addition to the cocaine and the crack cocaine located in Applicant's house, law enforcement recovered a set of digital scales, $12,500 in U.S. Currency, and a money counter. (Tr. pp. 260, 261-62).

[3] At first, Applicant was not truthful regarding the location of the cocaine; however, Applicant ultimately acquiesced led the investigators to it. (Tr. pp. 196-97).

[4] However, it appears that Investigator Swad incorrectly dated one evidence form indicating this occurred on March 3, 2012, when in fact it occurred on March 2, 2012. This was a simple scrivener's error. (Tr. p. 274).

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SUMMARY OF TESTIMONY AT PCR

I. Applicant testified to the following:

Applicant testified Counsel came to see him a couple of times. During a visit, they attempted to watch the undercover video filmed by Informant during the drug buy. However, the video cut off and Applicant could not watch the entire video. Applicant did see himself present on the video. Applicant testified he never heard the audio recordings of the phone calls between him and Informant until a week or month prior to his PCR hearing. He was not sure if they were admitted or used at trial. He was shocked to hear his voice on the audio recordings. Applicant described the audio tapes as Informant calling him and urging him to meet. Applicant testified that had he known about the audio recordings, he would have pled guilty.

Applicant also believes Counsel failed to address the specific issue of intent in his motion for a directed verdict with regard to the PWID charge.[5] Applicant also testified Counsel did not review Rule 403, SCRE, or the law regarding prior bad acts with him. There were no hearings regarding what prior bad acts could be used against Applicant. Applicant specifically takes issue with testimony elicited by the State from Informant, explaining some terminology used in the undercover video that was admitted and played for the jury. (Tr. pp. 234-235). Applicant contends the entire portion of the video should have been excluded as prior bad acts, but Counsel did not request its exclusion. Applicant also believes Counsel should have objected when the Solicitor mentioned it again in closing on pages 314-315 of the trial transcript. Had Counsel objected, Applicant would have taken the issue up on appeal.

Applicant also testified Counsel told him he would only have to serve 85% of his sentence if convicted. Applicant testified he must serve his sentence day for day in its entirety.

[5] The jury found Applicant guilty of the lesser offense of possession of cocaine base, not PWID.

He claims that had he known he had to serve a day for day sentence, he would have pled guilty instead of going to trial.

Applicant understood generally what entrapment was. He admitted Counsel discussed entrapment with him, but Applicant claims he had not reviewed all of the State's evidence. After having reviewed it, he claims he would not have proceeded on entrapment defense. Applicant testified Counsel should have objected to the Solicitor's burden shifting comments in closing – specifically, the Solicitor addressing Applicant's failure to present evidence to show lack of predisposition – an element of the entrapment defense. (Tr. p. 316). Applicant testified he was not required to testify or present evidence and as such, the Solicitor's comments were improper and objectionable. Applicant claims he would have raised this issue on appeal.

Applicant reluctantly admitted he had three prior convictions for PWID crack and a prior conviction for distribution of crack.

II. Counsel testified to the following:

J. Faulkner Wilkes has been practicing criminal law for 30 years. He was retained by Applicant after he fired his previous attorney, Fletcher Smith, because he was dissatisfied. Counsel recalls meeting Applicant numerous times, but does not recall the exact number. Counsel filed a discovery motion and obtained discovery. He reviewed all of it with Applicant and discussed the evidence the State had against him. At one point, Counsel attempted to play the undercover video and the audio recordings for Applicant, but the battery to the device playing it died and Applicant was not able to review all of the recordings. However, Counsel did thoroughly discuss the content of the video and audio recordings and Applicant seemed ok with not actually reviewing them further than their discussion. Had Applicant requested to watch/listen to them, Counsel testified he would have certainly made sure Applicant saw and

heard them. However, Counsel testified Applicant was aware of the phone recordings and that his voice was on them.

Counsel attempted to pursue a defense of outrage and entrapment. He believed the defense of outrage was a bit of a stretch, but made the argument anyway. Counsel believed entrapment was the best and really only defense for Applicant. Counsel explained the facts of a "reverse buy" lend themselves to support of a defense of entrapment. Counsel explained the two elements of entrapment include inducement by law enforcement to commit a crime and a lack of predisposition to commit the crime absent the inducement. With regard to the allegation that counsel failed to get the audio recordings admitted or played for the jury, Counsel opined the recordings would be damaging to the case and the entrapment defense. The calls were more incriminating than helpful. Therefore, Counsel believed the State's failure to admit and publish the recordings played in his favor in his ability to argue during closing that the State did not let the jury hear them, while being protected from the incriminating effect the recordings would have had if they were played for the jury.

Though not fresh in his mind, Counsel recalled researching entrapment in preparation for Applicant's trial. Counsel testified he believes the State was allowed to present evidence to disprove any lack of predisposition once Applicant raised the defense of entrapment. He also believed it was proper for the Solicitor to address predisposition and Applicant's failure to prove lack thereof in his closing on page 316.

However, Counsel did not view the testimony elicited from Informant on page 234 of the transcript to be an effort to prove predisposition. Instead, Counsel saw the testimony as simply an explanation of the street terminology used in the undercover video which had been admitted and played for the jury. Counsel believed the State was entitled to use a witness's testimony to

explain language the jurors may not have understood from the video. Upon cross-examination, Counsel conceded he could have objected, although he believed there were other bases upon which the testimony was admissible. He conceded that an objection would have allowed the issue to be addressed on appeal. He also conceded that the evidence could be viewed as a prior bad act and he could have requested a Rule 403 analysis prior to being admitted. However, Counsel agreed that even if he did request a 403 analysis, he was not sure the Court would exclude the evidence. Counsel also believed that because Applicant was charged with trafficking, which includes manufacturing, and possession *with intent to distribute*, the state was entitled to elicit the testimony regarding the cocaine being cooked and to address it in their closing arguments on page 314-315.

Counsel testified he and Applicant spent lots of time discussing plea offers and whether he should plead guilty or pursue trial. The plea offers evolved, but Counsel recalled an offer of 10-15 years. At that time, Applicant refused because he wanted 10-12 years and then later he only wanted 10 years. Ultimately, it was Applicant's decision to proceed to a jury trial. Counsel vaguely recalled making a motion to dismiss based on a discovery violation in a pre-trial hearing, as well as his pre-trial motions to suppress the drugs based on a defect in the probable cause affidavit and the chain of custody for the drugs. Counsel also vaguely recalled the pre-trial Jackson v. Denno hearing. Counsel was aware of Applicant's criminal history and he discussed it with Applicant when discussing whether or not Applicant would testify. Counsel wanted Applicant to testify, but Applicant would become hostile when Counsel would suggest that he testify. So, Counsel did not address it with Applicant anymore until the day of trial. It was absolutely Applicant's decision not to testify.

With regard to the allegation that Counsel misinformed Applicant about how much time he would serve, Counsel recalled reading Applicant the offense statute and penalty statute. Although he did not specifically recall his discussion with Applicant, he testified his general practice is to inform a defendant of the minimum and maximum time they face. He also discusses a defendant's willingness to accept a sentence understanding it must be served day for day. He finds it highly unusual and unlikely that he would have ever advised a client that was pursuing a jury trial about not only the maximum sentence he faced, but also whether he would serve 85% or day for day. He generally does not advise on parole issues. He could see no reason why it would have been any different in Applicant's case.

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 at the post-conviction relief hearing. This Court has had the opportunity to observe the witnesses presented at the hearing, and has weighed their testimony and credibility accordingly. Below are the findings of fact and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (2017). Applicant has failed to prove by a preponderance of the evidence that Counsel was deficient or that he was prejudiced by any deficiency. A Post-Conviction Relief application is not a venue for questioning each and every decision of trial counsel in hindsight. Rather, the Applicant must demonstrate by a preponderance of the evidence that trial counsel was deficient and that the deficiency prejudiced the outcome of his trial. Applicant has failed to do so.

I. Ineffective Assistance of Counsel

Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence."

Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117 (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.

A. Juror Strike Issue

Although Applicant made an allegation that Counsel was ineffective for failing to object to the trial court's abuse of discretion in denying Applicant from striking a juror from the jury, Applicant has failed to meet his burden of proving this claim. Applicant presented no evidence or argument on this point. A reading of the record shows no abuse of discretion by the judge or ineffectiveness by Counsel for failing to object to the denial of a juror strike. Having failed to meet his burden of proof on this allegation, the claim is denied and dismissed with prejudice.

B. Failure to argue and present evidence regarding probable cause

Applicant alleged in his original PCR application that Counsel failed to sufficiently argue or present evidence to show the magistrate judge lacked a substantial basis upon which to find probable cause. Applicant did not present any evidence to support or prove this claim. Furthermore, the record is clear Counsel made an attempt during the pre-trial motion to suppress based on an alleged defect in the probable cause affidavit that was used in securing the magistrate judge's signature for a search warrant. The issue was briefed on appeal and affirmed by the South Carolina Court of Appeals. This Court finds Applicant has failed to meet his burden of proof on this claim and therefore it is denied and dismissed with prejudice.

C. Perjured testimony and fabricated evidence

In his original application, Applicant made an allegation that Counsel allowed him to be convicted based on perjured testimony and fabricated evidence. However, Applicant offered no evidence with regard to these allegations. Therefore, Applicant has failed to meet his burden of proof and this claim is denied and dismissed with prejudice.

D. Burden shifting statements in closing

Applicant alleges the Solicitor made improper burden shifting comments in closing. Specifically, Applicant claims page 316 of the trial transcript shows the Solicitor explaining it is the defendant's burden to prove a lack of predisposition to commit the crime if he raises the affirmative defense of entrapment. Applicant claims that because he is not compelled to testify or present evidence, the Solicitor's comments were improper and objectionable.

"One pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, ***which he would not otherwise have committed.***" State v. Brown, 362 S.C. 258, 262–63, 607 S.E.2d 93, 95 (Ct. App. 2004) (citing State v. Johnson, 295 S.C. 215, 217,

367 S.E.2d 700, 701; Babb v. State, 240 S.C. 235, 237, 125 S.E.2d 467, 467 (1962), cert. denied, 375 U.S. 979, 84 S.Ct. 502, 11 L.Ed.2d 425 (1964) ("Entrapment is an affirmative defense to the crime charged and imposes upon the accused the burden of showing that he was induced to commit the act for which he is being prosecuted."). (Emphasis added). While comments from the State placing any burden on the defendant are generally impermissible, certain affirmative defenses do in fact place a burden on the defendant to prove or disprove certain facts. Entrapment is an affirmative defense that places upon the defendant the burden of proving both elements – inducement and lack of predisposition. Id. The Solicitor's comments were a correct statement of the law. The Solicitor was only referring to the elements of the affirmative defense raised by Applicant, not the burden of proof the State was required to meet in proving the elements of the crime. Therefore, the comments by the Solicitor in closing were not objectionable and Counsel could not have been deficient by not objecting. There is no evidence in the record to suggest that but for the alleged error, there is a reasonable probability the outcome of the trial would have been different. This allegation is denied and dismissed with prejudice.

E. Failure to request "independent decision" jury instruction

In his original application, Applicant alleged Counsel was ineffective for failing to request that the trial judge "inform the jury of their fundamental right to stand by their independent decision of guilt or innocence of the Applicant irrespective of the majority's decision being to the contrary." However, Applicant presented no evidence in support of this allegation. Applicant has failed to meet his burden of proving Counsel was deficient or that he was prejudiced by any such deficiency. This allegation is denied and dismissed.

F. Erroneous advice regarding parole/early release

Applicant alleged Counsel was ineffective for giving him erroneous advice that he would serve 85% of "any sentence" that he would receive for trafficking of cocaine base. This Court finds Counsel's testimony on this issue credible and Applicant's testimony not credible. It is counterintuitive to believe Counsel advised Applicant in a manner inconsistent with his general practice for the past 30 years. It also strains credulity to believe had Applicant been aware he was facing a day for day sentence, he would have pled guilty.

Furthermore, Counsel credibly testified Applicant wanted a plea offer of ten years, but did not receive an offer better than a range of 10-15 years. According to Applicant's claims, had he known he would be required to serve day for day the 10-15 year offer – that he rejected under the belief he would serve 85% of it – he would have accepted the offer and pled guilty. Applicant has failed to meet his burden of proving deficiency or prejudice regarding this issue. Therefore, this claim is denied and dismissed with prejudice.

G. Failure to admit phone recordings at trial

In his amended application, Applicant alleges Counsel was ineffective for failing to admit and publish for the jury the undercover phone call recordings of the conversations between Informant and Applicant. This Court notes Applicant did not offer the actual recordings as evidence, but there was some testimony regarding their contents. Counsel's testimony was credible on the issue. It was Counsel's opinion that the phone recordings were more damaging than helpful to Applicant's case. Counsel further benefitted from the State's failure to present them to the jury by using that failure to demonstrate to the jury that the State was not showing their entire hand while inferring the tapes were beneficial to the defense's theory of entrapment, specifically the inducement element. Futhermore, the record demonstrates that Counsel did not

present any evidence and therefore preserved final closing argument. Presenting recordings Counsel believed to be damaging would have also waived his right to final closing argument.

This Court refuses to substitute its judgment for that of a well-seasoned trial attorney who made the decision not to play the undercover phone calls for the jury. Without having heard the recordings, this Court can only conclude Counsel made a sound decision based on his professional judgment.

Applicant did not express his desire to have the tapes admitted at trial, but rather expressed concern that he had not heard the recordings until a week prior to his PCR hearing. Despite the allegation pled in the amended application, Applicant actually testified he would have pled guilty if he had heard the undercover phone recordings prior to trial. However, this Court finds Counsel's testimony on the issue more credible than Applicant's. Counsel testified Applicant did not hear all (or possibly any) of the undercover calls, but that Counsel had listened to them and discussed the contents with Applicant. Counsel conceded Applicant had a right to listen to them, but Applicant indicated to Counsel he was comfortable with their discussion and did not request or insist on hearing the recordings. This Court finds Applicant has failed to meet his burden of proving any deficiency with regard to the handling of the undercover phone calls. The record also demonstrates that absent any alleged error, the outcome of the trial would not have been different. This allegation is denied and dismissed with prejudice.

H. Prior bad acts

Applicant has made a number of allegations revolving around Counsel failing to object at various times during the trial where there was implication of prior bad acts by Applicant. Counsel's failure to make any conceivable objection is not deficient *per se.* Objections are calculated to achieve a tactical end in keeping with a party's theory of the case. Counsel, on the

whole, reasonably calculated his objections to achieve the stated end. In any trial, decisions of Counsel can and will be questioned in hindsight. However, tactical trial decisions that do not serve to acquit the defendant do not, by definition, prove deficiency. In this matter, Counsel's performance was adequate and clearly within the standards of professional conduct. The Court will specifically address the transcript pages wherein Applicant claims Counsel should have objected:

1. **Trial transcript page 234, line 9 thru page 235, line 4:**

This Court finds Applicant has failed to meet his burden of proving Counsel was deficient or that he was prejudiced by any deficiency. Applicant has failed to prove, either by presentation of evidence or from support of the record, that Counsel was ineffective for failing to object to the testimony elicited by the State from Informant regarding communications on the undercover DVD during the sale of cocaine to Applicant. The Solicitor was requesting explanation for the street language used during the sale. The video showed Applicant complaining about a prior batch of drugs he purchased from Informant, complaining that they were not cooked the way he wanted. In the hearing, Applicant argued this was evidence of a prior bad act to which Counsel should have objected. Applicant also argued Counsel should have requested any prior bad acts be excluded under Rule 403, SCRE.

The objection would have been futile and the evidence would most likely have been admitted despite a Rule 403 analysis. Once a defendant has opened the door asserting an entrapment defense, the State is then entitled to present evidence to rebut the defense's claim of lack of predisposition. Evidence of prior dealings between Informant and Applicant directly rebut the claim Applicant lacked a predisposition to commit the crime absent inducement by the State. And of all the ways the State could prove predisposition (i.e. evidence of Applicant's

three prior PWID crack convictions and prior distribution of crack conviction), prior dealings between this particular informant and Applicant have a greater amount of probative value on the issue that cannot hardly be outweighed by the prejudice to Applicant. Where entrapment is the only viable defense, as was the case here according to Counsel's credible testimony, prejudicial evidence of predisposition is a necessary risk to asserting it. Here, it was Applicant's decision to proceed to trial instead of pleading guilty. On Applicant's behalf, Counsel put forward the best defense possible – entrapment. I find no deficiency or prejudice.

2. Trial transcript page 314 thru 315:

Applicant has failed to prove, either by presentation of evidence or from support of the record, that Counsel was ineffective for failing to object to the Solicitor's closing remarks that Applicant was trying to sell crack – a cooked version of cocaine. This Court finds these closing remarks appropriate and unobjectionable. The Solicitor was drawing reasonable inferences from the evidence presented in support of the allegations made against Applicant – that he was trafficking and possessing crack with the intent to distribute. Applicant was found in possession of cocaine *in excess of 250 grams*. The State not only presented the drugs as evidence, but also the scale, money counter, and $4,000 cash found in Applicant's possession as well as testimony from the informant who sold him the cocaine. It is a reasonable inference to draw that Applicant was in fact buying and selling crack cocaine. Furthermore, any objection from Counsel on this point was not reasonably likely to affect the outcome of the trial.

Having failed to meet his burden of proof, the allegation against Counsel for failing to object to the Solicitor's closing argument is denied and dismissed with prejudice.

CONCLUSION

Based on all the foregoing, this Court finds and concludes Applicant has not established any violations that would require this Court to grant his application. This Court finds Applicant has failed to prove any deficiencies on the part of Counsel and further, Applicant has failed to prove prejudice from any alleged deficiencies in Counsel's representation of him. Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice.

This Court notifies Applicant he must file and serve a notice of appeal within thirty (30) days from receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. An applicant has a right to an appellate counsel's assistance when they are seeking review of the denial of PCR. Austin v. State, 305 S.C. 453 (1991). If an applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. See Rule 71.1 (g), SCRCP. You must look at Rule 243 of the South Carolina Appellate Court Rules for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 2 day of MARCH, 2010.

2010 MAR -5 AM 9:42

G. THOMAS COOPER, JR.
Presiding Judge
Seventh Judicial Circuit

Clinton, South Carolina

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O Box 3483
Spartanburg, SC 29304-3483

Phone (864) 596-2591
Fax (864) 596-2239

M. Hope Blackley
Clerk of Court

March 5, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Shandre C. Williams # 196544

Applicant

7TH JUDICIAL CIRCUIT

CASE # 2015CP42-3439

VS

CERTIFICATE OF SERVICE

Respondent

I certify that, on this date, I served a copy of the Order Dismissing W/prejudice
In this action dated 3-2, on 3-5-18

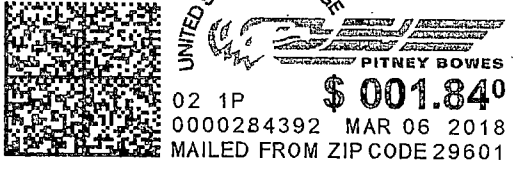
By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Valerie Cervantes
Lindsey McCoy
Rodney Richey
William Yarborough

3-5-18
(Date)

(Signature)

•Law Office of William G. Yarborough III•
522 North Church Street
Greenville, SC 29601



The Honorable Daniel E. Shearouse
Clerk of Court of the S.C. Supreme Court
1231 Gervais Street
Columbia, SC 29201