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**S.C. SUPREME COURT**

**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

**On Petition for Writ of Certiorari to Charleston County  
Court of Common Pleas  
The Honorable Bentley Price, Post-Conviction Relief Judge  
The Honorable Roger M. Young, Sr., Trial Judge**

**Appellate Case No. 2021-000089**

**JOSEPH T. ROWLAND, #2900065,**

**Respondent,**

**vs.**

**STATE OF SOUTH CAROLINA,**

**Petitioner.**

**PETITION FOR WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

ISSUES PRESENTED FOR CERTIORARI.....1

STATEMENT OF THE CASE .....2

STATEMENT OF FACTS... .....3

STANDARD OF REVIEW... .....7

ARGUMENT .....8

I. The PCR court erred in finding Rowland established trial counsel was ineffective for failing to argue additional grounds in support of suppressing the evidence where trial counsel was not deficient in his arguments and Rowland was not prejudiced as a result because the additional grounds lacked merit and would not have resulted in suppression of the evidence.....8

a. The PCR court erred in finding trial counsel was deficient for failing to adequately challenge the probable cause supporting the search warrant where trial counsel properly presented the best possible suppression arguments available and where ample evidence existed in support of issuance of the search warrant thus precluding the argument from merit.....11

b. The PCR court erred in finding trial counsel was deficient for failing to argue law enforcement’s alleged failure to comply with §17-13-150 in support of suppressing the evidence where there is contradicting testimony as to whether there was statutory compliance and where no case law exists to support suppression on that basis.....17

II. The PCR court erred in finding trial counsel was deficient for failing to renew his objection to the introduction of the evidence attained through the search warrant where ample evidence existed to support the trial court’s finding, thus no meritorious reason existed to reverse the ruling on appeal.....18

III. The PCR court erred in finding trial counsel was deficient for failing to call Leroy Rowland (Rowland’s father) or John Rowland (Rowland’s brother) to testify where their testimony would not have warranted the trial court granting the suppression motion.....20

IV. The PCR court erred in finding John Rowland’s testimony meets the standard for after-discovered evidence and that it reasonably would have changed the result of trial where trial counsel was aware of the potential testimony prior to trial and where the testimony would not have changed the result of trial.....22

CONCLUSION.....24

## **ISSUES PRESENTED FOR CERTIORARI**

- I. Did the PCR court err in finding Rowland established trial counsel was ineffective for failing to argue additional grounds in support of suppressing the evidence where trial counsel was not deficient in his arguments and Rowland was not prejudiced as a result because the additional grounds lacked merit and would not have resulted in suppression of the evidence?
  - a. Did the PCR court erred in finding trial counsel was deficient for failing to adequately challenge the probable cause supporting the search warrant where trial counsel properly presented the best possible suppression arguments available and where ample evidence existed in support of issuance of the search warrant thus precluding the argument from merit?
  - b. Did the PCR court erred in finding trial counsel was deficient for failing to argue law enforcement's alleged failure to comply with §17-13-150 in support of suppressing the evidence where there is contradicting testimony as to whether there was statutory compliance and where no case law exists to support suppression on that basis?
- II. Did the PCR court erred in finding trial counsel was deficient for failing to renew his objection to the introduction of the evidence attained through the search warrant where ample evidence existed to support the trial court's finding, thus no meritorious reason existed to reverse the ruling on appeal?
- III. Did the PCR court erred in finding trial counsel was deficient for failing to call Leroy Rowland (Rowland's father) or John Rowland (Rowland's brother) to testify where their testimony would not have warranted the trial court granting the suppression motion?
- IV. Did the PCR court erred in finding John Rowland's testimony meets the standard for after-discovered evidence and that it reasonably would have changed the result of trial where trial counsel was aware of the potential testimony prior to trial and where the testimony would not have changed the result of trial?

## STATEMENT OF THE CASE

Respondent, Joseph T. Rowland, is presently confined in the South Carolina Department of Corrections. On June 3, 2011, Rowland Joseph Rowland was arrested following a narcotics investigation that led to the discovery of cocaine and marijuana in his residence. On April of 2012, Rowland was indicted by the Charleston County Grand Jury for one count of trafficking in cocaine, one count of possession of marijuana with intent to distribute, one count of possession of a firearm during the commission of a violent crime, and one count of unlawful possession of a stolen pistol.

On May 12, 2014, a jury trial was commenced in the Charleston County Court of General Sessions with the Honorable Roger M. Young, Sr., circuit court judge, presiding. At the close of the State's case, Rowland's counsel moved for a directed verdict on all four of the charges. The Court directed a verdict of not guilty on the charge of possession of a stolen firearm but denied Rowland's directed verdict motion regarding the remaining three charges. The jury returned a verdict of guilty on the three remaining charges and the trial judge sentenced Rowland to concurrent terms of imprisonment of twenty years for trafficking in cocaine, five years for possession of marijuana with intent to distribute, and five years for possession of a firearm during the commission of a violent crime.

Rowland filed a timely notice of appeal. On appeal, Rowland alleged the trial court erred in denying Rowland's motion to suppress the drug evidence on the ground the search warrant was not supported by probable cause. Additionally, Rowland alleged the trial court erred in denying his motion for directed verdict when the evidence presented by the State did not suffice to create a jury issue as to constructive possession of the contraband. The South Carolina Court of Appeals affirmed Rowland's convictions on May 24, 2017. State v. Rowland, Op. No. 2017-UP-225 (S.C. Ct. App. filed May 24, 2017). The remittitur was returned to the circuit court on April 17, 2018.

Rowland filed his application for post-conviction relief on September 19, 2018. Thereafter on January 31, 2019, the State filed its Return, Partial Motion to Dismiss, and Motion for More Definite Statement. Rowland then filed an amendment to his PCR application.

An evidentiary hearing was held September 30, 2019 in the Charleston County Courthouse before the Honorable Bentley Price. Rowland was present and represented by James Falk, Esquire. Petitioner was represented by Benjamin Limbaugh, Assistant Attorney General. Rowland's trial counsel William Runyon testified along with Rowland, Rowlands' father Leroy Rowland, and Rowland's brother Joseph Rowland. The PCR court signed an order on June 2, 2020 granting post-conviction relief and remanding the matter to the Charleston County Court of General Sessions for a new trial. The PCR court found that Rowland was prejudiced by the deficiencies in trial counsel's efforts to suppress the evidence seized from the residence and absent trial counsel's deficient performance, there is a reasonable likelihood that the trial court would have granted Rowland's suppression motion. (App. p. 1613-1625). The PCR court also found had Rowland's father Leroy Rowland testified at the suppression hearing the evidence from the residence would have been suppressed and if he had testified during the trial that the gun was his the jury would have acquitted Rowland of the gun charge. (App. p. 1613-1625). Further, the PCR court found that trial counsel was deficient for failing to call John Rowland to testify and that if he had the evidence from the search would have been suppressed and the jury would have acquitted Rowland of the cocaine trafficking charge. (App. p. 1613-1625). The State moved for reconsideration pursuant to Rule 59(e), SCRPC, which was summarily denied. This appeal follows.

#### **STATEMENT OF FACTS**

On the afternoon of June 3, 2011, Sergeant Brandon Ratliffe and Investigator Keith Sumner, who were narcotics investigators with the Charleston Police Department, began conducting surveillance of the home of Rowland, which was located at 31 Woodleaf Court in

Charleston, South Carolina, after the officers received several complaints about drug activity occurring at that location over the course of the preceding year. (App. pp. 46; pp. 56; pp. 61; pp. 64). During their surveillance, the officers observed Rowland exit his residence and get into a vehicle parked outside. (App. p. 47). As they continued to watch, a bicyclist rode up, got into the vehicle with Rowland, exited the vehicle after only a minute, and swiftly left the area. (App. p. 57). Shortly thereafter, the officers observed a blue car pull up and park in front of 31 Woodleaf Court. (App. p. 46; p. 57). Immediately after that, Rowland, who had gone back inside his home after meeting with the bicyclist, exited the residence, walked directly over to the passenger side of the blue car, reached in through the car's window, and conducted what appeared to be a hand-to-hand drug transaction with the driver. (App. p. 46; p. 67). Rowland then hastily returned to his residence, and the driver of the blue car drove away. (App. p. 46; p. 67).

After the blue car left Rowland's residence, Sergeant Ratliffe and Investigator Sumner asked nearby officers waiting directly outside of Rowland's neighborhood to stop that vehicle based on the drug transaction they had just observed. (App. p. 49; p. 57). In response, the nearby officers quickly stopped the blue car and, during the ensuing stop, located marijuana and cocaine in the driver's possession. (App. pp. 49-50; p. 59). Sergeant Ratliffe and Investigator Sumner then responded to the scene of the stop and spoke with the driver, who confirmed he had just bought the drugs from "Blow," who the officers knew to be Rowland, at Rowland's address. (App. pp. 49-50; pp. 59-60).

Thereafter, Sergeant Ratliffe rapidly prepared a search warrant affidavit and appeared before a magistrate to obtain a search warrant for Rowland's residence. (App. p. 51; pp. 60-61; p. 64). The affidavit Sergeant Ratliffe presented to the magistrate specifically identified the premises

to be searched as the home located at 31 Woodleaf Court and contained the following information about the investigation:

Over the past 6 months, the Charleston Police Department Special Investigations Unit has received numerous complaints of narcotics activity from citizens, in reference to illegal narcotics being sold from 31 Woodleaf Ct. SIU has been conducting a[n] investigation on this residence and [Rowland] for more th[a]n a year for narcotic activity.

In response, within the past 72 hours, the CPD Special Investigations Unit . . . established a fixed surveillance location in which Inv. Ratliffe and Inv. Sumner observed [Rowland], a registered resident at this location, conduct a hand to hand narcotics transaction. At approx 1440hrs. [Rowland] was observed exiting the residence via the front door and walk[ing] up to a vehicle which parked in front of the residence. [Rowland] approached the door of the vehicle and conducted a hand to hand transaction with a person inside the vehicle [with a specified license tag number]. Within 1 minute of making contact with the driver of the vehicle [Rowland] then walked back into the above residence. The vehicle [with the specified license tag number] then immediately left the area. Inv. Ratliffe and Inv. Sumner then corroborate this by having a CPD patrol unit conduct a traffic stop on the above vehicle [with the specified license tag number] and locate an amount of illegal narcotics. The driver of the vehicle then wrote a statement confirming the above mentioned transaction of illegal narcotics.

Your affiant, Investigator C. Ratliffe, is a sworn police officer with the Charleston Police Department and has been for over 7 years with 1 year experience conducting narcotics investigation with the CPD Narcotics Unit. He has attended several narcotics investigation schools and seminars over the course of [his] career taught by the Drug Enforcement Administration, the South Carolina Criminal Justice Academy, and the Multi-jurisdictional Counterdrug Task Force Training. He has executed countless search warrants and has been involved in the arrest of over approximately 500 subjects for illegal drug offenses. Furthermore, he has conducted surveillance on suspected drug dealers, testified in court, managed informants, and interviewed numerous suspects and witnesses for drug related crimes.

Based on Inv. Ratliffe's experience and the current investigation, there is probable cause to believe that illegal narcotics, and/or the proceeds of, are being stored at [an entirely unrelated Charleston address].

(App. p. 61; pp. 267-273). Additionally, Sergeant Ratliffe provided supplemental information to the magistrate by informing him about his knowledge of and history with Rowland and about the tips he had received regarding Rowland in the past. (App. pp. 51-52; p. 62). The magistrate then

issued a search warrant authorizing a search of Rowland's home. (App. p. 67; p. 109; pp. 267-274).

Shortly thereafter, officers from the Charleston Police Department executed the search warrant at 31 Woodleaf Court while Rowland and his parents, who also lived in the home, were detained outside. (App. p. 54; pp. 67-69; p. 109; pp. 101-102). During the officers' search of the residence, they located pictures of Rowland with one of his children, letters addressed to Rowland at 31 Woodleaf Court, a notebook containing a ledger, multiple cellular phones, and a box of plastics bags in one of the residence's bedrooms. (App. pp. 114-116; p. 162; p. 1174). Additionally, in that same bedroom, the officers found a digital scale on top of a dresser along with a bag of cocaine and two more digital scales hidden in the dresser's drawers. (App. pp. 115-116; pp. 162-163). Likewise, the officers located a .45-caliber pistol and a book entitled "Criminal Procedure Guide for Drug Agents" on a bookshelf near the bed and a plastic container containing individually-packaged quantities of marijuana near a television. (App. p.185). Furthermore, the officers found a brown bag behind the bedroom door with two plastic bags of cocaine inside. (App. p. 128; pp. 143). One of those plastic bags contained thirty-four grams of cocaine, and the other plastic bag contained twenty-one smaller bags that each contained roughly a gram of cocaine. (App. pp. 172-173).

Defense counsel preliminarily moved for the evidence discovered in Rowland's case to be suppressed, and the trial judge conducted an in limine hearing on that motion. (App. pp. 8-11; p. 11). At the conclusion of the in limine hearing, defense counsel asked the trial judge to suppress the evidence discovered during the search of Rowland's home. (App. pp. 44-45). In seeking that relief, defense counsel noted the search warrant affidavit contained at least one error, asserted there was nothing inherently suspicious about riding a bicycle, and contended the "only real substance"

to the officers' surveillance was their observation of what appeared to be a hand-to-hand drug transaction between Rowland and another individual. (App. pp. 44-45). In rebuttal, the solicitor asserted the search warrant affidavit correctly identified the address of Rowland's residence numerous times and only incorrectly listed an unrelated address a single time due to a scrivener's error. (App. pp. 45-46). The solicitor further argued the information contained in the affidavit, including the information about the observed hand-to-hand drug transaction, established a probable cause basis supporting the issuance of the search warrant. (App. pp. 46-47). After listening to the solicitor's argument on the issue, defense counsel asserted to the trial judge he hated "to have to agree with my colleague[.]" (App. p. 47). The trial judge then denied the in limine suppression motion, explaining:

Based on the totality of the circumstances, it's clear that the reference to the [entirely unrelated Charleston address] was a scrivener's error. The correct address, 31 Woodleaf [Court], is referenced several times in here, and that was obviously just a scrivener's error.

The totality of the circumstances is that they had a reason to be observing [Rowland], the defendant's house. They witnessed – or they – based on tips that he had been drug dealing, et cetera, that's what got them to observe that house. They then witnessed at least one transaction, possibly two, on drugs. One was the bicycle, but, more importantly, the one was the one with the car.

They then stopped that person in driving the car who said yes, I bought drugs just a short time before from the defendant. That gets the search warrant and gives them information that is sufficient to rise to the level of probable cause to issue the warrant, so the search warrant is valid.

(App. pp. 48-49).

#### **STANDARD OF REVIEW**

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court's findings of fact and will

uphold them if there is **any** evidence in the record to support them. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

**I. The PCR court erred in finding Rowland established trial counsel was ineffective for failing to argue additional grounds in support of suppressing the evidence where trial counsel was not deficient in his arguments and Rowland was not prejudiced as a result because the additional grounds lacked merit and would not have resulted in suppression of the evidence**

Rowland argues trial counsel was deficient for failing to present all arguments in support of the trial court suppressing the evidence seized as a result of searching Rowland's residence. Rowland argues trial counsel should have argued deficiencies in Investigator Ratliffe's affidavit, lack of supplemental testimony, and lack of corroboration of the statement made by the driver of the blue Honda. However, trial counsel was not deficient in his suppression argument and Rowland cannot prove prejudice where ample probable cause existed in support of issuing the search warrant and the additional "issues" Rowland contends should have been argued would not have been meritorious. Further, the PCR court wholly failed in making any findings as to prejudice. As is made clear below, that is likely due to the fact that there was in fact no prejudice to be found.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United

States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.”). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”). Significantly, effective assistance of counsel does *not* mean perfect representation. See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”); see also Burt v. Titlow, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel’s assistance is considered to be constitutionally ineffective when “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel’s representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel’s deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the burden of establishing both deficiency and prejudice in order to be entitled to post-conviction relief. Hughes v. State, 364 S.C. 554, 558, 552 S.E.2d 315, 317 (2001). Significantly, “the ultimate focus of inquiry must be on the

fundamental fairness of the proceeding whose result is being challenged.” Strickland, 466 U.S. at 696.

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel’s performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Id.; see Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel’s performance in a highly deferential manner, will make every effort “to eliminate the distorting effects of hindsight,” and will “evaluate the conduct from counsel’s perspective at the time” in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel’s performance was deficient, the applicant must demonstrate “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687. Thus, counsel’s performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply “deviated from best practices or most common custom.” Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to post-conviction relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” Strickland, 466 U.S. at 691. In order for that burden to be met, counsel’s deficient performance must have prejudiced the applicant

to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added).

**A. The PCR court erred in finding trial counsel was deficient for failing to adequately challenge the probable cause supporting the search warrant where trial counsel was not deficient in his suppression arguments and where ample evidence existed in support of issuance of the search warrant thus precluding the argument from merit**

Rowland alleges trial counsel was ineffective for failing to address additional deficiencies in officer Ratliffe's probable cause application. However, trial counsel was not deficient in his suppression argument and Rowland cannot prove prejudice where ample probable cause existed in support of issuing the search warrant and the additional "issues" Rowland contends should have been argued would not have been meritorious.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." Florida v. Jimeno, 500 U.S. 248, 250 (1991). Thus, only unreasonable searches and seizures are prohibited. State v. Foster, 269 S.C. 373, 378, 237 S.E.2d 589, 591 (1977); see Maryland v. Buie, 494 U.S. 325, 331 (1990) ("It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures[.]").

Generally, in order for a search to be reasonable under the Fourth Amendment, a law enforcement officer must obtain a search warrant prior to conducting the search. Robinson v. State, 407 S.C. 169, 185, 754 S.E.2d 862, 870 (2014). In South Carolina, an officer seeking to obtain a search warrant must present a sworn affidavit to a judge presenting grounds sufficient to establish probable cause in order to justify the issuance of the warrant. State v. Bellamy, 336 S.C. 140, 143,

519 S.E.2d 347, 348-349 (1999); see S.C. Code Ann. § 17-13-140 (“A warrant issued hereunder shall be issued only upon affidavit sworn to before the magistrate, municipal judicial officer, or judge of a court of record establishing the grounds for the warrant.”); see also Illinois v. Gates, 462 U.S. 213, 238 (1983) (identifying probable cause as “a fair probability that contraband or evidence of a crime will be found”). In State v. Williams, 262 S.C. 186, 189, 203 S.E.2d 436, 437-438 (1974), the South Carolina Supreme Court explained probable cause as it relates to the issuance of a search warrant:

In order to justify the issuance of a search warrant, probable cause must be shown, but the term ‘probable cause’ does not import absolute certainty. In determining whether there is sufficient evidence to sustain a finding of probable cause, each case stands on its own facts. The evidence need not be sufficient to support a conviction, or a verdict of guilty, or to establish guilt beyond a reasonable doubt; nor need the proof be positive, it being enough if it is such as to induce in the mind of the issuing officer an honest belief that the facts set forth exist, or as would lead a man of prudence to believe that the offense has been committed.

(citing State v. Bennett, 256 S.C. 234, 182 S.E.2d 291 (1971)).

In deciding whether to issue a search warrant, the issuing judge must “make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Gates, 462 U.S. at 238. In making the probable cause determination, “[issuing judges] are concerned with probabilities and not certainties.” State v. Sullivan, 267 S.C. 610, 617, 230 S.E.2d 621, 624 (1976). Furthermore, the issuing judge must view the warrant affidavit in a common-sense and realistic fashion and give consideration to the fact such affidavits are typically prepared by non-lawyers in the haste of criminal investigations. State v. Arnold, 319 S.C. 256, 260, 460 S.E.2d 403, 405 (Ct. App. 1995); see United States v. Ventresca, 380 U.S. 102, 108 (1965)

(“Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place [when evaluating the sufficiency of search warrant affidavits].”).

When reviewing a decision to issue a search warrant, a reviewing court should decide whether the issuing judge had a substantial basis for concluding probable cause existed. State v. Dupree, 354 S.C. 676, 683, 583 S.E.2d 437, 441 (Ct. App. 2003). Applying the same standard as the issuing judge, the court should base its determination on the totality of circumstances and afford great deference to the issuing judge’s probable cause determination. State v. Keith, 356 S.C. 219, 223, 588 S.E.2d 145, 147 (Ct. App. 2003). Significantly, “[s]earches based on warrants will be given judicial deference to the extent that an otherwise marginal search may be justified if it meets a realistic standard of probable cause.” Dupree, 354 S.C. at 683-684, 583 S.E.2d at 441; see Ventresca, 380 U.S. at 106 (“[I]n a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall.”). “Suppression is appropriate in only a few situations, including when an affidavit is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’ ” State v. Weston, 329 S.C. 287, 293, 494 S.E.2d 801, 804 (1997) (quoting United States v. Leon, 468 U.S. 897, 923 (1984)).

In State v. Kinloch, 410 S.C. 612, 613-614, 767 S.E.2d 153, 153-154 (2014), the South Carolina Supreme Court considered whether the information contained in a search warrant affidavit was sufficient to establish a probable cause basis for the search of a residence. In that case, the officer who sought the search warrant included the following details in the search warrant affidavit: (1) officers conducted surveillance of a particular residence after receiving numerous tips about drug transactions taking place at that location; (2) during their surveillance, officers saw a man in a red shirt leave the residence and engage in hand-to-hand transactions with other individuals while a man in a black jacket stood nearby; (3) officers observed the man in the red

shirt count money after the transactions; (4) later on, officers saw the man in the black jacket approach another individual and exchange a plastic bag for money; and (5) after that, officers approached the person who made the exchange with the man in the black jacket and recovered a plastic bag containing heroin when it was dropped to the ground. Id. at 614-615, 767 S.E.2d at 154. Based on those facts, the magistrate issued a search warrant for the targeted residence, drugs and other incriminating evidence were discovered during the ensuing search, and Kinloch subsequently successfully moved to suppress that evidence during trial. Id. Thereafter, the State appealed, and the Court of Appeals affirmed the trial judge's ruling. Id. at 614, 767 S.E.2d at 155. Ultimately though, the Supreme Court granted certiorari and reversed. Id. at 618, 767 S.E.2d at 156. In reversing, the Supreme Court concluded the search warrant affidavit provided the magistrate with a substantial basis for reaching his probable cause determination based on the information contained within it regarding the numerous tips received by the officers and the officers' subsequent observation of "seemingly drug-related behavior." Id. at 618, 767 S.E.2d at 156.

In Rowland's case, the information included in the search warrant affidavit established the officers – much like the officers in Kinloch – had received numerous tips in regard to drug activity taking place at 31 Woodleaf Court. See id. (finding the receipt of numerous tips regarding drug activity to be relevant under the totality of the circumstances towards establishing a probable cause basis for a search). Additionally, the information in the search warrant affidavit established the officers – much like the officers in Kinloch – corroborated those tips by conducting surveillance and observing Rowland engaged in what appeared to be drug transactions to the trained and skilled officers. See id. (finding a substantial basis for probable cause existed where the officers observed "seemingly drug-related behavior" (emphasis added)); State v. Adams, 291 S.C. 132, 134, 352

S.E.2d 483, 485 (1987) (“[T]he evidence of a contemporaneous drug deal cited in the warrant’s supporting affidavit was a sufficient basis for the determination of probable cause under the totality of the circumstances.”); see also United States v. Cortez, 449 U.S. 411, 418 (1981) (“[A] trained officer draws inferences and makes deductions – inferences and deductions that might well elude an untrained person.”). Furthermore, the information in the search warrant affidavit established the officers stopped the driver of a vehicle who had just engaged in a hand-to-hand transaction with Rowland, discovered marijuana and cocaine during that stop, and were informed by the driver he had just purchased the drugs from Rowland at 31 Woodleaf Court. See Keith, 356 S.C. at 224, 588 S.E.2d at 147 (“We find the portion of the affidavit related to the investigative surveillance, stop, and seizure of illegal drugs from Keith’s car standing along sets forth sufficient information to support a probable cause finding in this case.”); see also State v. Jenkins, 790 So. 2d 626, 627 (La. 2001) (holding a search warrant authorizing a search of a residence was properly issued and supported by probable cause where the investigating officers included information in the search warrant affidavit establishing they observed what appeared to be a hand-to-hand transaction take place on the porch of the targeted residence, they stopped a person involved in the transaction after that person left the residence, and they seized a plastic bag containing vegetable matter from that person).

Based on the information contained in the search warrant affidavit, the magistrate reasonably concluded – and had a substantial basis to conclude – there was a fair probability drugs and other incriminating evidence would be found at Rowland’s residence. See Kinloch, 410 S.C. at 618, 767 S.E.2d at 156 (“We find based on these facts that the Court of Appeals erred in affirming the circuit court’s suppression ruling as the magistrate had a substantial basis for reaching his probable cause determination.”); cf. United States v. Rose, 321 F. App’x 324, 326-

327 (4th Cir. 2009) (finding probable cause for the issuance of a search warrant existed where officers conducted surveillance at the targeted residence, observed traffic consistent with drug activity there, stopped an individual who left the residence shortly after arriving, and were advised by the individual he had just purchased crack cocaine from the residence). As a result, the magistrate was justified in issuing the search warrant for Rowland's residence, and the trial judge correctly denied Rowland's motion to suppress the evidence discovered during the search of the residence. See Dupree, 354 S.C. at 691, 593 S.E.2d at 445 ("The magistrate had ample probable cause to issue the warrant. Given all the circumstances set forth in the affidavit, there was a 'fair probability' that crack cocaine would be found in the mobile home."); see also Gates, 462 U.S. at 238 ("The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.").

Rowland's allegation that counsel was deficient for failing to address the reliability of the statements in the search warrant or contesting the fact that the statements were not corroborated, as addressed above, has no merit. The officers corroborated the statements from the neighbors by investigating Rowland and observing multiple apparent drug transactions. Further, as the above case law notes, numerous tips are relevant in a totality of the circumstances evaluation for the purposes of finding probable cause to issue a search warrant. Rowland has failed to establish that the additional "issues" he contends counsel should have argued were indeed issues and he has failed to establish prejudice where the jurisprudence shows the trial court would have denied the suppression motion even if counsel had argued the additional points. Again, the PCR court wholly

failed in making sufficient findings as to prejudice, likely due to there being none. Therefore, this Court should grant Certiorari and deny Rowland relief.

**B. The PCR court erred in finding trial counsel was deficient for failing to argue law enforcement's alleged failure to comply with §17-13-150 in support of suppressing the evidence where there is contradicting testimony as to whether there was statutory compliance and where no case law exists to support suppression on that basis**

Rowland contends counsel was deficient for failing to raise the officer's failure to comply with §17-13-150 during the suppression, specifically requiring that a copy of the warrant along with the affidavit be furnished. First, there appears to be some question as to whether or not the search warrant and the affidavit was left at the residence. Although Officer Ratliff testified at the preliminary hearing that he did not leave a copy of the affidavit at the residence, he testified that Rowland would be given a copy of the affidavit at the conclusion of the search. (App. p. 62, ln. 1-5). Further, Officer Habbestad testified at trial that the search warrant return is given to the person in the residence. (App. p. 94, ln. 13-14). Along with this testimony, Officer Habbestad also swore an oath by signing the search warrant return stating that the search warrant was left at the place of searched. Therefore, there is credible evidence clearly indicating the search warrant was properly left at the residence. However, even if the PCR court concluded that the search warrant affidavit was not left at the residence and counsel failed to argue this at the suppression hearing, there is no case law stating that this error was anything more than ministerial and certainly would not merit suppression of the evidence found through the execution of the search warrant.

In support of his argument, Rowland cites to State v. Covert, 382 S.C. 205, 675 S.E.2d 740 (2009), alleging it stands for the proposition that failure to leave the search warrant and the supporting affidavit is sufficient for suppressing the evidence. However, that is not at all the factual situation in Covert and the holding is wholly irrelevant to Rowland's allegation. In Covert, the search was not signed by the magistrate until after the search was conducted, that is not the same

as the case at bar. Rowland correctly notes that the Court in Covert held that an unsigned search warrant was invalid and thus the evidence obtained under the warrant should have been suppressed. Covert is simply a completely different factual scenario than that of Rowland's case. The Court found that an unsigned warrant was not capable of being issued within the meaning of warrant (not the issue in the case at bar) and the unsigned warrant could not be saved by the "good faith exception" because it was never a warrant due to it being unsigned (also not the issue in the case at bar). Citation to Covert in an attempt to conclusively state that the alleged failure to leave a copy of the search warrant and the supporting affidavit requires suppression of the evidence is simply incorrect. Respondent has not found a single South Carolina case with such a holding. Therefore, Rowland has failed to establish that counsel was deficient for failing to raise an argument that would not merit suppression of the evidence under current jurisprudence and has failed to establish prejudice where the trial court would not have granted the motion due to there being no case law to support the argument. Therefore, this Court should grant Certiorari and deny Rowland relief.

**II. The PCR court erred in finding trial counsel was deficient for failing to renew his objection to the introduction of the evidence attained through the search warrant where ample evidence existed to support the trial court's finding, thus no meritorious reason existed to reverse the ruling on appeal**

Rowland argues that counsel was deficient for failing to preserve for appellate review the introduction of the evidence obtained from the search warrant. However, Rowland has failed to establish that had counsel properly preserved the issues for appellate review the issues would have been meritorious and there would be a reasonable probability that it would have resulted in a reversal and a new trial.

An issue that was raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575

S.E.2d 841 (2003);), Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an Rowland must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 (“Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam’s PCR claim.”). Therefore, before a post-conviction relief court can grant relief on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the court must determine the underlying claim was meritorious and a reasonable probability that it would have resulted in reversal and a new trial.

Trial counsel sought to suppress the introduction of the evidence obtained through the search of the residence, however, trial counsel did not renew his objection when the State sought to introduce that evidence at the trial. Numerous exhibits were introduced throughout the trial and counsel did not make contemporaneous objections to the evidence based on his objection to the validity of the search warrant. Rowland claims conclusively that since counsel did not have a reasonable explanation for his failure to renew his objections his performance was deficient. However, as argued extensively above in the section concerning other issues counsel could have argued during the suppression hearing, it is highly unlikely that had counsel properly preserved the issues for appellate review they would have been meritorious and likely to result in a reversal. As established above, there was ample evidence in support of the magistrate finding probable cause and issuing the search warrant. Rowland has failed to establish that an appellate court would find that the trial court erred in finding that there was sufficient probable cause to warrant the magistrate court issuing the search warrant. Other than the disputed issue of whether or not the search warrant and affidavit was left at the residence, which would not merit suppression of the evidence,

Rowland has failed to allege any other meritorious reason for reversing the trial court's ruling on appeal. Therefore, this Court should grant certiorari and reverse the PCR court's erroneous grant of relief.

**III. The PCR court erred in finding trial counsel was deficient for failing to call Leroy Rowland (Rowland's father) or John Rowland (Rowland's brother) to testify where their testimony would not have warranted the trial court granting the suppression motion**

Rowland contends that counsel was deficient for failing to call his father Leroy Rowland and his brother John Rowland to testify during the suppression hearing. However, Rowland has failed to establish that calling either of these witnesses would have resulted in the trial court granting the suppression motion or that the witnesses were willing to testify at the suppression hearing. Leroy Rowland testified that he was present throughout the trial and available to testify. At the suppression hearing Charleston City Police Officer Brandon Ratliffe testified that Rowland was at the residence when Ratliffe was at the residence to execute the search warrant. (App. p. 66, ln. 10-p. 67, ln 16). Officer Ratliffe testified CPD attempted to have Rowland stopped prior to getting to the residence; that he refused to stop, and Rowland then drove straight into the driveway where he was then detained. (App. p. 67, ln. 13-16). Leroy Rowland testified at the evidentiary hearing that when the CPD executed the search warrant, he and his wife were at the residence along with their son John Rowland. Rowland was not at the residence when CPD arrived at the residence. He testified that it was more than an hour later that a CPD patrol car arrived at the residence with Rowland in their custody. He further testified that he owned the .45 caliber gun that was seized from his home. Rowland has failed to show that this testimony would have changed anything if it were to have been presented at the suppression hearing. Leroy Rowland's testimony in no way impeaches the testimony of Officer Ratliffe. Officer Ratliffe testified that Rowland was at the residence when he went to execute the search warrant, but that Rowland left the residence

before they could do so. Ratliffe then testified that the officers staged at the residence and executed the search warrant while Rowland was away. Leroy Rowland's testimony simply confirms the testimony of Officer Ratliffe that Rowland arrived after the execution of the search warrant and fails to impeach the testimony that Rowland was at the residence while CPD was conducting surveillance prior to executing the search warrant. Further, Leroy Rowland's testimony concerning the weapon would not likely have acquitted Rowland of possession of a weapon during the commission of a violent crime charge. Counsel testified that he spoke to Leroy Rowland about testifying that the gun was his, however, counsel did not want to highlight the fact that the gun was found very near the premises where Rowland had control. Possession of a weapon during the commission of a violent crime does not contain an element that the weapon be owned by the person possessing the weapon, the jury still could have reasonably convicted Rowland of the charge under a theory of constructive possession. The weapon was found near or in an area where Rowland exhibited control, therefore, it could be inferred that he constructively possessed the weapon. Therefore, Rowland has failed to establish that failing to offer the testimony of Leroy Rowland at the suppression hearing was deficient or would have likely resulted in a different outcome at trial. This Court should reverse its decision as to this allegation and dismiss Rowland's application.

Rowland also contends that counsel was deficient for failing to call his brother John Rowland to testify during the suppression hearing. However, Rowland has failed to establish that counsel was deficient where he spoke to John Rowland about testifying prior to trial and he did not indicate that he was willing to testify, as well as failing to establish that the testimony would likely have resulted in a different outcome. John Rowland testified at the evidentiary hearing that he never spoke with Officer Ratliffe regarding his brother and any drug activity. However, counsel testified that he spoke with John Rowland prior to trial and told him that he needed to get a lawyer

(relating to different potential testimony) and to call him if he was prepared to testify. Counsel testified further that John Rowland never contacted him indicating that he was willing to testify and that he would have been prepared to put him on the stand had he been willing to testify. Further, even if John Rowland had testified at the suppression hearing his testimony would not have likely changed the result. Even if the trial court believed that John Rowland did not speak to Officer Ratliffe, there was still ample evidence to support the court's ruling that sufficient probable cause existed to warrant the magistrate judge issuing the search warrant. Therefore, Rowland has failed to establish any deficiency on the part of counsel or any resulting prejudice. This Court should grant Certiorari and deny Rowland relief.

**IV. The PCR court erred in finding John Rowland's testimony meets the standard for after-discovered evidence and that it reasonably would have changed the result of trial where trial counsel was aware of the potential testimony prior to trial and where the testimony would not have changed the result of trial**

Rowland contends that John Rowland's testimony that the cocaine found in the residence was his meets the requirements for after-discovered evidence and would reasonably result in the jury acquitting Rowland of the cocaine charge if the testimony were presented at trial. However, trial counsel was aware of the potential testimony before the trial and his testimony would not have reasonably resulted in a different result at trial where his testimony would not have exonerated Rowland.

The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if "there exists evidence or material facts. Not previously presented and heard, that requires vacation of the conviction or sentences in the interest of justice." S.C. Code Ann. §17-27-20(A)(4). If an Applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date the facts could have been ascertained by the exercise of

reasonable diligence. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

1. Is such as would probably change the result if a new trial was had;
2. Has been discovered since the trial;
3. Could not by the exercise of due diligence have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and,
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)).

John Rowland testified at the evidentiary hearing that he was present at his brother's trial and was available to testify. (App. p. 1549). He testified he would have stated that the cocaine in the Gucci bag along with the other cocaine located in the residence was his. (App. p. 1549). He testified that he had not revealed this information earlier because there was a pending investigation with the South Carolina Department of Social Services, and he feared that had he come forward before his brother's trial that he would have lost his children. (App. p. 1544).

Rowland has failed to establish that John Rowland's testimony meets the requirements for after-discovered evidence and it was not reasonably likely the jury would have acquitted Rowland of the cocaine trafficking charge. First, the testimony is not such that it would change the result if a new trial were had. John Rowland admitting that the cocaine was his does not change the fact that the evidence presented at trial proved that Rowland had constructive possession of the drugs and that the officers surveilling the residence saw Rowland selling drugs on multiple occasions in front of the residence. John Rowland claiming "ownership" over the cocaine does not affect Joseph Rowland's culpability at trial. Therefore, the testimony is not material to Rowland's guilt or innocence or would likely change the result if a new trial were had. Further, the evidence was not discovered after the trial and was discovered with due diligence prior to trial. Counsel testified that

John Rowland asked him about testifying at trial that the cocaine was his. (App. 1565). Counsel informed John Rowland that he should get a lawyer and to call him if he were willing to testify as to ownership of the cocaine, counsel never received a phone call from him. (App. p. 1565-1566). Therefore, Rowland has failed to establish that the evidence has been discovered since trial and could not have been discovered prior to trial. Rowland has failed to meet the requirements set forth for granting post-conviction relief based on after-discovered evidence. Therefore this Court should grant Certiorari and deny Rowland relief.

### **CONCLUSION**

For the foregoing reasons, this Court should grant this Petition for a Writ of Certiorari and reverse the post-conviction relief court's erroneous grant of relief.

Respectfully submitted,

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