

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2018-001137

Benjamin J. Newman, 352829,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

APPENDIX
VOLUME II

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Attorney General

Caroline Scrantom
Assistant Attorney General

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(803) 734-3737
Attorneys for Respondent

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DEC 19 2018

S.C. SUPREME COURT

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**INDICTMENT FOR
TRAFFICKING MARIJUANA (10 POUNDS OR
MORE, BUT LESS THAN 100 POUNDS)**

At a Court of General Sessions, convened on AUGUST 2011, the Grand Jurors of Lexington County present upon their oath:

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

465

ARREST WARRANT

M-302783

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Lexington

THE STATE OF SOUTH CAROLINA
against

Benjamin J Newman

Address:

Lexington, SC 29073-7407

Phone: _____ SSN: _____

Sex: M Race: W Height: 6 Weight: 208

DL State: SC DL #: _____

DOB: _____ Agency ORI #: SC0320000

Prosecuting Agency: Lexington County Sheriff

Prosecuting Officer: B. D. Slice - 1502

Offense: Drugs / Trafficking in marijuana, 10 lbs or more,
but less than 100 lbs - 1st offense

Offense Code: 2360

Code/Ordinance Sec: 44-53-0370(c)(1)

This warrant is CERTIFIED FOR SERVICE in the
☐ County/ ☐ Municipality ofThe accused
is to be arrested and brought before me to be
dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to
defendant Benjamin J. Newman
on 06-06-2011Signature of Constable/Law Enforcement Officer
Samuel E. Owens

RETURN WARRANT TO:

General Sessions

Lexington County Judicial Center

201 East Main Street

Lexington, SC 29072

ORIGINAL COPY ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Lexington

Personally appeared before me the affiant B.D. Slice who

being duly sworn deposes and says that defendant Benjamin J Newman

did within this county and state on or about 06/05/2011 violate the criminal laws of the

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Lexington)

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Trafficking in marijuana, 10 lbs or more, but less than 100 lbs - 1st offense

I further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That on June 5, 2011, at 423 Longview Drive in the Lexington area of Lexington Co., one Benjamin J Newman did knowingly sell,
manufacture, deliver, bring into this state and/or possess over 400 grams of cocaine, a schedule II controlled substance, without
authority to do so. The defendant also had in his possession approximately 50 pounds of marijuana also.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Lexington

Affiant's Address P O Box 639
Lexington, SC 29071-

Affiant's Telephone

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 6/5/2011 defendant Benjamin J Newman

did violate the criminal laws of the State of South Carolina (or ordinance of
☒ County/ ☐ Municipality of Lexington) as set forth below:

DESCRIPTION OF OFFENSE: Drugs / Trafficking in marijuana, 10 lbs or more, but less than 100 lbs - 1st offense

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon thereafter as is practicable
Sworn to and subscribed before me on 06/06/2011

Signature of Issuing Judge (L.S.)

Brian W. Jeffcoat

Judge Code: 5058

Judge's Address Lexington County Judicial Center
Lexington, SC 29072-

Judge's Telephone (803)951-2595

Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 518

BAIL set by

Judge

on

Type and Amount

Name of Surety:

PRELIMINARY HEARING held by

Judge

on

Defendant Attorney:

Decision:

DISPOSITION before

Judge

on

by

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition:

Sentence:

JURORS

WITNESSES

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

Telephone:

Name:

Address:

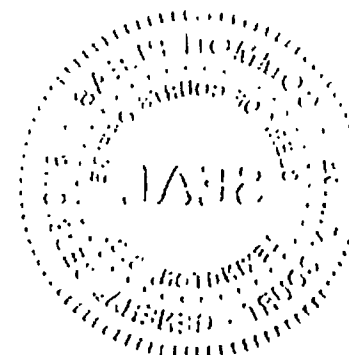
Telephone:

Name:

Address:

Telephone:

CODEFENDANTS



STATE OF SOUTH CAROLINA

COUNTY OF Lexington
STATE VS.Benjamin J Newman

AKA:

Race: White Sex: M Age: 26DOB: [REDACTED] SS#: [REDACTED]Address: [REDACTED]City, State, Zip: Lexington, SC 290738033DL#: [REDACTED] 4 SID#: SC01493985*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐

In disposition of the said indictment comes now the Defendant who was

TO: Drugs / Trafficking in marijuana, 10 lbs or more, but less than 100 lbs - 1st offensein violation of § 44-53-0370(e)(1)(a)1☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS of the S.C. Code of Laws, bearing CDR Code # 2360☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence

(defendant's initials)

[Signature] 015294 [Signature] #6145
Solicitor SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is committed to the

for a determinate term of 10 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 380 days☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUPTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u>100</u>
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ <u>25</u>
§ 50-21-114 (BUJ Breath Test Fee)	\$50	\$ <u>150</u>
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$
3% to County (if paid in installments)	\$	\$ <u>5</u>
TOTAL	\$	\$ <u>280</u>

Clerk of Court/Deputy Clerk

Court Reporter

SCCA/2012/10, C.C.C.F., G.S. & F.C.

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS3202259A/W#: M302783Date of Offense: 6/5/2011S.C. Code § : 44-53-0370(e)(1)(a)1CDR Code #: 2360

SENTENCE SHEET

1-10 yrs.
and
\$10,000☒ CONVICTED OF or ☐ PLEADSPresiding Judge [Signature]Judge Code: 6-3Sentence Date: 10/17/12

WITNESSES

Lexington County Sheriffs Department

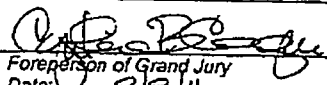
Brannon D. Slice

Law Enforcement Case #: 11022609

ARREST WARRANT NUMBER

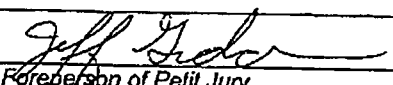
M302782

ACTION OF GRAND JURY


Foreperson of Grand Jury
Date: 8/3/11

VERDICT

GUILTY


Foreperson of Petit Jury
Date: 10-17-12

DOCKET NO. 2011GS3202261

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

AUGUST TERM 2011

THE STATE

vs.

Benjamin J. Newman

CDR #: 0281

Indictment for

TRAFFICKING COCAINE (400 GRAMS
OR MORE)

§ 44-53-0370(e)(2)(e)

DONALD V. MYERS, SOLICITOR

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

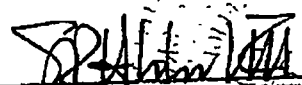
INDICTMENT FOR
TRAFFICKING COCAINE (400 GRAMS OR
MORE)

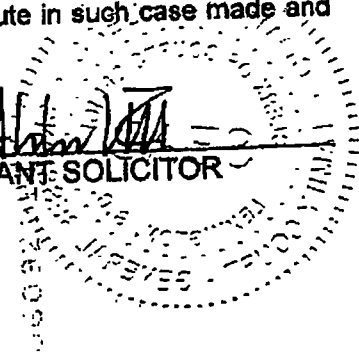
§ 44-53-0370(e)(2)(e)

At a Court of General Sessions, convened on AUGUST 2011, the Grand Jurors of Lexington County present upon their oath:

That **Benjamin J. Newman** did in Lexington County, South Carolina on or about June 5, 2011, knowingly sell, manufacture, deliver, purchase, or bring into this State, or did provide financial assistance or otherwise, aid, abet, attempt, or conspire to sell, manufacture, deliver, purchase, or bring into this State, or was knowingly in actual or constructive possession of or did knowingly attempt to become in actual or constructive possession of cocaine, a controlled substance under the provisions of § 44-53-110, et. seq. of the South Carolina Code of Laws (1976), as amended, in a quantity of four hundred (400) grams or more , in violation of § 44-53-370(e)(2)(e), of the South Carolina Code of Laws (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR



ARREST WARRANT

M-302782

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Lexington

THE STATE

against

Benjamin J Newman

Address:

Lexington, SC 29073-7407

Phone: _____ SSN: _____
Sex: M Race: W Height: 6 Weight: 208DL State: SC DL #: _____

DOB: _____ SC0320000

Prosecuting Agency: Lexington County SheriffProsecuting Officer: B. D. Slice - 1502Offense: Drugs / Trafficking in cocaine, 400 g or moreOffense Code: 0281Code/Ordinance Sec: 44-53-0370(c)(2)This warrant is CERTIFIED FOR SERVICE in the☐ County/ ☐ Municipality of

The accused

is to be arrested and brought before me to be

dealt with according to the law.

(L.S.)

Signature of Judge

Date: _____

RETURN

A copy of this arrest warrant was delivered to
defendant Benjamin J. Newman
on 06-06-2011

Signature of Constable/Clerk Enforcement Officer

RETURN WARRANT TO:

General Sessions:
Lexington County Judicial Center
205 E. Main Street
Lexington, SC 29072ORIGINAL
Lex. Co. C.C.G.P. G.S. & F.G.

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Lexington

Personally appeared before me the affiant B. D. Slice whobeing duly sworn deposes and says that defendant Benjamin J Newmandid within this county and state on or about 06/05/2011 violate the criminal laws of theState of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Lexington)

in the following particulars:

DESCRIPTION OF OFFENSE Drugs / Trafficking in cocaine, 400 g or moreI further state that there is probable cause to believe that the defendant named above did commit
the crime set forth and that probable cause is based on the following facts:That on June 5, 2011, at 423 Longview Drive in the Lexington area of Lexington Co., one Benjamin J Newman did knowingly sell,
manufacture, deliver, bring into this state and/or possess over 400 grams of cocaine, a schedule II controlled substance, without
authority to do so. The defendant also had in his possession approximately 50 pounds of marijuana also.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Lexington

Affiant's Address P O Box 639
Lexington, SC 29071-

Affiant's Telephone _____

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on or about 6/5/2011 defendant Benjamin J Newman

did violate the criminal laws of the State of South Carolina (or ordinance of

☒ County/ ☐ Municipality of Lexington) as set forth below:DESCRIPTION OF OFFENSE: Drugs / Trafficking in cocaine, 400 g or moreHaving found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or
her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as
soon hereafter as is practicable
Sworn to and subscribed before meon 06/06/2011 (L.S.)

Signature of Issuing Judge

Brian W. Jeffcoat

Judge Code: 5058Judge's Address Lexington County Judicial CenterLexington, SC 29072-Judge's Telephone (803)951-2595Issuing Court: ☒ Magistrate ☐ Municipal ☐ Circuit

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

BAH set by
Judge Mr. [Signature]
on June 2, 2011
Type and Amount: 1st
Name of Surety: _____

PRELIMINARY HEARING held by

Judge _____
on _____
Defendant Attorney: _____
Decision: _____

DISPOSITION before

Judge _____
on _____
by _____
(Indicate jury trial, bench trial, plea, nol. pros., etc.)
Disposition: _____
Sentence: _____

JURORS

WITNESSES

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

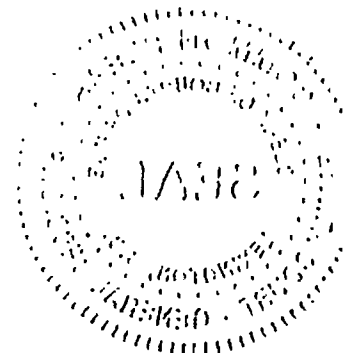
Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

Name: _____
Address: _____
Telephone: _____

CODEFENDANTS



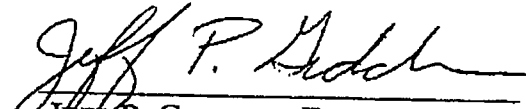
**INDICTMENT NO. 2011-GS-32-2261
TRAFFICKING IN COCAINE (400 GRAMS OR MORE)**

We, the jury, unanimously find on Indictment Number 2011-GS-32-2261, that
the Defendant, **Benjamin J. Newman**, is:

X Guilty of Trafficking in Cocaine.

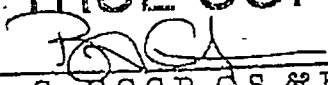
OR

_____ Not Guilty.


JEFF P. GEDCKE, Foreperson

Lexington, South Carolina
October 17, 2012

A TRUE COPY


Lex. Co. C.C.C.P., G.S. & F.C.

STATE OF SOUTH CAROLINA

COUNTY OF Lexington
STATE VS.Benjamin J Newman

AKA:

Race: White Sex: M Age: 26DOB: [REDACTED] SS# [REDACTED]Address: [REDACTED]City, State, Zip: Lexington, SC 290738033DL#: 9 SID#: SC01493985*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Drugs / Trafficking in cocaine, 400 g or more

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2011GS3202261A/W#: M302782Date of Offense: 6/5/2011S.C. Code § : 44-53-0370(e)(2)(e)CDR Code #: 0281

SENTENCE SHEET

25-30 yrs
and
\$ 200,000☒ CONVICTED OF or ☐ PLEADSin violation of § 44-53-0370(e)(2)(e)☐ NON-VIOLENT ☒ VIOLENT ☒ SERIOUS ☐ MOST SERIOUSof the S.C. Code of Laws, bearing CDR Code # 0281☐ Mandatory GPS(CSC §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

SC Bar# 015294

Defendant

Attorney for Defendant

SC Bar# 6145

WHEREFORE, the Defendant is committed to the

☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed years
and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment
of \$, plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections. 30 days☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code § 17-25-135.
Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$ Payment Terms: ☐ Set by SCDPPPS Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)	\$	
§ 14-1-211(A)(1) (Conv. Surcharge)	\$100	\$
§ 14-1-211(A)(2) (DUI Surcharge)	\$100	\$ <u>100</u>
§ 56-5-2995 (DUI Assessment)	\$12	\$
§ 56-1-286 (DUI Breath Test)	\$25	\$
Proviso 47.9 (Public Def/Prob)	\$500	\$
§ 14-1-212 (Law Enforce. Funding)	\$25	\$
§ 14-1-213 (Drug Court Surcharge)	\$150	\$ <u>25</u>
§ 50-21-114(BUI Breath Test Fee)	\$50	\$ <u>150</u>
§ 56-5-2942(J) (Vehicle Assessment)	\$40/ea	\$
Proviso 90.5 (SCCA Surcharge)	\$5	\$ <u>5</u>
3% to County (if paid in installments)	\$	\$ <u>5</u>
TOTAL	\$	\$ <u>280</u>

Clerk of Court Deputy Clerk

Court Reporter: [Signature]

SCCA/217 (03/20/11)

Lex. Co. C.C.C.P., G.S. & F.G.

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☒Random Drug/Alcohol testing ☒Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ beginning \$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge: [Signature]Judge Code: C2Sentence Date: 10/17/12

STATE OF SOUTH CAROLINA)
)
)
COUNTY OF LEXINGTON)

IN THE COURT OF GENERAL SESSIONS

Indictment Nos. 2011-GS-32-2259
2011-GS-32-2261

STATE OF SOUTH CAROLINA)
)
)
v.)
)
BENJAMIN J. NEWMAN,)
)
Defendant.)
_____)

VERDICT

**INDICTMENT NO. 2011-GS-32-2259
TRAFFICKING IN MARIJUANA
(10 POUNDS OR MORE, BUT LESS THAN 100 POUNDS)**

We, the jury, unanimously find on Indictment Number 2011-GS-32-2259, that
the Defendant, **Benjamin J. Newman**, is:

 X Guilty of Trafficking in Marijuana.

OR

 Not Guilty.

[GO ON TO NEXT PAGE]

STATE OF SOUTH CAROLINA
COURT OF APPEALS
APPEAL FROM LEXINGTON COUNTY
COURT OF GENERAL SESSIONS

The Honorable Alexander Macaulay, Circuit Court Judge

Indictments Nos. 2011-GS-32-2259, 2011-GS-32-2261

The State of South Carolina Respondent,

v.

Benjamin J. Newman Appellant.

FINAL BRIEF OF APPELLANT

Benjamin A. Stitely, #75339
Robert T. Williams, #6149
Williams, Hendrix, Steigner & Brink, P.A.
200 East Main Street
Post Office Box 849
Lexington, South Carolina 29071
(803) 359-1550

Attorneys for Appellant

RECEIVED

JUL 26 2013

SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT ERR WHEN IT DENIED THE APPELLANT'S MOTION TO SUPPRESS THE DRUG EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH?**
 - A) Did the Trial Court err when it denied the Appellant's motion to suppress the drug evidence obtained as a result of an unlawful search conducted prior to the procurement of a search warrant?
 - B) Did the Trial Court's failure to suppress the unlawfully seized drug evidence constitute substantial prejudice to the Appellant?
2. **DID THE TRIAL COURT ERR WHEN IT FAILED TO GRANT THE APPELLANT'S MOTIONS FOR DIRECTED VERDICT?**

STATEMENT OF THE CASE

On June 5, 2011 Appellant Benjamin Newman was arrested in Lexington County on charges of Trafficking in cocaine, 100 g or more, but less than 200 g, Trafficking in ice, crack or crack - 200 g or more, but less than 400 g, Trafficking in cocaine, 400 g or more, and Trafficking in marijuana, 10 lbs or more, but less than 100 lbs - 1st offense.

On October 15-17, 2012 the Appellant appeared before the Court of General Sessions of Lexington County for a jury trial on indictments 2011-GS-32-02259, Trafficking in marijuana, 10 lbs or more, but less than 100 lbs - 1st offense, and 2011-GS-32-0261, Trafficking in cocaine, 400 g or more.

The case was heard by the Honorable Alexander McCaulay. The Appellant was ultimately convicted on both indictments on October 17, 2012, and received a sentence of Twenty Five (25) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0261 and Ten (10) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0259 both sentences running concurrently.

On October 23, 2012 the Appellant filed and served his Notice of Intent to Appeal his conviction. A request for transcript was timely filed by Appellant's counsel.

On January 4, 2013 a notice was filed that extended the deadline to produce the trial transcript until February 1, 2013. On February 4, 2013 a notice was filed that extended the deadline to produce the trial transcript until March 1, 2013. On March 4, 2013 a notice was filed that extended the deadline to produce the trial transcript until April 1, 2013. The trial transcript was received by counsel on April 5, 2013.

On April 18, 2013 Appellant's counsel filed a motion to grant an extension to file the Appellant's Initial Brief; said request was granted by Order on April 23, 2013. The extension to file the Appellant's Initial Brief was granted until June 5, 2013.

ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION TO SUPPRESS THE DRUG EVIDENCE OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH

A review of the issues dealing with searches is helpful in making a correct assessment as to whether the drug evidence introduced in the Appellant's trial should have been introduced into evidence or not.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend IV.

The crux of the err committed by the Trial Judge lies in the allowance of evidence obtained from the search of the premises without securing a search warrant, or following additional appropriate Constitutional guidelines.

A) Did the Trial Court err when it denied the Appellant's motion to suppress the drug evidence obtained as a result of an unlawful search conducted prior to the procurement of a search warrant?

As previously stated, the Fourth Amendment to the United States Constitution ensures that a person shall be protected from unlawful search and seizure. Section 17-13-140 of the S.C. Code Ann., reflects this same standard provided by our United States Constitution. State v. Covert, 368 S.C. 188, 628 S.E.2d 482 (Ct. App., 2006); State v. Jones, 342 S.C. 121, 536 S.E.2d 675 (2000). The failure of the State to obtain a search warrant is more than a procedural mistake;

this failure amounts to a violation of the Appellant's Constitutional protections.

In the present matter, the Court was in error when it failed to suppress the drug evidence obtained by a search of 433 Longview Rd, in Lexington County prior to the procurement of a search warrant. Agents of the Lexington County Multi-Agency Narcotics Task Force (NET team) conducted an undercover operation utilizing a confidential informant to allegedly broker a drug transaction with the Appellant on June 5, 2011. (R. p 25, l. 8-13) The Lexington County SWAT team entered the premises at 433 Longview Rd. only to find the Appellant outside the home in the rear portion of the property. (R. p 31, l. 21-25, p.32, l. 1-5) Subsequent to the arrest of the Appellant, Agent Tracy obtained a search warrant for the premises. (R. p 32, l. 10-25) The actual search warrant was obtained and delivered a significant period of time after the arrest of the Appellant. (R. p 39, l. 10-22).

During the pretrial hearing on the Appellant's motion to suppress drug evidence, several officers testified before the Court regarding the circumstances surrounding the arrest, search, and subsequent search warrant for 433 Longview Rd. During the pretrial hearing Agent Slice with the NET team testified that during the interim between the arrest of the Appellant and the signing of the Search Warrant, no search was conducted (R. p 41, l. 5-10). This testimony was however contradicted by the evidence from an audio recording made by another officer. The audio recording contains a conversation amongst the NET team officers stating that "officers were searching around for cocaine prior to the search warrant being there." (R. p. 247, l. 5-7) The audio recording in its entirety was offered as an exhibit (Court's Exhibit 7) during the pretrial hearing (R. p 42, l. 5-24). Officer Carver, also with the NET team, testified that he along with agents Barnes and Setree were sitting inside the residence for a period of time waiting on the

search warrant, however nobody was looking around or searching. (R. p 90, l. 5-23) Agent Setree contradicts the testimony of the previous officers stating that there was something "chaotic about this whole search thing" and that officers were in fact searching all around for drug evidence. (R. p 97, l. 19-25, p 98, l. 1-23 and R. p 106, l. 20-23) Additionally, Agent Setree testified that the drug evidence in question was located by Agent Barnes (R. p 107, l. 21-23), the same Agent Barnes, that Agent Carver specifically states was not looking around or searching at all. Agent Barnes further testified that she went in search of the drug evidence in response to statements made by Agent Carver prior to them re-entering the dwelling. (R. p 296, l. 21-25, p. 297, l. 1-11)

The testimony offered from the State's witnesses was at best contradictory. The admissions by Agent Setree and those from the audio tape, which is the only evidence not diminished by shifting recollections and elapsed time, confirm that there was in fact searching inside and out to locate cocaine evidence.

In State v. Vice, the Court examined the entry into a dwelling and a subsequent search prior to the obtaining of a search warrant on the basis that speed was of the essence, much like in the present matter, and the Court found that where the location is secured it would be inappropriate and reversible error to allow a search and the product of that search into evidence at a trial. State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972) *See also* Stoner v. California, 376 U.S. 483 (1964) In the present matter, the location was secured by the Lexington County SWAT team as well as the NET team and there were no exigent circumstances requiring a speedy warrant-less search.

In addition to claiming no search was conducted, the State further argued that the drug

evidence was only located while searching for items in plain view, and was not an item recovered in accordance with the subsequent search warrant. Both, the claims that there was no search and secondarily, that if there was a search it was only conducted for items in plain view are both inconsistent with the actual Return filed with the search warrant. On the actual Search Warrant and Return (Court Exhibit 1), within the inventory of items seized, it clearly states that Agent Barnes discovered and seized the drug evidence as part of the search authorized by the actual search warrant. Specifically, the Return states that the "quantity of off-white material consistent w/ cocaine located in area by kitchen by Tucker (Barnes)," not in a backpack in that was in plain view as previously testified by Agent Setree. (R. p 8) Agent Barnes further admitted to specifically going to "look" for the cocaine in a specific area upon direction from statements made by Agent Carver. (R. p 297, l. 1-4) She continued to "look" for "several minutes." (R. p 306, l. 24-25) The Appellant maintains that several minutes of "looking" without a warrant is in fact a search and should have resulted in a suppression of the discovered drug evidence.

B) Did the Trial Court's failure to suppress the unlawfully seized drug evidence constitute substantial prejudice to the Appellant?

The long standing precedent established in Wong Sun v. United States, created the term of art: "fruit of the poisonous tree." Specifically, evidence obtained as a result of an illegal police action, a search or seizure, must be excluded barring a specifically carved exception. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963) *See also* State v. Jihad, 347 S.C. 12, 553 S.E.2d 249 (2001).

The Appellant acknowledges that a second prong exists when addressing wrongfully obtained, and subsequently admitted evidence, in that upon appeal he must make a showing that the admission of the evidence created irreparable and reversible harm. This question is particularly important to the issues addressed by the Appellant upon appeal. Absent the admission of the drug evidence, it is the Appellant's position that the Jury would have lacked sufficient direct or circumstantial evidence to return a guilty verdict. Additionally, baring the admission of the drug evidence, the State would not have been able to survive a directed verdict challenge made by the Appellant.

The admittance of said evidence created an irreparable harm to the Defendant and denied him Due Process of law. The actions of the Court should be reversed and a new trial ordered without the admission of any items obtained from unlawful search of the premises.

2. THE TRIAL COURT ERRED IN FAILING TO GRANT THE APPELLANT'S MOTIONS FOR A DIRECTED VERDICT

On appeal, when considering the Trial Court's refusal to grant a Defendant's directed verdict motion it must view the evidence in the light most favorable to the State. State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001). Ultimately, the State relied substantially upon circumstantial evidence presented through directly conflicting testimony. The Trial Court erred in denying the Appellant's motions for directed verdict when made at the conclusion of testimony both the State's and the Appellant's cases. (R. p 324, l.21-25, p 325, l. 1-25, p 326, l. 1-10, p 337, l. 12-25, and p 338, l. 1-7) During a trial, the Trial Court, in a directed verdict motion, must be concerned with the existence or nonexistence of evidence. State v. Cherry, 361

S.C. 588, 606 S.E.2d 475 (2004). Pertinent to this matter, in State v. Edwards, the Court reminds that the trial court should not hesitate to grant a Defendant's motion where the evidence presented by the State merely raises suspicion of guilt. State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989). In the present matter the State did not present evidence sufficient to prove more than a suspicion of guilt, establish that the Appellant had dominion or control over the alleged drug evidence, nor establish more than mere presence.

In order to return a conviction on Indictments 2011-GS-32-2259 and 2011-GS-32-2261 the State must prove that Appellant did knowingly and intentionally possess a controlled prescribed amounts of specific controlled substance, to wit: marijuana not less than Ten pounds, nor more than One Hundred pounds S.C. Code Ann. § 44-53-370 (e)(1)(a)(1) (1976) and cocaine in excess of Four Hundred grams in violation of S.C. Code Ann. § 44-53-370 (e)(2)(e) (1976). (R. p 17, l. 1-4) In order to overcome its burden and sustain a conviction under the aforementioned code sections it requires proof of possession, either actual or constructive, coupled with knowledge of its presence. State v. Muhammed, 338 S.C. 22, 524 S.E.2d 637 (Ct. App. 1999) *rehearing denied, certiorari denied*.

A directed verdict should be granted when evidence presented by the State only establishes circumstances that are suspicious, but ultimately falls short of providing a basis upon which a jury could reasonably determine the Defendant's guilt. State v. Arnold, 351 S.C. 302, 569 S.E.2d 379 (Ct. App 2002) Further, the State bears the burden of demonstrating that the Defendant was not only at the scene of a crime, but actually committed the criminal act to withstand a directed verdict challenge. State v. Schrock, 283 S.C. 129, 32 S.E.2d 450 (1984)

In the present matter with the evidence taken most favorably for the State, Appellant is placed merely at the scene where drugs were found, no direct testimony was offered that he fully possessed a sufficient amount of either marijuana or the cocaine to satisfy the statute. The evidence offered by the State does no more than raise a circumstantial suspicion and fails to meet the required burden to go to a jury, even when evidence is considered in the light most favorable to the prosecution. The circumstantial link between the Appellant and alleged dominion and control over items found in a backpack and duffle bag, both of which were brought to the scene by the NET team or their agents, and which were not presented as evidence at trial leaves a nebulous connection, one that fails to uphold the State's appropriate threshold to withstand a directed verdict motion.

If the Court were to accept the idea that evidence was reasonably sufficient to establish a real possibility that the Appellant could have constructively possessed the controlled substances, by way of dominion and control, the second element of the Statute is still lacking. For a conviction, a second prong requires that possession must be "coupled with knowledge of its presence." As stated, the State's evidence fails to place the backpack containing the drugs in the possession of the Appellant. In State v. Taylor the Court found a Defendant who was negligent in the possession of, but without knowledge could not be convicted under the statute. State v. Taylor, 323 S.C. 162, 473 S.E.2d 817 (Ct. App. 1996).

In making this argument, the Appellant maintains that any drug evidence discovered and seized was done so through an illegal warrant-less search in violation of the Appellant's constitutional and statutory rights. Further, in making this argument, the Appellant notes that only evidence presented at the actual trial, and not testimony taken in pretrial hearings outside the

presence of the jury can be used to successfully withstand a directed verdict motion.

During the trial, the only witness presented by the State who was actually present with the Appellant at the time he allegedly possessed the drug evidence was Agent Carver. Testimony offered by Agent Carter stated that outside the residence, where the initial alleged encounter between Agent Carver and the Appellant took place, no drug evidence was on the person or in the possession of the Appellant, and the only illegal substances present were specifically under the dominion and control of the State's Agent. (R. p 196, l. 3-6) It is further testified that the Appellant never took possession or control of the "duffle bag" containing the alleged marijuana either outside or inside the premises. (R. p 197, l. 3-18, p 203, l. 22-25, p 204, l. 1) As it relates to the cocaine evidence, the only testimony offered by Agent Carter is at first that it was removed from a cardboard box on the counter. (R. p 198, l. 21-25) In later testimony, Agent Carter backtracks and states he only "thought it was on the counter." (R. p 206, l. 20-22) Ultimately, it is testified that the cocaine evidence was actually located in the book bag which was brought to the location by Agents of the State. (R. p 204, l. 19-23, R. p 216, l. 13-22, and R. p 264, l. 3-5) Agent Carver at no point indicates he witnessed the Appellant place the cocaine into the back pack, nor did he observe the Appellant even have an opportunity to do so. Additionally, when examining who searched the backpack prior to its arrival at the premises with the NET team, no testimony was offered regarding verification of its contents. The only testimony offered was that, Agent Laney, who did not testify, allegedly searched Mr. Ainsworth's vehicle where the bag was located prior to arrival. (R. p 243, l. 21-25)

Ultimately, the State failed to satisfactorily produce any testimony or evidence that any and all drug evidence which was recovered did not in fact come with and remain in possession of

the NET team or its Agents. The only consistent evidence presented by the State specifically relating to the Appellant actually possessing, or asserting dominion and control, over any controlled substance was that the Appellant allegedly did examine a small portion of marijuana offered to him by Agent Carver. (R. p 198, l. 5-11) However, there was no testimony nor proof offered establishing this unknown amount of marijuana was a sufficient amount to satisfy the weight requirements of the Statute for trafficking in marijuana.

Totaling all circumstantial evidence presented by the State in its case in chief, at best, places the Appellant at a residence, where a quantity of controlled substances were located within bags which the State's Agents brought to the location. This demonstration of mere presence accompanied by, at best, a suspicion of guilt should have been insufficient to withstand a directed verdict motion.

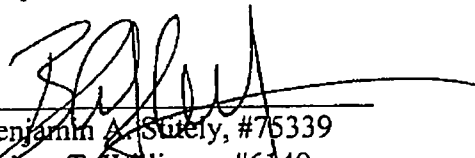
CONCLUSION

The Trial Judge erred by failing to suppress the unlawfully obtained drug evidence as a product of an unlawful search without a search warrant. This error failed to protect the Appellant's Constitutional and Statutory rights and ultimately denied him due process and did not allow him to receive a fair trial.

Further, the Trial Judge was in error by failing to grant the Appellant's Motions for Directed Verdict both at the end of the State's case and at the conclusion of the Appellant's case. Even considered in a light most favorable to the State, evidence which was presented was grossly insufficient to support a finding of guilt.

July 26, 2013

Respectfully submitted,



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STATE OF SOUTH CAROLINA
COURT OF APPEALS
APPEAL FROM LEXINGTON COUNTY
COURT OF GENERAL SESSIONS

The Honorable Alexander Macaulay, Circuit Court Judge

Indictments Nos. 2011-GS-32-2259, 2011-GS-32-2261

The State of South Carolina Respondent,

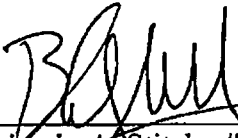
v.

Benjamin J. Newman Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellants complies with Rule 211(b),
SCACR.

July 24, 2013



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SC Court of Appeals

STATE OF SOUTH CAROLINA
COURT OF APPEALS
APPEAL FROM LEXINGTON COUNTY
COURT OF GENERAL SESSIONS

The Honorable Alexander Macaulay, Circuit Court Judge

Indictments Nos. 2011-GS-32-2259, 2011-GS-32-2261

The State of South Carolina Respondent,

v.

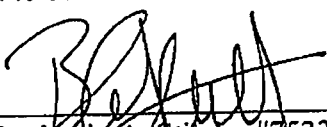
Benjamin J. Newman Appellant.

PROOF OF SERVICE

I certify that I have served the Final Brief on the Respondent by depositing copies of it in the United States Mail, postage prepaid, on July 26, 2013, addressed to Rick Hubbard, Deputy Solicitor, 205 East Main Street, Lexington, South Carolina 29072, Dale Scott, Deputy Solicitor, PO Box 516, Greenwood, SC.29649; and Jennifer Ellis Roberts, Assistant Attorney General and Alan Wilson, Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, South Carolina 29211-1549.

I further certify that all parties required to be served have been served.

Dated: July 26, 2013



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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No: 2012-213383

THE STATE,

Respondent,

v.

BENJAMIN J. NEWMAN,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The trial court properly denied Appellant's motion to suppress the drug evidence because it was seized lawfully as the result of a transaction that took place in the presence of a law enforcement officer and was found under the plain view exception to the Fourth Amendment rule prohibiting warrantless searches.

II.

Appellant's specific arguments regarding a lack of evidence establishing more than a suspicion, dominion or control, and mere presence are not preserved for review, but even if preserved, the trial court properly denied Appellant's motion for a directed verdict because the State presented sufficient evidence to establish Appellant's guilt on both trafficking charges.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant for trafficking in marijuana, 10 pounds or more, but less than 100 pounds, first offense and trafficking in cocaine, 400 grams or more. (R. pp.1-4.) On October 15-17, 2012, Appellant proceeded to trial before a jury. Robert T. Williams, Esquire, represented Appellant, and Assistant Solicitors Samuel R. Hubbard and Dale Scott represented the State. The jury found Appellant guilty of both charges, and the Honorable Alexander S. Macaulay sentenced him to ten years' imprisonment on the marijuana charge and twenty-five years' imprisonment on the cocaine charge, to be served concurrently. (R. p.340-341; 343.)

On October 23, 2012, Appellant filed a Notice of Appeal.

STATEMENT OF FACTS

On June 5, 2011, the Lexington County Multi-Agency Narcotics Enforcement Team (NET) arranged a drug exchange with Appellant, a suspected drug dealer. (R. p.22, lines 12-14; R. p.23, line 4-R. p.24, line 15.) A confidential informant (CI) made arrangements to introduce an undercover agent to Appellant who agreed to exchange fifty pounds of marijuana for twenty-five ounces of cocaine. (R. p.187, lines 7-23; R. p.192, lines 10-21.) Immediately following the exchange, a SWAT team entered following the use of a flash-bang.¹ (R. p.202, lines 2-6.) The CI and the undercover agent got down on the floor, and Appellant ran out the back door. (R. p.202, lines 7-15.) Appellant was apprehended and arrested for trafficking marijuana and cocaine. (R. p.75, lines 22-24; R. pp.1-4.)

Pretrial, Appellant moved to suppress the evidence. (R. p.17, line 15.) The State called NET officer Brannon Slice. (R. p.21, line 16-18.) He testified he entered the residence where the drug deal occurred after the SWAT team arrived, at which time he saw marijuana sitting on a table. (R. p.31, lines 21-25.) Agent Slice estimated he waited approximately 15-20 minutes for the search warrant. (R. p.39, lines 10-22.) He testified that no searching of the residence took place until the officers were notified the search warrant was signed. (R. p.41, lines 5-10.)

NET Agent Dennis Tracy testified next. (R. p.44, lines 7-25.) He testified he was the one who typed the search warrant and took it to Judge Reinhart to be signed. (R. p.48, line 18-R. p.49, line 5.) He explained that afterwards, he called and notified Agent Paige Tucker that the judge had signed it and he was on his way back to the residence.

¹ According to Agent Nicholas Carver, a flashbang is a very loud device that is used to discombulate the occupants in a situation like this. (R. p.202, lines 2-5.)

(R. p.52, lines 17-20.) He testified that when he arrived back at the residence, agents were searching. (R. p.60, lines 18-25.)

The State then called Agent Nicholas Carver, an undercover NET agent who participated in the drug deal while wearing a recording device. (R. p.62, line 18-R. p.63, line 22; R. p.65, lines 2-7.) After he made the drug exchange with Appellant, he testified that he could have arrested Appellant right then because the drug deal occurred in his presence and he was in the residence by consent. (R. p.72, line 23-R. p.73, line 17.) Agent Carver testified no one was searching the house during the time he was removed from the home; rather, they were clearing out the house and removing the people. (R. p.76, lines 5-17.) He verified he heard Agent Setree's voice on the audiotape from the incident. (R. p.76, lines 18-20.) He explained Agent Setree was telling him what he could have done better because Carver was new. (R. p.76, line 21-R. p.77, line 5.) Specifically, Agent Carver testified there was no search going on, but that Agent Setree was making sure and telling him, "[W]e don't do that[;] that's not what we do." (R. p.77, lines 6-10.) He testified that when the officers came in to make the arrest, the marijuana was readily visible. (R. p.77, lines 15-17.) Agent Carver explained that everyone was concerned about where the cocaine went and thought Appellant might have grabbed it when running out the back door. (R. p.77, line 20-R. p.78, line 7.) Carver testified that the officers were looking around the backyard for Appellant and the cocaine. (R. p.78, lines 8-11.) He testified the officers ultimately discovered the cocaine in the book bag he had brought the marijuana in, which was lying open on the floor next to the kitchen island. (R. p.78, lines 15-24.)

On cross-examination, Agent Carver stated no one was searching between the time he was taken out of the house and the time he returned, which was approximately

five minutes. (R. p.89, lines 12-22.) Carver testified nobody was searching while they were waiting for the search warrant. (R. p.90, lines 13-23.) He testified that on the recording, Agent Setree is heard correcting Officer Lance, a SWAT team member, because he "looked over something." (R. p.90, line 24-R. p.91, line 9.) He testified that Agent Setree told the officer, "Don't do that." (R. p.91, lines 5-6.)

The next to testify was Agent Brian Setree of the NET. (R. p.93, line 24.) He testified that no one in the house was searching following Appellant's arrest. (R. p.96, line 24-R. p.97, line 1.) He explained that the cocaine was on the kitchen counter and then was no longer there and that the SWAT team was looking for it in the backyard because they thought Appellant had taken it when he ran. (R. p.97, line 19-R. p.98, line 4.) Setree testified he was heard on the recording calming the SWAT team down by telling them not to worry about the cocaine because they were getting a search warrant. (R. p.98, lines 14-19.) He further testified he was critiquing what they do and why they do things a certain way in the portion of the recording when he was speaking to Agent Carver. (R. p.98, lines 20-23.) He testified he told other officers, "Don't worry about looking for this cocaine. We'll find this cocaine." (R. p.100, lines 2-3.) Setree clarified that no one was going through any cabinets or looking under any furniture. (R. p.100, lines 4-5.) He explained that because the drug transaction had already gone down at that point, the cocaine had essentially already been seized and the search warrant was to be used to recover any other evidence related to the case. (R. p.100, lines 5-10.) He testified that because two felonies were conducted in the presence of a police officer, the only reason they even needed the search warrant was to search for things tying Appellant to the residence. (R. p.100, lines 11-17.) The trial court listened to the recording from

the audio recording device worn by Agent Carver during the drug transaction. (R. p.27, line 25-R. p.28, line 1; R. p.29, lines 22-25; R. p.110-112.)

Appellant argued officers searched prior to obtaining a search warrant. (R. p.113, lines 1-10.) The State clarified that it was only introducing the drugs and possibly some letters with Appellant's name on them, but that it would not try to introduce other items found such as guns and bullets. (R. p.114, lines 1-6.) Appellant argued the issue was whether the cocaine was seized incident to arrest or during a search. (R. p.114, lines 7-14.) The trial court pointed out that the CI and undercover agent were invited into the house and that the contraband was in clear view. (R. p.114, lines 15-22.) Appellant then specifically stated, "Your Honor, but there are other exhibits which they're intending to introduce aside from that." (R. p.115, lines 6-8.) The State again stated it would only introduce envelopes with Appellant's name on them. (R. p.115, lines 12-16.) The trial court noted that was not contraband but was merely identification. (R. p.115, line 25-R. p.116, line 1.) The trial court determined the cocaine and marijuana would be admitted and cautioned the State to let him know if it intended to introduce anything else so he could rule on it outside the presence of the jury. (R. p.119, lines 5-15.) The trial court denied the motion to suppress. (R. p.119, lines 20-23.)

At trial, the State called Brannon Slice, the NET agent who planned the controlled drug exchange. (R. p.124, line 19-25; R. p.127, lines 14-24.) He explained how he placed a wire on the CI and an audio recording device and videotaping device on Agent Carver. (R. p.137, line 24-R. p.138, line 4.) He testified he mistakenly did not turn on the video recorder. (R. p.138, line 4.) After Appellant objected to Agent Slice's testifying to what was found in the residence, a proffer was presented and the trial court

allowed him to testify that he found a duffle bag of marijuana, a bale of marijuana on the counter, and cocaine in a bag in plain view. (R. p.151, line 17-R. p.164, line 15.)

Next, the State called Agent Nicholas Carver. (R. p.184, line 25.) Agent Carver explained his undercover role as a drug dealer. (R. p.197, lines 7-13.) He testified Appellant told him he wanted 1000 pounds of marijuana next time and explained to Carver how to keep the cocaine in a brick. (R. p.196, lines 12-14; R. p.197, line 21-R. p.198, line 3.) Agent Carver testified Appellant was supposed to trade twenty-five ounces of cocaine for the fifty pounds of marijuana but added two extra ounces. (R. p.199, lines 4-17.) He testified that when the SWAT team activated the flash-bang device, he and the CI got on the floor and Appellant ran out the back door. (R. p.202, lines 2-15.) He stated the cocaine was on the edge of the counter when the bust took place but was not there afterwards. (R. p.204, lines 6-12.) He testified the cocaine ended up in the open book bag that had contained the marijuana before it was removed. (R. p.204, lines 13-23.) Agent Carver testified officers were looking in the backyard for the cocaine at first. (R. p.206, line 23-R. p.207, line 4.) He verified that as an officer, he could have arrested Appellant on his own immediately after the drug exchange. (R. p.217, lines 19-21.)

On cross-examination, Appellant asked Agent Carver whether the audio recording indicated the officers were searching the house prior to obtaining the search warrant, and he said no one was searching prior to issuance of the search warrant. (R. p.246, line 20-R. p.247, line 4.) He clarified the officers were looking for a known item that could not be located but had already been identified during a transaction that took place in front of an officer. (R. p.247, lines 6-12.)

Next, the State called Agent Brian Setree. (R. p.251, line 20.) Agent Setree testified he was the senior NET agent involved in the drug transaction on June 5, 2011. (R. p.252, line 18-R. p.253, line 9.) He testified regarding what he was heard saying on the audio recording. (R. p.256, lines 7-11.) Setree testified that he thought the video recorder was on and admitted saying the video should have been turned off. (R. 256, lines 16-25; R. p.257, lines 15-22.) On the stand, he admitted the audio recorder was left on even though it should have been turned off after the bust. (R. p.258, lines 14-23.) Agent Setree testified he could be heard on the audiotape telling the SWAT agents, who were panicked because the cocaine was no longer on the counter, not to worry about the cocaine because they were getting a search warrant for the residence anyway. (R. p.259, lines 6-25.) He testified he told them, "[I]f it's not in plain view on the inside of the residence, don't worry about it. We'll find it once we obtain the search warrant." (R. p.260, lines 1-5.) Agent Setree also testified to being present when Agent Barnes saw the cocaine in the book bag in plain view because the bag was open. (R. p.261, lines 7-14.)

The State called D. I. Blackwell, a deputy sheriff with the Lexington County Sheriff's Department, who analyzed the marijuana and testified it weighed fifty-one pounds. (R. p.249, line 22-R. p.293, line 4.) The next to testify was Paige Barnes (formerly Tucker), another NET agent. (R. p.293, line 21-R. p.294, line 10; R. p.297, line 19-R. p.298, line 7.) She testified she found the cocaine in an open book bag after looking near the counter where she was told by Agent Carver it had been before. (R. p.296, lines 4-25; R. p.297, 1-4.) She testified she waited for the search warrant for about thirty minutes. (R. p.298, lines 16-24.)

Finally, the State called Emily Homer Conrad, a chemist with the Lexington County Sheriff's Department. (R. p.308, lines 4-16.) She was qualified as an expert in

forensic analysis of drugs, to include cocaine. (R. p.310, line 17-R. p.311, line 6.) She testified the cocaine was sealed in a Best evidence kit when she received it from Candy Kyzer, an evidence custodian for the Lexington County Sheriff's Department, on June 6, 2011. (R. p.311, line 13-R. p.313, line 1.) She testified the two packages in the Best kit were cocaine and weighed 709 grams and 42.34 grams. (R. p.314, line 19-R. p.315, line 3.)

At the close of the State's evidence, Appellant moved for a directed verdict, arguing:

Your Honor, we would move for directed verdict of not guilty. The evidence taken in the light most favorable to the State and viewed in favor of the State would be insufficient as a matter of law for this jury to return a verdict of guilty in regards to either indictment, that is, trafficking in marijuana and the other being trafficking in cocaine.

(R. p.324, line 21-R. p.325, line 2.) The trial court denied the motion. (R. p.326, line 10.) Ultimately, the jury found Appellant guilty of both charges, and the trial court sentenced him to ten years' imprisonment on the marijuana charge and twenty-five years' imprisonment on the cocaine charge, to be served concurrently. (R. p.340-341; 343.)

ARGUMENTS

I.

The trial court properly denied Appellant's motion to suppress the drug evidence because it was seized lawfully as the result of a transaction that took place in the presence of a law enforcement officer and was found under the plain view exception to the Fourth Amendment rule prohibiting warrantless searches.

Appellant argues the trial court erred in denying his motion to suppress the drug evidence because it was obtained as a result of an unlawful search. Specifically, he argues officers searched prior to the procurement of a search warrant in violation of the Fourth Amendment. On the contrary, the drug evidence was obtained as the result of the drug deal taking place in the presence of an officer who was inside the residence by Appellant's consent and, thus, no search warrant was required to seize the drugs. Furthermore, the drugs were discovered in plain view, so no search was conducted to locate them. The officers did not begin searching the residence until one of the officers reported back that a judge had signed the search warrant and, because the drugs had already been seized by then, the drugs were not obtained as part of this lawful search. Therefore, the trial court properly denied Appellant's motion to suppress the drug evidence.

In criminal cases, the appellate court sits to review errors of law only. State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). In Fourth Amendment search and seizure cases, the appellate court is limited to determining if there is *any* evidence to support the trial court's findings and can only reverse due to clear error. State v. Flowers, 360 S.C. 1, 5, 598 S.E.2d 725, 727 (Ct. App. 2004) (emphasis added); State v. Bowman, 366 S.C. 485, 501, 623 S.E.2d 378, 386 (2005). The appellate

court will not reverse merely because it would have reached a different conclusion than the trial judge. State v. Rivera, 384 S.C. 356, 361, 682 S.E.2d 307, 310 (Ct. App. 2009). The reviewing court may conduct its own review of the record to determine whether the trial judge's ruling is supported by the evidence. State v. Khingratsaiphon, 352 S.C. 62, 70, 572 S.E.2d 456, 460 (2002). However, the appellate court *must* affirm the trial court if there is any evidence in the record to support the ruling. State v. Pichardo, 367 S.C. 84, 96, 623 S.E.2d 840, 846 (Ct. App. 2005) (emphasis added).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. However, "[t]he purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but 'to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals.'" United States v. Mendenhall, 446 U.S. 544, 553-54 (1980) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976)).

The Fourth Amendment's exclusionary rule prohibits unreasonable searches and seizures. U.S. Const. amend. IV; see also S.C. Const. art. I, § 10. Any evidence seized as the result of an unreasonable search and seizure must be excluded from trial. State v. Weaver, 374 S.C. 313, 319, 649 S.E.2d 479, 482 (2007). "Generally, a warrantless search is per se unreasonable and thus violative of the Fourth Amendment's prohibition against unreasonable searches and seizures." State v. Bultron, 318 S.C. 323, 331, 457 S.E.2d 616, 621 (Ct. App. 1995). However, a warrantless search may be constitutional if it falls within a recognized exception. Id. at 331-32, 457 S.E.2d at 621. South Carolina courts have recognized several exceptions to the warrant requirement, including: (1) search incident to a lawful arrest; (2) "hot pursuit"; (3) stop and frisk; (4) the automobile

exception; (5) the "plain view" doctrine; and (6) consent. State v. Bailey, 276 S.C. 32, 36, 274 S.E.2d 913, 915 (1981). Additionally, exigent circumstances can justify a warrantless search of a home which would otherwise be unreasonable. State v. Herring, 387 S.C. 201, 209, 692 S.E.2d 490, 494 (2009). Under the plain view exception, "a law enforcement officer who is lawfully in a position to view [an] object" may seize it. State v. Abdullah, 357 S.C. 344, 352, 592 S.E.2d 344, 349 (Ct. App. 2004). The plain view doctrine applies when "(1) the initial intrusion which afforded the authorities the plain view was lawful; (2) the discovery of the evidence was inadvertent; and (3) the incriminating [nature of the] evidence was immediately apparent to the seizing authorities." Id. at 352-53, 592 S.E.2d at 349 (quoting State v. Culbreath, 300 S.C. 232, 237, 387 S.E.2d 255, 257 (1990)). The United States Supreme Court has eliminated the requirement that the discovery be inadvertent, as long as the seizure meets the other two requirements. Id. at 353 n.5, 592 S.E.2d at 349 n.5 (citing Horton v. California, 496 U.S. 128, 130 (1990)).

A police officer may, without a warrant, arrest a person who commits a crime in his presence. State v. Tyndall, 336 S.C. 8, 16, 518 S.E.2d 278, 282 (Ct. App. 1999) (citing State v. Mims, 263 S.C. 45, 208 S.E.2d 288 (1974) (officer has power and authority to arrest without warrant those who have committed violation of criminal laws of this State within view of such officer)).

Here, ample evidence exists to support the trial court's denial of Appellant's motion to suppress the drug evidence. The trial court held a thorough suppression hearing, during which multiple witnesses testified. Initially, Agent Nicholas Carver, the undercover agent who participated in the drug deal, testified he could have arrested Appellant immediately following the deal because it occurred in his presence and he was

inside the residence by consent. However, he also testified that no one was searching the house during the time he was removed, that officers were merely clearing out the house and removing the people, and that no one was searching while they all waited for the search warrant. Agent Carver explained that officers were merely looking around the backyard for both Appellant and the cocaine after Appellant fled. He testified that when the officers entered the residence, the marijuana was readily visible. Agent Brannon Slice also testified that when he first entered the residence following the SWAT team's arrival, the marijuana was sitting on a table in plain view. He further testified no searching took place until Agent Dennis Tracy called on the way back from obtaining the judge's signature and notified the officers the search warrant had been issued by the judge. Agent Tracy verified he had made that telephone call and that when he reached the residence, officers were searching.

Agent Brian Setree also verified that no one was searching the house following Appellant's arrest. However, he did state that SWAT officers were looking for the cocaine in the backyard because they thought Appellant had grabbed it when he ran. He admitted he told the SWAT team not to worry about finding the cocaine because they were getting a search warrant. He testified that even when he said something on the audiotape about "looking for the cocaine," no one was going through cabinets or looking under any furniture. Agent Setree pointed out that because two felonies were conducted in the presence of Agent Carver, the search warrant was not necessary to obtain the drugs but would likely be used to look for items that might connect Appellant to the residence.

First, the testimony demonstrates the drug evidence was obtained without the need for a search warrant because the transaction occurred in the presence of Agent Carver, who had the authority to arrest Appellant as soon as the exchange took place.

Second, the marijuana was in plain view when the officers lawfully entered the residence when attempting to arrest Appellant during the drug bust. In addition to the lawful entry to arrest, Agent Carver was lawfully in the residence by consent. Under either scenario, the initial intrusion that afforded the plain view was lawful. Similarly, the cocaine was located in plain view in an open book bag without having to search underneath items or manipulate items. Thus, the drug evidence fell within the plain view exception to the exclusionary rule and was properly admitted. See Abdullah, 357 S.C. at 353 n.5, 592 S.E.2d at 349 n.5 (noting the United States Supreme Court has eliminated the requirement that the discovery be inadvertent, as long as the seizure meets the other two requirements that the initial intrusion was lawful and the incriminating nature of the evidence was immediately apparent).

In sum, the trial court properly denied Appellant's motion to suppress the drug evidence, determining the drugs were obtained lawfully because the exchange occurred in the presence of an officer who was invited into the house and the drugs were in plain view. (R. p.114, lines 15-22.) Therefore, this Court should affirm the trial court's denial of Appellant's motion to suppress the drug evidence.

II.

Appellant's specific arguments regarding a lack of evidence establishing more than a suspicion, dominion or control, and mere presence are not preserved for review, but even if preserved, the trial court properly denied Appellant's motion for a directed verdict because the State presented sufficient evidence to establish Appellant's guilt on both trafficking charges.

Appellant argues the trial court erred in denying his directed verdict motion because the State did not present evidence sufficient to (1) prove more than a suspicion of guilt, (2) establish Appellant had dominion or control over the alleged drug evidence, or (3) establish more than mere presence. However, Appellant did not make these specific arguments at trial; rather, he simply stated the evidence would be insufficient to return a guilty verdict. Accordingly, these particular arguments are not preserved for appellate review. In any case, the State did present sufficient evidence showing Appellant was guilty of both crimes. Thus, the trial court correctly denied the directed verdict motion and allowed the case to be submitted to the jury for resolution.

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). "When ruling on a motion for a directed verdict, the trial court is concerned with the existence or nonexistence of evidence, not its weight." State v. Weston, 367 S.C. 279, 292, 625 S.E.2d 641, 648 (2006). When reviewing a trial court's denial of a defendant's motion for a directed verdict, an appellate court must view the evidence in a light most favorable to the State. State v. Venters, 300 S.C. 260, 264, 387 S.E.2d 270, 272 (1990). An appellate court must find a case is properly submitted to the jury if any direct evidence or any substantial circumstantial evidence reasonably tends to prove the guilt of the accused. Weston, 367

S.C. at 292-93, 625 S.E.2d at 648. An appellate court may reverse a trial court's denial of a motion for a directed verdict if there is no evidence to support the trial court's ruling or if the ruling is based on an error of law. State v. Dantonio, 376 S.C. 594, 603, 658 S.E.2d 337, 342 (Ct. App. 2008). "[U]nless there is a total failure of evidence tending to establish the charge laid in the indictment, the trial judge's ruling upon a motion for a directed verdict must stand absent an error of law." State v. Nix, 288 S.C. 492, 496, 343 S.E.2d 627, 629 (Ct. App. 1986) (emphasis added).

"In reviewing a denial of directed verdict, issues not raised to the trial court in support of the directed verdict motion are not preserved for appellate review. A defendant cannot argue on appeal an issue in support of his directed verdict motion when the issue was not presented to the trial court below." State v. Kennerly, 331 S.C. 442, 455, 503 S.E.2d 214, 221 (Ct. App. 1998). See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal.").

The only grounds Appellant argued in his motion for directed verdict at trial were as follows:

Your Honor, we would move for directed verdict of not guilty. The evidence taken in the light most favorable to the State and viewed in favor of the State would be insufficient as a matter of law for this jury to return a verdict of guilty in regards to either indictment, that is, trafficking in marijuana and the other being trafficking in cocaine.

(R. p.324, line 21-R. p.325, line 2.) He did not argue the State raised only a mere suspicion of his guilt, nor did he argue the State failed to establish Appellant had dominion or control over the alleged drug evidence or failed to establish more than mere presence. Thus, these specific issues are not preserved for review. See Kennerly, 331

S.C. at 455, 503 S.E.2d at 221 (noting issues not raised to the trial court in support of a directed verdict motion are not preserved for appellate review).

Addressing the merits, the trial court properly denied the directed verdict motion because sufficient evidence existed to establish Appellant's guilt as to both charges, raising much more than a mere suspicion. Agent Carver testified about his role as the undercover drug dealer who exchanged fifty pounds of marijuana for twenty-seven ounces of cocaine. The audiotape provided evidence of Appellant's participation in the drug deal. Appellant was even heard asking for 1,000 pounds of marijuana for the next deal. He is also heard giving Agent Carver two extra ounces of cocaine and telling him how to work with the cocaine when he unwraps it. The State called D. I. Blackwell, a deputy sheriff with the Lexington County Sheriff's Department, and Emily Homer Conrad, a chemist with the department, to testify regarding the weight of the drugs: 51 pounds of marijuana and a total of 751.34 grams of cocaine.

In regard to proving dominion or control over the drugs, Agent Carver established this element when he testified about how the drug exchange took place. Further evidence of that transaction was provided on the audiotape. The details of the drug deal itself demonstrate Appellant's dominion and control over the drugs when he invited Agent Carver and the CI into the home and engaged in a drug transaction by taking the fifty pounds of marijuana in exchange for twenty-seven ounces of cocaine. In regard to Appellant's mere presence argument, as noted earlier, this was not argued at trial. Regardless, it is clear from the testimony and the audiotape that Appellant was an active participant in the drug deal and was not merely present. Thus, this argument has no merit. Notably, mere presence was part of the jury instructions per Appellant's request. (R. p.336, lines 1-8; R. p.339, lines 2-19.)

In sum, sufficient evidence existed to support the denial of Appellant's directed verdict motion, and the trial court properly submitted the case to the jury for its resolution. Contrary to what is required before a directed verdict should be granted, Appellant's case did not present a complete failure of evidence of his guilt. See State v. Brown, 205 S.C. 514, 520, 32 S.E.2d 825, 827 (1945) ("Where there is any evidence, however slight, on which the jury may justifiably find the existence or the non-existence of material facts in issue, or if the evidence is of such character that different conclusions as to such facts reasonably may be drawn therefrom, the issues should be submitted to the jury.").

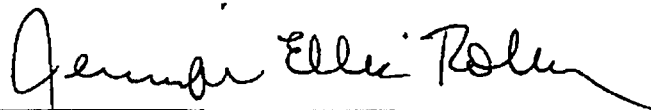
CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

July 23, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No: 2012-213383

THE STATE,

Respondent,

v.

BENJAMIN J. NEWMAN,

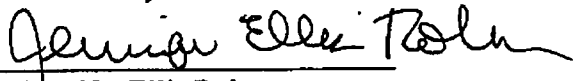
Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

July 23, 2013

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No: 2012-213383

THE STATE,

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v.

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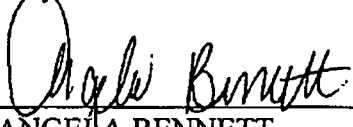
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Benjamin A. Stitely, Esquire
Robert T. Williams, Esquire
Williams, Hendrix, Steigner & Brink, P.A.
200 East Main Street
Post Office Box 849
Lexington, SC 29071

I further certify that all parties required by Rule to be served have been served.
This 23rd day of July, 2013.


ANGELA BENNETT
Legal Assistant

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Benjamin J. Newman, Appellant.

Appellate Case No. 2012-213383

Appeal From Lexington County
Alexander S. Macaulay, Circuit Court Judge

Unpublished Opinion No. 2014-UP-034
Submitted December 1, 2013 – Filed January 29, 2014

AFFIRMED

Robert T. Williams, Sr. and Benjamin Allen Stitely, both
of Williams, Hendrix, Steigner & Brink, PA, of
Lexington, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Jennifer Ellis Roberts, both of
Columbia, for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following
authorities:

1. As to whether the trial court erred in denying Newman's motion to suppress the drug evidence: *State v. Missouri*, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004) ("When reviewing a Fourth Amendment search and seizure case, an appellate court must affirm the trial [court's] ruling if there is *any* evidence to support the ruling."); *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) ("Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence."); *State v. Abdullah*, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004) (noting law enforcement may enter a dwelling "to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside [the] dwelling").

2. As to whether the trial court erred in denying Newman's motion for a directed verdict: *State v. Williams*, 346 S.C. 424, 430, 552 S.E.2d 54, 57 (Ct. App. 2001) ("In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find that the case was properly submitted to the jury."); *id.* ("Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury.").

AFFIRMED.¹

SHORT, WILLIAMS, and THOMAS, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appellate Case No. 2012-213383

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SC COURT OF APPEALS

The State,

Respondent,

v.

Benjamin J. Newman,

Appellant.

Appeal from Lexington County
Alexander S. Macaulay, Circuit Court Judge
Case Nos. 2011-GS-32-2259, 2011-GS-32-2261

PETITION FOR REHEARING

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ATTORNEY FOR APPELLANT.

NOW COMES the Appellant in the above-captioned action, acting by and through undersigned counsel, seeking rehearing on this Court's unpublished opinion in this matter. *State v. Benjamin J. Newman, Opinion No. 2014-UP-034 (S.C. Ct. App. Filed January 29, 2014)*. Pursuant to *Rules 221(a) and 219, SCACR*, the Appellant petitions for rehearing on the ground that certain issues of material fact or law have either been overlooked or misapprehended by the Court in the opinion in question. In support of this position, the Appellant would show unto this Honorable Court the following:

Issue 1.

The Trial Court erred when it denied the Appellant's Motion to Suppress the drug evidence obtained as a result of an unlawful search.

The Appellant would respectfully note that the opinion of this Court appears to have overlooked or misapprehended material facts which supported his Motion to Suppress the drug evidence in his case. The testimony was that a team of officers entered the residence in question after audio surveillance of a drug transaction with the Appellant, a confidential informant and undercover police officer. According to the testimony adduced at trial, the Appellant ran out of the back door as the SWAT team entered the residence. R. p. 202, ll. 2-15. Despite seeing the Appellant go out the back door of the residence, the record below indicates that the CI, the undercover agent and some members of the SWAT team remained inside the residence for fifteen – twenty minutes while they waited for a search warrant for this residence. R. p. 39, ll. 10-22. It was during this time period when officers allegedly observed the drugs in question in plain view. The Appellant would respectfully submit that once the residence was checked for any immediate threat to the officers at the scene, law enforcement had no authority to remain inside this residence pending their receipt of a search warrant. Agent Paige Barnes testified that she observed the cocaine in this case in an open book bag after

looking near the counter where she had been told the cocaine was located. Her testimony reflects that they waited inside the house for approximately thirty minutes before the search warrant arrived. R. p. 293, l. 21- R. p. 298, l. 24. In addition, the audio recording of this operation documented a conversation between law enforcement officers at the scene in which it was stated that "officers were searching around for cocaine prior to the search warrant being there." R. p. 247, ll. 5-7. This recording was entered in its entirety during the pre-trial hearing on the Appellant's Motion to Suppress. It was marked and introduced as Court's Exhibit No. 7. R. p. 42, ll. 5-24.

Based on all the foregoing, the Appellant would respectfully ask this Court rehear the issue of whether or not the lower court erred in failing to suppress the drug evidence in this case.

ISSUE II

The Trial Court erred in failing to grant the Appellant's Motion for a Directed Verdict on the charge of Trafficking in Cocaine, 400 grams or more.

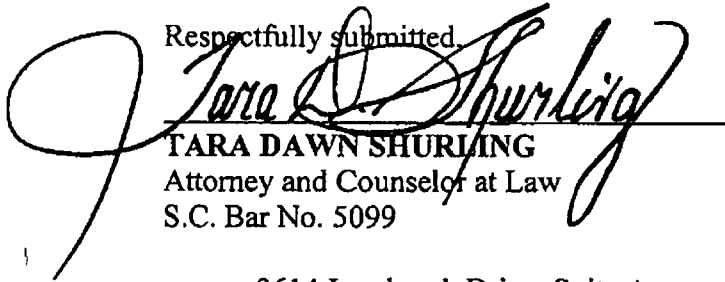
The record below indicates that a confidential informant and an undercover agent set up a drug transaction with the Appellant in the course of which he exchanged a quantity of cocaine for a quantity of marijuana. In this monitored drug transaction, Agent Carver testified that the Appellant was suppose to trade twenty-five ounces of cocaine for fifty pounds of marijuana, but added two extra ounces. R. p. 199, ll. 4-17. His testimony in fact establishes that the cocaine was ultimately found in a book bag that had been brought to the residence by law enforcement carrying the marijuana for this drug transaction. Thus, the Appellant would respectfully submit that the evidence conclusively establishes that the transfer of the cocaine for the marijuana had already taken place prior to the raid of law enforcement on this residence. Therefore, according to the evidence introduced by the State, the law enforcement agents involved in this drug

transaction had taken physical custody of the cocaine prior to the Appellant's arrest. For that reason, the Appellant would respectfully submit a directed verdict of acquittal should have been granted on the cocaine charge. On the facts of this case, the cocaine in question was, according to the State's own evidence, used as currency to purchase the marijuana traded for it. The Appellant would respectfully submits that all the evidence in this case indicates that the only cocaine involved in this transaction was clearly under the exclusive dominion and control of the law enforcement agents who had taken possession of the cocaine in question. There being no evidence of any other cocaine being in the Appellant's possession, the Motion for Directed Verdict on that charge should have been granted. For these reasons, the Appellant respectfully asks this Honorable Court to rehear the issue of whether or not he was entitled to a directed verdict of acquittal on the charge of trafficking in cocaine.

CONCLUSION

For all the reasons set forth above, the Appellant now asks for rehearing on these issues.

Respectfully submitted,


TARA DAWN SHURLING
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S.C. Bar No. 5099

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ATTORNEY FOR APPELLANT

This 24th day of February, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

FEB 24 2014

SC Court of Appeals

Appellate Case No. 2012-213383

The State,

Respondent,

v.

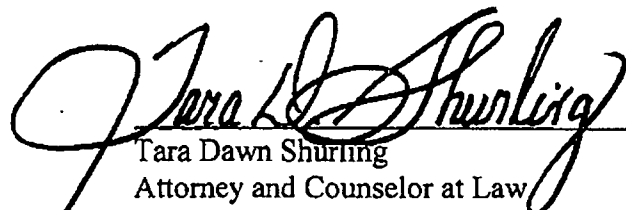
Benjamin J. Newman,

Appellant.

Appeal from Lexington County
Alexander S. Macaulay, Circuit Court Judge
Case Nos. 2011-GS-32-2259, 2011-GS-32-2261

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Appellant's Petition for Rehearing in the above-entitled case have been served upon opposing counsel, Jennifer Ellis Roberts, Assistant Deputy Attorney General, P O Box 11549, Columbia, SC 29211, by depositing in the U.S. Mail, postage prepaid, postage prepaid, this 24th day of February, 2014.


Tara Dawn Shurling
Attorney and Counselor at Law
S.C. Bar No. 5099
February 24, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
Honorable Alexander S. Macaulay, Circuit Court Judge
Appellate Case No. 2012-213383

RECEIVED

APR 23 2014

SC Court of Appeals

THE STATE,

Respondent,

vs.

BENJAMIN J. NEWMAN,

Appellant.

RETURN TO PETITION FOR REHEARING

On January 29, 2014, this Court issued an unpublished opinion in which it unanimously affirmed Appellant's convictions for trafficking in marijuana and trafficking in cocaine. State v. Newman, Op. No. 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014): Pursuant to Rule 221(a), SCACR, Appellant petitioned this Court for rehearing, and this Court requested that Respondent ("the State") file a return to Appellant's petition. For the following reasons, Appellant's petition for rehearing should be denied.

Suppression Issue

In his petition for rehearing, Appellant first contends that this Court erred in affirming the trial judge's decision to deny Appellant's motion to suppress the drug evidence obtained as a result of an allegedly unlawful search. In support of that contention, Appellant initially maintains that the law enforcement officers had no authority to remain inside Appellant's residence pending their receipt of a search warrant. (Pet. for Reh. p. 2). Appellant further

maintains the audio recording at the scene documented that “officers were searching around for cocaine prior to the search warrant being there.” (Pet. for Reh. p. 3). Contrary to Appellant’s contentions, neither this Court nor the trial judge committed any error in finding Appellant’s motion to suppress the drug evidence in his case to be meritless, and Appellant’s conviction was properly affirmed on appeal.

As this Court noted in its opinion, “Under the ‘plain view’ exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence.” State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011). Furthermore, this Court noted that law enforcement may enter a dwelling “to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside [the] dwelling.” State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004).

Ample evidence existed to support the trial court’s denial of Appellant’s motion to suppress the drug evidence. The trial court held a thorough suppression hearing, during which multiple witnesses testified. The agent who participated in the drug deal testified he could have arrested Appellant immediately following the deal because it occurred in his presence and he was inside the residence by consent. He also testified that no one was searching the house during the time Appellant was removed, that officers were merely clearing out the house and removing the people, and that no one was searching while they waited for the search warrant. He explained that officers were merely looking around the backyard for both Appellant and the cocaine after Appellant fled. He testified that when the officers entered the residence, the marijuana was readily visible.

The testimony demonstrates the drug evidence was obtained without the need for a search warrant because the transaction occurred in the presence of a law enforcement agent, who had the authority to arrest Appellant as soon as the exchange took place. Also, the marijuana was in plain view when the officers lawfully entered the residence when attempting to arrest Appellant during the drug bust. In addition to the lawful entry to arrest, the agent was lawfully in the residence by consent. Under either scenario, the initial intrusion that afforded the plain view was lawful. Similarly, the cocaine was located in plain view in an open book bag without officers having to search underneath items or manipulate items. Thus, the drug evidence fell within the plain view exception to the warrant requirement and was properly admitted. Accordingly, Appellant's petition for rehearing should be denied.

Directed Verdict Issue

In his petition for rehearing, Appellant next contends this Court erred in affirming the trial judge's denial of his directed verdict motion on the trafficking cocaine charge. In support of that contention, Appellant submits the transfer of the cocaine for the marijuana had already taken place prior to the law enforcement raid on Appellant's residence. Accordingly, he contends a directed verdict of acquittal should have been granted on the cocaine charge because law enforcement had taken physical custody of the cocaine prior to Appellant's arrest and the cocaine was under the dominion and control of law enforcement agents.

As this Court correctly noted in its opinion, "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find that the case was properly submitted to the jury." State v. Williams, 346 S.C. 424, 430, 552 S.E.2d 54, 57 (Ct. App. 2001). Furthermore, this

Court noted, "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Id.

The details of the drug transaction demonstrate Appellant's dominion and control over the drugs when he invited the agent and the confidential informant into his home and engaged in a drug transaction by accepting the fifty pounds of marijuana in exchange for twenty-seven ounces of cocaine. The audiotape provided further evidence of Appellant's participation in the drug deal. Appellant was heard asking for 1,000 pounds of marijuana for the next deal and was also heard giving the agent two extra ounces of cocaine and telling him how to work with the cocaine when he unwrapped it. Sufficient evidence existed to support the denial of Appellant's directed verdict motion and the trial court properly submitted the case to the jury for its resolution. As a result, the trial judge properly denied Appellant's motion for a directed verdict on the trafficking cocaine charge, and this Court correctly affirmed the trial judge's ruling. Appellant's petition for rehearing should be denied.

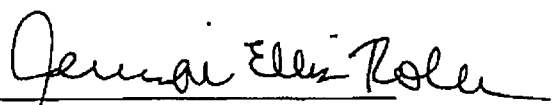
Conclusion

Based on the foregoing, coupled with the arguments raised in the Final Brief of Respondent, the State respectfully requests that Appellant's petition for rehearing be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

By: 
Jennifer Ellis Roberts

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April 23, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

Appeal from Lexington County
Honorable Alexander S. Macaulay, Circuit Court Judge
Appellate Case No. 2012-213383

APR 23 2014

SC Court of Appeals

THE STATE,

Respondent,

vs.

BENJAMIN J. NEWMAN,

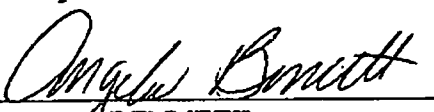
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Return to Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tara Dawn Shurling, Esquire
3614 Landmark Drive
Suite A
Columbia, SC 29204

I further certify that all parties required by Rule to be served have been served.
This 23rd day of April, 2014.


ANGELA BENNETT
Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2014-001449

RECEIVED

AUG 21 2014

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

BENJAMIN NEWMAN,

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies, pursuant to Rule 242(d)(1), SCACR, that the Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on June 3, 2014.

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Questions Presented

Issue I.

Did the Court of Appeals err in affirming Petitioner's convictions and sentences where the Trial Court erred in denying his Motion to Suppress the drug evidence obtained as a result of an unlawful search?

ISSUE II.

Did the Court of Appeals err in affirming Petitioner's conviction and sentence for trafficking in cocaine where record below supports Petitioner's position that the Trial Court erred in failing to grant his Motion for a Directed Verdict on the charge of Trafficking in Cocaine, 400 grams or more?

Statement of the Case

Petitioner was arrested in Lexington County on June 5, 2011 on charges of Trafficking in cocaine, 100 grams or more, but less than 200 grams, Trafficking in ice, crank or crack – 200 grams or more, but less than 400 grams, Trafficking in cocaine, 400 grams or more, and Trafficking in marijuana, 10 pounds or more, but less than 100 pounds. He proceeded to trial by jury on October 15-17, 2012, in Lexington County Court of General Sessions, before the Honorable Alexander McCaulay, on indictments 2011-GS-32-02259, First Offense Trafficking in marijuana, 10 pounds or more, but less than 100 pounds and 2011-GS-32-0261, Trafficking in cocaine, 400 grams or more.

At the conclusion of said jury trial, Petitioner was convicted on both indictments on October 17, 2012, and received a sentence of Twenty-Five (25) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0261 and a concurrent Ten (10) years incarceration in the South Carolina Department of Corrections on Indictment 2011-GS-32-0259. Petitioner filed and served his timely Notice of Intent to Appeal his conviction on October 23, 2012. Following briefing by both sides, the Court of Appeals affirmed Petitioner's convictions and sentences. See, *State v. Benjamin J. Newman*, Up. Op. No. 2014-UP-034, filed January 29, 2014. Petitioner filed Petition for Rehearing on February 24, 2014. The Respondent filed a Return to said Petition on April 23, 2014. The Petition for Rehearing was denied by Order of the Court of Appeals Filed June 3, 2014. Petitioner now prays that the Writ might be granted and that he be afforded to fully brief the issues summarized herein. Petitioner certifies that the issues addressed herein were addressed in his Petition for Rehearing which was denied by the Court of Appeals.

ARGUMENT

Issue I.

Did the Court of Appeals err in affirming Petitioner's convictions and sentences where the Trial Court erred in denying his Motion to Suppress the drug evidence obtained as a result of an unlawful search?

At Petitioner's trial, the testimony was that a team of officers entered the residence in question after audio surveillance of a drug transaction between Petitioner, a confidential informant and undercover police officer. According to the testimony adduced at trial, Petitioner ran out of the back door of the residence just as the SWAT team entered the front of the residence. ROA at p.202, ll. 2-15. Despite clearly witnessing Petitioner go out the back door of the residence, the record below indicates that the a confidential informant, the undercover agent and some members of the SWAT team remained inside the residence for between fifteen and twenty minutes while they waited for a search warrant for this residence. ROA at p.39, ll. 10-22. It was during this time period when officers allegedly observed the drugs involved in this case in plain view.

Petitioner would respectfully submit that once the residence was checked for any immediate threat to the officers at the scene, law enforcement had no authority to remain inside this residence pending their receipt of a search warrant. At trial, Agent Paige Barnes testified that she observed the cocaine in this case in an open book bag after looking near the counter where she had been told the cocaine was located. Her testimony actually indicates that law enforcement waited inside the house for approximately *thirty* minutes before the search warrant arrived. ROA at p.293, l. 21- ROA at p.298, l. 24. In addition, the audio recording of this operation documented a conversation between law enforcement officers at the scene in which it was stated that "*officers were searching around for cocaine prior to the search warrant being*

there." ROA at p.247, ll. 5-7. This recording was entered in its entirety during the pre-trial hearing on Petitioner's Motion to Suppress. It was marked and introduced as Court's Exhibit No. 7. ROA at p.42, ll. 5-24.

The Fourth Amendment to the United States Constitution protects individuals from unlawful searches and seizures. S.C. Code Ann., §17-13-140, reflects this same standard provided by our United States Constitution. *State v. Covert*, 368 S.C. 188, 628 S.E.2d 482 (Ct. App. 2006); *State v. Jones*, 342 S. C. 121, 536 S.E.2d 675 (2000). In the present matter, the trial court clearly erred when it failed to suppress the drug evidence improperly seized during a search of 433 Longview Rd, in Lexington County, prior to the procurement of a search warrant by law enforcement. On the facts of this case, the failure of law enforcement to obtain a search warrant was more than a procedural mistake, it constituted a deliberate violation of Petitioner's Constitutional rights.

According to the testimony adduced at trial, Agents of the Lexington County Multi-Agency Narcotics Task Force (NET team) conducted an undercover operation utilizing a confidential informant to allegedly broker a drug transaction with Petitioner on June 5, 2011. ROA at p.25, l. 8-13. When the Lexington County SWAT team entered the residence at 433 Longview Road, they immediately discovered that Petitioner had run outside the back door of the home. He was subsequently located in the rear of the property. ROA at p.31, l. 21-25, p. 32, l. 1-5. After Petitioner was placed under arrest, Agent Tracy obtained a search warrant for the premises. ROA at p.32, l. 10-25. The record below supports Petitioner's position that the search warrant was actually obtained and delivered to the scene a significant period of time after Petitioner's arrest and after the discovery of the drug evidence in this case. ROA at p.39, l. 10-22.

During the pretrial hearing on Petitioner's motion to suppress drug evidence, several officers testified before the Court regarding the circumstances surrounding the arrest, search, and subsequent search warrant for 433 Longview Rd. Agent Slice with the NET team actually claimed in his testimony that no search was conducted while they waited for the Search Warrant to be signed. ROA at p.41, l. 5-10. Clearly, however, this claim was directly contradicted by an audio recording made by another office. That audio recording contains a conversation amongst the NET team officers in which they can be heard to state that *"officers were searching around for cocaine prior to the search warrant being there."* ROA at p.247, l. 5-7 The audio recording in its entirety was offered as an exhibit (Court's Exhibit 7) during the pretrial hearing ROA at p.42, l. 5-24. Officer Carver, also with the NET team, admitted in his trial testimony that he, along with Agents Barnes and Setree, were sitting inside the residence for a period of time waiting on the search warrant. He claimed, however, that nobody was looking around or searching the residence while they waited. ROA at p.90, l. 5-23. Agent Setree contradicts the testimony of both the previous officers. In his testimony he stated that there was something *"chaotic about this whole search thing"* and that officers were in fact searching all around for drug evidence. ROA at p.97, l. 19-25, p. 98, l. 1-23 and ROA at p.106, l. 20-23. It was his testimony that established that the drug evidence in question was located by Agent Barnes ROA at p.107, l. 21-23. This testimony directly contradicted the earlier claim by Agent Carver that he, Agent Barnes, and Agent Setree, were not looking around or searching at all. Agent Barnes testified that she was originally outside during the drug transaction but, after monitoring "the transmission between the undercover, and Benji Newman and the CI, she went into the house for the sole purpose of getting Agent Carver out of the residence. Agent Barnes forthrightly admitted that after she retrieved Agent Carver they were all outside for about five minutes before they went back into the house. She described there being a commotion because the officers

could not locate the cocaine. Agent Barnes went back into the house in search of the drug evidence in response to statements made by Agent Carver prior to them re-entering the dwelling. ROA at p.294, l. 11 - p. 297, l. 11.

The testimony offered from the State's witnesses was at best contradictory. The admissions by Agents Setree and Barnes, as well as those preserved on the audio tape, confirm that law enforcement in fact was searching inside and out of this residence trying to locate drug evidence before the search warrant was obtained.

In a case very similar to Petitioner's, our Supreme Court examined the admissibility of evidence obtained when law enforcement officers gained entry into a dwelling and subsequently conducted a search prior to obtaining a search warrant. In that case, the State claimed that speed was of the essence. In that case, this Honorable Court found that where a location has been secured it would be reversible error to allow evidence of the search, and the evidence found as a result of that search, into evidence at a trial. *State v. Vice*, 259 S. C. 30, 190 S.E.2d 510 (1972) *See also, Stoner v. California*, 376 U.S. 483 (1964) The record below is crystal clear. At the time the drugs in question were located, the location had been secured by the Lexington County SWAT team, as well as the NET team, Petitioner had been taken into custody and there were no exigent circumstances requiring a speedy, warrantless search.

In addition to claiming no actual search was conducted, the State argued that to the extent there was a search, the drug evidence was only located in plain view. These two arguments are not only inconsistent with each other, they also don't match up with the actual Return filed with the search warrant. Specifically, the Return specifically lists the *"quantity of off-white material consistent w/cocaine located in area by kitchen by Tucker (Barnes)."* As evidence taken *"pursuant to the warrant."* ROA at p.8. Agent Barnes specifically admitted going back in the house to *"look"* for the cocaine in a specific area of the residence based upon what she had been

told by Agent Carver concerning where he last saw the cocaine. ROA at p.297, l. 1-4. She continued to *"look"* for *"several minutes."* ROA at p.306, l. 24-25.

Petitioner respectfully asserts that the drug evidence in question should have been suppressed in response to Petitioner's Motion to Suppress. The officers in this case went back into the residence in question well after they panned the area to insure their safety and the security of any evidence in the dwelling. Petitioner maintains that several minutes of *"looking"* without a warrant constituted a search and should have resulted in the suppression of the evidence, discovered pursuant to that search. The fact that the drugs in question were not readily viewed out in *"plain sight"* is readily established by Agent Barnes' admission that she went back in the house to search further for these drugs because they *"could not locate"* the drugs. The fact that a team of experienced narcotics agents did not initially locate the drugs, even when searching for them, refutes any notion that the drugs were located in plain view where they would have been observed by anyone looking around the room for legitimate purposes. Even assuming *arguendo* that the cocaine in the backpack was visible by someone looking into the backpack from above its location, that should not have defeated Petitioner's Motion to Suppress where any legitimate reason for law enforcement being in the residence had been exhausted, Petitioner was in custody and the only reason Agent Barnes went back into the house before the search warrant was obtained was expressly to look for drug evidence. During Petitioner's trial, Agent Slice testified that the deal in this case was for Petitioner to exchange 25 ounces of cocaine for 50 pounds of marijuana. He clearly testified that the deal *"went down"* on Sunday, June 5, 2011 at *"around 1:30, 2 o'clock"*. ROA at p.129, ll. 8 - 25. In his testimony, this officer strongly implies that he found and seized the drug evidence in this case after the search warrant arrived. ROA at p.151, ll. 1 - 11 and ROA at p.154, ll. 3 - 8. On closer inspection however, it is clear that Agent Slice did not *"find"* the book bag and observe the cocaine in plain

view inside the bag, he was shown this evidence by Agent Carver, whose ruffled nerves about the location of the cocaine had previously been soothed when Agent Barnes located it for him before the search warrant was obtained. ROA at p.154, ll. 10 – 15.

The actions of law enforcement in this case violated Petitioner's rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution and the evidence found as a result of their actions should have been suppressed.

ISSUE II.

Did the Court of Appeals err in affirming Petitioner's conviction and sentence for trafficking in cocaine where record below supports Petitioner's position that the Trial Court erred in failing to grant his Motion for a Directed Verdict on the charge of Trafficking in Cocaine, 400 grams or more?

When considering the Trial Court's refusal to grant a Defendant's directed verdict motion, the reviewing appellate court must view the evidence in the light most favorable to the State. *State v. McHoney*, 344 S.C. 85, 544 S.E.2d 30 (2001). On the very unusual and narrow facts of this case, Petitioner asserts that the trial court erred in failing to grant his Motion for a Directed Verdict of Acquittal on the cocaine charge he was convicted and sentenced for. The Trial Court erred in denying Petitioner's Motion for a Directed Verdict when made at the conclusion of testimony both the State's and Petitioner's cases. (R. p 324, l. 21-25, p. 325, l. 1-25, p. 326, l. 1-10, p. 337, l. 12-25, and p. 338, l. 1-7)

During a trial, the Trial Court, in a directed verdict motion, must be concerned with the existence or nonexistence of evidence. *State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). In *State v. Edwards*, this Honorable Court reminded the trial court that it should not hesitate to grant a Defendant's motion where the evidence presented by the State merely raises suspicion of guilt. *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (198). In this case the operative question

is more unique. Where the State engages in a controlled buy during which its agents exchange a quantity of one controlled substance for another quantity of a second type of drug, should the State be allowed to turn what was essentially one drug deal into two by charging Petitioner with trafficking in both drugs.

A directed verdict should be granted when evidence presented by the State only establishes circumstances that are suspicious, but ultimately falls short of providing a basis upon which a jury could reasonably determine the Defendant's guilt. *State v. Arnold*, 351 S.C. 302, 569 S.E.2d 379 (Ct. App. 2002) Further, the State bears the burden of demonstrating that the Defendant was not only at the scene of a crime, but actually committed the criminal act to withstand a directed verdict challenge. *State v. Schrock*, 283 S. C. 129, 32 S.E.2d 450 (1984).

The record below indicates that a confidential informant and an undercover agent set up a drug transaction with Petitioner in the course of which he allegedly exchanged a quantity of cocaine for a quantity of marijuana. In this monitored drug transaction, Agent Carver testified that Petitioner was suppose to trade twenty-five ounces of cocaine for fifty pounds of marijuana, but added two extra ounces. ROA at p.199, ll. 4-17. Testimony at trial in fact establishes that the cocaine was ultimately found in a book bag that had been brought to the residence by law enforcement. According to law enforcement testimony, the 50 pounds of marijuana brought to the scene by law enforcement was carried into the house in two bags. One duffle bag contained four, ten pound bales of marijuana. The remaining ten pound bale was brought to the scene in the book bag that was subsequently found to contain the 27 ounces of cocaine seized at the scene. ROA at p.164, ll. 7 – 15. Thus, Petitioner would respectfully submit that the evidence conclusively establishes that the transfer of the cocaine for the marijuana had already taken place prior to the raid of law enforcement on this residence. Therefore, according to the evidence introduced by the State, the law enforcement agents involved in this drug transaction had taken

physical custody of the cocaine prior to Petitioner's arrest. According to the testimony of the State's witnesses, the deal was no sooner consummated than the house was raided by the various law enforcement officers monitoring the transaction. Again, according to their own witnesses, Petitioner fled out the back door just as their law enforcement teams were bursting on the scene having listened to the transaction on audio surveillance equipment. On the facts of this case, it would violate due process for the State to be permitted to turn one drug transaction into two by electing to use one drug as the currency to purchase another type of drug of equal value.¹ For that reason, Petitioner would respectfully submit a directed verdict of acquittal should have been granted on the cocaine charge. On the facts of this case, the cocaine in question was, according to the State's own evidence, used as currency to purchase the marijuana traded for it. The testimony of the State's own witnesses establishes that the transaction had been completed when the raid occurred and Petitioner ran out the back door. Thus, even under the testimony of the State's own witnesses, the cocaine in question no longer belonged to Petitioner inasmuch as the agents of the State sent in to conduct this undercover transaction had taken possession of the cocaine in question. The fact of the completion of the transaction was documented at trial in a number of ways, the most obvious being that the cocaine was found inside a book bag brought to the scene by the State's agents and was used to carry part of the marijuana traded for the cocaine.

Petitioner respectfully submits that all the evidence in this case indicates that the only cocaine involved in this transaction was clearly under the exclusive dominion and control of the law enforcement agents who had taken possession of the cocaine in question at the time it was seized. There being no evidence of any other cocaine being in Petitioner's possession, the

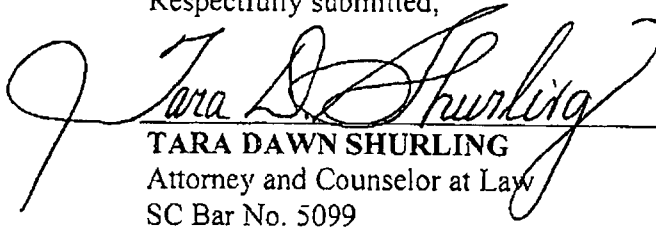
¹ This case is reminiscent of, although admittedly not on all fours with, *State v. Sammie Lee Brown*, 319 S.C. 400, 461 S.E.2D 828 (1995), wherein the Court of Appeals found that it would violate the double jeopardy clauses of both the United States Constitution and the South Carolina Constitution to allow the State to punish *Brown* twice for what was in essence one drug transaction turned into two separate offenses by the actions of the State.

Motion for Directed Verdict on that charge should have been granted. For these reasons, Petitioner respectfully asks this Honorable Court to grant the writ and set aside his conviction and sentence on the cocaine charge. Alternatively, he asks that the writ be issued and that he be afforded the opportunity to more fully brief the issue summarized herein.

CONCLUSION

For all the reasons set forth herein, Petitioner asks that his convictions and sentences be vacated. Alternatively, he asks that he be granted the opportunity to fully brief the issues summarized herein.

Respectfully submitted,


TARA DAWN SHURLING
Attorney and Counselor at Law
SC Bar No. 5099

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ATTORNEY FOR THE PETITIONER

This 18th day of August, 2014.

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

Appeal from Lexington County
Court of General Sessions

Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2014-001449

The State,

Respondent,

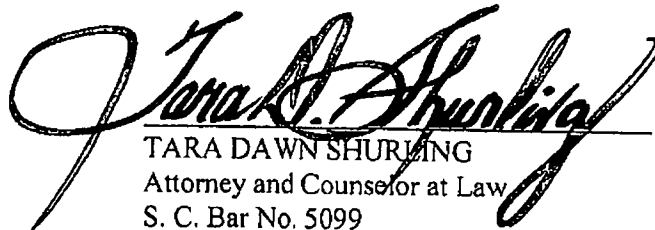
v.

Benjamin J. Newman,

Petitioner.

CERTIFICATE OF SERVICE

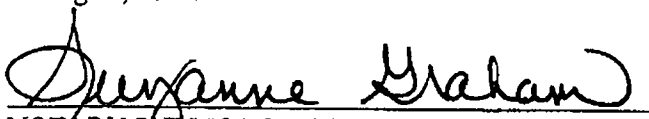
The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari in the above matter has been served on opposing counsel, Jennifer Ellis Roberts, Assistant Attorney General, by mailing in an envelope properly addressed to the Office of the Attorney General, P. O. Box 11549, Columbia, SC 29211, with postage prepaid on this the 18th day of August, 2014.


TARA DAWN SHURLING
Attorney and Counselor at Law
S. C. Bar No. 5099

3614 Landmark Drive, Suite A
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(803) 738-8622

ATTORNEY FOR PETITIONER.

SWORN TO BEFORE me this 18th day
of August, 2014.


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 2/28/24

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

SEP 12 2014

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

S.C. Supreme Court

Alexander S. Macaulay, Circuit Court Judge

Opinion No. 2014-UP-034 (S.C. Ct. App. filed January 29, 2014)

Appellate Case No. 2014-001449

State of South Carolina, ... Respondent,

v.

Benjamin Newman, ... Petitioner.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the Court of Appeals properly affirm the trial court's denial of Petitioner's motion to suppress the drug evidence because it was seized lawfully as the result of a transaction that took place in the presence of a law enforcement officer and was found under the plain view exception to the Fourth Amendment rule prohibiting warrantless searches?
- II. Did the Court of Appeals properly affirm the trial court's denial of Petitioner's motion for directed verdict because the State presented sufficient evidence reasonably tending to prove Petitioner's guilt on the trafficking cocaine charge?

STATEMENT OF THE CASE

Procedural History

A Lexington County Grand Jury indicted Petitioner for trafficking in marijuana, 10 pounds or more, but less than 100 pounds, first offense and trafficking in cocaine, 400 grams or more. (R.* Indictments.) On October 15-17, 2012, Petitioner proceeded to trial before a jury. Robert T. Williams, Esquire, represented Petitioner, and Assistant Solicitors Samuel R. Hubbard and Dale Scott represented the State. The jury found Petitioner guilty of both charges, and the Honorable Alexander S. Macaulay sentenced him to ten years' imprisonment on the marijuana charge and twenty-five years' imprisonment on the cocaine charge, to be served concurrently. (R.pp. 340-41; 343.) On October 23, 2012, Petitioner filed a Notice of Appeal.

On January 29, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. See State v. Newman, Op. No. 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014). Petitioner's request for rehearing was denied on June 3, 2014. A Petition for Writ of Certiorari to the Court of Appeals was submitted on August 18, 2014, and this Return follows.

Factual Background

On June 5, 2011, the Lexington County Multi-Agency Narcotics Enforcement Team (NET) executed an arranged drug exchange with Petitioner, a suspected drug dealer. (R.p.22, lines 12-14; R.p.23, line 4-R.24, line 15.) A confidential informant (CI) made arrangements to introduce an undercover agent to Petitioner who agreed to exchange fifty pounds of marijuana for twenty-five ounces of cocaine. (R.p.187, lines 7-23; R.p.192, lines 10-21.) Immediately following the exchange, a SWAT team entered

following the use of a flash-bang.¹ (R.p.202, lines 2-6.) The CI and the undercover agent got down on the floor, and Petitioner ran out the back door. (R.p.202, lines 7-15.) Petitioner was apprehended and arrested for trafficking marijuana and cocaine. (R.p.75, lines 22-24; R.pp.1-4.)

Pretrial, Petitioner moved to suppress the evidence. (R.p.17, line 15.) The State called NET officer Brannon Slice. (R.p.21, line 16-18.) He testified he entered the residence where the drug deal occurred after the SWAT team arrived, at which time he saw marijuana sitting on a table. (R.p.31, lines 21-25.) Agent Slice estimated he waited approximately 15-20 minutes for the search warrant. (R.p.39, lines 10-22.) He testified that no searching of the residence took place until the officers were notified the search warrant was signed. (R.p.41, lines 5-10.)

NET Agent Dennis Tracy testified next. (R.p.44, lines 7-25.) He testified he was the one who typed the search warrant and took it to Judge Reinhart to be signed. (R.p.48, line 18-R.p.49, line 5.) He explained that afterwards, he called and notified Agent Paige Tucker that the judge had signed it and he was on his way back to the residence. (R.p.52, lines 17-20.) He testified that when he arrived back at the residence, agents were searching. (R.p.60, lines 18-25.)

The State then called Agent Nicholas Carver, an undercover NET agent who participated in the drug deal while wearing a recording device. (R.p.62, line 18-R.p.63, line 22; R.p.65, lines 2-7.) After he made the drug exchange with Petitioner, he testified that he could have arrested Petitioner right then because the drug deal occurred in his presence and he was in the residence by consent. (R.p.72, line 23-R.p.73, line 17.) Agent Carver testified no one was searching the house during the time he was removed

¹ According to Agent Nicholas Carver, a flash-bang is a very loud device that is used to discombobulate the occupants in a situation like this. (R.p.202, lines 2-5.)

from the home; rather, they were clearing out the house and removing the people. (R.p.76, lines 5-17.) He verified he heard Agent Setree's voice on the audiotape from the incident. (R.p.76, lines 18-20.) He explained Agent Setree was telling him what he could have done better because Carver was new. (R.p.76, line 21-R.p.77, line 5.) Specifically, Agent Carver testified there was no search going on, but that Agent Setree was making sure and telling him, "[W]e don't do that[;] that's not what we do." (R.p.77, lines 6-10.) He testified that when the officers came in to make the arrest, the marijuana was readily visible. (R.p.77, lines 15-17.) Agent Carver explained that everyone was concerned about where the cocaine went and thought Petitioner might have grabbed it when running out the back door. (R.p.77, line 20-R.p.78, line 7.) Carver testified that the officers were looking around the backyard for Petitioner and the cocaine. (R.p.78, lines 8-11.) He testified the officers ultimately discovered the cocaine in the book bag he had brought the marijuana in, which was lying open on the floor next to the kitchen island. (R.p.78, lines 15-24.)

On cross-examination, Agent Carver stated no one was searching between the time he was taken out of the house and the time he returned, which was approximately five minutes. (R.p.89, lines 12-22.) Carver testified nobody was searching while they were waiting for the search warrant. (R.p.90, lines 13-23.) He testified that on the recording, Agent Setree is heard correcting Officer Lance, a SWAT team member, because he "looked over something." (R.p.90, line 24-R.p.91, line 9.) He testified that Agent Setree told the officer, "Don't do that." (R.p.90, lines 5-6.)

The next to testify was Agent Brian Setree of the NET. (R.p.93, line 24.) He testified that no one in the house was searching following Petitioner's arrest. (R.p.96, line 24-R.p.97, line 1.) He explained that the cocaine was on the kitchen counter and

then was no longer there and that the SWAT team was looking for it in the backyard because they thought Petitioner had taken it when he ran. (R.p.97, line 19-R.p.98, line 4.) Setree testified he was heard on the recording calming the SWAT team down by telling them not to worry about the cocaine because they were getting a search warrant. (R.p.98, lines 14-19.) He further testified he was critiquing what they do and why they do things a certain way in the portion of the recording when he was speaking to Agent Carver. (R.p.98, lines 20-23.) He testified he told other officers, "Don't worry about looking for this cocaine. We'll find this cocaine." (R.p.100, lines 2-3.) Setree clarified that no one was going through any cabinets or looking under any furniture. (R.p.100, lines 4-5.) He explained that because the drug transaction had already gone down at that point, the cocaine had essentially already been seized and the search warrant was to be used to recover any other evidence related to the case. (R.p.100, lines 5-10.) He testified that because two felonies were conducted in the presence of a police officer, the only reason they even needed the search warrant was to search for things tying Petitioner to the residence. (R.p.100, lines 11-17.) The trial court listened to the recording from the audio recording device worn by Agent Carver during the drug transaction. (R.p.27, line 25-R.p.28, line 1; R.p.29, lines 22-25; R.pp.110-12.)

Petitioner argued officers searched prior to obtaining a search warrant. (R.p.113, lines 1-10.) The State clarified that it was only introducing the drugs and possibly some letters with Petitioner's name on them, but that it would not try to introduce other items found such as guns and bullets. (R.p.114, lines 1-6.) Petitioner argued the issue was whether the cocaine was seized incident to arrest or during a search. (R.p.114, lines 7-14.) The trial judge pointed out that the CI and undercover agent were invited into the house and that the contraband was in clear view. (R.p.114, lines 15-22.) Petitioner then

specifically stated, "Your Honor, but there are other exhibits which they're intending to introduce aside from that." (R.p.115, lines 6-8.) The State again stated it would only introduce envelopes with Petitioner's name on them. (R.p.115, lines 12-16.) The trial court noted that was not contraband but was merely identification. (R.p.115, line 25-R.p.116, line 1.) The trial court determined the cocaine and marijuana would be admitted and cautioned the State to let him know if it intended to introduce anything else so he could rule on it outside the presence of the jury. (R.p.119, lines 5-15.) The trial court denied the motion to suppress. (R.p.119, lines 20-23.)

At trial, the State called Brannon Slice, the NET agent who planned the controlled drug exchange. (R.p.124, line 19-25; R.p.127, lines 14-24.) He explained how he placed a wire on the CI and an audio recording device and videotaping device on Agent Carver. (R.p.137, line 24-R.p.138, line 4.) He testified he mistakenly did not turn on the video recorder. (R.p.138, line 4.) After Petitioner objected to Agent Slice's testifying to what was found in the residence, a proffer was presented and the trial court allowed him to testify that he found a duffle bag of marijuana, a bale of marijuana on the counter, and cocaine in a book bag (or backpack) in plain view. (R.p.151, line 17-R.p.164, line 15.)

Next, the State called Agent Nicholas Carver. (R.p.184, line 25.) Agent Carver explained his undercover role as a drug dealer. (R.p.197, lines 7-13.) He testified Petitioner told him he wanted 1,000 pounds of marijuana next time and explained to Carver how to keep the cocaine in a brick. (R.p.196, lines 12-14; R.p.197, line 21-R.p.198, line 3.) Agent Carver testified Petitioner was supposed to trade twenty-five ounces of cocaine for the fifty pounds of marijuana but added two extra ounces. (R.p.199, lines 4-17.) He testified that when the SWAT team activated the flash-bang device, he and the CI got on the floor and Petitioner ran out the back door. (R.p.202,

lines 2-15.) He stated the cocaine was on the edge of the counter when the bust took place but was not there afterwards. (R.p.204, lines 6-12.) He testified the cocaine ended up in the open book bag that had contained one bale of marijuana before it was removed. (R.p.204, lines 13-23.) Agent Carver testified officers were looking in the backyard for the cocaine at first. (R.p.206, line 23-R.p.207, line 4.) He verified that as an officer, he could have arrested Petitioner on his own immediately after the drug exchange. (R.p.217, lines 19-21.)

On cross-examination, Petitioner asked Agent Carver whether the audio recording indicated the officers were searching the house prior to obtaining the search warrant, and he said no one was searching prior to issuance of the search warrant. (R.p.246, line 20-R.p.247, line 4.) He clarified the officers were looking for a known item that could not be located but had already been identified during a transaction that took place in front of an officer. (R.p.247, lines 6-12.)

Next, the State called Agent Brian Setree. (R.p.251, line 20.) Agent Setree testified he was the senior NET agent involved in the drug transaction on June 5, 2011. (R.p.252, line 18-R.p.253, line 9.) He testified regarding what he was heard saying on the audio recording. (R.p.256, lines 7-11.) Setree testified that he thought the video recorder was on and admitted saying the video should have been turned off. (R.p.256, lines 16-25; R.p.257, lines 15-22.) On the stand, he admitted the audio recorder was left on even though it should have been turned off after the bust. (R.p.258, lines 14-23.) Agent Setree testified he could be heard on the audiotape telling the SWAT agents, who were panicked because the cocaine was no longer on the counter, not to worry about the cocaine because they were getting a search warrant for the residence anyway. (R.p.259, lines 6-25.) He testified he told them, "[I]f it's not in plain view on the inside of the

residence, don't worry about it. We'll find it once we obtain the search warrant." (R.p.260, lines 1-5.) Agent Setree also testified to being present when Agent Barnes saw the cocaine in the book bag in plain view because the bag was open. (R.p.261, lines 7-14.)

The State called D. I. Blackwell, a deputy sheriff with the Lexington County Sheriff's Department, who analyzed the marijuana and testified it weighed fifty-one pounds. (R.p.249, line 22-R.p.293, line 4.) The next to testify was Paige Barnes (formerly Tucker), another NET agent. (R.p.293, line 21-R.p.294, line 10; R.p.297, line 19-R.p.298, line 7.) She testified she found the cocaine in an open book bag after looking near the counter where she was told by Agent Carver it had been before. (R.p.296, lines 4-25; R.p.297, 1-4.) She testified she waited for the search warrant for about thirty minutes. (R.p.298, lines 16-24.)

Finally, the State called Emily Homer Conrad, a chemist with the Lexington County Sheriff's Department. (R.p.308, lines 4-16.) She was qualified as an expert in forensic analysis of drugs, to include cocaine. (R.p.310, line 17-R.p.311, line 6.) She testified the cocaine was sealed in a Best evidence kit when she received it from Candy Kyzer, an evidence custodian for the Lexington County Sheriff's Department, on June 6, 2011. (R.p.311, line 13-R.p.313, line 1.) She testified the two packages in the Best kit were cocaine and weighed 709 grams and 42.34 grams. (R.p.314, line 19-R.p.315, line 3.)

At the close of the State's evidence, Petitioner moved for a directed verdict, arguing:

Your Honor, we would move for directed verdict of not guilty. The evidence taken in the light most favorable to the State and viewed in favor of the State would be insufficient as a matter of law for this jury to return a

verdict of guilty in regards to either indictment, that is, trafficking in marijuana and the other being trafficking in cocaine.

(R.p.324, line 21-R.p.325, line 2.) The trial court denied the motion. (R.p.326, line 10.)

Ultimately, the jury found Petitioner guilty of both charges, and the trial court sentenced him to ten years' imprisonment on the marijuana charge and twenty-five years' imprisonment on the cocaine charge, to be served concurrently. (R.pp.340-41;-343.)

ARGUMENTS

- I. The Court of Appeals properly affirmed the trial court's denial of Petitioner's motion to suppress the drug evidence because it was seized lawfully as the result of a transaction that took place in the presence of a law enforcement officer and was found under the plain view exception to the Fourth Amendment rule prohibiting warrantless searches.

Petitioner argued to the Court of Appeals that the trial court erred in denying his motion to suppress the drug evidence obtained as a result of an allegedly unlawful search. In his petition for certiorari, Petitioner initially maintains that the law enforcement officers had no authority to remain inside Petitioner's residence pending their receipt of a search warrant. Petitioner further maintains the audio recording at the scene documented that "officers were searching around for cocaine prior to the search warrant being there." Contrary to Petitioner's contentions, neither the Court of Appeals nor the trial court committed any error in finding Petitioner's motion to suppress the drug evidence in his case to be meritless. The drug evidence was obtained as the result of the drug deal taking place in the presence of an officer who was inside the residence by Petitioner's consent and, thus, no search warrant was required to seize the drugs. Furthermore, the drugs were discovered in plain view, so no search was conducted to locate them. The officers did not begin searching the residence until one of the officers reported back that a judge had signed the search warrant and, because the drugs had already been seized by then, the drugs were not obtained as part of this lawful search. Thus, Petitioner's conviction was properly affirmed on appeal.

As the Court of Appeals noted in its opinion, "Under the 'plain view' exception to the warrant requirement, objects falling within the plain view of a law enforcement officer who is rightfully in a position to view the objects are subject to seizure and may be introduced as evidence." State v. Wright, 391 S.C. 436, 443, 706 S.E.2d 324, 327

(2011). Furthermore, the Court of Appeals noted that law enforcement may enter a dwelling "to prevent a suspect from fleeing or where there is a risk of danger to police or others inside or outside [the] dwelling." State v. Abdullah, 357 S.C. 344, 351, 592 S.E.2d 344, 348 (Ct. App. 2004).

Ample evidence existed to support the trial court's denial of Petitioner's motion to suppress the drug evidence. The trial court held a thorough suppression hearing, during which multiple witnesses testified. The agent who participated in the drug deal testified he could have arrested Petitioner immediately following the deal because it occurred in his presence and he was inside the residence by consent. He also testified that no one was searching the house during the time he and the CI were removed, that officers were merely clearing out the house and removing the people, and that no one was searching while they waited for the search warrant. He explained that officers were merely looking around the backyard for both Petitioner and the cocaine after Petitioner fled. He testified that when the officers entered the residence, the marijuana was readily visible in plain view. Agent Brannon Slice also testified that when he first entered the residence, the marijuana was sitting on a table in plain view. He further testified no searching took place until Agent Dennis Tracy called on the way back from obtaining the judge's signature and notified the officers the search warrant had been issued by the judge. Agent Tracy verified he had made that telephone call and that when he reached the residence, officers were searching.

Agent Brian Setree also verified that no one was searching the house following Petitioner's arrest. However, he did state that SWAT officers were looking for the cocaine in the backyard because they thought Petitioner had grabbed it when he ran. He admitted he told the SWAT team not to worry about finding the cocaine because they

were getting a search warrant. He testified that even when he said something on the audiotape about "looking for the cocaine," no one was going through cabinets or looking under any furniture. Agent Setree pointed out that because two felonies were conducted in the presence of Agent Carver, the search warrant was not necessary to obtain the drugs but would likely be used to look for items that might connect Petitioner to the residence.

Petitioner argues the audio recording contains a conversation where NET officers can be heard saying that "officers were searching around for cocaine prior to the search warrant being there." However, the record shows nobody searched prior to the securing of the warrant. As noted above, Agent Carver and Agent Slice testified no one was searching the house. Agent Carter verified he heard Agent Setree's voice on the audiotape from the incident and explained Agent Setree was telling him what he could have done better because Carver was new. (R.p.76, line 18-R.p.77, line 5.) Specifically, Agent Carver testified there was no search going on but that Agent Setree was making sure and telling him, "[W]e don't do that[;] that's not what we do." (R.p.77, lines 6-10.) He and Agent Slice testified that when the officers came in to make the arrest, the marijuana was readily visible. (R.p.77, lines 15-17.) Agent Carver and Agent Slice testified that the officers were looking around the backyard for Petitioner and the cocaine. (R.p.78, lines 8-11.) Agent Carver testified the officers ultimately discovered the cocaine in the book bag he had brought the marijuana in, which was lying open on the floor next to the kitchen island in plain view. (R.p.78, lines 15-24.)

Petitioner also argues this Court's decision to not allow evidence in State v. Vice, 259 S.C. 30, 190 S.E.2d 510 (1972), is similar to this case. To the contrary, Vice is quite different factually from the case at hand. It involved a murder, and the State argued the exigencies of the situation made the search of the Petitioner's room imperative. This

Court found that because the investigation took place about five hours after the body was discovered, speed was not essential and there were no exigencies to support searching prior to securing a search warrant. The instant case is different because officers did obtain a search warrant and, while they were waiting for it, happened to see in plain view the drug evidence in the home. At that time, they were lawfully inside the home by consent and because they already had the right to arrest Petitioner based on the drug transaction that had taken place. Indeed, this case had nothing to do with exigency or speed; therefore, Vice does not apply.

The testimony demonstrates the drug evidence was obtained without the need for a search warrant because the transaction occurred in the presence of a law enforcement agent who had the authority to arrest Petitioner as soon as the exchange took place. Also, the marijuana was in plain view when the officers lawfully entered the residence when attempting to arrest Petitioner during the drug bust. In addition to the lawful entry to arrest, the agent was lawfully in the residence by consent. Under either scenario, the initial intrusion that afforded the plain view was lawful. Similarly, the cocaine was located in plain view in an open book bag without officers having to search underneath items or manipulate items. Thus, the drug evidence fell within the plain view exception to the warrant requirement and was properly admitted. Accordingly, Petitioner's petition for writ of certiorari should be denied.

II. The Court of Appeals properly denied Petitioner's motion for directed verdict because the State presented sufficient evidence reasonably tending to prove Petitioner's guilt on the trafficking cocaine charge.

Petitioner also argued to the Court of Appeals that the trial court erred in denying his directed verdict motion on the trafficking cocaine charge. In support of that contention, Petitioner now submits the transfer of the cocaine for the marijuana had already taken place prior to the law enforcement raid on Petitioner's residence. Accordingly, he contends a directed verdict of acquittal should have been granted on the cocaine charge because law enforcement had taken physical custody of the cocaine prior to Petitioner's arrest and the cocaine was under the dominion and control of law enforcement agents. To the contrary, the cocaine was found on premises under the control of Petitioner. Thus, the trial court correctly denied the directed verdict motion and properly submitted the case to the jury for its resolution.

As the Court of Appeals correctly noted in its opinion, "In reviewing the denial of a motion for a directed verdict, the evidence must be viewed in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, the appellate court must find that the case was properly submitted to the jury." State v. Williams, 346 S.C. 424, 430, 552 S.E.2d 54, 57 (Ct. App. 2001). Furthermore, the Court of Appeals noted, "Where contraband materials are found on premises under the control of the accused, this fact in and of itself gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury." Id.

Agent Carver testified about his role as the undercover drug dealer who exchanged fifty pounds of marijuana for twenty-seven ounces of cocaine. The audiotape provided evidence of Petitioner's participation in the drug deal. He is heard giving Agent

Carver two extra ounces of cocaine and telling him how to work with the cocaine when he unwraps it. The State called D. I. Blackwell, a deputy sheriff with the Lexington County Sheriff's Department, and Emily Homer Conrad, a chemist with the department, to testify regarding the weight of the drugs: 51 pounds of marijuana and a total of 751.34 grams of cocaine.

The details of the drug transaction demonstrate Petitioner's dominion and control over the drugs when he invited the agent and the confidential informant into his home and engaged in a drug transaction by accepting the fifty pounds of marijuana in exchange for twenty-seven ounces of cocaine. Sufficient evidence existed to support the denial of Petitioner's directed verdict motion and the trial court properly submitted the case to the jury for its resolution. As a result, the trial judge properly denied Petitioner's motion for a directed verdict on the trafficking cocaine charge, and the Court of Appeals correctly affirmed the trial judge's ruling. Petitioner's petition for writ of certiorari should be denied.

CONCLUSION

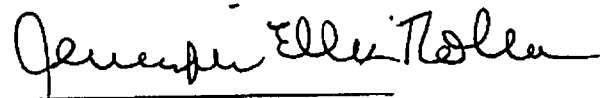
Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

ALAN WILSON
Attorney General

JENNIFER ELLIS ROBERTS
Assistant Attorney General

BY: _____



Jennifer Ellis Roberts
Bar # 79818

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ATTORNEYS FOR RESPONDENT

September 12, 2014

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions

Alexander S. Macaulay, Circuit Court Judge

Appellate Case Tracking No. 2014-001449

State of South Carolina, ... Respondent,

v.

Benjamin Newman, ... Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Return to Petition For Writ of Certiorari to the Court of Appeals by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tara Dawn Shurling, Esquire
3614 Landmark Drive, Suite A
Columbia, SC 29204

I further certify that all parties required by Rule to be served have been served.
This 12th day of September, 2014.


ANGELA BENNETT
Legal Assistant
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(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Benjamin J. Newman, Petitioner.

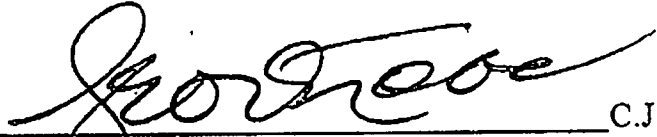
Appellate Case No. 2014-001449

Lower Court Case No. 2011-GS-32-02259

Lower Court Case No. 2011-GS-32-02261

ORDER

This matter is before the Court on a petition for a writ of certiorari to review the Court of Appeals' decision in *State v. Newman*, Op. No. 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014). The petition is denied.


C.J.
FOR THE COURT

Columbia, South Carolina

November 7, 2014

cc:

The Honorable Jenny Abbott Kitchings

The Honorable Beth Carrigg

Tara Dawn Shurling, Esquire

Jennifer Ellis Roberts, Esquire

Alan McCrory Wilson, Esquire



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
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November 18, 2014

The Honorable Beth Carrigg
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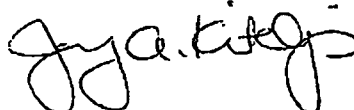
REMITTITUR

Re: The State v. Benjamin J. Newman
Lower Court Case No. 2011GS3202259, 2011GS3202261
Appellate Case No. 2012-213383

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,


CLERK

Enclosure

cc: Jennifer Ellis Roberts, Esquire
Benjamin Allen Stitely, Esquire
Alan McCrory Wilson, Esquire
Tara Dawn Shurling, Esquire

FORM 5

STATE OF SOUTH CAROLINA **FILED**

IN THE COURT OF COMMON PLEAS

County of Lexington 2015 APR 25 PM 2:29

Benjamin J. Newman #352829 CARRIGG
Full name and prison number (if any) of Applicant

2015 CP3202236

v.

State of South Carolina

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broadriver Corr. Institution, 4460 Broadriver Road, Columbia, S.C. 29210
2. Name and location of Court which imposed sentence Court of General Sessions Lexington, South Carolina.
3. Name(s) of co-defendant(s) (if any) None!
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 2011-GS-32-2259; 2011-GS-32-2261

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- (b) Trafficking marijuana 10 lbs or more less than 100 lbs.
- (c) Trafficking cocaine 400 gms or more.
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 17, 2012 (Marijuana 10 years I/N GS-2259)
- (b) October 17, 2012 (Cocaine 25 years I/N 2261)
- (c) Sentences ran Concurrent.
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty XX
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes!
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals.
- ii. S.C. Supreme Court.
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. Denied
- iii. _____
- (c) the date of each such result:
- i. January 29, 2014. 2014-UP-034
- ii. November 17, 2014 2014-001449
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) N/A

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- (b) N/A
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel.
- (b) Lack of True Billed Grand Jury Indictment.
- (c) Outrageous Government and Prosecutorial Misconduct.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See Attached Shetts for additional grounds and supporting facts and argument for each and every issue.
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? only direct appeals.
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? First!
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? None!
- (d) any other petitions, motions or applications in this or any other Court? No!
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____

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iv. N/A

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No.

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

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16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Ineffective Assistance of counsel in not cognizable normally on direct appeal. For which all issues come.

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Mr. Williams

(c) your sentencing? Mr. Williams

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Mr. Williams

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Robert T. Williams P.O. Box 849 Lexington, S.C. 29071

ii. Tara Dawn Shurling 3614 Landmark Dr. Cola., S.C. 29204.
Writ of Certiorari

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial, Sentencing and Direct app.

ii. Tara D. Shurling, Writ of Cert.

iii. _____

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2015 CP3202236

19. State clearly the relief you seek in filing this application:

To vacate conviction and sentence as required by law.

20. Are you now under sentence from any other court that you have not challenged?

No!

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of Lexington)

VERIFICATION

I, Benjamin J. Newman #352829, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

SWORN to and subscribed before me this 22nd
day of June, 2015.

Susan H. Faye (L.S.)
Notary Public

My Commission Expires: _____

My Commission Expires
March 5, 2018

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2015 CP 5202236

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Benjamin D. Neuman, hereby apply for leave to
proceed in this action without prepayment of fees or costs or security therefor. In support of my
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give
security thereof.

Benjamin D. Neuman
Applicant

SWORN or affirmed to and subscribed before me this
22nd day of June, 2015.

Susan H. Dye
Notary Public

My Commission Expires: _____

My Commission Expires
March 5, 2013

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JULIA GARRIG
CLERK OF COURT
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[Signature]
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STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

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JULY 2015

2015 CP3202236

Benjamin J. Newman,

Petitioner,

Vs.

Case No: _____

State of South Carolina,

Respondent. _____/

ATTACHED SHEETS REFERENCING PCR APPLICATION.

This matter is being brought before this Honorable court, by way of this pro-se Applicant (hereinafter referred to as "Petitioner") requesting relief by vacating his conviction and sentence, according to South Carolina Code of Laws, Section §17-27-10, for which is the Uniform Post Conviction Act.

Pursuant to §17-27-20, "[a] person may institute the above proceedings as an exclusive remedy when (a) he or she has been convicted and sentenced for a crime, and wh claims:

(1) That the conviction of 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 imposed sentence;

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- (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. Id. §17-27-10.

PRO-SE STANDARD FOR RELIEF.

Pro-se litigants pleadings are to be construed liberally and held to less stringent standard than formal pleadings drafted by lawyers; if a court can reasonably read the pleadings to state valid claims on which the litigant could prevail, it should do so (i. e. grant relief) despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with pleading requirements. See McCor-mick v. City of Chicago, 230 F3d 319 (7th Cir. 2000); Boag v. Mac-Dougall, 454 U.S. 364, 102 S. Ct. 700 (1982); and Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594 (1972).

BACKGROUND OF THE CASE

Petitioner begins by importantly pointing out that this case presents an unusual circumstance surrounding it. Which could only be attributed to "Prosecutorial Misconduct", which is a violation of Due Process. As well as a "lack of subject-matter-jurisdiction", and of course, "Ineffective Assistance of trial and appellate coun-

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sels".

In the approximate days preceeding June 5, 2011, Petitioner was contacted by a State informer, looking to purchase cocaine. According to the record, at all times mentioned. This informer, while "conspiring" with the Petitioner to obtain the drugs, was working for the Lexington County Multi-Agency Narcotics Task Force (NET TEAM) to broker a deal (drug transaction) with the Petitioner.

The record reflects that on or about June 5, 2011, such drug transaction was set to take place at 433 Longview Road, in Lexington County, South Carolina. On that same date, Petitioner's resident was overran by SWAT team officers, that entered the home without a search warrant. Whereas, this residence was not the original home targeted by police, whereas the Petitioner changed the address where the meeting would occur, at the very last minute. Thus, "no timely search warrant could be secured".

On that same date (June 5, 2011), Petitioner was found outside of the residence when SWAT members cleared the house. And the NET TEAM illegally searched the residence. Although Agent Slice testified under oath, "no search was conducted prior to the search warrant arriving, almost an hour later". Such was contradicted by the "audio recording" of conversation amongst the NET TEAM officers. (Tr. tr. p. 283, 1-7).

On June 5, 2011, Petitioner was arrested and charged with (1) Trafficking Cocaine, 400 grams or more, 1st offense; (2) and Trafficking Marijuana, 10 pounds or more, but less than 100 pounds. Again, "what should be absolutely noteworthy, is the fact that Pe-

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titioner ["himself"], never had actual nor constructive possession over the drugs the police "admittedly" brought into his residence. See the below portions of the transcribed record.

1). Tr. tr. p. 12, lines 10-15; Lead Investigator Slice:

Well, originally, June 5, 2011, there was not suppose to be anything going on. We had a plan, but we were to obtain information through the informant that the defendant Mr. Newman was pressing us to---pressing the informant to bring 50 pounds of marijuana in exchange for 27 ounces of cocaine.

2). Tr. tr. p. 14, lines 23-24; Agent Slice on Direct by Sol. Scott:

Q: What did you--what was the plan once you got to 423 Longview, how was that operation suppose to work?

A: Well, the plan was Agent Carver was to bring in 50 pounds of marijuana that Mr. Newman had wanted in exchange for 27 ozs. of cocaine. Once the exchange was made and Agent Carver seized the cocaine, the SWAT team was going to do what we refer to as a bust buy. Id. Tr. tr. p. 14, line 25; p. 15 lines 1-4.

3). Tr. tr. p. 19 line 24, Direct by Solicitor Scott:

Q: After entry! What did you observe?

A: I observed marijuana sitting on the table and Agent CARVER and the informant laying on the---laying on the floor. And I observed the defendant in the backyard. Id. Tr. tr. p. 20, lines 1-2.

4). Tr tr. p. 84, lines 8-15. Direct by Solicitor Hubbard of Nicholas Carver.

Q: And how did ya'll transport the 50 pounds of Marijuana?

A: It was transported in a duffle bag as well as one additional bale in a bookbag that we got from our area where we work at. It was our bags that we provided.

Q: Okay. The duffle bag and bookbag belong to you-all?

A: Yes Sir.

5). Tr. tr. p. 94. Direct of Nicholas Carver, By Sol. Hubbard, lines 20-21.

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(4)

Q: Now, the cocaine, did you all see where that was right after law enforcement came in ?

A: "No sir". Line 22.

6). Tr. tr. p. 95, lines 15-18.

Q: Nick, where was the cocaine?

A: In the bookbag.

Q: The bookbag you brought?

A: Yes sir.

Q: And is that the bookbag you took in?

A: Yes sir. Tr.tr. p. 96 line 1.

In accordance with highlighting the background of this case, Petitioner felt compelled to establish beyond any reasonable doubt that the drugs in this case was brought to his residence. And for that particularized reason. Petitioner plead "not guilty", but was convicted based on such insufficient evidence, and sentenced to serve 25 years in the South Carolina Department of Corrections, for a first offense. As a result of counsel's poor performance and unfamiliarity with available defenses for a client in such a situation as this.

GROUND ONE INEFFECTIVE ASSISTANCE OF COUNSEL.

In more than a single aspect to counsel's deficient representation. Petitioner begins by alleging that the Sixth Amendment guarantees the right to "effective assistance of counsel" in all criminal prosecutions. See Yarborough v. Gentry, 540 U.S. 1, 4 (2003); see also McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970) (6th Amendment right to counsel is the right to "effective assistance of counsel"). To obtain relief by reversal of a conviction or sen-

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(5)

tence, the defendant must prove that counsel's performance fell below an objective standard of reasonableness. See Strickland v. Washington, 466 U.S. 668 (1984). See also Yarbrough v. Johnson, 520 Fd. 3d 486, 490 (4th Cir. 2008); and Toro v. Quaterman, 498 Fd. 3d 486 490 (5th Cir. 2007).

As a matter of fact, the Supreme Court held; "that a person who happens to be a lawyer being present at trial alongside the accused, however, is not enough to satisfy the constitutional command". See Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963). Because the Sixth Amendment recognizes the right to the assistance of counsel, "it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results". See McMann v. Richardson, supra.

a). Petitioner contends as a initial claim that counsel was ineffective for failing to move to dismiss the indictment "prior to the jury being sworn", based on the failure of the State to obtain a "true billed indictment" in this case. In such an instance, Petitioner does not have to meet the "prejudice" prong of Strickland, whereas, prejudice is automatically presumed. Wherever there is a showing of a trial without a true billed grand jury indictment. See Cronic v. United States, 466 U.S. 648, 658 (1984)(prejudice presumed where counsel "entirely fails to subject the prosecution's case to any meaningful adversarial testing") see also Mickens v. Taylor, 535 U.S. 162, 166 (2002)(prejudice presumed when assistance

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of counsel "denied entirely during a critical stage of the proceeding").

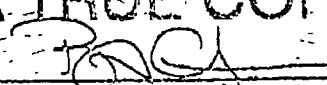
In otherwords the purpose of the Presentation Clause of the Fifth Amendment is twofold: (1) it entitles a defendant to be in jeopardy only for those offenses charged by a group of his fellow citizens acting independent of either prosecutor or the judge and (2) it entitles the defendant to be appraised of the charges against him so that he knows what he must meet at trial. See United States v. Fogel, 901 F3d. 23 (4th Cir. 1990) and United States v. Field, 875 F.2d 130 (7th Cir. 1989).

Under Article I., Section §11, of the South Carolina Constitution. It guarantees that; "No person may be held to answer for any crime the jurisdiction over which is not within magistrate's court, unless on a presentment or indictment of a grand jury of the county where the crime has been committed", in relevant part.

The indictment Petitioner enters "as evidence" in this case was picked up directly from the "Clerk of Court", in the county where the crime were allegedly committed, by a family member. And the "Clerk" admonished the omission. More importantly or equally important is the South Carolina Rule 3 (c) under criminal proceedings, governing the filing and timeliness of indictments. It reads as follows:

"Within ninety (90) days after receipt of an arrest warrant from the Clerk of Court, the solicitor shall take action on the warrant by (1) preparing an indictment for presentment to the grand jury, which indictment shall "be filed with the Clerk of

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Court, assigned a criminal case number, and presented to the Grand Jury; (2) formally dismissing the warrant noting on the face of the warrant the action taken; or (3) making other affirmative disposition in writing and filing such action with the Clerk of Court.

See also §17-19-10, stating; "No person shall be held to answer in any court for an alleged crime or offense, unless upon indictment by a grand jury, except in cases involving (1) when a prosecution by information is expressly authorized by statute; or (2), such proceeding is a magistrate court case; or (3) if the proceedings are before courts martial." In the instant case at bar, although Petitioner points to Statutory, Constitutional, as well as the Rules governing the State to mandatorily obtain a "true billed" indictment. Such was and is obviously lacking in this case, and counsel was grossly ineffective for failing to notice the lack of a proper indictment.

Finally, in outlining counsel's poor performance in failing to notice such a fundamental guarantee. Is where the Court in State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), held; "that subject-matter-jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings belong. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000); and that issues related to subject matter jurisdiction may be raised at any time. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001). That the lack of subject matter jurisdiction (i.e. INDICTMENT), may not be waived, even by consent of the parties, and should be taken notice by this Court. See also Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

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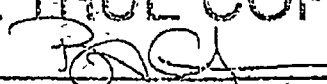
For all practical reasons, Petitioner's trial was convened without a "grand jury indictment". In which deprived the court of subject matter jurisdiction. And this conviction and sentence has no other alternative except to be vacated and dismissed as a matter of law.

b). Next, Petitioner claims counsel was ineffective for failing to pursue available defenses available for someone in his situation. In otherwords, the identical "video recording" which would have clearly demonstrated where "all the drugs came from", was maliciously and intentionally destroyed by the NET TEAM. Yet counsel failed to argue prosecutorial misconduct, and make a contemporaneous objection to any attempt to use "drugs brought to his residence by the police", against him at trial.

Additionally, the mere admonishment by police in regards to "their informant" "conspiring to violate the laws of South Carolina", is a crime initself. In otherwords, to those that are legally and professionally trained in the science of law. Understands that "a informer or agent cannot conspire to break the law", which is how the June 5, 2011 incident took place. Lets review the law on this point.

According to §44-53-370(e)(2)(e), such statute outlaws a barrage of criminal acts under South Carolina's Controlled Substance Act. To the inclusion of "conspiracy to commit the actual drug offense". In South Carolina, when the State charges "TRAFFICKING" IN

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a particular controlled substance. Conspiracy is included within §44-53-370. Thus, the court charges the jury that it is permissible to consider and find that the defendant conspired to commit the overall offense.

Conspiracy is defined, according to Black's Law Dictionary, as an agreement by two or more persons to commit an unlawful act, coupled with an intent to achieve the agreement's objective and (in most states) action or conduct that furthers the agreement.

However, it has remained "black letter law", under the United States, as well as the several States under the Union. That a suspect "cannot conspire with a informer or government agent".

Thus, to prove conspiracy "to traffic drugs" in this case. At least "two culpable conspirators must agree", and consequently, defendant's agreement must be someone "other than government agent or informant". See United States v. Hendrickson, 26 F.3d 321 (2nd Cir. 1994); see also United States v. Rodriguez, 765 F.2d 1546 (11th Cir. 1986) (neither informant nor agent of the Drug Enforcement Administration could be considered a party to illegal agreement, since government agents and informers cannot be conspirators; similarly, codefendant could not be considered a conspirator since he was acquitted of charge).

See also State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (S.C. 2005) (one cannot enter into a conspiracy with another who only feigns acquiescence in a crime, such as an informer or undercover agent); also see State v. Holmes, 277 S.C. 232, 285 S.E.2d 353 (19-81); and United States v. Chase, 372 F.2d 453, 459 (4th Cir. 1967)

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(rule remains in tact that "one cannot conspire with another who only feigns acquiescence in a crime", such as a "informer or undercover agent").

As noticed in State v. Holmes, 285 S.E.2d 353 (1981), had Holmes conspired "only with the informant working for the police", that would have precluded any conviction for the offense. Distinguishable from Holmes, is the instant case at bar. Where "none other than the informer (Mr. Ainsworth), and the undercover agent, Mr. Nicholas Carver, together "conspired" to accomplish a unlawful objective. Where the mere conspiracy itself was unlawful.

Had counsel been aware "there can be no "meeting of the minds" between informer working for police, or undercover agents and suspect. To achieve an unlawful objective. Premised on the fact such circumstance deprives a defendant of due process of law. On that bases alone, he should have move to dismiss the indictment. Where the outcome of the proceeding "would have been different". Strickland, supra.

c). Finally, Petitioner contends that he was not only deprived of his Sixth. Amendment right "to the effective assistance of counsel", but moreover, this deprivation involving the foregone claims in conjunction with the instant claim herein, clearly exposes a circumstance of "outrageous governmental conduct, as well as prosecutorial misconduct". That can be seen as "shocking to the universal scense of fairplay". See Rochin v. California, 342 U.S. 165 (1952).

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Take for instance. At the close of the State's case. Totally without defense counsel moving for special instructions to the jury on Petitioner's behalf. The court, on its own volition, seen the need to "charge jurors under the affirmative entrapment defense". See Tr. tr. p. 385, lines 1-4. Whereas the following outlines a chronological chain of events clearly exposing outrageous government conduct and prosecutorial misconduct. That defense counsel failed to notice.

(1) Here, the record reflects that Petitioner had no prior convictions for distributing or trafficking drugs when he was targeted to be a drug supplier by the NET team. Based on information brought to them by informant Mr. Ainsworth.

(2) During the trial, the only witness presented by the State who was actually present with the Petitioner at the time he "allegedly" possessed the drugs, was agent Nicholas Carver. It is noteworthy however, to notice that "although video surveillance was amongst the investigative equipment ", it conveniently failed to record the transaction.

(3) This chance encounter between agent Carver and the Petitioner, was the result of the conspiracy between Mr. Ainsworth, setting up a meeting with the petitioner. And the initial encounter took place outside the residence, where "no drugs" were possession of the petitioner. The only controlled substances present, was testified by agent Carver, that he maintained "control and dominion" over the drugs at all times herein. (Tr.tr. p. 196, lines 1-6)

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(4) It is further testified by agent Carver that, Petitioner never took possession of the drugs in the bags police brought to the residence either inside or outside the residence. (Tr. tr. p. 197 lines 3-18; p. 203 lines 22-25; p. 204 line 1).

(5) As it relates to the cocaine, the only testimony offered by agent Carver is at first it was removed from a cardboard box on the counter (Tr. tr. p. 198, lines 21-25), totally omitting whether the box had come from the bag brought in by police. In a later testimony by agent Carver, Carver backtracks and states; "he only thought it was on the counter". (Tr. tr. p. 206, lines 20-22)

(6) As a matter of fact, agent Carver's retracted statements here contradicts the testimony given to sustain the search under "the plain view exception to the warrant requirement". For which the Court of Appeals affirmed Petitioner's case on appeal. When on Tr. tr. p. 208/244 lines 1-6, nothing when officers entered the residence, was in plain view.

(7) Agent Carver further testifies that "the cocaine evidence was located in the bookbag which was brought to the scene by agents of the State. (Tr. tr. p. 204, lines 19-23; p. 216 lines 13-22; and p. 264 lines 3-5)

(8) Agent Carver, at no point accuses nor indicates he witnessed the Petitioner place cocaine evidence into the bookbag, nor did he observe the Petitioner to have a opportunity to do so. Coupled with when examining the bookbag prior to its arrival at the premises with the NET team, no testimony was offered regarding verification

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of its contents. The only testimony offered was that Agent Laney, who did not testify at trial, allegedly searched Mr. Ainsworth (informant) vehicle where the bag was located prior to arrival. (Tr. tr. p. 243, lines 21-25)

(9) Comparing this circumstance with what agent Carver testified to at (6) above. Connotes the State elicit patently "false and misleading testimony to jurors". When Brannon Slice, (the lead Agent on this case) at Tr.tr.p. 164/200 lines 9-15, asserted under oath that the 27 ounces of cocaine was on the kitchen counter "in plain view". Which led jurors to believe Petitioner had possession of the drugs when actually they were at all times mentioned, under the care, custody and control of police.

ARGUMENT AND SUPPORTING AUTHORITY

Petitioner herein, rightly maintained his innocence in light of the unusual circumstances surrounding this case. He plead "not guilty" to trafficking in the marijuana and cocaine "he never had possession of". Under the law "possession is 9/10 thereof" And no testimony offered could contradict the NET team's delivery as well as actual possession of all drugs involved in this case. Nor could it be logically explained "how the cocaine got into the book-bag brought to the scene by police".

For over six decades since the decision in Rochin v. California, 342 U.S. 165 (1952). It is black letter law that the police

while attempting to "enforce the law, cannot break the laws in the course thereof". However, the above restriction goes out the window at Tr.tr. p. 243 lines 9-11, where agent Nick Carver explains that "there is no question, that the informant called up Benjamin Newman". Which results in "a conspiracy to accomplish an illegal objective". For which the "in furtherance of the conspiracy", allegedly took place on June 5, 2011.

To backtrack a little; "State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (S.C. 2005)", explains one cannot enter into a conspiracy with another who only feigns acquiescence in a crime, such as a informer or undercover agent. See also State v. Holmes, 277 S.C. 232, 285 S.E.2d 353 (1981, and several federal cases stating the identical restrictions. United States v. Chase, 372 F.2d 453 (4th Cir. 1967); and United States v. Hendrickson, 26 F.3d 321 (2nd Cir. 1994). Thus, such should have clearly been understood by any competent defense attorney, acting as advocate for his client.

Secondly, such "outrageous government misconduct" can be seen as to shock the conscience of the average individual in society that is unaware of the law on this point. In otherwords, according to the government's case. It allowed a unknown informant to arrange a suspected drug deal through conspiratorial tactics. Of a person who had never been convicted of a drug offense in South Carolina. And set the terms (of which are unknown), whereas law enforcement agents appear at the residence with marijuana and cocaine from the police evidence room. Then get on the witness stand a "falsely assert, "the cocaine was in plain view".

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Lex. Co. C.C.C.P., G.S. & F.C.

2015 CP 5202236

In conclusion, a prosecutor on state or federal level, may not obtain a criminal conviction through the use of false testimony. See Thompson v. Calderon, 109 F3d 1358 (9th Cir. 1996). Nor can they allow false testimony to go uncorrected. See United States v. Goodson, 165 F.3d 610 (8th Cir 1999).

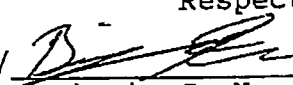
When such circumstances are exposed, it violates substantive due process no matter how many procedural safeguards the state or federal prosecutions employ. See Rochin.

While the defense of "entrapment" focuses on the defendant's predisposition. The defense of "outrageous governmental conduct, as well as prosecutorial misconduct", focuses on the government's conduct. See Hampton v. United States, 425 U.S. 484 (1975) and United States v. Berg, 178 F3d 976 (1999).

And based on the foregone claims as well as defenses outlined herein. Had counsel raised them at the critical stage of the proceedings. There is little doubt the outcome would have been different. For these reasons, Petitioner is entitled to have the conviction (s) and sentences vacated as a matter of law. Pursuant to §17-27-20. And any further reasons deemed just and proper by this Honorable Court.

Respectfully Submitted,

S/


Benjamin J. Newman, #352829
Broadriver Corr. Institution
4460 Broadriver Road
Columbia, S.C. 29210

cc: filed

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Lex. Co. C.C.C.P., G.S. & F.C.

(16 of 16)

FILED

2015 JUN 25 PM 2:29

June 23, 2015

ETHA A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Ms. Beth Carriage, Clerk of Court
Lexington County Courthouse
205 E. Main Street
Lexington, S.C. 29072

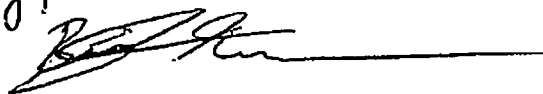
2015 CP3202236

Dear Ms. Carriage,

Enclosed for filing is my application for
PCR. May I also respectfully request an officially
filed copy of my application.

Of course I do thank you for your assistance
in this matter.

Sincerely,



Benjamin J. Newman, 352829
BREI / Monticello B-193
4460 Broad River Road
Columbia, S.C. 29210

A TRUE COPY

Lex. Co. C.C.C.P., G.S. & F.O.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

C.A. No. 2015-CP-32-02236

RETURN

Respondent.

I. Conviction and Sentence

The Lexington County Grand Jury indicted Applicant during its August 2011 term for Trafficking Marijuana (10 pounds or more, but less than 100 pounds) and Trafficking Cocaine (400 grams or more) (2011-GS-32-02259, -02261). (Attachment 2: Indictments).

Robert T. Williams, Esquire, represented Applicant, who proceeded to trial on October 15, 2012, before the Honorable Alexander S. Macaulay. Rick Hubbard, now Eleventh Circuit Solicitor, prosecuted the case on behalf of the State. Trial proceeded after a full suppression motion. (Attachment 3: Trial Tr.). The jury found Applicant guilty of both charges. Judge Macaulay sentenced Applicant to imprisonment for ten (10) years for Trafficking Marijuana and

twenty-five (25) years for Trafficking Cocaine. He issued the sentences to be served concurrently with credit for 38 days' time served. (Attachment 4: Sentencing Sheets, Verdict Forms).

Counsel Williams timely filed notice of appeal Applicant's behalf. In addition to Counsel Williams, Benjamin A. Stitley, Esquire, represented Applicant on appeal, filing a brief which raised the following issues:

- I. Did the trial court err when it denied the Appellant's motion to suppress the drug evidence obtained as a result of an unlawful search?
- II. Did the trial court err when it failed to grant the Appellant's motions for directed verdict?

(Attachment 5: Final Br. of App.).

By and through the Attorney General's Office, the State made its brief in response, arguing against both issues on the merits, and additionally arguing the second issue raised was not preserved for appellate review. (Attachment 6: Final Br. of Resp.).

The South Carolina Court of Appeals affirmed Applicant's convictions without oral argument. (Attachment 7: *State v. Newman*, 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014)). At that point Applicant and Counsel Williams consented to the substitution of Tara Dawn Shurling, Esquire, as counsel, and she petitioned the Court of Appeals for Rehearing on Applicant's behalf. The State made a Return, and the Court of Appeals denied the Petition. (Attachment 8: Ct. App. Rehearing Filings and Disposition).

Counsel Shurling then petitioned the South Carolina Supreme Court for a writ of certiorari on both issues. The State made a Return. Certiorari was denied on November 11, 2014. (Attachment 9: Sup. Ct. Cert. Pet. Filings and Disposition). The Court of Appeals issued the Remittitur on November 18, 2014. (Attachment 10: Remittitur).

II. Facts as Presented at Trial

On June 5, 2011, the Lexington County Multi-Agency Narcotics Enforcement Team (NET) arranged a drug exchange with Applicant, a suspected drug dealer. (Attachment 3: Trial Tr. (hereinafter "Tr."), pp. 10-12). A confidential informant (CI) made arrangements to introduce an undercover agent to Applicant who agreed to exchange fifty pounds of marijuana for twenty-five ounces of cocaine. (Tr. p. 223, lines 7-23, p. 228, lines 10-21). Immediately following the exchange, a SWAT team used a flash-bang and entered. (Tr. p. 238, lines 2-6). The CI and the undercover agent got down on the floor, and Applicant ran out the back door. (Tr. p. 238, lines 7-15). Applicant was apprehended and arrested for trafficking marijuana and cocaine. (Tr. p. 92, lines 22-24).

Pretrial, Applicant moved to suppress the evidence. (Tr. p. 4, line 15.) A full hearing was conducted which delved into whether law enforcement searched the residence prior to the officer's arriving with the search warrant. (Tr. p. 9 – p. 136). Agents testified that when the officers came in to make the arrest, the marijuana was readily visible. (Tr. p. 19, lines 21-25; Tr. p. 94, lines 15-17). One officer testified they discovered the cocaine in a bookbag which was lying open on the floor next to the kitchen island. (Tr. p. 95, lines 15-24). Another officer explained that the cocaine was on the kitchen counter and then was no longer there and that the SWAT team was looking for it in the backyard because they thought Applicant had taken it when he ran. (Tr. p. 115, line 4, p. 116, line 19). The trial court listened to the recording from the audio recording device worn by Agent Carver during the drug transaction. (Tr. p. 15, lines 25 - p. 16, line 1; Tr. p. 17, lines 22-25; Tr. p. 127-29). Applicant argued officers searched prior to obtaining a search warrant. (Tr. p. 130, lines 1-10). The State countered that it was only

introducing the drugs and possibly some letters with Applicant's name on them, but that it would not try to introduce other items found such as guns and bullets. (Tr. p. 131, lines 1-6). Applicant argued the issue was whether the cocaine was seized incident to arrest or during a search. (Tr. p. 131, lines 7- 14). The trial court pointed out that the CI and undercover agent were invited into the house and that the contraband was in clear view. (Tr. p. 131, lines 15-22). Applicant then specifically stated, "Your Honor, but there are other exhibits which they're intending to introduce aside from that." (Tr. p. 132, lines 6-8). The State again stated it would only introduce envelopes with Applicant's name on them. (Tr. p. 132, lines 12-16). The trial court noted that was not contraband but was merely identification. (Tr. p. 132, line 25 – p. 133, line 1). The trial court determined the cocaine and marijuana would be admitted and cautioned the State to let him know if it intended to introduce anything else so he could rule on it outside the presence of the jury. (Tr. p. 136, lines 5-15). The trial court denied the motion to suppress. (Tr. p. 136, lines 20-23).

At trial, the State called Brannon Slice, the NET agent who planned the controlled drug exchange. (Tr. p. 160, line 19-25, p. 163, lines 14-24). He explained how he placed a wire on the CI and an audio recording device and videotaping device on Agent Carver. (Tr. p. 173, line 24 – p. 174, line 4). He testified he mistakenly did not turn on the video recorder. (Tr. p. 174, line 4). After Applicant objected to Agent Slice's testifying to what was found in the residence, a proffer was presented and the trial court allowed him to testify that he found a duffle bag of marijuana, a bale of marijuana on the counter, and cocaine in a bag in plain view. (Tr. p. 187, line 17 - p. 200, line 15).

Next, the State called Agent Nicholas Carver. (Tr. p. 184, line 25.) Agent Carver explained his undercover role as a drug dealer. (Tr. p. 220, lines 7-13). He testified Applicant

told him he wanted 1000 pounds of marijuana next time and explained to Carver how to keep the cocaine in a brick. (Tr. p. 232, lines 12-14; p. 233, line 21 - p. 234, line 3). Agent Carver testified Applicant was supposed to trade twenty-five ounces of cocaine for the fifty pounds of marijuana but added two extra ounces. (Tr. p. 235, lines 4-17). He testified that when the SWAT team activated the flash-bang device, he and the CI got on the floor and Applicant ran out the back door. (Tr. p. 238 lines 2-15). He stated the cocaine was on the edge of the counter when the bust took place, but gone afterwards. (Tr. p. 240, lines 6-12). He testified the cocaine ended up in the open bookbag that had contained the marijuana before it was removed. (Tr. p. 240, lines 13-23). Agent Carver testified officers were looking in the backyard for the cocaine at first. (Tr. p. 242, line 23 - p. 243, line 4). He verified that as an officer, he could have arrested Applicant on his own immediately after the drug exchange. (Tr. p. 253, lines 19-21).

On cross-examination, Applicant asked Agent Carver whether the audio recording indicated the officers were searching the house prior to obtaining the search warrant, and he said no one was searching prior to issuance of the search warrant. (Tr. p. 282, line 20 - p. 283, line 4). He clarified the officers were looking for a known item that could not be located but had already been identified during a transaction that took place in front of an officer. (Tr. p. 283, lines 6-12).

Next, the State called Agent Brian Setree, who was the senior NET agent involved, and who could be heard on the audio recording. (Tr. p. 287-92). On the stand, he admitted the audio recorder was left on after the bust, even though it should have been turned off. (Tr. p. 294, lines 14-23). Agent Setree testified he could be heard on the audiotape telling the SWAT agents, who were panicked because the cocaine was no longer on the counter, not to worry about the cocaine because they were getting a search warrant for the residence anyway. (Tr. p. 295, lines 6-25). He testified he told them, "if it's not in plain view on the inside of the residence, don't worry about

it. We'll find it once we obtain the search warrant." (Tr. p. 296, lines 1-5). Agent Setree also testified to being present when Agent Barnes saw the cocaine in plain view in the open bookbag. (Tr. p. 297, lines 7-14).

The State later called another NET agent, Paige Barnes, who testified she also found the cocaine in an open bookbag and that she waited about half an hour for the search warrant to arrive at the residence. (Tr. pp. 329-34). The State then called a series of witnesses who verified the substance and weight of the drugs seized. (Tr. p. 249-93; p. 346-51).

Applicant presented no witnesses or entered any exhibits as evidence at trial.

III. The Instant Application

Applicant commenced the present action by filing his application with the Lexington County Clerk of Court on June 25, 2015. S.C. Code. Ann. § 17-27-40. With the Remittitur from his direct appeal being issued in November 2014, Applicant timely filed within the one-year statute of limitations. S.C. Code. Ann. § 17-27-45(A).

Within his *pro se* application, Applicant alleges that he is being held in custody unlawfully and seeks relief premised upon the following ineffective assistance of counsel claims, enunciated in questions 10 and 11 of the post-conviction relief (hereinafter "PCR") application and supporting memorandum, and copied below verbatim:

1. Ineffective Assistance of Counsel
2. Lack of True Billed Grand Jury Indictment
3. Outrageous Government and Prosecutorial Misconduct

(Attachment 11: PCR App.).

Applicant filed a memorandum wherein he delineates the bases for his PCR allegations:

- a) Trial counsel failed to move to dismiss his indictment upon the basis that it was not true-billed;

- b) Trial counsel failed to pursue all available defenses related to alleged misconduct on the part of the prosecuting agencies;
- c) "Outrageous government conduct and prosecutorial misconduct" stemming from the Court's decision to instruct the jury on the defense of entrapment;
- d) Applicant was actually innocent of the crimes convicted because he did not have possession of the drugs.

(*Id.*).

Tricia A. Blanchette, Esquire, has been appointed to represent Applicant in the present action. (Attachment 12: Or. Substituting Counsel). Upon motion by Counsel Blanchette, limited discovery was ordered by the Honorable Edward W. Miller on September 7, 2016, to include: (1) a copy of the SLED file; (2) a list of items produced to trial counsel by the Solicitor's Office pursuant to Rule 5, SCRCrimPro; (3) an opportunity for counsel Blanchette and any private investigators or potential experts to review the evidence maintained by SLED in the underlying criminal action; and (4) a copy of the trial exhibits maintained by the Lexington County Clerk. (Attachment 13: Or. Authorizing Discovery).

IV. Request for the Resolution of Applicant's Claims

The State makes its Return pursuant to S.C. Code. Ann. § 17-27-70(a). Respondent denies the allegations raised herein and demands strict proof thereof. A PCR application shall "specifically set forth the grounds upon which the application is based" including "[f]acts within the personal knowledge of the applicant." S.C. Code. Ann. § 17-27-50. Otherwise, summary dismissal may be appropriate. S.C. Code Ann. § 17-27-70(b); Rules 12(b)(6) and 12(e), SCRCP.

A. Some Claims Not Cognizable:

Insufficient Evidence, Misconduct, and Lack of Subject Matter Jurisdiction

Respondent submits that, as pled, the claims appearing within the application that do not reflect an allegation of ineffective assistance of counsel may be appropriately resolved through

summary dismissal pursuant to Rules 12(b)(6) or 56, SCRCF, because Applicant has failed to allege any PCR claim upon which relief can be granted. S.C. Code Ann. § 17-27-70(b).

"Although the allegations in the petition are to be treated as true, the petition must make out a prima facie case showing petitioner is entitled to relief." *Gibson v. State*, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (internal citations omitted). An applicant must produce facts or testimony in support of a cognizable allegation in order to establish that the claim meets the standard warranting relief. *Id.* Moreover, when a PCR claim was proper pre-trial or on direct appeal, it is not cognizable in the present action. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("It is uniformly held that an application for post-conviction relief is not a substitute for an appeal."). An action for PCR "is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code Ann. § 17-27-20(B). When the *Simmons, supra*, doctrine applies, summary dismissal is appropriate. *Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); Rules 12(b)(6) and 12(e), SCRCF

On the face of the *pro se* application, a number of allegations and supporting facts fail to state a claim upon which relief can be granted. Throughout his memorandum and application, Applicant alleges that there existed insufficient evidence to convict and that "outrageous government and prosecutorial misconduct" tainted his conviction. (See Attachment 11; PCR App. at 5, 11-16). The entirety of Applicant's misconduct and insufficient evidence claims appear to be premised upon a presupposition that the State acted unlawfully in engaging a confidential informant to orchestrate the drug transaction for which Applicant was ultimately convicted. (*Id.*). These claims contain incorrect legal and factual premises. The time for a convicted party to allege that the State did not meet its burden of proving each element beyond a

reasonable doubt is on direct appeal. *See State v. Brown*, 360 S.C. 581, 590-91, 602 S.E.2d 392, 397-98 (2004) (explaining that the proper remedy for convictions premised upon insufficient evidence is to reverse the conviction). Similarly, Applicant challenged the legality of the search and seizure leading to his arrest pre-trial, and appealed the outcome of that challenge. (Attachments 3-10). He puts forth no colorable claim of misconduct which was different than that raised during the suppression hearing. Accordingly, these freestanding claims were appropriate at an earlier time and should be summarily dismissed as a result. *Simmons v. State*, *supra*.

To the extent that Applicant claims that the trial court lacked subject matter jurisdiction due to an invalid indictment, that allegation is similarly without legal or factual support. (See Attachment 11: PCR App. at 9). "Indictments are sufficient when they allege a time and place, as required by law, and charge the crime substantially in the language of the statute or the common law which prohibits the crime or so plainly that the offense charge may be easily understood" S.C. Code Ann. § 17-19-20. The South Carolina Supreme Court has held that all indictments must be viewed with a "practical eye" to determine whether they fulfill their function to notify the accused of the charge he must answer, notify the court of what judgment and sentence to pronounce, and present a bar to subsequent prosecution. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). In *State v. Bultron*, the court held that a conviction based on an indictment which was "signed by the grand jury foreman but was not stamped or otherwise marked as a 'true bill' or a 'no bill'" was valid. 318 S.C. 323, 328, 457 S.E.2d 616, 619 (Ct. App. 1995). That case held that the trial court properly refused to quash the indictment because it was "evident the subject bill of indictment was necessarily true billed and the lack of a stamp saying as much was merely a scrivener's error." *Id.* at 329-330, 457 S.E.2d at 620.

As in *Bultron*, the grand jury foreman in Applicant's case signed and dated the two indictments issued, but did not mark them "true billed." (Attachment 2: Indictments). Respondent submits that the lack of a "true bill" stamp is merely a scrivener's error and is not sufficient evidence to support a claim alleging an invalid indictment, nor is the claim sufficient to invalidate the conviction. *State v. Bultron, supra*.

Since Applicant has failed to make even a *prima facie* showing of any cognizable freestanding allegation raised in the *pro se* application, Respondent would submit that any claim not pertaining to the ineffective assistance of counsel should be dismissed pursuant to Rule 12(b)(6), SCRPC, for failing to meet the requirements of the Uniform Post-Conviction Procedures Act. Moreover, as to the allegation that there was not sufficient evidence to convict Applicant, and that his indictments are facially insufficient, those claims could have been properly brought on direct appeal and are improper before the PCR court. *Simmons v. State, supra*; *Dempsey v. State, supra*. The PCR Act "shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction." S.C. Code Ann. § 17-27-20(a)(6).

In the alternative, Respondent would submit Application should be required to provide a more definite statement pursuant to Rule 12(e), SCRPC, because the freestanding allegations appear so vague and ambiguous Respondent cannot reasonably be required to frame a response other than the response provided herein.

B. Ineffective Assistance of Counsel Allegations

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case."

Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with “a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.” *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006).

Petitioner’s ineffective assistance allegations pertain to the freestanding claims discussed above. Specifically, he alleges counsel should have challenged the validity of his indictment, and that counsel failed to pursue defenses related to alleged misconduct by prosecutors and/or law enforcement. (See Attachment 11: PCR App.). As to the indictment-related claim, the indictment is valid on its face for reasons discussed above. *State v. Bultron, supra*. Thus, any related claim for failure to object to that indictment cannot be meritorious in the present action because Applicant cannot succeed in showing either error or resulting prejudice from the alleged inaction by counsel. *Strickland v. Washington, supra*.

Similarly, with no present proof of misconduct on the part of law enforcement or the solicitor’s office, any related ineffective assistance of counsel claim for failure to defend Applicant at trial upon the basis that misconduct occurred cannot succeed. *Id.* However, the record further reflects that Applicant’s trial counsel moved to dismiss the indictments against him upon the basis that he thought a video recording of the drug bust existed and was never produced. (Tr. p. 5). The State was heard in regards to that motion and explained that one law enforcement officer had a wristwatch which was intended to produce a video of the drug bust but “it failed to do so,” and therefore no video recording existed to produce in anticipation of trial.

(Tr. pp. 6-8). The State proffered agent testimony in defense of the motion. (Tr. pp. 8-21, 35-36, 43-45, 83-84, 102-04, 120, 125-26). That record is clear that law enforcement attempted to obtain a video recording but the device they were using to do so simply failed. (*Id.*). The trial court denied the motion to dismiss. (Tr. pp. 133-34). Therefore, in regards to the related ineffective assistance of counsel claim for failure to pursue defenses in light of a missing video recording, Applicant cannot demonstrate that counsel failed to act in the manner alleged. *Strickland v. Washington, supra.*

However, our courts have determined that some PCR claims may not be conclusively refuted by the record, thus raising a question of fact and requiring an evidentiary hearing. *Sharper v. State*, 279 S.C. 264, 266, 305 S.E.2d 247, 249 (1983). Respondent submits that an evidentiary hearing may be necessary to fully develop factual support in furtherance of the instant ineffective assistance allegations. S.C. Code Ann. § 17-27-80. However, Respondent maintains that Applicant cannot satisfy either requirement of the standard defined within *Strickland v. Washington, supra.*

V. Right to Amend

Respondent additionally notes that prior to such time as a hearing is called in this case, Applicant, by and through his appointed PCR counsel, must specify any claims he intends to raise. *See* Rules 11, 71.1, SCRCP. All claims should be made well in advance of any hearing.

Respondent additionally hereby reserves the right to amend its Return to the extent Petitioner may file amended pleadings in accord with S.C. Code. Ann. § 17-27-70(a), or to the extent the allegations in this proceeding are otherwise altered in accord with the appropriate procedures and laws of this State.

VI. Conclusion

Each and every allegation contained within the application not expressly admitted, qualified, or explained, is denied.

WHEREFORE, having made the Return, Respondent requests the Court hold an evidentiary hearing on the issue of ineffective assistance of counsel.

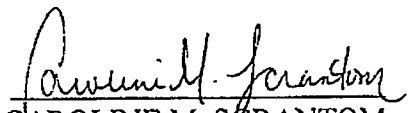
Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General

CAROLINE M. SCRANTOM
Assistant Attorney General

By: 
CAROLINE M. SCRANTOM
S.C. Bar No. 101357
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

October 13, 2017
Columbia, South Carolina

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

2015-CP-32-02236

Benjamin J. Newman,

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

STATE OF SOUTH CAROLINA,

Respondent.

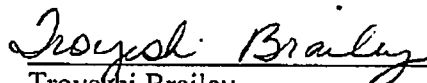
1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return with attachments, in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
PO Box 2147
Leesville, SC 29070

RETURN ATTACHMENT LIST:

- (1) SCDC records
- (2) Lexington County Clerk Records
- (3) Trial Transcript
- (4) Sentencing Sheets
- (5) – (10) Appellate records
- (11) PCR Application
- (12) Order Substituting Counsel
- (13) Order Authorizing Discovery

DATED this 5th day of September, 2017.


Troyeshi Brailey
Paralegal to Caroline Scrantom
Assistant Attorney General

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2016 SEP 14 AM 10:32 NO.: 2015-CP-32-2236

BENJAMIN J. NEWMAN, 352829

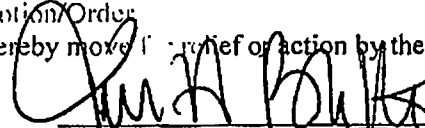
vs.

STATE OF SOUTH CAROLINA

Defendant.

BETULA GARRIGG
CLERK OF COURT
LEXINGTON, SC

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: A. Blanchette, Bar No. 74904 Address: Box 12725, Columbia, SC 29211 Phone: 803-988-0008 Fax 803-988-8070 Email: blanchettelaw@gmail.com Other: _____		Defendant's Attorney: Johanna C. Valenzuela, Bar No. _____ Address: PO Box 11549, Columbia, SC 29211 Phone: 803-734-3737 Fax _____ E-mail: _____ Other: _____	
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) PROPOSED ORDER / CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: _____		Court Reporter Needed: ☐ YES / ☐ NO	
Estimated Time Needed: _____		SECTION II: Motion/Order Type	
Written motion attached: ☐ Yes / ☐ No I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff / ☐ Defendant September 13, 2016 Date submitted			
SECTION III: Motion Fee			
PAID - AMOUNT: \$ _____			
EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☒ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION		JUDGE CODE _____	
Motion Fee to be paid upon filing of the attached _____		Date: _____	
CLERK'S VERIFICATION			
Filed by: _____ Date Filed: _____			
MOTION FEE COLLECTED: \$ _____			
UNTESTED - AMOUNT DUE: \$ _____			

LA 233 (11/2003)

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) DOCKET NO.: 2015-CP-32-2236
2016 SEP 14 AM 10:32

BENJAMIN J. NEWMAN, 352829,)
Applicant,) BETH A. CARRIGG
v.) CLERK OF COURT
LEXINGTON, NC) ORDER AUTHORIZING DISCOVERY
STATE OF SOUTH CAROLINA,)
Respondent,)

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2015. On February 2, 2016, Tricia A. Blanchette, Esquire, was substituted in via Order signed on December 21, 2015.

On April 6, 2016, Applicant through counsel filed a Motion for Discovery. The State submitted a Return to Motion for Discovery on or about May 6, 2016. A motion hearing was conducted at the Lexington County Courthouse on August 3, 2016 in front of the Honorable Edward W. Miller. Applicant was present and represented by Tricia A. Blanchette, Esquire. Johanna C. Valenzuela, Senior Assistant Deputy Attorney General, appeared on behalf of the State.

At the motion hearing and by way of the written motion, counsel explained that she reviewed and obtained copies of trial counsel's file. Thereafter, she provided and reviewed the copied file with Applicant. After reviewing and discussing the case documents provided, it was apparent that a request for discovery was needed to properly prepare Applicant's case for an evidentiary hearing and to determine what witnesses are necessary to be called at an evidentiary hearing. To ensure that Applicant and counsel have the case materials needed to properly prepare his case for an evidentiary hearing, counsel moved this Court for the opportunity to issue subpoenas to the appropriate people, offices or agencies for the production of the following case files/materials

pursuant to S.C. Code Ann. §17-27-150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding:

1. A copy of the file maintained by the Lexington County Solicitor's Office, and if not contained therein, a copy of the Lexington County Sheriff Department's file, to include all information regarding controlled or confidential informant buys related to the case, tips related to the case, chain of custody for the drugs at issue, testing of the drugs at issue, evidence handling procedures for utilizing evidence from a prior drug arrest in a subsequent controlled buy, and information regarding technology used in surveillance and at the scene during the controlled buy and the information obtained therefrom (audio and video).
2. A copy of the State Law Enforcement Agency (SLED) file.
3. The opportunity for Applicant's counsel, private investigator and potential experts to review the evidence maintained at the Lexington County Sheriff's Department and SLED (if needed).
4. A copy of the trial exhibits from the Lexington County Clerk of Court.¹

Applicant further requested the opportunity for his counsel, private investigator and/or experts to review any and all requested materials that cannot be copied or provided to counsel.

This Court was further informed by both parties that an agreement had been reached that if this Court made a finding of good cause, Applicant's counsel would be provided a list of the items turned over to trial counsel in discovery from the solicitor's office to determine what if any items were not located in trial counsel's file. Both parties further informed this Court that it was questionable that a file existed from SLED, so the existence of the file would need to be addressed as a threshold question prior to the file being requested.

Counsel for Applicant explained to the Court that she was not asking to go on a fishing expedition, but she needed the opportunity to complete the requested inquiries

¹ This request was added verbally at the motion hearing.

and obtain the requested items to assist Applicant in determining the legitimacy of allegations to be raised and properly preparing to meet the burden of proof placed on Applicant. Simply put, counsel was making the request to ensure that Applicant obtained "one full bite of the apple."

Based upon a showing of good cause, this Court finds that Applicant's request shall be granted in part as addressed below to ensure that Applicant, through counsel, can properly prepare his Application for an evidentiary hearing. Therefore, Applicant, through counsel, shall be allowed to issue subpoenas to the appropriate people, offices or agencies for the production of the following case files/materials pursuant to S.C. Code Ann. §17-27-150(a) (2008) limited to those files/materials that were subject to discovery during the underlying criminal proceeding:

1. A copy of the State Law Enforcement Agency (SLED) file.
2. The Solicitor's Office shall provide a list of items provided to original defense counsel under Rule 5, SCRPC, for Applicant's counsel to review. If counsel identifies any items in the list that are not part of the defense file, she will issue a subpoena *limited to* copies of the items she identified from the list provided by the Solicitor's office.
3. The opportunity for Applicant's counsel, private investigator and potential experts to review the evidence maintained at the Lexington County Sheriff's Department and SLED, if any evidence exists.
4. A copy of the trial exhibits from the Lexington County Clerk of Court.

This Court further grants Applicant's request for his counsel, private investigator and/or experts to review any and all requested materials that cannot be copied or provided to counsel. This Court finds that Applicant, through counsel, should provide Respondent with all discovery received pursuant to this Order. This Court further finds that if a party

fails to comply or does not have a file or requested item to produce, a written explanation must be provided for the failure to produce said file or item to Applicant's counsel.

IT IS THEREFORE ORDERED:

1. That Counsel for Applicant is permitted to serve a subpoena and/or submit a written request, along with a copy of this Order, upon the above listed agencies or entities for the production of the above listed items.
2. That any parties in receipt of a subpoena pursuant to this Order may file a timely objection, which will be addressed by this Court.

AND, IT IS SO ORDERED this 7 day of Sept, 2016.

Hill, South Carolina


Honorable Edward W. Miller
Presiding Circuit Court Judge

2016 SEP 14 AM 10:33
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2015-CP-32-2236

2016 SEP 14 AM 10:33

Benjamin J. Newman, 352829)

v.)

State of South Carolina,)

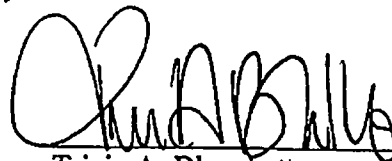
Respondent,)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 13th day of September 2016, a copy of an Order for Protection and Order for Discovery to Johanna C. Valenzuela of the Attorney General's Office, at:

Office of the Attorney General
Attn: Johanna C. Valenzuela, Sr. Ast. Deputy AG
P.O. Box 11549
Columbia, SC 29211-1549



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008

September 13, 2016

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

COPYIN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2015-CP-32-02236

BENJAMIN J. NEWMAN, 352829,

Plaintiff,

vs.

STATE OF SOUTH CAROLINA

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**2017 NOV 15 AM 11:10
LISA H. CONER
CLERK OF COURT
LEXINGTON SC**Plaintiff's Attorney:**

Tricia A. Blanchette, Bar No. 74904

Address:

PO Box 2147, Leesville, SC 29070

Phone: 803-908-3266 Fax _____

E-mail: blanchettelaw@gmail.com Other: _____

Defendant's Attorney:

Carolina M. Scrantom, Bar No. _____

Address:

PO Box 11549, Columbia, SC 29211

Phone: 803-734-3737 Fax _____

E-mail: _____ Other: _____

☒ **MOTION HEARING REQUESTED** (attach written motion and complete **SECTIONS I and III**)☐ **FORM MOTION, NO HEARING REQUESTED** (complete **SECTIONS II and III**)☐ **PROPOSED ORDER/CONSENT ORDER** (complete **SECTIONS II and III**)**SECTION I: Hearing Information**

Nature of Motion: Amendment to PCR Application

Estimated Time Needed: 4 hours

Court Reporter Needed: ☒ YES / ☐ NO**SECTION II: Motion/Order Type**☒ Written motion attached☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff / ☐ Defendant

November 13, 2017

Date submitted

SECTION III: Motion Fee☐ PAID - AMOUNT: \$ _____☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support☐ Domestic Abuse or Abuse and Neglect☐ Indigent Status ☐ State Agency v. Indigent Party☐ Sexually Violent Predator Act ☒ Post-Conviction Relief☐ Motion for Stay in Bankruptcy☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF)☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____**JUDGE'S SECTION**☐ Motion Fee to be paid upon filing of the attached order.☐ Other: _____

JUDGE CODE _____

Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____☐ CONTESTED - AMOUNT DUE: \$ _____

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2015-CP-32-02236

BENJAMIN J. NEWMAN, #352829,)

Applicant,)

v.)

STATE OF SOUTH CAROLINA,)

Respondent,)

AMENDMENT TO APPLICATION
FOR POST CONVICTION RELIEF

LISA H. CONER
CLERK OF COURT
LEXINGTON SC

2017 NOV 15 AM 11: 50

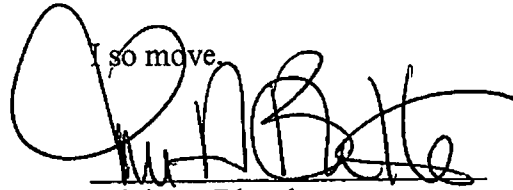
FILED

This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2015. By and through his undersigned counsel, Applicant would move to amend his Application for Post Conviction Relief. In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post-Conviction Relief to contain the following specific allegations of ineffective assistance of trial counsel:

1. Trial counsel rendered ineffective assistance for failing to move to suppress and/or object to the drug evidence due to change in appearance. Trial counsel rendered further ineffective assistance when he agreed to the destruction of the evidence post trial. Transcript p. 436.
2. Trial counsel rendered ineffective assistance in the handling of the entrapment defense.
3. Trial counsel rendered ineffective assistance for failing to require the State to identify the specific portion of the trafficking statute on which the trial was proceeding and failing to attack the conspiracy portion of the statute.
4. Trial counsel rendered ineffective assistance for failing to investigate and utilize necessary witnesses for the defense and for failing to further cross-examine state witnesses during pre-trial and trial, which resulted in the denial of pre-trial motions and a guilty verdict.
5. Alternatively, newly discovered evidence if witnesses and testimony was not discoverable at the time of trial.

6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

I so move.



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
Attorney for Applicant

November 13, 2017

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2015-CP-32-2236

Benjamin J. Newman, 352829,)
Applicant,)

v.)

State of South Carolina,)
Respondent,)

CERTIFICATE OF SERVICE

LISA M. COHEN
CLERK OF COURT
LEXINGTON SC

2017 NOV 15 AM 11:10

FILED

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 13th day of November 2017, a copy of an Amendment to Application for Post Conviction Relief to Caroline M. Scrantom, Esquire, of the Attorney General's Office, at:

Office of the Attorney General
Att: Caroline M. Scrantom, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

November 13, 2017

1 County of Lexington Court of Common Pleas
2 Eleventh Judicial Circuit
3
4 Benjamin Newman,) Transcript of Record
5 Applicant,)
6 vs.) 2015-CP-32-02236
7 State of South Carolina,)
8 Respondent.)

9
10 December 15, 2017
11 Lexington, South Carolina

12 B E F O R E:

13 The Honorable J. Cordell Maddox, Junior
14

15 A P P E A R A N C E S:

16 Tricia A. Blanchette, Esquire
17 On behalf of the Applicant

18 Caroline M. Scrantom, Esquire
19 Melody J. Brown, Esquire
20 On behalf of the State of South Carolina

21 Stacy S. Johnson
22 Circuit Court Reporter
23
24
25

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1 (The following proceedings were held December 15,
2 2017, beginning at 10:28 AM.)

3 **THE COURT:** Yes, ma'am.

4 **MS. SCRANTOM:** All right, Your Honor. This is
5 Benjamin Newman versus State of South Carolina;
6 2016-CP-32-1285. This is a Lexington County PCR action.

7 Mr. Newman was tried and convicted in October of 2012
8 for trafficking marijuana and for trafficking cocaine.
9 The charges arose from a buy bust involving a confidential
10 informant and agents from Lexington County Narcotics
11 Enforcement Team. As presented at trial, Mr. Newman
12 arranged with the CI to exchange 50 pounds of marijuana
13 for 25 ounces of cocaine. I believe by the end of the buy
14 bust he ups the amount of cocaine to 27 ounces. The SWAT
15 team arrived immediately following the exchange and Mr.
16 Newman was apprehended after attempting to flee from his
17 home.

18 That buy bust occurred on June 5, 2011. He was
19 convicted at trial and sentenced by Judge Macaulay to
20 ten years for trafficking marijuana and to 25 years for
21 trafficking cocaine, issued to run concurrent.

22 Mr. Newman was represented by Theo Williams at trial
23 and on appeal. His direct appeal raised two issues; one
24 pertaining to the suppression motion pretrial, which was
25 denied, and the other pertaining to the outcome of the

1 directed verdict motion. The Court of Appeals affirmed in
2 an unpublished opinion. Mr. Newman then retained Ms. Tara
3 Dawn Shurling, who petitioned for re-hearing and then for
4 certiori, which was denied by our State Supreme Court.

5 He filed this PCR action on July 22, 2016. He's
6 present today, along with his counsel, Ms. Tricia
7 Blanchette, who was substituted in in December of 2015.

8 On behalf of the State, myself, Caroline Scrantom,
9 filed the return in October of this year, and
10 Ms. Blanchette filed her amended application last month
11 and we are prepared to go forward with the evidentiary
12 hearing today.

13 **THE COURT:** Okay.

14 Yes, ma'am.

15 **MS. BLANCHETTE:** Thank you, Your Honor.

16 May it please the Court? Tricia Blanchette here on
17 behalf of Mr. Benjamin Newman. The State has done a very
18 good job of comprehensively setting forth the procedural
19 history, but, Your Honor, this case should not be a very
20 lengthy case. But if Your Honor wouldn't mind, I'd like
21 to just go through the allegations at the beginning to
22 give you a little background information before I call my
23 first witness.

24 **THE COURT:** Sure.

25 **MS. BLANCHETTE:** The first allegation in the

1 amendment that was recently filed is that counsel was
2 ineffective for moving to suppress the drug evidence due
3 to change in appearance and that trial counsel was
4 ineffective when he agreed to destroy the evidence and
5 allow the evidence to be substituted with pictures. That
6 will just be -- go into some testimony from Mr. Williams
7 and from my client regarding that matter.

8 The second issue was that trial counsel was
9 ineffective in his handling of the entrapment defense.
10 The Court decided that he would instruct the jury on
11 entrapment and it was argued in both parties' closing
12 arguments, never mentioned in opening arguments. I don't
13 see where it was actually raised as an affirmative defense
14 and the jury actually asked to be reinstructed on the
15 entrapment instruction on page 439 of the transcript.

16 The third issue is that trial counsel rendered
17 ineffective assistance for failing to require the State to
18 identify the specific portions of the trafficking statute
19 on which the trial was proceeding and failing to attack
20 the conspiracy portion of the statute. There we will be
21 addressing that it's our position that the deal actually
22 never took place so at most Mr. Newman was conspiring with
23 both the CI and an undercover officer, which we would
24 submit is not sufficient for him to be convicted of
25 trafficking, and that was not argued by counsel.

1 **THE COURT:** Okay.

2 **MS. BLANCHETTE:** Issue number four is trial counsel
3 rendered ineffective assistance for failing to investigate
4 and utilize necessary witnesses for the defense and for
5 failing to further cross-examine state witnesses during
6 pretrial and trial which resulted in the denial of
7 pretrial motions and a guilty verdict.

8 Alternatively, newly discovered evidence of witnesses
9 and testimony was not discoverable at the time of the
10 trial and there our primary issue that we will be going
11 into is I intend to call Joshua Ainsworth, who was the
12 confidential informant in this case. He did not testify
13 at trial. He is spoken about throughout trial and if
14 Your Honor would like I could give you references to that
15 now or while people are on the stand I could elicit that
16 as well, but he is discussed thoroughly from opening to
17 close and the primary argument made by defense counsel in
18 closing is where is Mr. Ainsworth, he's the one that knows
19 what really happened. So we intend to call him today and
20 go into the issue of why he was not called at the trial.

21 Your Honor, that covers the issues. I'm prepared to
22 call my first witness at this time unless there's anything
23 further I can provide to the Court?

24 **THE COURT:** No, that's fine. You can call your first
25 witness.

1 **MS. BLANCHETTE:** Your Honor, I would call Joshua
2 Ainsworth to the stand.

3 **THE COURT:** Okay.

4 (Whereupon, Joshua Ainsworth was duly sworn by the
5 Clerk of Court.)

6 **THE COURT:** If you would, give us your full name and
7 spell your last name.

8 **THE WITNESS:** Joshua Ainsworth, A-I-N-S-W-O-R-T-H.

9 **THE COURT:** Okay.

10 JOSHUA AINSWORTH,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MS. BLANCHETTE:

14 Q. Mr. Ainsworth, I'm Tricia Blanchette. We have
15 previously met; is that correct?

16 A. Yes, ma'am.

17 Q. Okay. And I just want to ask you a little bit about
18 the incident that we're here about today that happened on
19 June 5, 2011, and then we're gonna talk about how it is
20 that you came to be here to testify today, okay?

21 A. Okay.

22 Q. Mr. Ainsworth, at the time of the bust buy that we're
23 here about today on June 5th of 2011, had you been working
24 with Lexington County authorities as an under -- or as a
25 confidential informant?

1 A. Yes, ma'am.

2 Q. And how was it that you came to start working as a
3 confidential informant?

4 A. They approached me and asked me to.

5 Q. And was that just because you were walking on the
6 street or why did they approach you and ask you to be a
7 confidential informant?

8 A. I'm not sure what made them approach me and ask me.

9 Q. Okay. Did you have any pending charges at that time?

10 A. Yes, ma'am.

11 Q. Okay. And what type of charges did you have?

12 A. Bank fraud.

13 Q. Okay. And when they approached you and asked you,
14 what -- what was the purpose? Who was it that you started
15 assisting them with?

16 A. Dana Merritt.

17 Q. Okay. And can you explain who Dana Merritt is?

18 A. He's a guy I met through Benji.

19 Q. Okay. And when you say Benji, do you mean Mr. Newman?

20 A. Yes, ma'am.

21 Q. And you call him Benji, so that's how you will
22 reference him today?

23 A. Yes, ma'am.

24 Q. Okay. And you're doing a pretty good job, but just
25 make sure we talk one at a time because the court reporter

1 right there can only take one of us down at a time, okay?

2 A. All right.

3 Q. So you began working with Lexington County and the
4 primary target, for lack of better words, was Dana Merritt;
5 is that correct?

6 A. Yes. Yes, ma'am.

7 Q. Okay. And at some time did you indicate to them that
8 you no longer wanted to work with them?

9 A. Yes, ma'am.

10 Q. Could you, please, explain?

11 A. I just let them know that I was done helping them,
12 done working with them, and the day after that three --
13 well, two narcotics agents picked me up from my house, the
14 third agent met us in the woods off of Industrial Drive
15 and they proceeded then to tell me that they would charge
16 me with conspiracy to traffic a bunch of cocaine and Agent
17 Setree told me that he'd been working for the department
18 twenty-five years and he would beat my ass, get fired and
19 draw his pension, you know, if I didn't continue helping.

20 Q. And so at that time did you continue to work with
21 Lexington County?

22 A. Yes, ma'am.

23 Q. Okay. And in -- kind of in relation, a timeframe,
24 how far before June 5th of 2011 was that?

25 A. It was just a few weeks. I couldn't give you an

1 exact date, but it was just a few weeks before the incident
2 at Benji's house whenever they had me in the woods.

3 Q. Okay. Let's talk a little bit about how things went
4 into play for what ultimately happened on June 5th of 2011.
5 Were you the one that was asked to contact Mr. Newman
6 regarding this potential deal of trading marijuana for
7 cocaine?

8 A. Yes, ma'am.

9 Q. Okay. And were you the one that initiated the
10 contacts with him?

11 A. Yes, ma'am.

12 Q. Okay. And how did you do that? Did you talk to him,
13 did you call him? How did you start talking to him about
14 it?

15 A. Agent Slice called me and told me he had fifteen
16 pounds of high grade marijuana and to call Benji and ask
17 if he wanted to swap it for cocaine and then he changed
18 it and said he had fifty pounds of regular marijuana.

19 Q. And both Agent Slice and Agent Setree testified at the
20 pretrial and trial in this case, as well as Agent Carver,
21 and do you recall who Agent Carver was?

22 A. Yes, ma'am.

23 Q. And who was Agent Carver?

24 A. He's the one that rode with me to Benji's house.

25 Q. Okay. And on page 242 specifically of the transcript,

1 Agent Carver says these calls between yourself and Benji
2 weren't recorded. Would you agree with that; that when
3 you were calling Benji they were not recording those?

4 A. Yes, they weren't.

5 Q. Okay. And so was it you calling Benji trying to set
6 up this deal or was he calling you? Who was kind of the
7 pursuer?

8 A. No, the agents were getting to me to call Benji.
9 Benji never called me and asked me for the marijuana. I
10 called him and, you know, presented the deal to him.

11 Q. Now at trial both -- and in pretrial both Agent Slice
12 and Agent Setree testified on numerous occasions that
13 Mr. Newman was very pushy. It was all supposed to be set
14 up for the 7th and he wanted it to happen on the 5th, so
15 everything had to get changed quickly. What was your
16 understanding of when it was supposed to take place and
17 who set the date?

18 A. The agents are the ones that set the date.

19 Q. And were you aware in your communications that you
20 had directly with Mr. Newman that he changed the date of
21 this transaction?

22 A. He didn't change the date.

23 Q. And so do you agree with their testimony that he
24 moved it from the 7th to the 5th?

25 A. No, that's not what happened.

1 Q. Now let's go to the day of the 5th. Take us through
2 kind of what happened that day once you meet up with law
3 enforcement.

4 A. They contacted me and asked me to get a car, so I
5 borrowed a vehicle from my cousin. I didn't have a
6 license or a vehicle at the time. We met at a -- behind
7 an orthopedics office in Three Fountains off of Main and
8 Church. They pulled up in two county vehicles. There
9 was two bags; one duffle bag and one bookbag. They placed
10 that in the vehicle I was driving and then Agent Slice
11 strapped a thing on my thigh and me and -- Nick is the
12 guy's name, I guess that's the Agent Carver, we got in the
13 vehicle that I borrowed from my cousin and drove to Benji
14 house.

15 Q. And let me stop you there. You mentioned you didn't
16 have a license. Did you tell that to law enforcement?

17 A. I told Brandon Slice that, yes.

18 Q. And it was your understanding that they were okay
19 with you operating that vehicle without a license?

20 A. Yes, ma'am.

21 Q. Okay. And Agent Slice testified pretrial about
22 searching your car. Did they search that car you had
23 borrowed?

24 A. No, ma'am.

25 Q. Now you said you drove to Benji. Were you being

1 followed by the law enforcement vehicles or kind of take
2 us through the convoy or how you guys got to Benji's
3 location.

4 A. I don't -- I don't know if we were being followed or
5 not. We just drove and, you know, went straight from that
6 place where they put the weed in the car and we drove
7 straight to Benji house.

8 Q. Okay. When you got to Benji's house, did you carry
9 either of the bags into the house?

10 A. Yes, ma'am.

11 Q. Which one did you carry?

12 A. The bookbag.

13 Q. Okay. And when you got in the house, what did you do
14 with the bookbag?

15 A. Set it on the floor.

16 Q. And they played a very lengthy recording at trial
17 where you can hear what happens in the house. Did you
18 ever see a drug transaction take place? And just to be
19 specific, did you ever see Mr. Newman exchange cocaine
20 for the marijuana that you-all brought into the house?

21 A. No, ma'am.

22 Q. And it's testified to that -- on Page 89, specifically
23 Line 23 of the transcript by Agent Carver, that Mr. Newman
24 gave him the drugs. Did you see Mr. Newman give Agent
25 Carver the drugs?

1 A. No, ma'am.

2 Q. And then later in the transcript --

3 MS. BLANCHETTE: And, Your Honor, may I approach the
4 stand? I do have an extra copy of the transcript just in
5 case anyone wants to reference it.

6 THE COURT: Sure.

7 BY MS. BLANCHETTE:

8 Q. Later on, and I believe it's on page 110, the issue
9 is being discussed about what happened to the drugs because
10 they couldn't seem to find the drugs after the bust took
11 place and Agent Carver says that the informant could have
12 put them in the bookbag or knocked them in there. Did you
13 ever put the cocaine in the bookbag or knock the drugs into
14 the bookbag?

15 A. The cocaine was never even brought out before the door
16 was knocked down, so there's no way I put the cocaine in
17 the bookbag.

18 Q. What happened once the door got knocked down? Kind of
19 take us through everything you heard and saw.

20 A. Well, it happened real fast, but Benji ran out the
21 back door and then the agents threw me on the floor in the
22 kitchen and they handcuffed me and then took me outside.

23 Q. How long do you think you were in the house?

24 A. Just a matter of minutes. A minute or two. As soon
25 as they cuffed me, they took me outside.

1 Q. Okay. When they came in the house, did you hear
2 anyone yelling search warrant?

3 A. Yes, ma'am.

4 Q. Okay. And so it would be your understanding that they
5 had had a search warrant at that time?

6 A. Yes, ma'am.

7 Q. Could you see anything while you were still in the
8 house?

9 A. No, ma'am. It happened really fast.

10 Q. Okay.

11 A. I wasn't in there long after they kicked the door
12 down.

13 Q. Okay. So where at trial they testify and they play
14 the -- they just have the audio, they don't have the video,
15 where they're very concerned and looking for the drugs,
16 were you in there when they realized they couldn't find the
17 drugs?

18 A. No, ma'am.

19 Q. Okay. So you were already out of the house at that
20 time?

21 A. Yes, ma'am.

22 Q. Once you were out of the house, who took you into
23 their custody?

24 A. Brandon Slice.

25 Q. Okay. And then what happened -- where did Mr. Slice

1 take you after that? Or Agent Slice. I apologize.

2 A. We got straight in his -- whatever he was driving, it
3 was an SUV, and left. We got maybe like a half a mile or
4 a mile down the road and he pulled over. The phone rang
5 and he pulled over and he started cussing and he said that
6 the cocaine was fake and then we proceeded to another one
7 of Benji properties.

8 Q. And was it your understanding they were executing
9 search warrants at all his properties?

10 A. I didn't know, but, yes -- I'm sorry. I didn't know
11 they were, but, yes, ma'am, they were. Whenever we pulled
12 up, then I saw them knock the door down.

13 Q. So you went and attended the other search warrants?

14 A. At both houses, yes, ma'am.

15 Q. Okay. And I want to take you back to something you
16 said about him pulling over and you hearing that the drugs
17 were fake. About how far you were from the house when that
18 happened?

19 A. We were only like a half a mile or a mile. We were
20 still on Boiling Springs Road, so. I mean, it's not far.

21 Q. Okay.

22 A. Just a minute or two down the road.

23 Q. So within a minute or two it was your understanding
24 that they had the drugs in their possession and had already
25 determined that they weren't real drugs?

1 A. Yes, ma'am.

2 Q. After you went to the other locations, then what
3 happened?

4 A. He asked me -- they were gonna take me to the jail
5 and book me in and then bond me out or whatever, I'm not
6 sure how -- exactly what they were gonna do, and I just
7 decided not to go through with that and they carried me
8 back to the house where it all started at to get the
9 vehicle that I had drove over there.

10 Q. And then where did you go from there?

11 A. Home.

12 Q. So you -- you just left after all this had transpired?

13 A. Yes, ma'am.

14 Q. Okay. And you were driving a vehicle without a
15 license?

16 A. Yes, ma'am.

17 Q. Okay. What happened thereafter? Did you continue
18 to talk with law enforcement, did you do any further
19 operations with them?

20 A. No, ma'am. I got a call from Agent Slice not long
21 after this happened and he told me that I had a ten
22 thousand dollar hit on my head and that he would meet me
23 and give me money so I could leave town and him and a lady
24 met me an ATM and they gave me a thousand dollars and I
25 left and went to Georgia.

1 Q. Okay. And then did you stay out of the state of South
2 Carolina for some time?

3 A. Yes, ma'am.

4 Q. And was it your understanding that Mr. Newman's bond
5 had actually been denied because of issues of threatening
6 witnesses such as yourself?

7 A. Yes, ma'am.

8 Q. Okay. And that's what they were telling you about the
9 hit?

10 A. Yes, ma'am.

11 Q. Okay. Now once you left the State, how long until you
12 returned back to South Carolina?

13 A. Probably about a year or so.

14 Q. Okay. And have you ever tried to look into this
15 matter or raise any concerns regarding your involvement
16 with law enforcement in this case?

17 A. Yes, ma'am.

18 Q. Okay. And what have you done?

19 A. I filed a complaint about being threatened. This was
20 before the trial ever happened. I filed a complaint with
21 the Attorney General's office online and I also filed a
22 complaint online with the Department of Justice. I got a
23 response back from the Attorney General's office, but I
24 can't remember exactly what it said. I was supposed to go
25 to the sheriff's department and start the complaint, but I

1 just never went through with it.

2 Q. Okay. And let's talk about at the time of trial.

3 Mr. Newman was tried in this case on October 16th and 17th
4 of 2012. Were you back in the state of South Carolina at
5 that time?

6 A. Yes, ma'am. I was in the Department of Corrections.

7 Q. Okay. And did you ever prior to trial hear from
8 anybody on Mr. Newman's behalf working with Theo Williams
9 or his office?

10 A. No, ma'am.

11 Q. Okay. And if anybody on behalf of the defense would
12 have approached you, would you have been willing to speak
13 to them?

14 A. Yes, ma'am.

15 Q. Okay. And would you have been willing to tell them
16 the information that you've told us today?

17 A. Yes, ma'am.

18 Q. Okay. And did anybody from the solicitor's office
19 meet with you prior to the trial?

20 A. No, ma'am.

21 Q. Now on the day of the trial, October 16th, where were
22 you?

23 A. At this courthouse in the solicitor's office.

24 Q. Okay. And was it your understanding you were gonna
25 be called as a witness?

1 A. Yes, ma'am.

2 Q. Okay. And did you ever meet with anybody that day to
3 prepare you to testify?

4 A. No, ma'am.

5 Q. What did you do that day?

6 A. I sat here for a while and then they carried me to
7 the county jail.

8 Q. Okay. And did you ever hear from anybody from the
9 defense, from Mr. Williams or Mr. Newman while you sat up
10 here?

11 A. No, ma'am.

12 Q. Okay. And then what transpired? Were you ever called
13 as a witness in the trial?

14 A. No, ma'am. I just stayed at the county jail for
15 either two or three days and then they carried me back to
16 the Department of Corrections.

17 Q. Okay. If you would have been notified that you were
18 needed as a witness for the defense, would you have been
19 willing to testify for the defense?

20 A. Yes, ma'am.

21 Q. Okay. And I apologize if I've already asked you that.

22 A. That's okay.

23 Q. Now, Mr. Ainsworth, let's talk a little bit about how
24 it is that you came to be here today. Do you recall
25 receiving a letter from myself contacting you?

1 A. Yes, ma'am.

2 Q. Okay. And you agreed to meet with me; is that
3 correct?

4 A. Yes, ma'am.

5 Q. And we sat down and you just told me many of the facts
6 that you've said today; is that correct?

7 A. Yes, ma'am.

8 Q. And then, thereafter, did you agree to meet with Pete
9 Skidmore, who is an investigator working on behalf of
10 Mr. Newman?

11 A. Yes, ma'am.

12 Q. Okay. Have I ever in our interactions ever made you
13 any promises or threats or anything to get you here to
14 testify today?

15 A. No, ma'am.

16 Q. And you're here under subpoena; is that correct?

17 A. Yes.

18 Q. Okay. And has Mr. Newman made you any promises or
19 done anything to get you here to testify today?

20 A. No, ma'am.

21 Q. Are you testifying to the facts that you had been
22 willing to testify to at the time of Mr. Newman's trial?

23 A. Yes, ma'am.

24 **MS. BLANCHETTE:** Your Honor, if I could I beg the
25 Court's indulgence just one moment.

1 Q. Okay. And Benji was supposed to provide the cocaine
2 in exchange, right?

3 A. Yes, ma'am.

4 Q. You didn't know where that cocaine came from, did you?

5 A. No, ma'am.

6 Q. Okay. Were you friends with Benji or acquaintances
7 with Benji before this happened?

8 A. We were friends.

9 Q. How many years do you think you've known him?

10 A. I've known him and his family my whole life.

11 Q. Okay. Do you visit -- did you visit with him before
12 this? I mean, were y'all social together?

13 A. Yeah, we hung out every now and then. Not every day
14 or every weekend, but every now and then.

15 Q. Okay. So did you have any knowledge of any drug
16 operations that Benji was running?

17 A. No, ma'am.

18 Q. Had you dealt with him before?

19 A. No, ma'am.

20 Q. Okay. Did you go on an arranged buy with Benji a
21 couple of days or a couple of weeks before this bust
22 happened?

23 A. I'm not sure when it was, but, yes, twice. Two prior
24 times.

25 Q. Okay. And did Nick Carver go with you both those

1 times?

2 A. No, ma'am, neither time.

3 Q. Okay. Did you drive yourself to those two prior
4 busts?

5 A. Yes, ma'am.

6 Q. Were they -- did you know -- did you have a wire for
7 those?

8 A. No, ma'am.

9 Q. Okay. And you were trying to work off a number of
10 fraud charges, bank fraud charges, with Lexington, right?

11 A. Yes, ma'am.

12 Q. And you were in jail at the Lexington County Detention
13 Center during Benji's trial?

14 A. I was brought to the Lexington County Detention Center
15 from the Department of Corrections.

16 Q. And wasn't Benji also at the Lexington County
17 Detention Center at that time?

18 A. If he was, I didn't see him.

19 Q. Okay. Did you get picked up in Columbia a week or so
20 after Benji's trial by law enforcement?

21 A. No, ma'am.

22 Q. Okay. How many cases would you say that you worked
23 as a confidential informant in for Lexington?

24 A. Dana's and Benji's. That's it.

25 Q. Okay. Have you had warrants in Georgia?

- 1 A. Have I had warrants in Georgia?
- 2 Q. Yes.
- 3 A. Yes, ma'am.
- 4 Q. Have you had them in Tennessee?
- 5 A. Yes, ma'am.
- 6 Q. Have you had some in North Dakota?
- 7 A. Yes, ma'am.
- 8 Q. Have those all been after Benji's trial?
- 9 A. Yes, ma'am.
- 10 Q. Did you receive a threat from Benji prior to
- 11 testifying at his trial?
- 12 A. No, ma'am.
- 13 Q. Who were the threats coming from that you were --
- 14 testified to just a minute go?
- 15 A. The threat I heard, Agent Slice told me that I had a
- 16 ten thousand dollar bounty on my head. I don't know where
- 17 he heard it, but that's who I heard it from was the
- 18 sheriff's department.
- 19 Q. Okay. And you said that you skipped town after the
- 20 bust because law enforcement came to you and offered you
- 21 some money and that you were out of town for about a year,
- 22 right?
- 23 A. Roughly a year. I can't, you know, testify to exactly
- 24 how long I was gone because I -- I mean, I don't know what
- 25 day I left and what day I came back.

1 Q. Okay.

2 A. I came back in custody. I didn't come back on my own.

3 Q. Okay. Where did you come back from?

4 A. I was arrested in Georgia.

5 Q. Okay.

6 MS. SCRANTOM: If I may have a moment to confer with
7 co-counsel?

8 THE COURT: Sure.

9 BY MS. SCRANTOM:

10 Q. Do you know, Mr. Ainsworth, how Dana Merritt knew
11 Mr. Newman?

12 A. No, ma'am.

13 Q. You know Dana Merritt through Mr. Newman, correct?

14 A. Yes, ma'am.

15 Q. Did you ever question why law enforcement was asking
16 you to get into this predicament with Mr. Newman?

17 A. Yeah, I questioned it when I told them I didn't want
18 to do it anymore.

19 Q. Okay. But you did it to work off your charges?

20 A. That was -- at the start, that's what I was gonna do,
21 yes.

22 Q. Okay.

23 A. But I -- I told them that I didn't want to do it
24 anymore, I wanted to back out.

25 Q. So ultimately you ratted out your friend to work off

1 your fraud charges?

2 A. Yes, ma'am.

3 Q. Okay.

4 MS. SCRANTOM: Thank you. No further questions.

5 THE COURT: Anything on redirect?

6 MS. BLANCHETTE: No, Your Honor.

7 THE COURT: Okay. You can be excused. Thank you.

8 THE WITNESS: Thank you.

9 (Witness excused.)

10 MS. BLANCHETTE: And, Your Honor, as I stated, he's
11 here under subpoena with transport officers from Evans. I
12 just ask that they be released at this time.

13 THE COURT: Any objection?

14 MS. SCRANTOM: No objection.

15 THE COURT: Okay. Thank you.

16 MS. BLANCHETTE: Your Honor, I call Pete Skidmore to
17 the stand.

18 THE COURT: Okay.

19 (Whereupon, Peter G. Skidmore was duly sworn by the
20 Clerk of Court.)

21 PETER G. SKIDMORE,

22 having been duly sworn, testified as follows:

23 DIRECT EXAMINATION

24 BY MS. BLANCHETTE:

25 Q. Could you, please, state your name on the record?

1 A. Peter G. Skidmore.

2 Q. And, Mr. Skidmore, what is your profession?

3 A. I'm a licensed private investigator.

4 Q. And were you retained by Mr. Newman to assist with the
5 preparation and investigation of his PCR case?

6 A. I was.

7 Q. And as part of that, did I request that you speak with
8 a Mr. Joshua Ainsworth?

9 A. I did.

10 Q. And how many times did you go and speak with him in
11 person?

12 A. I believe three.

13 Q. Okay. And you were in the courtroom today for his
14 testimony; is that correct?

15 A. Yes.

16 Q. Okay. When you met with Mr. Ainsworth over those
17 three meetings, was he willing to speak to you?

18 A. Very much so.

19 Q. Okay. And just kind of take us through how those
20 meetings took place. Did you guys just sit down and talk
21 and he shared details with you or what happened?

22 A. The first time he was at like a work release center
23 and we sat down and talked and he wasn't very comfortable
24 because of the movement of people coming in and out and we
25 were on a very short, limited time, but he had given me

1 enough information and I thought it would be very helpful
2 to come back and talk to him later and then he was changed
3 to a Level 2, I believe, institution and we had more
4 privacy and a conference room.

5 Q. Okay. And so then you spoke to him again and went
6 through more details; is that correct?

7 A. Yes.

8 Q. Okay. And then did you just meet with him again last
9 week prior to this hearing?

10 A. I did, yes.

11 Q. Okay. And the testimony you heard today, was that
12 consistent with the information that he shared with you
13 during your meetings?

14 A. Very much so.

15 Q. Okay. And, Mr. Skidmore, do you assist in preparing
16 cases that are getting ready for trial?

17 A. I do.

18 Q. Okay. And if you had been retained to assist in
19 getting -- with Mr. Newman's case before trial, would you
20 have been willing to speak with -- locate and speak with
21 Mr. Ainsworth?

22 A. Yes.

23 Q. Okay. And the information that you ascertained from
24 Mr. Ainsworth as part of this PCR, in your experience is
25 that information you would have told the defense attorney

1 that you thought could be helpful to their case?

2 A. Yes, very much so.

3 Q. Okay. Mr. Skidmore, is there anything else regarding
4 your interactions and location of Mr. Ainsworth that you'd
5 like to share with the Court?

6 A. Not at this time. He was very helpful.

7 **MS. BLANCHETTE:** Your Honor, I have no further
8 questions.

9 **THE COURT:** Okay.

10 Yes, ma'am.

11 CROSS-EXAMINATION

12 BY MS. SCRANTOM:

13 Q. Good morning, Mr. Skidmore.

14 A. Good morning. How are you?

15 Q. Good. Thank you. How are you?

16 A. Good. Thanks.

17 Q. You were retained directly essentially by Mr. Newman
18 for your services today?

19 A. Yes.

20 Q. Do you have any personal working knowledge of the buy
21 bust that occurred in this case?

22 A. Just through going through the transcripts and the
23 testimony.

24 Q. Okay. So you were not part of any law enforcement
25 agency at the time that that occurred?

1 A. No.

2 Q. Okay.

3 MS. SCRANTOM: I think those are all the questions
4 that I have for you.

5 THE WITNESS: Thank you.

6 THE COURT: Anything else?

7 MS. BLANCHETTE: Nothing further, Your Honor.

8 THE COURT: Okay. Thank you.

9 THE WITNESS: Thank you.

10 (Witness excused.)

11 MS. BLANCHETTE: Your Honor, I would call Theo
12 Williams to the stand.

13 THE COURT: Okay.

14 (Whereupon, Robert Theodore Williams, Senior, was
15 duly sworn by the Clerk of Court.)

16 ROBERT THEODORE WILLIAMS, SENIOR,
17 having been duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MS. BLANCHETTE:

20 Q. Could you, please, state your name for the record?

21 A. It's Robert Theodore Williams, Senior.

22 Q. And, Mr. Williams, I apologize if I've called you
23 Theo, but do you go by Theo Williams?

24 A. I do.

25 Q. Okay. And what is your profession?

1 A. I'm an attorney.

2 Q. Okay. And how long have you been an attorney?

3 A. A little over forty-one years. Since --

4 Q. And during those -- I'm sorry.

5 A. I was just gonna say November of 1976, so whatever
6 that is. I think it's forty-one. It could be going on
7 forty-two.

8 Q. And during those forty-one years, what has been the
9 primary focus of your practice?

10 A. Since 1997 it's been criminal practice.

11 Q. Okay. So at the time that you represented Mr. Newman,
12 you primarily were focussing on criminal cases?

13 A. I did almost nothing but criminal then.

14 Q. Okay. And do you recall your representation of
15 Mr. Newman?

16 A. I do.

17 Q. How did it come to be that you represented him?

18 A. I've known Benji for a while. I may have represented
19 Benji on some other things before that, if I remember
20 right, but I knew who Benji was. I knew Benji, I knew his
21 friends.

22 Q. Okay. And did he come and meet with you or did
23 someone else retain you on his behalf; do you remember?

24 A. I don't remember.

25 Q. Okay. And do you recall going over the discovery in

1 this case?

2 A. I do.

3 Q. And do you recall doing that with Mr. Newman?

4 A. I did.

5 Q. Okay. Specifically, do you recall the video in this
6 case? Or, I'm sorry, the audio that was supposed to be a
7 video.

8 A. Yeah. I was gonna say now I don't remember the video.

9 Q. That wasn't a trick question. I promise. Do you
10 remember going over the audio that was -- they had said
11 they took a video, but it just was an audio. Do you
12 remember going over that audio with Mr. Newman?

13 A. I don't think they produced the audio for his hearing
14 at the time. I don't think Benji heard the audio.

15 Q. Okay. So would it be fair to say he may have heard
16 it for the first time at trial?

17 A. True, because I may have heard it right then. There
18 was -- there was a lot of discussion between them producing
19 things at the time.

20 Q. Correct. And since we're just here on the PCR, I'm
21 not gonna go through all of the record. The record shows
22 the arguments that you made specifically regarding that
23 matter. I do want to ask you about one other thing, a
24 pretrial matter. Did you also have the opportunity to
25 represent a Dana Merritt that we just heard mentioned here

1 in the courtroom?

2 A. I did.

3 Q. Okay. And how was it that you represented both him
4 and Mr. Newman?

5 A. They both signed waivers in terms of me representing
6 both of them and Mr. Merritt was -- was not a witness
7 against Dana (sic).

8 Q. Okay.

9 **MS. BLANCHETTE:** Your Honor, may I approach the
10 witness? Yes.

11 **THE COURT:** Yes, ma'am.

12 **BY MS. BLANCHETTE:**

13 Q. Mr. Williams, you just referenced waivers. I was
14 gonna see if you could identify that for the record?

15 A. Yes, I do.

16 Q. Okay. And what does that appear to be?

17 A. It appears to be a waiver.

18 Q. Okay. And does that appear to be signed by
19 Mr. Benjamin Newman?

20 A. It does.

21 Q. Okay. And would that have been something that was
22 part of your file in this case?

23 A. It would have been.

24 **MS. BLANCHETTE:** Your Honor, at this time I would
25 move this in as -- I believe I'm on Applicant's Number 1.

1 **THE COURT:** I assume no objection?

2 **MS. SCRANTOM:** No objection.

3 (Applicant's Exhibit Number 1, a waiver, was marked
4 and admitted into evidence.)

5 BY MS. BLANCHETTE:

6 Q. And, Mr. Williams, I'm gonna hand you another piece
7 of paper and see if you can identify that for us?

8 A. I do.

9 Q. And what does that appear to be for the record?

10 A. It's a waiver signed by Dana.

11 Q. Okay.

12 **MS. BLANCHETTE:** Your Honor, at this time I would
13 move the handwritten waiver of Dana Merritt as Applicant's
14 Number 2.

15 **THE COURT:** Any objection?

16 **MS. SCRANTOM:** Your Honor, I'm not sure that we have
17 established whether this would be part of Benji's case file
18 in this case.

19 **MS. BLANCHETTE:** I can ask that question, Your Honor.

20 **THE COURT:** Okay. Yeah, ask that.

21 BY MS. BLANCHETTE:

22 Q. Mr. Williams, was this contained in your file in
23 Mr. Newman's case that we're here for today?

24 A. I don't know whose file it was in. It may have been
25 in Benji's, it may have been in Dana's.

1 Q. Did you provide -- did I come and meet with you and
2 you provided me a complete copy of your file?

3 A. I did.

4 Q. Okay. And would this have been contained in the file
5 that you turned over to my office?

6 A. It may have been.

7 Q. Okay.

8 MS. BLANCHETTE: Your Honor, that's about the best
9 that I can offer.

10 THE COURT: Okay. Over your objection I'll allow it
11 and I'll review it.

12 (Applicant's Exhibit Number 2, a waiver, was marked
13 and admitted into evidence.)

14 BY MS. BLANCHETTE:

15 Q. Mr. Williams, do you recall being contacted by the
16 solicitor's office to see if Mr. Merritt would cooperate
17 against Mr. Newman?

18 A. No.

19 Q. I'm gonna show you this document and see if that
20 refreshes your memory.

21 A., Okay.

22 Q. Do you recall being contacted by the solicitor's
23 office to see if Mr. Merritt would cooperate against
24 Mr. Newman?

25 A. I recall this as being a -- an e-mail, but I don't

1 think they ever called me about that.

2 Q. Okay.

3 A. Because for several reasons why they wouldn't have
4 called me about that. Mr. Merritt was not gonna testify
5 against Benji to begin with.

6 Q. Okay.

7 **MS. BLANCHETTE:** Your Honor, at this time I would
8 move the e-mail that has been referenced in his testimony
9 as Applicant's Number 3.

10 **THE COURT:** Any objection?

11 **MS. SCRANTOM:** No objection.

12 **THE COURT:** Okay. Without objection.

13 (Applicant's Exhibit Number 3, an e-mail, was marked
14 and admitted into evidence.)

15 BY MS. BLANCHETTE:

16 Q. And, Mr. Williams, just to be clear, I'm not
17 attempting to ask you questions about a conflict of
18 interest, just trying to show how the players in this case
19 became together.

20 A. Okay.

21 Q. So the last thing I'm gonna show you here is an
22 affidavit of Dana Merritt and ask if you can identify that
23 for the record?

24 A. I do.

25 Q. Okay. And was that -- would that have been contained

1 in your file on Mr. Newman's case?

2 A. It would have been and it looks like something that
3 somebody on my staff prepared, maybe Ben prepared, to make
4 sure that there was no conflict in regards to whether or
5 not Dana testified or didn't testify.

6 **MS. BLANCHETTE:** Your Honor, at this time I would
7 move the affidavit of Dana Merritt dated July 6, 2012, as
8 Applicant's Number 4.

9 **THE COURT:** Any objection?

10 **MS. SCRANTOM:** No objection.

11 **THE COURT:** All right. Without objection.

12 (Applicant's Exhibit Number 4, an affidavit, was
13 marked and admitted into evidence.)

14 BY MS. BLANCHETTE:

15 Q. And, Mr. Williams, you've already made it clear
16 Mr. Merritt did not intend to cooperate against Mr. Newman.

17 A. He absolutely was not going to.

18 Q. And once you informed the State of that, did it just
19 end there?

20 A. I don't know if the State pushed me on anything. The
21 only thing I remember from the State was just them sending
22 me the e-mail. I don't think they called me up and said
23 well, are you sure, Theo, he's not gonna testify? If
24 there was anything that was said, it would have been a
25 causal conversation from me to them saying I don't think

1 Dana Merritt's gonna testify against him. That's my
2 understanding. I think they knew he was not gonna testify.

3 Q. Okay. Now you said you didn't have the recording, but
4 did you feel that you had all the other discovery leading
5 up to the time of trial?

6 A. You never know if you have all the discovery when it
7 comes to solicitors turning things -- well, I shouldn't
8 say that. When it comes to before trial because half the
9 time you always -- they always pull something else out.

10 Q. Okay. Did you have a private investigator who worked
11 on this case?

12 A. No.

13 Q. Okay. Did you do any type of independent
14 investigation yourself?

15 A. I talked to Benji.

16 Q. Okay. Did you speak to any other witnesses, law
17 enforcement officers, anyone else involved in the case?

18 A. No, I knew what happened.

19 Q. Okay. Did you ever attempt to speak to Mr. Ainsworth?

20 A. No, and for many reasons.

21 Q. Would you like to explain?

22 A. I can. My impression of Mr. Ainsworth was that you
23 could not believe anything he said. I knew because I
24 knew -- Mr. Ainsworth had spent quite some time running
25 from state to state to state to state. He had charges

1 all over the place. Al Holcomb had him on bond in Horry
2 County and Al was trying to secure the whereabouts of
3 Mr. Ainsworth and was somewhat upset with law enforcement
4 because as I understand it law enforcement was facilitating
5 Mr. Ainsworth's not being around, and that's obviously
6 clearly a hearsay thing because that's based on what I've
7 been told by the bonding company because there was --
8 there was pressure to find Mr. Ainsworth by the bonding
9 company. And I -- I can go on.

10 Q. Now at trial you -- and I'm gonna get into this in a
11 little bit more detail, but both Agent Slice and Agent
12 Setree say that they had seen him in the courthouse that
13 week and you asked them specifically when they'd seen him.
14 Were you aware that he was at the courthouse during the
15 time of trial?

16 A. I didn't know that until the day -- probably the day
17 of trial because he was like hard to find. But then I'd
18 also talked -- I think I talked to Benji about that and
19 we were not interested in putting up Mr. Ainsworth as a
20 witness because he set this whole thing in motion and was
21 doing it just to cover himself.

22 Q. And let me ask you this. You weren't aware that he
23 was incarcerated in the state of South Carolina prior to
24 trial?

25 A. I thought that he was in -- he had been in

1 Philadelphia or -- and I think he had been in Tennessee,
2 he had been arrested at some point in time in Georgia. He
3 had been sighted at -- I want to say it was like North
4 Dakota or something like that. And the way I know all
5 these things is because I knew the bonding company was
6 looking for him and had had several conversations with the
7 bonding company about where the heck he was.

8 Q. But you weren't aware that he was incarcerated in the
9 state of South Carolina?

10 A. No.

11 Q. Okay. Since we're speaking about Mr. Ainsworth, let's
12 just explore that issue a little bit further. I want to
13 take you through the transcript and I've provided a copy
14 there if you'd like it for your reference. During the
15 State's opening they had made no mention of Mr. Ainsworth,
16 but if you look at page 159 of the transcript, beginning
17 on line 2, there you begin speaking about Mr. Ainsworth
18 and you devote two paragraphs there about how Mr. Ainsworth
19 is the alleged confidential informant.

20 A. That's right.

21 Q. Okay. Then throughout the trial, as I already
22 mentioned, Agent Slice says he saw him in the hallway that
23 week, but Agent Setree when he's on the stand says that,
24 you know, he was just the middleman, and that's on page
25 301. He also explains about how he had seen him that week.

1 A. (Nods head.)

2 Q. Did you feel like at trial they were playing down the
3 involvement of Mr. Ainsworth?

4 A. Yes, and I was trying to force them into calling
5 Mr. Ainsworth because I knew that everything he said was
6 basically gonna be subject to ridicule, if you will, so it
7 appeared to be a better trial strategy to have him talked
8 about as being there as opposed to me, if I could have
9 found him, and putting him up there.

10 Q. An issue becomes -- a major issue at the trial, would
11 you agree, was how did this cocaine get from supposedly
12 Mr. Newman's possession into this bookbag that the Court
13 of Appeals ultimately found was in plain view. Was that a
14 primary issue at trial?

15 A. It was an issue at trial.

16 Q. Okay. And do you recall Agent Carver on page 110,
17 line 10, specifically, saying that the informant could have
18 been the one that put it in the bookbag, that's how it got
19 there?

20 A. And that's why we talked about that he wasn't there
21 and why didn't they present him and all this other stuff.

22 Q. Would it have been helpful to your defense to show
23 that this deal actually never took place, there was no
24 exchange of the cocaine for the marijuana?

25 A. Are you asking me should I have changed the facts or

1 what are you asking me?

2 Q. I will rephrase my question if that's what you're
3 responding to. What I'm asking, Mr. Williams, is this.
4 Was it any part of your defense that no exchange took
5 place, no actual exchange took place between Mr. Newman
6 and law enforcement?

7 A. No, because that was not believable.

8 Q. And why was that not believable?

9 A. Because there had been a substantial amount of
10 conversation, if I remember right, about how it's cooked
11 and how it's done that, and there clearly -- there clearly
12 had been something going on with the cocaine and the
13 marijuana and I didn't think a jury would buy that.

14 Q. Did you think a jury would buy that he was just
15 conspiring to have a drug deal and the actual drug deal
16 itself never took place?

17 A. I guess a jury could have bought that.

18 Q. Did you ever ask the State to clarify which portion
19 of the trafficking statute they were going forward on?

20 A. I don't remember.

21 Q. Okay. Did you ever move to quash the indictments
22 because of the vagueness of the trafficking statute and
23 due to the fact that we have established case law in
24 South Carolina that you can't conspire with only a State
25 informant or someone working for the State?

1 A. No.

2 Q. Okay. Is there any reason that you didn't do that in
3 this case?

4 A. I thought based on the facts that it wouldn't be --
5 it wouldn't be sufficient to get it quashed.

6 Q. Now I'm gonna ask you a little bit more -- going back
7 to Mr. Ainsworth, and I apologize if I'm jumping around,
8 but I'm trying to follow along here with you, too.

9 A. Okay.

10 Q. When you guys get to closing arguments -- and I'm
11 sorry, I'm from the midwest, I say "you guys". When both
12 parties get to closing arguments, the State on page 397,
13 beginning on line 10 through 398, goes into a long
14 explanation of why they didn't call, and I'm quoting the
15 State, the dirt bag, cockroach Ainsworth, and then
16 thereafter at the conclusion, and if I can I beg the
17 Court's indulgence while I turn there very quickly, after
18 going through and greatly discrediting or attempting to
19 argue and discredit Mr. Ainsworth, referencing you on page
20 398, the solicitor says you know why Mr. Williams is going
21 to harp on him, because he'd rather -- Mr. Williams is a
22 good guy, he'd rather beat up on a dirt bag than on cops
23 he knows that are good.

24 Is there any reason you didn't object to that line of
25 argument?

1 A. I didn't think it -- I didn't think it merited an
2 objection in the middle of his closing argument.

3 Q. Did it strike you as odd the State saying that their
4 CI who set up this whole deal, who is such an integral
5 part of the deal is a dirt bag in making this argument
6 against their own confidential informant?

7 A. Well, it didn't strike me as odd because -- I mean,
8 I think it's -- I think it's pretty much true, but I
9 didn't think -- but I thought that the jury would be more
10 overcome with the fact that the whole thing began with him
11 and that he was working for the police while they didn't
12 put him up there to testify.

13 Q. And that kind of lends itself right into your
14 closing argument. On page 404, line 15, you say that
15 Mr. Ainsworth is the most important person in the case.

16 A. (Nods head.)

17 Q. On page 405, you go on though to say that
18 Mr. Ainsworth is key to the issue of entrapment. Did you
19 truly believe what you were saying, that he was key to the
20 issue of entrapment?

21 A. Well, if -- you're asking me my personal beliefs or
22 are you asking my trial strategy?

23 Q. I'm asking -- I'm sorry if the word "belief" was
24 confusing. What was your strategy --

25 A. It's not confusing, but I don't think you want the

1 answer.

2 Q. What was the strategy behind that argument saying he
3 was the key to the entrapment?

4 A. I wanted the jury to have reasonable doubt in regards
5 to the little holes that I was trying to throw out there,
6 the many issues that seemed like it could have been
7 presented better if the State had really wanted to prove
8 that my client was guilty.

9 Q. Would you agree that entrapment is an affirmative
10 defense?

11 A. It is.

12 Q. And did you ever raise entrapment prior to closing
13 argument?

14 A. No, because I didn't think that we could actually
15 prove entrapment because they had been looking at Benji
16 for quite a while.

17 Q. And then why did you decide to raise it in your
18 closing argument?

19 A. So that I could -- so that I hoped that the jury
20 would buy that in all honesty, that maybe they would think
21 that this guy who was not here was the one that set him up
22 and he really wasn't gonna do anything if this guy hadn't
23 set him up.

24 Q. If Mr. Ainsworth though was the key to the entrapment
25 defense, wouldn't you have had to call him as a witness?

1 A. True.

2 Q. Now on page 405, continuing on line 20, you say I
3 don't know what Josh Ainsworth is going to say. I know
4 that he's the one that got everything started. You've
5 already conceded that you did not look into speaking with
6 Mr. Ainsworth before trial; is that correct?

7 A. That is true.

8 Q. So you truly did not know what he was going to say?

9 A. Well, I actually did know what Ainsworth was gonna
10 say. He was gonna say what is most beneficial to Josh
11 Ainsworth at the time.

12 Q. And what do you base that opinion upon?

13 A. His previous history and what he's done. So he had
14 actually had several conversations with other people
15 explaining his disappearance and I can go into that if
16 you want me to.

17 Q. That's sufficient. I'll ask you another question.
18 You say on page 406, and you'd discussed this already,
19 that the police didn't even say they couldn't find
20 Mr. Ainsworth, they didn't give any explanation for why
21 he wasn't there, and they both say they -- you have two
22 officers saying they just saw him.

23 A. (Nods head.)

24 Q. So you were aware that he was in and around the
25 courthouse at the time of Mr. Newman's trial?

1 A. I had been told he was at the courthouse by the
2 solicitor and I asked the solicitor if he was gonna call
3 him and he said no, we're not.

4 Q. And when did you find out they weren't gonna call
5 Mr. Ainsworth?

6 A. That day.

7 Q. And when you say that day, would that have been the
8 15th, 16th or 17th?

9 A. In the midst of the trial.

10 Q. Okay. And finally, the last question about your
11 closing argument and Mr. Ainsworth, on page 411 you argue
12 that the State wants the jury to believe that Mr. Newman
13 changed the date, but Mr. Ainsworth knows he's the one who
14 made the phone calls. Again, is your reasoning the same
15 for why you didn't call Mr. Ainsworth to testify to those
16 details?

17 A. Sure.

18 Q. Okay.

19 **MS. BLANCHETTE:** Your Honor, if I could beg the
20 Court's indulgence one moment?

21 **THE COURT:** Sure.

22 **BY MS. BLANCHETTE:**

23 Q. Did you think it was interesting in the case that
24 the calls between Mr. Ainsworth and Mr. Newman were not
25 recorded?

1 A. I did.

2 Q. Did you think it would be at all helpful to your case
3 to get Mr. Ainsworth or any of the other officers' take on
4 what happened regarding the search warrant issue and
5 whether or not they had a search warrant in hand when they
6 were searching in this case?

7 A. Well, I -- I thought I brought all of that up in
8 the trial about the search warrant and why the -- and
9 speculated as to whether or not the item was actually found
10 before the search warrant was signed or not signed and as
11 to why there was discrepancies in the search warrant.

12 Q. And you would agree there was a lot of conflicting
13 testimony about when searching was done, how it was done
14 and how the drugs were located?

15 A. Absolutely.

16 Q. Okay. And that was one of your primary arguments in
17 the case?

18 A. It was.

19 Q. Okay.

20 **MS. BLANCHETTE:** And, Your Honor, just for your
21 reference, I have asked that the exhibits from trial be
22 brought up and one of those is the search warrant.

23 **THE COURT:** Okay.

24 **THE WITNESS:** I understood -- I'm sorry.

25 **MS. BLANCHETTE:** And understanding that those

1 exhibits would be part of the record for this if they
2 were the trial exhibits.

3 **THE COURT:** Right.

4 BY MS. BLANCHETTE:

5 Q. I'm sorry. I didn't mean to cut you off.

6 A. You didn't ask a question. I should not have spoken.

7 Q. Now I'm gonna just take you through some of the other
8 issues that don't involve Mr. Ainsworth as much in this
9 case. The first issue that Mr. Newman has alleged is you
10 were ineffective for failing to move to suppress the drug
11 evidence due to a change in appearance. I understand you
12 did object to the admissibility during the course of the
13 trial, but what I really want to ask you about is you
14 agreed on page 434 through 436 as put on the record that
15 the drugs could be destroyed and they would just be
16 substituted in with pictures. What was your reasoning for
17 making that agreement with the State?

18 A. It was 50 pounds of -- are you talking about the 50
19 pounds of marijuana?

20 Q. It just says drugs and as far as I know, what I've
21 been informed, I've not been provided even though we had a
22 court order, the drugs in this case.

23 A. Well, to describe the marijuana to you, it was over
24 50 pounds of marijuana, but not quite 60, and it was --
25 it was probably the worst smelling item that you could

1 possibly smell. It was real skanky marijuana with stems
2 and all kinds of stuff and it was kind of an offensive
3 smell in the courtroom and I think the clerk and everybody
4 else was complaining about it and it was marijuana. It
5 was marijuana. So I don't know that the destruction of
6 the marijuana was crucial in the -- in the progression of
7 the case.

8 Q. And is it your understanding that just the marijuana
9 was destroyed?

10 A. I thought that was probably all that they were gonna
11 destroy was the marijuana.

12 Q. Did you ever go over with Mr. Newman any issues
13 regarding the change in appearance in the drugs or remember
14 him bringing that to your attention, that he had a concern
15 about the drugs being different in appearance?

16 A. No.

17 Q. Now --

18 A. Can I ask you a question on that question?

19 Q. I don't believe you can ask me questions.

20 A. Okay. Well, I was uncertain of the question, so I
21 may have answered it incorrectly, but that's okay.

22 Q. Now you did make an objection as reflected on 359
23 through 360, the Court's ruling on the chain, and they
24 cite to Hatcher and Sweet and kind of the cases in line
25 with that. Did you ever think to raise an argument that

1 Mr. Ainsworth didn't testify regarding these drugs and that
2 he was a necessary link in the chain?

3 A. Well, I talked about Ainsworth on everything else,
4 so, I mean, his name was throughout the entire trial as to
5 why he wasn't here.

6 Q. I mean, on your argument on the law to the judge, is
7 there a reason you didn't raise Ainsworth as being a
8 necessary link in the chain?

9 A. No.

10 Q. Okay. We've already talked a little bit about the
11 entrapment issue. The jury here did ask to be reinstructed
12 on page 439 on the issue of entrapment and what is your
13 reasoning again that you did not raise that as an
14 affirmative defense and address it prior to closing
15 argument?

16 A. Because I didn't think we could prove entrapment, I
17 thought it was great that the judge allowed me to talk
18 about it.

19 Q. Did you feel differently after the jury asked to be
20 reinstructed on it?

21 A. I felt more -- I felt -- I felt very good that they
22 were thinking about it.

23 **MS. BLANCHETTE:** Your Honor, if I could just beg the
24 Court's indulgence one moment?

25 **THE COURT:** Sure.

1 BY MS. BLANCHETTE:

2 Q. And, Mr. Williams, you handled the appeal; is that
3 correct?

4 A. I did.

5 Q. And what was the primary issue or issues you argued
6 on appeal?

7 A. It was probably the sufficiency of the evidence
8 dealing with the directed verdict motions, which is
9 normally done, and it probably was -- because I can't
10 recall right now, it probably was the search warrant or
11 the search I should say.

12 Q. And that's just from your memory; is that correct?

13 A. Yes, that is just from my memory.

14 Q. Okay. Have you reviewed the briefs or anything in
15 preparation for today?

16 A. Not really. I've skimmed it a little bit, but I had
17 several yesterday, too, so.

18 Q. Okay. Just to refresh your memory, and you can let
19 me know if you agree or not, you raised the directed
20 verdict argument, but you also raised the unlawful search,
21 and do you recall there being two parts to that; that the
22 Court was in error when it failed to find the search prior
23 to obtaining search warrant unlawful and, secondly, the
24 trial court's failure to suppress the unlawfully seized
25 drug evidence constitutes substantial prejudice to

1 Appellant. So was the primary issue how they obtained
2 this drug evidence as far as you see it?

3 A. Yes.

4 Q. Okay. And do you now think it would have been
5 helpful to call more witnesses or call any witnesses for
6 the defense to address that issue?

7 A. There were no other witnesses that were there who
8 could have -- who would have been able to testify except
9 for Benji and Mr. Ainsworth and it would not have been
10 good to put Benji on the stand.

11 **MS. BLANCHETTE:** Your Honor, may I approach the
12 witness?

13 **THE COURT:** Yes, ma'am.

14 BY MS. BLANCHETTE:

15 Q. And just to make sure we have a thorough record, can
16 you identify this for me, please?

17 A. Yes, but I can't remember why the first one's on the
18 list.

19 Q. What does it appear to be just for the record?

20 A. This is a list of Defendant's witnesses and the
21 middle one -- I can tell you who the middle one is.

22 **MS. BLANCHETTE:** Well, at this time, Your Honor, I
23 would move to admit this as Applicant's Number 5.

24 **THE COURT:** Any objection?

25 **MS. SCRANTOM:** No objection.

1 **THE COURT:** All right. Without objection.

2 (Applicant's Exhibit Number 5, a witness list, was
3 marked and admitted into evidence.)

4 BY MS. BLANCHETTE:

5 Q. Okay. And do you have a recollection of who the
6 people are on your witness list?

7 A. I know who the second one is. The second one is
8 David Crawford, who is the bondsman with A Plus Bonding
9 Company. Spencer Sexton, I can't remember at this time.

10 Q. Okay.

11 A. It was tangential. Obviously he was not there at the
12 arrest.

13 Q. Okay. But you have already admitted that you did not
14 do an investigation or talk to any witnesses leading up to
15 this case?

16 A. Well, I shouldn't say that. That's not really an
17 accurate statement.

18 Q. Well, then --

19 A. I talked to many witnesses in regards to the trial of
20 this case. I talked to Benji and I talked to potentially
21 David Crawford, I talked to any number of people, but
22 nobody that I thought would be beneficial in the trial of
23 the case except maybe David -- except maybe David Crawford.

24 **MS. BLANCHETTE:** Your Honor, I have no further
25 questions of this witness.

1 **THE COURT:** All right.

2 Yes, ma'am.

3 CROSS-EXAMINATION

4 BY MS. SCRANTOM:

5 Q. Good morning, Mr. Williams.

6 A. Good morning.

7 Q. Just out of curiosity, how long has your office been
8 across the street from this courthouse?

9 A. My office across the street from this courthouse has
10 been there since 1997. It's been -- the building has been
11 there since 1912 and there were other law offices that
12 were across the street before 1997.

13 Q. And you knew Mr. Newman before you represented him on
14 these particular trafficking charges, correct?

15 A. I did.

16 Q. But did he have any priors?

17 A. He had had some prior arrests.

18 Q. Okay. But no prior convictions before this trial?

19 A. I hope I got him off on most of them, but I -- I can't
20 -- I know I had represented him before, but it was nothing
21 significant I don't think.

22 Q. And what is your memory of the exact charges in this
23 case?

24 A. You mean do I know what he was charged with, the
25 trafficking? Is that what you're asking me?

1 Q. Yes.

2 A. He was charged with trafficking.

3 Q. Okay. And going back to the trafficking statute,
4 does the State have to prove one or all of the elements in
5 that statute?

6 A. One.

7 Q. And is that based on the oral language?

8 A. Yes.

9 Q. Do you feel that the indictments in this case were
10 sufficient to notify you of the charges against your client
11 in preparation for trial?

12 A. Yes.

13 Q. What is your recollection of the basic facts of
14 Benji's case?

15 A. Basically Ainsworth hooked Benji up with a guy by the
16 name of Nick Carver, who was a Batesburg-Leesville police
17 officer who had gone undercover. Nick was brought up to
18 the house where Benji was, along with several other
19 officers who were working to make the bust. They were
20 trading some amount of marijuana. The deal was supposed
21 to be 50 pounds of marijuana for 25 cocaine or ended up
22 being like 27. It was -- it was a typical buy. They
23 allegedly searched the confidential informant, they take
24 the marijuana up there, they have a bookbag on one of the
25 guys, and I thought it was on Nick Carver, but it may have

1 been on the -- the confidential informant, and they get
2 there and they make the deal and then at some point in time
3 when someone hears the signal they kick in the door and
4 throw in the flash bomb and Benji runs out in the backyard
5 and all this smoke is around there. Somebody throws the
6 confidential informant down on the ground and scooted out
7 and then they looked for the cocaine saying they can't find
8 it.

9 Q. Okay. And how many times would you say that you
10 talked about Mr. Newman's case with him before the trial?

11 A. A lot, but it's okay. But, I mean, Benji's a good
12 guy, I like talking to Benji, but we talked plenty of
13 times.

14 Q. Okay. And did he ever list off a number of people
15 that you should potentially go and try to hunt down to
16 testify in his behalf?

17 A. Absolutely not.

18 Q. Okay. And what -- how did that play into your
19 preparation for trial?

20 A. There was nobody Benji could have brought that would
21 save him in terms of us putting up a witness to say that
22 Benji wasn't there, Benji didn't have the drugs, Benji
23 didn't sell the drugs. The only thing we could do really
24 was poke holes at the solicitor's case.

25 Q. Did you have any plea offers from the State in this

1 case?

2 A. Not that I can remember.

3 Q. Okay. So what would you say was the decision --
4 Benji's decision to go to trial based upon?

5 A. Gosh, you have asked me a hard question. I think
6 Benji's decision was based on him not wanting to plead
7 guilty to the charge and go to jail and his confidence
8 that his friend Theo would get him out of it.

9 Q. Going back to your pretrial investigation,
10 Mr. Williams, was your sole reason for not making contact
11 with the confidential informant in this case due to your
12 belief of his reliability?

13 A. Say that one more time.

14 Q. Was your sole reason for not making contact with the
15 confidential informant due to your belief that he was
16 unreliable?

17 A. No. No. The major reason was he was unreliable, I
18 just didn't know -- number one, I didn't know where he was
19 most of the times. I knew he was unreliable. I knew that
20 he had given different stories about different things. I
21 mean, he had told one of the bonding people that -- some
22 story that --

23 **MS. BLANCHETTE:** Your Honor, I object on hearsay.

24 **THE COURT:** Yeah. Go ahead. You can answer.

25 **BY MS. SCRANTOM:**

1 Q. Would it have mattered if you had found him pretrial?

2 A. I still wouldn't have put him up.

3 Q. Okay. And what was your reason for that?

4 A. Because he doesn't say the same thing like to
5 different people that is consistent and that he was hard
6 to get ahold of. You couldn't find him. He was running
7 from people.

8 Q. And was it essentially his fault for Benji incurring
9 these charges in the first place?

10 A. I don't know how to assess fault.

11 Q. Okay.

12 A. You know, fault can mean -- it might have been
13 Benji's fault for believing in him and thinking he was a
14 good guy and it might have been -- I don't know how you
15 assess fault.

16 Q. Okay. But, nonetheless, Mr. Ainsworth was the CI who
17 was involved in this buy bust transaction?

18 A. He was.

19 Q. And he was the one that was making contact with
20 Mr. Newman?

21 A. He was.

22 Q. Okay. And you succeeded in getting the entrapment
23 instruction to the jury, correct?

24 A. I did.

25 Q. What did you need to establish that as a defense?

1 A. Well, I needed to prove that he wasn't predisposed
2 to -- to the sale of drugs or being involved in drugs and
3 conceivably if I had attempted to bring that out, I think
4 perhaps they might have brought out other information they
5 had about Benji where they knew about this drug deal or
6 that drug deal. I think that perhaps they might have been
7 able to bring that information out even though it may not
8 have been a conviction or any time he'd actually been
9 involved with an arrest with drugs.

10 Q. So how did you work to develop that defense to present
11 at trial?

12 A. I -- I used it to indicate that there was nothing to
13 indicate in the testimony of the State that he brought
14 this about; that everything was brought about by virtue of
15 something the State had done or something else that the
16 confidential informant had done. That he wasn't moving
17 facts or calling somebody and saying, you know, you want to
18 buy some drugs.

19 Q. Okay. And you -- you put forward a pretty strong
20 suppression motion in this case; would you say?

21 A. Thank you. I think so.

22 Q. You also moved to dismiss the charges though pretrial
23 in addition to the suppression, correct?

24 A. I did.

25 Q. And the reason for that motion to dismiss was that

1 wristwatch that didn't record during this particular bust?

2 A. I actually alleged prosecutorial misconduct.

3 Q. You did. Because that wristwatch, what, it had
4 worked one time prior, but it didn't work in this case?

5 A. It just seemed real strange, you know, that it worked
6 when they want it to work and it doesn't work when they
7 don't want it to work.

8 Q. And what was your basis for challenging the search
9 warrant in the suppression hearing?

10 A. There was a -- there was a difference in locations.
11 The search warrant was actually signed at a later date.
12 The time is interesting on that because depending on when
13 you think they found the cocaine, I want to say it was
14 like an hour -- maybe an hour later that the search warrant
15 was signed according to the time on it, you know. If they
16 actually found the cocaine before they had the search
17 warrant -- if they're saying they seized the cocaine
18 pursuant to the search warrant, maybe you've got something
19 to argue about. I think -- but I think the Supreme Court
20 or the Court of Appeals said, you know, it was in plain
21 view or -- they're saying it didn't matter I think.

22 Q. Did the facts at trial buttress the plain view
23 location of the cocaine?

24 A. Yes.

25 Q. Okay. Did you continue kind of that theme on the

1 suppression motion throughout the trial?

2 A. Yes.

3 Q. Did you do that through cross-examination of law
4 enforcement officers?

5 A. I did.

6 Q. Okay. Would you agree that perhaps one of your
7 theories during trial was to make it appear to the jury
8 that the warrant wasn't on the premise at the right time?

9 A. Yes.

10 Q. And also that the drugs were not in plain view?

11 A. Yes.

12 Q. Is there anything peculiar pertaining particularly
13 to a Lexington County jury that affected the way that you
14 wanted to speak to the jury in closing argument?

15 A. Well, if I had been typical Theo, I probably would
16 have been a little more brazen about what I was saying, but
17 in my experience when you want to accuse a police officer
18 of doing something wrong you have to do it in a kind and
19 caring way because the jury -- particularly Lexington
20 County juries will turn you off as soon as you say it
21 plainly and clearly, so you have to let them feel that
22 perhaps the police officer made a mistake, he wasn't doing
23 this the right way, but he certainly didn't have evil
24 intent when he was doing whatever he was doing.

25 Q. Did you contest the chain of custody of the drugs at

1 all?

2 A. Yes.

3 Q. Throughout the trial?

4 A. Yes.

5 Q. How do you characterize that you did that?

6 A. Well, I want to say that I asked -- there should have
7 been something in that transcript about how in the world
8 someone seizes, I don't know, 60 pounds of marijuana. If
9 the Lexington County Sheriff's Department comes in and
10 then they don't have -- it seems like if you're taking
11 drugs from a law enforcement standpoint and you're using
12 those drugs in another drug transaction that somebody at
13 the sheriff's department would have had a receipt and
14 release type of procedure that would allow the Court and
15 somebody to look at, well, we took out 50 pounds of
16 marijuana, we traded 50 pounds of marijuana, we received
17 50 pounds of marijuana. If I remember right, they didn't
18 have that evidence to show how much marijuana was actually
19 taken from the sheriff's department and I already knew that
20 it was seized -- it was like 60 pounds when it had been
21 seized, so I was trying to point at the slipshod way in
22 which they set -- I don't want to use the words "set Benji
23 up", but the slipshod way that they got Benji convicted
24 or that Benji was convicted. It should have been more
25 detailed, it should have been -- you know, it should have

1 been cleaner.

2 Q. And so if I'm remembering correctly, they didn't
3 weigh the marijuana before they took it out of the evidence
4 locker?

5 A. No.

6 Q. Okay. And the bust did change -- the date changed,
7 right?

8 A. Right.

9 Q. It was two days earlier than it was originally
10 scheduled to be?

11 A. (Nods head.)

12 Q. Now was it your understanding that Benji was the one
13 that had changed the date of the bust?

14 A. No, I don't think Benji changed the date of the bust.
15 I mean, they were in charge of when the bust was.

16 Q. Okay. Was law enforcement by any indication expecting
17 the bust to occur exactly when it did?

18 A. No.

19 Q. Okay. Do you feel that you pointed that out to the
20 jury at trial?

21 A. Yes.

22 Q. Do you have any of knowledge regarding whether the
23 drugs at the trial were the same drugs that were at the
24 bust?

25 A. Are you saying do I think they were the same drugs?

1 Q. Yes.

2 A. Yes, I think they were the same drugs.

3 Q. Okay. And then would it be uncommon to reach an
4 agreement with the State to destroy the drugs at the end
5 of trial?

6 A. No. As a matter of fact, we had -- we had a meth
7 case one time in which I thought the judge was gonna put
8 somebody -- if the solicitor -- I thought the judge was
9 gonna put the solicitor in jail if he didn't agree to get
10 rid of the meth which Hope was keeping in the clerk's
11 office.

12 Q. So if a drug comes in as an exhibit at trial, it's
13 got to stay in the clerk's office as an exhibit in the
14 locker, right?

15 A. Correct.

16 Q. So the benefit to destroying the drugs would be that
17 the clerk's office doesn't become laden with illicit
18 material?

19 A. It's problematic with the clerk's office keeping
20 drugs; particularly when it was at the old courthouse
21 when they used to keep it in the safe downstairs in the
22 basement.

23 Q. Okay.

24 **MS. SCRANTOM:** If I may have a moment to confer?

25 **THE COURT:** Sure.

1 BY MS. SCRANTOM:

2 Q. Where was your understanding of where the cocaine was
3 at the time that law enforcement came into Benji's house?

4 A. On the counter.

5 Q. Okay. But they were found in the bookbag, right?

6 A. They were.

7 Q. Was the bookbag open --

8 A. Yes.

9 Q. -- when they were found? Okay.

10 MS. SCRANTOM: Thank you. No further questions.

11 THE COURT: Anything on redirect?

12 MS. BLANCHETTE: Briefly, Your Honor.

13 THE COURT: Okay.

14 REDIRECT EXAMINATION

15 BY MS. BLANCHETTE:

16 Q. Mr. Williams, the State asked you about the execution
17 of the search warrant, the timing of the search warrant,
18 and I just wanted to see if you could look over that and
19 see if it's something you recall having in your file?

20 A. Yes.

21 Q. And what does it appear to be?

22 A. It's an investigative report detailing searches.

23 Q. Okay. And is it -- the reporting officer's listed
24 as a Detective S. Ellis?

25 A. Yes.

1 Q. Okay. And would you agree in here looking at the
2 second paragraph, it states I-O and several operators from
3 Lexington County Sheriff's Department Special Weapons and
4 Tactics, SWAT team, executed a search warrant at a -- at a
5 residence -- sorry, I cannot read -- on Long View Road in
6 the Lexington area of Lexington County, South Carolina, and
7 then it details about upon their arrival they activated a
8 device and then went they into the home. In reading that,
9 does it appear that he's stating that they were there to
10 execute a search warrant?

11 A. It does.

12 MS. SCRANTOM: Your Honor, I would object on the
13 basis of hearsay to the foundation of the details within
14 the warrant.

15 THE COURT: All right. Over your objection, I'll
16 allow it to be admitted. I've got to look through
17 everything anyway, so I understand.

18 MS. SCRANTOM: Thank you.

19 BY MS. BLANCHETTE:

20 Q. Mr. Williams, let me just ask it to you this way. Do
21 you recall reviewing this as part of your preparation of
22 Mr. Newman's case?

23 A. Sure.

24 Q. Does it appear from this report that this officer is
25 indicating that they had a search warrant in hand that

1 they were executing at the time they made entry into
2 Mr. Newman's residence?

3 A. It says that -- well, it certainly indicates that
4 because allegedly he yelled sheriff's department, search
5 warrant, several times.

6 Q. Okay. And the report also indicates we were executing
7 a search warrant, but is it true from the facts of the
8 case as was put forth at trial the search warrant wasn't
9 obtained until they were able to meet with the magistrate
10 near the dam to sign off on the search warrant after they
11 had already gone into the home?

12 A. Yes.

13 Q. So would this report here substantiate your theory of
14 the case and your argument on the search warrant?

15 A. I don't know about the report. I would have to get
16 it in through the witness who would have been Detective
17 Ellis.

18 Q. Okay. Did you ever talk to Detective Ellis?

19 A. I'm sure I have at some point in time.

20 Q. Okay. Do you have any specific recollection of
21 speaking to Detective Ellis?

22 A. But I don't think it was a question in regards to how
23 it was tried or anything like that. I think this issue
24 was -- was clear that -- that they did not have a search
25 warrant when they came in. That was not an issue in the

1 case. They did not have a search warrant when they came
2 in.

3 Q. But that would be in -- that would conflict with
4 what's in this report?

5 A. That would -- that would mean that somebody screwed
6 up when they typed up this report.

7 **MS. BLANCHETTE:** Your Honor, just to make sure I have
8 a complete record, I would move this in as Applicant's
9 Number 6.

10 **THE COURT:** Any objection?

11 **MS. SCRANTOM:** No, Your Honor. I would just renew
12 my objection from earlier to the contents of the matter
13 for the truth asserted.

14 **THE COURT:** Sure, and I'll obviously take that into
15 account.

16 Okay.

17 (Applicant's Exhibit Number 6, an Investigative
18 Report, was marked and admitted into evidence.)

19 BY MS. BLANCHETTE:

20 Q. And then, Mr. Williams, just one other question. Do
21 you recall that the jury asked to be reinstructed on the
22 trafficking statute as well?

23 A. I don't, but I believe you.

24 **MS. BLANCHETTE:** Your Honor, I have no further
25 questions.

1 **THE COURT:** Okay. You can step down. Thank you.

2 **THE WITNESS:** Thank you.

3 (Witness excused.)

4 **THE COURT:** Do you have one more witness?

5 **MS. BLANCHETTE:** Your Honor, I have my client very
6 briefly and then I needed to recall Mr. Skidmore on just
7 one matter.

8 Could I ask for just a five break real quick, Your
9 Honor?

10 **THE COURT:** Sure.

11 (Recess taken.)

12 **MR. BLANCHETTE:** Your Honor, I would briefly recall
13 Pete Skidmore to the stand.

14 **THE COURT:** All right. He's still under oath.

15 **THE WITNESS:** Thank you.

16 PETER G. SKIDMORE,
17 having been previously sworn, testified as follows:

18 REDIRECT EXAMINATION

19 BY MS. BLANCHETTE:

20 Q. Mr. Skidmore, in the investigations that you handle
21 for attorneys, do you regularly go speak with people that
22 are incarcerated?

23 A. Yes.

24 Q. And do you that in the state of South Carolina and
25 in other states?

1 A. Yes.

2 Q. Okay. And in this case when you spoke to
3 Mr. Ainsworth, he was incarcerated; is that correct?

4 A. Yes.

5 Q. And if you had assisted pretrial, if Mr. Ainsworth
6 had spoken to you and then he got on the stand and changed
7 his story, would you be available to impeach him at trial
8 if needed?

9 A. Yes.

10 Q. And is that something you've had to do before in a
11 trial?

12 A. Yes, many times.

13 **MS. BLANCHETTE:** Your Honor, I have no further
14 questions.

15 **THE COURT:** Anything?

16 **MS. SCRANTOM:** No questions.

17 **THE COURT:** Okay. You can step down.

18 **THE WITNESS:** Thank you.

19 (Witness excused.)

20 **THE COURT:** All right. You can call your next
21 witness.

22 **MS. BLANCHETTE:** Your Honor, I'd call Benjamin Newman
23 to the stand.

24 (Whereupon, Benjamin Newman was duly sworn by the
25 Clerk of Court.)

1 **THE COURT:** If you would, when you sit down, and be
2 real careful there, just state your full name and spell
3 your last, please.

4 **THE WITNESS:** Benjamin Newman, N-E-W-M-A-N.

5 **THE COURT:** Okay.

6 Yes, ma'am.

7 BENJAMIN NEWMAN,

8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MS. BLANCHETTE:

11 Q. And, Mr. Newman, you're currently incarcerated; is
12 that correct?

13 A. Yes, ma'am.

14 Q. And you're serving a sentence of out Lexington County
15 for how many years?

16 A. 25.

17 Q. And that's the result of a trial that was held in
18 October of 2012?

19 A. Yes, ma'am.

20 Q. And who represented you at the time leading up to and
21 during that trial?

22 A. Mr. Williams.

23 Q. Okay. And did you retain him or was he appointed?

24 A. Retained.

25 Q. And how was it that you retained him? Just explain

1 how it was that you came to utilize his services.

2 A. Well, he's been representing people I know and family
3 members of my family for a long time. I mean, he's like
4 the only lawyer I ever really even knew. I didn't even
5 know lawyers existed, you know, until him really.

6 Q. Okay. And he referenced in testimony that he helped
7 you get out of some charges prior to this charge. Had he
8 represented you previously on other charges?

9 A. I had got a -- allegedly got a DUI when I was like
10 19 or 20 years old and I had used him and he had got it
11 thrown out of court or whatnot, but that's the only
12 services I ever used him for.

13 Q. Okay. So he had not represented you on prior drug
14 charges?

15 A. No, ma'am. I never had no prior drug charges.

16 Q. And did you have any prior convictions? You've
17 probably pretty much already answered that.

18 A. No, ma'am.

19 Q. Okay. Now once you retained Mr. Williams, do you
20 know approximately how many times you guys met? Or explain
21 what you did to prepare for trial.

22 A. Really nothing. I really -- I really didn't know
23 nothing about trials. I was actually in Allendale. I
24 remember it like it was yesterday and I just had got some
25 new hunting property and Mr. Williams had called me up on

1 a Friday and was beginning to tell me that we had good
2 news and we had bad news and trial was gonna be starting
3 that following Monday or whatever and so I really kind of
4 hurried up and got off the phone with him and -- because
5 I didn't really see too much good news, you know, that he
6 had to contact me with because I was down there with my
7 family enjoying outdoor activities and he called me up,
8 you know, on this Friday with we go to court on Monday with
9 no prep -- I mean, no preparations or no understanding
10 that I was even about to be on the roster to go to court
11 in two days.

12 Q. And he testified that he didn't -- and I apologize if
13 I'm mischaracterizing, the record will speak for itself,
14 but essentially he didn't need to investigate the case
15 because he knew what happened because he talked to you.
16 How many times did you guys go over what had happened?

17 A. Maybe one time. Most of the time when we met it was
18 -- really the only thing that we really talked about a lot
19 was the conflict of him representing me and Mr. Merritt
20 at the same time being that Mr. Ainsworth was the one that
21 set both of us up.

22 Q. Okay. And did you guys go over the discovery and
23 review the evidence that the State had against you in this
24 case?

25 A. Like he stated, they was -- they come up with evidence

1 at the last moment, you know. I mean, they didn't -- they
2 come in -- like that tape, they come in with that tape at
3 trial. They didn't ever show nothing of that tape before
4 trial. I mean, so -- not that it -- not to my knowledge
5 anyway.

6 Q. Mr. Williams testified when he was on the stand -- he
7 characterized himself as your friend Theo that you thought
8 would get him out of it. Was that your understanding and
9 feeling towards Mr. Williams?

10 A. I mean, I wouldn't say friend. Now I would say, of
11 course, I thought, you know, he was gonna be able to assist
12 me in beating these charges or getting acquitted of these
13 charges and pertaining -- you know, staying at home with
14 my family, but that's just because I didn't know no other
15 lawyers at the time.

16 Q. Okay. Did you at any time think of retaining a
17 different attorney?

18 A. Yes. I said something to him the day of trial because
19 I didn't like the way things was unfolding and I just felt
20 like I didn't -- I wasn't getting a fair chance. I even
21 said something to him about hiring Mr. Jack Swerling.

22 Q. Now we'll jump into trial since you did -- you went
23 ahead and referenced a conversation you had with him at
24 trial. Did you raise a concern to him at trial you had
25 about the drug evidence that had been allegedly in this

1 bookbag and the drug evidence they were showing in the
2 courtroom?

3 A. Yes. The drug evidence they showed in the courtroom
4 they had in a yellow envelope and it was one solid piece
5 and the --

6 Q. And -- go ahead.

7 A. -- and the drugs that -- as you can see in the
8 pictures right there are powdered up in clumps and in
9 pieces like that.

10 Q. And I'm gonna show you what was marked at trial as
11 State's Exhibit 16 and 17. Is that what you were
12 referencing as far as them being in clumps and in chunks?

13 A. Yes, ma'am.

14 Q. Okay. And that's not how the drugs appeared as far
15 as your recollection at trial?

16 A. That's not how they appeared at all.

17 Q. And you brought that to his attention?

18 A. Yes, ma'am, I did.

19 Q. And did he ever bring that to the Court's attention?

20 A. I don't believe so.

21 **MS. BLANCHETTE:** And, Your Honor, these exhibits are
22 -- I will keep them here with the original envelope from
23 the trial.

24 **THE COURT:** Okay. All right.

25 **BY MS. BLANCHETTE:**

1 Q. Prior to or during the trial did Mr. Williams ever
2 discuss with you the affirmative defense of entrapment?

3 A. No, ma'am.

4 Q. Did he ever discuss with you the advantages and
5 disadvantages of you taking the stand at trial?

6 A. He just told me that he didn't think it was a good
7 idea that I got on the stand because he said that the
8 prosecution or prosecutors or whatever with the way they
9 wordplay certain things that I wouldn't be able to defend
10 myself I guess you would say properly.

11 Q. Did he ever go through kind of a mock trial with
12 you? And by that I mean did he ask you questions that
13 the solicitor may ask you to see how you may or may not
14 perform on the stand?

15 A. I'm not gonna say he did or he didn't. I mean, I'm
16 sure he probably asked me a few questions, you know, but
17 as far as preparing for the trial like we have it hasn't
18 been -- it wasn't nothing like that.

19 Q. Did he discuss with you the trafficking statute and
20 specifically the conspiracy portion of it?

21 A. No, ma'am.

22 Q. Did he ever tell you what specific portion he
23 believed that the State was gonna proceed to trial on?

24 A. No, ma'am.

25 Q. Mr. Newman, did any exchange of cocaine for marijuana

1 ever physically take place before the SWAT team entered
2 your residence?

3 A. No, ma'am.

4 Q. Were you aware of any investigation that Mr. Williams
5 did into your case prior to your trial?

6 A. None whatsoever.

7 Q. Did he ever discuss with you witnesses he intended to
8 call or any witnesses that you wanted called?

9 A. No, ma'am.

10 Q. Okay. Did you raise to him the question of why
11 Mr. Ainsworth, the confidential informant, wasn't being
12 utilized by either side at your trial?

13 A. I mentioned it and he told me that that was a good
14 thing. That's -- that's all he said.

15 Q. Were you aware of any investigation he did into
16 Mr. Ainsworth prior to your trial?

17 A. None whatsoever.

18 Q. Would you have wanted him to try to locate and speak
19 to Mr. Ainsworth prior to your trial?

20 A. Of course. I would have wanted him to speak to every
21 witness as possible to help me prove my innocence in this
22 case.

23 Q. And did you ask me to locate and speak with
24 Mr. Ainsworth prior to your postconviction relief case?

25 A. I mentioned something to you about it, yes, ma'am.

1 Q. Okay. And as a result of that you also hired an
2 investigator to speak with Mr. Ainsworth?

3 A. Yes, ma'am.

4 Q. And he was called here today and you were in the
5 courtroom; is that correct?

6 A. Yes, ma'am.

7 Q. Would you have wanted Mr. Ainsworth used in the
8 capacity he was used today at your trial?

9 A. Of course.

10 Q. Do you think he was a necessary witness to your
11 defense of this case?

12 A. I think he's the main key to the whole puzzle.

13 Q. Is there anything you'd like to further explain
14 regarding that?

15 A. I just don't see how you wouldn't call him to the
16 trial if he's the one -- being State or defense because
17 he's the -- he's the main -- he's the main thing that made
18 all this take place and transpire, so how can you build a
19 case behind someone and not even have them at trial? I
20 mean, y'all are saying this man is a piece of shit --
21 excuse my language -- a piece of crap, y'all are saying
22 all these things about him, but y'all also are not --
23 you're not -- you're not bringing -- you're using him --
24 you used him to entrap me or however you want to put it
25 and then you're not using him, so it just didn't make too

1 much sense to me.

2 Q. And, Mr. Newman, did you call Mr. Ainsworth and ask
3 him if he'd like to exchange some drugs or did he contact
4 you?

5 A. I never contacted him. They contacted me adamantly
6 numerous times back to back to back to back to back to back
7 to back to back.

8 Q. And did you ask for the date of this meeting to be
9 moved up or was that done -- was the date set by law
10 enforcement?

11 A. It was set by -- I can't say who it was set by, but
12 it was set by Ainsworth. That's who contacted me with it.

13 Q. So it was your understanding he was sitting up the
14 date and time of your meeting?

15 A. Yes, ma'am.

16 Q. Mr. Newman, you have worked with me very extensively
17 in preparation for today, you've been a very active part
18 of your case. Is there anything further that you'd like
19 to testify to in support of the allegations set forth in
20 your amendment?

21 A. No, ma'am.

22 **MS. BLANCHETTE:** Your Honor, if I could just beg the
23 Court's indulgence one moment?

24 **THE COURT:** All right.

25 **BY MS. BLANCHETTE:**

1 Q. Was it ever brought to your attention that this case
2 could have involved fake or imitation drugs?

3 A. Was it brought to my attention by someone else or --

4 Q. Did you ever discuss with Mr. Williams that this case
5 could have involved fake or imitation drugs?

6 A. Of course. It was.

7 Q. And did he ever look into that for you?

8 A. No, ma'am, he didn't.

9 Q. Is that a defense you would have wanted him to present
10 on your behalf?

11 A. Yes, ma'am. I asked him could we pay our own analyzer
12 to test the drugs ourself and I -- there wasn't nothing
13 else said about it.

14 Q. And it's your understanding based upon the order of
15 discovery that we did in this case that the drugs are not
16 available at this time?

17 A. Correct.

18 **MS. BLANCHETTE:** Your Honor, I have no further
19 questions of this witness.

20 **THE COURT:** All right.

21 Yes, ma'am.

22 CROSS-EXAMINATION

23 BY MS. SCRANTOM:

24 Q. Good afternoon, Mr. Newman. You knew Mr. Ainsworth
25 for a period of time before this bust occurred, correct?

1 A. Yes, ma'am.

2 Q. For how long would you say you've known him?

3 A. I've known him -- I've known his family their whole
4 lives. You know, I really actually grew up with his
5 younger brother and that's how I -- his brothers grew up
6 with my brother and, you know, that's how. We just -- we
7 just grew up living in the same area.

8 Q. So his family knew your family?

9 A. Correct.

10 Q. And your family knew his family?

11 A. Not like family, but brothers. Like we went to
12 school together. Like my -- I was under -- I was like in
13 his brother's generation, you know, we were in the same
14 year, and him and my brother -- or my brother and his
15 brother was a little older and they was in their generation
16 and him -- I actually met him through my nephew, which is
17 older than me, you know, they was real good friends.
18 That's -- that's who -- they, you know, hung out all the
19 time.

20 Q. Okay. And did you meet with Mr. Ainsworth a few days
21 or a few weeks before this bust because he requested to
22 meet with you?

23 A. Yeah, I seen him frequently though. I mean, that
24 wasn't nothing. We went out to Five Points drinking
25 together, you know. I mean, we went fishing all the time

1 together. I mean, it wasn't abnormal for me to see him or
2 speak with him or, in fact, be around him or his family.

3 Q. Did he come to you and ask to buy some drugs a couple
4 of days or a couple weeks before this bust?

5 A. No, ma'am.

6 Q. Okay. So the first time you're saying that he ever
7 came to you and asked to buy any drugs -- or exchange any
8 drugs was the date that this bust happened?

9 A. No, ma'am. He actually like -- he was actually
10 setting up or whatever you want to call it Dana Merritt
11 and I had noticed it or whatever and I had kept seeing
12 them making -- you know, doing whatever they was doing or
13 whatnot and so I said man, what do y'all got going on? I
14 just asked him a simple question and they was like none
15 of your business, so I left it alone like that and then I
16 -- if I'm not -- if I remember correctly, I was at a house
17 in Gaston and he showed up to meet Dana and Dana wasn't
18 there and that's how the -- we nego -- we first started
19 what you was speaking about earlier with the two -- first
20 transactions y'all had or whatever that did not test
21 positive for cocaine because it was simply not cocaine,
22 you know. But, yeah, that's how -- I mean, that's how I
23 met him.

24 Q. Who knew Dana Merritt first? Did you know Dana
25 Merritt and introduced Dana Merritt to Mr. Ainsworth?

1 A. I wouldn't say I introduced them. I -- I did know
2 him first from fishing -- actually some fishing
3 tournaments, that's how I had met him, but I never really
4 introduced them ever, you know. I had actually went to
5 one of the houses one time and they was in there drinking
6 beer together. That's how -- I was like -- I didn't --
7 that's how I figured -- found out that they knew each
8 other.

9 Q. Okay. Were you -- did you know when you were in the
10 Lexington County Detention Center during your trial, before
11 your trial, that Mr. Ainsworth was also being held there?

12 A. No, ma'am.

13 Q. Okay. So you didn't try to contact him or pass him
14 a note or anything in the jail leading up to the trial?

15 A. No, ma'am.

16 Q. Okay. Would you still consider yourselves friends
17 with Mr. Ainsworth today?

18 A. No, ma'am.

19 Q. Do y'all correspond?

20 A. I mean, you can't --

21 Q. I'm sorry.

22 A. -- consider yourself a friend with someone that would
23 betray you like that and try to take your life, I mean,
24 because that's pretty much what he done, you know.

25 Q. Do y'all correspond at all, write any letters?

1 A. No, ma'am.

2 Q. Have you been in any kind of trouble since you've
3 been at SCDC?

4 A. I mean, as far as --

5 Q. Have you gotten caught with cell phones?

6 A. I mean, I think that's irrelevant to this case, but,
7 yes, ma'am, I have been caught with cell phones.

8 Q. About five times, less than five times, more than
9 five times?

10 A. I don't know.

11 Q. More than ten times maybe?

12 A. No, ma'am.

13 Q. Okay.

14 **MS. SCRANTOM:** May I beg the Court's indulgence?

15 **THE COURT:** Uh-huh.

16 BY MS. SCRANTOM:

17 Q. Have you previously been arrested on drug charges
18 before the bust happened?

19 A. No, ma'am.

20 Q. Okay.

21 **MS. SCRANTOM:** No further questions.

22 **THE COURT:** Okay. Anything else?

23 **MS. BLANCHETTE:** I don't have anything further, Your
24 Honor.

25 **THE COURT:** Okay. You can step down.

1 (Witness excused.)

2 **MS. BLANCHETTE:** Your Honor, at this time I have a
3 file folder full of cases to hand up. I have just a ten
4 second explanation as to each one while I'm handing it up.
5 I'm happy to do that now or at the conclusion of the
6 State's case, but we have no further witnesses at this
7 time.

8 **THE COURT:** Okay. Anything else from the State?

9 **MS. SCRANTOM:** One moment. Let me confer.

10 Your Honor, if there's no objection, we could
11 recall Mr. Williams. Although I recognize that he was
12 Ms. Blanchette's witness, I would move to potentially
13 reopen cross-examination.

14 **MS. BLANCHETTE:** That's absolutely within the Court's
15 discretion, Your Honor.

16 **THE COURT:** I'll allow it. I mean, briefly. Go
17 ahead. I'll allow it.

18 **MS. SCRANTOM:** Yes, Your Honor.

19 Mr. Theo Williams, if you can retake the stand for us.

20 ROBERT THEODORE WILLIAMS, SENIOR,
21 having been previously sworn, testified as follows:

22 RE CROSS EXAMINATION

23 BY MS. SCRANTOM:

24 Q. Mr. Williams, you testified earlier that you had
25 represented Mr. Newman on some prior charges; is that

1 correct?

2 A. Yes.

3 Q. Do you have a recollection of what those charges
4 were?

5 A. Well, I think he's already testified about a DUI. I
6 thought -- there's a rap sheet which you have in your
7 possession clearly which you showed to me and it's an
8 indication obviously --

9 **MS. BLANCHETTE:** Your Honor, I would object. I think
10 that Mr. Newman should have been asked when he said he
11 didn't have any priors. They did not attempt -- they did
12 not show him the rap sheet. At this time I'd say this is
13 an improper line of questioning at this point.

14 **THE COURT:** Okay. Your objection's noted. Go ahead.
15 I mean, I assume he's got a prior drug charge, but go
16 ahead.

17 **MS. SCRANTOM:** Yes, Your Honor. I would ask if I
18 could approach the witness?

19 **THE COURT:** Sure.

20 BY MS. SCRANTOM:

21 Q. Did you -- Mr. Williams, would you have reviewed
22 Mr. Newman's criminal history in preparation for
23 representing him at trial?

24 A. I would have.

25 Q. Have you had a chance to refresh your recollection as

1 to what his criminal history may be?

2 A. Based on the document you've handed me, it's a piece
3 of discovery clearly from his trial and, yes -- the answer
4 is yes and it's from -- this is a document from his trial
5 discovery.

6 Q. Okay. Thank you.

7 **MS. SCRANTOM:** Your Honor, we would ask that this
8 be entered into evidence as Respondent's Exhibit 1 as
9 Mr. Williams to my understanding has authenticated it or
10 notified the Court that it would have been a part of the
11 discovery in preparation for his trial.

12 **THE COURT:** Let's me ask you something. What does
13 his prior record have to do with his allegations on PCR?

14 **MS. SCRANTOM:** Well, one of the issues that
15 Ms. Blanchette has raised is the sufficiency of the
16 presentation of the entrapment offense --

17 **THE COURT:** Right.

18 **MS. SCRANTOM:** -- and one of the elements that you
19 would need to prove entrapment would be that Mr. Newman
20 was not predisposed in any way to be involved in the drug
21 transaction that went down and if he had prior drug charges
22 and Mr. Williams was aware of those prior charges, it may
23 or may not have assisted in his defense of his client.

24 **THE COURT:** That's a pretty good answer. Any
25 objection to it?

1 **MS. BLANCHETTE:** Your Honor, I've just been handed
2 this. It is -- it does appear to be numerically marked
3 like it was part of the discovery in this case, I'm not
4 disputing that, I'm just seeing arrest charges here though
5 with no disposition if I'm reading this correctly.

6 **THE COURT:** Okay.

7 **MS. SCRANTOM:** That's correct and that's the way that
8 we've intended to present it. It was just part of the
9 discovery and part of what Mr. Williams may or may not have
10 been aware of, again, in representing his client at trial.

11 **THE COURT:** Well, let me ask you this. Was he ever
12 convicted of a drug charge prior to this? I mean, can you
13 look at his --

14 **MS. BLANCHETTE:** No.

15 **MS. SCRANTOM:** He was not.

16 **THE COURT:** I'll allow that to be admitted, so
17 somebody can tell me.

18 **MS. SCRANTOM:** He was not.

19 **THE COURT:** Okay. But he was charged?

20 **MS. SCRANTOM:** Yes.

21 **THE COURT:** Okay.

22 **MS. BLANCHETTE:** Your Honor, my only fear is that
23 was not presented to Mr. Newman while he was on the stand.

24 **THE COURT:** Sure. I understand.

25 **MS. BLANCHETTE:** Okay.

1 **THE COURT:** Okay. Any questions for him or --

2 **MS. SCRANTOM:** No further questions for Mr. Williams.

3 **THE COURT:** Okay. You can step down again.

4 **THE WITNESS:** Thank you, Your Honor.

5 (Witness excused.)

6 (Respondent's Exhibit Number 1, a rap sheet, was
7 marked and admitted into evidence.)

8 **THE COURT:** Okay. I'll be happy to hear from you on
9 your case law. I'll take the file and obviously I'm gonna
10 have to read through this and --

11 **MS. BLANCHETTE:** Your Honor, I just thought that may
12 be the easiest way to put it in a file for you so you will
13 have copy of every case I referenced so I didn't have to
14 give you a long recitation. In my experience with you,
15 you will review everything that I give to you and take it
16 under consideration, so very briefly I'd just like to
17 state the reason for why I'm handing up these cases.

18 I handed up Bounds. It's the primary precedent that
19 talks about how counsel needs to at a minimum conduct an
20 independent investigation and have a very reasonable,
21 strategic process that he goes through before determining
22 whether or not a witness should be called. I also handed
23 up Walker versus State, which is in line with Bounds just
24 on the same issue of whether counsel properly prepared
25 and investigated and called witnesses for the defense.

1 And then Edwards versus State and there the reason why I
2 included this is the decision by counsel in that case was
3 found to be very planned and calculated to not utilize
4 the co-defendant. He went to a guilty plea, he reviewed
5 prior statements, those type of things that we would
6 submit are absent in this case in the decision not to call
7 Mr. Ainsworth. I have also handed up Trapp and State
8 versus Mr. Sweet, which both go to the chain of custody.
9 Sweet specifically deals with when a CI was not presented
10 at trial there was a break in the chain that made the
11 drugs inadmissible.

12 And then finally regarding -- I'm sorry, not finally.
13 Regarding the argument about the conspiracy portion of the
14 trafficking statute, I have included State versus Crocker
15 and then I referenced imitation drugs, so have I included
16 the case of State versus McCluney. And then finally as to
17 entrapment, I have included for you State versus Brown.

18 Your Honor, I don't typically do a closing argument,
19 you've listened very intently today. If you have any
20 questions, I'd be happy to answer those, but I think we've
21 set forth our allegations very clearly.

22 **THE COURT:** You have. No, I understand. But I'll be
23 happy to hear from the State, too.

24 **MS. SCRANTOM:** Yes, Your Honor. We would just rely
25 on the record and, of course, Strickland versus Washington,

1 the issue of insufficient performance and in that it
2 prejudiced our client, we don't believe that if there was
3 a finding of insufficient performance here today -- based
4 on the testimony here today, which we don't believe one is
5 warranted, that prejudice would not have resulted in the
6 case based on the facts presented at trial by the State.

7 **THE COURT:** Okay.

8 All right. Well, I've got a lot of stuff to read
9 from this week, so I will put this -- it's gonna be
10 mid-January before you hear from me, okay?

11 **MS. BLANCHETTE:** Thank you, Your Honor.

12 **THE COURT:** Thank you-all.

13 **MS. SCRANTOM:** Thank you.

14 (Whereupon, the proceedings were concluded at
15 12:20 PM.)

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C E R T I F I C A T E

I, Stacy S. Johnson, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned case in Circuit Court on the 15th day of December, 2017.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor have an interest to any party hereto.

September 10, 2018

ISI Stacy S. Johnson
STACY S. JOHNSON
CIRCUIT COURT REPORTER

I waive any conflict with RT Williams
representing me and Dene Merritt. He has shown
me both texts that indicate that they wish
for Dene to testify against me. Even if Dene
Merritt should secure other representation, I waive
any alleged conflict and request that Robert
T. Williams represent me. I know of ~~nothing~~ nothing
that Dene Merritt could testify to that was
against me or could be used against me.

July 3, 2012

L. B. Williams



I waive any possible conflict
with Robert T. Williams representing
myself and Benji Newman. He has explained
all the possible ways in which there could
be a conflict and I desire his representation.
I intend on bringing any assertions of
guilt against me.

10-18-11

Don Hoff



Glenda Amick

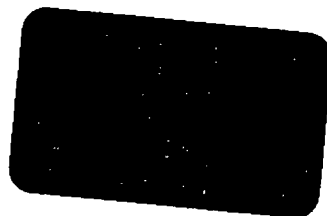
From: Hubbard, Rick [RHubbard@lex-co.com]
Sent: Tuesday, June 12, 2012 12:17 PM
To: Theo Williams
Cc: Scott, Dale
Subject: Benji Newman & Dana Merritt, Jr.

Theo,

Dale and I would like to call one or both of these cases for trial the week of October 15th. However, as we discussed, we are interested in seeing if Merritt is willing to talk to us and possibly cooperate against Newman. Merritt is looking at 7 to 25 years on both of his two charges. We realize this would put you in a difficult position, but we have to explore the possibility. When you get a chance, stop by and let's talk so we know how to proceed.

Thanks,

Rick

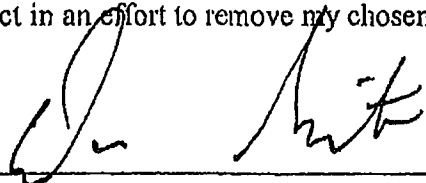


STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

**AFFIDAVIT OF
DANA C. MERRITT, JR**

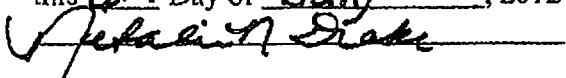
PERSONALLY APPEARED BEFORE ME, Dana Merritt, Jr, who, being first duly sworn, deposes and says that I have been informed by my counsel Robert T. Williams, that the Solicitor for Lexington County has requested I provide testimony, and or evidence, in a case set for trial against Benjamin Newman. Mr. Williams has informed me that the State may be willing to reduce or even dismiss my charges, however I have no knowledge of events alleged in the State's case against Mr. Newman, nor could provide any additional information to the State. I have elected not to speak with their office.

Being that Mr. Williams also represents Mr. Newman, Mr. Williams has directed me to visit with and seek the advice and assistance of other counsel as it relates to the State's request for me to testify against Mr. Newman. In light of this situation Mr. Williams has offered to return any unused portion of my fee if I were to hire different counsel. I have elected not to seek the assistance of other counsel because I have nothing to provide by way of knowledge or testimony to the State. It is my intention to keep the services of Mr. Williams and his law firm. It is my belief that the State is trying to manifest a conflict in an effort to remove my chosen counsel, however I do not believe any conflict exists.



Dana C. Merritt, Jr.

Sworn to and Subscribed Before Me
this 6th Day of July, 2012



Notary Public for South Carolina
My Commission Expires: 7/13/13

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE GENERAL SESSIONS COURT

THE STATE OF SOUTH CAROLINA,
Plaintiff,
vs.
BENJAMIN J. NEWMAN,
Defendant.

Indictment No(s). 2011GS3202259
and 2011GS3202261

DEFENDANT'S WITNESS LIST

The Defendant plans to call the below listed witnesses for trial.

1. Spencer Sexton
2. David Crawford, Jr.
3. Benjamin J. Newman

Respectfully submitted,



Robert T. Williams, Sr.
Williams, Hendrix, Steigner & Brink, P.A.
206 East Main Street
P.O. Box 849
Lexington, SC 29072
(803) 359-1550
Attorney for Defendant

Lexington, South Carolina

October 15, 2012



LEXINGTON COUNTY SHERIFF'S OFFICE INVESTIGATIVE REPORT				CASE NUMBER 11019162	
AGENCY I.D. SCO320000		☐ ORIGINAL REPORT ☒ SUPPLEMENTAL REPORT ☐ STATUS CHANGE		☐ ADDITIONAL VICTIMS ☐ ADDITIONAL OFFENSES ☐ ADDITIONAL STOLEN PROPERTY ☐ ADDITIONAL RECOVERED PROPERTY	
				PAGE 1 of 1 PAGES.	
ORIGINAL COMPLAINANT ☐ OR VICTIM ☐				DATE OF BIRTH	
NAME:				RACE SEX	
STREET ADDRESS:				AGE	
CITY - STATE - ZIP:					
INCIDENT TYPE:					
ORIGINAL SUSPECT:				DATE OF BIRTH	
NAME: Newman, Benjamin Jonathan				RACE SEX	
STREET ADDRESS:					
CITY - STATE - ZIP					
RECOVERED PROPERTY DOLLAR AMOUNT: \$					
CANCEL NCIC ENTRY: YES ☐ NO ☐					
6-05-11 The Lexington County Sheriff's Department SWAT team was requested to assist the narcotics team in executing several search warrants at residences in Lexington County. We were advised that these were search warrants for narcotics and that the operators on the SWAT team would be securing the residences and those persons found inside or on the property outside of the residence. We would then turn these people over to members of the narcotics team, along with the residence for their additional investigation. I/O and several operators from the Lexington County Sheriff's Department Special Weapons and Tactics (SWAT) Team executed a search warrant at a residence on _____ in the Lexington area of Lexington County South Carolina. On our arrival, operators exited the van the approached the front door of the residence. Operator Ellis deployed a distraction device in the open area in the front yard of the residence. Operators forced entry to the front door of the residence after loudly yelling, "Sheriff's Department, search warrant" several times. Operators entered the residence and detained two white male individuals in handcuffs. These two individuals were located inside the residence in or near the kitchen area. Other operators with the SWAT team located a third white male in the back yard of the residence. He was detained in handcuffs. All three individuals and the residence were turned over to members of the narcotics team after the house was cleared for any persons who maybe inside. Operators and I/O then proceeded to a residence located at _____ in the Lexington area of Lexington County South Carolina. A team of operators made entry into the front door of the residence who I/O and other operators secured the outside area of the residence. This residence and the persons inside were turned over to members of the narcotics team. 6-05-11 at about 14:20; I/O and several operators from the Lexington County Sheriff's Department Special Weapons and Tactics (SWAT) Team executed a search warrant at _____ in the Gaston area of Lexington County South Carolina. The SWAT team made entry into the residence and searched it to make sure that no one was inside. We then exited the residence and stood by until Det. Laney and Det Lovin (ATF) arrived on scene. We turned the residence over to them.					
SUBJECT IDENTIFIED		SUBJECT LOCATED		☐ ACTIVE ☐ UNFOUNDED ☐ ADMN CLOSED	
YES ☐ NO ☐		YES ☐ NO ☐		☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER ☐ EX-CLEAR 18 AND OVER	
REASON FOR EXCEPTIONAL CLEARANCE: ☐ OFFENDER DEATH ☐ NO PROSECUTION ☐ VICTIM/WITNESS DECLINES COOPERATION ☐ EXHAUSTION DENIED ☐ JUVENILE, NO ARREST					
REPORTING OFFICER		DATE	UNIT NUMBER	APPROVING OFFICER	
Det. S. Ellis		6/5/11	304		
REPORTING OFFICER		DATE	UNIT NUMBER	APPROVING OFFICER	

LE# 11022609

Print LEMS Web Message ICHR 003FA5C668 from SCCH

Page 1 of 3



ICHR 003FA5C668 from SCCH

LEXP434

.ICHR.003FA5C668.SCCH.20110506 14:32:53

TO: LEXP434-2820 20110506 14:32:53 003FA5C668
 FROM: SCCH-10864232 20110506 14:12:54

ICHR REQUEST FOR RAP SHEET

ORI-SC0320400 FBI-

PUR-C

ATN-HAZEWINKE

AUTHORIZED CRIMINAL JUSTICE AGENCY USE ONLY. CONTACT CONTRIBUTING
 AGENCY FOR SPECIFIC/MORE DATA ABOUT CHARGES AND/OR DISPOSITIONS.
 BECAUSE ADDITIONS OR DELETIONS MAY BE MADE AT ANY TIME, A NEW COPY
 SHOULD BE REQUESTED WHEN NEEDED FOR SUBSEQUENT USE.

PAGE-01 DATE-05/06/2011 TIME-14:18:48

REQ ORI-SC0320400 LEXINGTON POLICE DE

SID-SC01493985 FBI-492922CC6

NAME-NEWMAN, BENJAMIN JOHN

SEX-M RACE-W

HEIGHT-600 WEIGHT-160 EYES-BRO HAIR-BRO SKIN- BORN-SC

FPC-

HENRY-

PHOTOGRAPH AVAILABLE

1-FINGERPRINT IMAGES ON THIS SUBJECT ARE STORED ON SCAPIS

DATE RECORD ENTERED--08/18/2003

DATE OF LAST UPDATE--12/14/2010

ADDITIONAL IDENTIFIERS

BIRTH

NAME

DATES MARKS

SOC SEC

MISC NUM

NEWMAN, BENJAMIN J

NEWMAN, BENJAMIN

CONTRIBUTOR/SUBJECT

DOA/RCVD CHARGE/DISPOSITION/ETC

NEWMAN, BENJAMIN JOHN

06/21/2003

SC0320400 LEXINGTON POLICE DE

ATN-980000444033

WARR-H239569

CIT-44-53-390-FELONY

ARREST CHARGE 01-VIO DRUG
 DISTRIBUTION LAW, PROHIBIT
 ED ACTS C
 OFFENSE DATE-06/21/2003
 PHOTOGRAPH AVAILABLE

WARR-H239571

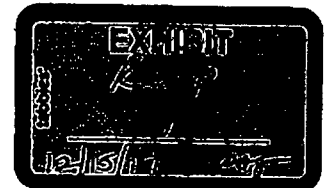
CIT-44-53-445(B)(1)-FELONY

ARREST CHARGE 02-D/S/P/M
 DRUG O/T C/COCAINE/PWID/NE
 AR SCHOOL
 OFFENSE DATE-06/21/2003

WARR-25601CO

CIT-44-53-960-MISDEMEANOR

ARREST CHARGE 03-POSSESSION
 OF DRUG PARAPHERNALIA
 OFFENSE DATE-06/21/2003



http://10.1.2.28/lems/default.asp?Category=MessageManager&Service=PrMsg&MRpt=32... 5/10/2011

LE# 11022609

Print LEMS Web Message QH 0035EAAF69 from III

Page 1 of 1



LEXP434

.QH.0035EAAF69.III.20110506 10:49:22

TO: LEXP434-2818 20110506 10:49:22 0035EAAF69

FROM: III-15380329 20110506 10:48:41

7L0102D30008EA2QH

SC0320400

THIS NCIC INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR
INQUIRY ON NAM/NEWMAN,BENJAMIN SEX/M RAC/W DOB, PUR/CNAME FBI NO. INQUIRY DATE
NEWMAN,BENJAMIN JOHN 2011/05/06SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR PHOTO
M W 600 160 BRO BRO NBIRTH PLACE
SOUTH CAROLINAFINGERPRINT CLASS PATTERN CLASS
AU RS RS RS RS LS LS LS LS LS
WU LS AU AU WU WU WU WU
LSALIAS NAMES
NEWMAN,BENJAMIN NEWMAN,BENJAMIN J

SOCIAL SECURITY

IDENTIFICATION DATA UPDATED 2010/08/13

THE CRIMINAL HISTORY RECORD IS MAINTAINED AND AVAILABLE FROM THE
FOLLOWING:ARKANSAS - STATE ID/AR3328748
SOUTH CAROLINA - STATE ID/SC01493985THE RECORD(S) CAN BE OBTAINED THROUGH THE INTERSTATE IDENTIFICATION
INDEX BY USING THE APPROPRIATE NCIC TRANSACTION.

END

Print LEMS Web Message ICHR 003FA5C668 from SCCI

Page 2 of 3

NEWMAN, BENJAMIN JOHN 11/03/2004
SCSHP0100 SC HIWAY DEPT DIST 1
CASE-NA
ATN-990000001534
WARR-B727766
CIT-56-5-2940(1)-MISDEMEANOR

ARREST CHARGE 01-DRIVING
UNDER THE INFLUENCE 1ST.
OFFENSE
OFFENSE DATE-11/03/2004
PHOTOGRAPH AVAILABLE

WARR-B727766
CIT-568-5-5040-MISDEMEANOR

ARREST CHARGE 02-VEHICULAR
TIRE VIOLATION
OFFENSE DATE-11/03/2004

NEWMAN, BENJAMIN J 12/25/2009
SC0400000 RICHLAND CNTY SO
CASE-0912218425
ATN-40D100021348
WARR-80267EZ
CIT-56-5-750(B)(1)-MISDEMEANOR

ARREST CHARGE 01-FAIL TO
STOP FOR BLUE LIGHT
OFFENSE DATE-12/25/2009
PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

WARR-80266EZ
CIT-56-5-6190-MISDEMEANOR

ARREST CHARGE 02-LEAVING
SCENE OF ACCIDENT UNATTEND
ED VEHICLE
OFFENSE DATE-12/25/2009

WARR-M237469
CIT-16-9-320(B)-FELONY

ARREST CHARGE 03-ASSUALT
POLICE OFFICER WHILE RESIS
TING ARREST
OFFENSE DATE-12/25/2009

CIT--MISDEMEANOR
WARR-80266EZ

COURT CHARGE 01-LEAVING SCENE
OF ACCIDENT UNATTENDED
VEHICLE
COURT DISP-NON-CONVICTION;
NOT GUILTY/BENCH TRIAL
COURT DATE-08/02/2010
ATN-40D100021348

SC040015G CENTRAL PPP
CASE-040000
CIT-56-5-750(B)(1)-MISDEMEANOR

07/13/2010 CUSTODY STATUS-PROBATION

COURT CHARGE 01-FAIL TO STOP
FOR BLUE LIGHT
COURT DISP-CONVICTED; 3Y SS
TO 3Y PROBATION
ATN-990000527801

CIT-16-9-320(A)-MISDEMEANOR

COURT CHARGE 02-RESISTING
ARREST

<http://10.1.2.28/lems/default.asp?Category=MessageManager&Service=PrMsg&MRpt=32...> 5/10/2011

LE# 11022609

Print LEMS Web Message ICHR 003FA5C668 from SCCH

Page 3 of 3

COURT DISP-CONVICTED;1Y SS
TO 18M PROBATION

BASED ON SEARCH OF SCLED CJIS CCH FILE USING FBI/
REQUESTED FOR CRIMINAL JUSTICE PURPOSES

SCLED CJIS RECORD INDICATES SUBJECT HAS OUT OF STATE ARREST INFORMATION
REQUEST FORWARDED TO NCIC FOR OUT-OF-STATE INFORMATION
INFORMATION FROM OTHER STATES TO FOLLOW THRU NLETS VIA YOUR TERMINAL

INQUIRY WILL BE FORWARDED TO: N C I C W A N T E D P E R S O N S

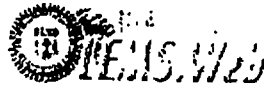
INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING FIREARM OR AMMUNITION
PURSUANT TO FEDERAL GUN CONTROL ACT OF 1968

INFORMATION SUBMITTED TO SLED CCH INDICATES THIS INDIVIDUAL HAS BEEN
CONVICTED OF A MISDEMEANOR IN WHICH AN OFFENDER COULD RECEIVE IN EXCESS OF
TWO (2) YEARS OF CONFINEMENT, ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS.
THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT OR RECEIVE ANY
FIREARMS OR AMMUNITION, AFFECTED BY INTERSTATE OR FOREIGN COMMERCE AS
DEFINED BY THE GUN CONTROL ACT OF 1968 (18.USC 922(G)).

** S C CJIS END OF RECORD **

Print LEMS.Web Message CR 0008D3C413 from NLETS

Page 1 of 1



CR 0008D3C413 from NLETS

LEXPD434
 .CR.0008D3C413.NLETS.20110506 14:32:19
 TO: LEXPD434-2819 20110506 14:32:19 0008D3C413
 FROM: NLETS-13878291 20110506 14:12:59
 CR.ARII0000
 11:12 43445
 05/06/2011 51064 SC0320400
 *02D30008EC
 TXT

HDR/2L0102D30008EC2QR
 ATN/HAZEWINKE

THIS RECORD IS BASED ONLY ON THE SID NUMBER IN YOUR REQUEST-SID/AR3328748

NAME	6020174	SID NO.	INQUIRY DATE	
NEWMAN, BENJAMIN, J,		3328748	2011-05-06	
SEX RACE BIRTH DATE	HEIGHT	WEIGHT	EYES	HAIR SKIN BIRTH PLACE
M W	6'00"	205	BRO BRO	
FINGERPRINT CLASS	SCR-MRK-TAT	SOCIAL SECURITY	FBI NO	SINGLE-MULTI
				M

ARREST-01 2007-11-16 SID 3328748 ARREST TRACKING # 1048226 6020174
 ARREST AGENCY-AR0190000 CROSS COUNTY SHERIFF
 CASE #: OFFICER:
 CHARGE: VIOL UNIFORM CONTROL SUBSTANCE ACT
 CHARGE: (FC)DELV, POSS, MANU, ETC DRUG PARAPHERNALIA
 CHARGE: (MC)USE OF A SPOTLIGHT
 DISTRICT COURT CROSS WYNNE MC
 DOCKET # : 20074369 DIV:00 TRIAL TYPE: UNKNOWN DEF ATTY: UNKNOWN
 FILED: 01 CNTS VIOL UNIFORM CONTROL SUBSTANCE ACT
 FINAL: 01 CNTS VIOL UNIFORM CONTROL SUBSTANCE ACT -PLEA:GU 01
 DISPOSITION: DATE 2007-11-19
 GUILTY - 1 NOT GUILTY - NOL PROS - DISMISS -
 FILED: 01 CNTS POSSESSION OF DRUG PARAPHERNALIA
 FINAL: 01 CNTS POSSESSION OF DRUG PARAPHERNALIA -PLEA:
 DISPOSITION: DATE 2007-11-19
 GUILTY - NOT GUILTY - NOL PROS - 1 DISMISS -
 FILED: 01 CNTS MIS-C USE OF A SPOTLIGHT
 FINAL: 01 CNTS MIS-C USE OF A SPOTLIGHT -PLEA:
 DISPOSITION: DATE 2007-11-19
 GUILTY - 1 NOT GUILTY - NOL PROS - DISMISS -
 LCRT FINE:\$ 560 - \$ 0 SUSP. - COURT COST:\$ 100
 OTHER INFO: DK#20074371
 OTHER INFO: POSS C/S

----- END OF ARREST 01 -----
 ----- END OF CCH RESPONSE FOR SID AR 3328748 -----
 ** THERE IS NO GUARANTEE THAT THIS RECORD RELATES TO THE PERSON
 YOU ARE INTERESTED IN WITHOUT FINGERPRINT VERIFICATION (POSITIVE
 FINGERPRINT COMPARISON). IF DISPOSITION IS NOT SHOWN OR IF
 FURTHER EXPLANATION OF CHARGE OR DISPOSITION IS DESIRED, CONTACT
 THE ARRESTING AGENCY. THIS CRIMINAL HISTORY INFORMATION IS TO BE
 USED ONLY FOR PURPOSES AUTHORIZED BY LAW. A NEW COPY SHOULD BE
 REQUESTED AT THE TIME OF ANY FUTURE USE BECAUSE CHANGES MAY BE
 MADE TO THIS RECORD AT ANY TIME.
 END OF RECORD

<http://10.1.2.28/lems/default.asp?Category=MessageManager&Service=PrMsg&MRpt=32...> 5/10/2011

LE# 11022609

Lexington County Sheriffs Office
Lexington, SC
Booking Form

Inmate: NEWMAN, BENJAMIN JOHN

JailId: 30421

BookID: 21712610

Inmate Bio Information

Inmate: NEWMAN, BENJAMIN JOHN	JailId: 30421
SSN: ***-**-7259	
DOB: AGE:	BookID: 21712610
Address: --- --	FBI:
LEXINGTON, SC 29073	Marital Status: S
Phone: /	No. of Children: 0
Education: GRADE TEN	Military: no
Employer: ALTMANS	Occupation: CONSTRUCTION
Birth Place: LEXINGTON	Curch/Relig.: OTHER
Dangerous: N	Country/State: US/SC
Suicidal: N	Escape Risk: N
	Housed at Unit:

Inmate Physical Information

Sex: MALE	Race: WHITE
Ethnicity: NON HISPAN	Build: SLIM OR SL
Hair: BROWN	Hair Style: SHORT-ABOV
Eyes: BROWN	Glasses: NONE
Facial Hair: MUSTACHE	Skin: MEDIUM
HGT: 6'00	WGT: 160

Inmate Alias Information

No Alias Info available

Inmate SMT Information

No S/M/T available

Current Booking Information

Arrest Date: 11/03/2004	Arrest Time: 03:24
Book Date: 11/03/2004	Book Time: 06:59
Arrest Type: FULL BOOKING	Arresting Officer: HAYNES
Arresting Ag.: South Carolina Highway Patrol	
Arrest Loc.:	Booking Officer:
Arrest City:	Search Officer:
Auto Make:	Warrant No.:
Auto Color:	Local Check: yes
Alcohol: no	Civil Process: yes
Towed: no	Resist: no
Phys.Exam: no	Towed/Where:
Jail Rules: yes	Phone Calls: yes
Phys.Ed.: no	NCIC Check: yes
Court Date: ?	Court Time: 00:00
Release Date: 11/03/2004	Release Time: 16:20

<http://192.168.20.223/jamin/progci.exe?program=Rinfo?recid=3553133?bookid=21712610> 5/2/2011

LE# 11022609

722

Solicitor, prosecuted the case on behalf of the State. Trial proceeded after a full suppression hearing.

The basic facts of the case as presented at trial established that on June 5, 2011, the Lexington County Multi-Agency Narcotics Enforcement Team (NET) arranged a drug exchange with Applicant, a suspected drug dealer. A confidential informant established arrangements for the exchange, which was conducted between an undercover NET agent and Applicant, who provided twenty-seven ounces of cocaine in exchange for fifty pounds of marijuana. Immediately following the exchange, a SWAT team used a flash-bang and entered. The CI and the undercover agent got down on the floor, and Applicant ran out the back door and was soon thereafter apprehended on the property. After the flash-bang, agents located the cocaine from the exchange in an open bookbag on the floor at the location of the exchange.

The jury found Applicant guilty of both charges. Judge Macaulay sentenced Applicant to imprisonment for ten years for Trafficking Marijuana and 25 years for Trafficking Cocaine. He issued the sentences to be served concurrently with credit for 38 days' time served.

Counsel Williams timely filed notice of appeal Applicant's behalf. In addition to Counsel Williams, Benjamin A. Stitley, Esquire, represented Applicant on appeal, filing a brief which raised the following issues:

- I. Did the trial court err when it denied the Appellant's motion to suppress the drug evidence obtained as a result of an unlawful search?
- II. Did the trial court err when it failed to grant the Appellant's motions for directed verdict?

By and through the Attorney General's Office, the State made its brief in response, arguing against both issues on the merits, and additionally arguing the second issue raised was not preserved for appellate review.

The South Carolina Court of Appeals affirmed Applicant's convictions without oral argument. *State v. Newman*, 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014). At that point Applicant and Counsel Williams consented to the substitution of Tara Dawn Shurling, Esquire, as counsel, and she petitioned the Court of Appeals for Rehearing on Applicant's behalf. The State made a Return, and the Court of Appeals denied the Petition.

Counsel Shurling then petitioned the South Carolina Supreme Court for a writ of certiorari on both issues. The State made a Return. Certiorari was denied on November 11, 2014. *State v. Newman*, 2014-001449 (S.C. Sup. Ct. cert. denied November 7, 2014). The Court of Appeals issued the Remittitur on November 18, 2014.

B. The Instant PCR Action

Applicant presented the following initial claims for PCR, supporting each claim with additional facts in his application and supporting memorandum:

1. Ineffective Assistance of Counsel
 - a. Trial counsel failed to move to dismiss his indictment upon the basis that it was not true-billed;
 - b. Trial counsel failed to pursue all available defenses related to alleged misconduct on the part of the prosecuting agencies;
2. Outrageous Government and Prosecutorial Misconduct
 - a. "Outrageous government conduct and prosecutorial misconduct" stemming from the Court's decision to instruct the jury on the defense of entrapment;
 - b. Applicant was actually innocent of the crimes convicted because he did not have possession of the drugs.
3. Lack of True Billed Grand Jury Indictment

The State made a Return to this application on or about October 13, 2017.

Applicant secured Tricia A. Blanchette, Esquire, as counsel. Upon motion by Counsel Blanchette, limited discovery was ordered by the Honorable Edward W. Miller on September 7, 2016, to include: (1) a copy of the SLED file; (2) a list of items produced to trial counsel by the

Solicitor's Office pursuant to Rule 5, SCRCrimPro; (3) an opportunity for counsel Blanchette and any private investigators or potential experts to review the evidence maintained by SLED in the underlying criminal action; and (4) a copy of the trial exhibits maintained by the Lexington County Clerk.

In accord with Rule 71.1, SCRCP, Counsel Blanchette served an amended application on November 13, 2017. The application including the following claims which were pursued at the evidentiary hearing before the undersigned:

1. Trial counsel rendered ineffective assistance for failing to move to suppress and/or object to the drug evidence due to change in appearance. Trial counsel rendered further ineffective assistance when he agreed to the destruction of the evidence post trial. Transcript p. 436.
2. Trial counsel rendered ineffective assistance in the handling of the entrapment defense.
3. Trial counsel rendered ineffective assistance for failing to require the State to identify the specific portion of the trafficking statute on which the trial was proceeding and failing to attack the conspiracy portion of the statute.
4. Trial counsel rendered ineffective assistance for failing to investigate and utilize necessary witnesses for the defense and for failing to further cross-examine state witnesses during pre-trial and trial, which resulted in the denial of pre-trial motions and a guilty verdict.
5. Alternatively, newly discovered evidence if witnesses and testimony was not discoverable at the time of trial.
6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the evidentiary hearing, this Court had before it the *pro se* and amended PCR applications and the State's Return, which included as attachments the Lexington County Clerk of Court records pertaining to Applicant's indictments and sentencing, Applicant's South Carolina Department of Corrections records, the transcript of Applicant's trial and sentencing,

and Applicant's appellate records including the briefs considered by the Court of Appeals.

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the records submitted to it by the parties and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80, this Court denies the application and, in doing so, makes the following findings based upon all of the probative evidence presented.

A. Standard of Review

"In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case." *Porter v. State*, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984) (seminal case developing the ineffective assistance of counsel standard)). In regards to the first prong, "[t]he proper measure of attorney performance remains reasonableness under prevailing professional norms." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2065. The second prong requires a showing that 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 v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

At all times during the proceeding, the Applicant maintains the burden of establishing that he is entitled to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). Moreover, the proceeding is coupled with "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in

the case.” *Morris v. State*, 371 S.C. 278, 282, 639 S.E.2d 53, 55 (2006). “Judicial scrutiny of counsel’s performance must be highly deferential, 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, 104 S.Ct. at 2065; *Edwards v. State*, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011).

Therefore, Applicant must demonstrate 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.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 441(1985) (quoting *Strickland*, 466 U.S. at 686, 104 S. Ct. at 2064). 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. *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069.

B. The Merits of the Allegations

This Court thus proceeds with its consideration of claims one through five in the amended application and finds all other claims have been waived and abandoned as they were not addressed at the evidentiary hearing. S.C. Code Ann. § 17-27-90. When the evidentiary hearing convened, Counsel Blanchette clarified that the claims going forward at the hearing would be those pursued within the amended PCR application. No motions were made to amend that pleading to conform with the testimony and evidence presented, nor did the testimony presented establish a basis for additional allegations not raised in the amended application.

At the evidentiary hearing, Applicant called as witnesses on his behalf (1) confidential

informant Joshua Ainsworth, (2) private investigator Pete Skidmore, and (3) his trial counsel Robert (Theo) Williams, Esquire. Applicant then testified on his own behalf.

As a matter of general impression, this Court finds trial counsel, who has been practicing criminal law in Lexington for 41 years, to have provided credible and persuasive testimony on all matters. Trial counsel established that knew Applicant because he had previously represented him on other charges, though Applicant had no prior convictions. The State later established that his earlier representation pertained to prior drug charges, which Applicant denied from the witness stand.

This Court finds not credible Applicant's testimony and assertions. This Court additionally finds Ainsworth's testimony and assertions not credible. This Court additionally finds private investigator Skidmore did not offer any material testimony in furtherance of the claims pursued at the hearing, as he had no personal knowledge of the investigation pertaining to the buy/bust for which Applicant was tried and convicted. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Also as a matter of first impression, this Court finds applicable the strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in his representation of Applicant at all stages of Applicant's trial. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*). "[W]hen counsel articulates a *valid* reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and evaluate counsel's decisions at the time they

were made. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. Any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "[W]hen counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Smith v. State*, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing *Caprood v. State*, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)).

Proceeding on claims one through five raised in the amended application, this Court finds each without merit:

1. Trial Counsel's Alleged Failure to Move to Suppress and/or Object to Drug Evidence Due to Change in Appearance

Applicant's first PCR allegation claims that trial counsel rendered ineffective assistance for failing to move to suppress and/or object to the drug evidence due to change in appearance. As the basis for his change of appearance claim, Applicant testified at the evidentiary hearing that the drugs the State presented at trial appeared in a solid piece, but that the drugs photographed at the scene were in clumped and/or powdered form. Applicant also testified that he asked his trial counsel if he could hire a drug analyst to independently test the drugs, which did not occur.

This Court notes that claim four from the amended application overlaps with this first allegation. Claim four alleges in part that trial counsel's cross-examination of the State's witnesses during pre-trial motions was deficient. To this end, this Court intends its findings in this portion of its Order to encompass all ineffective assistance allegations raised within the amended application and pertaining to the pre-trial motions argued in this case.

The record demonstrates that trial counsel indeed conducted a full suppression hearing challenging the admission of the drugs under the Fourth Amendment. (Trial Tr. Volume I, pp. 1-141). Trial counsel also pursued the outcome of the suppression motion on appeal. *State v. Newman*, 2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014). At PCR, trial counsel ultimately testified that the cocaine was located in an open bookbag. His bases for suppression, however, fell among the acts of law enforcement who testified at the suppression hearing. At PCR, trial counsel testified that when he made the motion he had no additional witnesses to call other than the agents involved. There were no other fact witnesses who could further this basis. Likewise, trial counsel testified that it was not a good idea to put Applicant on the stand in furtherance of suppression.

Trial counsel instead conducted a suppression hearing in which he elicited testimony from officers in an attempt to establish that (1) law enforcement searched for and seized the cocaine prior to a search warrant's appearance on the premises, and (2) that the cocaine was not discovered in plain view as alleged by the agents. Trial counsel elicited testimony from the agents in an attempt to establish that agents acted without a warrant when they were looking for the cocaine, which was not left in the same place they saw it prior to the flash-bang. (Trial Tr., pp. 1-50, 79-140). At trial, agents established the chain of custody for the drugs used in the buy/bust. (Trial Tr. pp. 257-64, 304-10). This Court notes that, in addition to questioning the NET agents during the suppression hearing, trial counsel duly cross-examined the State's chain of custody witness Candy Kyzer in line with the strategic decisions discussed at a later point in this Court's Order. (Trial Tr. pp. 310-15). While trial counsel challenged the whereabouts of the drugs throughout trial, neither the record nor Applicant's presentation at PCR establishes that the appearance of the cocaine changed as Applicant has alleged. (See Trial Tr. pp. 94-100). The

record does not otherwise corroborate any change in appearance of the drug evidence. (See Trial Tr. pp. 250-53).

Based upon the foregoing, this Court finds that trial counsel exercised reasonable professional judgment in moving to suppress the drug evidence based upon the timing of the search warrant in relation to the location of the drugs seized, and in foregoing the hiring of an independent drug analyst to test them. *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596; *Lounds v. State*, 380 S.C. at 462, 670 S.E.2d at 650. Trial counsel did not deliver deficient performance as it was objectively reasonable to challenge the admission of the drug evidence in the manner represented at trial. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. The fact that trial counsel was unsuccessful does not render his performance deficient. *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel); see *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 64 (2011) (“we must be wary of second-guessing trial counsel’s tactics”).

Additionally, this Court finds that trial counsel’s performance in regards to the introduction of the drug evidence did not prejudice Petitioner. Trial counsel’s own PCR testimony wholly established that the cocaine introduced at trial was in fact located in plain view, in an open bookbag on the floor at the place where the exchange occurred. The trial record corroborates the plain view discovery of the cocaine in the bookbag. And, at both the suppression hearing and at trial, the agents identified that State’s Exhibits 5, 6 and 7 were the drugs exchanged during the buy/bust and seized from the residence. While trial counsel cross-examined State’s witnesses regarding the chain of custody, nothing in the record established a change in appearances. As an additional consideration, Applicant has presented no credible evidence to support any theory that he lacked the intent required by S.C. Code Ann. § 44-53-370,

such that he could prevail on any claim that he reasonably mistook the 50 pounds of marijuana and 28 ounces of cocaine subject to the exchange for some other, legal, substance. *See State v. Kelsey*, 331 S.C. 50, 502 S.E.2d 63 (1998) (mistake of fact will preclude a conviction when it negates the existence of the mental element of the offense) ("a trial court is not required to give an instruction on mistake of fact unless and until the defendant introduces some evidence, direct or circumstantial, of a reasonable basis for having made the mistake"). Therefore, there is no reasonable probability of a different result had trial counsel premised his suppression motion upon a change of appearance, or objected to the introduction of the drugs on that basis. *Cherry v. State*, 300 S.C. at 117-18, 386 S.E.2d at 625 (citing *Strickland*). Despite Applicant's assertions to the contrary, sufficient evidence existed for the State submit the drug evidence against Applicant.

Citing trial transcript page 436, Applicant further alleges in his application that trial counsel rendered ineffective assistance when he agreed to the destruction of the evidence post trial. Trial counsel testified that such destruction was a general practice. Trial counsel testified that the physical drugs were not crucial in the presentation of the case. This Court finds no basis in the record upon which Applicant can prevail upon this claim under the *Strickland* standard. This Court finds it is of no consequence to Applicant's defense that trial counsel consented to the destruction of the physical evidence after the completion of his trial. As trial counsel's testimony established, it is not practicable for the Clerk of Court to maintain the physical drug evidence entered as an exhibit at trial. Moreover, no prejudice flows from the post-trial destruction of the physical drug evidence in this case. The record is not devoid of the type, appearance, and amount of drugs lending to Applicant's conviction. Photographs of that evidence were maintained as part of the trial record, as was the SLED analyst's report denoting its chemical makeup. These

considerations were made part of the record wherein trial counsel consented to the drug's destruction.

For the foregoing reasons, Applicant's request for relief by way of this allegation is **DENIED.**

2. Trial Counsel's Alleged Deficient Performance in Pre-Trial Investigation and in his Presentation of a Defense at Trial

This Court addresses claims two and four from the amended application in tandem as they pertain to the extent of the defense prepared and put forth by trial counsel. In claim two, Applicant alleges deficient performance in the presentation of an entrapment defense. In claim four, Applicant alleges trial counsel failed to investigate and utilize necessary witnesses for the defense and to cross-examine the State's witnesses in a manner deserving of an acquittal. As this Court has already addressed claims pertaining specifically to the pre-trial motions, this Court now turns to counsel's performance at trial.

Testimony Taken at the PCR Hearing

In furtherance of these allegations, Applicant testified that he retained trial counsel because he was the only lawyer Applicant had ever known. Applicant testified he felt that trial counsel did not adequately prepare for trial and that he believed he could have assisted trial counsel with his preparations. Applicant also testified that trial counsel did not discuss the trafficking statute with him. Applicant testified that he recalled discussing with trial counsel whether the confidential informant (CI) Joshua Ainsworth was a potential witness. Applicant testified he wanted trial counsel to locate Ainsworth as well as everyone else who might help with his case. As for the buy/bust itself, Applicant testified that there was no physical exchange of drugs at the scene.

Applicant presented the CI, Joshua Ainsworth, as a witness at PCR. Ainsworth did not testify at trial. At PCR, Ainsworth testified that when Lexington agents approached him about acting as a CI, Ainsworth responded that he did not want to work with them. Ainsworth testified that the next day two agents met him and said they would charge him with trafficking and conspiracy if he did not act as a CI. According to Ainsworth, his contact with agents began a few weeks prior to the buy/bust with Applicant. Ainsworth said he was tasked by agents with initiating communication with Applicant and arranging a swap wherein Agent Carver would ride along with Ainsworth to Applicant's location and exchange 50 pounds of marijuana for cocaine. Ainsworth testified that the agents changed the date of the agreed upon exchange and then, days or weeks after it concluded, paid him \$1000 to leave South Carolina and go to Georgia. As for the exchange of drugs, Ainsworth testified at PCR that he did not witness it, but he also testified that the cocaine never came out of the bookbag he brought to the deal.

Ainsworth further testified that he was in the custody of the Department of Corrections at the time of Applicant's trial. He stated he was brought to the Solicitor's office during the course of the trial. He stated he would have been willing to testify for the defense but Applicant's counsel never contacted him. Ainsworth also established during his testimony that he had known Applicant and Applicant's family for some time prior to the buy/bust. Ainsworth also had a number of prior fraud charges in other jurisdictions and was in and out of custody before, during and after Applicant's trial.

Applicant next called as a witness at PCR private investigator Pete Skidmore, who testified that Applicant retained him to assist in preparation for this evidentiary hearing. Skidmore testified he met with Ainsworth three times prior to the hearing. Skidmore also

testified he had no role in the investigation leading to Applicant's trial and conviction. He was not retained for assistance pre-trial.

Contradicting Applicant, trial counsel's own PCR testimony established that he investigated the facts of Applicant's case and strategized accordingly in preparation for his client's defense. Trial counsel established that he consulted with Applicant about the facts of his case. Trial counsel also established a familiarity with Applicant, having previously represented him on prior drug charges, and testifying that he knew Applicant's friends. Trial counsel testified that Applicant did not want to plead guilty. Trial counsel stated that he read the investigative reports and discovery provided as part of this case and discussed it with his client.

Through trial counsel, Applicant introduced as its Exhibit 6 an incident report by Detective Ellis, who did not testify at trial. Applicant also introduced as his Exhibit 5 trial counsel's witness list furnished at the start of trial. It lists Applicant, Spencer Sexton, and Lexington bail bondsman David Crawford, Jr. as potential trial witnesses, but they did not testify at trial. Trial Counsel testified that Applicant could not provide information on any potential witnesses who could have aided in his defense at trial. Counsel testified that nobody that he spoke with in investigation and preparation for trial would have been beneficial to Applicant's defense.

Addressing Ainsworth, trial counsel testified he was aware that Ainsworth and Applicant had a friendship. He spoke with Applicant about Ainsworth, but testified he did not speak with Ainsworth directly because, despite a friendship with Applicant, Ainsworth acted as the CI who established the buy/bust. In trial counsel's view, Ainsworth could not provide any exculpatory information because he set the course of inculpatory events in motion. Trial counsel also testified that while he was unaware that Ainsworth was incarcerated at the time of trial, Ainsworth was

hard to locate. Trial counsel did inquire with Ainsworth's bondsman and learned that the bondsman himself was in fact looking for him. Trial counsel also testified that by downplaying Ainsworth's involvement during trial, he might force the State to call Ainsworth as their own witness. Trial counsel testified that he considered Ainsworth unreliable.

On the subject of an entrapment defense, trial counsel established that he was familiar with the elements of that defense, but testified that he was not sure he could prove it given the evidence in this case. He did not discuss the defense of entrapment in his opening statement; however, trial counsel tried Applicants' case in a manner which garnered that jury instruction. Trial counsel testified that he recalled the jury asking for a reinstruction on entrapment during deliberations, indicating to him that he tried the case in a way in which the jury could have found the defense applied. Trial counsel also testified that his understanding of the facts of the case was that Applicant, not the agents, changed the date of the deal.

Regarding potential alternative defenses, trial counsel testified that it would not have assisted Applicant's defense to argue that the exchange of drugs did not occur. Trial counsel stated the jury would not buy that defense. He testified that, based upon his experience with Lexington County juries, it would not look favorable to present a defense premised upon a firm accusation of misconduct on the part of law enforcement. Trial counsel testified that he attempted throughout trial and at closing to cast doubt upon law enforcement's actions and, in closing, worked to elude to improper acts on the part of the agents involved in the buy/bust. Trial counsel testified he aimed to challenge the chain of custody and handling of the evidence.

Post-conviction counsel Blanchette inquired about a third party, Dana Merritt, with each Ainsworth and trial counsel. About Merritt, Ainsworth testified that he knew him through Applicant. Trial counsel testified that he previously represented Merritt and that Merritt would

not testify against Applicant. He did not recall whether the Solicitor's Office wanted Merritt to testify against Newman. Through trial counsel, Applicant introduced as his Exhibits 1 and 2 conflict waivers executed by both Merritt and Applicant. They were executed months apart and before Applicant's trial. Applicant introduced as his Exhibit 3 an email to trial counsel from the Solicitor's Office indicating he would call Applicant or Merritt to trial during one particular term of court and stating the prosecution was interested in seeing if Merritt would cooperate against Applicant. Over Respondent's objection, Applicant also introduced an affidavit of Dana Merritt as his Exhibit 4. The affidavit acknowledged that trial counsel represented Applicant and Merritt but does not otherwise establish the existence of an actual conflict and in fact states that Merritt did not believe any conflict existed. Merritt did not testify either at PCR or at trial.

At Trial

Aside from cross-examination of the State's witnesses and the pre-trial motions already addressed by this Court, Applicant presented no witnesses or entered any exhibits as evidence at trial. During his closing argument, trial counsel belittled the State's case and asked the jury consider reasonable doubt, entrapment, and mere presence. He argued for the jury to infer from the evidence presented that law enforcement lured Applicant into the deal because (1) law enforcement failed to have a working video recording of the crime, (2) the State failed to call the CI to testify at trial even though he was the person who established the drug deal, (3) no testimony established which law enforcement officer searched the CI's car for reliability during the buy/bust, (4) the State did not introduce the bookbag testified to as containing the drugs so that the jury could see if the drugs seized could in fact fit inside the bookbag for transport, nor (5) did they establish the weight of the marijuana before the buy/bust, and (6) the State did not call all of the officers and agents present at the house where the buy/bust occurred. (Tr. pp. 404-

14). Trial counsel drew out a basis for each of these points in his cross-examination of the State's witnesses in front of the jury.

The Strickland Standard Applied

This Court finds that Applicant has not met his burden of demonstrating either deficient performance or prejudice in regards to trial counsel's preparation for and performance during trial. Trial counsel credibly testified to making a series of valid strategic decisions. *Lounds v. State*, 380 S.C. at 462, 670 S.E.2d at 650 ("when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel"). As previously stated, any post-conviction relief court must be wary of second-guessing trial counsel's tactics. *Whitehead v. State*, 308 S.C. at 122, 417 S.E.2d at 531. Only when they are objectively unreasonably do they warrant a finding of deficient performance. *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2065; *Smith v. State*, 386 S.C. at 567, 689 S.E.2d at 632.

This Court finds Applicant failed to meet his burden proving trial counsel was ineffective for failing to interview and investigate potential defense witnesses. This Court finds that trial counsel conducted an appropriate investigation into the facts of his client's case. "A criminal defense attorney has a duty to perform a reasonable investigation." *Lounds v. State*, 380 S.C. at 460, 670 S.E.2d at 649. "[W]hile the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597. Counsel's testimony credibly established that his client was forthcoming with what had occurred and that no one whom he spoke had exculpatory information to aid in his client's defense. The State's case demonstrates that Applicant was caught in a buy/bust scenario in which it would be Applicant's word against law enforcement,

who recorded audio evidence of the exchange. Applicant did not provide his trial counsel with leads as to any viable defense witnesses. Nor, as established above, was there another valid basis upon which to challenge the State's evidence other than through the motions litigated by trial counsel.

This Court further finds that trial counsel reasonably decided to forego interviewing Ainsworth and calling him as a witness because Ainsworth was the CI who set his client up. When valid, counsel's choice of tactics will not be deemed ineffective assistance. *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 530 (1992); *see also Dempsey v. State*, 363 S.C. 365, 610 S.E.2d 812 (2005); *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003). Trial counsel credibly testified that he hoped to force the State to call Ainsworth so that he could cross-examine him. As trial counsel testified to, Ainsworth's role as a CI in this case, and the demonstrated difficulty in locating him, makes him an unreliable and incredible witness for the defense. Ainsworth's presentation fails to persuade the Court that had he testified on Applicant's behalf at trial, that he could have offered exculpatory information.

This Court finds of note that Applicant provided no testimony from any additional witnesses. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at PCR. *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992). An applicant's mere speculation as to what a witness's testimony would have been cannot, by itself, satisfy his burden of showing prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993); *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995). An 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 from the witness's failure to testify at trial. *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998). Specifically as to one

Dana Merritt, this Court finds that Applicant has failed to meet his burden. Dana Merritt did not testify at PCR and thus, this Court is unable to conclusively establish who this person was and what he could have offered Applicant's defense.

As to trial counsel's alleged failure to and ineffective assistance in presenting an entrapment defense, this Court finds trial counsel did not render deficient performance. "[T]he entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition" on the part of the defendant. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004). "One pleading entrapment has the burden of showing that he was induced, tricked or incited to commit a crime, which he would not otherwise have committed." *State v. Johnson*, 295 S.C. 215, 217, 367 S.E.2d 700, 701 (1988). Trial counsel succeeded in garnering his client the benefit of a jury instruction on this affirmative defense. (Trial Tr. p. 385). In this case, trial counsel was tasked with advocating to a Lexington County jury that local law enforcement did not act in good faith at all stages of the buy/bust. This Court finds that trial counsel challenged the State's presentation of evidence at all stages of the trial, cross-examining the State's witnesses in an attempt to poke holes not only in the veracity of their actions as government agents, but in the quality of the recovery and maintenance of the marijuana and cocaine seized pursuant to the buy/bust. (Trial Tr. pp. 202-20, 268-85, 298-303, 310-14, 329, 333-43, 352-57).

As to prejudice, this Court finds that Applicant has failed to demonstrate a "reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 596 (quoting *Strickland v. Washington*, 466 U.S. at 695, 104 S.Ct. 2052). The State clearly established at trial that Applicant was not only present at, but was willing to and did in fact orchestrate the exchange of a large amount of

marijuana for cocaine. Unbeknownst to Applicant at the time, he was managing the deal with law enforcement, albeit with the assistance of Joshua Ainsworth. Testimony produced throughout the course of the PCR hearing in this case fails to persuade the undersigned that had counsel called witnesses in Applicant's defense or chosen to pursue an alternative defensive strategy that a jury would have returned with a verdict of not guilty. Additionally, this Court finds that there is no reasonable likelihood that had Ainsworth testified on behalf of the defense that the outcome of the trial would have been different. As trial counsel indicated, Ainsworth set the incident in motion.

For all the foregoing reasons, Applicant's request for relief by way of this allegation is **DENIED.**

3. Trial Counsel's Alleged Failure to Identify the Portion of the Trafficking Statute the State Proceeded Upon in Prosecuting Applicant, and Alleged Failure to Attack the Conspiracy Portion of that Statute

In regards to this allegation, trial counsel credibly testified at PCR that the indictments in this case sufficiently gave notice of the crimes charged. Trial counsel recognized, as does this Court, that our trafficking statute contains "or" language, meaning that the State need only prove the alleged committed one of several actions. S.C. Code Ann. § 44-53-370; *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute.").

Applicant was indicted for Trafficking Marijuana (10 pounds or more, but less than 100 pounds) and Trafficking Cocaine (400 grams or more) (2011-GS-32-02259, -02261). The indictments made part of this record by way of attachment to the State's Return reflect the exact language of the trafficking statutes with which Applicant was charged. S.C. Code Ann. §§ 44-53-370(e)(1)(a)(1) and (e)(2)(e). The prohibited actions are for the accused himself to knowingly

sell, manufacture, cultivate, deliver, purchase, or bring into this State a substance defined by the statute. S.C. Code Ann. § 44-53-370(e). The statute also prohibit a person from providing financial assistance or otherwise aiding, abetting, attempting, or conspiring to do one of the aforementioned actions. *Id.* Finally, the statute prohibits one from knowingly being in, or attempting to be in, actual or constructive possession of the defined substances. *Id.*

Given counsel's testimony on this point and the wording of the trafficking statute, this Court finds no *Strickland* error or prejudice flowing from the failure to specifically identify the portion of the trafficking statute under which Applicant was prosecuted. Likewise, this Court finds no merit to the allegation that trial counsel failed to attack the conspiracy portion of the statute, as that portion is not dispositive of Applicant's guilt or innocence. The facts established at trial demonstrate that Applicant was either in, or attempted to be in, actual or constructive possession of both the cocaine and marijuana as a result of the buy/bust. Accordingly, Applicant's request for relief by way of this allegation is **DENIED**.

4. Alternative claim of Newly Discovered Evidence

To the extent Applicant raises an alternative claim of newly discovered evidence, Applicant has not met his burden. The PCR Act allows an applicant to file an application for relief "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence." S.C. Code Ann. § 17-27-45(C) (2014) (allowing applications to be filed within one year of the date of actual discovery of the facts or from the date when the facts "could have been ascertained by the exercise of reasonable diligence"); *see also* S.C. Code Ann. § 17-27-20(A)(4). In a PCR proceeding following a jury trial, "[t]he standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or

innocence.” *McCoy v. State*, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013); *Jamison v. State*, 410 S.C. 456, 467, 765 S.E.2d 123, 128 (2014) (refusing to apply “traditional five-part test” for newly discovered evidence to PCR proceeding occurring after a guilty plea). That test is met when the applicant shows that the alleged newly discovered evidence “(1) would probably change the result if a new trial is had; (2) has been discovered since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching.” *Clark v. State*, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993).

The totality of the evidence presented at Applicant’s PCR hearing was discoverable and available to counsel at the time of trial. For the reasons discussed above, trial counsel made a valid strategic decision to forego calling Ainsworth as a witness. Moreover, this Court finds that no credible testimony presented at the evidentiary hearing was material to Applicant’s guilt or innocence. Applicant was not prejudiced by the defense presented at trial given the nature of the buy/bust prosecution and the wealth of evidence against Applicant. As a result of the foregoing, Applicant’s request for relief by way of this allegation is **DENIED**.

III. CONCLUSION

Upon consideration of the testimony presented at the evidentiary hearing, a review of the pertinent portions of the file made part of this record by way of attachment to the State’s Return, and the applicable case law, the undersigned finds that Applicant has failed to meet his burden of establishing any constitutional deprivation which would warrant relief. Even if Applicant had put forth sufficient evidence that trial counsel’s performance was in some way unreasonable under prevailing professional norms, which this Court finds he did not, Applicant has failed to present any evidence that would tend to establish that he was prejudiced by some act or omission of

counsel, or that had counsel not acted in the manner complained of, that there is a reasonable likelihood that the outcome of Applicant's trial would have differed.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

This Court additionally notes Applicant must file and serve a notice of appeal within 30 days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

AND IT IS SO ORDERED this 30 day of March, 2018.



J. CORDELL MADDOX, JR.
PRESIDING JUDGE

Anderson, South Carolina

COPY

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2018 APR 20 AM 8:00 CASE NO.: 2015-CP-32-02236

BENJAMIN J. NEWMAN, 352829,

LISA M. COMEY
Plaintiff of Court
LEXINGTON SC

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

vs.

STATE OF SOUTH CAROLINA

Defendant.

Plaintiff's Attorney: Tricia A. Blanchette, Bar No. 74904 Address: PO Box 2147, Leesville, SC 29070 Phone: 803-908-3266 Fax _____ E-mail: blanchettelaw@gmail.com Other: _____		Defendant's Attorney: Carolina M. Scrantom, Bar No. _____ Address: PO Box 11549, Columbia, SC 29211 Phone: 803-734-3737 Fax _____ E-mail: _____ Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: Reconsideration		Court Reporter Needed: ☒ YES / ☐ NO	
Estimated Time Needed: 30 minutes			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order			
I hereby move for relief or action by the court as set forth in the attached proposed order.			
Signature of Attorney for ☐ Plaintiff / ☐ Defendant		April 18, 2018 Date submitted	
SECTION III: Motion Fee			
☐ PAID - AMOUNT: \$ _____			
☒ EXEMPT: (check reason)			
☐ Rule to Show Cause in Child or Spousal Support			
☐ Domestic Abuse or Abuse and Neglect			
☐ Indigent Status ☐ State Agency v. Indigent Party			
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief			
☐ Motion for Stay in Bankruptcy			
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)			
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions			
Name of Court Reporter: _____			
☐ Other: _____			
JUDGE'S SECTION		JUDGE CODE _____	
☐ Motion Fee to be paid upon filing of the attached order.		Date: _____	
☐ Other: _____			
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____			
☐ MOTION FEE COLLECTED: \$ _____			
☐ CONTESTED - AMOUNT DUE: \$ _____			

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2015-CP-32-02236

2018 APR 20 AM 8:41

BENJAMIN J. NEWMAN, #352829,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent,

LISA M. COHER

CLERK OF COURT

LEXINGTON

MOTION PURSUANT TO
RULE 59(a) & (e)

Pursuant to Rule 59(a) and (e) of the South Carolina Rules of Civil Procedure, Applicant would move before this Court for reconsideration of the standing Order of Dismissal. This matter comes before the Court by way of an Application for Post Conviction Relief filed on June 25, 2015. The State filed a Return on October 13, 2017.

By way of an Amendment dated November 13, 2017, Applicant made the following specific allegations of ineffective assistance of trial counsel:

1. Trial counsel rendered ineffective assistance for failing to move to suppress and/or object to the drug evidence due to change in appearance. Trial counsel rendered further ineffective assistance when he agreed to the destruction of the evidence post trial. Transcript p. 436.
2. Trial counsel rendered ineffective assistance in the handling of the entrapment defense.
3. Trial counsel rendered ineffective assistance for failing to require the State to identify the specific portion of the trafficking statute on which the trial was proceeding and failing to attack the conspiracy portion of the statute.
4. Trial counsel rendered ineffective assistance for failing to investigate and utilize necessary witnesses for the defense and for failing to further cross-examine state witnesses during pre-trial and trial, which resulted in the denial of pre-trial motions and a guilty verdict.
5. Alternatively, newly discovered evidence if witnesses and testimony was not discoverable at the time of trial.
6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

An evidentiary hearing was convened on December 15, 2017 in front of the Honorable J. Cordell Maddox, Jr. at the Lexington County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Carolina Scrantom, Assistant Attorney General. On March 30, 2018, Judge Maddox issued an Order of Dismissal, which was filed April 6, 2018. Applicant, through counsel, received a copy of the Order via mail on April 16, 2018, from which this Motion timely follows.

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post-conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80. Therefore, Applicant respectfully requests that this Court review the evidentiary hearing transcript and ensure that specific findings of fact and conclusions of law are entered and that the arguments and testimony of each witness is properly addressed. Applicant urges the Court to thoroughly address each issue raised and would further urge the Court to reconsider the reasoning used to deny each issue raised.

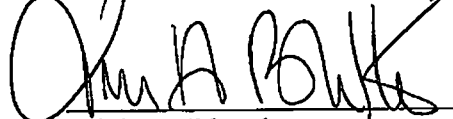
Specifically, Applicant requests that this Court alter, amend and/or reconsider the credibility findings. Applicant urges this Court to find the credibility of Applicant and Joshua Ainsworth was not lacking and that the testimony offered established findings of ineffective assistance of counsel. Furthermore, Applicant asserts that the testimony of trial counsel was lacking in credibility and inconsistent at best.

Additionally, Applicant asks this Court to find that the failure to utilize Joshua Ainsworth, with counsel admittedly not speaking to him first or conducting any form of

independent investigation, cannot amount to a reasonable strategic decision or effective assistance. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (Holding that while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.). As the Order states, it appears counsel's trial strategy was poking holes in the State's case, yet he failed to call the one witness that he told the jury was noticeably missing from trial. By his own closing argument, trial counsel deemed Ainsworth the most important person in the case and key to the issue of entrapment. Trial p. 404, ln. 15, p. 405. Applicant submits that Ainsworth's evidentiary hearing testimony supports trial counsel's assertions in closing argument and further supports a finding of ineffective assistance of counsel.

Therefore, Applicant asks this Court to reconsider the standing Order in its entirety and find that the record supports the granting of a new trial.

I so move,



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
Attorney for Applicant

April 18, 2018

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 2015-CP-32-2236

Benjamin J. Newman, 352829,)
Applicant,)

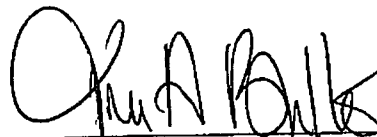
v.)

CERTIFICATE OF SERVICE

State of South Carolina,)
Respondent,)
_____)

I, Tricia A. Blanchette, Attorney for Applicant, hereby certify that I placed in the United States Mail this 18th day of April 2018, a copy of Motion Pursuant to Rule 59 to Caroline M. Scrantom, Esquire, of the Attorney General's Office, at:

Office of the Attorney General
Att: Caroline M. Scrantom, Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549



Tricia A. Blanchette
PO Box 2147
Leesville, SC 29070
(803) 908-3266

April 18, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2018 MAY 21 AM 11:48

Civil Action No.: 2015-CP-32-02236

Benjamin J. Newman,

LISA H. COMER
CLERK OF COURT
LEXINGTON SC

Plaintiff,

vs.

State of South Carolina,

Defendants.

**ORDER DENYING APPLICANT
BENJAMIN NEWMAN'S MOTION TO
RECONSIDER**

This matter comes before the Court on Applicant Benjamin Newman's Motion to Reconsider pursuant to Rule 59(a) & (e), South Carolina Rules of Civil Procedure. This Motion for Reconsideration is hereby denied.


The Honorable J. Cordell Maddox, Jr.
South Carolina Circuit Court Judge

This 12th day of May 2018

The South Carolina Court of Appeals

The State, Respondent,

v.

Benjamin J. Newman, Appellant.

Appellate Case No. 2012-213383

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Spert, Jr. J.

Id B. W. J.

Paul E. Thomas J.

Columbia, South Carolina

cc: Jennifer Ellis Roberts, Esquire
Benjamin Allen Stitely, Esquire
Alan McCrory Wilson, Esquire
Tara Dawn Shurling, Esquire
The Honorable Alexander S. Macaulay

FILED

June 3, 2014