

STATE OF SOUTH CAROLINA  
In The Supreme Court

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**May 12 2020**

**S.C. SUPREME COURT**

APPEAL FROM GREENWOOD COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, III, Circuit Court Judge

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Case No. 2019-CP-24-00160

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Earnest E. Vaughn, #246912, ..... Petitioner,

v.

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

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**NOTICE OF APPEAL**

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Applicant Earnest E. Vaughn, appeals the order of the Honorable J. Mark Hayes, II, dated April 28, 2020, and filed May 8, 2020.



May 11, 2020

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STATE OF SOUTH CAROLINA )  
COUNTY OF GREENWOOD )  
Earnest Edward Vaughn, Sr., #246912, )  
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Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

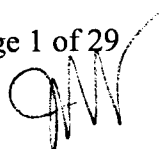
IN THE COURT OF COMMON PLEAS  
FOR THE EIGHTH JUDICIAL CIRCUIT

2019-CP-24-0160

**ORDER OF DISMISSAL**

The matter before this Court is an action for post-conviction relief (PCR). Earnest Edward Vaughn (Applicant) commenced this PCR action February 14, 2019. The State made its return on May 30, 2019. On March 3, 2020, Applicant, through PCR counsel, submitted an amended PCR application. The Court held an evidentiary hearing March 12, 2020, at the Laurens County Courthouse before the undersigned. Applicant was present and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General's Office represented the State.

At the PCR hearing, Applicant testified on his own behalf. Jane H. Merrill, Esquire, (Trial Counsel), Taylor D. Gilliam, Esquire (Appellate Counsel), and Assistant Solicitor Micah E. Black (Black) of the Eighth Circuit Solicitor's Office also testified at the hearing. After reviewing the testimony presented and the relevant portions of the record before the Court, for the reasons discussed below, this Court finds Applicant's allegations are without merit and concludes Applicant failed to meet his burden. Therefore, this Court denies relief and dismisses this action with prejudice.



## **PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenwood County Clerk of Court. During its May 2016 term, the Greenwood County Grand Jury indicted Applicant for trafficking in methamphetamine (16-GS-24-0539), possession of marijuana with the intent to distribute (PWID) (16-GS-24-0540), and unlawful neglect of a child (16-GS-24-0541). Jane Merrill, Esquire, represented Applicant. Senior Assistant Solicitor Elizabeth White and Assistant Solicitor Micah Black of the Eighth Circuit Solicitor's Office prosecuted the case.

On October 31, 2016, Applicant proceeded to a jury trial before the Honorable Donald B. Hocker. The jury convicted Applicant on the trafficking in methamphetamine and unlawful neglect of a child charges, but found Applicant not guilty of PWID. Judge Hocker sentenced Applicant to consecutive terms of thirty years' imprisonment for trafficking methamphetamine and ten years' imprisonment for unlawful neglect of a child.

Subsequently, Applicant timely appealed his sentences and convictions. Appellate Defender Taylor D. Gilliam of the South Carolina Commission on Indigent Defense—Office of Appellate Defense submitted a final brief on behalf of Applicant. On December 11, 2017, Assistant Attorney General J. Scott Matthews filed Respondent's final brief. On November 7, 2018, in an unpublished opinion (No. 2018-UP-409), the South Carolina Court of Appeals affirmed Applicant's conviction. On November 27, 2018, the Remittitur was issued to the Greenwood County Clerk of Court.

## **FACTUAL BACKGROUND**

On January 27, 2016, agents with the Greenwood County Sheriff's Office utilized the services of a confidential informant, Debbie Tucker, (CI) to arrange a controlled buy of



methamphetamine. (Tr. 117). Tucker made a phone call to Brandy Wilson and arranged to purchase a half ounce of methamphetamine from Applicant and Ms. Wilson at a car wash in Greenwood that evening. (Tr. 134-135). Police were told by Debbie Tucker that they should be looking for a dark colored Chevrolet Tahoe. (Tr. 118). Law enforcement arrived early to set up surveillance at the buy location. Before Debbie Tucker could arrive, a dark colored Chevy Tahoe arrived driven by Brandy Wilson. (Tr. 119). Applicant was in the passenger seat, and Applicant's five year old grandchild was in the back. (Tr. 256). Law enforcement called off the controlled purchase and initiated a traffic stop on the Tahoe. (Tr. 119, 138). Applicant was seen "fidgeting" by law enforcement and it appeared to Captain Jarvis Reeder that Applicant was attempting to hide something. (Tr. 255-256). Applicant was read his Miranda<sup>1</sup> rights and made a statement to law enforcement admitting that he did have drugs in his pants near his testicles. (Tr. 258-260). Law enforcement then searched Applicant's person and located two plastic bags of suspected drugs underneath Applicant's testicles. (Tr. 262). Applicant was then placed under arrest.

At trial Josh Hood, Chad Cox, and Jarvis Reeder each testified about finding drugs in Applicant's "crotch area." (Tr. 174-175, 187, 262). Furthermore, Jarvis Reeder testified that Applicant made a Mirandized statement admitting he had drugs inside his pants. (Tr. 258-260). Brandy Wilson also testified Applicant sent her a letter encouraging her to make statements to Applicant's attorney regarding Applicant's lack of culpability. (Tr. 221-222). Applicant specifically urged Brandy Wilson to tell his attorney that Debbie Tucker had sold them a camper with drugs inside of it, and that they were merely returning Ms. Tucker's drugs to her. (Tr. 221-222).

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436 (1966).

Agent Bryan Louis testified about his involvement with the arrest as well. Agent Louis was asked by the State “Were Ms. Wilson and Mr. Vaughn placed into custody?” (Tr. 154, line 3). Agent Louis responded “They were. I had an active arrest warrant for Mr. Vaughn from a previous incident.” (Tr. 154, line 4-5). The jury found the Applicant guilty on two of three counts. Applicant then filed his appeal.

### **ALLEGATIONS RAISED**

On February 14, 2019, Applicant filed an application for post-conviction relief, alleging he is being held in custody unlawfully for the following reasons:

A. Judicial Error / Abuse of Discretion

1. “The Court erred by failing to suppress tainted evidence claimed to have been seized by police during an unlawful traffic stop and an illegal detention of the petitioner and illegal search.”
2. “The Court abused its discretion by denying defense counsel’s motion for a mistrial after inadmissible testimony was given relating to a sham (pretext), warrant was given to jury that prejudiced petitioner.”
3. “That the Court failed to properly rule by law on objections made by defense counsel. It was resolved improperly with personal opinions.”
4. The Court was biased in this case! Judge Hocker should have recused himself after previously presiding over a bond-hearing and setting an excessive bond of \$100,000.”

B. Prosecutorial Misconduct

1. “...prosecutor failed to correct perjured testimony by police relating to probable cause.”
2. “... prosecutor withheld exculpatory evidence from defense and failed to fully respond to Rule 5 discovery before trial.”
3. “Prosecutor conspired to tamper with other evidence (took sound out of video), dash cam!”

C. “Police Misconduct”

1. “...police used false allegations to conduct unlawful traffic stop.”
2. “when police use[d] sham (fabricated) pretext arrest warrant as probable cause to unlawfully detain petitioner.
3. police tamper[ed] with evidence, improper chain of custody and testing of evidence.”
4. “police commit[ed] Marinda [sic] violation, then tamper[ed] with video to exclude audio on dash cam.



5. "police lie[d] under oath stating they had a sham arrest warrant in hand at the time of the traffic stop."
6. "The acts of misconduct listed in this case violated Due Process under the Equal Protection Clause of the 14<sup>th</sup> Amendment and rendered the trial fundamentally unfair."

D. Ineffective Assistance of Trial and Appellate Counsel

1. "Trial counsel ineffective for failing to properly prepare the case for trial."
2. "failing to object to inadmissible and tainted evidence"
3. "Appellate counsel ineffective for failing to include issues preserved for appellate review as instructed."
4. "Trial counsel and appellate counsel violated attorney/ client relationship."

Applicant subsequently filed three pro se amendments re-stating his allegations.

On March 3, 2020, Applicant, through PCR counsel, submitted an amended application, alleging the following claims:

A. Ineffective Assistance of Counsel of Jane H. Merrill, Esquire:

1. "Trial counsel failed of adequately cross-examine and challenge the officer related to the tainted evidence that was seized by police. When the drugs were initially turned in the officer noted there were 18 grams but then later supplemented it with 3.4 grams that were found on the floor."
2. "Trial counsel failed to recuse Judge Hocker from presiding over the trial as Judge Hocker had already shown bias against the Applicant when he at an excessive bond of \$100,000 (that was alter reduced to \$20,000). Judge Hocker also had forced the Applicant to take a drug test."
3. "Trial counsel failed to adequately move for a mistrial after one of Applicant's family members made contact with a juror in the bathroom."
4. "Trial counsel should have not allowed the Applicant's prior overturned conviction to be mentioned during sentencing."
5. "Trial Counsel failed to adequately challenge the chain of custody on the substances seize from the Applicant. The chain of custody on these drugs was broken. The date on the drugs were taken to SLED and received by SLED are different dates. Furthermore, Josh Hood admitted to detaining and searching the Applicant without consent or without a search warrant."
6. "Trial Counsel failed to challenge the State's witness about the deal she was making with the State to testify at the Applicant's trial."

7. "Trial Counsel failed to adequately challenge the issue related to the dash-cam and its lack of audio at certain points."

B. Ineffective Assistance of Appellate Counsel as to Assistant Appellate Defender Taylor D. Gilliam

1. "Counsel failed to raise valid and preserved arguments on appeal, particularly that the Court erred in failing to suppress the tainted drugs that were seized by police."
2. "Failed to petition the issue related to the mistrial in Supreme Court."

C. Prosecutorial Misconduct as to Micah E. Black

1. "Mr. Black intentionally withheld the criminal record of the informant, Debbie Rucker. Furthermore, Mr. Black falsely indicated to the Court that the Applicant had made death threats against the government."
2. "Mr. Black failed to turn over as part of Discovery, the report made by Gregory Allison where Allison admitted to finding a bag of substance on the floor of his office and adding it to the contents of the Applicant's case. (Please see attached supplemental report obtained by the Applicant.)"
3. "Mr. Black attempted to withhold the field test of the substance seized from the Applicant at the time of his arrest that shows that the substances tested negative for drugs."

A hearing was held on March 12, 2020, at the Laurens County Courthouse. At the outset of the hearing, Applicant stated he was going forward on the allegations of ineffective assistance of trial and appellate counsel, and prosecutorial misconduct, as contained in his original and amended applications. Accordingly, this Court finds the allegations of police misconduct and judicial error are hereby waived and abandoned.

**APPLICABLE LAW**

*Ineffective Assistance of Trial Counsel*

In a post-conviction relief action, the 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 the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 300 S.C. 115. First, the applicant must prove counsel’s performance was deficient. Id. Under this prong, courts measure an attorney’s performance by its “reasonableness under prevailing professional norms.” Id. (citing Strickland, 466 U.S. at 688). Second, any 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.” Id. at 117-18, 300 S.C. 115.

#### *Ineffective Assistance of Appellate Counsel*

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). However, the right to appellate counsel does not extend to a discretionary appeal. See Evitts v. Lucey, 469 U.S. 387, 394 (1985) (stating the right to appellate counsel “is limited to the first appeal as of right . . .”). Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (emphasis added). “For [courts] to second-guess reasonable professional

judgments and impose on [appellate] counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . .” Jones v. Barnes, 463 U.S. 745, 754 (1983).

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. Thus, the question becomes (1) whether appellate counsel’s performance was deficient, and (2) whether the applicant was prejudiced by appellate counsel’s deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel’s errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). As for proving prejudice from appellate counsel’s lack of pursuing a discretionary appeal, “[The applicant] must prove prejudice by showing he would have prevailed on appeal had a writ been filed by counsel and granted by [the Supreme Court].” Id.

#### *Prosecutorial Misconduct / Brady Violation*

The Brady<sup>2</sup> disclosure rule requires the prosecution to provide a defendant any evidence in the prosecution’s possession that may be favorable to the accused and material to guilt or punishment. State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 220 (Ct. App. 1998) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)). Favorable evidence includes both exculpatory evidence and evidence which may be used for impeachment. United States v. Bagley, 473 U.S. 667, 676 (1985). “Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993).

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<sup>2</sup> Brady v. Maryland, 373 U.S. 83, 87 (1963).

The Supreme Court of South Carolina has recognized that:

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment.

Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999) (internal citations omitted).

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **I. Ineffective Assistance of Trial Counsel**

#### *1. Failure to Adequately Cross-Examine and Challenge the Officer Related to the Tainted Evidence that Was Seized by Police.*

Applicant alleges Trial Counsel failed to cross-examine Greg Allison, who testified that, due to an oversight, he inadvertently failed to include two different bags of drugs in his original inventory check. (Trial Tr. 296-99).

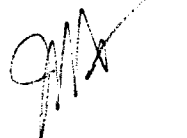
“Counsel’s performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel ‘rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” Strickland, 466 U.S. at 690. There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect: Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Further, decisions primarily involving trial strategy and tactics may be made by



trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir. 1998). Examples of such decisions include, “which jurors to accept or strike, which witnesses should be called on the defendant’s behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.” Abney, 408 S.C. at 48, 757 S.E.2d at 547 (Ct. App. 2014) (Pieper, J., concurring).

Applicant testified he believed the drug evidence was “tainted” and Trial Counsel did not adequately cross-examine Allison regarding this tainted evidence. Trial Counsel testified Allison inadvertently excluded two bags of methamphetamine from his initial inventory count: one bag containing .34 grams and another bag containing 3.6 grams. (Supp. Report). Trial Counsel testified she received Greg Allison’s supplemental report from the Solicitor’s Office through her Brady / Rule 5 motion. Trial Counsel testified she asked Allison about the error during cross-examination, but strategically chose not to “harp” on Allison’s error, because she did not want the jury to repeatedly be reminded of the substantial quantity of drugs law enforcement found in Applicant’s possession.

This Court finds Trial Counsel’s testimony on this issue very credible, while also finding Applicant’s testimony not credible. As Trial Counsel credibly testified, she cross-examined Allison regarding the inventory error, and therefore, the jury was aware of the error and was able to weigh Allison’s credibility accordingly. Additionally, Trial Counsel credibly testified she strategically chose to refrain from over-emphasizing the inventory error because doing so would require Allison to repeatedly remind the jury of the large quantity of drugs that were found on Applicant. Moreover, even if the two supplemented drug bags had not been added to the original inventory report, the amount of drugs found in Allison’s initial inventory report were sufficient to



support Applicant's drug charge.<sup>3</sup> This Court finds Trial Counsel's strategic decision was a valid and reasonable strategic decision. Accordingly, Applicant has failed to meet his burden as to deficiency.

Applicant has also failed to establish any resulting prejudice from Trial Counsel's alleged deficiency. Applicant did not show this Court how any additional questioning would have changed the outcome of his case, nor did he state what specific questions he believed Trial Counsel should have asked Allison. Applicant merely testified that Trial Counsel did not "adequately" question Allison on cross-examination. Importantly, Allison's initial inventory yielded an amount of drugs sufficient to support Applicant's indictment and conviction, and therefore, the supplemental bags of drugs were not crucial to Applicant's case. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

## 2. *Failure to Recuse Judge Hocker*

Applicant alleges Trial Counsel was ineffective for failing to move to recuse Judge Hocker after Judge Hocker ordered Applicant to take a drug test prior to trial and revoked his bond, and that this drug test ultimately negatively affected his sentence.

Canon 3(C)(1)(a) of the Code of Judicial Conduct, Rule 33, Rules of Practice of the Supreme Court, requires the judge to recuse himself when he "has a personal bias or prejudice concerning a party." The alleged bias must stem from an extrajudicial source and result in a decision based on other than what the judge learned from his participation in the case. Payne v. Holiday Towers, Inc., 283 S.C. 210, 321 S.E.2d 179 (Ct.App.1984). It is not enough for a party

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<sup>3</sup> Allison's initial inventory consisted of 7.66 grams in Bag #2, which was later supplemented with .34 grams, and 10.62 grams in Bag #1, which was later supplemented with 3.6 grams.

to allege bias; a party seeking disqualification of a judge must show some evidence of bias or prejudice. Lyvers v. Lyvers, 280 S.C. 361, 312 S.E.2d 590 (Ct.App.1984). When no evidence is presented other than claimed "adverse" rulings by the judge, the judge is not required to recuse himself. Payne, 283 S.C. 210, 321 S.E.2d 179 (Ct.App.1984). Adverse rulings, even if erroneous, are insufficient to establish a trial judge's bias or prejudice. Butler v. Sea Pines Plantation Company, 282 S.C. 113, 317 S.E.2d 464 (Ct.App.1984).

Applicant testified Judge Hocker denied Applicant bond initially, but eventually set a bond of \$100,000. Applicant testified Judge Hocker eventually lowered the bond to \$50,000. According to Applicant, Judge Hocker was biased against Applicant, evidenced by the fact that Judge Hocker forced him to take a drug test. Applicant testified that the test came back negative for illegal drugs, but was positive for amphetamines, which could have been due to his cold medicine. Applicant testified this further affected his case as it relates to the sentence he received from the Court.

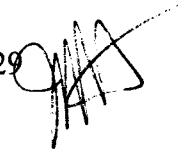
Trial Counsel testified she did not see any valid legal reason to request that Judge Hocker to recuse himself from Applicant's case, nor did Applicant ask her to make a motion to recuse Judge Hocker. Trial Counsel testified that starting at the beginning of trial, Applicant appeared to be asleep and was inattentive. Trial Counsel testified claimed he was on medication for COPD and that it made him "sleepy." Trial Counsel testified she called to the detention center to inquire as to Applicant's demeanor before trial, and officials at the detention center stated he had not acted in that manner while at the detention center. Trial Counsel also testified she objected to Judge Hocker's request to take a drug test, but Judge Hocker ultimately required Applicant to take the drug test. Trial Counsel testified Applicant tested positive for amphetamines.



This Court finds Trial Counsel's testimony very credible, while also finding Applicant's testimony not credible. This Court finds there was no legal basis for Trial Counsel to move to recuse Judge Hocker. Trial Counsel objected to the Court's request to test Applicant for drugs, but Judge Hocker ordered Applicant to take the drug test due to his questionably intoxicated demeanor. (Trial Tr. 94; 99). Due to Applicant testing positive for amphetamines and due to his "sleepy demeanor," Judge Hocker revoked Applicant's bond. (Trial Tr. 97). Applicant informed the trial court that he tested positive for amphetamines due to a medical condition, but did not elaborate further. (Trial Tr. 99). However, Judge Hocker discussed this with Applicant on the record and informed him that he could not consider this alleged explanation because he did not have any evidence to support Applicant's assertion that he tested positive for amphetamines due to the medical condition. (Trial Tr. 99). Accordingly, Applicant has failed to show that Judge Hocker's order for Applicant's drug test and subsequent bond revocation was based on any extraneous bias.

Furthermore, Applicant faced a twenty-five to thirty year sentence for indictment 16-GS-24-539, and up to ten years' imprisonment for indictment 16-GS-24-541. Applicant received a sentence of thirty years for indictment 539 and a consecutive sentence of ten years for indictment 541. (Trial Tr. 406). Applicant did not receive an unlawful sentence, and his sentence appropriately reflected not only that this was Applicant's third drug offense, but also the fact that Applicant has an extensive criminal history, including, *inter alia*, convictions of burning not subject to arson, possession of marijuana and drug paraphernalia, criminal domestic violence, auto breaking and grand larceny, forgery, and two other charges of possession of methamphetamine. Accordingly, this Court finds Trial Counsel was not deficient for failing to request Judge Hocker's recusal.

Applicant has also failed to establish any resulting prejudice from Trial Counsel's alleged deficiency because Applicant has failed to credibly show there is a reasonable probability that the



motion would have been granted and any recusal would have changed the outcome of Applicant's case. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

3. *Failure to Move for a Mistrial after Incident with Juror*

Applicant alleges Trial Counsel was ineffective for failing to move for a mistrial after Applicant's granddaughter (Granddaughter) approached a juror (Juror) in the restroom during Applicant's trial.

When an error occurs, one remedy available to a trial judge is to grant a mistrial. State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). However, the granting of a mistrial is an extreme remedy that should only be imposed when an incident occurs during trial that is so grievous its prejudicial impact cannot be removed through any other means. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999). "The power of the court to declare a mistrial should be used with the greatest caution and for plain and obvious causes." Earley v. State, 418 S.C. 255, 267, 792 S.E.2d 226, 232-33 (2016) (internal citations omitted). In determining whether to grant a mistrial, the trial court should consider whether the mistrial is dictated by manifest necessity and must exhaust all other methods to cure any possible prejudice that occurred prior to stopping the trial. State v. Simmons, 352 S.C. 342, 354, 573 S.E.2d 856, 862 (Ct. App. 2002); see Council, 335 S.C. at 13, 515 S.E.2d at 514 ("[T]he trial judge should exhaust other methods to cure possible prejudice before aborting a trial."); State v. Prince, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) ("The less than lucid test is therefore declared to be whether the mistrial was dictated by manifest necessity or the ends of public justice, the latter being defined as the public's interest in a fair trial designated to end in just judgment."). Significantly, a mistrial should **not** be granted unless




“absolutely necessary.” Harris, 340 S.C. at 63, 530 S.E.2d at 627-628; see State v. Brown, 389 S.C. 84, 94, 697 S.E.2d 622, 627 (Ct. App. 2010) (“A manifest necessity must exist for the trial court to discharge the jury and declare a mistrial.”).

Applicant testified Granddaughter was crying in the restroom during a brief trial recess when a Juror entered and asked Granddaughter why she was upset. Applicant testified Granddaughter informed Juror she was Applicant’s granddaughter and told Juror “she didn’t want her papa to go to jail.” Applicant testified Juror informed the bailiff regarding this interaction and the State moved to have Juror removed from the jury because the State felt Juror could no longer be impartial. Applicant testified Trial Counsel “didn’t know what to do,” and Judge Hocker ruled to keep Juror on the jury because Juror testified to the trial court that she could still be fair and impartial.

Trial Counsel testified that Juror gave the bailiff a message indicating that she had an interaction with Granddaughter. Trial Counsel testified she did not move to excuse Juror because Juror was questioned by the Court, and indicated that she could remain fair and impartial. Trial Counsel testified she did not see any reason the juror could not be fair and impartial to her client such that it would offend Applicant’s right to a fair trial.

This Court finds Trial Counsel’s testimony very credible, while also finding Applicant’s testimony credible only to the extent Applicant testified his Granddaughter approached Juror in the restroom. This Court finds Applicant has failed to establish how Trial Counsel was deficient in any way regarding the incident concerning Juror and Granddaughter. The Court confirmed with Juror that she was still able to be fair and impartial, and it was further determined that Juror did not inform the other jurors about the encounter. (Trial Tr. 281-82). There is no reasonable likelihood a mistrial would have been granted. There was no manifest necessity requiring the grant

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of a mistrial, as the trial court questioned the juror regarding her ability to remain fair and impartial. Therefore, Trial Counsel was not and cannot be deficient for failing to move to excuse a juror or failing to move for a mistrial. See State v. Green, 301 S.C. 347, 354 (1990) (“The ultimate consideration is that the juror be unbiased, impartial and able to carry out the law as it is explained to him.”). Accordingly, Applicant has failed to meet his burden as to deficiency.

Applicant has also failed to establish any resulting prejudice from Trial Counsel’s alleged deficiency. Given that Juror confirmed her ability to be fair and impartial, Applicant has not shown that a motion for a mistrial would have been granted. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*4. Failure to Object to Applicant’s Overturned Conviction Being Mentioned During Sentencing*

Applicant alleges Trial Counsel was ineffective for failing to object the mention of his overturned drug conviction during his sentencing.


Applicant testified he had a conviction that was expunged in 2004 that was used against him in sentencing. Applicant testified Trial Counsel did not object to that charge being mentioned during sentencing, and that this negatively impacted his sentence.

Trial Counsel testified Applicant was granted PCR relief for one of his previous drug crimes. Trial Counsel testified she was not concerned about whether this conviction would affect his sentencing because it was specifically mentioned to the Trial Court that Applicant received PCR relief for that charge, and because that drug charge was not used to enhance his charge in this case. Trial Counsel testified the State used two other methamphetamine charges, for which Applicant did not receive PCR relief, to enhance the charge in this case.



This Court finds Trial Counsel's testimony very credible, while also finding Applicant's testimony not credible. This Court finds Applicant has failed to establish how Trial Counsel was deficient in any way regarding the sentencing phase of his case. Applicant had several other drug charges, which were not overturned on PCR, including: (1) a simple possession of marijuana charge in 1983; (2) possession of marijuana charge from 2005; (3) possession of a controlled substance in 2012; (4) possession of methamphetamine in 2010; (5) a possession of marijuana in 1989; (6) possession of methamphetamine in 2008; and (7) possession of a controlled substance, schedule 1-5 and possession of methamphetamine in 2012. The 2008 and 2012 possession of methamphetamine charges were the specific charges used to enhance this charge as a third-offense. (Trial Tr. 405). As Trial Counsel testified, the conviction for which Applicant received PCR relief was not used to enhance his charge, and, the Solicitor specifically informed the trial court: "1997 he was actually tried for and convicted, I believe it was in Anderson County on a possession with intent to distribute marijuana, or methamphetamine. Judge, that charge ultimately got overturned on a PCR so there was no conviction for that." (Trial Tr. 405). As Trial Counsel testified, there was no valid reason to object to the Solicitor's mention of the 1997 drug charge, as it was mentioned only to the judge during sentencing, not in the presence of the jury, and because the judge was informed that Applicant received PCR relief for that charge. Accordingly, Applicant has failed to prove Trial Counsel was deficient for failing to object to the mention of his overturned conviction.

Applicant has also failed to establish any resulting prejudice from Trial Counsel's alleged deficiency. Applicant has not shown this Court how any objection to his overturned conviction being mentioned would have affected the outcome of his case. Additionally, as discussed above, Applicant had an extensive criminal history containing other convictions that were not overturned,

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that could be considered by the trial court when considering sentencing. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

5. *Failure to Object to the Challenge the Chain of Custody*

Applicant alleges Trial Counsel was deficient for failing to challenge the chain of custody in his case.

Applicant testified he believed the drug evidence in his case had been altered because he was previously arrested on unrelated drug charges, and in that case, two of the officers were caught fabricating evidence against him. Applicant further testified that these two officers were eventually charged with embezzlement and misconduct in office. According to Applicant, these officers that were involved in his previous case were involved in the underlying charges in this case, and based on that, the chain of custody must have been tainted. Trial Counsel testified she did not believe there was a meritorious argument regarding the chain of custody, and that the witnesses established chain of custody through their testimony. Trial Counsel testified she made a motion to suppress the drug evidence based on what she felt was the most legitimate argument: that the stop was not based on the arrest warrant, but was pretextual.

This Court finds Trial Counsel's testimony regarding this allegation credible, while also finding Applicant's testimony not credible. This Court finds Applicant has failed to establish how Trial Counsel was deficient in any way regarding the chain of custody of the drugs in this case. Even assuming *arguendo* the assertions concerning the officers in Applicant's case were true,<sup>4</sup> a

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<sup>4</sup> This Court was not presented with any independent evidence to substantiate Applicant's claim that two of the officers in this case were involved in embezzlement or misconduct in a previous case of Applicant's.



prior instance of misconduct in an unrelated criminal case, is not sufficient grounds for alleging a flawed chain of custody. Applicant has not shown this Court there was a valid basis to challenge the chain of custody. Accordingly, Applicant has failed to meet his burden as to deficiency on behalf of Trial Counsel.

Applicant has also failed to establish any resulting prejudice from Trial Counsel's alleged deficiency. Applicant has failed to establish that a motion to suppress based on a flawed chain of custody would have been granted and would have changed the outcome of his case. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*6. Failure to Suppress the Evidence Based on the Search Warrant*

Applicant alleges that Trial Counsel was ineffective for failing to suppress the evidence based on a "sham arrest warrant."

Applicant testified he believed Trial Counsel was ineffective for failing to object to a "sham" search warrant. Applicant testified the State admitted that law enforcement used the "sham" arrest warrant to "skirt around" the fact that law enforcement did not have probable cause to make the traffic stop and for not having a reliable confidential informant. Applicant testified Trial Counsel raised this issue in her pre-trial motion to suppress the drugs. Applicant testified law enforcement pulled his car over because they were told that there was a warrant out for him, which was not true, and he felt Trial Counsel should have moved to suppress the evidence on that basis.

Trial Counsel testified that Applicant also had warrants arising out of a different drug crime, and that Andrew Hodges represented Applicant on those other charges. Trial Counsel testified she reviewed the warrants and indictments applicable to Applicant's case and did not see



any errors that would make them facially invalid. However, Trial Counsel testified she made a pre-trial motion to suppress the drugs, but that motion was denied.

This Court finds Trial Counsel's testimony regarding this issue credible, while also finding Applicant's testimony credible only to the extent Applicant admits Trial Counsel made this argument to the trial court. This Court finds Applicant has failed to establish how Trial Counsel was deficient in any way regarding the motion to suppress in Applicant's case. Applicant has failed to articulate what specific argument regarding his "sham arrest warrant" Trial Counsel should have made but did not. Trial Counsel credibly testified she reviewed the applicable arrest warrants, and did find any errors that would make them facially invalid. Furthermore, as both Trial Counsel and Applicant credibly testified, she still made a motion to suppress the drugs, during which she argued the traffic stop made pursuant to the arrest warrant was pre-textual, and therefore, the drugs should have been suppressed due to the unreliability of the CI. (Trial Tr. 84-91). However, the trial court denied Trial Counsel's motion. Accordingly, Applicant has failed to meet his burden as to deficiency.

Applicant has also failed to establish any resulting prejudice from Trial Counsel's alleged deficiency. Applicant has failed to establish that challenging the search warrant would have changed the outcome of his case. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

*7. Failure to Adequately Cross-Examine the Confidential Informant About Deal Made With Prosecutors*

Applicant alleges Trial Counsel was ineffective for failing to adequately question CI regarding the deal she made with prosecutors in exchange for her testimony against Applicant.

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Applicant testified CI was caught with drugs prior to his trial, but she never received formal charges due to the fact that she testified against him at his trial. Applicant testified Trial Counsel did not adequately question CI regarding this deal she made with the Solicitor's Office. Trial Counsel testified she was aware of the agreement between the CI and the State, and that she in fact questioned the CI regarding the agreement on cross-examination so the jury could assess her credibility accordingly.

This Court finds Trial Counsel's testimony regarding this issue credible, while also finding Applicant's testimony credible only to the extent he testified CI faced drug charges from an incident that occurred prior to his trial. This Court finds Applicant has failed to establish how Trial Counsel was deficient in any way regarding her cross-examination of CI. As Trial Counsel credibly testified, she questioned CI regarding the benefit she received in exchange for her testimony against Applicant. During cross-examination, CI revealed that she received several drug charges pending, and she hoped her testimony against Applicant would benefit her. (Trial Tr. 147-149). Therefore, the jury was aware of the benefit the CI received and could evaluate the CI's credibility accordingly. (Trial Tr. 144-50). Furthermore, Applicant did not state what additional questions he believed Trial Counsel should have asked CI on cross-examination. Accordingly, Applicant has not met his burden as it pertains to any deficiency on behalf of Trial Counsel.

Applicant has also failed to establish any resulting prejudice from Trial Counsel's alleged deficiency. Applicant did not show this Court how any additional questioning would have changed the outcome of his case, nor did he state what specific questions he believed Trial Counsel should have asked. Applicant merely testified that Trial Counsel did not "adequately" question the CI on cross-examination. Based on the standard set forth above, this Court finds Applicant has failed to



meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

8. *Failure to Adequately Challenge the Issue Related to the Dashboard Camera and Its Intermittent Lack of Audio*

Applicant alleges Trial Counsel was ineffective for failing to challenge the statement he made to law enforcement, on the basis that the dashboard camera lacked audio during certain points.

Applicant testified Trial Counsel was ineffective for failing to move to suppress Applicant's statement to law enforcement. More specifically, Applicant argues he invoked his Sixth Amendment right by asking for an attorney and informing law enforcement he would not make a statement until he spoke with an attorney. Applicant testified that this statement was not heard on the dashboard camera video because the audio cut out of the dashboard at the exact moment he made that statement.

Trial Counsel testified there was some issues with the audio on the dashboard camera. Trial Counsel testified she verified with Black that the State's copy also contained the same audio issues. Trial Counsel said that based on her review of the video, she did not believe the intermittent lack of audio was crucial or helpful to Applicant's case. Trial Counsel testified that she still attempted to suppress the statements made by Applicant during a Jackson v. Denno<sup>5</sup> hearing, but her motion was unsuccessful.

This Court finds Trial Counsel's testimony credible, while also finding Applicant's testimony not credible. As Trial Counsel testified, Commander Chad Cox and Captain Jarvis Reeder, the two officers whom Applicant made statements to at the scene, testified during a pre-

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<sup>5</sup> Jackson v. Denno, 378 U.S. 368 (1964).

trial Jackson v. Denno hearing. Both Cox and Reeder testified that they read Applicant his Miranda rights, and that Applicant did not ask for a lawyer when was read his Miranda rights. (Trial Tr. 67-68; 78-79). Moreover, Trial Counsel cross examined each officer during the pre-trial hearing. (Trial Tr. 69-75; 79-114). Based on the credible testimony, the trial court denied Applicant's motion to suppress, finding that Applicant voluntarily made the statements and that there were no Miranda violations. (Trial Tr. 91). Moreover, despite the fact that the statement was admissible based on the trial court's ruling on trial counsel's motion, trial counsel was able to question the officers regarding the audio issues, which allowed the jury to assess the credibility of the evidence accordingly. Accordingly, Applicant has failed to meet his burden as to deficiency.

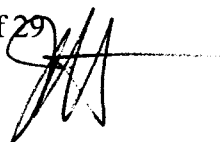
Applicant has also failed to establish any resulting prejudice from Trial Counsel's alleged deficiency. Applicant did not show this Court what additional arguments Trial Counsel should have raised regarding the alleged Miranda violations but did not. Further, Applicant has not shown this court how any additional arguments or cross-examination would have changed the outcome of his case. Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Trial Counsel and, therefore, this allegation is denied and dismissed with prejudice.

## **II. Ineffective Assistance of Appellate Counsel**

### *1. Failure to Raise Fourth Amendment Issue on Appeal*

Applicant alleges Appellate Counsel was ineffective for failing to raise a Fourth Amendment argument on appeal.

Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decisions to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).



Appellate Counsel is not required to raise each and every non-frivolous issue preserved for appeal. See Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990).

Applicant testified he spoke with Appellate Counsel and described the details of the arrest warrant because he wanted Appellate Counsel to make the argument that the motion to suppress should have been granted due to the fact that, according to Applicant, the stop was predicated on the “sham” arrest warrant. Applicant testified Appellate Counsel informed him he could not bring that issue on appeal, but that Applicant wanted Appellate Counsel to raise that issue because it was preserved for appeal.

Appellate Counsel testified he spoke with Applicant regarding his case seven times by telephone. Appellate Counsel testified he recalled having a fourth amendment discussion with Applicant, but did not believe they specifically discussed the arrest warrant. Appellate Counsel testified Applicant did not ask him to raise any specific issues that Appellate Counsel did not raise. Appellate Counsel testified that even if Applicant had requested he raise particular issues, he would not have raised any non-meritorious claims. Appellate Counsel testified he does not raise each and every single issue preserved for appeal. Appellate Counsel testified he raised the following issue on appeal:

“The Trial Court erred in failing to declare a mistrial upon the mention of an active arrest warrant in Applicant’s name which was unrelated to his trial and improperly influenced the jury to decide the case on prejudice instead of the evidence presented.”

Appellate Counsel testified that, after reviewing the record, he raised this issue because it was the most possible meritorious issue in Applicant’s case. Appellate Counsel testified he does not raise every issue preserved for appeal due to the page limit set by the Appellate Court Rules. Appellate Counsel testified that if he were to raise more issues than necessary, he would be limiting the number of pages he could use on more meritorious arguments.

This Court finds Appellate Counsel's testimony credible, while also finding Applicant's testimony not credible. As Appellate Counsel credibly testified, he raised the most meritorious issue for appeal, and does not raise each and every single issue that is preserved for appeal. See Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990). Accordingly, Applicant has not met his burden requiring him to show this Court how Appellate Counsel was deficient.

Applicant has also failed to establish any resulting prejudice from Appellate Counsel's alleged deficiency. Applicant has not shown this Court that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Appellate Counsel and, therefore, this allegation is denied and dismissed with prejudice.

2. *Failure to Petition the Supreme Court of the United States*

Applicant alleges Appellate Counsel was ineffective for failing to file a Petition for a Writ of Certiorari in the Supreme Court of the United States.

There is no duty on appellate counsel to pursue a rehearing and/or certiorari following the decision of the Court of Appeals in a criminal direct appeal. Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006). The decision whether to pursue certiorari is a matter left solely to the appellant's attorney's professional discretion. Id.

Appellate Counsel testified he did not appeal to the South Carolina Supreme Court, nor would he have ultimately appealed to the Supreme Court of the United States (SCOTUS) because he did not see any valid legal reason to do so. Appellate Counsel testified that, based on the record and applicable law, he did not believe the South Carolina Supreme Court would grant certiorari and reverse the decision of the South Carolina Court of Appeals, nor did he believe there was a



legitimate meritorious argument such that SCOTUS would ultimately grant certiorari in Applicant's case. Appellate Counsel testified he will not file a writ of certiorari in a supreme court, whether state or federal, for every case because these courts rarely grant certiorari, and because these courts only grant certiorari when certain criteria are present, which were not present in this case.

This Court finds Appellate Counsel's testimony very credible. As Appellate Counsel testified, he used his professional judgment and knowledge of the record and ultimately determined that he should not continue the appeal process for Applicant's case. Appellate Counsel credibly testified he did not see any valid reason to file a writ of certiorari in the South Carolina Supreme Court, nor did he see a valid reason to ultimately file a petition in SCOTUS.

This Court finds the South Carolina Court of Appeals properly determined that the trial court did not err by refusing to grant Applicant's motion to mistrial. Our appellate courts have consistently held that the standard of review for determining whether a mistrial should have been granted is an abuse of discretion. "The decision to grant or deny a mistrial is within the sound discretion of the trial judge." State v. Thompson, 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). "The court's decision will not be overturned on appeal absent an abuse of discretion amounting to an error of law." Id. "The power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes" stated into the record by the trial judge. Thompson, 560, 575 S.E.2d at 82, citing State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977). "A mistrial should not be granted unless absolutely necessary." State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. In order to receive a mistrial, the defendant must show error and resulting prejudice. Id. The court properly determined the trial

court did not abuse its discretion by refusing to grant Applicant a mistrial. Trial Counsel cannot be found deficient for failing to further appeal Applicant's case merely because Applicant was not satisfied with the result of his appeal. Accordingly, Applicant has not met his burden requiring him to show deficiency on behalf of Appellate Counsel.

Applicant has also failed to establish any resulting prejudice from Appellate Counsel's alleged deficiency. Applicant has not shown this Court that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Based on the standard set forth above, this Court finds Applicant has failed to meet his requisite burden of establishing constitutional ineffectiveness of Appellate Counsel and, therefore, this allegation is denied and dismissed with prejudice.

### III. Prosecutorial Misconduct

#### 1. *Brady* Violations<sup>6</sup>

Applicant alleges Black committed Brady violations by withholding the criminal record of the CI, Greg Allison's supplemental report, and field drug tests allegedly performed at the scene.

Trial Counsel testified she filed a Brady / Rule 5 motion in this case, and that the State was generally compliant with this motion. Trial Counsel testified there was a misunderstanding regarding the CI's criminal history, but Black provided the defense with the CI's criminal history prior to the start of trial as soon as the error was discovered. Trial Counsel testified she was able to review the criminal history and question the CI accordingly. Trial Counsel also testified Black provided Greg Allison's supplemental report in response to her Brady / Rule 5 motion. Trial Counsel testified she could not recall whether a field test was done on the drugs at the scene, and did not recall that being an issue in the case.

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<sup>6</sup> This section addresses all three claims of prosecutorial misconduct.

Black testified the State was compliant with Trial Counsel's Brady / Rule 5 violation, and continued to provide discovery throughout the trial as it became available. Black testified he initially inadvertently put the criminal record of another CI in Applicant's case file but remedied the error immediately upon realizing that the criminal history provided was not the correct one. Black testified he provided the correct criminal record to the defense immediately following pre-trial motions, and that Trial Counsel had time to review the criminal record. Black testified he recalled Trial Counsel questioning the CI about her criminal history during cross-examination. Black testified he did not recall a field test being done in this case, but even if a field test had been done in this case, the drug evidence would have been subsequently tested by SLED's laboratory analysts. Black testified that even if SLED did not specifically test the drugs contained in each of the bags recovered by law enforcement, SLED had tested enough of the bags to support the trafficking charge. Black testified the SLED analyst tested the drugs contained in four of the Ziploc bags contained in exhibit 1.1, and each bag tested positive for methamphetamine, totaling 13.51 grams of methamphetamine. Therefore, according to Black, even if SLED had not tested the remaining bags, there was still enough methamphetamine tested to support Applicant's indictment for trafficking in methamphetamine, of 10 grams or more, but less than 28 grams.

This Court finds the testimony of Trial Counsel and Black very credible. Both Black and Trial Counsel testified the defense received both documents in a timely manner, which is reflected in the trial transcript. (Trial Tr. 85-86). Trial Counsel was able to review each of these documents and cross-examine the applicable witness accordingly. Therefore, based on the aforementioned test set forth in Gibson<sup>7</sup>, Applicant has failed to establish a Brady violation occurred. Accordingly, this Court finds Applicant has failed to establish a Brady violation.

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<sup>7</sup> Gibson v. State, 334 S.C. 515 (1999).

## CONCLUSION

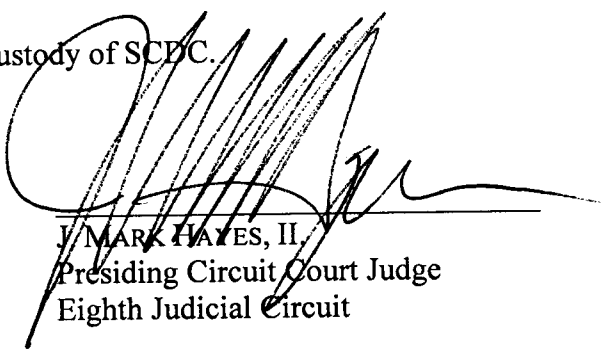
Based on the foregoing, this Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant relief pursuant to the Uniform Post Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10 to -160. Neither Trial Counsel nor Appellate Counsel were deficient in any manner regarding their performance, nor was Applicant prejudiced by either counsel's representation. Additionally, Applicant failed to meet his burden as to his prosecutorial misconduct claims. Accordingly, all allegations are denied and dismissed with prejudice.

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 (providing the appropriate procedure to perfect an appeal). 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. Further, Rule 71.1(g), SCRCP, 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 Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

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

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice;
2. Applicant shall be remanded to the custody of SCDC.

**AND IT IS SO ORDERED.**

  
J. MARK HAYES, II  
Presiding Circuit Court Judge  
Eighth Judicial Circuit

April 28, 2020