

ROSS AND ENDERLIN, PA
ATTORNEYS AT LAW

December 21, 2018

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S.C. SUPREME COURT

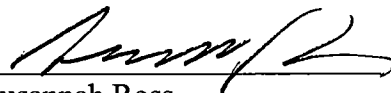
Mr. Daniel E. Shearouse
Clerk, The S.C. Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Antonio Emerson Tate v. State
2016-CP-23-5259

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondent and the Order of Dismissal. These matters are being referred to the Office of Appellate Defense.

Sincerely,



Susannah Ross
Attorney at Law

enclosure

cc: Office of the Attorney General
Office of Appellate Defense
Greenville County Clerk of Court

330 E. COFFEE ST. • GREENVILLE/SC • 29601
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OCT 18 2019

THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

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Paul Wickensmer - COC 60L SC

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

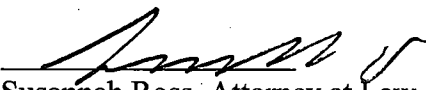
2016-CP-23-5259

Antonio Emerson Tate, Appellant,
v.
The State, Respondent.

NOTICE OF APPEAL

Antonio Emerson Tate appeals the Honorable Brian M. Gibbons' Order of Dismissal filed August 23, 2019, and Order Denying applicant's Motion to Alter or Amend filed October 1, 2019.

This 16 day of October, 2019.


Susannah Ross, Attorney at Law
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Greenville, SC 29601
(864) 242-0029
Attorney for Appellant

Other Counsel of Record:
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Attorney for Respondent

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of South Carolina State Grand Jury Clerk of Court. On December 13, 2011, the South Carolina State Grand Jury indicted Applicant by superseding indictment for Trafficking in Methamphetamine (Conspiracy) (400 grams or more) (2011-GS-47-0007) as part of a multi-count, multi-defendant indictment stemming from an investigation into a methamphetamine trafficking ring throughout the Upstate region.

On May 28, 2013, Applicant proceeded to a jury trial in the Greenville County Court of General Sessions before the Honorable Letitia H. Verdin, circuit court judge. R. Mills Ariail, Jr., Esquire, and David J. Farnham, Esquire¹, represented Applicant. Assistant Attorneys General Joshua R. Underwood and Curtis A. Pauling of the South Carolina Attorney General's Office prosecuted the case. On May 31, 2013, the jury convicted Applicant as indicted. Judge Verdin sentenced Applicant to twenty-five years imprisonment.

On June 14, 2013, Applicant filed a motion for a new trial, arguing the trial court erred in denying his motion for directed verdict. By order signed June 27, 2013 and filed July 8, 2013, Judge Verdin denied Applicant's post-trial motion.

On July 8, 2013, Applicant filed a timely notice of appeal. Applicant was represented on appeal by Wendy J. Keefer, Esquire. On appeal, Applicant raised the following issues:

- I. Did the trial court err in submitting the case to the jury and denying the Motion for Directed Verdict where the State presented evidence of Trafficking in Methamphetamine 400 grams or more?
- II. Did the trial court commit reversible error by limiting cross examination of cooperating witnesses pleading to lesser charges, and no longer facing mandatory minimum on their initial charges, which were the same as Appellant

¹ Mr. Farham is a member of the Georgia Bar and was admitted *pro hac vice* to represent Applicant in this matter alongside Mr. Ariail.



was facing, and where cross was allowed as to receiving a substantial reduction in sentence and the possible sentence of the initial charge was ultimately communicated to the jury?

III. Did the trial court err in permitting testimony by a witness with experience investigating methamphetamine cases about the organizational sale and distribution of methamphetamine?

Following briefing and oral argument, the South Carolina Court of Appeals affirmed Applicant's conviction in an unpublished opinion. State v. Antonio Emerson Tate, 2016-UP-291 (Ct. App. filed June 15, 2016). The Remittitur was returned to the circuit court on July 1, 2016. Thereafter, Applicant initiated this current proceeding with the filing of an application for post-conviction relief.

SUMMARY OF EVIDENCE ADDUCED AT TRIAL

At Applicant's trial, the State presented evidence of Applicant's guilt of Trafficking Methamphetamine-400 grams or more. Such evidence included testimony of witnesses about purchasing methamphetamine from Applicant in Georgia for distribution and sale in South Carolina. Some of the testifying witnesses were charged as co-conspirators and were initially charged with the same crime as Applicant, but had accepted plea agreements to plead guilty to lesser charges. The trial court permitted defense counsel to inquire as to the possible sentence on the lesser charges and testimony was given that the charges exposed the witnesses to substantially less time for incarceration than their original charges.

The State presented the testimony of eleven witnesses involved in the purchase of methamphetamine from Applicant in Atlanta, Georgia for sale in South Carolina. Witnesses testified about traveling to Georgia to retrieve narcotics from Applicant and how these transactions were initiated and conducted. The witnesses described in detail how to arrive at designated meeting locations repeatedly used by Applicant and that Applicant used different



phone numbers. Witnesses also testified calling Applicant to arrange deals for methamphetamine and recalled particular meet locations and some specific occurrences.

Witnesses independently testified to the same locations used for the sale of the narcotics such as a Waffle House and Applicant's residence. The witnesses knew which exit to take and how to get there.

Witnesses recalled details of specific instances such as the purchase at the Shell gas station. Witnesses testified to numerous and repeated purchases of methamphetamine in amounts greater than one would purchase for personal use, of tactics used in the sale of narcotics for future distribution involving large amounts of money such as "fronting", and the use of green dot cards. Witnesses also testified as to Applicant's knowledge of witnesses residing in South Carolina and to seeing him on a least one occasion in South Carolina.

Witnesses independently identified Applicant in a photo line-up prior to or at the on-set of cooperating with law enforcement, at different times. Witnesses also identified Applicant in court as the individual from whom large amounts of methamphetamine were purchased.

The State's case, primarily in the form of testimonial evidence through the various co-conspirators, consistently shows that Applicant sold dealer weights of methamphetamine while in Georgia to individuals known to reside in South Carolina who were bringing that methamphetamine back to South Carolina over the period of time alleged in the indictment for an amount greater than 400 grams. He also traveled to South Carolina on two occasions and provided methamphetamine to Jason Griffin and Javin Adams. Following all testimony presented, the jury found the State had proven its case beyond a reasonable doubt and convicted Applicant as indicted.

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CURRENT ACTION BEFORE THE COURT

In his *pro se* application for post-conviction relief, Applicant alleged he is being held in custody unlawfully due to ineffective assistance of counsel for “fail[ing] to interview potential witnesses.” Applicant also alleges his due process rights guaranteed under the Fourteenth Amendment to the U.S. Constitution were violated when the “State failed to obtain exculpatory evidence.” Applicant failed to set forth with any specificity any of the underlying facts giving rise to these allegations. In response, Respondent filed its return, partial motion to dismiss, and motion for a more definite statement.

In his first supplemental application filed on March 27, 2018, by counsel Ross, Applicant raised the additional allegations for relief:

- (1) failing to preserve the issue of insufficient proof of conspiracy in his directed verdict motion;
- (2) conceding that he would not cross examine co-defendant witnesses who were also originally charged with trafficking 400 grams or more avoiding twenty-five year mandatory minimum when he had every right to do so under State v. Gracely, 731 S.E. 2d 880 (2012);
- (3) failing to cross examine eight co-defendant witnesses about avoiding twenty-five year mandatory minimum sentence and when applicable possible life without parole sentences;
- (4) failing to consistently object to testimony by investigators regarding the legal definition of conspiracy and the sufficiency of the evidence and/or allowing investigators to testify as experts; (R. pp. 317-319, p. 332, l. 21, p. 657, l. 19, p. 659, l.1, p.664)
- (5) failing to object to the investigator's to testifying as to the ultimate issue, (p. 655, l. 8);
- (6) consistently failing to object to leading and improper questions by the State;
- (7) failing to object to Agent Barwick's recital of statements made at the bond hearing by the Attorney General that the Applicant had a twin and attempted to use his identity to allude police and other improper comments by testifying agents. (R. p. 339, l.22)



(8) failing to move to suppress or object to the admission of drugs, money, drug paraphernalia, phones, and a weapon recovered from Jason Griffin, Rachael Eades and Christopher Simmons;

(9) failure to challenge the identification procedure;

(10) failing to put up a defense case advising Mr. Tate not to testify and failure to investigate and present defense witnesses;

(11) due process violation based on Applicant's failure to get a fair trial and a total breakdown of the adversarial process.

In his second supplemental application filed on October 22, 2018, by counsel Ross,

Applicant raised the following allegations for relief:

(1) failing to preserve the issue of insufficient proof of conspiracy in his directed verdict motion;

(2) conceding that he would not cross examine co-defendant witnesses who were also originally charged with trafficking 400 grams or more avoiding twenty-five year mandatory minimum when he had every right to do so under State v. Gracely, 731 S.E. 2d 880 (2012);

(3) failing to cross examine eight co-defendant witnesses about avoiding twenty-five year mandatory minimum sentence and when applicable possible life without parole sentences;

(4) failing to consistently object to testimony by investigators regarding the legal definition of conspiracy and the sufficiency of the evidence and/or allowing investigators to testify as experts; (R. pp. 317-319, p. 332, l. 21, p. 657, l. 19, p. 659, l.1, p.664)

(5) failing to object to the investigator's to testifying as to the ultimate issue, (p. 655, l. 8);

(6) consistently failing to object to leading and improper questions by the State;

(7) failing to object to Agent Barwick's recital of statements made at the bond hearing by the Attorney General that the Applicant had a twin and attempted to use his identity to allude police and other improper comments by testifying agents. (R. p. 339, l.22)

(8) failing to move to suppress or object to the admission of drugs, money, drug paraphernalia, phones, and a weapon recovered from Jason Griffin, Rachael Eades and Christopher Simmons;



(9) failure to challenge the identification procedure;

(10) failing to put up a defense case advising Mr. Tate not to testify and failure to investigate and present defense witnesses;

(11) failing to argue the sentence exceeded the maximum sentence for conspiracy;

(12) failure to move to quash the indictment arguing that the underlying statute did not have the force of law under Article III, Section 18 of the South Carolina Constitution and Article I, Section 23 of the South Carolina Constitution and lack of extraterritorial jurisdiction; and

(13) failure to argue in directed verdict that the underlying statute did not have the force of law under Article III, Section 18 of the South Carolina Constitution and Article I, Section 23 of the South Carolina Constitution and lack of extraterritorial jurisdiction.

(14) Due Process violations are alleged based on Mr. Tate's failure to get a fair trial due to cumulative error, a total breakdown of the adversarial process, and lack of constitutionality and enforceability of Section 44-53-375 SC Code Ann.

At the evidentiary hearing, Applicant proceeded forward on the claims as set forth in his second supplemental application. Applicant testified on his own behalf and presented testimony from his children's mother Chastity Raines. Respondent presented trial counsels Mills and Farnham.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has thoroughly reviewed the record in its entirety, including the trial transcript, the appellate records, and the records for this current action. 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).

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Ineffective Assistance of Counsel

Applicant has alleged trial counsels were constitutionally ineffective in their representation for thirteen specific allegations as set forth in his second supplemental application. After a thorough review of all evidence presented, this Court finds Applicant has failed to meet his requisite burden of proof as to each allegation of ineffective assistance of counsel and denies each allegation, which will be specifically addressed below.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. 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). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that counsel was constitutionally ineffective, he 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. at 686

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 proceeding. 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. 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, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624,

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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 the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "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). 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 Petitioner 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.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, Strickland requires the post-conviction relief applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the

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identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690.

Although courts may not indulge “post hoc rationalization” for counsel’s decision making that contradicts the available evidence of counsel’s actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), 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). 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.” Strickland, 466 U.S. 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

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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.

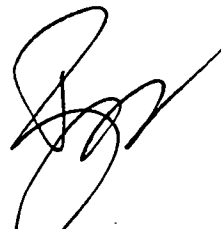
This Court finds Applicant has failed to meet his requisite burden of proof as to each allegation of ineffective assistance of trial counsel. Each allegation is addressed below.

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Allegation that counsel failed preserve the issue of insufficient proof of conspiracy in his directed verdict motion

Initially, Applicant asserts trial counsels were ineffective for failing to preserve the issue of insufficient proof of conspiracy in his directed verdict motion. At the evidentiary hearing, Applicant testified counsels were ineffective because they only argued the identity issue during the directed verdict stage, thereby leaving his arguments regarding the sufficiency of the indictment unrepresented to the trial court and unrepresented for appellate review. In support of relief, Applicant cites to the appellate decision from the Court of Appeals finding his particular directed verdict arguments raised on appeal unrepresented because such arguments had not been presented to the trial court.

When questioned about this specific allegation at the evidentiary hearing, trial counsel Mills testified he handled the directed verdict motion on behalf of the defense team. He testified he moved for a directed verdict at the close of the State's case based on the State's failure to sufficiently establish Applicant's identity based on several witnesses unable to distinguish Applicant from his identical twin brother, whom was present in the courtroom throughout trial and about whom the witnesses were questioned. Mills testified he also argued the State had failed to meet its burden of proof because its co-conspirator witnesses had provided false testimony and information. Mills testified he selected these grounds on which to move for a directed verdict because he believed these were the strongest arguments based on his professional opinion and the evidence presented (or not presented) at trial. He testified he did not argue the State had presented insufficient evidence of Applicant's intent to conspire because the State had indeed presented such evidence through various co-conspirator witnesses and he accordingly had no good faith basis to move for a directed verdict on that ground. He elaborated

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one co-conspirator, Albrie Nate Bashaw, testified Applicant knew she had customers in South Carolina that she was re-selling the methamphetamine she purchased from him.

This Court finds this allegation is without merit and Applicant cannot prevail on this claim. The record establishes trial counsels moved for a directed verdict at the close of the State's case based on the State's purported failure to prove the identity of the defendant (Applicant). Specifically, counsels argued the State could not prove Applicant's identity and had failed to meet its burden of proof based on false testimony elicited from State's witnesses and co-conspirators as well as an inability of State's witnesses to distinguish Applicant from his identical twin brother who was present in the courtroom throughout trial. See Tr. P. 670. This Court agrees with Mills assessment that the defense presented its strongest possible argument for a directed verdict motion—that the State had failed to prove identity and therefore the trial court should direct a verdict of not guilty.

This Court rejects Applicant's argument that he is entitled to relief merely because this particular directed verdict issue was not preserved for appellate review. The fact that Applicant's appellate counsel elected to present a different argument on appeal is not dispositive as to this issue and does not establish that trial counsels were ineffective. On appeal, Applicant, though appellate counsel, argued a different reason a directed verdict should have been granted by the trial court—that the State failed to sufficiently prove Applicant's participation in the conspiracy based on a lack of intent to conspire. This argument was not raised to the trial court, and accordingly, the Court of Appeals found the issue unpreserved for appellate review:

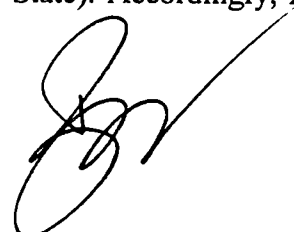
1. We affirm the trial court's denial of Tate's motion for a directed verdict, finding Tate did not preserve the issue of insufficient proof of a conspiracy by the State in providing only isolated sales of meth rather than any intent to conspire with the purchasers because the issue was not raised in his directed verdict motion. Rather, Tate raised the failure of the witnesses to positively identify him and the lack of credibility of the witnesses. Accordingly, we find this issue is not

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preserved for appellate review. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal.”); State v. Jordan, 255 S.C. 86, 93, 177 S.E.2d 464, 468 (1970) (stating issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review).

State v Antonio Emerson Tate, 2016-UP-291 (Ct. App. filed June 15, 2016).

Applicant’s argument that trial counsels were ineffective because his appellate counsel elected to raise an issue of first impression that was never raised to the trial court rather than the issue that was raised to and ruled upon by the trial court. However, this argument is without merit. It is clear from the record that trial counsels presented their strongest possible argument for a directed verdict motion—that the State had failed to prove identity and therefore the trial court should direct a verdict of not guilty. This argument was much stronger than a challenge to the sufficiency of the State’s evidence of conspiracy, as the record was well-developed that there was a conspiracy between “Ant/Amp,” the methamphetamine dealer in Georgia, to sell and transport large quantities of methamphetamine into South Carolina. Specifically, through the testimony of Albrie Nate Bashaw, the State presented evidence that Ant knew she lived in South Carolina and was selling the methamphetamine he provided to her in South Carolina. As the State clearly presented direct or substantial circumstantial evidence tending to prove the guilt of the defendant when viewing the evidence and all reasonable inferences in the light most favorable to the State, a directed verdict motion on this ground would have been denied. See State v. Pearson, 415 S.C. 463, 470, 783 S.E.2d 802, 806 (2016) (citing State v. Butler, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) (holding the standard for denial of a directed verdict and sending the case to the jury is whether the State has presented any direct or substantial circumstantial evidence tending to prove the guilt of the defendant when viewing the evidence and all reasonable inferences in the light most favorable to the State). Accordingly, Applicant

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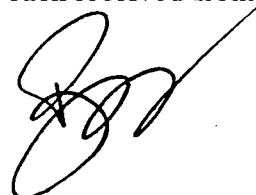
cannot establish deficiency of counsel or prejudice as to this allegation. This Court finds this allegation must be denied and dismissed with prejudice.

Allegation that counsel improperly conceded he would not cross-examine co-conspirators regarding the mandatory minimum sentence for trafficking in methamphetamine 400 grams or more failing to cross-examine his co-conspirators on their original possible sentence exposure

As his second and third grounds for relief, Applicant asserts trial counsels were ineffective for conceding Applicant would not cross examine co-conspirator witnesses who were also originally charged with trafficking 400 grams or more avoiding twenty-five year mandatory minimum and failing to cross-examine his co-conspirators on their original possible sentence exposure. Applicant asserts he had every right to do so under State v. Gracely, 731 S.E. 2d 880 (2012) and counsels were ineffective for failing to properly cross-examine the witnesses on this mandatory minimum sentence.

At the evidentiary hearing, Applicant testified counsels were ineffective for conceding they would not cross-examine the co-conspirator witnesses on the specific sentences each was initially facing based on his or her original charge(s). Applicant acknowledged the jury did hear through at least one witness that the sentence for trafficking in methamphetamine – 400 grams or more was twenty-five years of imprisonment and that counsel elicited from all witnesses that they reaped a substantial benefit in terms of sentence exposure by cooperating with the State.

When questioned about these allegations, Mills, who handled the cross-examination for the co-conspirator witnesses, testified the State moved pre-trial to limit his questioning of the co-conspirator witnesses on the particular sentences for their original indictments since the co-conspirators had already pled guilty to lesser-included offenses and did not want the jury to hear the specific sentence Applicant was facing if convicted. In response, Mills argued he should be allowed to question the co-conspirators on the substantial benefit each received from cooperating

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with the State, including the reduction in sentence. Mills testified the trial court ultimately agreed to allow him to cross-examine the co-conspirators on the benefit each received but precluded him from mentioning the specific sentence for trafficking in methamphetamine – 400 grams or more. During this pre-trial discussion, Mills noted the Gracely decision was specifically discussed. Mills testified during that during trial, he was able to elicit favorable testimony from all co-conspirators that each received a substantial reduction in sentence exposure for cooperating with the State and the specific ranges each faced for the lesser-included offense. He also testified he was able to elicit the specific sentence range of twenty-five years imprisonment for the original charge from Jason Griffin. Mills also testified this issue was raised on Applicant’s direct appeal and found to be harmless.

This Court finds these allegations are without merit and Applicant cannot prevail on these claims. The record establishes the State moved *in limine* to prevent the defense from eliciting any testimony from State’s witnesses and co-conspirators about the potential sentences for trafficking in methamphetamine up to 400 grams because the State did not want the jury to know Applicant’s potential sentence range, as sentencing is an issue outside the province of the jury. Trial counsels argued they should be able to cross-examine the co-conspirators on the substantial benefit they received by cooperating. The trial court agreed to allow the defense to cross-examine the co-conspirators on the sentencing ranges/exposure for the offenses to which they pled guilty as well as question them about the substantial benefit they received by pleading guilty to lesser-included offenses, thereby significantly reducing their sentencing exposure. When cross-examining the various co-conspirators, trial counsels did just that—eliciting testimony that each had received a substantial benefit by cooperating with the State and

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testifying against Applicant. In fact, during the testimony of co-conspirator Gary Jason Griffin, Mills was able to elicit the specific sentencing range for the original offense. See Trial Tr. p. 172.

This very issue was raised on appeal and the Court of Appeals found any possible error in the trial court limiting the defense's cross-examination was harmless beyond a reasonable doubt, noting "the numerous co-defendants that testified regarding their reduced sentences, the mandatory minimum sentences or the sentencing ranges of their original charges compared to their plea recommendations, and the substantially greater sentences they would have faced." State v Antonio Emerson Tate, 2016-UP-291 (Ct. App. filed June 15, 2016).

Accordingly, this Court finds there is no way Applicant can now prevail on this claim when an appellate court has already properly determined he suffered no prejudice as to this very issue. "Harmless error review looks to the basis on which the jury actually rested its verdict." Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). "From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" Id. (citing Yates v. Evatt, 500 U.S. 391, 403 (1991); See Arnold v. State/Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (noting that the requirement that a constitutional error be harmless beyond a reasonable doubt "embodies a standard requiring reversal 'if there is a reasonable possibility that the evidence complained of might have contributed to the conviction' " (quoting Yates, 500 U.S. at 403)); see also Clark v. Groose, 16 F.3d 960, 964 (8th Cir. 1994) (concluding even if evidence is erroneously admitted but it constitutes at most harmless error, no ineffective performance is shown); LePage v. Idaho, 851 F.2d 251, 257 (9th Cir. 1988) (concluding that since admission of statements obtained in violation of Massiah was harmless error beyond a reasonable doubt,

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LePage suffered no prejudice from his counsel's failure to object to the statements). Accordingly, Applicant cannot establish deficiency of counsel or prejudice as to these allegations, which this Court denies and dismisses with prejudice.

Allegation that counsel was ineffective for failing to consistently object to testimony by investigators regarding the legal definition of conspiracy and the sufficiency of the evidence and/or allowing investigators to testify as experts

As fourth and fifth allegations, Applicant asserts trial counsels were ineffective for failing to consistently object to testimony by investigators regarding the legal definition of conspiracy and the sufficiency of the evidence and/or allowing investigators to testify as experts, as well as allowing law enforcement to testify as to the ultimate issue in the case—whether a conspiracy existed. See R. pp. 317-319, p. 332, l. 21, p. 657, l. 19, p. 659, l.1, p.664).

At the evidentiary hearing, Applicant testified trial counsels repeatedly failed to object to testimony from various witnesses testifying as to the legal definition of conspiracy and the ultimate issue in the case, which he argues amounted to improper expert testimony.

When questioned about these allegations, counsels testified the defense strategy was not that that a conspiracy to traffic methamphetamine was taking place, but rather, that Applicant was simply not involved in the conspiracy in any way whatsoever. Both stressed the presentation of Applicant's twin brother and the repeated challenges to Applicant's identity. Accordingly, counsel testified these comments during testimony from numerous law enforcement witnesses had no impact on their case and were irrelevant. Counsels testified the jury was already on notice this was a conspiracy case, as the trial court read the indictment to the jury at the start of trial. Moreover, when questioned about the specific instances that Applicant alleges counsel should have objected, counsel noted these portions of the testimony were not objectionable, as they were often just explaining the course of the investigation

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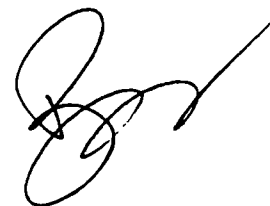
This Court finds these allegations are without merit and Applicant cannot prevail on these claims. Overall, it was abundantly clear to the jury that this was a conspiracy case from the start of trial. As is standard practice, the trial court read the indictment to the jury indicating Applicant was charged with conspiracy to traffic methamphetamine:

Alright, uh, ladies and gentlemen, the S—the State is alleging that **this is a drug conspiracy case**. The State has accused Mr. Tate of trafficking methamphetamine from At – the Atlanta area to the Upstate through a number of individuals during the dates of November 2009 and November 2011. He is charged with trafficking methamphetamine **by conspiracy** for more than 400 grams.

Trial Tr. p. 15 (emphasis added). From the very outset, the jury knew the State was proceeding forward on trafficking in methamphetamine based on not only conspiracy but particularly a conspiracy where Applicant sold methamphetamine from Atlanta to be brought into the Upstate region of South Carolina with a number of other individuals. During the trial, the State then presented co-conspirator after co-conspirator who all testified regarding their involvement in the conspiracy, including their travels to Georgia to purchase large quantities of methamphetamine from Applicant to be transported to and sold in the Upstate region. For Applicant to now be arguing the result of his trial would have been different—i.e., that he would have been acquitted—but for a few utterances of the word “conspiracy” by law enforcement witnesses—is illogical and cannot succeed based on the record before the court.

Additionally, it is clear from the record that when the term “conspiracy” was used by law enforcement, it was in the context of the officers explain how the investigation began or unfolded. It was not in the context of a legal definition or expert testimony as Applicant argues.

Moreover, it is abundantly clear from the record that trial counsels were proceeding forward on a defense of identity—essentially arguing not that a drug conspiracy was not underway but that Applicant had no involvement in the conspiracy and the State had charged the

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wrong man. Accordingly, these few utterances of “conspiracy” by law enforcement witnesses had no impact on counsel’s trial strategy and the outcome of the case. Accordingly, Applicant cannot establish deficiency of counsel or prejudice as to these allegations, which this Court denies and dismisses with prejudice.

Allegation that counsel was ineffective for failing to consistently object to leading questions by the State

As a sixth allegation, Applicant asserts trial counsels were ineffective for failing to consistently object to leading questions by the State. Applicant testified there were several instances during trial when the State asked various co-conspirator witnesses whether Applicant knew the drugs he was selling were being resold in South Carolina, which Applicant asserts was improperly asking the witnesses to speculate on someone else’s state of mind. He testified counsels should have objected when a witness was questioned about his “rap sheet” and made a comment that it was several pages long. Applicant also referenced instances where the State’s re-direct examination went beyond the scope of his cross-examination and counsel failed to object. Applicant testified he believed these various instances affected the outcome of his trial.

When questioned about their failures to object, trial counsels testified they routinely and consistently objected at trial when they believed an objection was warranted based on their years of trial experience. As to the various instances listed by Applicant, counsels testified they do not believe these particular exchanges warranted an objection nor did they have any impact on Applicant’s trial.

This Court agrees with counsels and finds Applicant has failed to establish his burden of proof as to this allegation. The record shows trial counsel routinely objected to leading questions and other objectionable issues during trial and some of these objections were sustained while others were overruled. Applicant has failed to establish any objectionable instances where



counsels should have objected that had any impact whatsoever on the outcome of his trial. Accordingly, this Court finds this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to object to Agent Barwick's recital of statements made at the bond hearing by the Attorney General that the Applicant had a twin and attempted to use his identity to allude police and other improper comments by testifying agents.

As a seventh allegation, Applicant asserts trial counsels were ineffective for failing to object to Agent Barwick's recital of statements made at the bond hearing by the Attorney General that Applicant had a twin and attempted to use the identity of his twin to allude law enforcement and other improper comments by testifying agents. (R. p. 339, l. 22). Applicant testified his identity was a crucial issue at trial and the State improperly implied he had used his twin brother to evade arrest. He also testified several witnesses discussed his identical twin brother in advance of their testimony.

When questioned about this allegation, counsels both testified using Applicant's twin brother throughout trial was a main component of their trial strategy to attack and challenge Applicant's identity. They testified, and the record reflects, that Applicant's twin brother was utilized early in the trial by defense counsel and they continued to question the co-conspirator witnesses about Applicant's twin throughout trial. Counsel testified he believes the defense opened the door to the State questioning law enforcement about Applicant's twin brother but it was based on a deliberate and well-reasoned trial strategy to attack Applicant's identity.

This Court finds Applicant cannot meet his requisite burden of proof as to this allegation and denies relief. The record establishes that during the testimony of Agent Barwick, the State asked him to elaborate on a conversation between two co-conspirators, Ms. Eades and Ms. Lollis, at their bond hearings and Agent Barwick responded:

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Uh, there was discussion about their bonds not being reduced and . . . not bein' happy about that and reduced and then the discussion I think that they were alluding to earlier 'bout Mr. Tate was that they learned at the bond hearing, uh, when Mr. Underwood was presenting information to Judge Cooper that, uh, Mr. Tate had a twin brother, that it was at that point in time my understanding that they learned this. Uh, Mr. Underwood went on to explain that, uh, he had a twin brother and Mr. Tate attempted to use his brother's identity to elude police when he was, uh, when when they approached him in in Georgia on our charges because once our indictments were issued we issued charges for him and he, uh, tried to use his brother's ID to stop being arrested, well Mr. Underwood was explainin' this to the judge and during that conversation, uh, Ms. Eades and them heard this and and they were talkin' about that on the way back to the LEC.

Tr. p. 339-40.

At this point during Applicant's trial, the jury had already been advised that Applicant had an identical twin brother. The defense team had questioned several witnesses about Applicant's identical twin brother and had also elicited testimony or challenged the witnesses as to whether they had discussed that Applicant had an identical twin brother with other co-conspirators in an attempt to make sure their testimonies would be consistent—a valid trial strategy to attach these witnesses' credibility. Accordingly, the State was merely responding to this line of inquiry as posed by the defense, which was part of a reasonable trial strategy by the defense to paint the co-conspirators as untruthful and to attack their identification of Applicant as the mastermind of this methamphetamine ring. Accordingly, Applicant cannot meet his requisite burden of proof as to this allegation, which this Court denies and dismissed with prejudice/

Allegation that counsel was ineffective for failing to move to suppress or object to the admission of drugs, money, drug paraphernalia, phones, and a weapon recovered from Jason Griffin, Rachael Eades and Christopher Simmons

As an eighth allegation, Applicant asserts trial counsels were ineffective for failing to move to suppress or object to the admission of drugs, money, drug paraphernalia, phones, and a weapon recovered from Jason Griffin, Rachael Eades and Christopher Simmons. Applicant

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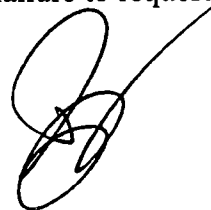
testified he asked his attorneys to object to this evidence but they failed to do so. He also complains the State mentioned this evidence during closing and counsels failed to object.

When questioned about this allegation, Mills testified whether co-conspirators were found with methamphetamine and that evidence was introduced was wholly irrelevant to Applicant's defense of identity and that he was not involved with the trafficking ring. He elaborated there was no evidence tying Applicant to these particular drugs and drug paraphernalia and he did not believe he had any valid standing to challenge the evidence based on Fourth Amendment grounds.

This Court finds Applicant cannot meet his requisite burden of proof as to this allegation. As discussed above, it is abundantly clear from the record that the defense strategy was to challenge identity and specifically argue to the jury that Applicant was not involved with any conspiracy to traffic methamphetamine—not that this particular methamphetamine ring did not exist. Accordingly, the testimony and evidence pertaining to drugs, money, drug paraphernalia, phones, and a weapon recovered from Jason Griffin, Rachael Eades and Christopher Simmons was wholly irrelevant to the defense strategy. Moreover, there was nothing tying Applicant to this particular evidence recovered from these co-conspirator and accordingly, could not have impacted the verdict in any substantial way. Accordingly, Applicant cannot meet his requisite burden of proof as to this allegation, which this Court denies and dismisses with prejudice.

Allegation that counsel was ineffective for failing to challenge the identification procedure

As a ninth allegation, Applicant asserts trial counsels were ineffective for failing to challenge the identification procedure. At the evidentiary hearing, Respondent acknowledged a pre-trial hearing to determine the admissibility of the lineup should have been conducted pursuant to Neil v. Biggers, 409 U.S. 188, 196 (1972) and counsel's failure to request such a pre-

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trial hearing could be construed as deficient performance. However, Respondent argued Applicant still cannot prevail on this claim, as there is nothing to establish the identifications would have been excluded had a pre-trial hearing been conducted, and therefore, Applicant cannot establish any requisite prejudice. This Court agrees.

At the evidentiary hearing, Mills (who handled the cross-examination of the co-conspirator witnesses) testified in detail regarding the admission of all nine of the identifications that were admitted by the State at Applicant's trial. Mills testified each identification was made by a cooperating co-conspirator witness who testified regarding the method and procedures used by law enforcement and the level of certainty in which the witness selected Applicant as the person who sold them methamphetamine. Mills testified each identification made was not based on suggestive procedures from law enforcement and the witnesses all had a great deal of certainty regarding the identifications. Accordingly, he did not believe there was any arguable basis in which he could keep out any of the identifications, which he believes were all properly conducted by law enforcement and properly admitted into evidence.

When Farnham was questioned regarding the identifications, he testified the defense team thoroughly reviewed all the identifications and found there was nothing suggestive that would have led to exclusion of any of the identifications. Moreover, he elaborated the defense team wanted the identifications admitted into evidence because one of their main defense arguments was that it was Applicant's twin brother who had sold the methamphetamine, not Applicant, and the identifications supported (or at the least were irrelevant to) this defense strategy.

This Court finds Applicant cannot meet his requisite burden of proof as to this allegation, which must be denied and dismissed with prejudice, as there is no reasonable likelihood any of the identifications would have been suppressed had counsels challenged their admission.

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When evidence of an eyewitness identification is introduced during a criminal trial, a defendant may be deprived of due process of law if the identification procedure employed in the particular case was unnecessarily suggestive and highly conducive to **irreparable** mistaken identification. Neil v. Biggers, 409 U.S. 188, 196 (1972). In determining the admissibility of identification evidence, a court must conduct a two-prong inquiry into the matter. See id. at 199-200 (outlining the necessary inquiry regarding out-of-court identifications and the factors to be weighed when determining reliability). That inquiry involves first ascertaining whether the identification process was unduly suggestive and then determining whether the out-of-court identification was nevertheless so reliable no substantial likelihood of misidentification existed. State v. Govan, 372 S.C. 552, 558, 643 S.E.2d 92, 95 (Ct. App. 2007); see State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (“Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.”).

Importantly, even assuming the particular identification procedure used in a case is found to be unduly suggestive, identification evidence may still be admissible if the State can prove by clear and convincing evidence the identification is reliable notwithstanding the suggestiveness of the identification procedure employed. Govan, 372 S.C. at 559, 643 S.E.2d at 95-96. “Reliability is the linchpin in determining the admissibility of identification testimony.” State v. Brown, 356 S.C. 496, 504, 589 S.E.2d 781, 785 (Ct. App. 2003). To determine whether the identification is reliable, a court must look to: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated by the witness

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at the confrontation; and (5) the amount of time between the crime and the identification. Govan, 372 S.C. at 559, 643 S.E.2d at 96; see also State v. Scipio, 283 S.C. 124, 127, 322 S.E.2d 15, 17 (1984) (“The reliability of an identification is determined by the facts.”). “[I]f the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.” Perry v. New Hampshire, __ U.S. __, 132 S. Ct. 716, 720 (2012).

Significantly, “[a] conviction based on a suggestive pretrial photographic lineup and a subsequent in-court identification will be set aside only if ‘the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.’ ” State v. Carlson, 363 S.C. 586, 599-600, 611 S.E.2d 283, 290 (2005) (quoting Simmons v. United States, 390 U.S. 377 (1968)); see Brown, 356 S.C. at 504, 589 S.E.2d at 785 (“Suggestiveness alone does not mandate the exclusion of evidence.”). Thus, even where a suggestive out-of-court identification procedure is employed, an “in-court identification is admissible if based on information independent of the out-of-court procedure.” Carlson, 363 S.C. at 600, 611 S.E.2d at 290. Critically, the exclusion of evidence is a “drastic sanction” and should be “limited to identification testimony which is manifestly suspect.” Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983).

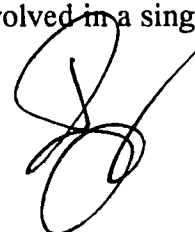
In the present case, there is nothing to establish the trial court would have excluded the identifications had a pre-trial hearing been requested as there is no evidence that law enforcement used any sort of improper methods or suggested who the co-conspirators should select during the identification procedure, and therefore, Applicant cannot establish that it was unduly suggestive. Moreover, there is no substantial risk of irreparable misidentification as the

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co-conspirators testified were certain in their identifications. At the evidentiary hearing, Respondent and Mills painstakingly reviewed all nine of the six-pack photo lineup identifications and the record supports that each lineup was properly conducted by law enforcement without coercive or suggestive procedures. See State's Ex. No. 1-9, Trial Tr. 58, 76-77. 155-60, 287-89, 412-16, 541-46, 480-88, 590-98, 614-16, 642-49. Moreover, the record establishes there was no irreparable risk of misidentification based on the certainty of the identifications. Accordingly, the identifications made by the various co-conspirators would have been admissible at trial and trial counsel's failure to move for a pre-trial hearing to determine admissibility of the identifications pursuant to Neil v. Biggers had no result on the outcome of the trial. Accordingly, this Court finds Applicant cannot establish the result of his proceeding would have been different but for counsel's failure to challenge the identifications. Accordingly, this allegation must be denied and dismissed with prejudice.

Allegation that counsel was ineffective for advising Applicant not to testify, failing to investigate, and failing to present defense witnesses

As a tenth allegation, Applicant asserts trial counsels were ineffective for advising Applicant not to testify, failing to investigate, and failing to present defense witnesses. At the evidentiary hearing, Applicant testified he did not testify at trial on the advice of counsels, who advised him they did not believe his testimony would be needed based on the evidence presented by the State. He acknowledged he was properly advised by the trial court about his right to testify and he informed the court it was his decision not to take the stand in his own defense. He testified he also provided counsels with the names of six witnesses who could have testified to prove that he did not sell drugs and only sold auto parts. At the hearing, the only witness Applicant presented was Chastity Raines, the mother of his children, who testified she was present at Applicant's trial and prepared to testify that she was involved in a single transmission

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sale with some of the co-conspirators and drugs were not purchased. She testified she was never called as a witness despite being sequestered outside the courtroom and prepared to testify.

When questioned about this allegation, Mills testified the defense team thoroughly reviewed Applicant's right to testify with him and Applicant knowingly, voluntarily, and intelligently elected not to present a defense including not testifying. He testified the trial court also reviewed Applicant's right to testify with him and Applicant affirmed on the record under oath that he did not wish to testify or present a defense. Farnham testified similarly and acknowledged while he has no independent recollection of advising Applicant regarding his right to testify and present a defense, this is his standard practice he follows in every criminal trial and has no reason to believe he differed in this case.

Both counsels also testified they elected not to present any witnesses on Applicant's behalf because they had adequately challenged the State's case based on identity, lack of evidence showing Applicant sold any methamphetamine, and the lack of credibility of the various co-conspirators. Mills also testified he did not believe any witnesses would have been beneficial based on the nature of the State's case. He elaborated alibi witnesses were not practical based on the vast timeline of the conspiracy, Applicant's twin was not willing to testify and implicate himself, and character witnesses would have been irrelevant to the case. He testified the defense team reviewed this with Applicant at the close of the State's case and he was in agreement not to present witnesses.

This Court finds Applicant cannot meet his requisite burden as to this allegation. As to Applicant's allegation that trial counsels were ineffective for advising him not to testify, this allegation must fail as Applicant was thoroughly and adequately advised by the trial court regarding his right to testify. In response, Applicant told the trial court he had sufficiently talked

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to his attorneys about his right to testify and even told the court he informed his attorneys there was no need for much of a discussion because he did not intend to testify. (Tr. 671-74). He elaborated that he was not involved in this conspiracy and had nothing to add to the case because he had no knowledge. (Tr. 673-74). He affirmed that it was his decision alone not to testify. (Tr. 674. Accordingly, Applicant cannot now assert the contrary to what he previously told the trial court while under oath—that he did not want to testify and the choice was his alone.

As to Applicant's allegation that trial counsel failed to investigate or present witnesses on his behalf, this allegation is refuted by the record, which shows counsels were thoroughly prepared for trial and had clearly investigated the underlying facts of his case. "Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary." Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633–34 (Ct. App. 2014) (citing Strickland, 466 U.S. at 691). "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel's decision not to undertake a particular investigation should be assessed for reasonableness under all the circumstances with heavy deference to counsel's judgment. Bagwell, 410 S.C. at 265, 763 S.E.2d at 633 (citing Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006)). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). "Counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions." Bagwell, 410 S.C. at 265, 763 S.E.2d at 634. (internal citations

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omitted). “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Strickland, 466 U.S. at 690. The record shows trial counsels investigate and then presented his identical twin brother to multiple witnesses throughout the trial. Moreover, the record establishes a clearly defined trial strategy—to attack the identification of Applicant as participant in the drug conspiracy. Accordingly, Applicant cannot meet his requisite burden of proof as to this allegation, which this Court denies and dismisses with prejudice.

Allegation that counsel was ineffective for failing to argue Applicant’s sentence exceeded the maximum sentence for conspiracy

As an eleventh allegation, Applicant asserts trial counsels were ineffective for failing to argue his sentence exceeded the maximum sentence for conspiracy. This Court finds this allegation is patently without merit, as Applicant’s sentence of twenty-five years’ imprisonment is the mandatory minimum sentence he could have received upon conviction.

Applicant was indicted for and convicted of trafficking in methamphetamine (conspiracy) (400 grams or more) pursuant to S.C. Code Ann. § 44-53-375(C)(5), which states in relevant part:

(C) A person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or conspires to sell, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base, as defined and otherwise limited in Section 44-53-110, 44-53-210(d)(1), or 44-53-210(d)(2), is guilty of a felony which is known as “trafficking in methamphetamine or cocaine base” and, upon conviction, must be punished as follows if the quantity involved is:

(5) four hundred grams or more, a term of imprisonment of not less than twenty-five years nor more than thirty years with a mandatory minimum term of imprisonment of twenty-five years, no part of which may be suspended nor probation granted, and a fine of two hundred thousand dollars.



S.C. Code Ann. § 44-53-375

Applicant was sentenced to the mandatory minimum sentence he could receive upon conviction—twenty-five years' imprisonment. Accordingly, this allegation is without merit and is denied and dismissed with prejudice.

Allegation that counsel was ineffective for failing to move to quash the indictment arguing that the underlying statute did not have the force of law under Article III, Section 18 of the South Carolina Constitution and Article I, Section 23 of the South Carolina Constitution and lack of extraterritorial jurisdiction; and failing to argue in directed verdict that the underlying statute did not have the force of law under Article III, Section 18 of the South Carolina Constitution and Article I, Section 23 of the South Carolina Constitution and lack of extraterritorial jurisdiction

As twelfth, thirteenth, and fourteenth allegations, Applicant asserts trial counsels were ineffective for failing to move to quash the indictment arguing that the underlying statute did not have the force of law under Article III, Section 18 of the South Carolina Constitution and Article I, Section 23 of the South Carolina Constitution and lack of extraterritorial jurisdiction; and failing to argue in directed verdict on the same grounds. Applicant also asserts due process violations on the same grounds. In support of this allegation, Applicant presented a letter from the South Carolina Department of State Archives dated April 19, 2018, stating 1993 Act No. 184 does not have a visible impression of the great seal. He testified his attorneys failed to argue the statute was improper based on the lack of a great seal. He also argues trial counsels failed to argue the State of South Carolina lacked jurisdiction over him because the drug sales occurred in Georgia.

When questioned about these specific allegations, counsels testified there was no proper basis to object to the indictments on either a great seal argument or extraterritorial jurisdiction argument. Mills elaborated the extraterritorial jurisdiction issue was addressed in Applicant's direct appeal and the Court of Appeals expressly found there to be no merit to this claim.



This Court finds Applicant cannot meet his requisite burden of proof as to any of these allegations. As to Applicant's allegations pertaining to extraterritorial jurisdiction, on appeal, Applicant argued the trial court did not have jurisdiction over Applicant because any purported crimes occurred in Georgia not South Carolina. The Court of Appeals expressly rejected this argument, finding, "the State presented overwhelming evidence that Tate committed acts intended to produce and producing detrimental effects within South Carolina." Accordingly, Applicant cannot now argue he is entitled to a new trial based on trial counsels' failure to move to quash the indictment and for a directed verdict on the same grounds that were already expressly rejected by the Court of Appeals. Applicant cannot meet his require burden of proof as to these allegations, which are denied and dismissed.

This Court also finds Applicant's allegations regarding counsels' purported ineffectiveness for failing to move to quash his indictments and for failing to move for a directed verdict pertaining to S.C. Code Ann. § 44-53-375 based on an alleged lack of the Great Seal in violation of Article III, Section 18 of the South Carolina Constitution, as well as his similar allegation he was denied due process because the statute lacked the Great Seal, are wholly without merit and are denied.

Pursuant to South Carolina Constitution, Article III, Section 18. "No Bill or Joint Resolution shall have the force of law until it shall have been read three times and on three several days in each house, has had the Great Seal of the State affixed to it, and has been signed by the President of the Senate and the Speaker of the House of Representatives: Provided, That either branch of the General Assembly may provide by rule for a first and third reading of any Bill or Joint Resolution by its title only".

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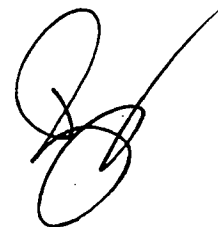
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The South Carolina Supreme Court has held absolute literal compliance is not essential to valid legislation, but substantial compliance is sufficient. Smith v. Jennings, 67 S.C. 324, 45 S.E. 821, 824 (1903). Furthermore, under the enrolled bill rule, an act is deemed to be properly passed when it has been ratified by the presiding officers of the General Assembly, approved by the Governor, and enrolled in the Office of Secretary of State. Medical Soc. of South Carolina v. Medical Univ. of South Carolina, 334 S.C. 270, 278, 513 S.E.2d 352, 356 (1999); Beaufort County v. Jasper County, 220 S.C. 469, 487, 68 S.E.2d 421, 430 (1951); State v. Town Council of Chester, 39 S.C. 307, 17 S.E. 752, 755 (1893) (“when the bill . . . is deposited in the department of state, according to law, its authentication as a bill that has passed congress is complete and unimpeachable”).

At the time Applicant was indicted in 2015, S.C. Code Ann. § 44-53-375 was properly ratified and approved pursuant to 2010 Act No. 273, § 38, which went into effect on June 2, 2010. See 2010 Act No. 273, § 38 (noting the legislation was ratified on June 1, 2010 and approved on June 2, 2010). This legislation was properly ratified, signed by the Governor, and the Great Seal was affixed to the Act on or about the time it was enrolled with the Office of the Secretary of State on June 8, 2010. Applicant’s assertions he is entitled to post-conviction relief because the Great Seal of the State of South Carolina is missing from an outdated statute under which he was not indicted lack merit. This Court finds these allegations pertaining to the great seal are 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



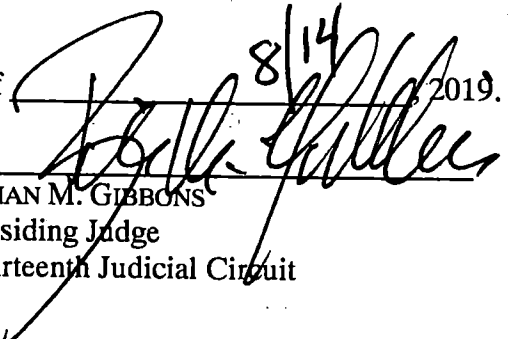
post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.


This Court notes that if Applicant wishes to appeal this order, Applicant, though his counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. 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 remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED this _____ day of _____ 2019.


BRIAN M. GIBBONS
Presiding Judge
Thirteenth Judicial Circuit

, South Carolina

Copy mailed to
Attorney General and S. Ross
on 8 / 23 / 2019

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

ANTONIO EMERSON TATE,
APPLICANT.

v.

THE STATE OF SOUTH CAROLINA,
RESPONDENT.

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

) MOTION TO ALTER OR AMEND THE
) JUDGMENT
)
)
)

) CASE # 2016-CP-23-5259
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Paul Wickensmeyer DOC GUL SC

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCR, to alter or amend the judgment of this Court filed on August 23, 2019. The eleventh allegation that the Applicant argued regarding his sentence exceeding the maximum sentence for conspiracy is not fully addresses in the Order denying post-conviction relief in his case. (Order p. 30)

Citing State v. Castineira, the Applicant argues that his lawyer was ineffective for failing to argue that sentence exceeded the maximum because he should have been sentenced to twelve and one-half to fifteen years pursuant to S.C.Code Ann. § 44-53-420. The Court in Castineira reasoned:

A plain reading of the language of section 44-53-370 establishes that the legislature intended to include conspiracy within the substantive framework of the offense of trafficking. The trafficking statute delineates conspiracy to sell, manufacture, deliver, or bring into the State more than ten grams of cocaine as a violation. Violations of this statutory offense are known as "trafficking in cocaine." State v. Wilson, 315 S.C. 289, 294, 433 S.E.2d 864, 867 (1993). Specifically, the language exempting trafficking convictions from the conspiracy penalty provision states that "a person convicted of conspiracy pursuant to this subsection must be sentenced as provided in this section." S.C.Code Ann. § 44-53-370(e) (Supp.1999) (emphasis added).

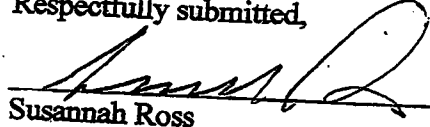
State v. Castineira, 341 S.C. 619, 626, 535 S.E.2d 449 (S.C. App., 2000)

Unlike in Castineira who was convicted under S.C.Code Ann. § 44-53-370(e), the Applicant here was indicted and convicted under S.C.Code Ann. § 44-53-375(c)(e). That statute

uses the identical language to define trafficking as S.C.Code Ann. § 44-53-370(e) including the language "or conspires to sell....". However, unlike S.C.Code Ann. § 44-53-370(e), § 44-53-375 does not contain the following sentence, "Notwithstanding Section 44-53-420, a person convicted of conspiracy pursuant to this subsection must be sentenced as provided in this section with a full sentence or punishment and not one-half of the sentence or punishment prescribed for the offense." The presence of that language in section 44-53-370 shows that the legislature could and did include such language when the intent of the statute was to exempt conspiracy to traffic convictions from the punishment for conspiracy as prescribed in Section 44-53-420. S.C.Code Ann. § 44-53-375(c)(e) does not contain that language.

For the foregoing reasons, the Applicant requests this Court to alter its Order of Dismissal and grant Applicant relief.

Respectfully submitted,


Susannah Ross
Attorney for the Applicant
330 E. Coffee St,
Greenville, SC 29601
(864) 242-0029

Greenville, South Carolina
This 4 day of Sept, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS)
THIRTEENTH JUDICIAL CIRCUIT)

ANTONIO EMERSON TATE,)
APPLICANT,)

ORDER DENYING APPLICANT'S)
MOTION TO RECONSIDER)
ALTER OR AMEND)

v.)

THE STATE OF)
SOUTH CAROLINA,)

CASE # 2016-CP-23-5259)

RESPONDENT.)

ENTERED COMPUTER)

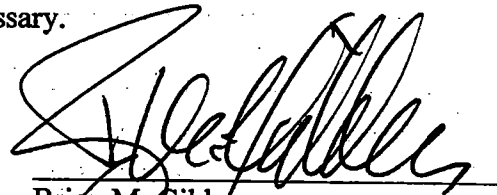
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CLERK OF COURT
MICHAEL W. WOODRUFF

After further deliberation, review of the Court's extensive notes, and considering the evidence presented and applicable law, the Court respectfully denies the applicant's motion to reconsider/ alter or amend. Further hearing is not necessary.

AND IT IS SO ORDERED.

Chester, S.C.

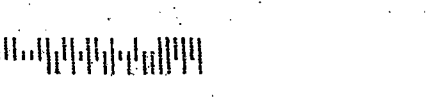
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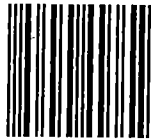
Brian M. Gibbons
Circuit Court Judge

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