ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI FROM GREENWOOD COUNTY
Court of Common Pleas
The Honorable J. Mark Hayes, II, Post-Conviction Relief Judge

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Appellate Case No. 2020-000530

MAUNWELL ERVIN,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

BRIEF OF PETITIONER

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I. Because trial counsel is not required to be clairvoyant and anticipate changes in the law, the PCR court erred in granting relief based on an instruction comporting with the law as it existed at the time of trial. This Court told trial judges to provide the jury instruction under the law at the time of trial.

II. The PCR court erred in finding Counsel ineffective for not objecting to lay opinion testimony from narcotics officers because counsel exercised reasonable professional judgment in declining to object to the testimony and because the narcotics officers were not required to be qualified as experts to offer testimony based on the officers' experience.

III. Because the solicitor's closing argument was not improper, counsel's performance was not deficient for declining to object to the argument, and the PCR court's finding that counsel's stated strategy was unreasonable is controlled by an error of law. Further, the PCR court's finding that Ervin was prejudiced is not supported with probative evidence.

STATEMENT OF THE CASE

After the Greenwood County Sheriff's Department received information that illegal narcotics were contained within a residence rented by Ervin, law enforcement obtained a search warrant for the residence. App. p. 172, lines 10-14. Only Ervin's name appeared on the lease application. App. pp. 161-162. According to the rental agreement, the only residents in the home were Ervin and his son. App. p. 164, lines 10-15.

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

25.

The Greenwood County deputies executing the search warrant found marijuana, pills, cocaine, and a firearm in the residence. Marijuana was located in one of the kitchen cabinets, and marijuana and pills were also located in a kitchen drawer. App. p.187, lines 7-10; p. 235. Crack cocaine was hidden in a potato chip can in the kitchen. App. p. 189; p. 235. After searching the kitchen, officers searched a bedroom in the residence, finding cocaine and marijuana inside a hollow bedpost. App. p. 190.

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

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

On July 23-24, 2013, Ervin proceeded to a jury trial on the remaining charges: trafficking in cocaine base (2011-GS-24-785), trafficking in cocaine base within proximity of a school or park (2011-GS-24-786), possession with intent to distribute marijuana (2011-GS-24-783), possession with intent to distribute marijuana with proximity of a school or park (2011-GS-24-784), and possession of a controlled substance (2013-GS-24-293). The jury convicted Ervin of possession

of a controlled substance, possession with intent to distribute marijuana, and the possession with intent to distribute marijuana within the proximity of a school or park. The jury was unable to reach a verdict as to the trafficking and trafficking proximity charges[1].

Ervin appealed and was represented by Robert Pachak, Esquire. The South Carolina Court of Appeals dismissed Ervin's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Ervin, 2014-UP-427 (filed November 26, 2014). The Remittitur was issued on December 12, 2014.

On November 30, 2015, Ervin filed his initial PCR application and he subsequently amended his application on June 1, 2017. The State filed its Return on October 31, 2016. A hearing was held on March 2, 2018, before the Honorable J. Mark Hayes, II. Ervin was represented by C. Rauch Wise, Esquire. The State was represented by Assistant Attorney General Justin J. Hunter.

By Order dated August 27, 2018, and filed September 13, 2018, the PCR court found: (1) "Trial Counsel was ineffective for failing to object to the jury charge impermissibly told the jury they may infer knowledge and control over the drugs if the defendant had knowledge and control over the premises where the drugs were found"; (2) Trial Counsel was ineffective for "failing to object to a jury charge that impermissibly defined constructive possession that effectively eliminated a *mens rea* as to the possession of the other drugs"; (3) Trial Counsel was ineffective

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

for "failing to object on Double Jeopardy grounds to the consecutive sentence for possession with intent to distribute marijuana within proximity to a school that was consecutive to the charge of possession with intent to distribute marijuana"; (4) Trial Counsel was ineffective for "failing to object to the opinion testimony of several law enforcement offices when none of them was ever qualified as an expert"; and (5) Trial Counsel was ineffective for "failing to object to the closing argument of the prosecuting attorney when the argument expresses his personal opinion as to the credibility of the officers involved."

The State moved to reconsider pursuant to Rule 59(e), SCRCP. A hearing on the State's motion was held on October 1, 2019. C. Rauch Wise, Esquire, represented Ervin. Assistant Attorney General Janelle Gregory represented the State. By Order dated February 14, 2020, Judge Hayes granted the State's motion in part, only amending its order to reflect that Counsel was not ineffective for failing to raise the double jeopardy argument. The PCR court denied the State's motion to reconsider on the remaining grounds.

The State filed its notice of appeal and Assistant Attorney General Brianna Lynn Schill filed the Petition for Writ of Certiorari for the State. Respondent Ervin did not file a return to the State's petition. By order dated July 6, 2021, this Court granted the State's petition.

STANDARD OF REVIEW

The PCR court's findings will be upheld only if supported by probative evidence. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). In granting relief, the PCR court in the instant case committed several errors of law and its findings are simply not supported by probative evidence.

When an applicant alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Id. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007).

Courts use a two-pronged test to evaluate allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. The attorney's performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment and the burden to show counsel's performance was deficient "rests squarely on the defendant" Burt v. Titlow, 571 U.S. 12, 17

(2013); Cullen v. Pinholster, 563 U.S. 170, 189 (2011) ("Recognizing the temptation for a defendant to second guess counsel's assistance after conviction or adverse sentence, . . . the Court established that counsel should be strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.") (Citations and internal quotation marks omitted).

Strickland also requires the PCR applicant to prove prejudice. Strickland, 466 U.S. at 691-92. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. This requires "a substantial, not just conceivable likelihood of a different result." Pinholster, 563 U.S. at 189 (citation and internal quotation marks omitted).

ARGUMENT

I.

Because trial counsel is not required to be clairvoyant and anticipate changes in the law, the PCR court erred in granting relief based on an instruction comporting with the law as it existed at the time of trial.[2] This Court told trial judges to provide the jury instruction under the law at the time of trial.

The PCR court found counsel was ineffective for failing to object to the jury instruction for constructive possession. The PCR court made an error of law for failing to apply the law as it existed at the time of trial. The trial court provided the following jury charge:

> To prove possession the state must prove beyond a reasonable doubt that the defendant had both the power and intent to control the disposition or use of the crack cocaine and/or marijuana. Possession may be either actual or constructive. Actual possession means that the drugs were in actual physical custody of the defendant. Constructive possession means that the defendant had dominion and control, or the right to exercise dominion and control, over either the crack cocaine and/or the marijuana itself, or the property on which the drugs were found. Again, mere presence at the scene where the drugs were found is not enough to prove possession. The defendant's knowledge and possession may be inferred when the substance is found in the property under the defendant's control, however this inference is simply an evidentiary fact to be taken into consideration by you along with the other evidence in this case and be given the weight you decide it should have.

App. p. 387, line 12 – p. 388, line 4. As discussed below, the jury instruction complies with this Court's admonishment to trial judges on the correct instruction for constructive possession. State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987).

The remainder of the trial court's instructions, as a whole, emphasized the jury's fact-

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

finding role, the State's burden of proof, and the requisite criminal intent; mere presence was well-explained too. For instance, preceding the above instruction, the trial court extensively explained a defendant is presumed innocent unless guilt is proved beyond a reasonable doubt. App. p. 379. The trial court also explained the prosecution bore the burden of proving guilt beyond a reasonable doubt and defined reasonable doubt. App. p. 380. The trial court told the jury it was the sole and exclusive judge of facts. The trial court warned the jury it should not infer anything the trial court said to be the trial court's opinion about the facts of the case. App. p. 381, lines 16-25. The trial court told the jury, **"[T]he law does not allow me to have an opinion about the facts in this case** . . . . As jurors, it's your duty to determine the effect and the value, weight, and truth of the evidence presented during this trial." App. p. 379, lines 1-6.

The trial court told the jury "[I]n order to establish criminal liability, . . . , criminal intent is required." App. p. 384, line 25 – p. 385, line 1. The trial court admonished the jury, "Criminal intent must be proven by the state beyond a reasonable doubt." App. p. 385, lines 4-5. Additionally, the trial court advised, "criminal intent is a mental state, a conscious wrong-doing." App. p. 385, lines 18-19.

The trial court told the jury mere presence was not sufficient to prove guilt and if the prosecution failed to prove "any other participation in the crime," the jury should find Ervin not guilty. App. p. 385, line 22- p. 386, line 10. Following the constructive possession instruction, the trial court told the jury for the possession with intent to distribute charges, the prosecution also must prove beyond a reasonable doubt that Ervin "intended to distribute the marijuana." App. p. 388, lines 6-9.

The PCR court's Order found trial counsel's performance was deficient for failing to object to this charge because: (1) the charge is not supported by South Carolina case law, (2) the charge

constitutes a judge's impermissible comment regarding a fact of Ervin's case, thereby violating Article I, § 21 of the Constitution of the State of South Carolina, and (3) the jury charge impermissibly eliminated the *mens rea* requirement.

The PCR court's ruling is wrong because case law at the time of trial found this was a permissible instruction. Undoubtedly, the PCR court made a correct prediction of the law. The PCR court's ruling anticipated the holding in State v. Stewart, 433 S.C. 382, 858 S.E.2d 808, 813 (2021), which found, without elaboration, that a similar instruction "is improper."[3] However, the PCR court's ruling is not an accurate portrayal of the law as it existed at the time of Ervin's trial, which is the relevant time frame to judge a claim of ineffective assistance of counsel.

State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987) controls the result.

Stewart explicitly overrules State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987), a clear indication that prior to this Court's May 2021 opinion, Adams was the controlling law, and so Adams is the law that determines the result in this case.

In Adams, the defendant objected to a jury instruction that "charged the jury that articles in a dwelling house 'must be deemed to be in the constructive possession of the person controlling the house in the absence of evidence to the contrary.'" Adams, 291 S.C. at 135, 352 S.E.2d at 486. This Court found the instruction reviewed in that case impermissibly shifted the burden to the defendant. Id. This Court then told trial judges how to instruct the jury on constructive possession:

> **The proper charge on constructive possession** is to instruct the jury that the defendant's knowledge and possession may be inferred if the substance was found on the premises under his control. . . . The trial judge should explain to the jury that it is free to accept or reject this permissive inference of knowledge and possession depending upon its view of the evidence.

[3] Therefore, this Court did not reach the question of whether the instruction violated Article I, § 21 in Stewart.

Id. at 135-36, 352 S.E.2d at 486 (internal citation omitted) (emphasis added). In its order, the PCR concluded this Court wrongly decided Adams because this Court wrongly interpreted State v. Hudson, 277 S.C. 200, 284 S.E.2d 773 (1981). See App. p. 513. In other words, the PCR court, in its order, overruled this Court's precedent.

The instruction in Stewart appears to be identical to the instruction in the present case and was provided by the same judge presiding over Ervin's trial. Reviewing several cases concerning the proof necessary to establish illegal possession of a narcotic, this Court determined, "In Adams, this Court misinterpreted these decisions and directed trial courts to explain the inference of knowledge and possession to a jury. . . . The challenged charge in this case was taken almost verbatim from Adams, ..." Stewart, 433 S.C. at ___, 858 S.E.2d at 812.

The PCR court erred because the jury charge was the proper jury charge pursuant to valid, controlling case law as held by this Court at the time of trial. Clairvoyance is not a requirement of defense counsel. Harden v. State, 360 S.C. 405, 409, 602 S.E.2d 48, 50 (2004). This Court found the lower court erred in granting relief on the basis that defense counsel should have objected to an instruction contrary to State v. Daniels, 401 S.C. 251, 254, 737 S.E.2d 473, 474 (2012), five years before Daniels was issued. Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). This Court held "that the PCR court erred in finding trial counsel ineffective for failing to object to the jury instruction when no case law existed rendering the instruction improper per se." Id. In reaching this result, this Court declared the following:

> This Court has previously held that reasonable representation does not require trial counsel to foresee successful appellate challenges to novel questions of law. E.g., Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994) ("We have never required an attorney to be clairvoyant or anticipate changes in the law. . . ." (citing Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993))), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999); Thornes, 310 S.C. at 309-10, 426

> S.E.2d at 765 ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

Id.; see Kornaharens v. Evatt, 66 F.3d 1350 (4th Cir. 1995) (holding "the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law."). Counsel is not ineffective for failing to object to the jury charge when the trial court instructed the jury with the charge this Court said judges should charge. As in Teamer, reasonable representation did not require Counsel to foresee Stewart's successful appellate challenge to Adams. Accordingly, the PCR court erred in finding Counsel ineffective.

The permissive inference did not violate constitutional rights.

The PCR court relied on Leary v. United States, 395 U.S. 6 (1969), to find the permissive inference charge in the instant case was similar to a statutory mandatory presumption instruction in Leary. However, Leary is inapplicable. In Leary, the challenged statutory presumption required jurors to infer a person in possession of any amount of marijuana knew whether the marijuana was imported or domestically grown. In its analysis, the Leary court observed: (1) most marijuana smokers were occasional rather than regular users and were less likely to be informed about the marijuana they smoked; (2) the great majority of marijuana possessors obtained their marijuana from suppliers within the country; (3) imported marijuana usually passed through numerous hands before reaching the end consumer; (4) marijuana grown in Texas was of the same quality as Mexican marijuana; and (5) the end consumers were not typically informed of the origin of the marijuana purchased. Id. at 48-50. Accordingly, the Leary Court found "no rational connection between the fact proved and the ultimate fact presumed" to sustain the statutory presumption. Id. at 33. "In short, it would be no more than speculation were we to say that even as much as a majority of possessors 'knew' the source of their marihuana." Id. at 53.

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

The United States Supreme Court hardly prohibited inferences: "Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact – from the existence of one or more 'evidentiary' or 'basic' facts." Cty. Court of Ulster Cty., N. Y. v. Allen, 442 U.S. 140, 156 (1979).

In Ulster, the United States Supreme Court reviewed a challenge to a statutory permissive inference that the presence of a firearm in a vehicle is evidence of illegal possession by all of its occupants. The United States Supreme Court observed in that case:

> The trial judge's instructions make it clear that the presumption was merely a part of the prosecution's case, that it gave rise to a permissive inference available only in certain circumstances, rather than a mandatory conclusion of possession, and that it could be ignored by the jury even if there was no affirmative proof offered by defendants in rebuttal. The judge explained that possession could be actual or constructive, but that constructive possession could not exist without the intent and ability to exercise control or dominion over the weapons. . . .

Id. at 160-61. Further, the Ulster court found a "'rational connection' between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is 'more likely than not to flow from' the former." Id. at 164-65. Like Ervin, the respondent in Ulster "overlook[ed] the distinction between a permissive presumption on which the prosecution is entitled to rely as one not necessarily sufficient part of its proof and a mandatory presumption which the jury must accept

even if it is the sole evidence of an element of the offense." Id. at 166. The Ulster Court rejected the respondent's reasonable doubt test for the permissive presumption, explaining:

> [T]he prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard. There is no more reason to require a permissive statutory presumption to meet a reasonable-doubt standard before it may be permitted to play any part in a trial than there is to require that degree of probative force for other relevant evidence before it may be admitted. As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in Leary.

Id. at 167. The Ulster Court found New York's statutory presumption met the test in Leary. Id. Much the way the New York statute properly supplied a permissive inference of constructive possession of firearms to occupants of a vehicle, the permissive inference for constructive possession of a resident was proper under Ulster, and did not violate of the rule in Leary.

In the instant case, the trial court charged the jury: (1) that the jurors **may** make such an inference and (2) "however this inference is simply an **evidentiary fact to be taken into consideration by you** along with the other evidence in this case and **be given the weight you decide it should have**." App. p. 388, 1-4. See also State v. Neva, 300 S.C. 450, 452, 388 S.E.2d 791, 792 (1990) ("Evidentiary presumptions must be charged as permissive inferences with specific instructions that the jury may accept or reject them.").

Accordingly, in the instant case, the instruction did not violate due process or In re Winship, 397 U.S. 358 (1970) because the inference was not advanced as a mandatory presumption, and the jury was free to accept the inference, or reject it for any reason. Certainly on its face, the presumption established a logical inference that typically a person with control over the premises where drug violations are occurring, may, depending on the evidence, be in constructive possession, alone or with others, of the drugs found on the premises. Accordingly, to the extent the order finds the instruction violated Leary, it is an error of law in light of Ulster.

Mens rea

In its Order, the PCR court found that the jury instruction altered the *mens rea* requirement. However, as discussed above, the charge was a proper jury charge consistent with South Carolina law and the South Carolina constitution. This issue was addressed in State v. Stewart, 433 S.C. 382, 858 S.E.2d 808 (2021). In Stewart, this Court explained that for a possession type drug offense, the prosecution must prove possession (actual or constructive) and "knowledge of the drugs and the intent to control their disposition or use." Id. at ___, 858 S.E.2d at 810 (internal quotation marks omitted). The jury instruction in Stewart, as in the instant case, included in its constructive possession charge a statement that "mere presence at the scene where the drugs were found is not enough to prove possession." Id. This Court found the mens rea element was communicated to the jury when considering the jury instructions as a whole. Id. at ___, 858 S.E.2d at 812. Like Stewart, the jury instruction in the instant case sufficiently communicated the correct *mens rea* when the jury instruction was read as a whole.

Counsel testified she did not find the charge objectionable because the jury charge simply provided the proper legal definition of constructive possession. App. p. 484-85. Counsel testified she did not believe the jury charge was improper. App. p. 486. Trial Counsel testified she requested the mere presence instruction, which was charged by the trial court. App. p. 468, lines 5-7. As discussed above, the challenged jury instruction was the instruction this Court required trial judges to use at the time of trial. Adams, supra.

Counsel's assessment was correct, even under the subsequent authority of Stewart. The charge given by the trial court was a full and correct statement of law. It specifically instructed the State had the burden of proof and must prove its case beyond a reasonable doubt. Specifically, the trial court admonished the jury that mere presence was not enough to prove possession.

Ervin Was Not Prejudiced by Any Alleged Deficiency

With respect to prejudice, an applicant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687; Harrington v. Richter, 562 U.S. 86, 104 (2011).

The PCR court's order fails to explain how Ervin was prejudiced by the jury instruction. Even if the jury charge was improper, nothing in the record supports the PCR court's conclusory finding that "[Trial Counsel's] failure to object was prejudicial to [Ervin]." As with the permissive inference reviewed in Ulster, the jury was free to reject the permissive inference, and was advised early and often that it was the finder of facts. Further, the jury was told mere presence at the scene was not enough. State v. Grovenstein, 335 S.C. 347, 353, 517 S.E.2d 216, 219 (1999) (noting the jury is presumed to follow the law as instructed to them in the trial court's jury charge); State v. Smith, 315 S.C. 547, 554, 446 S.E.2d 411, 415 (1994) (noting the substance of the law, not any particular verbiage, must be charged to the jury). Simply put, the trial court's instruction provided the jury with the proper law to decide a fair verdict. Accordingly, Counsel was not ineffective and the PCR court's grant of relief should be reversed.

II.

The PCR court erred in finding Counsel ineffective for not objecting to lay opinion testimony from narcotics officers because counsel exercised reasonable professional judgment in declining to object to the testimony and because the narcotics officers were not required to be qualified as experts to offer testimony based on the officers' experience.

In its Order, the PCR court found Counsel ineffective for not objecting to testimony the PCR court found should only be offered by expert witnesses. However, Counsel's performance was not deficient because the testimony was proper lay testimony and because Counsel testified she declined to object based on her reasonable trial strategy.

The PCR court found Counsel was ineffective for failing to object to three types of law enforcement testimony that it found should only be provided by expert testimony: (1) several instances of testimony about the use of scales in narcotics sales by drug dealers; (2) testimony in which an officer testified identified a crack cocaine "cookie;"[4] and (3) testimony from an officer interviewing Ervin that in his experience, Ervin was accepting responsibility for the narcotics found in his residence.

"A witness may not testify to a matter unless evidence is introduced sufficient to support a finding the witness has personal knowledge of the matter." State v. Williams, 321 S.C. 455, 463, 469 S.E.2d 49, 54 (1996) (citing Rule 602, SCRE). Lay witnesses are permitted to offer opinion testimony when the opinion or inference: (1) is rationally based on the witness' perception; (2) is helpful to a clear understanding of the witness' testimony or to the determination of a fact in issue;

[4] "We refer to it as a cookie. A crack cocaine cookie. Also on the top you see some of it is broken into little pieces. Normally, we see it like that when it's ready for distribution." App. p. 189, lines 15-25. The officer further explained "a narcotics user and dealer [possesses these types of drugs in these amounts]. Based on the pictures, it was ready to sell." App. p. 194, line 14 – p. 195, line 1.

and (3) does not require special knowledge, skill, experience, or training. Rule 701, SCRE; see Williams, 321 S.C. at 463, 469 S.E.2d at 54 ("The opinion or inference of a lay witness is admissible if it is a) rationally based on the perception of the witness, b) helpful to the determination of a fact in issue, and c) does not require special knowledge."). "[C]onclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury." State v. McClinton, 265 S.C. 171, 176-77, 217 S.E.2d 584, 586 (1975).

However, Williams observed, "Some statements are not mere opinions, but are impressions drawn from collected, observed facts." Williams, 321 S.C. at 464, 429 S.E.2d at 54. "A natural inference based on stated facts is not opinion evidence." Id.

Notably, "Rule 701 [FRE] does not prohibit lay witnesses from testifying based on particularized knowledge gained from their own personal experiences." United States v. Hill, 643 F.3d 807, 841 (11th Cir. 2011). In Hill, the appellant alleged the trial court erred in allowing several bank officials testify as lay witnesses about what their institutions would have done if they knew various loan applications were falsified. The Eleventh Circuit rejected this claim, observing:

> Most of the lay witnesses who answered hypothetical questions in this case did not do so based on any "scientific, technical or other specialized knowledge," but instead based their testimony on their personal experiences as officers of financial institutions with knowledge of their companies' policies and of the specific transactions at issue. Besides, it does not take any specialized or technical knowledge to realize that lending institutions would be reluctant to approve a loan application if they knew that it contained false statements about material facts. Because of that, there is little or no danger that lay witness testimony was used to evade the reliability requirements of Rule 702.

Id. at 842.

Moreover, "just because [a lay witness's] position and experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered 'expert

testimony.'" United States v. LeCroy, 441 F.3d 914, 927 (11th Cir. 2006). "Lay witnesses may draw on their professional experiences to guide their opinions without necessarily being treated as expert witnesses." United States v. Jeri, 869 F.3d 1247, 1265 (11th Cir. 2017). "[L]aw enforcement officers may testify as lay witnesses even though their expertise often makes them more efficient or productive at their jobs." Id.

Whether or not testimony about the narcotics trade requires expert testimony is not always a clear cut answer. See generally United States v. Castillo, 924 F.2d 1227, 1233 (2nd Cir. 1991) ("Simply stated, we are not convinced that New York jurors in today's climate. . .need an expert to enlighten them as to such elementary issues as the function of a scale. . . in a drug deal. The need is even less apparent when an eye-witness, as in this case [an officer], has already explained or described the relevant procedures and equipment."); but see United States v. Romero, 57 F.3d 565, 571 (7th Cir. 1995) (distinguishing Castilllo, observing, "But our society has not progressed (or rather, descended) to the point where the tools of the drug trade are familiar to all.").

In this context, Strickland allows a wide-range of judgment in the determination of whether counsel's performance fell below professional norms, because the question is not whether counsel's professional judgment is absolutely correct with the benefit of hindsight, but rather whether counsel's real-time judgment was reasonable within professional norms. The differing views and fact-centric nature of inquiry between the Second and Seventh Circuit Court of Appeals draws the inescapable conclusion that reasonable minds can differ, especially when necessarily made in real-time judgment as counsel necessarily needed to do, and neither view would be so unreasonable as to fall under reasonable professional norms. Strickland.

Arguably, similar to the testimony regarding the scales, testimony concerning the process of distribution of narcotics to end consumers, such as breaking crack cookies into individual doses

falls within common knowledge that a jury might deduce without expert testimony. Naturally, drugs for sale are broken or repackaged in order to be sold to multiple consumers, and drug dealers require a larger amount of drugs to be able to supply their customers. As stated above, just because a lay witness's position and experience could have qualified him for expert witness status does not mean that any testimony he gives at trial is considered "expert testimony." LeCroy, 441 F.3d at 927 (2006); see United States v. Jeri, 869 F.3d 1247 (11th Cir. 2017) ("[The officer's] testimony was not improper expert testimony; it merely showed [his] familiarity with narcotics investigations and his experience interviewing drug couriers, which had been developed during his tenure as a law-enforcement officer."). Accordingly, this testimony does not constitute testimony requiring expert witnesses, and therefore, Counsel's performance was not deficient for declining to impose an objection to the lay testimony.

The PCR court also found Counsel was ineffective for failing to object to testimony during which an officer stated that "[b]ased on [his] training and experience and being at that location and hearing [Ervin]," Ervin made an "admission of guilt that he was taking responsibility for the things that were found inside the home." App. p. 347, lines 1-10. This testimony is not improper lay opinion testimony requiring the officer to be qualified as an expert. See State v. Jones, 417 S.C. 319, 328, 790 S.E.2d 17, 22 (Ct. App. 2016) ("Expert testimony differs from lay testimony in that an expert is permitted to state an opinion based on facts not within his firsthand knowledge. . . a lay witness may only testify as to matters within his **personal knowledge** and may not offer opinion testimony which **requires** special knowledge, skill, experience, or training.")

Clearly, when reading the testimony in context, the prosecutor merely asked the officer how he interpreted Ervin's statement to him. The officer offered his interpretation of Ervin's statement, considering Ervin's tone, body language, and gestured, in combination with the

officer's own knowledge of the evidence found and the circumstances of the case. Thus, clearly the testimony was rationally based on the officer's own perceptions. See United States v. Parkhurst, 865 F.3d 509, 515 (7th Cir. 2017) (explaining a detective's testimony about the interpretations he drew from a conversation with a defendant was "based on his perceptions of the conversation at the time it occurred" and characterizing such testimony as "classic Rule 701 lay-witness testimony").

Additionally, that perception-based testimony was helpful to the jury to understand Appellant's responses during the interview because the officer—unlike the jurors—was seated directly across from Ervin in the interview room and, therefore, was in the best possible position to evaluate and interpret her demeanor, statements, and gestures as she spoke with him. See State v. Fripp, 396 S.C. 434, 439-440, 721 S.E.2d 465, 467-468 (Ct. App. 2012) (finding the trial judge properly permitted two witnesses to offer lay witness opinion testimony identifying Fripp from surveillance footage based on their familiarity with him because the testimony was rationally based on their perceptions and aided the jurors by providing a better perspective of the evidence before them); cf. Robinson v. United States, 797 A.2d 698, 707 (D.C. 2002) ("Whalen's 'opinion' testimony was based on his personal observations of Harris' demeanor and on the fact that he had received contradictory information from another witness that Harris was outside, not inside, when the shooting occurred. The trial judge could, and did, reasonably conclude that Whalen's testimony would be helpful to the jury because it explained why he questioned Harris a second time for information about Frank Blakeney's murder."). Accordingly, the officer's testimony did not require her to be qualified as an expert witnesses.

Further, immediately, Counsel cross-examined Agent Smith on this assertion, as follows:

> Q: So Mr. Ervin said, "Benoit Bush does not have anything to do with this."

A: Yes, he did.

Q: He didn't say, "These are my drugs."

A: No, he did not.

Q: He didn't say, "I know whose drugs these are."

A: No.

Q: He didn't say anything like that. All he said was this individual didn't have anything to do with it.

A: Yes, ma'am.

Q: So you're just assuming that that's an admission; correct?

A: Through my experience. Yes, ma'am.

App. p. 347, line 15 –p. 348, line 2.

The PCR court overlooked that Counsel articulated a valid, reasonable trial strategic reason for declining to object to the officers' testimony, and therefore, was not deficient for not objecting to the testimony. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland, at 691. Therefore, judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The burden of disproving the reasonableness of trial strategy lies with the applicant. Burt v. Titlow, 571 U.S. 12, 17 (2013); Dunn v. Reeves, 141 S.Ct. 2405, 2410

(2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.") (citation and internal quotation marks omitted).

At the PCR hearing, Counsel testified she refrained from an objection to the officers' testimony and instead chose to challenge the officers' credibility during cross-examination. Counsel testified she "temper[ed] her objections with what was going to irritate the jury and the judge." App. p. 490, lines 1-3. Counsel further testified she believed she made her "point pretty sufficiently across through examination." App. p. 490. Counsel completed a thorough cross-examination of the officers, especially in challenging Agent Smith's testimony regarding Ervin's alleged admission. App. p. 337, lines 3-11; 347, lines 10-25. Accordingly, Counsel was not deficient.

Further, Ervin was not prejudiced. To prove prejudice, an applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 694). A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

First, even if counsel interposed an objection, the prosecution certainly would establish some of the officers, if not all, possessed sufficient training, education, and experience to be qualified as experts and provide the same testimony after being qualified as experts in front of the jury, which this Court found tends to **enhance** the prosecution's presentation. See State v. Kromah, 401 S.C. 340, 737 S.E.2d 490 (2013) ("Smith was qualified as an expert and, although an expert's testimony theoretically is to be given no more weight by a jury than any other witness,

it is an inescapable fact that jurors can have a tendency to attach more significance to the testimony of experts.").

Additionally, testimony concerning the use of digital scales is limited in its potential to harm since evidence supported Ervin's charges based on the possession and quantity of the drugs – and their packaging – notwithstanding the presence of a digital scale. Moreover, the evidentiary inference made from the presence of a digital scale in the kitchen could be argued by the prosecutor; and anyway, jurors could easily make the same inference themselves.

Further, the testimony from law enforcement officers offering lay testimony on the use of digital scales is merely cumulative to testimony from Sergeant Kenya Griffin, who was qualified as an expert in marijuana analysis. App. p. 267. She testified digital scales are used by those in the "sale of narcotics." App. p. 273. The PCR court, without any analysis, apparently claimed the testimony exceeded the scope of her expertise when making the offhand observation in which "one SLED expert who testified to matters for which she was not qualified." App. p. 523. However, Sergeant Griffin testified, based on her "training and experience," about the use of digital scales. App. p. 273, lines 7-9. So despite the conclusory finding, it does not appear Sergeant Griffin exceeded the scope of her expertise.

Additionally, as previously discussed, the PCR court found Counsel was ineffective for failing to object to the officer's interpretation of Ervin's statement to law enforcement. Ervin failed to meet his burden as to prejudice because even if Counsel made the objection and the objection was sustained, jurors certainly were able to decipher Ervin's words themselves, to Ervin's detriment.

However, as to all of Ervin's "expert testimony" allegations, Ervin was not prejudiced because none of the statements constituted opinion testimony that required an expert witness.

Moreover, even if the testimony did require the law enforcement witnesses to be qualified as experts, they likely would be admitted as experts in this case. See Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) (observing that to be competent to testify as an expert, a witness must have acquired by reason of study or experience such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony). In Ervin's case, the officers who testified were sure to carry the requisite knowledge and skill regarding narcotics cases, and were qualified to testify as experts. Accordingly, Ervin was not prejudiced by any alleged deficiency; and more importantly, counsel's strategy easily met the Dunn standard for judging the reasonableness of articulated strategy. Therefore, this Court should reverse the PCR court's erroneous grant of post-conviction relief.

III.

Because the solicitor's closing argument was not improper, counsel's performance was not deficient for declining to object to the argument, and the PCR court's finding that counsel's stated strategy was unreasonable is controlled by an error of law. Further, the PCR court's finding that Ervin was prejudiced is not supported with probative evidence.

The PCR court found Counsel ineffective for failing to object during closing argument to the prosecutor's declaration that, "I'm proud to be [law enforcement's] solicitor and the job that they're doing here and the job that they did in this case." App. p. 358, lines 17-19. Of course, context matters – it was part of this statement:

> You're going to hear a lot of attacks probably. This is the last chance I get to come up here and talk to you. You're going to get to hear from Ms. Taylor at the end of this case and I'm sure she's going to tell you all the things that they did wrong. **Are these guys perfect? Absolutely not.** None of us are. But I'm proud to be their solicitor and the job that they're doing here and the job that they did in this case.

App. p. 358, lines 12-19.

Counsel's decision to not object to the prosecutor's argument that he was proud of the officers – softening his admission the officers made mistakes – is not deficient performance because the prosecutor's argument was not improper. Further, Counsel articulated a valid strategic reason for not objecting. Additionally, Ervin was not prejudiced by the argument. The PCR court's ruling is controlled by errors of law as discussed below.

"The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. . . . A prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004) (internal citations

omitted)). However, a prosecutor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. Matthews v. State, 350 S.C. 272, 275, 565 S.E.2d 766, 768 (2002).

The wide range of allowable argument was discussed by this Court in State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). In that case, the Supreme Court found the trial court did not abuse its discretion in denying mistrial despite that the solicitor argued to the jury what it does would serve as a deterrent to others and if the jury turned "every man loose simply because you are afraid of convicting an innocent man, you're not doing your job." Id. at 91, 212 S.E.2d at 590. The Supreme Court noted arguments "similar to that of the solicitor in this case" were addressed in C.J.S. as follows:

> So long as he stays within the record and its reasonable inferences, the prosecuting attorney may legitimately appeal to the jury to do their full duty in enforcing the law, or to return the verdict which he conceives it to be their duty to return under the evidence, and may employ any legitimate means of impressing on them their true responsibility in this respect, as by stating that a failure to enforce the law begets lawlessness. Thus, he may in effect tell them that the people look to them for protection against crime, and may illustrate the effect of their verdict on the community or society generally with respect to obedience to, and enforcement of, the law; he has the right to dwell on the evil results of crime and to urge a fearless administration of the criminal law; and he may ask for a conviction, or assert the jury's duty to convict. **He may argue with reference to any matter which the jurors may properly consider in arriving at their verdict, and may point out as well the matters which they should not consider.**

Id. at 92, 212 S.E.2d at 590 (quoting 23A C.J.S. Criminal Law § 1107) (emphasis added). In the instant case, the prosecutor's argument seems to concede mistakes by law enforcement but attempts to argue the investigation as a whole was worthy in an attempt to dissuade the jury from putting emphasis on the mistakes. It was not an improper argument.

The only case the PCR court relied on was Tappeiner v. State, 416 S.C. 239, 785 S.E.2d

471 (2016). In Tappeiner, a sexual assault case, the prosecutor asserted the rape crisis counselor who interviewed the victim believed the victim (although the counselor did not testify to this). The prosecutor further argued, "I think the expert told you that she has done over 200 forensic interviews. Folks, these are people who can detect when someone is making something up or if there is nothing there." Id. at 246, 785 S.E.2d at 474-75. Additionally, the solicitor argued in reaching a verdict, the jury "should consider 'would you let [Tappeiner] babysit your kids? Your grandkids? Nieces and nephews? I think the answer to that is why you should find her guilty.'" Id. at 247, 785 S.E.2d at 475. This Court found the prosecutor's argument was improper because the prosecutor asserted the witnesses believed the victim, which was bolstering and objectionable. Further, the prosecutor's rhetorical questions concerning whether jurors would want Tappeiner to babysit their children was improper because it appealed to the jurors' emotions rather than the evidence in the record. Therefore, this Court found counsel was ineffective. Id. at 251-52, 785 S.E.2d at 477-78. Note the opinion does not indicate if the defense attorney in that case offered a strategic reason for not objecting to the closing argument.

The facts in the instant case simply do not implicate Tappeiner. In the instant case, the prosecutor did not say he believed the law enforcement witnesses or claim the law enforcement witnesses believed other witnesses. Nor was the argument calculated to appeal to the jurors emotions. Further, the prosecutor did not make an explicit personal assurance or hint at information not presented to the jury, but merely commented on the quality of the investigation per the testimony provided by the law enforcement witnesses (by admitting the investigation was not perfect). Accordingly, probative evidence does not support the finding that the prosecutor's argument was improper.

Moreover, the four-paragraph analysis of this issue in the PCR court's order contains two

significant errors of law. In its order, the PCR court relied on Rule 3.5 of the Rules of Professional Responsibility, which states in part a lawyer shall not "assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness. . . ." In the present case, the prosecution did not claim personal knowledge of a fact in issue, but merely complimented law enforcement's investigation. Further, the PCR court's reliance on the Rules of Professional Conduct is an error of law. This Court advised, "In our view, the Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction." Langford v. State, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993).

Even more problematic is the error of federal law committed by the PCR Court when dispatching Counsel's stated trial strategy. During the PCR hearing, Counsel explained why she did not object to the prosecutor's comment:

> I didn't object to the closing for several reasons. One, I had done a pretty good job of discrediting his officers on that stand, and I feel like he made that statement solely to try to get some sort of rehabilitation back from what they had lost through my cross. And, second, objecting in a closing argument I think sometimes has a negative effect with both the judge and the jury. So I almost thought making that statement was him even further repudiating that they weren't acting as they should to the standard.

App. p. 478, lines 3-11. Counsel testified she did not see the prosecutor's statement as bolstering at the time, although she testified, "I can see how you could view it that way now **in hindsight**."[5] App. p. 478, lines 12-19.

Counsel elected to offer a contrary opinion of law enforcement's performance, telling the jury in closing argument, "I think, I may be sure, I don't know, that's not good enough; okay?"

[5] See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.").

App. p. 371. She remonstrated: "Problem number one, no notes. . . . They didn't think it was important. If they had taken notes in this case we might have a different trial, a different suspect, maybe even a different defendant; okay? It wasn't important." App. p. 372, lines 14-25. She lamented how Captain Reeder testified several times "he couldn't remember because it was so long ago." App. p. 373, lines 1-6. She questioned why only one of the three officers reported to find narcotics testified. App. p. 373, lines 14-24. Counsel criticized law enforcement for not speaking with Brent Ervin, noting his dry cleaning receipts were found in the house and he was sitting in a Georgia prison for drug offenses. App. p. 373, line 20 – p. 374, line 6. She argued, "What we have here, ladies and gentlemen, is sloppy investigation. Sloppy investigation." App. p. 375, lines 7-9.

The PCR court's order made a skeletal assessment of Counsel's express strategy: "Trial counsel defended her position by saying she did not like to object to the closing argument of opposing counsel. This is generally true for virtually any attorney who tried cases on a regular basis. But there comes a time when such an objection is necessary to protect the integrity of the system. This was one." App. p. 524. The PCR court's ruling overlooks the high standard a PCR applicant must meet to find an attorney's articulated strategy was unreasonable. Dunn v. Reeves, 141 S.Ct. 2405, 2410 (2021) ("[E]ven if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.") (citation and internal quotation marks omitted). Further, the PCR court's belief that counsel must make an objection "to protect the integrity of the **system**" instead of acting in the client's best interests when deciding whether or not to impose an objection is contrary to Strickland's requirements. Strickland at 688 ("Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, ... From

counsel's function as assistant to the defendant drive the overarching duty to advocate the defendant's cause . . . . Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."); Id. at 690 (explaining in determining a question of ineffective assistance, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work **in the particular case**.") (emphasis added). Id. at 688-89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counselor the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latititude counsel must have in making tactical decisions. . . . Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."); see generally, Burt v. Titlow, 571 U.S. 12, 24 (2013) ("But the Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance, and we have held that a lawyer's violation of ethical norms does not make the lawyer per se ineffective."). Because the PCR court relied on a prophylactic view in deciding the reasonableness of Counsel's strategy, rather than an examination into whether declining to object to the closing argument infringed on Ervin's personal rights to effective assistance under the Sixth Amendment and Strickland, the PCR court's finding that counsel's strategy was unreasonable is controlled by an error of law and is unsupported by probative evidence.

Further, Ervin was not prejudiced by the alleged deficiency. It "is not enough that the prosecutors' remarks were undesirable or even universally condemned." Darden v. Wainwright,

477 U.S. 168, 181 (1986). Appellate courts should be "careful and critical" in finding allegedly improper statements of counsel to be reversible error, and "[e]very case must necessarily depend upon its own particular circumstances." State v. Gilstrap, 205 S.C. 412, 415, 32 S.E.2d 163, 164 (1944). Appellate courts must determine if the solicitor's statements "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Tappeiner v. State, 416 S.C. 239, 251, 785 S.E.2d 471, 477 (2016) (quoting Vaughn v. State, 362 S.C. 163, 170, 607 S.E.2d 72, 75 (2004)).

The United States Supreme Court observed:

> [The prosecution's] arguments, like all closing arguments of counsel, are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear. While these general observations in no way justify prosecutorial misconduct, they do suggest that a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974). Further, to meet the high Strickland standard, "The likelihood of a different result must be *substantial*, not just conceivable." Harrington v. Richter, 562 U.S. 86, 112 (2011).

Not only was Counsel not deficient, Ervin was not prejudiced by any alleged deficiency. As previously discussed, at no point did the Solicitor make a statement regarding the credibility of the witnesses. Because the statement was not improper Ervin cannot prove he was prejudiced by a proper statement. Even if finding an oblique reference to the witnesses' credibility and assigning the argument's worst meaning, Ervin still failed to meet his burden of proving prejudice, as the statement was one brief statement in an entire closing argument. See State v. Tucker, 324 S.C. 155 (1996) (Affirming conviction, in part, because the statement made in Solicitor's closing

argument was "one isolated event in the entire argument."). The PCR court's determination from the cold record that Ervin was prejudiced is not supported by probative evidence.

Because the PCR court's determination that counsel was ineffective is controlled by errors of law and is unsupported by probative evidence, the grant of relief should be reversed.

CONCLUSION

Based on the foregoing arguments, Petitioner respectfully requests this Court reverse the PCR court's grant of relief and for this Court to affirm the convictions and sentences.

Respectfully submitted,

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October 26, 2021