

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Roger L. Couch, Circuit Court Judge

Appellate Case No.: 2016-001230

ANTHONY BERNARD CHAPMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ALAN WILSON  
Attorney General

VALERIE GARCIA GIOVANOLI  
Assistant Attorney General  
SC Bar # 102524

P.O. Box 11549  
Columbia, SC 29211  
(803) 734-4124

ATTORNEYS FOR RESPONDENT

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## **QUESTION PRESENTED**

- I. Is the record complete and sufficient for appellate review of the PCR court's ruling where the record contains probative evidence to support the PCR court's ruling?

## STATEMENT OF THE CASE

### Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Spartanburg County. In January of 2015, Petitioner was indicted for manufacturing marijuana, trafficking cocaine, and possession with intent to distribute (PWID) cocaine. On October 5, 2010, Petitioner proceeded to trial before the Honorable J. Derham Cole. Michael D. Brown, Esquire, represented Petitioner. Assistant Solicitor Ryan F. McCarty represented the State. At the start of trial, a hearing was held on Petitioner's motion to suppress, which Judge Cole ultimately denied. Following the ruling on the motion, Petitioner subsequently pleaded guilty to all charges. Judge Cole sentenced Petitioner to five years' incarceration for manufacturing marijuana, twenty years' incarceration for trafficking cocaine, and twenty years' incarceration for PWID cocaine. All sentences were to run concurrently. On October 15, 2010 Petitioner filed a *pro se* motion for reconsideration. The motion was never ruled upon.

On April 25, 2011, Petitioner filed a *pro se* Notice of Appeal. On October 12, 2011 the Court of Appeals dismissed the appeal for failure to timely serve Respondent. The Remittitur was issued on October 28, 2011.

### PCR

On December 8, 2011, Petitioner filed an application for post-conviction-relief alleging the following grounds for relief:

1. "4<sup>th</sup> Amendment Violation; probable cause"
  - a. "Unlawful probable cause for search and arrest"
2. "6<sup>th</sup> Amendment violation; ineffective counsel"
  - a. "Failure to investigate"
3. "Voluntariness of guilty plea; right to trial; 5<sup>th</sup>, 6<sup>th</sup>, 14<sup>th</sup>, amendments"
  - a. "Not fully informed of discovery, pertaining to arrest."
4. "Failure to file appeal"

a. "Counsel stated no appeal could be filed."

On June 4, 2012, Petitioner, through counsel, moved for discovery. On or about September 11, 2012, the State made its return requesting an evidentiary hearing. On January 21, 2014, an evidentiary hearing into the matter was convened before the Honorable Roger L. Couch at the Spartanburg County Courthouse. J Faulkner Wilkes, Esquire, represented Petitioner and Assistant Attorney General Suzanne H. White represented the State.

*Motion to Reconsider*

The issue of the outstanding motion for reconsideration came up during the PCR evidentiary hearing. Following the hearing, on or about May 15, 2014, Petitioner filed a memorandum of law requesting his PCR action be stayed pending a ruling on his outstanding motion for reconsideration. On or about May 29, 2014, the State filed a memorandum of law requesting a ruling on the merits of the PCR without regard to the improperly filed motion for reconsideration. On July 18, 2014 Judge Couch issued an order granting a hearing on Petitioner's motion for reconsideration and holding the PCR ruling in abeyance. On October 31, 2014, Judge Cole presided over Petitioner's motion for reconsideration hearing in the Spartanburg County Court of General Sessions. Wilkes represented Petitioner and Assistant Solicitor Russell Ghent represented the State. By order filed February 12, 2016, Judge Cole denied Petitioner's motion for reconsideration.

*PCR Order of Dismissal*

Thereafter, on May 20, 2016, Judge Couch denied relief in a written order of dismissal dated May 20, 2016. On June 6, 2016, Petitioner served a notice of appeal.

*Motion to Reconstruct*

On April 6, 2016, Petitioner, through counsel, moved this Court for remand to the trial court to reconstruct the record of the PCR, claiming the transcript was insufficient for appellate review. The State filed a return opposing the motion to reconstruct. On June 16, 2017, this Court denied Petitioner's request for reconstruction. On July 17, 2017, the Petitioner filed a petition for writ of certiorari. This return to petition for writ of certiorari follows.

## STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision is whether “any evidence of probative value” exists to sustain the lower court’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The post-conviction relief court’s findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000).

## ARGUMENT

- I. **The record is complete and sufficient for meaningful appellate review where the standard of review is whether there is any probative evidence in the record to support the PCR court's ruling and there is probative evidence in the record to support the PCR court's ruling.**

Petitioner argues he is entitled to a new PCR evidentiary hearing because portions of the transcript are missing. Petitioner is not entitled to a new PCR hearing because the record, as it exists, contains the probative evidence upon which the PCR court based its ruling.

“A new trial is... appropriate if the appellant established that ‘the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review.’” State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 174 (Ct. App. 2007) (citing In re D.W., 171 N.C.App. 496, 615 S.E.2d 90 (2005)). Before a defendant can establish that he is entitled to a new trial on the basis of an inadequate record, he must identify a **specific** appellate claim that this court would be unable to review effectively using the record. Sweat v. Crawford, 292 S.C. 324, 356 S.E.2d 147 (Ct. App. 1987) (emphasis added). “Most jurisdictions require an appellant to demonstrate **specific** prejudice flowing from an incomplete or reconstructed record... We believe our supreme court would follow a rule requiring the party challenging a reconstructed record on appeal to demonstrate prejudice.” Sweat, 292 S.C. at 327. (emphasis added). In Sweat, the court determined omissions from the record did not prejudice appellant because the evidence included in the record sufficiently supported the findings of fact made by the referee.

This matter can undergo meaningful appellate review without remanding for a new evidentiary hearing because there is probative evidence in the record to support the PCR Court’s ruling. In the PCR Court’s order of dismissal, the following issues were addressed:

- a. Whether Counsel was ineffective in failing to inform Petitioner of discovery.
- b. Whether Counsel was ineffective in failing to investigate.

- c. Whether Counsel was ineffective in failing to challenge the search warrant and arrest.
- d. Whether Counsel was ineffective in failing to file an appeal.
- e. Whether Petitioner's guilty plea was involuntary.

The testimony that the Court relied on in denying the Petitioner's claims is all available in the PCR hearing transcript, in addition to pertinent parts located in the trial record.

***Failing to inform Petitioner of discovery***

In denying Petitioner's allegation that Counsel was ineffective for failing to inform him of discovery, the PCR court's order states,

Counsel testified he met with Applicant at least three times. Counsel testified he reviewed all discovery with Applicant, and Applicant admitted he had seen a copy of the video of the controlled buy. This Court finds Counsel adequately conferred with Applicant and reviewed all discovery with him.

(App. p. 268). In an effort to easily locate the evidence relied upon, Respondent will cite the appendix for each fact from the above excerpt from Judge Couch's order.

1. Counsel met with Petitioner at least three times – App. p. 204, ll. 3-23.
2. Counsel reviewed all discovery with Petitioner – App. p. 204, l. 24 – p. 207, l. 24.
3. Petitioner saw the video of the controlled buy – App. p. 165, ll. 22-24; 177, ll. 3-7.

Therefore, there is probative evidence in the record to support the PCR court's finding on this issue.

***Failure to Investigate***

In denying Petitioner's allegation that Counsel was ineffective for failing to investigate, the PCR court's order states,

Counsel reviewed all the evidence against Applicant and discussed it with him. Counsel testified that he discussed potential defenses with Applicant, including the challenges to the search and Applicant's statements. Applicant failed to produce any evidence regarding any additional investigation that Counsel could have pursued.

(App. p. 269). In an effort to easily locate the evidence relied upon, Respondent will cite the appendix for each fact from the above excerpt from Judge Couch's order.

1. Counsel discussed evidence and defenses with Petitioner – App. p. 91, l. 20 – p. 92, l. 9; p. 204, l. 24 – p. 207, l. 24.
2. Petitioner failed to produce any evidence of what further investigation Counsel could have done or how further investigation would affect outcome of trial – App. pp. 156-174.

Therefore, there is probative evidence in the record to support the PCR court's finding on this issue.

***Failure to challenge the search warrant and arrest***

In denying Petitioner's allegation that Counsel was ineffective for failing to investigate, the PCR court's order states,

Counsel made pretrial motions challenging both the search warrant and the admissibility of Applicant's statement. Ultimately, the motions were not successful. [...] Though Applicant testified he had other theories that he wanted Counsel to explore, he failed to present sufficient evidence showing what these theories would have been or how they would have been successful.

(App. pp. 269-270). In an effort to easily locate the evidence relied upon, Respondent will cite the appendix for each fact from the above excerpt from Judge Couch's order.

1. Counsel challenged the search warrant and the admissibility of Petitioner's statement – App. pp. 5-85.

Therefore, there is probative evidence in the record to support the PCR court's finding on this issue.

***Failure to file an appeal***

In denying Petitioner's allegation that Counsel was ineffective for failing to investigate, the PCR court's order states,

Counsel made pretrial motions to suppress on Applicant's behalf that were not successful. Counsel then conferred with Applicant regarding his options to proceed with trial or enter a plea. Counsel negotiated a favorable plea offer on Applicant's behalf and testified that Applicant made the decision to plead. [...]Applicant clearly stated on the record that he understood that if the judge accepted the plea, he would receive a twenty year sentence. In addition, the plea judge admonished him that he was waiving any challenge to the evidence by pleading guilty. This Court finds that there is no evidence that a rational defendant would want to appeal or that the Applicant indicated he wanted an appeal.

(App. pp. 10-11). In an effort to easily locate the evidence relied upon, Respondent will cite the appendix for each fact from the above excerpt from Judge Couch's order.

1. Counsel was unsuccessful in pre-trial motions to suppress – App. p. 5-85.
2. Counsel conferred with Petitioner regarding proceeding to trial or entering a guilty plea – App. p. 86, ll. 2-23; p. 207, l. 25 – p. 208, l. 9).
3. Counsel negotiated a favorable plea offer – App. p. 101, ll. 7-21; p. 102, ll. 6-16; p. 208, ll. 9-14.
4. Petitioner made decision to plead guilty – App. p. 98, ll. 6-19.
5. Petitioner understood he was receiving a twenty year sentence before pleading guilty – App. p. 101, l. 7 – p. 103, l. 6; p. 185, ll. 18-21.
6. The plea judge admonished Petitioner he could not challenge the evidence after pleading guilty – App. p. 92, l. 10 – p. 94, l. 11.
7. No rational defendant would want an appeal in this case and Petitioner did not indicate he wanted an appeal – App. p. 208, l. 15 – 209, l. 11.

Therefore, there is probative evidence in the record to support the PCR court's finding on this issue.

### *Involuntary guilty plea*

In denying Petitioner's allegation that Counsel was ineffective for failing to investigate, the PCR court's order states,

This Court finds that the record fully supports the knowing and voluntary nature of Applicant's guilty plea. Applicant has presented no reason why he should be allowed to depart from the truth of his statements made at the plea hearing. Applicant's Counsel made challenges to the search warrant and made a motion to suppress Applicant's statements. The plea judge denied the motions and admonished Applicant that by pleading guilty he was waiving any challenges he had to the Court's ruling. The record reflect that Applicant told the plea judge that he was not threatened, coerced, or forced to plead guilty. Counsel informed Applicant of his constitutional rights, and Applicant waived these rights, including the right to challenge the search and seizure of the drugs, the admission of his statement, his right to a jury trial, right to remain silent, and right to confront witnesses.

(App. pp. 272-273). In an effort to easily locate the evidence relied upon, Respondent will cite the appendix for each fact from the above excerpt from Judge Couch's order.

1. Record supports Petitioner's knowing and voluntary plea – App. pp. 86-115.
2. Counsel challenged search warrant and statements – App. pp. 5-85.
3. The motions were denied and Petitioner was advised he could not challenge the court's ruling if he pleaded guilty – App. p. 92, l. 10 – p. 94, l. 11.
4. Petitioner told plea judge he was not threatened, coerced or forced to plead guilty – App. p. 98, ll. 6-12.
5. Counsel informed Petitioner of his rights and he waived those rights – App. pp. 92-98

Therefore, there is probative evidence in the record to support the PCR court's finding on this issue.

Petitioner takes great issue with a missing witness's name within the PCR transcript. However, it is clear from the thorough summary of testimony included in the order of dismissal, as well as the type of questions asked and answers given, that the testimony was, in fact, from Assistant Solicitor, Eddie Hunter. Respondent inadvertently described him as "prosecuting Assistant Solicitor" in its return to Petitioner's motion for reconstruction when in fact, he did not represent the State during Petitioner's motion to suppress and subsequent guilty plea. However, Petitioner's criminal case was originally assigned to Hunter. Hunter was in trial prosecuting Derrick Cheeks<sup>12</sup> at the same time Petitioner's case was up for trial. (Circuit Court Case Nos. 2009-GS-42-6452 & 6453; Appellate Case No. 2011-183009, State v. Derrick Cheeks, 401 S.C. 322, 737 S.E.2d 480 (2013)). Therefore, Hunter's supervisor, Ryan F. McCarty, represented the State at Petitioner's motion to suppress and subsequent guilty plea. Hunter testified during Petitioner's PCR hearing on behalf of the Seventh Circuit Solicitor's Office after McCarty left his position at the Seventh Circuit Solicitor's Office on December 28, 2011. Although Petitioner's expresses grave concern over why Hunter would testify at his PCR hearing, it was Petitioner who requested Hunter to testify and called Hunter to the stand.

Additionally, Petitioner had sought discovery in his PCR in order to have access to the records within the State's possession. (App. p. 142). Judge Couch granted Petitioner's motion for discovery and issued an order entitling Petitioner to "obtain records in the possession of the State, including the Sheriff of Spartanburg County or other law enforcement or State agencies involved in the investigation, search, arrest, or prosecution of the Applicant." (Supp. App. II p.

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<sup>1</sup> The undersigned's email to the transcriber was transmitted *after* the undersigned read the transcript in its entirety and the order of dismissal and arrived at the obvious conclusion that the transcript contained all of the probative evidence upon which the PCR court relied in its ruling. Understanding reconstruction was unnecessary, the undersigned contacted the transcriber in an abundance of caution to further understand the meaning of her punctuation – a small task in an effort to investigate the facts that the Appellate Defender declined to pursue prior to representing to the Court her assumption that the two dots represented missing portions of testimony.

<sup>2</sup> Coincidentally, Petitioner's PCR counsel was Cheeks's trial counsel.

1). Following this order and upon information and belief, Petitioner subpoenaed the Sheriff's office to testify in addition to requesting Hunter testify, because the discovery was an issue in Petitioner's PCR.

Respondent concedes a portion of Hunter's testimony is missing from the transcript, but disagrees with Petitioner's assertion a "significant" portion is missing because there is no basis for such a qualitative assumption. In the PCR court's order of dismissal, the extent of the summary of Hunter's testimony was,

Eddie Hunter of the Seventh Circuit Solicitor's Office testified regarding the chain of custody for the first charge. He testified that he did not have drug analysis or chain for the June 18, 2009, offense. Hunter testified that he had a note in his file dated November 2, 2009, regarding discovery being turned over. Hunter testified that Applicant was permitted to see the video prior to trial.

(App. p. 265). The transcript contains this testimony, if not word for word, summarily. Notably, the PCR court's order did not specifically rely on any of Hunter's testimony in making its ruling. Therefore, the entire "unknown witness" issue is irrelevant to the outcome of Petitioner's PCR action.

Petitioner further speculates that McCarty must have testified and his testimony is nowhere in the PCR transcript or the PCR court's order. Petitioner also surmises that had McCarty not testified, there must have been some discussion during the PCR hearing about his unavailability to testify that is also not in the PCR transcript. This is pure speculation for which Petitioner has no basis. Such speculative "questions" do not warrant a new PCR evidentiary hearing. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) ("Pure conjecture" insufficient to prove prejudice and grant new trial.). Otherwise, every PCR petitioner could make a winning argument for a new PCR hearing on appeal by alleging testimony *may* have been left out of the transcript.

With regard to the forty-five appearances of two dots (“.”), Respondent contacted the transcriber, Mrs. Harriet Bennett, of the transcript and received a response explaining her use of the two periods. In her response, which was included in the State’s return to Petitioner’s motion to reconstruct, Mrs. Bennett explains the two periods indicate that an answer was not given, not that a portion of testimony is inaudible or missing.

Petitioner relies on Ladson, supra, in support of his argument for a new PCR hearing. However, Petitioner’s reliance is misplaced. In Ladson, no transcript existed from Ladson’s three-day trial for first degree burglary. The Court of Appeals remanded the case to the trial court for reconstruction. However, the reconstruction mainly consisted of conclusory summarization of the witnesses the State had presented at trial with debate over whether Ladson had even testified in his own defense. The Court of Appeals found the reconstructed record “largely conclusory, with testimony, objections, and the like recalled only in summary fashion” which left them with only a “bare bones summary of the evidence (with more remaining unknown than known)[.]” Ladson, 373 S.C. at 323 and 327. Here, the transcript from Petitioner’s PCR hearing consists of seventy-four pages containing sworn testimony from four witnesses and nine exhibits. The transcript is hardly comparable to the reconstructed record the Court of Appeals declined to accept in Ladson. It also leaves very little “unknown” about what occurred at the hearing and what evidence the PCR court based its ruling.

Petitioner’s reliance on Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002), is also misplaced. Whitehead was granted a new PCR hearing where no transcript of his first PCR hearing existed. In this case, there is a transcript of Petitioner’s PCR hearing. Not only is there a transcript, but it includes probative evidence to support the PCR court’s ruling.

This case is more analogous to Sweat, supra, where Sweat argued the circuit court made reversible error in reviewing a transcript, on appeal, of proceedings before the referee. Sweat, 292 S.C. at 326. The transcript contained “inaudible” portions and completely omitted one witness’s testimony. Id. The Court of Appeals found the omissions were not prejudicial and found the evidence that was in the record was sufficient to support the referee’s ruling. Id. at 327. Although not binding on this Court, Sweat is analogous and persuasive.

Petitioner should not be granted a new evidentiary hearing because a few small portions of the transcript of his original hearing are missing. This Court should review the PCR transcript as a whole and in context of the PCR court’s rulings, not get bogged down on few inaudible portions and dots that indicate pauses and no response. Additionally, the record is not limited to the PCR transcript. It also includes Petitioner’s pre-trial motion and guilty plea transcript and the PCR court’s order. Each of these parts of the record should be reviewed in conjunction with one another, not separated and scrutinized individually.

Also, Petitioner has failed to prove that anything in those missing portions affected his PCR action or this appeal other than mere speculations of what may have been left out of the transcript. Petitioner does not identify a specific appellate claim this Court cannot review because of the defects in the record. Id. In fact, Petitioner does not even address the appropriate appellate standard of review in PCR. As Petitioner has failed to demonstrate specific prejudice caused by the defects in the record, Petitioner’s petition for writ of certiorari and request for a new PCR hearing should be denied.

## CONCLUSION

Based on the foregoing, Respondent respectfully requests this Honorable Court deny Petitioner's petition for writ of certiorari. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

VALERIE GARCIA GIOVANOLI  
Assistant Attorney General  
S.C. Bar No. 102524

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

By:   
ATTORNEYS FOR PETITIONER

October 19, 2017.

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CERTIORARI TO SPARTANBURG COUNTY  
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The Honorable Roger L. Couch, Circuit Court Judge

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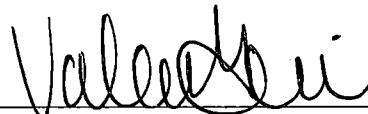
**CERTIFICATE OF SERVICE**

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I, Valerie Garcia Giovanoli, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**Susan B. Hackett, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia South Carolina 29211-1589**

I further certify that all parties required by Rule to be served have been served.  
This 19<sup>th</sup> day of October, 2017.



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Valerie Garcia Giovanoli  
S.C. Bar # 102524  
Office of Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEY FOR RESPONDENT