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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Greenville County
Letitia H. Verdin, Trial Judge
Brian M. Gibbons, Post-Conviction Relief Judge

S.C. SUPREME COURT

Appellate Case No. 2019-001338

ANTONIO EMERSON TATE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S COUNTERSTATEMENT OF ISSUES

I. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to request a pre-trial hearing pursuant to Neil v. Biggers to determine the admissibility of several out-of-court identifications of Petitioner by State's witnesses where none of the identification procedures were unduly suggestive, and accordingly, none of the out-of-court identifications would have been suppressed had counsel requested a Neil v. Biggers hearing.

II. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for agreeing not to explicitly question cooperating witnesses about the mandatory minimum sentence each faced for his or her originally indicted offenses where this very issue was already addressed on direct appellate review and deemed non-prejudicial to Petitioner, counsel thoroughly cross-examined each regarding the substantial benefit of a reduced sentence for cooperation, and the jury heard the mandatory minimum sentence through the testimony of one witness.

III. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for not arguing his sentence exceeded the maximum where Petitioner was appropriately sentenced upon his conviction for trafficking in methamphetamine (400 grams or more) and S.C. Code Ann. § 44-53-420 is inapplicable.

IV. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to object to purportedly improper questioning, where counsel used both instances to his benefit on cross-examination and there is no substantial likelihood the result of the proceeding would have been different had counsel objected.

V. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to object to testimony regarding bond hearing statements, where trial counsel utilized this testimony to show the co-conspirators had been discussing Petitioner's case and that the State had made outlandish statements without proper investigation at this bond hearing.

VI. The PCR court properly declined to apply a cumulative error analysis.

STATEMENT OF THE CASE

Petitioner Antonio Emerson Tate was indicted by superseding indictment by the South Carolina State Grand Jury for trafficking in methamphetamine (400 grams or more) (2011-GS-47-0007, Count 1) in violation of S.C. Code Ann. § 44-53-375(C)(5). The indictment arose out of a multi-year investigation into a methamphetamine trafficking ring throughout the Upstate.

On May 28, 2013, Petitioner proceeded to a jury trial in the Greenville County Court of General Sessions before the Honorable Letitia H. Verdin. R. Mills Ariail, Jr., Esquire, and David J. Farnham, Esquire, a member of the Georgia State Bar who was admitted *pro hac vice*, represented Petitioner. The jury convicted Petitioner as indicted. Judge Verdin sentenced Petitioner to twenty-five years imprisonment. Petitioner filed a motion for a new trial, arguing the trial court erred in denying his motion for directed verdict. Judge Verdin denied the motion.

Petitioner filed a timely notice of appeal and raised the following issues:

- I. Did the trial court err in submitting the case to the jury and denying the Motion for Directed Verdict where the State presented evidence of Trafficking in Methamphetamine 400 grams or more?
- II. Did the trial court commit reversible error by limiting cross examination of cooperating witnesses pleading to lesser charges, and no longer facing mandatory minimum on their initial charges, which were the same as Appellant was facing, and where cross was allowed as to receiving a substantial reduction in sentence and the possible sentence of the initial charge was ultimately communicated to the jury?
- III. Did the trial court err in permitting testimony by a witness with experience investigating methamphetamine cases about the organizational sale and distribution of methamphetamine?

Following briefing and argument, the South Carolina Court of Appeals affirmed Petitioner's conviction. State v. Antonio Emerson Tate, 2016-UP-291 (Ct. App. filed June 15, 2016).

Petitioner then sought post-conviction relief. Respondent filed its return, partial motion to dismiss, and motion for a more definite statement, and requested an evidentiary hearing. Petitioner, though counsel Susannah Ross, filed two amended applications. Respondent filed an

amended return and partial motion to dismiss on June 4, 2019. An evidentiary hearing was convened June 7, 2019, before the Honorable Brian M. Gibbons. At the evidentiary hearing, Petitioner proceeded forward on the fourteen claims as set forth in his second supplemental application. Petitioner testified on his own behalf and presented testimony from his children's mother Chastity Raines. Respondent presented trial counsels Mills and Farnham. Thereafter, Judge Gibbons denied and dismissed the application by order filed August 23, 2019. Petitioner filed a timely motion to alter or amend, which was summarily dismissed by Judge Gibbons.

STATEMENT OF FACTS

At Petitioner's trial, the State presented the testimony of eleven witnesses involved in the purchase of methamphetamine from Petitioner in Atlanta, Georgia for sale in South Carolina. Witnesses testified about traveling to Georgia to retrieve narcotics from Petitioner and how these transactions were initiated and conducted. The witnesses described in detail how to arrive at designated meet locations repeatedly used by Petitioner, and that Petitioner used different phone numbers. Witnesses also testified calling Petitioner to arrange deals for methamphetamine and recalled particular meet locations and some specific occurrences. Witnesses independently testified to the same locations used for the sale of the narcotics such as a Waffle House, a gas station, and Petitioner's residence. Witnesses testified to numerous and repeated purchases of methamphetamine in amounts greater than one would purchase for personal use, of tactics used in the sale of narcotics for future distribution involving large amounts of money such as "fronting", and the use of green dot cards. Witnesses also testified as to Petitioner's knowledge of witnesses residing in South Carolina and to seeing him on a least one occasion in South Carolina. Some of the testifying witnesses were charged as co-conspirators and were initially charged with the same crime as Petitioner, but had accepted plea agreements to lesser charges.

The court permitted defense counsel to inquire as to the possible sentence on the lesser charges and the substantial benefit in sentence reduction. One witness explicitly stated he was facing twenty-five to thirty years imprisonment for the original charges. Nine witnesses independently identified Petitioner in a photo line-up at different times. Witnesses also identified Petitioner in court as the individual from whom large amounts of methamphetamine were purchased.

The State presented co-conspirator Wendy Lollis, who testified she began using methamphetamine when she was 18 or 19 years old, was an addict, and dealt methamphetamine for five or six years prior to trial. She also admitted she pleaded guilty to charges related to the conspiracy alleged in this case after reaching a plea deal with the State and that if convicted of the original charges she would be facing a considerably higher amount of time. (App. 54-57).

Lollis testified David Moore purchased an ounce or more of meth at a time from a source in Atlanta and she identified Petitioner in court as Moore's source. She testified to traveling to Georgia to purchase meth from Petitioner and taking others to meet him. Lollis testified she introduced a number of other individuals to Petitioner, including Jason Griffin, and they purchased meth from him as well beginning in early 2009. Lollis testified Petitioner knew she and the others were from South Carolina. (App. 52-64).

Lollis testified Petitioner did not sell less than an ounce at a time. She testified she purchased meth from Petitioner with Amy Cagle on one occasion and that Paul Simon and Anthony Gambrell also purchased meth from Petitioner an ounce at a time. She also testified she knew Javin and Nate were in a drug relationship with Petitioner. (App. 69-74).

Lollis cooperated with law enforcement. She testified she was shown a lineup at the probation office in September 2011 and officers asked her if she could recognize anyone in the

six photo lineup. She testified officers did not suggest who she should identify in any way. Lollis identified Petitioner as the man who sold her methamphetamine in Atlanta. (App. 75-78, 80).

Lollis says she went to Georgia between ten and fifteen times. While she did not provide an address, she stated Petitioner provided directions to her and she recalled going to two or three apartment buildings in Indian Trail and the exit number 101. Lollis acknowledged she did not know Petitioner's phone number, but stated that she could probably get it. (App. 88-90).

Lollis admitted receiving a "substantial reduction" in her sentence in exchange for her cooperation. She acknowledged she was initially charged with trafficking 400 grams or more of methamphetamine and she pled to the reduced charge of trafficking 28-100 grams with a recommended sentence of twelve to fifteen years. (App. 55-56, 99-101).

The State next presented Gary Jason Griffin, who incarcerated at the time of trial. Griffin testified he met Lollis and started dealing methamphetamine with her. Griffin testified about a month after he met Lollis, he went with Lollis and his ex-wife, Rachel Eades to Atlanta to meet Petitioner, where they purchased 28 grams of methamphetamine for \$1,400. After the transaction, Eades drove Lollis and Griffin back to South Carolina. (App. 113-126).

Griffin testified he later returned with Lollis and Eades to get an ounce of methamphetamine from Petitioner but received cocaine instead. Griffin, like Lollis, recalled a transaction at a Shell Gas Station. He testified Petitioner became more comfortable and started letting him come to an apartment, which was off the same exit as the Shell Station. Griffin stated he returned to Georgia to deal with Petitioner on fifteen to twenty additional times and he eventually began to make quarter-pound purchases from Petitioner, having initially purchased by the ounce. These transactions with Petitioner took place during a three-month time frame and on two occasions he purchased a half pound at Petitioner's apartment. (App. 127-147).

Griffin testified to seeing Petitioner in South Carolina at his house when he resided there with Eades. On this occasion, Griffin testified Petitioner brought a quarter ounce of methamphetamine for Griffin and, though he “can’t say for a fact,” Griffin believed Petitioner gave Lollis a quarter ounce, too. Griffin testified the meth recovered from his vehicle when he was arrested with Eades and Simmons came directly from Petitioner. (App. 147-154).

Griffin identified Petitioner in court as the individual from whom he purchased methamphetamine. Griffin cooperated with law enforcement after his arrest and identified Petitioner in a photo line-up. Specifically, Griffin testified Agent Brett Barwick with the Pickens County Sheriff’s Department showed him a six photograph lineup and asked him if he could recognize anyone as the person from whom he purchased methamphetamine in Atlanta. He testified law enforcement did not suggest who he should select and he was able to identify Petitioner as his methamphetamine supplier. (App. 155-160).

On cross-examination, Petitioner was questioned about the similarities between Petitioner and his twin. He also noted he met Petitioner at a Waffle House and he was told by Petitioner that Petitioner’s brother worked there. He further stated the individual with whom he dealt did not wear glasses. He also testified after his arrest he spoke with Petitioner in person and was sure Petitioner was the individual from whom he received methamphetamine. (App. 157-177).

Griffin admitting to pleading guilty for his involvement in this matter. He testified he was initially charged with conspiracy for trafficking 400 grams or more of methamphetamine and acknowledged pleading to trafficking 28-100 grams with a recommended sentence of fifteen to twenty years. When asked if he knew the sentencing range on the original charge, Griffin replied twenty-five to thirty years. (App. 171-173).

Eades testified Griffin introduced her to methamphetamine and she met Lollis in 2009 through Griffin. Eades stated she overheard Lollis tell Griffin she had a friend in Atlanta who could sell him inexpensive methamphetamine. Eades testified she went with Griffin to Georgia to buy methamphetamine at a Waffle House in January 2010. Eades stated she went with Griffin to Georgia on eight to ten other occasions to purchase methamphetamine. Eades testified the first transaction occurred at a Waffle House, while others occurred at the Shell Station and at an apartment. Eades provided directions to the apartment. She recalled a particular transaction at the Shell Station when Wendy, Jason, and Paul were there and provided details. Transactions were for an ounce or more of methamphetamine. One meeting took place at a strip bar and at that time they were purchasing 2 to 3 ounces. Eades identified Petitioner in court as the supplier of methamphetamine. (App. 182-207).

Eades acknowledged as a result of this investigation, she was charged with conspiracy to traffic 400 grams or more of methamphetamine. She entered a plea with a recommendation of seven to ten years and admitted she was initially exposed to a substantially higher sentence. Eades also admitted she committed felony child neglect and fraud. (App. 222-223).

Next, the State presented Christopher Bishop, who was working as a confidential informant. He admitted to being a former user of marijuana and hallucinogenic mushrooms with felony convictions for bank robbery and making a bomb threat. After completing six buys on other individuals, Bishop was to purchase meth from Petitioner in Atlanta. According to Bishop, he contacted Chad Ayers of the Greenville County Police Department Vice Squad, who “wired [him] up,” and gave him a thousand dollars to make the controlled purchase with another co-conspirator, Albie Nate Bashaw, with whom Bishop had previously conducted 2 undercover buys. Bashaw and Javin Adams had contacted Bishop to go to Georgia with her to get a

transmission from Petitioner. Bishop testified they never consummated the transaction; instead, they drove around for an hour and a half because Petitioner came to suspect an unmarked police car was following him. Bishop testified Petitioner eventually called off the transaction due to the purported police surveillance. (App. 274-305).

Sometime after this incident, Bishop identified Petitioner in a photographic lineup. Bishop testified he was shown “two or three” different pages of people and was asked to try to identify the person he met with in Georgia. He testified law enforcement did not suggest whom he should select in any way and he identified Petitioner. (App. 287-89).

The State presented Charles Javin Adams, who testified Chad Moore asked him to accompany him to Atlanta to help him get drugs from Petitioner. Adams traveled to Atlanta between eight and thirteen times to purchase meth from Petitioner, sometimes with Bashaw and sometimes with Moore. He testified during the time he was dealing with Petitioner, he tried to go every other day and the smallest amount he would purchase was an ounce. (App. 390-398).

Adams stated he would call Petitioner’s cellular phone when he wanted to make a deal, and, like Lollis, he testified Petitioner changed his telephone number several times. Adams testified that Petitioner came to Adam’s apartment in South Carolina on several occasions. Adams also testified about the unsuccessful controlled purchase with Bishop and that Petitioner told him to never send Bishop again, because Bishop had been “tailed.” (App. 404-411).

Adams testified he usually went to Petitioner’s house for the purchases. He also testified to the use of a green dot card for making purchases. He also testified on one occasion Petitioner “fronted” him an ounce and on another occasion brought an ounce to him at his residence in South Carolina. After he was sentenced to house arrest, he began sending Bashaw along with a driver named Norman Trebuchon to purchase the meth from Petitioner. (App. 396-404).

Adams later began working with law enforcement and became a confidential informant. Adams testified he was shown a lineup at the Southern Command Center and told to see if he could identify the drug dealer from Atlanta; he testified law enforcement did not suggest whom he should select. He identified Petitioner in a photo lineup and was certain that he bought methamphetamine from Petitioner and not his twin brother. (App. 412-416, 450).

Adams acknowledged to initially being charged in this case with trafficking 400 grams or more and to a pleading guilty to the lesser charge of trafficking 10 to 28 grams with a recommendation of three to six years. He also stated he would have been facing a significant amount of time if not for his cooperation. (App. 388-389, 429-431).

The State then presented Albie Nate' Bashaw, who testified she moved in with Javin Adams in July 2010 and they both sold methamphetamine at this time. Bashaw testified she took trips to Atlanta from July 2010 to January 2011 to secure methamphetamine and the amount varied between two ounces to four ounces. She testified she travelled to Atlanta an average of three times a week during this period. In total, Bashaw claimed she had dealt with Petitioner on twenty occasions over a period of about nine months. (App. 457, 469-472, 489).

Bashaw began cooperating with law enforcement in March 2011 and she provided information on her drug dealings and participated in undercover deals. In one such deal, she testified she, Adams, Officer Chad Ayers and Agent Brett Barwick attempted to arrange a controlled deal with Petitioner. However, the deal was unsuccessful and Petitioner told her he was no longer interested but would contact them in the future if he felt he could make some money off of them. Law enforcement showed Bashaw a photo lineup and asked her if she could identify anyone as the drug dealer from Atlanta. She testified law enforcement did not indicate whom she should select and that she was able to identify petitioner. (App. 479-88).

Bashaw acknowledged she was originally charged with trafficking 400 grams or more of methamphetamine. She testified the State substantially reduced her sentence exposure down to three to six years in exchange for her cooperation. (App. 495-496).

Charles Norman Trebuchon testified he has known Adams since he was a “kid” and admitted using methamphetamine with him. For a period of time, he lived with Adams and Bashaw. Trebuchon testified he would drive Bashaw to Atlanta for her to obtain methamphetamine from Petitioner and he would wait in the living room of Petitioner’s apartment while she made the purchase in the kitchen. He recalled specific instances and he took Bashaw approximately a dozen times. He also testified he went by himself twice on behalf of and at the direction of Adams purchase methamphetamine from Petitioner. Each of these trips ended in a purchase of “usually 4 ounces.” Trebuchon was never charged in this case and did not receive the benefit of a plea deal to a reduced sentence. He was shown a lineup by law enforcement and identified Petitioner. (App. 528-34, 542-43).

Warren Chastain testified he began purchasing methamphetamine to support his habit, but then purchased a sufficient quantity to sell. Chastain testified he drove from South Carolina to Atlanta with Brian Stegall to purchase methamphetamine. Upon arriving at a hotel room in Atlanta, he met Petitioner at a Waffle House, and then went with Stegall to a motel room where Stegall purchased methamphetamine from Petitioner and a “Hispanic guy” in the motel room’s bathroom using Chastain’s money, and Stegall then gave Chastain the two ounces of methamphetamine he had purchased. After this, Chastain returned to South Carolina to sell these two ounces. He testified he saw Petitioner once more at Griffin’s home in South Carolina, but did not know if Petitioner brought any methamphetamine to Griffin’s home. (App. 558-564).

Chastain acknowledged he pled guilty to a lesser charge for this crime, and that by doing so, he avoided a much larger sentence. Specifically, he pled guilty to a second offense of the trafficking of twenty-eight to a hundred grams of methamphetamine with a State recommendation of twelve to fifteen years. (App. 560).

Larry Anthony Gambrell testified he met Petitioner through Lollis, who took him to an apartment in Atlanta to purchase methamphetamine. He testified he went to Atlanta five or six more times and purchased two to four ounces of methamphetamine on each trip. Gambrell agreed to work for law enforcement and identified Petitioner in a photo lineup. Specifically, Gambrell testified Agent Barwick showed him a lineup, asked him if he could identify the drug dealer from Atlanta, and did not suggest whom he should select. Gambrell was serving time for Distribution of Methamphetamine unrelated to this case and was not indicted in this case nor did receive any deal related to this case. (App. 576-585, 590-92)

Norman Bergholm also testified for the State. He started purchasing methamphetamine from Adams once a week and met Petitioner at Adam's home during a birthday party. He testified he purchased methamphetamine from Petitioner on numerous occasions. Bergholm stopped purchasing from Petitioner because the product was "no good." Bergholm met with law enforcement in June of 2011 and was shown a photo lineup to see if he could identify the man who sold him methamphetamine. He testified officers did not suggest who he should select and he identified Petitioner in a photo lineup. (App. 605-615).

Bergholm testified he was serving prison time in Iowa for felony eluding and had other felony convictions. Bergholm was originally charged with trafficking methamphetamine 400 grams or more and pled guilty to trafficking twenty-eight to a hundred grams of

methamphetamine with a recommended a sentence of fifteen to eighteen years in exchange for his cooperation. (App. 601-602, 627).

Chad Dewayne Moore testified he bought methamphetamine from Griffin, whom he met through Lollis. Moore eventually met Griffin and Lollis' supplier, who he identified as Petitioner, at an apartment in Atlanta, where he bought an ounce of methamphetamine. He stated he drove back to Atlanta on two or three other occasions to purchase about an ounce of methamphetamine from Petitioner, who eventually stopped selling meth to him. He detailed these transactions, including taking exit 101 to meet Petitioner. (App. 633-637).

While in the county detention center on unrelated charges, Moore was approached by law enforcement and asked if he could identify the person who sold him drug from a photo lineup. He testified law enforcement did not suggest whom he should select and he was able to identify Petitioner. (App. 642-643). Moore acknowledged he was initially facing the same charge as Petitioner of trafficking Methamphetamine 400 grams and the possible penalty was up to thirty years. He also acknowledged that the State agreed to recommend a sentence of eighteen years, a substantial reduction, in exchange for his cooperation. (App. 651-653).

The State presented numerous law enforcement witnesses, including Lt. Henry Dale Campbell, Agent Brett Barwick, and Agent Ashley Asbill. Lt. Campbell testified he is employed by the Pickens County Sheriff's Office in the narcotics unit and has been with the Sheriff's Office for more than fifteen years. He explained how he conducts investigations and the use of confidential informants. (App. 232-33). Lt. Campbell used a confidential informant for a controlled purchase from Simmons on March 2010, for the investigation underlying this case. Eades and Simmons were present and methamphetamine was recovered. Lt. Campbell testified subsequent to the arrest of Simmons he learned that the methamphetamine came from Petitioner.

(App. 234-241). Agent Barwick testified he works as a narcotics officer for the Pickens County Sheriff's Office and he became involved in this investigation when another officer developed a confidential informant that was aware of several persons trafficking methamphetamine throughout Pickens and Greenville County. He said the investigation widened as he spoke to more confidential informants and others who would cooperate with him. Eventually, this process led to the source of the methamphetamine for this case, Petitioner. (App. 316-319). Agent Ashley Asbill of the State Law Enforcement Division testified and explained the general concept of the organizational makeup of a drug conspiracy. Asbill further testified the individuals indicted in this conspiracy were organized in the sense they all went to Atlanta to purchase methamphetamine from one source—Petitioner, and then sold substantial amount of methamphetamine in the upstate directly from Petitioner. Asbill testified Petitioner was the highest source in this group. (App. 664-665).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

On appeal, Petitioner asserts the PCR court erred in denying him relief as to five separate

claims of ineffective assistance of counsel. Petitioner asserts counsel was deficient in his representation and he was sufficiently prejudiced as to each of these five claims. As an alternative ground, Petitioner also asserts that if this Court should not find sufficient prejudice for relief on any of these five grounds alone, this Court should adopt a cumulative error analysis, wherein Petitioner can accumulate the prejudice stemming from each individual ground (insufficient to warrant relief on its own), and find the cumulative effect of counsel's performance sufficiently prejudiced Petitioner enough to grant a new trial. The PCR court properly considered the record in its entirety, listened to the evidence and arguments presented at the evidentiary hearing, and determined Petitioner did not meet his burden of establishing counsel was constitutionally ineffective as to any of his claims. Moreover, the PCR court properly refused to undertake a cumulative error analysis. These findings are supported by ample probative evidence and not premised on any errors of law.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result." Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at

117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 697. The function of the PCR court is to determine if “in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance” required of a criminal defense attorney.” Id. at 690. Although courts may not indulge “post hoc rationalization” for counsel’s decision-making that contradicts the available evidence of counsel’s actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a

“strong presumption” counsel’s attention to certain issues to the exclusion of others reflects tactics rather than “sheer neglect.” Yarborough v. Gentry, 540 U. S. 1, 8 (2003).

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.

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt

might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Id. at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86. “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)).

I. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to request a pre-trial hearing pursuant to Neil v. Biggers to determine the admissibility of several out-of-court identifications of Petitioner by State’s witnesses where none of the identification procedures were unduly suggestive, and accordingly, none of the out-of-court identifications would have been suppressed had counsel requested a Neil v. Biggers hearing.

Petitioner argues the PCR court erred in denying him relief because counsel was ineffective for failing to request a pre-trial hearing to determine the admissibility of the out-of-court identifications of Petitioner by various witnesses. Specifically, Petitioner argues a pre-trial hearing pursuant to Neil v. Biggers should have been conducted, counsel had no legitimate trial strategy for failing to request such a hearing, and because the lineup “may have been suggestive,” counsel was prejudiced by counsel’s failure to request a pre-trial hearing. The PCR court correctly found counsel deficient for failing to request a pre-trial hearing, but nevertheless found Petitioner could not establish the necessary prejudice for a grant of relief because the identifications were not the result of unduly suggestive police procedures. There is ample

evidence in the record to support this finding and it is not premised upon any error of law.

At trial, the out-of-court identifications of Petitioner by nine witnesses were admitted without objection. There was no pre-trial hearing pursuant to Neil v. Biggers to determine the admissibility of these identification. Respondent conceded below and again concedes on appeal that trial counsel should have requested a pre-trial hearing pursuant to Neil v. Biggers to determine the admissibility of the nine out-of-court identifications and the failure to do so amounts to deficient performance. See State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (“Due process requires courts to assess, on a case-by-case basis, whether the identification resulted from unnecessary and unduly suggestive police procedures, and if so, whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed.”). The PCR court properly found trial counsel was deficient for failing to request a pre-trial hearing.¹

However, Petitioner still must establish he was prejudiced by counsel’s failure to request a Biggers hearing to such an extent that the result of his proceeding would have been different, and, crucially, Petitioner is unable to do so because there is no reasonable likelihood the identifications would have been suppressed. There is no evidence the lineups were the result of any unduly suggestive police procedures. At trial, each of the nine witnesses testified as to the circumstances surrounding their identification and each was asked whether law enforcement indicated whom they should select, that they must select someone, or otherwise did anything suggestive; all answered unwaveringly and consistently that law enforcement did not do anything suggestive. While Petitioner argues “the procedures used by the officers in showing the line-up

¹ Petitioner spends a substantial portion of his argument outlining how counsel was deficient and that no valid trial strategy exists for the failure to request a pre-trial hearing. Respondent agrees—a Biggers hearing should have been conducted and counsel’s failure to do so was not based on a valid strategy, as the PCR court correctly found.

may have been suggestive,” citing Petitioner’s photograph was in the same position in all lineups, he has failed to meet his burden of establishing the identification procedures were unduly suggestive. Petitioner failed to present any evidence that the any of the identifications were the result of “unnecessary and unduly suggestive police procedures,” and, accordingly, has failed to establish requisite prejudice because the nine identifications would have still been admissible following a pre-trial hearing to determine their reliability. See State v. Dukes, 404 S.C. 553, 557–58, 745 S.E.2d 137, 139 (Ct. App. 2013) (“If the court finds the identification did not result from impermissibly suggestive police procedures, the inquiry ends there and the court does not need to consider the second prong.”). The PCR court properly denied relief.

II. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for agreeing not to explicitly question cooperating witnesses about the mandatory minimum sentence each faced for his or her originally indicted offenses where this very issue was already addressed on direct appellate review and deemed non-prejudicial to Petitioner, counsel thoroughly cross-examined each regarding the substantial benefit of a reduced sentence for cooperation, and the jury heard the mandatory minimum sentence through the testimony of one witness.

Petitioner argues counsel was ineffective for agreeing not to question the cooperating witnesses explicitly about the mandatory minimum sentences each avoided for their originally-indicted offenses. The PCR court properly rejected this claim, finding this issue was already addressed and deemed harmless on direct appeal, counsel adequately cross-examined each witness about the substantial benefit each received for their cooperation, and the jury was apprised on the mandatory minimum sentence for trafficking in methamphetamine (400 grams or more). These findings are supported by the record and not premised upon an error of law.

Initially, as the PCR court correctly found, this very issue was already raised by Petitioner and found to be non-prejudicial by the Court of Appeals during Petitioner’s direct appeal. On direct appeal, Petitioner explicitly argued that “[t]he trial court preclude[d] any

inquiry into the *mandatory minimum sentences* co-defendants faced prior to their cooperation.”

(App. 1002) (emphasis added). In rejecting this claim, the Court of Appeals found:

We find no reversible error by the trial court in prohibiting defense counsel from cross-examining co-defendants regarding their potential sentences under their original charges because of the numerous co-defendants that testified regarding their reduced sentences, the mandatory minimum sentences or the sentencing ranges of their original charges compared to their plea recommendations, and the substantially greater sentences they would have faced. Therefore, we find no prejudice to Tate, and any error was harmless. See State v. Gracely, 399 S.C. 363, 373-74, 731 S.E.2d 880, 885 (2012) (finding error where the trial court excluded evidence regarding the mandatory minimum sentences faced by testifying codefendants); id. at 375, 731 S.E.2d at 886 (acknowledging “[a] violation of the Confrontation Clause is not *per se* reversible but is subject to a harmless error analysis”); State v. Whatley, 407 S.C. 460, 469, 756 S.E.2d 393, 397 (Ct. App. 2014) (finding no prejudice where the trial court excluded the defendant from questioning a witness concerning the sentences the witness faced for reduced charges because the limitation did not prevent a full picture of her possible bias).

State v. Antonio Emerson Tate, Unpub. Op. no. 2016-UP-291 (Ct. App. filed June 15, 2016).

The Court of Appeals squarely addressed and rejected the issue, finding while the trial court (not defense counsel) limited Petitioner’s ability to cross-examine the co-conspirators on the mandatory minimum sentences they avoided by cooperating, Petitioner suffered no prejudice because the jury was made aware of the mandatory minimum sentences the cooperating witnesses faced and the substantial benefit each gained through cooperation. Petitioner’s attempts in this appeal to argue that the issue now raised is more nuanced is unpersuasive and is in direct contravention to what he argued on direct appeal.

Moreover, the PCR court’s finding counsel thoroughly cross-examined the cooperating witnesses regarding potential bias, the substantial benefit they received, and their anticipated, vastly lower sentences is supported by the record. Counsel aptly questioned each witness regarding their original charges and their dramatically lower sentencing exposure. Additionally, Chad Moore and Jason Griffin testified about the specific sentencing range for trafficking in

methamphetamine (400 grams or more), with Moore explicitly stating the sentencing range was twenty-five to thirty years. (App. 171-173, 649-650). Certiorari should be denied as to this issue.

III. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for not arguing his sentence exceeded the maximum where Petitioner was appropriately sentenced upon his conviction for trafficking in methamphetamine (400 grams or more) and S.C. Code Ann. § 44-53-420 is inapplicable.

Petitioner argues because the State proceeded forward based on a theory that Petitioner conspired with numerous co-conspirators to traffic 400 grams or more of methamphetamine, he should have been sentenced pursuant to Section 44-53-420 and counsel was ineffective for failing to make such an argument to the trial court. See Section 44-43-420(A) (“Except as provided in subsection (B), a person who attempts or conspires to commit an offense made unlawful by the provisions of this article, upon conviction, be fined or imprisoned in the same manner as for the offense planned or attempted; but the fine or imprisonment shall not exceed one half of the punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”). However, as the PCR court correctly found, Petitioner was convicted of and properly sentenced for trafficking in methamphetamine (400 grams or more) pursuant to Section 44-53-375(C)(5), which provides, “[a] person who knowingly sells, manufactures, delivers, purchases, or brings into this State, or who provides financial assistance or otherwise aids, abets, attempts, or *conspires to sell*, manufacture, deliver, purchase, or bring into this State, or who is knowingly in actual or constructive possession or who knowingly attempts to become in actual or constructive possession of ten grams or more of methamphetamine or cocaine base . . . is guilty of a felony which is known as “trafficking in methamphetamine.” Despite his assertions otherwise, Petitioner was not convicted of conspiracy to traffic in methamphetamine, but rather, of the principle offense of trafficking in methamphetamine. Accordingly, Section 44-53-420 is inapplicable. See Harris v. State, 349 S.C.

46, 48, 562 S.E.2d 311, 312 (2002) (“[T]here is no distinction between conspiracy to traffic and the substantive offense of trafficking.”); State v. Castineira, 341 S.C. 619, 627, 535 S.E.2d 449, 453 (Ct. App. 2000), aff’d, 351 S.C. 635, 572 S.E.2d 263 (2002) (holding Castineira was properly sentenced for trafficking rather than conspiracy, where he was indicted for trafficking under a conspiracy theory and trafficking statute delineates conspiracy as a method by which trafficking can be committed); see also State v. Harris, 351 S.C. 643, 647-48, 572 S.E.2d 267, 270 (2002) (reaffirming that the legislature intended conspiracy to traffic be treated as trafficking and rejecting an attempt to circumvent this result with a distinction between a substantive offense of “trafficking by conspiracy” and “conspiracy to traffic”).

Moreover, Petitioner’s argument that because Section 44-53-375 does not including the exclusionary language found in other trafficking statutes (such as Section 44-53-370, which explicitly excludes sentencing pursuant to Section 44-53-420), Petitioner was therefore entitled to the drastic sentence reduction provided for in Section 44-53-240 and counsel was ineffective for making such an argument is unpersuasive. While the exclusion of Section 44-53-420 is not explicitly included within the express language of Section 44-53-375, counsel nonetheless would not be deficient for failing to request Petitioner be sentenced to half of the mandatory minimum sentence for trafficking in methamphetamine (400 grams or more) based on the plethora of case law clearly indicting a conviction for trafficking based on a conspiracy theory is a conviction for trafficking, not conspiracy to traffic, and Section 44-53-420 is not applicable. Counsel reasonable could rely on Harris, Harris, or Castineira, as well as the plain reading of Section 44-53-375 and believe Petitioner was appropriately sentenced pursuant to Section 44-53-375.

IV. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to object to purportedly improper questioning, where counsel used both instances to his benefit on cross-examination and

there is no substantial likelihood the result of the proceeding would have been different had counsel objected.

Petitioner argues counsel was ineffective for failing to object when law enforcement testified regarding the whether there was any reason to doubt the co-conspirators identification of Petitioner and when law enforcement testified regarding Petitioner's criminal record. The PCR court properly found Petitioner could not establish any constitutional ineffectiveness, where counsel was able to use both instances to his benefit on cross examination and there is no substantial likelihood the result of the proceeding would have been different but for counsel's failure to object.

Counsel thoroughly cross examined law enforcement regarding Petitioner's record, including that is was for misdemeanors and did not contain any drug offenses, which supported the defense theory that this was a case of mistaken identity, with all the co-conspirators conspiring together to falsely frame Petitioner as a drug kingpin without any independent evidence. (App. 344-45, 364-65). Counsel highlighted the State's evidence hinged solely on the testimony of these self-interested, drug-addled admitted liars who were only cooperating to avoid significant terms of incarceration. (App. 666). There is no substantial likelihood the result of Petitioner's case would have been different had counsel objected. Certiorari should be denied.

V. The PCR court properly found Petitioner failed to meet his burden of establishing trial counsel was constitutionally ineffective for failing to object to testimony regarding bond hearing statements, where trial counsel utilized this testimony to show the co-conspirators had been discussing Petitioner's case and that the State had made outlandish statements without proper investigation at this bond hearing.

Petitioner argues counsel was ineffective for failing to object to testimony from Agent Barwick regarding statements made by the State at Petitioner's bond hearing that Petitioner had a twin brother he was using to elude law enforcement and that two cooperating co-conspirators discussed this information before trial. The PCR court correctly found Petitioner could not

establish any constitutional ineffectiveness, where counsel used this questioning to Petitioner's benefit to show the co-conspirators were discussing Petitioner's case to strengthen their own testimony against Petitioner and to argue the State failed to properly investigate the case.

On cross-examination, Counsel was able to use this testimony about Eades and Lollis to show the co-conspirators were discussing Petitioner's case and colluding to strengthen the State's case against Petitioner for their own self-preservation (App. 346-47). Counsel thoroughly questioned law enforcement about statements made at Petitioner's bond hearing, including unsubstantiated claims that he was involved with a Mexican drug cartel and a flight risk without even investigating whether Petitioner had a passport. Counsel strategically used the information regarding the bond hearing and the witnesses discussing the case prior to trial to strengthen the defense theory that Petitioner was uninvolved in the conspiracy and was being setup by self-interested and colluding witnesses following a shoddy investigation by law enforcement.

VI. The PCR court properly declined to apply a cumulative error analysis.

Petitioner argues the PCR court erred when it failed to apply a cumulative error analysis based on "the cumulative effect of five separate incidents of deficient performance." While noting South Carolina has not adopted a cumulative error analysis when reviewing claims of ineffective assistance of counsel, Petitioner nonetheless urges this Court to adopt a cumulative error approach to such claims and asserts this case is the proper vehicle to do so. However, the PCR court, which found counsel deficient in only one of the litany of issues raised, properly declined to apply a cumulative error analysis. This Court should likewise decline to adopt a cumulative error framework in this case.

Traditionally, an applicant must show both deficient performance and prejudice to establish his or her trial counsel was constitutionally ineffective. Strickland, 466 U.S. 668.

However, “[w]hen counsel’s deficiency is so pervasive as to render a particularized prejudice inquiry unnecessary, a defendant may be relieved of his burden to show prejudice.” Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). “Whether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina.” Id. (citing Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002)).

In Smalls v. State, this Court reaffirmed the necessity of the PCR to make specific findings on prejudice that are tied to the particular deficiencies alleged. Smalls, 422 S.C. at 194, 810 S.E.2d at 864 (“As we have explained, the strength of the evidence must be considered along with the specific impact of counsel’s errors.”). “In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial. In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” Id. at 188, 810 S.C. at 844 (internal citations omitted).

Here, since the PCR court properly found one limited instance of counsel error, the court properly declined to conduct a cumulative error analysis. See Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002) (recognizing “the threshold to asking the cumulative prejudicial question is to first find multiple errors”). See also Lorenzen v. State, 376 S.C. 521, 535 n. 3, 657 S.E.2d 771, 779 n. 3 (2008) (internal citations omitted) (noting whether several errors, which are independently found not be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina). The PCR court properly declined to apply a cumulative error analysis.

CONCLUSION

Because the PCR court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari.

Respectfully submitted,

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