STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUL 23 2018

S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY
G. Thomas Cooper, Jr., PCR Judge
John C. Hayes, III, Trial Judge

Appellate Case No. 2017-002180

DEMARIO CUNNINGHAM,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES

I. Petitioner's assertion that the post-conviction relief erred in denying post-conviction relief based on prosecutorial misconduct is not preserved for appellate review, where Petitioner failed to raise this allegation in his application and the court did not rule on this allegation. Regardless of preservation concerns, Petitioner failed to establish the State committed prosecutorial misconduct by not providing Petitioner with the video of a drug transaction with a confidential informant for a dismissed charge.

II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to challenge the drug evidence based on purported manipulation.

III. The post-conviction relief court properly denied relief where Petitioner failed to establish he was entitled to belated appellate review of his guilty plea pursuant to White.

STATEMENT OF THE CASE

During its May 2015 term, the York County Grand Jury indicted Petitioner Demario Cunningham for trafficking cocaine and possession of a weapon during the commission of a violent crime (2015-GS-46-1542). Assistant Public Defender Mindy Harvey-Lipinski of the Sixteenth Circuit Public Defender's Office represented Petitioner. Assistant Solicitor Leslie Robison of the Sixteenth Circuit Solicitor's Office prosecuted the case.

On January 11, 2016, Petitioner proceeded to a jury trial before the Honorable John C. Hayes, III, circuit court judge. Following the denial of his motion to suppress, Petitioner elected to forgo trial and plead guilty as indicted. Pursuant to a recommendation from the State for a sentence of no more than ten years, Judge Hayes sentenced Petitioner to imprisonment for eight years for trafficking cocaine and five years for the weapons charge. Petitioner did not file a notice of appeal.

Thereafter, on June 23, 2016, Petitioner filed an application for post-conviction relief. The State (Respondent) served its return on November 9, 2016, requesting an evidentiary hearing. An evidentiary hearing was convened on April 18, 2017, before the Honorable G. Thomas Cooper, Jr., circuit court judge. Petitioner was present and represented by Tommy A. Thomas, Esquire. Respondent was represented by Assistant Attorney General Justin J. Hunter of the South Carolina Attorney General's Office. At the hearing, Petitioner testified and presented testimony from trial counsel and his brother, James Cunningham. By written order filed on July 31, 2017, the court denied and dismissed Petitioner's application. Thereafter, on July 19, 2017, Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, asking the court to

reconsider its denial of a <u>White</u> appeal. An order denying this motion was filed on September 18, 2014. Petitioner filed a timely notice of appeal.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Smalls, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Petitioner's assertion that the post-conviction relief erred in denying post-conviction relief based on prosecutorial misconduct is not preserved for appellate review, where Petitioner failed to raise this allegation in his application and the court did not rule on this allegation. Regardless of preservation concerns, Petitioner failed to establish the State committed prosecutorial misconduct by not providing Petitioner with the video of a drug transaction with a confidential informant for a dismissed charge.

Petitioner argues, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), that the State committed prosecutorial misconduct by not providing Petitioner with the video of a drug transaction with a confidential informant for a dismissed charge. Petitioner asserts that because the drug transaction was the basis for the search warrant led to the discovery of the cocaine and weapon subject to these charges, he was entitled to view the video of the drug transaction and he was prejudiced by the State's refusal to provide the video. However, Petitioner failed to raise this allegation of prosecutorial misconduct in his post-conviction relief application, did not amend his application to include this allegation, and the post-conviction relief court therefore did not rule on this allegation. However, regardless of any preservation concerns, Petitioner failed to establish the State committed prosecutorial misconduct by not providing Petitioner with the video of an undercover drug transaction with a confidential informant for a dismissed charge, where the State provided Petitioner with still images from this video and had no duty to provide this information to Petitioner. This Court should deny certiorari.

As an initial matter, Petitioner failed to raise this issue to the post-conviction relief court in his application for post-conviction relief or any amendment and the post-conviction relief court did not rule upon this allegation, and thefrore, it is not preserved for this Court's review. Issues must be raised to and ruled upon by the post-conviction relief court to be preserved for

appellate review. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007); Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d 127, 128 (1992). The failure to specifically rule on the issues precludes appellate review of the issues. Id. Because Petitioner never raised this issue to the lower court nor did the court rule on it, it is unpreserved for appellate review.

Regardless of preservation concerns, Petitioner has failed to establish the State committed prosecutorial misconduct by not providing Petitioner with the video of an undercover drug transaction with a confidential informant for a dismissed charge, where the State provided Petitioner with still images from this video and had no duty to provide this information to Petitioner.

"A defendant who pleads guilty usually may not later raise independent claims of constitutional violations." Gibson v. State, 334 S.C. 515, 523, 514 S.E.2d 320, 324 (1999) (citing Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975)). However, "a defendant's decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution's case" and therefore, the waiver of constitutional rights cannot be deemed knowing and voluntary when a defendant lacks knowledge of material evidence in the prosecution's possession. Gibson, 334 S.C. at 523, 514 S.E.2d at 324 (internal citations omitted).

The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (internal citation omitted). Brady evidence is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). "Materiality of evidence is determined based on the

reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Id. (citing State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998)). A "reasonable probability" is demonstrated when the suppression "undermines confidence in the outcome of the trial." Id. (quoting United States v. Bagley, 473 U.S.667, 678). The State must disclose Brady evidence even when a criminal defendant does not specifically request the evidence. Id. (citing United States v. Agurs, 427 U.S. 97, 107 (1976)).

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 432–42 (1995); Brady, 373 U.S. at 87; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996).

In the present case, Petitioner cannot meet the requirements above to establish the State committed prosecutorial misconduct by failing to providing Petitioner with the video of an undercover drug transaction with a confidential informant for a dismissed charge. Petitioner has failed to establish the video contained any evidence that was favorable to him, and the State informed the trial court that it had provided still shots from the video to Petitioner's counsel that clearly identified Petitioner. (App. p. 102). Moreover, because the charge stemming from the undercover drug transaction was dismissed, Petitioner cannot establish the video was material to the charges to which he pled guilty. Petitioner has failed to establish any prosecutorial misconduct relating to this video. Certiorari should be denied.

II. The post-conviction relief court properly denied relief where Petitioner failed to establish counsel was constitutionally ineffective for failing to challenge to the drug evidence based on purported manipulation.

Petitioner asserts trial counsel was constitutionally ineffective for failing to challenge the drug evidence based on a purported manipulation. Specifically, Petitioner alleges the drug evidence was manipulated because two bags of cocaine were recovered from Petitioner's residence, but the evidence inventory log only listed one bag of cocaine. However, as the post-conviction relief court correctly denied this allegation because counsel investigated any purported manipulation at Petitioner's request and determined no such manipulation had taken place. This Court should deny certiorari.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his or her 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 applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, the applicant must prove that counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its

"reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

"A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 74 (1977)). "Indeed, where a thorough colloquy is conducted, courts must exercise caution in setting aside the guilty plea." Garren v. State, Op No. 2015-000756 (S.C. Sup. Ct. filed Apr. 25, 2018) (Shearouse Adv. Sh. No. 17 at 60); see Jamison v. State, 410 S.C. 456, 469-71, 765 S.E.2d 123, 129-30 (2014) (observing that "guilty plea[s] must be treated as final in the vast majority of cases" and instructing that caution must be

exercised so as not to "undermine the solemn nature of a guilty plea and the finality that generally attaches to a guilty plea").

In the present case, counsel informed the trial court during the plea colloquy that Petitioner had concerns regarding the drug evidence in this case, particularly that some records showed one bag of cocaine and other records showed two bag of cocaine and that she had discussed the issue with Petitioner thoroughly prior to his decision to enter a guilty plea. (App. p. 118). When asked about this issue at the evidentiary hearing, counsel testified

> He — When we initially went over discovery when he got the discovery in jail, he brought it to my attention or became I would say somewhat fixated on the fact that on the evidence sheet for the trafficking case it listed, you know, Item 1, bag of cocaine and listed it in a singular context.
>
> And when we went over the photographs you can see in the drawer there it appears at least to be what would have been two bags of cocaine. He told me that he believed that that was evidence that they have contaminated the evidence or tainted the evidence or planted drugs on him. And I told him that I didn't necessarily see it the same way he did; that I felt if it was one bag of cocaine that magically became two that was something I thought the jury would so to speak latch onto but that I didn't necessarily think it would.
>
> I did go down to the property and evidence and viewed the evidence and did – what happened was what I suspected happened. Because they were somewhat tied together or possibly tied together or just found together that they had placed the two bags within one heat sealed bag and then later submitted. I thought it was probably shotty record keeping. They should have indicated that there were two bags of cocaine within that but that didn't happened. But I didn't think that it would necessarily would be evidence that – evidence that had been planted or contaminated because it was consistent with that you see in the photograph in the drawer.
>
> I then – so I took a picture of that, the front and back of the heat sealed envelope, showed it to Mr. Cunningham, showed him that the labeling on the bag indicated that there were two bags placed within the bigger bag and that we would raise it in terms of cross-examining those witnesses and the accuracy of their work, but that I did not think it would give rise to an argument that they had planted evidence on him or contaminated his evidence or tampered with his evidence in any way. And

> I thought that I we went to that level it would undermined the bit of the argument that we could make.
>
> . . .
>
> He disagreed. It was something he talked about in many of our conversations but it was something that we talked about and discussed and how to use it and how to get the most leverage out of it at trial.

(App. pp. 160-161). Counsel clearly investigated this issue, discussed how she could challenge this discrepancy at trial, and after these discussions, Petitioner elected to accept a favorable plea offer from the State rather than proceed to trial.

Additionally, Petitioner has failed to establish any prejudice for counsel's purported deficiency, as failed to establish he would not have pled guilty but for counsel's purported failure to challenge this evidence. Hill v. Lockhart, 474 U.S. 52 (1985) (holding that with respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial). Additionally, Petitioner has failed to present any evidence of manipulation or alteration of the drug evidence.

Ultimately, Petitioner made a knowing, voluntary, and intelligent decision to plead guilty after discussing his case, and this particular issue, with counsel thoroughly. Counsel's performance was in accordance with professional standards and Petitioner has failed to establish any prejudice. Therefore, the post-conviction relief court properly denied relief. Certiorari should be denied.

III. The post-conviction relief court properly denied relief where Petitioner failed to establish he was entitled to belated appellate review of his guilty plea pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

Petitioner asserts counsel was ineffective for failing timely file a direct appeal on his behalf and asserts he wanted to appeal his guilty plea and sentence that was in accordance with the agreed upon recommendation. However, the post-conviction relief court properly determined Petitioner was not entitled to belated appellate review of his guilty plea pursuant to White.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White, 263 S.C. 110, 208 S.E.2d 35. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id. However, the standard for a guilty plea differs, and absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. Turner v. State, 380 S.C. 223, 224–25, 670 S.E.2d 373, 374 (2008) (citing Roe v. Flores–Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)).

In the present case, the post-conviction relief court found Petitioner failed to prove by a preponderance of the evidence that he was not advised of the right to appeal that he reasonably demonstrated to counsel he was interested in timely appealing, or that there was reason to think a rational defendant would want to appeal. (App. pp. 228). The post-conviction relief court noted that counsel credibly testified that Petitioner did not ask her to appeal. The record supports this finding, as counsel testified she reviewed Petitioner's appellate rights with him before and after

his plea and she does not remember him asking her to file an appeal on his behalf. (App. pp. 181-182). Certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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DEMARIO CUNNINGHAM,

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v.

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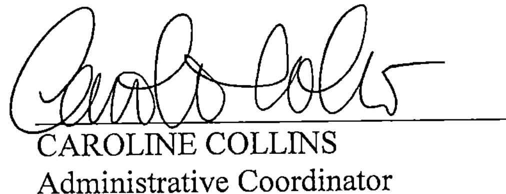
Respondent.

CERTIFICATE OF SERVICE

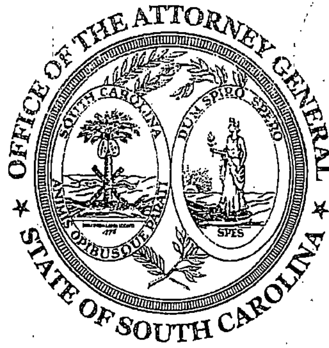
The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

This 23rd day of July, 2018



CAROLINE COLLINS
Administrative Coordinator



ALAN WILSON
ATTORNEY GENERAL

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JUL 23 2018
S.C. SUPREME COURT

July 23, 2018

The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: **Demario Cunningham v. State of South Carolina**
Appellate Case No. 2017-002180
Lower Court Case No. 2016-CP-46-1915

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
SC Bar No. 100108

MHJ/cc
Enclosures

cc: Tommy A. Thomas, Esquire (2 copies)