

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO YORK COUNTY  
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

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Appellate Case No. 2016-000808

RECEIVED

APR 05 2017

S.C. SUPREME COURT

DONELL HUTCHINSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## PETITIONER'S ISSUE PRESENTED

- I. Did the PCR court err in finding that, although trial counsel's performance was deficient for failing to obtain the audio recording of the purported controlled buy that the State relied on for probable cause to secure a search warrant of Petitioner's residence, Petitioner was unable to prove prejudice when the audio recording did not support the State's contention that Petitioner sold drugs to the confidential informant?

## STATEMENT OF THE CASE

Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the York County Clerk of Court's orders of commitment. Petitioner was indicted by the November 2009 term of the York County Grand Jury for Possession of Cocaine Base (2009-GS-46-4381) and Trafficking in Cocaine (2009-GS-46-4382). Erik Delaney, Esquire, represented him. On February 23, 2010, Petitioner proceeded to a jury trial pursuant to which he was found guilty of both charges as indicted. The Honorable Lee S. Alford sentenced Petitioner to confinement for ten years for trafficking in cocaine, 28-100 grams, 2nd Offense, and three years concurrent for possession of crack cocaine, less than one gram, 1st offense. The sentences were to run concurrently.

A notice of appeal was filed and an appeal perfected pursuant to Anders v. California, 386 U.S. 783 (1967). The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Hutchinson, Op. No. 2012-UP-269 (S.C. Ct. App. filed May 2, 2012). The Remittitur was issued on May 21, 2012.

Petitioner filed a PCR Application on September 25, 2012. Respondent made its Return on January 11, 2013. A hearing was convened November 19, 2014, at the York County Courthouse. Petitioner was present at the hearing and was represented by counsel, Glen Kirkland Hardyman, Esquire. Respondent was represented by Assistant Attorney General J. Rutledge Johnson, Esquire. By a signed order filed March 31, 2016, the Honorable Alison Lee dismissed Petitioner's PCR Application with prejudice.

Petitioner filed a notice of appeal. The Petition for Writ of Certiorari was submitted, dated November 18, 2016. This Return follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

Petitioner argues that the PCR Court erred in failing to find Counsel ineffective where Counsel did not obtain the audio recording of the transaction between Petitioner and the Confidential Informant. For the following reasons, Respondent contends that this argument is without merit.

### Relevant Law

In a PCR action, the petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the petitioner must prove that "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, 104 S.Ct. 2052, 2064 (1984); Butler, *supra*.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, *supra*. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a

reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

**I. The PCR Court correctly ruled that Counsel was not ineffective and that prejudice did not result from Counsel's failure to obtain the audio recording of the transaction between Petitioner and the Confidential Informant.**

How the Issue Was Raised

Prior to the trial, Counsel moved to suppress the search warrant that led to Petitioner's arrest. Officer Michelle Del Castillo Reiten of the Rock Hill Police Department testified during the suppression hearing that she had a confidential informant come to her office and say that he could go to Petitioner's residence to purchase drugs. App. 44, ll. 16-17. She testified that she had used this particular informant half a dozen times and found him reliable in the past. App. 44, ll. 18-24. The informant and his vehicle were searched at the police station and the informant was given electronic surveillance equipment. App. 45, ll. 2-7. The informant went to Petitioner's residence and returned to the police station with the purchased drugs. App. 45, ll. 8-12. The informant also named Petitioner and picked Petitioner out of a lineup as the person from whom he purchased the drugs. App. 45, ll. 17-20. Officer Reiten testified that she prepared the return for the search warrant of Petitioner's mother's house. App. 46, l. 1.

The police executed the search warrant on July 31, 2013. App. 86, ll. 23-24. Officer Reiten testified that the officers secured the individuals inside the apartment, including Sergeant Breeden who made contact with Petitioner as he was leaving the bathroom. App. 87, ll. 11-13. She further testified that drugs were found in and recovered from the toilet. App. 98, l. 21 – 99, l. 1.

Sergeant Breeden testified that when he entered the residence, he turned into the bathroom and immediately saw Petitioner standing in the bathroom. App. 109, ll. 5-9. He

testified that Petitioner threw his hands up and said "I was using the bathroom." App. 109, ll. 10-11. Sergeant Breeden testified that he looked in the toilet and saw a plastic bag starting to swirl down the toilet, and he reached in and retrieved it before it could be flushed. App. 109, ll. 12-16. Sergeant Breeden testified that as the toilet was flushing, it did not appear to have feces or urine in it, as if someone had just used the bathroom. App. 110, 3-5.

Counsel argued to the trial court that the search warrant should be suppressed because the affidavit did not contain testimony or statements that would go to the reliability of the Confidential Informant. App. 49, l. 24 – 50, l. 3. The trial judge denied the motion to suppress, finding that there was probable cause and giving deference to the magistrate's determination at the time. App. 50, l. 22 – 51, l. 12.

At the PCR hearing, Petitioner argued that Counsel should have obtained the audio recording of the CI buy that supported the affidavit of the search warrant. App. 290, ll. 7-10. Petitioner's PCR Counsel pointed out that the Court previously ordered the solicitor's office to produce a redacted copy of the audio recording which redacted out anything identifying the Confidential Informant and the voice of the confidential informant and ordered the solicitor's office to produce a transcript of the audio recording. App. 290, ll. 13-21. Specifically, Petitioner's PCR Counsel argued that the actual recording of the controlled buy does not support the statements in the affidavit used to obtain the search warrant. App. 291, ll. 10-15.

At the PCR hearing, Petitioner moved to admit into evidence a transcription of the controlled buy audio recording that was unredacted except as to personal identifiers of the Confidential Informant. Petitioner also played the redacted audio recording of the controlled buy and moved it into evidence. App. 293, l. 23 – 295, l. 11. Petitioner's Trial Counsel testified that

the solicitor's office had a policy where they would not produce any recordings involving a confidential informant. App. 305, ll. 8-20.

The PCR Court issued an Order of Dismissal, finding that Counsel was not ineffective. In addressing the issue at hand, that Counsel did not obtain the audio of the transaction between Petitioner and the Confidential Informant, the PCR Court found that Petitioner failed to prove that the outcome of the trial would have been different. App. 326. The PCR Court found that the magistrate had probable cause to issue the warrant. App. 326. The PCR Court based its ruling on the fact that officers testified that they saw Petitioner attempting to flush drugs down the toilet when they executed the search warrant and they grabbed the drugs out of the toilet. App. 326. The PCR Court held that the audio "would have done nothing to show that [Petitioner] did not, in fact, possess the subject contraband at the time the search warrant was executed." App. 326-327.

#### Analysis

Petitioner's argument is without merit. First, it is important to note that the PCR Court did not find that Counsel's performance was deficient. Nowhere in the Order of Dismissal does the PCR Court make a finding that Counsel was deficient. In fact, regarding the issue of the audio recording, the PCR Court did not even address the first prong in Strickland. Without ever making a finding on the deficiency prong, the PCR Court simply found "Even if [Counsel] was deficient as trial counsel in not obtaining this audio, [Petitioner] would not be able to satisfy the second prong of the ineffective assistance of counsel analysis." App. 326. Thus the PCR Court found it unnecessary to examine the first prong because of the obvious lack of prejudice.

There is certainly probative evidence to support the PCR Court's finding that Counsel was not ineffective for failing to obtain the audio recording of the controlled buy. In examining the totality of the evidence presented, the PCR Court correctly held that the magistrate had

probable cause to issue the search warrant. Officer Reiten testified that the Confidential Informant had been used by the Rock Hill Police Department half a dozen times and had been reliable. App. 44, ll. 21-24. This Confidential Informant told the officers that he could get drugs from Petitioner at a specific residence. This residence was listed on Petitioner's DMV records as his residence. App. 44, ll. 11-17. The Confidential informant was searched and wired with surveillance equipment, and sent to that specific residence to buy drugs from Petitioner. App. 45 ll. 2-7. He then returned to the police department with drugs, told officers that he purchased drugs from Petitioner, and picked his photo out of a lineup. App. 45, ll. 8-16. Based on all of this, the Trial Court found that search warrant was valid and the PCR Court agreed.

Moreover, as the PCR Court pointed out in finding Petitioner was not prejudiced, Petitioner was apprehended by police officers in his residence near the bathroom. Petitioner stated he had just used the bathroom and the officer simultaneously found drugs in the process of being flushed down the toilet. App. 109, l. 5 – 100, l. 7. There is ample evidence to support the PCR Court's finding that the outcome of Petitioner's trial would not have been different had Counsel obtained the controlled buy audio. The search warrant was valid and it was clear the drugs that formed the basis of his possession and trafficking charges were in his possession or control.

**CONCLUSION**

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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4/5, 2017

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S.C. SUPREME COURT

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Certiorari to York County  
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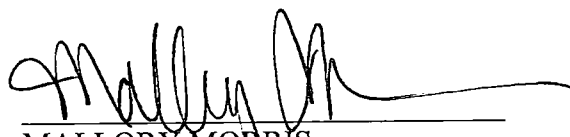
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Ms. John H. Strom, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589**

This 5<sup>th</sup> day of April, 2017

  
MALLORY MORRIS  
Legal Assistant for Respondent