

MARK A. PEPPER, ESQ.  
MARK@PEPERLAWFIRM.COM

MARVIN R. PENDARVIS, ESQ.  
MARVIN@PEPERLAWFIRM.COM

BRENNA D. WILES, ESQ.  
BRENNA@PEPERLAWFIRM.COM



WWW.PEPPERLAWFIRM.COM

THE PEPPER LAW FIRM, PA  
548 Savannah Highway  
Charleston, SC 29407  
843.225.2520 (O)  
843.225.2554 (F)

**RECEIVED**

MAR 11 2019

S.C. SUPREME COURT

March 6, 2019

**VIA US MAIL**

Supreme Court of South Carolina  
Clerk of Court  
Post Office Box 11330  
Charleston, SC 29211


Re: Henry Nesbit Jr., #292341 v. State of South Carolina  
Case No. 2016-CP-10-2761

Dear Clerk:

Please find enclosed the original and one copy of Mr. Nesbit's Notice of Intent to Appeal and Certificate of Service for filing. If you would be kind enough to return a clocked copy in the self-addressed stamped envelope, I would be most appreciative.

With best regards, I am

Sincerely,



Mark A. Peper, Esq.

Enclosures as stated.  
MAP/lbh



NOTICE OF APPEAL IN A CIVIL CASE

RECEIVED

THE STATE OF SOUTH CAROLINA  
In the Court of Common Pleas

MAR 11 2019

S.C. SUPREME COURT

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

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G. Thomas Cooper, Circuit Court Judge

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Case No. 2016-CP-10-2761

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State of South Carolina,

Respondent,

v.

Henry Nesbit, Jr. SCDC  
#292341,

Appellant.

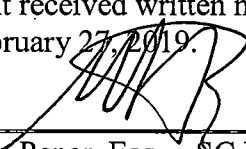
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NOTICE OF APPEAL

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Henry Nesbit, Jr. SCDC #292341 appeals the Order of Dismissal of the Honorable G. Thomas Cooper dated February 15, 2019. Appellant received written notice of entry of this Order of Dismissal of Post-Conviction Relief on February 27, 2019.

March 6, 2019

  
\_\_\_\_\_  
Mark A. Peper, Esq. - SC Bar # 72624

The Peper Law Firm, PA  
548 Savannah Highway  
Charleston, SC 29407  
843-225-2520  
Attorney for Appellant

Other Counsel of Record:  
Benjamin Limbaugh, Asst. Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
Attorney for Respondent

STATE OF SOUTH CAROLINA

In the Court of Common Pleas

**RECEIVED**

MAR 11 2019

APPEAL FROM CHARLESTON COUNTY  
G. Thomas Cooper, Circuit Court Judge

S.C. SUPREME COURT

Case No: 2016-CP-10-2761

THE STATE OF SOUTH CAROLINA, .....Respondent,

v.

HENRY NESBIT, JR. #292341, .....Appellant.

**CERTIFICATE OF SERVICE**


The undersigned hereby certifies that on the date indicated below, he served counsel for the Respondent and Clerk of Court, with a copy of the NOTICE OF INTENT TO APPEAL by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

Supreme Court of South Carolina  
Clerk of Court  
P.O. Box 11330  
Columbia, SC 29211

Charleston County Clerk of Court  
100 Broad Street, Suite 106  
Charleston, SC 29401

Benjamin Limbaugh, Asst. Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, SC 29201

March 6, 2019

  
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Mark A. Peper, Esq.

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
Henry Nesbit, Jr., SCDC #292341 )  
Applicant, )  
v. )  
State of South Carolina )  
Respondent, )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

Case No.: 2016-CP-10-2761

**ORDER OF DISMISSAL**

FILED  
2019 FEB 22 PM 3:21  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief filed on May 26, 2016, by Henry Nesbit Jr. (Applicant), alleging he was entitled to post-conviction relief based on constitutionally ineffective counsel and a violation of South Carolina chain of custody laws in handling of drugs in Applicant's case. Applicant amended his application to include the following claims: Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf, counsel failed to locate and examine all of the state's evidence prior to trial, counsel failed to present evidence he believes was exculpatory, counsel failed to request a jury charge on simple possession, and alternatively counsel failed to object to a charge of possession with intent to distribute. Respondent served its return on September 28, 2018, requesting an evidentiary hearing be convened on the application.

An evidentiary hearing was held on December 6, 2018, before this Court at the Charleston County Courthouse. Applicant was present and was represented by counsel Mark Peper. Respondent was represented by Assistant Attorney General Benjamin Limbaugh of the South Carolina Attorney General's Office. At the hearing, testimony was taken from trial counsel Melisa Gay, trial counsel Michael Nelson, and Applicant.

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.

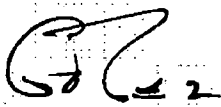
#### **Procedural History**

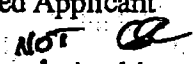
Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Charleston County Clerk of Court's orders of commitment. During its September 2013 term, the Charleston County Grand Jury indicted Applicant for failure to stop for a blue light (2013-GS-10-5527), trafficking cocaine (2013-GS-10-5634), and possession with intent to distribute ("PWID") methylene (bath salts) (2013-GS-10-5639). Melisa Gay, Esquire and Michael Nelson, Esquire represented him. On May 5-8, 2014, Applicant proceeded to trial before the Honorable Deadra L. Jefferson and a jury. On May 8, 2014, the jury convicted Applicant as indicted for failure to stop for a blue light and the lesser-included-offenses of PWID cocaine and possession of methylene. Judge Jefferson sentenced Applicant to concurrent terms of fifteen years for PWID cocaine, five years for failure to stop for a blue light, and one year for possession of methylene.

Applicant appealed. Robert M. Pachak, Esquire represented Applicant on appeal and filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), on Applicant's behalf. The South Carolina Court of Appeals dismissed Applicant's appeal in an unpublished opinion. State v. Nesbit, Op. No. 2015-UP-483 (S.C. Ct. App. 2015). The Remittitur was returned to the circuit court on October 30, 2015.

#### **Facts of the Case**

This case begins with Deputy Chavez of the Charleston County Sheriff's Office. Deputy Chavez was assigned to off-duty patrol at the Isle of Palms Police Department to assist them with extra traffic enforcement and crowd control during the busy time of the beach season. Deputy



Chavez was parked in front of the Windjammer in the median. Deputy Chavez observed Applicant approaching the intersection of JC Long Boulevard at Ocean Boulevard and make a turn/using his turn signal. A traffic stop was initiated. (Tr. p. 91, line 17 – p. 93, line 19). <sup>NOT</sup> 

Applicant was driving a brown Harley Davidson motorcycle. When the blue lights were activated, Applicant started to slow down and make a right-hand turn onto a side street and then took off at a high rate of speed. (Tr. p. 97, lines 1 – 15). Deputy Chavez pursued Applicant and during the chase, Applicant wrecked his motorcycle. Deputy Chavez arrested Applicant for failing to stop for blue lights and placed him in handcuffs. Deputy Chavez then searched Applicant and found a large amount of cash and several bags of narcotics. (Tr. p. 100, line 21- p. 101, line 5). One bag of cocaine contained 1.72 grams of cocaine, the other bag contained 19.53 grams of cocaine. (Tr. p. 196, lines 3 – 7). Deputy Chavez also found 394.66 grams of a brown crystallized substance, which turned out to be Methylone. (Tr. p. 197, lines 23 – 25).

The trial judge agreed to charge the law of possession with intent to distribute cocaine as a lesser included offense of trafficking in cocaine. (Tr. p. 212, lines 3 – 4). The trial judge also agreed to charge simple possession after discussing the Methylone charge with counsel. (Tr. p. 210, line 7 – 12).

#### **Current Post-Conviction Relief Action**

Applicant proceeded to file this post-conviction relief application on May 26, 2016. The State filed its Return and Partial Motion to Dismiss and Motion for a More Definite Statement on April 13, 2017. Applicant filed an amendment to his post-conviction relief application on June 28, 2018.



In his filing, Applicant answers Question 10 of the Application for Post-Conviction Relief with the words "See Attach Sheet." The Applicant alleged in this first application that he was being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Trial Counsel"
2. "Violation of SC chain of custody laws in handling of drugs in Applicant's case"

The State filed its Return and Partial Motion to Dismiss and Motion for a More Definite Statement on April 13, 2017.

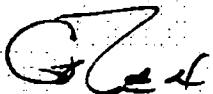
Thereafter, on June 28, 2018, Applicant through counsel Mark Archer, filed an Amended Application for Post-Conviction Relief. In this amended application, Applicant incorporates the previously mentioned attachment and sets forth the following grounds for post-conviction relief:

1. "Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf.
2. Counsel failed to locate and examine all of the state's evidence prior to trial.
3. Counsel failed to present evidence he believes was exculpatory.
4. Counsel failed to request a jury charge on simple possession.
5. Alternatively counsel failed to object to a charge of possession with intent to distribute.

#### **TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING**

##### ***Applicant***

Applicant testified that he was originally represented by Melisa Gay and that Michael Nelson was brought on right before trial. Applicant testified that counsel represented him eight to nine months prior to trial. Applicant testified that he retained counsel while he was incarcerated and did not meet with them when he was out. Applicant testified that he never met with Mr. Nelson and that he only met with Ms. Gay one or two times. Applicant testified that counsel did



not go over the elements of the offenses with him and did not review the evidence. Applicant testified that he did not see the law enforcement video while incarcerated and did not discuss testifying at trial while incarcerated. Applicant testified that counsel did not discuss his rights with him. Applicant testified that counsel did not discuss lesser included offenses with him. Applicant testified that counsel communicated a plea offer to him while he was incarcerated, the offer was a recommendation of eighteen to twenty-five years. Applicant testified that there was a second plea offer brought to him while he was in jail that was a recommendation of fifteen to twenty-five years. Applicant testified that there was a third plea offer before trial that he also rejected.

Applicant testified that there was a pair of pants that was in evidence, but that was never presented at trial. Applicant testified that his attorneys never saw the pants and that they did not move anything into evidence. Applicant testified that he did not put up a case and that they rested after the State's case. Applicant testified that counsel told him that he should not testify because he could be cross-examined and they wanted to have the last argument. Applicant testified that he wanted to testify at trial. Applicant testified that he wanted to tell the jury he was not arrested until a later time on the drug charges. Applicant testified that he thought his trial was all or nothing on the indicted charges and was unaware of the potential for lesser-included offenses. Applicant testified that he had an issue with the chain of custody and that the officer's signature was not actually on one of the bags of drugs in evidence.

*Counsel Nelson*

Nelson testified that he met with Applicant once or twice while he was incarcerated. Counsel testified that he did not personally review the video with Applicant. Nelson testified that he did not go over lesser-included offenses with Applicant. Nelson testified that he did not



discuss the pants with Applicant and that he saw pictures of the pants. Nelson testified that he made sure to question witnesses about the size of the pants and whether or not it was plausible the drugs could have been in the pants. Nelson testified that he discussed the risks of testifying with Applicant and that he was worried about cross-examination. Nelson testified that he thought it was very important to have the last argument to the jury in this case. Nelson testified that he saw the warrants and reviewed the discovery. Nelson testified that he did not request that the jury be brought back out and charged on possession after the question was asked. Nelson testified that he was surprised that he got the jury charge on possession with intent to distribute.

*Counsel Gay*

Gay testified that she reviewed the law enforcement video and thought that it was helpful to Applicant. Gay testified that you could only see Applicant's head in the video and it did not show anything that would be useful to the State. Gay testified that the motorcycle was not his and that the drugs were never in Applicant's dominion or control. Gay testified she believed that the jury bought in to the idea that the drugs that were found with the motorcycle were not Applicant's. Gay testified that they found small quantities of cocaine and meth when his pants were removed at the hospital. Gay testified that pants were cut off of Applicant and were taken away as part of the medical procedure. Gay testified that in hindsight she should've asked for a possession jury charge. Gay testified that the drugs were presented as a total weight and were not broken up by what was on the ground and what was found on Applicant's person. Gay testified that she believes it would not have been appropriate to ask for a jury charge on possession once the jury asked the question. Gay testified that she told Applicant that it would not be a good idea for him to testify at trial. Gay testified that she had a discussion with Applicant about potential past charges that could be brought out on cross-examination if he were to testify. Gay testified

*Gay*

that she had multiple telephone calls with Applicant to discuss the case. Gay testified that she discussed the trial and strategy with Applicant. Gay testified that she discussed the elements of the offenses with Applicant. Gay testified that as the trial evolved, the strategy to ask for lesser-included offense charges also evolved. Gay testified that Applicant saw the law enforcement video before trial. Gay testified that the law enforcement officer did not acknowledge it was his signature on the drug report and that she did not object, but she also was unsure as to what the judge would have done with that objection.

### **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, which allowed the Court to scrutinize the credibility 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 against trial counsel, Michael Nelson and Melisa Gay. Each allegation is addressed fully below.

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)); 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. See generally Id.

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, 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 (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; Harrington, 562 U.S. 86.

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010). 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 under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

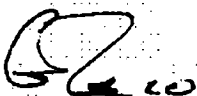
In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U. S. 15 (2009); Strickland, 466 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. Applicant's allegation is addressed fully below:

#### **Allegations**

***Counsel never fully explained the benefits and detriments of the Petitioner testifying at trial so the Defendant/Petitioner was unable to make an intelligent decision as to whether to testify in his own behalf.***

This Court finds that both counsel, and Applicant testified that Applicant was fully advised of the benefits and detriments of testifying at trial. Applicant testified that counsel advised him that it would not be wise to take the stand and submit himself to cross-examine. Counsel testified



that they advised Applicant that cross-examination would not be helpful to their case and that they believed having last argument would be most beneficial. This Court finds counsel's reasoning for advising Applicant not to testify was a valid trial strategy. "Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Abney v. State, 408 S.C. 41, 46, 757 S.E.2d 544, 546-47 (Ct. App. 2014) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995)). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 691. Counsel's decision not to request jury instructions on lesser-included offenses was a valid trial strategy. See Abney, 408 S.C. at 46-47, 757 S.E.2d at 546-47 (recognizing counsel's decision not to request a jury instruction on lesser included offenses can be a valid trial strategy). Therefore, this allegation is denied and dismissed with prejudice. Therefore, Applicant has failed to show either deficiency or prejudice, thus this allegation is dismissed.

***Counsel failed to locate and examine all of the state's evidence prior to trial***

This Court finds that counsel was not deficient for failing to locate all of the evidence in Applicant's case. Testimony at the evidentiary hearing brought out that Applicant's pants were not introduced into evidence by either the defense or the State. Applicant's allegation was that trial counsel should have introduced the pants into evidence in an attempt to bolster his defense that he could not have had the drugs on his person. Counsel testified that the pants were cut off of Applicant at the hospital as part of a medical procedure resulting from the motorcycle accident

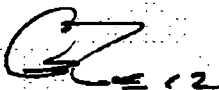
and were destroyed. The evidence presented shows that the pants were not available to either party to be introduced into evidence. Counsel testified that they thoroughly described the pants to the jury and felt that the jury believed their theory of the case, that the drugs were not actually on Applicant's person. Therefore, Applicant has failed to show deficiency or prejudice, thus this allegation is dismissed.

***Counsel failed to present evidence he believes was exculpatory***

This Court dismisses this allegation for the reasons set forth above. This Court interprets this allegation to reference the same evidence as the allegation above. Therefore, this allegation is dismissed as well.

***Counsel failed to request a jury charge on simple possession***

This Court does not find Applicant's testimony credible concerning the allegation that counsel should have requested a jury charge on simple possession. Applicant testified consistently that he believed his trial was all-or-nothing on the indicted charges, however, he now wants his counsel to have requested a charge for a lesser-included offense. Mr. Nelson, one of Applicant's trial counsel, testified that he did not believe that he would have gotten a charge on simple possession if he requested one and did not think the facts were appropriate to request one. Ms. Gay, Applicant's other trial counsel, testified that she should have requested a charge on simple possession in hindsight, but that it did not occur to her at the time. Both counsel testified that Applicant was involved in the trial strategy throughout the trial, including the decision to request certain jury charges. This court finds that failing to request a lesser-included charge in favor of an "all-or-nothing" approach is a valid trial strategy and is not deficient performance on the part of counsel. Indeed, where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*,



317 S.C. 292, 294, 454 S.E.2d 312, 313 (1996); *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 778, 778-79 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such a strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing *Goodson v. U.S.*, 564 F.2d 1071 (4<sup>th</sup> Cir. 1977)). Therefore, this court dismisses this allegation.

*Alternatively counsel failed to object to a charge of possession with intent to distribute*

This court finds that Applicant has failed to show deficiency on the part of trial counsel concerning this allegation. Applicant contends that counsel should have objected to a jury charge on the lesser-included offense of possession with intent to distribute. Mr. Nelson testified that they did not object to the charge because they felt that it was beneficial to their case, exposing Applicant to less risk. Mr. Nelson also testified that he was surprised to even get the charge on possession with intent to distribute, as he was not sure the facts existed to merit such a charge. This court finds that counsel was not deficient for failing to object to a jury charge of possession with intent to distribute, as minimizing the risk to Applicant was a valid trial strategy. The trial court is required to charge a jury on a lesser-included offense "if there is any evidence from which it could be inferred the lesser, rather than the greater, offense was committed." *State v. Gourdine*, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). However, the trial court is only required to include this jury charge when the parties request it. A trial court does not have a duty to *sua sponte* provide a charge of a less-included offense where it is warranted by the evidence. *State v. Parker*, 315 S.C. 230, 236-37, 433 S.E.2d 831, 834 (1993) (finding the trial court did not err by failing to charge the jury on a lesser included offense because such charge was not

Case 13

requested; "there was no duty on the court to *sua sponte* provide the charge," and the evidence did not warrant the charge). Therefore, this court dismisses the allegation.

### CONCLUSION


Based on all the forgoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient, nor was Applicant prejudiced by Counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

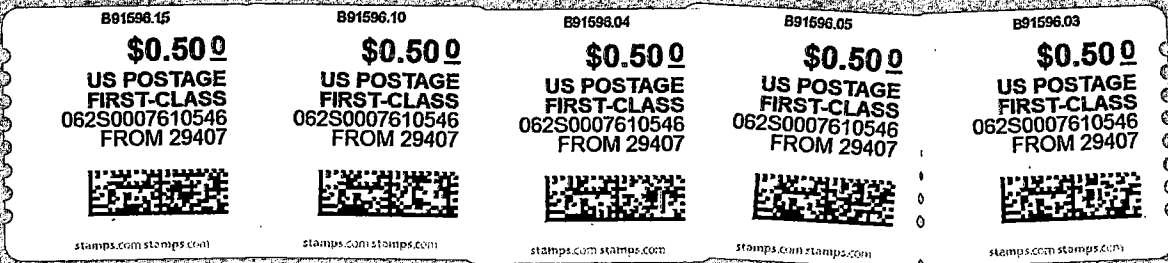
The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

### **IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 15 day of February, 2019.

  
G. THOMAS COOPER  
Presiding Judge  
Ninth Judicial Circuit



EPER LAW FIRM, PA  
AVANNAH HIGHWAY  
COLUMBIA, SC 29407

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