THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No.: 2019-CP-10-03294

Mark Lorenzo Blake, #368687..... Appellant

v.

State of South Carolina ..... Respondent

NOTICE OF APPEAL

Appellant appeals the Court's denial of his application for post-conviction relief. Attached is the order from the court dated May 10, 2022 and received May 11, 2022.

May 20, 2022

s/ Christopher L. Murphy
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May 11, 2022

Christopher L. Murphy, Esquire
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146 Fairchild Street, Suite 130
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(via electronic mail & US mail)

Re: **Mark Lorenzo Blake, #368687 v. State of South Carolina**
Case No.: 2019-CP-10-03294

Dear Mr. Murphy:

Enclosed please find a copy of the filed Order of Dismissal for the above-captioned case, signed by The Honorable Jennifer B. McCoy and filed with the Charleston County Clerk of Court. A certificate of service serving a copy of the Order of Dismissal on you via email is attached. Additionally, a hard copy of the filed Order of Dismissal has been sent to the address above via US mail on this date.

Sincerely,

Samantha J. Weidauer
Assistant Attorney General

SJW/vh
Enclosures

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Mark Lorenzo Blake, SCDC #368687, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2019-CP-10-03294 **ORDER OF DISMISSAL**

FILED
2022 MAY 10 AM 7:55
JULIE J. ARMSTRONG
CLERK OF COURT
BY: DGP

The matter before this Court is an action for post-conviction relief (PCR) commenced by Applicant Mark Lorenzo Blake on June 18, 2019. The State requested an evidentiary hearing through its return filed on October 18, 2019. A hearing into the matter convened before the undersigned on December 9, 2021, at the Charleston County Courthouse. Applicant was present and represented by Christopher L. Murphy, Esquire. Assistant Attorney General Samantha J. Weidauer represented the State. Applicant testified on his own behalf at the hearing. Applicant's trial counsel, Jason T. King, Esquire, also testified.

In addition to the pleadings in this action, this Court had before it a copy of the Charleston County Clerk of Court records regarding the subject conviction; Applicant's records from the South Carolina Department of Corrections; and records from Applicant's direct appeal, including the trial transcript.

After hearing the testimony at the PCR hearing and upon full review of the record, this Court finds Applicant's allegations regarding ineffective assistance of trial counsel are without merit. For the reasons discussed below, this Court finds Applicant has failed to meet his requisite burden of proof, denies relief, and dismisses this action with prejudice.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections. During its June 2013 term, the Charleston County Grand Jury indicted Applicant for possession with intent to distribute heroin (2013-GS-10-02729). On June 14-15, 2016, Applicant proceeded to a jury trial before the Honorable D. Garrison Hill. Applicant was represented by Jason T. King and Tamara Van Pala, Esquires. Stephanie Linder and Lauren Frierson of the Ninth Circuit Solicitor's Office prosecuted the case. On June 15, 2016, the jury found Applicant guilty as indicted. Judge Hill sentenced Applicant to twelve years' imprisonment with credit for time served for the possession with intent to distribute heroin charge.

Applicant filed a timely notice of appeal and an appeal was perfected on his behalf. Appellate Defender Kathrine H. Hudgins (Appellate Counsel) of South Carolina Commission on Indigent Defense – Division of Appellate Defense represented Applicant who argued the following issues:

1. Did the trial judge err admitting the second chemist's report, testimony and drug evidence when the State failed to establish an adequate chain of custody for the substance tested?
2. Did the trial judge err in refusing to suppress evidence obtained as a result of an unreasonable search of [Applicant's] home?

Following briefing, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence in an unpublished opinion without oral argument. *State v. Mark Lorenzo Blake, Jr.*, Op. No. 2018-UP-111 (Ct. App. filed March 14, 2018). Thereafter, Applicant filed a petition for rehearing on March 29, 2018. The Court of Appeals issued an order denying the petition for rehearing on April 26, 2018.

On May 25, 2018, Applicant, through Appellate Counsel, filed a Petition for Writ of Certiorari in the Supreme Court of South Carolina. The State filed its Return to the Petition for

Writ of Certiorari on June 25, 2018. On November 9, 2018, the Supreme Court denied certiorari. The Remittitur was issued on November 21, 2018. Applicant timely commenced this PCR action on June 18, 2019.

In his *pro se* application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. "Applicant was denied the right to effective assistance of counsel guaranteed by both U.S. Constitutional Amendments 6 and 14, S.C. Const. Art. 1, §§ 3, and 14 during both the preparational phase and course of applicant's trial".
    a. "Trial counsel's performance during both the preparational phase and course of trial was both inadequate and prejudicial; See. Strickland v. Washington; 466 U.S. 668 counsel's omission to: Arise and challenge both State and Federal Constitutional issues within pretrial. See. Sikes v. State: 448 S.E. 2d 560 (1994)";
    b. "Dismiss indictment; pursuant to: S.C. Art. 5, § 4 Supreme court's holding in State v. Langford 400 S.C. 421; 735 S.E. 2d 471 (2012). When applicant was arrested on the 22nd day of February, 2013 and was then after tried (40) months later, which was an (8) month unreasonable, excessive, and deliberate delay by the State and further breach of applicants said State Constitutional right"; and
    c. "Suppress evidence pursuant to: U.S. Constitutional Amendment 4, S.C. Const. Art. 1, § 10 appellate court's holding in State v. Philpot, 317 S.C. 458; 454 S.E. 2d 905 (1995). The veracity of the confidential informant was never established within search warrant affidavit; (see attached Exhibit – A) nor was the confidential informant ever disclosed to the applicant; U.S. Constitutional Amendment 6, S.C. Const. Art.1 § 14 (confrontation clause, right to fair trial). Due to the denial of pretrial motion to disclose confidential informant, dated March 21, 2016."

The State made its return on October 18, 2019.

II. Summary of Trial Testimony

As part of an ongoing drug investigation, officers from the Charleston County Sheriff's Office conducted surveillance on Applicant after receiving information through a confidential informant that involved controlled purchases. (Trial Tr. 44-45). As a result of the investigation, the officers obtained a search warrant for Applicant's residence. (Trial Tr. 45). After taking into consideration Applicant's criminal history, which included drug and weapon charges, a tip that a

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child may be in the home, and the nexus between drugs and weapons[1], law enforcement decided to take Applicant into custody by way of a felony traffic stop. (Trial Tr. 46).

On February 22, 2013, officers followed Applicant from his residence to the workplace of his girlfriend, where they conducted the felony traffic stop. (Trial Tr. 44, 48). The officers pinched in Applicant's vehicle, exited with their guns drawn, and ordered him to show his hands and exit his vehicle. (Trial Tr. 48-49). Applicant did not comply, so the officers removed him from his vehicle and took him to the ground. (Trial Tr. 49). He was placed under arrest for drug distribution charges, handcuffed, and secured in an officer's vehicle. (Trial Tr. 49-50). The officers had obtained a lawful search warrant for Applicant's residence; they drove him to his residence following the arrest and used his keys to gain access. (Trial Tr. 51-52). In the kitchen, officers found a bowl containing rice and drugs, a whisk, a mixing bowl, and scales. (Trial Tr. 201).

Pretrial, Applicant moved to suppress the evidence found during the search, claiming the search was conducted unreasonably. (Trial Tr. 39). Applicant challenged the constitutionality of the search and asked that the State demonstrate the search was executed in a reasonable manner. (Trial Tr. 39). The State called Detective Frank Waddell of the Charleston County Sheriff's Office to testify regarding the felony traffic stop and arrest. (Trial Tr. 40). Detective Waddell testified that following Applicant's arrest, the officers had also arrested his girlfriend and then headed to Applicant's residence to conduct a search. (Trial Tr. 50-51). Detective Waddell advised Applicant he had a lawful search warrant signed by a judge to search his residence. (Trial Tr. 51). Waddell explained they did not use a ram to get into the apartment but used Applicant's keys. (Trial Tr. 51-52).

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[1] *State v. Banda*, 371 S.C. 245, 253–54, 639 S.E.2d 36, 40–41 (2006).

Applicant was detained on the front stoop while officers conducted the search, and was agitated, speaking loudly and repeatedly in an aggressive manner. (Trial Tr. 53-54). Detective Waddell testified he even had to put his hands on Applicant when he continued to stand up after being ordered to sit down; testifying he placed his left hand on Applicant's right shoulder and pushed him back into the seat. (Trial Tr. 64-65). Detective Waddell further stated that after being taken into custody, Applicant was not cooperative; rather, he indicated Applicant was kept in the presence of law enforcement personnel instead of leaving him unattended because it was a safety issue. (Trial Tr. 61). Detective Waddell testified he tried to explain to Applicant the reason for the search. (Trial Tr. 54). On cross-examination, trial counsel asked whether Detective Waddell gave Applicant a copy of the search warrant, to which he replied that he left a copy at the residence. (Trial Tr. 62). He testified that Applicant "made vague inquiries as to what's going on, I haven't done anything, this is private property, what are y'all doing, general inquiries of that nature," but did not say that Applicant asked to see the search warrant. (Trial Tr. 62). He further explained Applicant was handcuffed behind his back sitting in a chair so he was not handed a copy as he would not have been able to hold it and read it behind his back, but he was advised of his warrants and the nature of the search warrant and what led to it. (Trial Tr. 63-64).

Trial counsel introduced a copy of the search warrant statute, section 17-13-150 of the S.C. Code, as Defendant's Exhibit #1 and asked Detective Waddell to read it. (Trial Tr. 65). The statute provided in part: "When any person is served with a search warrant such person shall be furnished with a copy of the warrant along with the affidavit upon which such warrant was issued." (Trial Tr. 65). He also introduced a copy of the search warrant as Defendant's Exhibit #2. (Trial Tr. 66). Defense counsel pointed out that the search warrant contained a phrase that read: "copy of this search warrant shall be delivered to the person in charge of the premises

searched at the time of search if practical." (Trial Tr. 66). Sergeant Mark Bryant also testified regarding his involvement in the felony traffic stop and search warrant. (Trial Tr. 71). He testified Applicant had "a bit of an attitude," was talking back and raising his voice, and was not calm while the search was in progress. (Trial Tr. 75). On cross-examination, he admitted he did not give Applicant a copy of the search warrant. (Trial Tr. 80).

Next, Deputy Andrew Miller testified that while the officers were conducting the search, Applicant asked repeatedly why he was being arrested even though Deputy Miller said it was explained to him at the time. (Trial Tr. 84). On cross-examination, he testified he did not give Applicant a copy of the search warrant and did not recall him asking for one. (Trial Tr. 86). The defense then called Applicant, who offered a slightly different version of the felony traffic stop and the events that transpired. He claimed he stepped out of the car and was tackled. (Trial Tr. 96). He also testified that he asked for the search warrant but the detectives told him, "Don't worry about that." (Trial Tr. 97). On cross-examination, the State presented Applicant with his statement and asked him to read a portion that stated: "Up the stairs and told us we were both under arrest for distribution of heroin and we sold over two ounces . . . ." (Trial Tr. 104). Applicant confirmed Detective Waddell told him why he was under arrest and why the search was happening. (Trial Tr. 107).

After the testimony of the witnesses, trial counsel argued based on *United States v. Thompson*, 667 F. Supp. 2d 758, 763 (2009), that the search was unreasonable because officers did not "give" Applicant a copy of the search warrant, and he moved to suppress all the evidence. (Trial Tr. 109). He argued the statute requires officers to serve a copy on the defendant, not just leave a copy at the residence. He claimed they could only leave a copy at the residence if no one was there, which was not the case here. (Trial Tr. 110). He further argued the

takedown that was part of the felony traffic stop was a factor in the unreasonableness of the execution of the search. (Trial Tr. 111).

The State then argued the circumstances in *Thompson* were different because a woman who was not part of the investigation was left outside in the heat for five hours with only a shirt on, and law enforcement did not identify themselves or explain what they were doing. (Trial Tr. 112). The solicitor argued that here, the felony traffic stop was necessary—based on the information officers had about Applicant's prior conviction and pending charges for guns and drugs—to minimize danger upon taking Applicant into custody. (Trial Tr. 113). She referred to the testimony by officers that Applicant was informed why he was being arrested and that a search was going to be executed at his residence. (Trial Tr. 113). She further argued that a copy of the search warrant could not be handed to him because he was belligerent and had his hands cuffed behind his back such that it would have been impossible for him to hold the copy. (Trial Tr. 116). Finally, she pointed out that the rationale behind suppressing evidence is to deter unlawful government behavior and because the government behaved lawfully and reasonably here while taking into consideration the safety of the community, suppression would not deter unlawful behavior. (Trial Tr. 116).

The trial judge distinguished the *Thompson* case and ultimately found this was not an unreasonable search. He based his ruling on the testimony of the officers that established justifiable reasons for the way the arrest and search were conducted. (Trial Tr. 121). He took into consideration the risk to officer safety based on Applicant's criminal history and found that the failure to give a copy of the search warrant to Applicant when he was handcuffed behind his back was not "enough in and of itself to deem the search unreasonable within the meaning of the Fourth Amendment." (Trial Tr. 122). He therefore denied the motion to suppress. (Trial Tr. 124).

At trial, Detective Frank Waddell testified similarly to his pretrial testimony. Afterward, the State called Philip Roberson, who was a narcotics sergeant with the Charleston County Sheriff's Office and was involved in executing the search warrant at Applicant's residence. (Trial Tr. 197-199). His role was to search the kitchen and part of the bedroom. (Trial Tr. 200). He testified that he found a bowl in the refrigerator in the kitchen that contained rice and drugs; he also found a whisk, mixing bowl, and scales. (Trial Tr. 201). He explained that the drugs he found were in bindles, which he said were packaged similar to a headache powder, and ten of them make up a bundle. (Trial Tr. 201). On cross-examination, Roberson testified that he recalled getting into the apartment not by forced entry but by using a key. (Trial Tr. 201).

Deputy Andrew Miller testified next regarding his role in the search as evidence custodian. (Trial Tr. 212). He collected all evidence found on the scene, took photographs of it, and transported it back to headquarters. (Trial Tr. 212-213, 222). He verified at trial that the bowls the drugs were found in were in the same condition as the day of the search except for the addition of fingerprint powder. (Trial Tr. 222-223). On cross-examination, trial counsel questioned him about a photograph of the door, and Deputy Miller testified he did not remember whether a key was used for entry. (Trial Tr. 233). He admitted the door looked like it had been busted open, but on redirect, he said it did not look like the door had been rammed because there was no large round mark on the door and the handle was not broken. (Trial Tr. 233, 237). When trial counsel asked him on re-cross, "Isn't this just a photograph of the door before it was busted open?" he answered that he would not take a photograph before entry because it would put him at risk. (Trial Tr. 238).

Jason Riley then testified as a forensic technician for the sheriff's department and went through the evidence storage process and explained chain of custody. (Trial Tr. 245-283). He

recalled that Deputy Miller submitted Evidence ID No. 135986, eleven bundles and one bindle of a brown substance, into evidence to him. (Trial Tr. 250-251). He testified he would not have accepted them into evidence if they had been tampered with. (Trial Tr. 253). He transported the evidence on several occasions, taking it to the City of Charleston's drug lab, and testified that it appeared to be in the same condition as when he first saw it. (Trial Tr. 254). He named two other people in his unit who also touched the evidence: Investigators Mark Watson and Aaron Meyer. (Trial Tr. 255). On cross-examination, he went over the dates the evidence was signed in and out and testified it was outside of his control three times. (Trial Tr. 256).

Next, Susan Payne testified as the evidence custodian in the forensic services division of the City of Charleston Police Department. (Trial Tr. 259). She handled the evidence in Applicant's case and testified she would not have transported it if it had been tampered with. (Trial Tr. 260-261). She testified it looked like it was in the same condition as when she first saw it and that she received it from Jason Riley and transported it to Renee Hilton. (Trial Tr. 262). On cross-examination, she testified in more detail that after receiving the evidence from Riley on March 1, 2013, she placed it in a safe and then it went to Elizabeth Mitchell before coming back to her on June 1, 2015. (Trial Tr. 263-264). It then went to Renee Hilton and stayed at the Charleston Police Department for seven days, from June 1–8, 2015, before going back to the sheriff's office. (Trial Tr. 264). Payne received it again on November 23, 2015, before it went to Hilton again. (Trial Tr. 264). She admitted that when she received it back from Mitchell on June 1, 2015, the bag had been cut open. (Trial Tr. 265).

Renee Hilton, a criminalist at the City of Charleston Police Department, testified next. (Trial Tr. 266). The trial court qualified her as an expert in drug analysis without *voir dire* or objection by the defense. (Trial Tr. 269). Hilton testified she analyzed the substances in this case and that

they were previously tested by her lab two years before. She had to look over the previous analyst's work to see if she came to the same conclusion; she did and was able to pass the review and release the report. (Trial Tr. 270-271). She testified that the reason the drugs were retested was because the previous analyst was no longer employed there and was not available to testify. (Trial Tr. 272). She testified each time a substance is tested there is an amount removed for testing that changes the weight and that temperature can also affect weight. (Trial Tr. 272-273). She testified that she prepared a lab report on December 1, 2015. (Trial Tr. 273-274). When the State tried to admit the report, trial counsel objected and the jury took a recess. (Trial Tr. 274).

Applicant objected to the chain of custody based on the fact that the State did not call Elizabeth Mitchell to testify, citing *State v. Joseph*, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997). (Trial Tr. 275). He also complained that Ashley Carr Earl and Mark E. Watson did not testify. (Trial Tr. 275-276). Applicant moved to exclude the drugs based on the chain of custody, claiming Mitchell was a crucial element. (Trial Tr. 276). The State argued that case law including *State v. Hatcher*, *State v. Taylor*, *State v. Pope*, and *Fleming v. United States* supported its argument that for fungible evidence such as drugs, the chain of custody must be established as far as practicable, that not every person was required to testify, and that the State presented a sufficient chain of custody. (Trial Tr. 276-279). After thorough arguments from both parties, the trial judge ruled the chain of custody had been sufficiently established, noting that the purpose of a chain of custody is to ensure the item is what it is purported to be. (Trial Tr. 299-300). He found the chain had been established as far as practicable, the identity of all people who handled the evidence had been established, and there was no evidence of tampering. (Trial Tr. 300). Finally, he determined that any discrepancies were certainly grounds the defense could pursue on

cross-examination regarding credibility but did not change his ruling on admissibility. (Trial Tr. 300).

After the State rested, the trial judge clarified his ruling after realizing he had misnamed the case he was relying on. He explained he was relying on *State v. Hatcher* and *State v. Taylor*. He noted "[t]here was expert testimony by Ms. Hilton that the State presented that demonstrates the likely and probable manner in which Ms. Mitchell tested and resealed this fungible item. And the identity of the people who transported it and had control at various times was established as far as practicable." (Trial Tr. 319). Defense counsel renewed his motions to suppress based on the search and also based on the chain of custody and moved for a directed verdict. The trial judge denied all the motions. (Trial Tr. 319-320).

Ultimately, the jury found Applicant guilty and Judge Hill sentenced him to twelve years' imprisonment with credit for time served. (Trial Tr. 381, 389).

III. Issues Before This Court

Applicant filed the instant post-conviction relief action on June 18, 2019. Though not specifically pled in his application or by formal amendment, Applicant, through Counsel, informed this Court at the beginning of the evidentiary hearing he intended to argue the following:

1. Trial counsel failed to explain the strike system to Applicant;
2. Trial counsel failed to explain Applicant's right to take the stand during trial or call Applicant to testify during trial;
3. Trial counsel failed to request a lesser-included charge of simple possession;
4. Trial counsel failed to object to witness comments and move for a mistrial; and
5. Trial counsel failed to object to a witness discussing Applicant's behavior when search warrant was executed.

To the extent the allegations set forth in Applicant's original application can be construed as separate grounds for relief from the grounds stated at the PCR hearing, the Court finds those

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claims were voluntarily waived and abandoned, and those claims are therefore denied and dismissed with prejudice. S.C. Code Ann. § 17-27-90.

IV. Standard of Review

An applicant may seek post-conviction relief upon the following types of allegations:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> 2. That the court was without jurisdiction to impose sentence;
>
> 3. That the sentence exceeds the maximum authorized by law;
>
> 4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> 5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
>
> 6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right, and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. The reviewing court applies the two-part test outlined in

Strickland to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Id.* at 687–88; *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. *Id.*

Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23

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(2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

"When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109–10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough*, 540 U.S. at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable.").

Review of counsel's actions is hallmarked by deference, as "it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688–89; *see id.* at 691 ("Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another."). "Defense lawyers have 'limited' time and resources, and so must choose from among 'countless' strategic options." *Dunn*, 594 U.S. ___, 141 S. Ct. at 2410

(quoting *Harrington*, 562 U.S. at 106–107). "Such decisions are particularly difficult because certain tactics carry the risk of 'harm[ing] the defense' by undermining credibility with the jury or distracting from more important issues." *Id* (quoting *Harrington*, 562 U.S. at 108). Thus, a fair assessment of attorney performance requires 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. *Strickland*, 466 U.S. at 689. The ultimate question is not whether counsel's actions were reasonable, but whether there is any reasonable argument counsel satisfied *Strickland*'s deferential standard.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance 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." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see id.* at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt").

In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An 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." *Id.* at 691. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90. 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 applicant's burden of proving both *Strickland* components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Id.* at 686; *see Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (noting that under *Strickland*, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); *cf. United States v. Morrow*, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so *manifestly* ineffective that defeat was snatched from the hands of probable victory.").

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V. Findings of Fact & Conclusions of Law

This Court has reviewed the testimony presented at the PCR hearing, observed the witnesses, passed upon their credibility, and weighed their testimony accordingly. After hearing the testimony presented and considering the legal arguments by counsel, as well as the record in this action incorporated by way of the State's return, this Court proceeds to the claims raised and finds each to be without merit. Pursuant to S.C. Code Ann. § 17-27-80, this Court makes the following findings of facts and conclusions of law based upon all of the probative evidence presented.

Allegation Counsel Failed to Explain the Strike System to Applicant

Applicant contends Counsel was ineffective for failing to explain the strike system to him. This Court finds this allegation is without merit. During the evidentiary hearing, Applicant testified he knew he had several other serious charges pending at the time of his trial. Applicant testified Counsel briefly discussed the strike system with him; however, Applicant states he did not understand how he would be effected should he receive a strike, nor could Applicant recall whether he understood that if he were found guilty, he would receive a strike for this charge. Applicant stated that prior to trial, Counsel primarily discussed Applicant's defense and trial strategy with him. Applicant testified the basis of Counsel's trial strategy was to show law enforcement had planted the heroin in his apartment following a felony traffic stop. Applicant opined that the only evidence the State had against him relied on the credibility of Detective Frank Waddell, one of the arresting officers, who Applicant testified he was suing for civil charges at the time of his trial[2]. Applicant further testified he believed Counsel wanted him to

[2] Counsel argued, *in limine,* that Applicant's lawsuit was a 1983 civil rights violation regarding how the search was conducted. The trial court ruled Applicant's pending lawsuit against Detective Waddell was admissible and trial counsel could question Detective Waddell whether he was being sued by Applicant. (Trial Tr. 35-36).

plead guilty to the instant charge instead of proceeding to trial. When asked about plea offers, Applicant testified that prior to trial, the State offered to drop three of his pending charges in exchange for a plea. However, Applicant adamantly testified at the evidentiary hearing he did not consider, nor did he wish to plead guilty.

Trial counsel, Jason T. King (Counsel), also testified at the evidentiary hearing. Counsel credibly testified he had been appointed to represent Applicant in this case and that he recalled trying this matter. Counsel testified his general impression of Applicant was that he was intelligent, but also a headstrong individual – wanting things to go "his way". Counsel testified he believed Applicant understood all conversations they had, that he had discussed Applicant's constitutional rights with him prior to trial, and stated Applicant was aware of the penalties and strike the charge carried. Counsel agreed that at the time of trial, Applicant had multiple other charges pending and stated Applicant did not want to plead guilty despite Counsel's belief that pleading guilty would have been in Applicant's best interest given the State's evidence. Counsel noted Applicant's decision to proceed to trial instead of plead guilty was a source of contention between Applicant and multiple counsels who represented Applicant prior to Counsel's appointment to the case.

Regarding Applicant's defense, Counsel testified his overall trial strategy was to show that the drugs in Applicant's apartment were planted by law enforcement. Counsel stated he believed this to be Applicant's best defense as it would allow Counsel to argue overzealous policing occurred and discuss the war on drugs with the jury. Counsel believed this defense was supported by how law enforcement enacted Applicant's felony traffic stop – law enforcement allowed Applicant to drive to his girlfriend's work place before stopping him. Counsel further testified this defense allowed him to present to the jury evidence that law enforcement refused to

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give Applicant a copy of the search warrant during the search[3]. While Counsel admitted he did not favor the defense, he felt it was the best and only defense Applicant had based on the strength of the State's case. In support of this defense, Counsel reasoned that looking forward in time to when Applicant would be tried for his other pending charges, Applicant's acquittal for this matter may have made the Solicitor reconsider the strength of those other charges. Counsel stated he believed Applicant could have received a better plea deal for charges to follow. Counsel further stated he believed Applicant to be in an impossible situation and discussed with Applicant the possibility he would be struck out eventually.

This Court finds Applicant has failed to establish any deficiency on the part of Counsel regarding this allegation. Applicant testified he discussed the strike system with Counsel in some capacity, but maintained he did not fully understand the ramifications of receiving a strike. This Court finds Applicant received complete and well-founded advice by counsel in advance of his trial. Specifically, this Court finds Counsel was credible in stating he felt Applicant understood their conversations prior to trial, that Counsel was credible when he stated he had discussed Applicant's constitutional rights with him, and that Counsel was credible when he testified Applicant was aware of the penalties and strike the charge carried. Thus, this Court finds that Applicant was informed of the strike system in relation to the charge and, consequently, relief is denied on this ground.

As to prejudice, a trial court has broad discretion in imposing criminal sentences within the limits prescribed by law. *State v. Franklin*, 267 S.C. 240, 226 S.E.2d 896 (1976); *Clark v. State*, 259 S.C. 378, 192 S.E.2d 209 (1972). The courts normally have no discretion to correct a

[3] Pretrial, Counsel made a motion to suppress the search warrant arguing the search was conducted unreasonably. (Tr. Transcript 39). Following testimony from multiple witnesses, the trial court found the search reasonable within the means of the Fourth Amendment and denied the motion to suppress. (Tr. Transcript 124).

sentence given within statutory limits. To be entitled to relief, Applicant must prove the alleged excessive sentence was the result of partiality, prejudice, oppression or corrupt motive, or that the sentence constitutes cruel and unusual punishment *per se*. *Clark*, 259 S.C. 378, 192 S.E.2d 209; *State v. Cogdell*, 273 S.C. 563, 257 S.E.2d 748 (1979). Applicant cannot prove, nor does he allege, any of these types of deficiencies in the sentence issued.

Accordingly, Applicant's ineffective assistance claim for Counsel's alleged failure to explain the strike system to him is **DENIED.**

Allegation Counsel Failed to Adequately Advise Applicant Regarding His Right to Testify at Trial

Applicant contends Counsel was ineffective for failing to advise him of his right to take the stand during trial and/or call Applicant to testify during trial. This Court disagrees and denies and dismisses this allegation.

At the PCR hearing, Applicant testified he remembered the Court apprising him of his right to testify. Applicant stated that though he remembered the Court's discussion with him regarding this right, he went along with the decision of the trial court. On cross-examination, when questioned whether he understood it was solely his decision whether or not to testify at trial, Applicant testified he understood it was his decision, and his decision alone.

Counsel testified at the PCR hearing that he discussed Applicant's constitutional rights with him and further noted that the trial court entered into a colloquy with Applicant regarding these rights on the record. Specifically, the following exchange took place between the trial court and Applicant:

> THE COURT: Sir, you have the opportunity to testify in this case. You also have the opportunity and the right not to testify. I want to make sure you understand your options and consequences of your choice about whether you are going to testify. If I ask you a question or if I say something that doesn't make sense, just ask me to repeat it or try to clear it up. Is that okay with you, sir?

THE DEFENDANT: Yes, sir.

THE COURT: All right. You can testify in this case and take the stand and tell your side of the story, present evidence that's relevant to this trial. If you do that, though, you need to understand the State can cross-examine you on the stand just as your lawyer has cross-examined their witnesses, okay? And that means that they can ask you anything that might bear on your credibility, that might be relevant to the issues in this case. I don't know, is there any prior record the State would seek to impeach him with if he testified?

MS. LINDER: Your Honor, there is nothing to impeach him with unless he would open the door to some of the other items.

THE COURT: Okay. So do you understand that you would have the right to take the stand and testify, sir?

THE DEFENDANT: Yes, sir.

THE COURT: And you also have the right not to testify, the right to remain silent. I have already told the jury repeatedly you don't have the burden of proof in this case, and you don't have to offer any evidence or explanation. I will tell them if you choose not to testify that they can't hold that against you or even discuss the fact that you didn't testify during their deliberations. It would not be keeping with their oath to talk about or discuss the fact that you didn't take the stand because everyone has a right to remain silent guaranteed by the Constitution. Do you understand that, sir?

THE DEFENDANT: I do.

THE COURT: All right. I do not know, has the defense presented any evidence at this point?

MR. KING: No, Your Honor.

THE COURT: I know there was some exhibits. There is also a consideration that you need to know about which you probably already discussed with your lawyer. If you do present evidence in this trial, the State will then get the final closing argument for the jury. That means they get the last word so to speak before the jury. If you don't present evidence your lawyer would have the final closing argument in the sequence of the closing arguments. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Okay. Now, do you have any questions of me about your right to testify or not to testify and the consequences of the choice?

THE DEFENDANT: No sir.

THE COURT: Thank you for your attention. Do you know how many witnesses you may be having?

MR. KING: At this point unless Mr. Blake changes his mind I don't intend to put up a case. I intend to get the last closing argument. I have advised Mr. Blake of that. He was in agreement unless he has changed his mind.

THE COURT: Okay. Is that your decision, sir?

THE DEFENDANT: Can me and my lawyer have a brief moment?

THE COURT: You may take as long as you need to talk to him about that.

(Trial Tr. 320-323).

A short luncheon recess was taken by the Court and parties to allow Counsel and Applicant to confer, where after the trial court asked Applicant the following:

> THE COURT: Sure. Have you made a decision about Mr. Blake?
> MR. KING: He has indicated he does not wish to testify, Your Honor. Defense is not putting up any evidence.

(Trial Tr. 324).

This Court finds Counsel's testimony concerning his discussions with Applicant regarding his constitutional rights to be credible and further finds Applicant was informed of his constitutional right to testify, as well as his right to remain silent by the trial judge. (Trial Tr. 320-324). It is ultimately solely Petitioner's decision whether to testify on his own behalf. *See* U.S. Const. Amend. V ("[n]o person ... shall be compelled in any criminal case to be a witness against himself"); *See generally Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000). "The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments." *State v. Wright*, 416 S.C. 353, 372, 785 S.E.2d 479, 489 (Ct. App. 2016) (citing *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987)). However, the right to present testimony is not without limitation. *Rivera,* 402 S.C. at 242, 741 S.E.2d at 703; *Rock,* 483 U.S. at 55. This right may be waived, and all that is necessary for a defendant to waive the right is to know that a right to testify exists. *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991).

This Court finds Applicant's decision not to testify was his and his alone, and was made freely, knowingly, and voluntarily after being informed of his rights by the Court and after being allowed an opportunity to discuss this right with Counsel and weigh the pros and cons. Applicant has therefore failed to establish deficiency or prejudice.

Accordingly, Applicant's claim pertaining to Counsel's failure to advise him of his right to testify is **DENIED.**

Allegation Counsel Failed to Request a Lesser-Included Jury Charge

Applicant contends Counsel was ineffective for failing to request a jury charge on the lesser-included offense – "simple possession". Applicant further contends and testified at the evidentiary hearing that Counsel did not discuss with him the possibility of requesting a lesser-included offense. This Court disagrees and finds Applicant failed to present any evidence or testimony indicating he was entitled to a lesser-included charge or any evidence that the trial court would have agreed to a lesser-included offense. Additionally, this Court finds this allegation is without merit because Counsel presented a well-reasoned strategic decision for not requesting a lesser-included jury charge and Applicant represented to the trial court he did not wish to request a lesser-included charge.

At the evidentiary hearing, Counsel credibly testified he did not request a lesser-included charge because it would have been counterintuitive to his trial strategy. Counsel testified his defense strategy was to argue that the subject heroin had been planted in Applicant's apartment and that Applicant was not the perpetrator. Counsel testified he believed trying this case "all or nothing" – not requesting a lesser-included offense – gave Applicant the best chance for acquittal. Counsel additionally noted Applicant was facing numerous other charges to be tried following this trial and he believed that if Applicant was found not guilty of this charge, it would indicate to the State that their pending cases were not as strong as they believed they were, possibly allowing Applicant to receive a more favorable deal on those pending charges in the future. Significantly, Counsel testified Applicant was not willing to plead to any charge, lesser-included or not and wanted to be found not guilty of the charge as indicted.

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Counsel further testified that at trial, the following colloquy took place between the trial court and Applicant regarding whether the defense would request a jury charge for the lesser-included offense:

> THE COURT: Do y'all have any request for a lesser included offense?
> (Attorney confers with client).
> MR. KING: I just discussed with him any lesser included and we are not – I thought about asking for possession or a lesser included, but we are not requesting it unless you amend the charges based on Mr. Blake's desire.
> THE COURT: That's a matter of strategy?
> MR. KING: Yes, Your Honor. I have asked Mr. Blake and he wants to go all or nothing and I'll go with his desire.
> THE COURT: So, Mr. Blake, is that correct?
> THE DEFENDANT: That's correct.
> THE COURT: And maybe the evidence would support a charge of possession which the jury would have the option of considering if they found the State had not proven all elements of possession to distribute. But you're saying you don't want the jury to have that option. You would rather them say guilty or not guilty as to the greater offense of possession with intent to distribute?
> THE DEFENDANT: Yes, Your Honor.
> THE COURT: All right. Do you have any questions of me about that?
> THE DEFENDANT: No.

(Trial Tr. 324).

This Court finds Applicant has failed to overcome the "strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in [his] case." *Ard*, 372 S.C. at 331, 642 S.E.2d at 596. When counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.*

Here, Counsel's credible testimony indicates he did not request a lesser-included charge of simple possession because: (1) Applicant was unwilling to plead guilty to any charge including a lesser-included charge and insisted on proceeding to trial; (2) arguing simple possession would have been inconsistent with his trial strategy—that Applicant was not the perpetrator; (3) Counsel believed an "all or nothing" strategy was Applicant's best chance at acquittal; and (4) arguing for a jury charge of simple possession would have gone against Applicant's wishes as established when Applicant testified on the record at trial that he did not wish to request a lesser-included charge. Counsel's strategy was objectively reasonable in this regard, particularly in light of his and Applicant's agreed upon "all or nothing" strategy. 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); *also see Abney v. State*, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (finding trial counsel articulated a valid reason for failing to request an instruction on the lesser-included offense of strong arm robbery where trial counsel felt the trial was going well and believed his client would be acquitted of armed robbery).

Accordingly, Applicant's claim pertaining to Counsel's failure to request a lesser-included jury charge is **DENIED.**

Failure to Object to Witness Testimony and Move for a Mistrial

Applicant next contends Counsel was ineffective for failing to object to specific testimony from State's witness, Andrew Miller, and for failing to move for a mistrial following the below-referenced testimony. Applicant's PCR Counsel directed the Court to the following testimony in support of this allegation:

> A. In my training and experiencing this is how they would in -- especially with the drugs that he was selling, how they would keep those together. They would wrap it up so they wouldn't lose any of the drugs that were inside.

(Trial Tr. 217, 11-13).

Though Applicant's PCR counsel placed this allegation on the record at the beginning of the evidentiary hearing, PCR counsel informed this Court Applicant would rest on the record and would not present testimony or argument for this allegation[4]. This Court finds Applicant's allegation is without merit as Applicant failed to present any evidence to suggest that Counsel's performance was deficient, nor did Counsel present any evidence that Applicant was prejudiced by Counsel's failure to object to support the allegation.

Leaving an issue unpreserved does not automatically constitute ineffective assistance of counsel. *See Millidge v. State*, 422 S.C. 366, 374, 811 S.E.2d 769, 800–01 (2018) (stating an applicant must prove both deficiency and prejudice to establish ineffective assistance of counsel for failing to preserve an issue); *see also id.* at 380, 811 S.E.2d at 804 ("[T]he proper inquiry for determining prejudice . . . is whether there is evidence in the record to support the trial court's finding . . . . If so, an appellate court would necessarily have affirmed the trial court's [ruling] . . . .").

Similarly, "[a]n ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." *Hough v. Anderson*, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Id.*; *see Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (noting

[4] On cross-examination, Respondent asked Counsel about the referenced testimony. Counsel agreed that while he did not believe witness, Deputy Miller, was referring to a specific sell or specific residence, he could not speculate to why he not did not contemporaneously object to the testimony.

that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Trial counsel's strategy is reviewed under "an objective standard of reasonableness." *Magazine v. State*, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). Moreover, "[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, 104. To establish prejudice, Applicant is required to show "there is 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." Id. at 694. Therefore, Applicant must also prove he was prejudiced by counsel's allegedly deficient performance.

Applicant further contends Counsel was ineffective for failing to move for a mistrial as a result of the elicited testimony. The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. *State v. Cooper,* 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for mistrial is an extreme measure that should be taken only when the incident is so grievous the prejudicial effect can be removed in no other way. *State v. Beckham,* 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999), *abrogated on other grounds by State v. Wright*, 391 S.C. 436, 706 S.E.2d 324 (2011). A mistrial should be granted only when absolutely necessary and a defendant must show both error and resulting prejudice to be entitled to a mistrial. *State v. Harris,* 340 S.C. 59, 63, 530 S.E.2d 626, 628 (2000). "A mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious

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reasons." *State v. Patterson,* 337 S.C. 215, 227, 522 S.E.2d 845, 851 (Ct.App.1999). "Whether a mistrial is manifestly necessary is a fact specific inquiry. 'It is not a mechanically applied standard, but rather is a determination that must be made in the context of the specific difficulty facing the trial judge.'" *State v. Rowlands,* 343 S.C. 454, 457-58, 539 S.E.2d 717, 719 (Ct.App.2000) (quoting *Gilliam v. Foster,* 75 F.3d 881, 895 (4th Cir.1996)). The trial court should exhaust other methods to cure possible prejudice before aborting a trial. *State v. Council,* 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999).

This Court finds that Applicant has failed to prove that he was prejudiced by Counsel's failure to object to the witness's statement and Applicant has failed to show that the comments infected the trial with unfairness as to make his conviction a denial of due process. *See e.g. State v. Durden*, 264 S.C. 86, 92, 212 S.E.2d 587, 590 (1975); *Brown v. State*, 383 S.C. 506, 515, 680 S.E.2d 909, 914 (2009). Moreover, Applicant has failed to show that a mistrial would have been granted if Counsel had moved for a mistrial. This Court finds this statement does not rise to the level of manifest necessity required to warrant a mistrial, even if this testimony were improper. Therefore, Counsel cannot be deemed deficient for failing to object to the statements or move for a mistrial. Further, Applicant did not present any testimony suggesting that Counsel's failure to object prejudiced Applicant, or had an effect on the outcome of Applicant's trial.

Accordingly, Applicant has failed to meet the burden imposed upon him, and therefore, Applicant's claim Counsel failed to object and move for a mistrial is **DENIED.**

Allegation Counsel Failed to Object to Testimony Regarding Applicant's Behavior During the Execution of the Search Warrant

Applicant lastly contends Counsel was ineffective for failing to object to testimony of Applicant's behavior during the search. Though Applicant's PCR counsel placed this allegation on the record at the beginning of the evidentiary hearing, PCR counsel informed this Court

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Applicant would rest on the record. This Court finds Applicant's allegation is without merit as Applicant failed to present any evidence to suggest that Counsel's performance was deficient, nor did Counsel present any evidence that Applicant was prejudiced by Counsel's failure to object to support the allegation.

"If evidence admitted without objection was admissible, then the complained of action fails both prongs of the *Strickland* test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." *Id.*; *see Miller v. Keeney,* 882 F.2d 1428, 1434 (9th Cir. 1989) (noting that if a petitioner challenges a futile objection, he fails both *Strickland* prongs); *U.S. ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (finding there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Additionally, because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.'" *Dunn v. Reeves*, 594 U.S. ___, ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting *Burt v. Titlow*, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that *no competent lawyer would have chosen.*" *Id.* (alteration in original) (emphasis added) (quoting *Titlow*, 571 U.S. at 23–24).

This Court finds testimony relating to Applicant's behavior during the execution of the search warrant was not harmful to Applicant's case. Counsel's testimony regarding his trial

strategy further supports this finding as Counsel credibly testified Applicant's defense centered around the notion that the heroin was planted by law enforcement. Additionally, this Court finds Counsel was able to adequately cross-examine witnesses regarding the execution of the search warrant, execution of the search warrant, and Applicant's behavior, and argue to the jury a plausible explanation for Applicant's behavior that related to the defense's trial strategy. Therefore, after a review of the record, this Court finds testimony relating to Applicant's behavior during the search was not harmful to his case and did not conflict with the defense's theory of the case.

Accordingly, Applicant has failed to meet the burden imposed upon him, and therefore, Applicant's claim Counsel failed to object to testimony regarding his behavior during the execution of the search warrant is **DENIED.**

VI. Conclusion

Based on the evidence presented at the PCR hearing and a thorough review of the record before this Court, this Court finds that Applicant has not proven any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application is denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203 SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

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IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the State within the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 9 day of May, 2022.

JENNIFER B. MCCOY
Presiding Circuit Court Judge
Ninth Judicial Circuit

Charleston, South Carolina

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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Mark Lorenzo Blake, #368687	)	Case No.: 2019-CP-10-03294
Applicant,	)	
v.	)	Certificate of Service
State of South Carolina	)	
Respondent,	)	

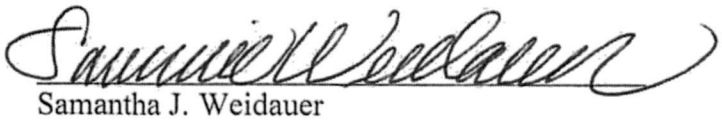
1. Undersigned is counsel of record for the Respondent in the above-captioned action.

2. Pursuant to the South Carolina Supreme Court's Order "RE: Operation of the Trial Courts During the Coronavirus Emergency" (Appellate Case No. 2020-000447), dated April 3, 2020), "a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer's primary email address listed in the Attorney Information System (AIS)."

3. Undersigned has served a copy of the Order of Dismissal in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

Christopher L. Murphy, Esquire
cmurphy@rlattorneys.com

DATED this 11th Day of May, 2022.



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