LAW OFFICE OF LINDA VALLAR WHISENHUNT, LLC

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December 24, 2018

South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RECEIVED

DEC 27 2018

S.C. SUPREME COURT

RE: Timothy Crosby v. State of South Carolina, Case #2017-CP-04-1545

Dear Sir or Madam:

Please find enclosed the original and one (1) copy of the Appellant's Notice of Appeal and Proof of Service on Megan Harrigan Jameson of the Office Attorney General in connection with the above-referenced matter. Please file the original and return a clocked copy to my office in the enclosed self-addressed stamped envelope. Also enclosed is a copy of the Order of Dismissal.

Please contact me if you have any questions.

Sincerely,

Linda Vallar Whisenhunt, LLC

Linda Vallar Whisenhunt

LVW/
Enclosure
cc: Timothy Crosby
Megan Harrigan Jameson, South Carolina Office of Attorney General
Adriane Burk, South Carolina Commission on Indigent Defense

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-04-1545

RECEIVED

DEC 27 2018

S.C. SUPREME COURT

Timothy Crosby,
S.C.D.C. No. 247353 Appellant,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Timothy Crosby appeals the denial of his Post Conviction Relief by the order of the Honorable R. Scott Sprouse, dated September 28, 2018 and filed October 12, 2018. Appellant received written notice of entry of this order on December 20, 2018.

December 24, 2018

Linda Vallar Whisenhunt
Linda Vallar Whisenhunt, LLC
213 South Main Street
Anderson, South Carolina 29624
(864) 225-3125
Attorney for Appellant

Other Counsel of Record:
Megan Harrigan Jameson
South Carolina Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Attorney for Respondent
(803) 253-6283

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

RECEIVED

DEC 27 2018

S.C. SUPREME COURT

R. Scott Sprouse, Circuit Court Judge

Case No. 2017-CP-04-1545

Timothy Crosby,
S.C.D.C. No. 247353 Respondent,

State of South Carolina, Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on State of South Carolina by depositing a copy of it in the United States Mail, postage prepaid, on December 24, 2018, addressed to its attorney of record, Megan Harrigan Jameson, South Carolina Office of Attorney General, Post Office Box 11549, Columbia, South Carolina 29211.

December 24, 2018

Linda Vallar Whisenhunt
Linda Vallar Whisenhunt, LLC
213 South Main Street
Anderson, South Carolina 29624
(864) 225-3125
Attorney for Appellant

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

TIMOTHY CROSBY,
S.C.D.C. No. 247353
Applicant,

v.

State of South Carolina,

Respondent.

Case No. 2017-CP-04-1545

ORDER OF DISMISSAL

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DEC 27 2018

S.C. SUPREME COURT

This matter comes before this Court by way of an application for post-conviction relief filed on July 26, 2017, by Timothy Crosby (Applicant). Respondent served its return, partial motion to dismiss, and motion for a more definite statement on October 26, 2017, requesting an evidentiary hearing be convened on Applicant's allegation of ineffective assistance of counsel after he amended his application to include specific instances of counsel's ineffectiveness. An evidentiary hearing was held on August 30, 2018, before this Court at the Anderson County Courthouse. Applicant was present and was represented by counsel Linda Whisenhunt. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson. At the hearing, Applicant testified on his own behalf and presented testimony from trial counsel Michael Scott McElhannon, Esquire.

Following a thorough review of the record in its entirety, and the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations and denies this application with prejudice.

PROCEDURAL HISTORY

The records before this court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of South Carolina Grand Jury Clerk of Court. On November 13, 2013, the State Grand Jury of South Carolina indicted

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Anderson, SC COC, CP/GS
Richard A. Shirley, COC

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Applicant for Trafficking in Cocaine (Conspiracy) (100 to 200 grams) and Trafficking in Cocaine Base (10-28 grams) (2013-GS-47-0022, Counts 1 & 13) as part of a multi-count, multi-defendant indictment stemming from an investigation into a cocaine trafficking ring. Applicant's charges stem from a recorded undercover drug transaction out of an auto body store, Toys R Us, in Anderson County and his larger role in a drug conspiracy operating out of Toys R Us.

On January 26, 2015, Applicant proceeded to a jury trial before the Honorable Alexander S. Macaulay, circuit court judge. Michael Scott McElhannon, Esquire (Counsel), represented Applicant. Assistant Attorney Generals Joshua R. Underwood and Lawrence Wedekind of the South Carolina Attorney General's Office, prosecuted the case. At the conclusion of the trial, the jury convicted Applicant of the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams) and as indicted of Trafficking in Cocaine Base (10-28 grams). Judge Macaulay sentenced Applicant to seven years imprisonment for Trafficking in Cocaine (Conspiracy) (28-100 grams) and a consecutive three years imprisonment for Trafficking in Cocaine Base (10-28 grams).

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf by Appellate Defender LaNelle Cantey Durant of the South Carolina Commission on Indigent Defense—Division of Appellate Defense. Following the submission of a brief pursuant to Anders[1] and a *pro se* brief, the South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion and granted counsel's motion to be relieved. State v. Timothy Crosby, 2017-UP-080 (Ct. App. filed February 15, 2017). Applicant filed a *pro se* petition for rehearing and the Court of Appeals denied the petition by written order dated April 24, 2017. Applicant then filed a *pro se* petition for a writ of certiorari to the South Carolina Supreme Court and the

[1] Anders v. California, 386 U.S. 738 (1967).

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Supreme Court denied the petition for a writ of certiorari by written order dated June 1, 2017. The Remittitur was returned to the circuit court on June 12, 2017.

ALLEGATIONS RAISED IN THE APPLICATION AND AT THE HEARING

In his *pro se* application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on allegations the trial court lacked subject matter jurisdiction for charging the jury on the lesser-included offense of which he was ultimately convicted and ineffective assistance of counsel. Applicant failed to set forth with any specificity any of the underlying facts giving rise to the allegation of ineffective assistance of counsel. Applicant failed to amend his application or otherwise respond to Respondent's motion for a more definite statement. However, at the evidentiary hearing, Applicant indicated to this Court that he would be proceeding forward on the following allegations of ineffective assistance of counsel:

-Counsel was ineffective for requesting a jury instruction on the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams)

-Counsel was ineffective for failing to retain and present a voice identification expert

At the hearing, Applicant proceeded forward on these grounds of ineffective assistance of counsel as well as his original allegation that the trial court lacked subject matter jurisdiction as to his Trafficking in Cocaine (Conspiracy) (28-100 grams) conviction.

SUMMARY OF TESTIMONY PRESENTED AT EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified first on his own behalf. Applicant testified Counsel was appointed to represent him in 2014. Applicant testified he met with Counsel three times and each of these meetings was for less than an hour. He testified the first meeting was unproductive ("we bumped heads") because Applicant insisted he had not been arrested. Applicant elaborated that if he had been arrested, there would have been a mug shot, but

acknowledged he bonded out of jail. He testified the substance of their second meeting focused on the fact that Applicant was not arrested with any drugs. He testified he was pulled over for a traffic violation shortly after leaving Toys R. Us, but he was not arrested and law enforcement did not find any drugs in his possession following a search.

He testified he came to Counsel's office to review discovery, including a small portion of the audio recording of the drug transaction. However, he testified he was not given a copy of his discovery and did not review all discovery until after his trial. He denied ever being informed that a protective order was in place limiting his access to review the discovery outside Counsel's office. He testified he was aware of the charges he was facing in the indictment and noted only two charges in the multi-count, multi-defendant indictment pertained to him. Applicant testified Counsel explained the charges he was facing, and the potential sentences, including the mandatory minimum sentence of twenty-five years for Trafficking in Cocaine (Conspiracy) (100-200 grams). However, he testified Counsel did not explain the elements of the offenses to him.

Applicant testified Counsel should have retained and presented a voice identification expert to determine who was involved in the drug transaction with the confidential informant. Applicant testified he was present at the Toys R Us shop during the day in question and acknowledged he called a witness, Phillip Wall, who also confirmed Applicant was present. However, Applicant testified he did not engage in any drug transactions during his time at the shop. He elaborated the voices on the recording were difficult to identify and an expert would have been useful to establish he was not part of the transaction. He also testified the jury should have listened to the entire audio recording, not the short portion that was played during trial. He acknowledged the entire audio recording was admitted as an exhibit at trial, but he is not sure if the jury listened to the entire recording.

Applicant testified he received numerous plea offers from the State, including offers to plead to a lesser-included offense for five years imprisonment and later for three to ten years imprisonment at the start of his trial. He testified he rejected these plea offers because he wanted to proceed to trial. He testified this was not his first drug conviction.

Applicant testified there were discrepancies as to the amount of drugs involved in the conspiracy and Counsel should have objected to the trial court instructing the jury on the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams). He testified he did not discuss this with Counsel before Counsel requested the lesser-included offense and if Counsel had asked him, he would not have consented to the lesser-included instruction. He testified Counsel never explained lesser-included offenses with him. Applicant testified he believes he might have been acquitted if the jury did not have the option of the lesser-included offense because he was not involved in the conspiracy.

Applicant testified he is not challenging his conviction for Trafficking in Cocaine Base (10-28 grams) and is only challenging his conviction for Trafficking in Cocaine (Conspiracy (28-100 grams).

Following Applicant's testimony, Counsel testified. He testified he was appointed to represent Applicant in either the later part of 2013 or early 2014 and he met with Applicant at least six times, with most meetings lasting over an hour. Counsel testified Applicant did not want to cooperate in his defense and denied that he was ever arrested despite recently bonding out of jail following an arrest. He testified Applicant denied any involvement with drugs and initial also denied he was ever pulled over by law enforcement for a traffic violation. Counsel testified Applicant later changed his version of events and told him law enforcement conducted a thorough search of his person and vehicle.

Counsel testified he has previously represented clients indicted by the State Grand Jury and is familiar with the particularities of these cases, including the protective order used to limit a defendant's access to the discovery materials outside his counsel's presence. He testified a protective order was in place in this case and he explained the implications of the protective order to Applicant. He testified he reviewed the discovery with Applicant in his office and also requested Applicant come to his office to review additional discovery but Applicant declined his request to review the additional discovery. He testified Applicant responded to his request by stating he did not need to hear anything else before trial. He testified Applicant's wife gave birth to twins shortly before trial. He testified he reviewed the indictment, the potential sentences, and lesser-included offenses with Applicant.

Counsel testified he listened to the audio recording of the drug transaction several times, including with Applicant. He further testified Applicant has a distinct voice and it sounded like Applicant on the audio recording. He testified he did not consider retaining a voice identification expert because of this and that Applicant never requested he retain a voice identification expert. He further testified Applicant never denied it was his voice on the recording.

Counsel testified Applicant insisted on testifying in his own defense and calling Phillip Wall as a witness, despite the fact that both he and Wall put Applicant at Toys R Us during the drug transaction. He testified Applicant's version of events was different than the State's witnesses, including discrepancies about the scope of the traffic stop. Counsel testified the confidential informant identified Applicant's truck on the recording and Applicant was pulled over in the truck a short time later, but no drugs or money were recovered because law enforcement only wanted to identify Applicant while allowing the conspiracy to build.

Counsel testified he received several plea offers from the State, all for lesser-included offenses. He testified the initial offer was for ten to fifteen years imprisonment if Applicant

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cooperated with law enforcement and Applicant rejected this offer and refused to cooperate. He testified the next plea offer was for five years imprisonment, which Applicant also turned down. He testified the final offer, which was made at the start of trial, was for three to ten years imprisonment, which Applicant also turned down.

Counsel testified there was varying testimony from State's witnesses as to the amount of drugs involved in the conspiracy, including State's witness William Angelo Johnson testifying he was so drunk and high during the time period of the conspiracy that he was unsure of the amount of drugs he bought and sold. Counsel testified that based on this wavering testimony, he made a strategic decision to request a jury instruction on the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams) to reduce the exposure of the mandatory minimum sentence Applicant would be facing if convicted. He testified he believed Applicant could very well have been convicted of the greater offense as indicted as the State had presented sufficient evidence. He testified he moved for a directed verdict, which was denied by the trial court. If was after the directed verdict was denied that Counsel decided to ask for the lesser-included offense. He testified he does not have any specific recollection of discussing this decision with Applicant, but his standard practice is to discuss anything of that nature with his client before making such a request to the court. He testified he believes the court took a break prior to his request for the lesser-included offense and he believes he used this time to discuss the decision to request the lesser-included with Applicant. Counsel testified he did discuss the concept of lesser-included offenses with Applicant during their representation because the various plea offers Applicant received were all for lesser-included offenses. Counsel testified the State also wanted the court to charge the jury on the lesser-included offense and if he had not made the request, it is likely the State would have asked the court to charge the lesser-included offense. He testified Trafficking in Cocaine (Conspiracy) (28-100 grams) is a lesser-included

offense of Trafficking in Cocaine (Conspiracy) (100-200 grams) and the court had subject matter jurisdiction to instruct the jury on the lesser-included offense.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety. Additionally, this Court heard the testimony presented at the evidentiary hearing and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant has alleged numerous instances of ineffective assistance of counsel and related allegation that the trial court lacked subject matter jurisdiction to charge the jury with the lesser-included offense for which he was ultimately convicted. This Court finds these allegations are without merit and must be denied and dismissed with prejudice.

Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S. at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970));

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Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, 466 U.S. at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced 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.

Although courts may not indulge "post hoc rationalization" for counsel's decision making that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8

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(2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. Id. at 688; Harrington v. Richter, 562 U.S. 86 (2011)

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687. See Harrington, 562 U.S. 86.

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371 (2010), and the strong societal interest in finality has "special force with respect to convictions based on guilty pleas." United States v. Timmreck, 441 U.S. 780, 784 (1979). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings knew of materials outside the record and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's representation amounted to incompetence

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under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id. at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693. Harrington, 562 U.S. 86.

Based on this standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing any constitutional ineffectiveness of counsel as to any of his various allegations. Each allegation is addressed fully below:

Allegation: Counsel was Ineffective for Requesting a Jury Charge on the Lesser Included Offense

Applicant alleges Counsel was ineffective for requesting a jury instruction on the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams). This Court finds this allegation is without merit, as Counsel made a reasonable strategic decision to request the lesser-included offense.

Initially, this Court finds Counsel's testimony as to this allegation credible and affords it great weight. At the evidentiary hearing, Counsel testified he made a strategic decision to request the lesser-included offense following the denial of his directed verdict motion to significantly reduce Applicant's mandatory minimum sentence from twenty-five years to seven years. He elaborated the wavering testimony from Johnson supported the lesser-included trafficking

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weight, but believed the jury could and likely would have convicted Applicant as indicted of the higher weight if it did not have the lesser included offense as an option. The record supports Counsel's assertions, as the testimony from several State's witnesses easily satisfied the more than 100 gram threshold. Counsel testified he believes he discussed this decision with Applicant at the break and both were in agreement to request the lesser-included offense. As Counsel employed a valid and reasonable strategy in moving for the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams), this Court finds Counsel's performance was not constitutionally ineffective. See McKnight v. State, 378 S.C. 33, 43, 661 S.E.2d 354, 359 (2008) (internal citations omitted) ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case. Where trial counsel articulates a valid reason for employing certain trial strategy, counsel will not be deemed ineffective."); see also Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014) (finding trial counsel articulated a valid, strategic reason for failing to request a jury instruction on the lesser included offense of strong arm robbery, and therefore, was not ineffective). Therefore, this allegation is denied and dismissed with prejudice.

Allegation: Counsel was Ineffective for Failing to Retain a Voice Identification Expert

Applicant alleges Counsel was ineffective for failing to retain and present a voice identification expert to challenge whether he was the person who engaged in the drug transaction with the confidential informant. This Court finds Applicant has failed to meet his requisite burden of proof and denies this allegation.

Initially, this Court notes Applicant failed to present a voice identification expert at the evidentiary hearing or otherwise present any evidence to show what benefit could have been derived from the sue of an expert, and therefore, any assistance that may have been gleaned from the use of such an expert is speculative. See Lorenzen v. State, 376 S.C. 521, 530, 657 S.E.2d

771, 776–77 (2008), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018) (finding Lorenzen failed to present evidence that would show a reasonable probability that, but for counsel's failure to call expert witnesses, the result of his trial would have been different where he failed to present an expert witness at the evidentiary hearing); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR.").

Moreover, Counsel credibly testified he listened to the recording several times, including in the presence of Applicant, and he believed it was Applicant's distinctive voice on the recording. Based on this, Counsel testified he did not believe such an expert was necessary. Therefore, this Court finds Counsel performed competently. This allegation is denied and dismissed with prejudice.

Subject Matter Jurisdiction

In additional to alleging Counsel was ineffective for requesting a jury instruction on the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams), Applicant alleges the trial court was without subject matter jurisdiction to charge the jury on the lesser-included offense. In its return and at the start of the hearing, Respondent moved to summarily dismiss this allegation, noting the trial court clearly had subject matter jurisdiction to instruct the jury on the lesser weight of trafficking based on the evidence presented during Applicant's trial. This Court agrees the trial court had subject matter jurisdiction to charge the jury on the lesser-included offense of Trafficking in Cocaine (Conspiracy) (28-100 grams).

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A circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment. State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (overruled on other grounds by State v. Gentry, 363 S.C. 93, 106, 610 S.E.2d 494, 501 (2005)) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)). "If there is evidence in the record from which the jury could infer the defendant is guilty of the lesser-included offense, rather than the crime charged, the trial judge must instruct the jury on the lesser-included offense." State v. Gilmore, 396 S.C. 72, 76–77, 719 S.E.2d 688, 690 (Ct. App. 2011) (citing Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005)).

In this case, Applicant was indicted by the State Grand Jury for Trafficking in Cocaine (Conspiracy) (100 to 200 grams) in violation of S.C. Code Ann. § 44-53-370(e)(2)(c). That indictment was true-billed, signed by the foreman of the grand jury, contained contains all the necessary elements of the offense, and further cited the applicable statute. At trial, the evidence presented to the jury could infer the defendant was guilty of the lesser-included offense of Trafficking in Cocaine (28-100 grams) based the testimony of State's witness William Johnson, which included conflicting and vague testimony about the exact amount of drugs involved. Trafficking in Cocaine (28-100 grams) is a lesser-included offense of Trafficking in Cocaine (100 to 200 grams). See State v. Gosnell, 341 S.C. 627, 635, 535 S.E.2d 453, 458 (Ct. App. 2000) ("[W]e conclude that 'Conspiracy to traffic in cocaine in the amount of 400 grams or more' can include conspiracy to traffic in lesser amounts."); Granger v. State, 333 S.C. 2, 507 S.E.2d 322 (1998) (finding an indictment for trafficking in cocaine in an amount over 10 grams was sufficient to put Granger on notice of the trafficking at higher weights, noting the offense of trafficking involves ten grams or more and then establishes different tiers, which affect the sentencing range); Matthews v. State, 300 S.C. 238, 387 S.E.2d 258 (1990) ("Under the

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legislative scheme, we conclude that the legislature intended possession with intent to distribute to be a lesser-included offense of trafficking based upon possession. Therefore, **when there is conflicting evidence as to whether the amount of marijuana involved is sufficient to invoke the trafficking statute**, both charges should be submitted to the jury. Where, however, the undisputed evidence is that the amount involved exceeds the minimum trafficking amount, then only the trafficking charged should be submitted to the jury." (emphasis added).

Therefore, the trial court properly instructed the jury on the lesser-included offense. Applicant cannot establish the trial court lacked subject matter jurisdiction to convict him of Trafficking in Cocaine (28-100 grams) because the jury was properly charged with it as a lesser-included offense. Therefore, this Court finds this allegation is without merit and must be denied and dismissed with prejudice.

CONCLUSION

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

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this Order by counsel of record to secure the appropriate appellate review. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is

directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and

2. Applicant shall remain in the custody of the State.

AND IT IS SO ORDERED this 28 day of September, 2018.

R. SCOTT SPROUSE
Presiding Judge
Tenth Judicial Circuit

Walhalla, South Carolina

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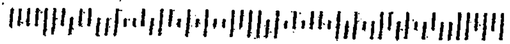
Anderson, SC COC, CP/GS

Richard A. Shirley, COC



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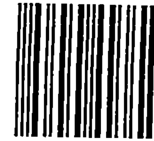

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South Carolina Supreme Court
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Columbia, SC 29211