RECEIVED

Sep 08 2020

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

---

PETITION FOR CERTIORARI FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge
The Honorable Frank R. Addy, Jr., Trial Court Judge

---

Appellate Case No. 2020-000530

---

MAUNWELL ERVIN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

---

# PETITION FOR A WRIT OF CERTIORARI

---

ALAN WILSON
Attorney General

BRIANNA L. SCHILL
Assistant Attorney General
S.C. Bar No. 103380

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR PETITIONER

## INDEX

## PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

**I. The PCR court erred in finding Trial Counsel was ineffective for failing to object to the jury charge which told the jury they may infer knowledge and control over the drugs if the defendant had knowledge and control over the premises where the drugs were found, where the jury charge was legally proper under South Carolina case law and the South Carolina constitution and where the charge did not eliminate the *mens rea* requirement, where Trial Counsel successfully requested a mere presence charge, and where Ervin was not prejudiced by any alleged deficiency.**

**II. The PCR court erred in finding that Trial Counsel was ineffective for failing to object to various alleged expert testimony, where the testimony was in fact not testimony that required an expert to testify, and where Trial Counsel did not object to the testimony based on a reasonable trial strategy, and where Ervin was not prejudiced by any alleged deficiency.**

**III. The PCR court erred in finding that Trial Counsel was ineffective for failing to object to a statement made by the Solicitor, where the statement was not improper, where the statement did not violate Ervin's due process rights, where Trial Counsel articulated a reasonable trial strategy for not objecting to the statement, and where Ervin was not prejudiced by any alleged deficiency.**

## STATEMENT OF THE CASE

The Greenwood County Sheriff's Department received information that illegal narcotics were contained within a residence ultimately determined to be rented by Ervin. (App. 172, l. 10-14). Law enforcement obtained a search warrant to search the residence. (App. 172, l. 10-14). Ervin's name was the only name to appear on the lease application. (App. 161-162). According to the rental agreement, the only individuals listed as residents in the home were Ervin and his son. (App. 164, l. 10-15).

On December 9, 2010, officers from the Greenwood Drug Enforcement Unit and the Greenwood Special Weapon and Tactical (SWAT) team executed the lawful search warrant on Ervin's rented residence. (App. 173, l. 1-10). Another individual named Benoit Bush was present during the search; however, Bush did not reside at the residence and was not charged in relation to this incident. (App. 193, l. 16-25).

During the lawful execution of the search warrant, Greenwood County officers found marijuana, pills, cocaine, and a firearm throughout the residence. Marijuana was located in one of the kitchen cabinets, and marijuana and pills were also located in a kitchen drawer. (App. 187, l. 7-10; 235). Crack cocaine was also discovered in a potato chip can located in the kitchen. (App. 189; 235). After searching the kitchen, officers searched a bedroom in the residence and ultimately found cocaine and marijuana inside a hollow bedpost. (App. 190).

Evidence found at the residence included documents pertaining to an individual named Brent Ervin. (App. 203). Trial Counsel questioned law enforcement officers about the documents found in the home pertaining to Brent Ervin to establish doubt as to whether the drugs belonged to Ervin. (App. 213-215, 226-227).

In March 2011, the Greenwood County Grand Jury indicted Ervin for trafficking in cocaine base, 100 to 200 grams (2011-GS-24-785), trafficking in cocaine base within proximity of a school or park (2011-GS-24-786), possession of marijuana with intent to distribute (2011-GS-24-783), possession with intent to distribute marijuana within proximity of a school or park (2011-GS-24-784), possession of a controlled substance (2013-GS-24-293), and possession of a weapon during the commission of a violent crime (2011-GS-24-0708). Lauren Taylor, Esquire (Trial Counsel), represented Ervin. Solicitor David Stumbo and Assistant Solicitor Aaron Taylor of the Eighth Circuit Solicitor's Office prosecuted the case.

In January 2013, Ervin first went to trial on these charges. At the conclusion of this first trial, Ervin was acquitted on the possession of a firearm charge, and the jury was unable to reach a verdict on the remaining charges.

On July 23-24, 2013, Ervin proceeded to a jury trial on the remaining charges: trafficking in cocaine base (2011-GS-24-785), trafficking in cocaine base within proximity of a school or park

(2011-GS-24-786), possession with intent to distribute marijuana (2011-GS-24-783), possession with intent to distribute marijuana with proximity of a school or park (2011-GS-24-784), and possession of a controlled substance (2013-GS-24-293). The jury convicted Ervin of possession of a controlled substance, possession with intent to distribute marijuana, and the possession with intent to distribute marijuana within the proximity of a school or park. The jury was unable to reach a verdict as to the trafficking and trafficking proximity charges[1].

Ervin filed a notice of appeal was an appeal was perfected by the filing of an *Anders*[2] brief by Appellate Defender Robert Pachak. In an unpublished opinion, the South Carolina Court of Appeals dismissed Ervin's appeal. *State v. Ervin*, 2014-UP-427 (filed November 26, 2014). The Remittitur was sent December 12, 2014.

On November 30, 2015, Ervin filed his initial PCR application. Ervin subsequently amended his application on June 1, 2017. The issues before the Court were as follows:

1. Was Trial Counsel ineffective in failing to object to a jury charge that impermissibly told the jury they may infer knowledge and control over the drugs if the defendant had knowledge and control over the premises where the drugs were found?
2. Was Trial Counsel ineffective in failing to object to a jury charge that impermissibly defined constructive possession that effectively eliminated a *mens rea* as to the possession of the other drugs?
3. Was Trial Counsel ineffective in failing to object on Double Jeopardy grounds to the consecutive sentence for possession with intent to distribute marijuana within proximity to a school that was

[1] Ultimately, Ervin appeared before the Honorable Eugene C. Griffith, Jr., and pled guilty to the lesser included offense of trafficking in cocaine (28-100 grams, 2nd offense). Pursuant to a recommendation, Ervin was sentenced to the mandatory minimum term of imprisonment for seven years. As a result of the guilty plea, the trafficking proximity charge (2011-GS-24-786) was dismissed. Ervin did not file a notice of appeal. Ervin subsequently filed a PCR application to challenge the conviction resulting from this plea. Relief was granted and the State filed a timely Motion to Reconsider Pursuant to Rule 59(e) and subsequent Notice of Appeal. The appeal is pending before this Court. (Lower Court Case No. 2017-CP-24-0754; Appellate Case No. 2020-000574).

[2] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

consecutive to the charge of possession with intent to distribute marijuana?

4. Was Trial Counsel ineffective in failing to object to the opinion testimony of several law enforcement offices when none of them was ever qualified as an expert?
5. Was Trial Counsel ineffective in failing to object to the closing argument of the prosecuting attorney when the argument expresses his personal opinion as to the credibility of the officers involved?

On October 31, 2016, the State filed its Return. A hearing was held on March 2, 2018, before the Honorable J. Mark Hayes, II. Ervin was represented by C. Rauch Wise, Esquire. By Order dated August 27, 2018, and filed September 13, 2018, the PCR court found: (1) "Trial Counsel was ineffective for failing to object to the jury charge impermissibly told the jury they may infer knowledge and control over the drugs if the defendant had knowledge and control over the premises where the drugs were found"; (2) Trial Counsel was ineffective for "failing to object to a jury charge that impermissibly defined constructive possession that effectively eliminated a *mens rea* as to the possession of the other drugs"; (3) Trial Counsel was ineffective for "failing to object on Double Jeopardy grounds to the consecutive sentence for possession with intent to distribute marijuana within proximity to a school that was consecutive to the charge of possession with intent to distribute marijuana"; (4) Trial Counsel was ineffective for "failing to object to the opinion testimony of several law enforcement offices when none of them was ever qualified as an expert"; and (5) Trial Counsel was ineffective for "failing to object to the closing argument of the prosecuting attorney when the argument expresses his personal opinion as to the credibility of the officers involved."

The State filed a timely Motion to Reconsider Pursuant to Rule 59(e). A hearing on the State's motion was held on October 1, 2019. C. Rauch Wise, Esquire, represented Ervin. By Order dated February 14, 2020, Judge Hayes granted the State's motion in part, only amending its order to reflect that Trial Counsel was not ineffective for failing to raise the double jeopardy

argument. The PCR court denied the State's motion to reconsider as it relates to the remaining arguments. The State filed a timely Notice of Appeal.

## STANDARD OF REVIEW

In PCR matters, the standard of review depends on the specific issue involved. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). Appellate courts will uphold a PCR court's findings of fact if there is any probative evidence in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

## ARGUMENT

**I. The PCR court erred in finding Trial Counsel was ineffective for failing to object to the jury charge which told the jury they may infer knowledge and control over the drugs if the defendant had knowledge and control over the premises where the drugs were found, where the jury charge was legally proper under South Carolina case law and the South Carolina constitution and where the jury charge did not eliminate the *mens rea* requirement, where Trial Counsel successfully requested a mere presence charge, and where Ervin was not prejudiced by any alleged deficiency.[3]**

The PCR court found Trial Counsel was ineffective for failing to object to the following jury charge:

> "To prove possession the state must prove beyond a reasonable doubt that the defendant had both the power and intent to control the disposition or use of the crack cocaine and/or marijuana. Possession may be either actual or constructive. Actual possession means that the drugs were in actual physical custody of the defendant. **Constructive possession means that the defendant had dominion and control, or the right to exercise dominion and control, over either the crack cocaine**

[3] The PCR court made separate findings regarding the jury charge: (1) the charge was not supported by South Carolina law and violated Section V, § 21 of the Constitution of South Carolina and (2) the jury charge eliminated the *mens rea* requirement as to the possession of the drugs. However, because Petitioner's arguments apply to both findings, Petitioner has addressed both findings in Part I.

> **and/or the marijuana itself, or the property on which the drugs were found. Again, mere presence at the scene where the drugs were found is not enough to prove possession. The defendant's knowledge and possession may be inferred when the substance is found in the property under the defendant's control, however this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case and be given the weight you decide it should have."**

(App. 387, l. 12-388, l. 4).

The PCR court's Order indicates Trial Counsel provided ineffective assistance of counsel by failing to object to this charge because: (1) the charge is not supported by South Carolina case law, (2) the charge constitutes a judge's impermissible comment regarding a fact of Ervin's case, thereby violating Article I, § 21 of the Constitution of the State of South Carolina, and (3) the jury charge impermissibly eliminated the *mens rea* requirement. However, the PCR court erred in this finding because the jury charge is a proper jury charge pursuant to valid, controlling case law held by this Court. The jury charge does not comment on the facts of the case such that it violates the Article I, § 21 of the South Carolina Constitution, nor does the charge eliminate the *mens rea* requirement. Therefore, any finding of ineffectiveness necessarily improperly finds that Trial Counsel must be clairvoyant. Accordingly, this Court should grant this Petition and reverse the PCR court's erroneous grant of relief.

*The Jury Charge is Proper, And Therefore, Trial Counsel Cannot Be Deficient For Not Objecting to the Jury Charge*

The PCR court erred in its finding because this jury charge was and remains good law in South Carolina. This charge is directly from the South Carolina Judicial Department's Circuit Court standard jury charge book and simply defines constructive possession. *State v. Adams*, which is controlling precedent from this Court and has not been overturned, is dispositive of this exact issue, holding:

> **The proper charge on constructive possession** is to instruct the jury that the

> defendant's knowledge and possession may be inferred if the substance was found on premises under his control. *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981); *State v. Brown*, 267 S.C. 311, 227 S.E.2d 674 (1976). The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence.

*State v. Adams*, 291 S.C. 132, 135–36, 352 S.E.2d 483, 486 (1987) (emphasis added). Furthermore, the Court held in *State v. Heath*, "In order to prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control…The defendant's knowledge and possession may be inferred if the substance was found on premises under his control." *State v. Heath*, 370 S.C. 326, 329–30, 635 S.E.2d 18, 19 (2006).

The PCR court's order essentially attempts to hold *Adams* is no longer controlling law, which the PCR court does not have the authority to do given that *Adams* is valid, controlling law of this Court. Moreover, even if this Court were to decide in the future that *Adams* is no longer controlling law, this would not support a finding of constitutional ineffectiveness as any finding of constitutional ineffectiveness would require Trial Counsel to be clairvoyant. Clairvoyance is not a requirement of defense counsel. *Harden v. State*, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004). Trial Counsel simply cannot be ineffective for failing to object to the jury charge when the jury charge given was supported directly by South Carolina case law, and Trial Counsel is not required to be clairvoyant.

In its Order, the PCR court took particular issue with *State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987). The PCR court appears to acknowledge the oft quoted language from *Adams* that: "The proper charge on constructive possession is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on premises under his control." However the PCR court indicated this statement is only supported by a citation to *State v. Hudson*, 277 S.C. 200, 284 S.E.2d 773 (1981), where *Hudson* itself does not support such a

charge. The PCR court found *Hudson* merely held that if a defendant is exercising dominion and control over the premises, then the case should be submitted to the jury, not that the inference should be charged to the jury when submitted. However, the PCR court has misconstrued the relevant cases.

*Hudson* cites to *State v. Ellis*, in which this Court stated: "Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession." *State v. Ellis*, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974). In *Adams*, this Court put an end to the practice of trial courts using a modification of the *Ellis* directed verdict inference language to charge the jury that items "must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary." *Adams*, 291 S.C. at 135, 352 S.E.2d at 486. This Court held this instruction impermissibly shifted the burden of proof to the appellant to disprove possession, but then corrected this problem by directing trial courts to charge both the inference and that it is merely permissive. *Id.* at 135-36, 352 S.E.2d at 486. Again, this is precisely what the trial court did in Ervin's case.[4] (App. 387 – 388). *See also State v. Neva*, 300 S.C. 450, 452, 388 S.E.2d 791, 792 (1990) ("Evidentiary presumptions must be charged as permissive inferences with specific instructions that the jury may accept or reject them.").

The PCR court also justified its decision by deciding the jury charge is similar to the federal statutory presumption of knowledge of illegal importation from the mere fact that the defendant

[4] The trial court charged the jury: (1) that they *may* make such an inference and (2) "however this inference is simply an **evidentiary fact to be taken into consideration by you** along with the other evidence in this case and **be given the weight you decide it should have**." (App. 388, 1-4).

possessed a small amount of marijuana, a presumption rejected by the United States Supreme Court (USSC) in *Leary v. United States*, 395 U.S. 6 (1969). The PCR court found the inference charge should similarly be rejected because such information is not within the specialized judicial competence or completely commonplace. However, the rationale of *Leary* does not apply in the instant case.

In *Leary*, the USSC considered whether a person in possession of marijuana could be inferred to know its origin and whether it was imported or domestically grown. The Court in *Leary*, after considering numerous sources, found: "In short, it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana." As a result, the *Leary* Court found an inference that being in possession of marijuana supported a conclusion the marijuana was known to be imported was improper.

*Leary* is clearly distinguishable from the current case. In this case, the jury is not asked to make a huge inferential leap that someone in possession of a substance knows whether it was imported or created domestically. Instead, the inference in the instant case merely asks the jury to rely on common sense to determine that a person in control of the property on which the substance is found can be inferred to know of the existence of that substance and possess that substance.

Moreover, in this particular case, as Trial Counsel requested, Ervin received an inference immediately before the one he complained the State improperly received. The jury was specifically charged: "Again, mere presence at the scene where the drugs were found is not enough to prove possession." (App. 387). The two charges given together form a balance and instruct the jury on its rule in considering the evidence. Neither charge is appropriate without the other. The charge at issue in the current case does not improperly comment on the facts, weigh the evidence, or isolate one type of evidence above others. Instead, it merely provides instruction to the jury on

how to use the doctrine of constructive possession. This charge no more comments on a fact or isolates a particular set of facts than does the mere presence charge which immediately proceeded it in the judge's instructions. Both the mere presence and the inference charge are instructions for the jury on how to use evidence, similar to reasonable doubt instructions, the instructions regarding direct versus circumstantial evidence, and instructions explaining the jury's role in weighing the evidence and determining credibility of the witnesses.[5] These are present to enlighten the jury and aid it in arriving at a correct verdict; they do not improperly comment on the facts, weigh the evidence, or provide a confusing or improper charge on the law.

The PCR court also found Trial Counsel was ineffective for failing to object to the jury charge because the jury charge violated the Constitution of South Carolina for impermissibly commenting on the facts of Ervin's case. However, the PCR court erred in its finding because the jury charge is not an impermissible comment on the facts, and even if this Court determined in the future this charge violates the South Carolina constitution, no clearly established controlling law making such a finding existed at the time of Trial Counsel's representation of Ervin. Accordingly, Trial Counsel was not ineffective, as any finding of ineffectiveness once again would impermissibly require Trial Counsel to be clairvoyant of the law. Accordingly, this Court should grant this Petition and reverse the PCR court's erroneous grant of post-conviction relief.

In *Norris v. Clinkscales*, 47 S.C. 488, 25 S.E. 797 (1896), this Court directly confronted the newly amended Constitution and what it meant when it indicated: "Judges shall not charge juries in respect to matters of fact, but shall declare the law." First, the Court considered what was meant by the long-standing portion of the provision that "Judges shall not charge juries in respect

[5] To the extent this Court found the permissive inference regarding knowledge and possession to be improper, the Court would have to find the mere presence charge improper because they are both the same type of charge providing the jury with the same type of explanation and instruction.

to matters of fact." This Court, referred to prior cases including *Moore v. Columbia & G.R. Co*., 38 S.C. 1, 16 S.E. 781 (1892), which explained:

> What is meant by the judge charging upon the facts? It seems to us it may be said to occur when, in the progress of a trial, the circuit judge conveys, by word, his opinion upon the sufficiency or insufficiency of certain testimony, in determining by the jury of some fact at issue between the parties litigant. It must be by charge; that is, oral or written statements of the judge to the jury. It must be an opinion on some matter of fact. It must be such an expression of opinion on a matter of fact that thereby the jury are made to know what his estimate is of the truth or falsity of some matter in testimony. And, lastly, such expression by the judge must relate to some matter of fact at issue between the parties.

*Moore v. Columbia & G.R. Co.,* 38 S.C. 1, 16 S.E. 781, 791 (1892). This is similar to the determination made by this Court in *State v. Cheeks,* 401 S.C. 322, 737 S.E.2d 480 (2013), that indicating one fact is "strong evidence" of another improperly weighs the evidence and is an expression of the trial court's opinion on the matter. This Court in *Norris* went on to state: "A judge violates this provision ["Judges shall not charge juries in respect to matters of fact"] when he expresses in his charge his **own opinion** upon the force and effect of the testimony, or of any part of it, or intimates **his views** of the sufficiency or insufficiency of the evidence in whole or in part." *Norris*, 47 S.C. at ___, 25 S.E. at 806 (emphasis added). In Ervin's case, the instructions did not provide the trial court's opinion or views. Instead, they merely explained to the jury how to use evidence if it found that evidence existed.

Significantly, *Norris* speaks directly to the type of charge in this case. This Court stated:

> We therefore conclude and hold that as it would be impossible to declare the legal principles involved without some state of facts, actual or hypothetical, it was the intention of the framers of the new constitution, in amending section 26, art. 4, that the trial judge, in charging the law of the case, should lay before the jury that law as applicable to a supposed state of facts, but that in so doing he should carefully avoid repeating the evidence on the facts at issue, making no statement of the testimony either in whole or in part. We are clearly of the opinion that under section 26, as it now reads, a judge

> may, in declaring the law applicable to the case, base that law upon hypothetical findings of fact by the jury, and instruct the jury that, **if they believe so and so from the evidence they have heard, then such and such will be the legal result**.

*Id*. at 809-810. This allowed instruction is exactly the type of inference presented in this case. It does not comment on the actual facts, but instead tells the jury if they believe certain facts to be the case, then they can infer other facts from them and use those for whatever evidentiary purpose they desire.

The trial court properly gave an inference charge in this case. The charge in the instant case was entirely correct and reasonable as a statement of law. It is entirely consistent with *Hudson* and *Adams*, and it is a constitutionally correct version of the charge approved in *Ellis*. The charge was not a comment on the facts and was exactly the type of charge contemplated by this Court very shortly after the South Carolina Constitutional provision was amended. Therefore, as discussed above, any finding of ineffectiveness requires Trial Counsel to be clairvoyant of future legal jurisprudence based on novel legal arguments. Once again, Trial Counsel is not required to be clairvoyant. Trial Counsel simply cannot be deficient for failing to object to a proper jury charge directly supported by valid, controlling law. Accordingly, this Court should grant this Petition and reverse the PCR court's erroneous grant of post-conviction relief.

In its Order, the PCR court found that the jury charge altered the *mens rea* requirement. However, as discussed above, the charge was a proper jury charge consistent with South Carolina law and the South Carolina constitution. Additionally, the charge is consistent with other state's jury charges of constructive possession.

Trial Counsel testified she did not believe the charge was objectionable as the jury charge simply provided the proper legal definition of constructive possession. (App. 485). Trial Counsel also testified that based on *State v. Heath*, she did not believe the jury charge was improper. (App.

486). Trial Counsel also testified she requested a mere presence charge, which was charged by the trial court. As discussed above, the jury charge is proper under established South Carolina law. *State v. Heath*, 370 S.C. 326, 329–30, 635 S.E.2d 18, 19 (2006) ("In order to prove constructive possession, the State must show a defendant had dominion and control, or the right to exercise dominion and control…The defendant's knowledge and possession may be inferred if the substance was found on premises under his control.").

Trial Counsel's assessment was correct. The charge given by the trial court was a full and correct statement of law. It specifically instructed the State had the burden of proof and must prove its case beyond a reasonable doubt. It then defined constructive possession in the way this Court and other courts have done for many years. Nothing in the charge altered the elements the State was required to prove in order to convict Ervin of any crime related to possession of the drugs.

This Court has made the same statement made by the trial court: "[C]onstructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs were found." *Ellis*, 263 S.C. 12, 22, 207 S.E.2d 408, 413 (1974) (citing *State v. Perry*, 516 P.2d 1104 (Wash. App. 1973), *overruled on other grounds by State v. Adams*, 291 S.C. 132, 352 S.E.2d 483 (1987). This Court has made the statement previously in defining constructive possession. *See State v. Burgess*, 408 S.C. 421, 440, 759 S.E.2d 407, 417 (2014) ("constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found."); *State v. Ballenger*, 322 S.C. 196, 199, 470 S.E.2d 851, 854 (1996) ("Actual possession occurs when the drugs are found to be in the actual physical custody of the person charged with possession, while constructive possession occurs when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs are found.").

Other courts from around the country have similarly defined constructive possession. *See State v. Withrow*, 8 S.W.3d 75, 80 (Mo. 1999) ("Constructive possession requires, at a minimum, evidence that the defendant had access to and control over the premises where the materials were found."); *People v. Warren*, 55 N.E.3d 117, 132 (Ill. App. 2016)("Actual possession requires actual physical dominion over the contraband, while constructive possession is established where a defendant has exclusive control of the premises in which the contraband is found."); *Williams v. State*, 154 So. 3d 426, 428 (Fla. Dist. Ct. App. 2014)(internal citations omitted) ("Actual possession exists where a defendant has physical possession of contraband. Constructive possession exists where a defendant does not have actual physical possession of contraband but knows of its presence on or about his premises and has the ability to exercise dominion and control over it."); *State v. Dues*, 24 N.E.3d 751, 756 (Ct. App. Ohio 2014) ("Constructive possession is also sufficient to prove possession. Possession may not be inferred from mere access to the thing; however, a person constructively possesses a thing or substance when he knowingly exercises or is able to exercise dominion and control over the thing or substance or over the premises on which the thing or substance is found or concealed, even though the thing or substance is not in his physical possession."); *State v. Carter*, 157 P.3d 420, 423–24 (Wash. App. 2007) ("Possession may be actual or constructive"; constructive possession means the person has "dominion or control over [the firearm] or over the premises where the firearm [is] found.").

The charge given, when viewed as a whole, properly instructed the jury that the State has to prove possession, including Ervin's knowledge of the drugs, and that one means of establishing possession is through constructive possession. The trial court properly defined constructive possession for the jury to distinguish it from actual possession, and it did so in a manner entirely

consistent with many years of case law from this Court. Accordingly, the jury charge was legally proper, and therefore, Trial Counsel was not deficient for not objecting to the charge.

*Ervin Was Not Prejudiced by Any Alleged Deficiency*

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; *Harrington*, 562 U.S. 86, 104, 131 S.Ct. 770, 788 (2011).

Moreover, while the PCR court's Order does not explain how Ervin was prejudiced by the jury charge, Ervin cannot be prejudiced by a proper jury charge. Even if the jury charge was improper, nothing in the record supports the PCR court's conclusory finding that "[Trial Counsel's] failure to object was prejudicial to [Ervin]." Accordingly, Trial Counsel was not deficient, nor was Ervin prejudiced by any allege deficiency, and therefore, this Court should grant certiorari and reverse the PCR court's grant of PCR relief.

**II. The PCR court erred in finding that Trial Counsel was ineffective for failing to object to various alleged expert testimony, where the testimony was in fact not testimony that required an expert to testify, where Trial Counsel did not object to the testimony based on a reasonable trial strategy, and where Ervin was not prejudiced by any alleged deficiency.**

In its Order, the PCR court found Trial Counsel was ineffective for failing to object to various portions of testimony, which Ervin contended required an expert witness. However, Trial Counsel was not and could not be deficient because the testimony in question was not opinion

testimony that required an expert testify and because Trial Counsel testified that she declined to object based on her reasonable trial strategy.

Trial Counsel was not and could not be deficient for failing to object to testimony that did not require witnesses to be qualified as experts, and where Trial Counsel testified as to a reasonable trial strategy. Pursuant to Rule 701 of the South Carolina Rules of Evidence, if the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. Notably, "Rule 701 does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences." *United States v. Hill*, 643 F.3d 807, 841 (11th Cir. 2011). Expert opinion testimony is generally not admissible when the matter is within the jury's common knowledge or range of experience. *McCown v. Muldrow*, 91 S.C. 523, 74 S.E. 386 (1912); *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052 (4th Circuit 1986); *see* 32 C.J.S. Evidence §546(62), at 264 (1964) ("[E]xperts may not testify as to matters of common knowledge or experience.").

"[J]ust because [a lay witness's] position and experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered 'expert testimony.'" *United States v. LeCroy*, 441 F.3d 914, 927 (11th Cir. 2006). Lay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses. *Id.* Indeed, law-enforcement officers can testify as lay witnesses even though their expertise often makes them more efficient or productive at their jobs. *Id.*

*1. The Testimony Did Not Constitute "Expert Testimony"*

The PCR court found Trial Counsel was deficient for failing to object to various portions of alleged "expert testimony." However, the testimony did not require an expert to testify, and therefore, Trial Counsel cannot be deemed ineffective for not objecting to the testimony.

First, Ervin alleged that Trial Counsel was ineffective for failing to object to testimony from several officers indicating that drug dealers utilized digital kitchen scales when dealing narcotics.[6] Ervin alleged and the PCR court incorrectly found that the testimony violated Rule 701 of the South Carolina Rules of Evidence.

However, such testimony does not constitute opinion testimony requiring the use of an expert witness. No testimony from the law enforcement officers was outside of knowledge common to any person regardless of their involvement in law enforcement. It is common knowledge that scales may be used by drug dealers to weigh drugs. In fact, other courts have found that expert witness testimony was improperly admitted because an expert witness is not necessary to establish that drug dealers use digital scales. *See United States v. Castillo*, 924 F.2d 1227, 1233 (2nd Cir. 1991)[7] ("Simply stated, we are not convinced that New York jurors in today's climate. . .need an expert to enlighten them as to such elementary issues as the function of a scale. . . in a drug deal. The need is even less apparent when an eye-witness, as in this case [an officer], has already explained or described the relevant procedures and equipment."). Accordingly, the testimony provided regarding the use of scales did not warrant an expert witness, and therefore, Trial Counsel was not and could not be deficient for failing to object to such testimony.

---

[6] This paragraph refers to the following portions of testimony referenced in the PCR court's Order: (1) Trial Tr. P. 84, ll. 15-23 (App.186); (2) Trial Tr. 94, ll. 7-25 (App. 196); (3) Trial Tr. 141, l .21 – 142, l. 2 (App. 243- 244); (4) Trial Tr. 171, ll. 7-15 (App. 273); and (5) Trial Tr. 218, ll. 25 – 219, l. 5 (App. 320).

[7] Although this federal case arose out of federal drug violations, this decision was made under Rule 702 of the Federal Rules of Evidence, which is identical to Rule 702 of the South Carolina Rules of Evidence.

The PCR court also found Trial Counsel was deficient for failing to object to witness testimony in which the officer testified as to the amount and nature of the cocaine.[8] However, similar to the testimony regarding the scales, this is simply common knowledge that a jury can deduce without expert testimony. Naturally, drugs would need to be "broken into little pieces" in order to be sold to multiple consumers, and drug dealers require a larger amount of drugs to be able to supply their customers. As stated above, just because a lay witnesses position and experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered 'expert testimony.' *LeCroy*, 441 F.3d at 927 (2006). *See United States v. Jeri*, 869 F.3d 1247 (11th Cir. 2017) ("[The officer's] testimony was not improper expert testimony; it merely showed [his] familiarity with narcotics investigations and his experience interviewing drug couriers, which had been developed during his tenure as a law-enforcement officer."). Accordingly, this testimony does not constitute testimony that would require expert witnesses, and therefore, Trial Counsel was not ineffective for not objecting to the testimony.

The PCR court also found Trial Counsel was ineffective for failing to object to the following testimony during which an officer stated that "[b]ased on [his] training and experience and being at that location and hearing [Ervin]" Ervin made an "admission of guilt that he was taking responsibility for the things that were found inside the home." (App. 347, ll. 1-10.) This testimony does not constitute improper opinion testimony that would require the officers to have been qualified as an expert. *See State v. Jones*, 417 S.C. 319, 328, 790 S.E.2d 17, 22 (Ct. App. 2016) ("Expert testimony differs from lay testimony in that an expert is permitted to state an

[8] Specifically, this paragraph refers to the following testimony cited to in the PCR court's order: (1) "we refer to it as a cookie. A crack cocaine cookie. Also on the top you see some of it is broken into little pieces. Normally, we see it like that when it's ready for distribution." (Trial Tr. 87, ll. 15-25) (App. 189) and (2) "a narcotics user and dealer [possesses these types of drugs in these amounts]. Based on the pictures, it was ready to sell." (Trial Tr. 92, ll. 14-93, l. 1) (App. 194-195).

opinion based on facts not within his firsthand knowledge. . . a lay witness may only testify as to matters within his **personal knowledge** and may not offer opinion testimony which **requires** special knowledge, skill, experience, or training.")

Clearly, when reading the testimony in context, the State is asking the officer how he interpreted the statement Ervin made to him. The officer was testifying as to his interpretation of Ervin's statement, considering Ervin's tone, body language, and gestured, in combination with the officer's own knowledge of the evidence found and the circumstances of the case. Thus, clearly the testimony was rationally based on the officer's own perceptions. *See United States v. Parkhurst*, 865 F.3d 509, 515 (7th Cir. 2017) (explaining a detective's testimony about the interpretations he drew from a conversation with a defendant was "based on his perceptions of the conversation at the time it occurred" and characterizing such testimony as "classic Rule 701 lay-witness testimony"). Additionally, that perception-based testimony could have been helpful to the jury in better and more fully understanding Appellant's responses during the interview because the officer—unlike the jurors—was seated directly across from Ervin in the interview room and, therefore, was in the best possible position to evaluate and interpret her demeanor, statements, and gestures as she spoke with him. *See State v. Fripp*, 396 S.C. 434, 439-440, 721 S.E.2d 465, 467-468 (Ct. App. 2012) (finding the trial judge properly permitted two witnesses to offer lay witness opinion testimony identifying Fripp from surveillance footage based on their knowledge of him due to the fact the testimony was rationally based on their perceptions and could have aided the jurors by providing a better perspective of the evidence before them); *cf. Robinson v. United States*, 797 A.2d 698, 707 (D.C. 2002) ("Whalen's 'opinion' testimony was based on his personal observations of Harris' demeanor and on the fact that he had received contradictory information from another witness that Harris was outside, not inside, when the shooting occurred. The trial

judge could, and did, reasonably conclude that Whalen's testimony would be helpful to the jury because it explained why he questioned Harris a second time for information about Frank Blakeney's murder."). Furthermore, his impression and interpretation was based on his training, experience, and hearing the words first-hand, though such training and experience would not be *required*. Accordingly, the officers' testimony did not require them to be expert witnesses, and therefore, Trial Counsel was not deficient for not objecting to their testimony.

*2. Trial Counsel Articulated a Valid, Reasonable Trial Strategic Reason for Declining to Object*

Trial Counsel also articulated a valid, reasonable trial strategic reason for declining to object to the officers' testimony, and therefore, was not deficient for not objecting to the testimony. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992).

At the PCR hearing, Trial Counsel testified she strategically did not object to the testimony of law enforcement because she wanted to be able to challenge them on cross-examination to call into question their credibility. Trial Counsel also testified that she "temper[ed] her objections with what was going to irritate the jury and the judge." (App. 490, l. 1-3). Trial Counsel further testified she believed she had made her "point pretty sufficiently across through examination." (App. 490).

Trial Counsel completed a thorough cross-examination of the officers, even directly cross-examining the officers regarding the statement made by Ervin. (App. 337, l. 3-11; 347, l. 10-25). Accordingly, Trial Counsel was not deficient.

*3. Ervin Was Not Prejudiced By Any Alleged Deficiency*

Not only was Trial Counsel not deficient for declining to object to any of the above-mentioned testimony, Ervin was not prejudiced by any alleged deficiency. To prove prejudice, an applicant must prove 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 (quoting *Strickland*, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694.

As previously discussed the PCR court found Trial Counsel was ineffective for failing to object to various statements indicating that drug dealers typically utilize digital scales. Ervin has not proven prejudice as Ervin's charges were based on the possession and amounts of the drugs themselves, not the presence of a digital scale.

Additionally, as previously discussed, the PCR court found Trial Counsel was ineffective for failing to object to the officer's interpretation of Ervin's statement to law enforcement. Ervin failed to meet his burden as to prejudice because even Trial Counsel made the objection and the objection was sustained, the words of Ervin himself were still presented to the jury for them to decipher.

However, as to all of Ervin's "expert testimony" allegations, Ervin was not prejudiced as none of the statements constituted opinion testimony that required an expert witness. Moreover, even if the testimony did require the witnesses to be qualified as experts, they would have been admitted as experts in this case. *See Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252-53,

487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). In Ervin's case, the officers who testified contained the requisite knowledge and skill regarding narcotics cases, such that they would have been admitted as experts. Accordingly, Ervin was not prejudiced by any alleged deficiency, and therefore, this Court should grant certiorari and reverse the PCR court's erroneous grant of post-conviction relief.

## III. The PCR court erred in finding that Trial Counsel was ineffective for failing to object to a statement made by the Solicitor, where the statement was not improper, where the statement did not violate Ervin's due process rights, where Trial Counsel articulated a reasonable trial strategy for not objecting to the statement, and where Ervin was not prejudiced by any alleged deficiency.

The PCR court found that Trial Counsel was ineffective for not objecting to the following statement in the Solicitor's closing argument: "I'm proud to be their[9] solicitor and the job that they're doing here and the job that they did in this case." (App. 358, l. 17-19). However, Trial Counsel could not be deficient as the statement was not improper, and because Trial Counsel articulated a valid strategic reason for not objecting. Moreover, Ervin was not prejudiced by any alleged deficiency. Therefore, this Court should grant this Petition and reverse the PCR court's grant of post-conviction relief.

*Trial Counsel Was Not Deficient*

As an initial matter, Trial Counsel was not deficient for failing to object to a closing statement because the statement is not improper. A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury. *Smith v. State*, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810

[9] "Their" refers to the officers involved in Ervin's case.

S.E.2d 836 (2018) (citing *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *Matthews v. State*, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002). However, "[a] solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record." *Smith*, 375 S.C. at 523, 654 S.E.2d at 531-32 (quoting *Matthews* at 276, 565 S.E.2d at 768 (2002)). "A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." *Vaughn v. State*, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

It "is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). The relevant question is whether the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Smith*, 375 S.C. at 522; *Donnelly v. Christoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974).

Here, the Solicitor did not commit improper bolstering or vouching. The Solicitor made no personal assurances to the jury that would indicate the Solicitor's statement is based on information not known to them. The Solicitor never said "I believe them" or "trust me" or anything that would constitute improper vouching by making personal assurances based on information outside of the record.

Even if the statement was improper, it did not violate Ervin's due process rights. The comment did not manipulate or misstate the evidence, nor did it implicate other specific rights such as the right to counsel or the right to remain silent. *Darden*, 477 U.S. at 183, 106 S.Ct. at 2472. Accordingly, the statement did not infect Ervin's trial with unfairness as to make his

conviction a denial of due process, and therefore, Trial Counsel cannot be ineffective for not objecting to the proper statement.

Trial Counsel also could not be deficient because she articulated a reasonable trial strategy for not objecting to the Solicitor's statement. Based on the standard discussed in Part II, Trial Counsel articulated a valid strategic reason for not objecting to the Solicitor's statement. Trial Counsel testified at the PCR hearing that she did not object to this sentence because she had successfully discredited the officers and because she saw this as the solicitor trying to save face in front of the jury, and she previously testified that she was strategically tempering her objections with the judge and the jury in mind. (App. 488-492). She testified she believed objecting during closing arguments has a negative effect and she did not see this comment as an improper bolstering statement. Overall, based on Trial Counsel's testimony, it is clear she saw this as an attempt to repair the deficiencies from the officer's testimony and believed it actually reflected poorly on the prosecution. Accordingly, Trial Counsel cannot be deficient for not objecting to the Solicitor's statement.

*Ervin Was Not Prejudiced by Any Alleged Deficiency*

Not only was Trial Counsel not deficient, Ervin was not prejudiced by any alleged deficiency. As previously discussed, at no point did the Solicitor make a statement that would constitute improper vouching such as "I believe them" or "trust me." The statement was not improper, and therefore, Ervin cannot prove he was prejudiced by a proper statement. Even if the statement was somehow improper, Ervin has not met his burden as to prejudice, as the statement was one brief statement in an entire closing argument. *See State v. Tucker*, 324 S.C. 155 (1996) (Affirming conviction, in part, because the statement made in Solicitor's closing argument was "one isolated event in the entire argument."). Moreover, as discussed above, the statement did

infect Ervin's trial with unfairness as to make his conviction a denial of due process. Accordingly, Ervin was not prejudiced by any alleged deficiencies.

## CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests this Court grant certiorari and reverse the PCR court's grant of post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

BRIANNA L. SCHILL
Assistant Attorney General

BY: s/ Brianna L. Schill
Brianna L. Schill
S.C. Bar No. 103380
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

September 8, 2020

ATTORNEYS FOR PETITIONER