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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas in a Post-Conviction Relief Action
J. Cordell Maddox, Jr., Circuit Court Judge

Appellate Case No. 2018-001137

BENJAMIN J. NEWMAN, #352829,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S QUESTION PRESENTED

I. The lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel when he failed to conduct an independent investigation and call the confidential informant as a witness at trial.

RESPONDENT'S COUNTER-QUESTION PRESENTED

I. Whether the record supports the PCR court's determination that trial counsel was not deficient in making the decision to forego interviewing and calling as a witness the confidential informant where trial counsel testified that he made the strategic decision to forego interviewing and calling the confidential information because the remainder of his investigation led him to determine that the confidential informant was not a reliable witness for the defense of entrapment.

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Petitioner Benjamin Newman in August 2011 for trafficking marijuana, ten pounds or more, but less than 100 pounds, and for trafficking cocaine, 400 grams or more. (App. 464-70). After a full suppression hearing, Petitioner proceeded to a jury trial beginning October 16, 2012, before the Honorable Alexander S. Macaulay. Robert T. Williams, Esquire, represented Petitioner on the charges. (App. 1-146). The jury found Petitioner guilty of both trafficking charges. (App. 473-75). Judge Macaulay sentenced Petitioner to ten years for the marijuana conviction and a concurrent 25 years for the cocaine conviction. (App. 486, 474).

The basic facts of the case as presented at trial and as recalled by trial counsel at PCR established that on June 5, 2011, the Lexington County Multi-Agency Narcotics Enforcement Team (NET) arranged a drug exchange with Petitioner, a suspected drug dealer. Joshua Ainsworth acted as the confidential informant (CI) who arranged the exchange, which was conducted between Petitioner and an undercover NET agent. Petitioner 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 Petitioner ran out the back door. He was thereafter apprehended on the property. After the flash-bang cleared, agents located the cocaine from the exchange in an open bookbag on the floor at the location of the exchange. (App. 159-418, 672-73, 682).

Trial counsel timely filed notice of appeal, and continued to represent Petitioner on appeal along with Benjamin A. Stitley, Esquire. On appeal, counsel challenged the trial court's denial of Petitioner's motion to suppress and for directed verdict. (App. 476-93). The South Carolina Court of Appeals affirmed without oral argument. (App. 519-20 (*State v. Newman*,

2014-UP-034 (S.C. Ct. App. filed Jan. 29, 2014)). At that point Petitioner and Counsel Williams consented to the substitution of Tara Dawn Shurling, Esquire, as counsel, and she petitioned the Court of Appeals for rehearing and, in turn, the South Carolian Supreme Court for certiorari. (App. 521-64). Petitioner was denied certiorari on November 11, 2014. (App. 565). The Court of Appeals issued the Remittitur on November 18, 2014. (Ap. 566).

Petitioner initiated this post-conviction relief (PCR) action with the filing of his *pro se* application and accompanying memorandum on June 25, 2015. (App. 567-90). By and through PCR counsel Tricia Blanchette, Esquire, Petitioner defined the claims through which he sought PCR in an amended application filed November 15, 2017, which included the following allegations relevant to the issue on appeal:

> 2. Trial counsel rendered ineffective assistance in the handling of the entrapment defense. . . .
>
> 4. Trial counsel rendered ineffective assistance for failing to investigate and utilize necessary witnesses for the defense and for failing to further cross-examinee state witnesses during pre-trial and trial, which resulted in the denial of pre-trial motions and a guilty verdict.

(App. 612-14).

The evidentiary hearing in Petitioner's PCR action convened on December 15, 2017, before the Honorable J. Cordell Maddox, Jr. (App. 615). Counsel Blanchette presented the CI Joshua Ainsworth, private investigator Pete Skidmore, trial counsel Williams, and Petitioner as witnesses in furtherance of the allegations in the amended application. (App. 616-21). Thereafter, Judge Maddox issued an Order which denied and dismissed with prejudice each of the allegations pursued at the PCR hearing. (App. 722-44). The PCR court found the testimonies of the CI and Petitioner not credible, and found that trial counsel credibly testified to making a series of valid strategic decisions in preparation for Petitioner's trial. (App. 728-44).

The Order of Dismissal was filed on April 6, 2018, after which Petitioner filed a motion to alter or amend pursuant to Rule 59, SCRE, which specifically sought the PCR court's reconsideration of its ruling regarding trial counsel's strategic decision-making concerning the failure to utilize the CI during his investigation and at trial, and its credibility findings regarding trial counsel, the CI, and Petitioner. (App. 722, 746-48). The PCR court denied the 59(e) motion in an Order filed May 21, 2018. (App. 750).

By and through PCR counsel, Petitioner timely served a notice of appeal. Counsel Blanchette continues to represent Petitioner in this appeal, to which Respondent makes the instant Return.

STANDARD OF REVIEW

"On certiorari in PCR cases, the Court applies an 'any evidence' standard of review. *McHam v. State*, 404 S.C. 465, 472, 746 S.E.2d 41, 45 (2013). This Court will affirm the PCR court's findings if there exists "any evidence of probative value" to sustain them, and will "reverse the PCR judge's decision when it is controlled by an error of law." *Suber v. State*, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007). "This Court gives great deference to the PCR judge's findings of fact and conclusions of law." *McHam v. State, supra.*

ARGUMENT

I. The record supports the PCR court's determination that trial counsel made a valid strategic decision to forego interviewing and calling the confidential informant as a witness.

Petitioner alleges that counsel rendered deficient performance when he failed to interview and call as a witness Joshua Ainsworth, the CI who initiated the drug deal for which Petitioner was convicted. Petitioner further alleges that Ainsworth's proffer at the PCR hearing demonstrates prejudice from counsel's alleged failure, because Ainsworth's PCR testimony "called into question the testimony and evidence offered by the State . . . ." (Cert. Pet. at 14-15). The PCR court found no error or prejudice flowing from trial counsel's affirmative decision to forego interviewing and calling Ainsworth at a witness. (App. 738-40). Certiorari on this issue is not warranted as the circuit court records support the PCR court's ruling, and as that ruling is appropriately rooted in law and fact.

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must first demonstrate deficient performance, "meaning that 'counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.' Second, he must demonstrate that this deficiency prejudiced him to the point that he was

deprived of a fair trial whose result is reliable." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984)). 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, Petitioner 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).

Because "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," a high degree of deference accompanies judicial scrutiny of trial counsel's performance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. Each PCR proceeding enjoys "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Courts are instructed to "be wary of second-guessing trial counsel's tactics." *Edwards v. State*, 392 S.C. at 457, 710 S.E.2d at 64. Where trial counsel "articulates a *valid* reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (emphasis in original); *Carter v. Lee,* 283 F.3d 240, 249 (4th Cir. 2002) (defendant must overcome presumption that the challenged action might be considered sound trial strategy);

Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998); *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).

Specifically as to counsel's duty to investigate and interview potential witnesses, "[s]o long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient." *Edwards v. State*, 392 S.C. at 457, 710 S.E.2d at 65. "While our case law does provide that defense counsel must, at a minimum, interview potential witnesses, a strict adherence to that rule loses sight of the controlling standard for counsel's duty to investigate: reasonableness." *Id.*, 710 S.E.2d at 64. Instead, this Court has found that "it would be an absurdity to require criminal defense lawyers to interview *every* potential witness," and as a result held that counsel fulfills the duty owed to his client when he "can articulate reasonable grounds" for not doing so. *Id.*, 710 S.E.2d at 64-65. "[T]he scope of a reasonable investigation depends upon a number of issues." *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597.

The record evidences trial counsel indeed fulfilled the duty owed to his client by conducting a reasonable investigation given the facts of the case and his familiarity with his client and others in his circle of influence. Trial counsel, an experienced criminal defense attorney, testified that he had known and represented Petitioner for "awhile" prior to being retained to represent him on these trafficking charges. (App. 647). Petitioner had prior arrests, but no prior convictions. (App. 671, *see* App. 716). Trial counsel was also familiar with Petitioner's friends. (App. 647). Trial counsel reviewed the evidence in Petitioner's case with his client and spoke with him many times about the case. (App. 648, 673). The facts of the case were such that Petitioner had been set up by a CI whom he had known for a long time. Petitioner was

supposed to provide 25 ounces of cocaine in exchange for 50 pounds of marijuana, but Petitioner ended up providing closer to 27 ounce of cocaine to complete the deal. (App. 672). When the smoke cleared from law enforcement's bust, the cocaine Petitioner was providing was located in an open bookbag on the floor of the residence next to the kitchen counter where the exchange was being conducted. (App. 682). That bookbag had been brought into the residence by the CI and law enforcement agent. (App. 672).

Then, he conducted a reasonable investigation given the facts of the case. Trial counsel explained that he spoke to his client and developed a full understanding of the events that transpired. (App. 654). Even give "a lot" of conversation, Petitioner did not name any number of potential witnesses who could testify on his behalf. (App. 673). Counsel did not hire a private investigator. (App. 654). He did, however, talk to a number of other people about the case. (App. 670). Trial counsel recognized that, given the facts of the case, Petitioner could not name anyone "that would save him in terms of us putting up a witness to say that Benji wasn't there, Benji didn't have the drugs, Benji didn't sell the drugs. The only thing we could do really was poke holes at the solicitor's case." (App. 673).

Specifically in regards to the CI, Ainsworth, trial counsel had an impression that he could not be believed—he was aware that the CI "had spent quite some time running from state to state to state" and "had charges all over the place." (App. 654-55). Counsel was aware that Ainsworth's bondsman was under pressure to secure him and in fact "had several conversations with the bonding company about where the heck he was." (App. 655-56). Counsel was not only aware of Ainsworth's "previous history," but had "several conversations with other people explaining [Ainsworth's] disappearance" and assessed that Ainsworth, if called to the stand, would only "say what [was] most beneficial to Josh Ainsworth at the time." (App. 662). Trial

counsel explained that even if he had found Ainsworth pre-trial, he would not have utilized him at a witness because counsel's investigation into Ainsworth indicated he did not provide consistent stories. (App. 675). But even if the "major reason" for choosing not to contact the CI was not his unreliability, it was not the sole reason. (App. 674). Trial counsel "didn't know where he was most of the time[ ]." (App. 674).

At trial, counsel "was trying to force [the State] into calling Mr. Ainsworth" because he was aware that everything Ainsworth said was "subject to ridicule, if you will, so it appeared to be better trial strategy to have him talked about as being there as opposed to" counsel finding him and placing him on the stand. (App. 657). Trial counsel learned that Ainsworth had been brought to the courthouse on the day of Petitioner's trial. (App. 655, 663). But the State chose not to present Ainsworth. (App. 663). Trial counsel explained that in assessing Ainsworth in the context of the remainder of the evidence presented at trial, he "thought that the jury would be more overcome with the fact that the whole thing began with him and that he was working for the police" and yet the State "didn't put him up there to testify." (App. 660). Thus, in another strategic move, trial counsel argued to the jury that Ainsworth was the key to the affirmative defense of entrapment because he "wanted the jury to have reasonable doubt in regards to the little holes that [he] was trying to throw out there"—there were "many issues that seemed like [they] could have been presented better if the State had really wanted to prove that my client was guilty." (App. 661).

Trial counsel was seeking a jury instruction on the defense of entrapment. While trial counsel succeeded in that regard, (App. 428-29), he did not think he could prove it as he assessed the case which would go forth at trial. He recognized law enforcement "had been looking at Benji for quite a while," making it difficult to prove that he was not predisposed to the drug deal

that occurred. (App. 661). As to his client being void of predisposition, counsel assessed: "conceivably if [he] had attempted to bring that out, [the State] might have brought out other information they had about Benji where they knew about this drug deal or that drug deal" based upon what counsel knew of Petitioner's history. (App. 676).

Yet, when it became clear that he would get the jury instruction, counsel pointed out the absence of the CI at closing order to plant in the jury's mind that the CI who was not present at trial set him up, and that Petitioner otherwise would not have engaged in the deal. (App. 661, *see* App. 408-11). Counsel recognized and argued to the jury "that everything was brought about by virtue of something the State had done or something else that the confidential informant had done." (App. 676, *see* App. 411-18). Although counsel had to calculate how to convey that argument to the peculiarity of a Lexington County jury:

> in my experience when you want to accuse a police officer of doing something wrong you have to do it in a kind and caring way because the jury – particularly Lexington County juries will turn you off as soon as you say it plainly and clearly, so you have to let them feel that perhaps the police officer made a mistake, he wasn't doing this the right way, but he certainly didn't have evil intent[.]

(App. 678).

As for alternative defenses, trial counsel also testified that in his assessment, the jury would not buy a defense that the drug deal never actually took place, because "there had been a substantial amount of conversation, if [he] remember[ed] right, about how it's cooked and how it's done" such that "there clearly had been something going on with the cocaine and the marijuana" based on the evidence presented at trial. (App. 658). He did not think it wise to put Petitioner on the stand. (App. 669). Trial counsel determined it best to challenge the timing of the issuance of the search warrant in comparison to the actual search that was conducted after the

flash-bang at the scene. (App. 664, 676-79). Trial counsel conducted a full suppression hearing on this issue was ultimately was not successful.[1] (App. 1-146; *see* App. 30-31).

As for the remainder of Petitioner's PCR presentation, it fails to discount the reasonableness of trial counsel's investigation and preparation for the trial given the facts of the case. Petitioner testified that he retained trial counsel on this charge because he had previously represented Petitioner's family members, as well as Petitioner on a prior DUI. (App. 689). In Petitioner's view, trial counsel did not really help him prepare for trial and Petitioner "didn't like the way things w[ere] unfolding" leading up to the trial date even though he had met with counsel and reviewed the evidence in his case. (App. 690-93). Petitioner testified that he was not aware of any pre-trial investigation conducted by trial counsel, who, according to Petitioner, did not discuss any potential witnesses with his client. (App. 694). Petitioner wanted counsel to "speak to every witness as possible to help [him] prove his innocence in this case," including the CI Ainsworth, whom Petitioner had grown up with. (App. 694, 698). Trial counsel advised Petitioner that it "was a good thing "that Ainsworth was not going to be called as a witness at trial. (App. 694). However, Petitioner maintained that he personally believed Ainsworth was "the

[1] A suppression full hearing was conducted which delved into whether law enforcement searched the residence prior to the officer's arriving with the search warrant. (App. 1-146). Agents testified that when the officers came in to make the arrest, the marijuana was readily visible. (App. 19; App. 95). One officer testified they discovered the cocaine in a bookbag which was lying open on the floor next to the kitchen island. (App. 95). 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 Petitioner took it when he ran. (App. 115-16). The trial court listened to the recording from the audio recording device worn by Agent Carver during the drug transaction. (App. 15-17, App. 127-29). The trial court pointed out that the CI and undercover agent were invited into the house and that the contraband was in clear view. (App. 131). The trial court determined the cocaine and marijuana would be admitted, denying the motion to suppress. (App. 136). The cocaine was found in plain view and thus did not require the search warrant be timed with its discovery. *State v. Wright*, 391 S.C. 436, 443, 706 S.E.2d 324, 327 (2011) (discussing admissibility of evidence seized from plain view and discarding requirement that discovery be inadvertent).

main key to the whole puzzle" because he was "the main thing that made all this take place and transpire" and was therefore critical to his case. (App. 695). Petitioner also testified that prior to the buy-bust he met Ainsworth "at a house in Gaston and he showed up to meet Dana [Merritt] and Dana wasn't there and that's how the – we nego – we first started what you was speaking about earlier with the two – first transactions" with Ainsworth. (App. 699). Petitioner testified that now he feels betrayed by Ainsworth. (App. 700). However, Petitioner's testimony only demonstrates that he was in fact predisposed to the deal at the time of the buy-bust because he had conducted prior deals with Ainsworth. Further, Petitioner's testimony fails to take into account the independent investigation and preparation demonstrated by trial counsel's testimony, which ultimately garnered Petitioner a jury instruction on the defense of entrapment.

Finally, Ainsworth's testimony further buttresses trial counsel's assessment of his viability as a credible witness. His testimony at PCR was inconsistent when challenged. He additionally demonstrated a predisposition by Petitioner to engage in the drug trade. Ainsworth, who grew up with Petitioner, testified he agreed to work as a confidential informant against Petitioner in a buy-bust in order to cooperate with law enforcement to help resolve a series of pending band fraud charges. (App. 623, 638, 641-42). According to Ainsworth, law enforcement initially wanted his assistance in targeting one Dana Merritt, whom Ainsworth knew through Petitioner. (App. 623-24, 641). At some point during his cooperation with law enforcement, Ainsworth agreed to individually engage Petitioner in two arranged buys which took place "a couple of days or a couple of weeks" prior to the buy-bust ending in Petitioner's arrest. (App. 638-40). Ainsworth testified that at some point prior to the final buy-bust, he told law enforcement he wanted to back out, but law enforcement threatened violence if he did not continue to cooperate. (App. 624, 641). Ainsworth agreed during cross-examination that he

ratted out his friend in order to work off his bank fraud charges. (App. 641-42). Ultimately, Ainsworth set up the final buy-bust with Petitioner. (App. 626-27). Ainsworth drove one agent to a residence of Petitioner's and Ainsworth and the agent each carried a bag with marijuana inside intending to exchange it for cocaine from Petitioner. (App. 627, 637-38).

Ainsworth also testified he never saw the cocaine prior to the flash-bang going off, and that once it did, he could not see anything in the house and he was knocked to the floor and handcuffed. (App. 628-30). He testified that as law enforcement drove him away from the residence, he overheard a telephone conversation between the agent driving the car and someone at the scene indicating "the cocaine was fake." (App. 631). He furthered that soon after the buy-bust, law enforcement gave him $1000 to leave and go to Georgia. Law enforcement at this time told him that someone had a $10,000 hit on his head.[2] (App. 632). On this, the testimony concerning the authenticity of the drugs as nearly immediately determined at the scene, and on verbal threat to continue acting as CI, Petitioner offered no corroboration. *See Bannister* The chemical and audio-recorded evidence presented at trial otherwise contradicts Ainsworth's assertions.

Ainsworth testified he was aware that Petitioner's bond was denied because he had been threatening witnesses. (App. 633). But Ainsworth thereafter testified that he never knew where the origin of law enforcement's telling him there was a $10,000 hit on his head, and that he never personally received a threat from Petitioner prior to trial. (App. 640). Ainsworth also testified he skipped town after the buy-bust and was arrested in Georgia about a year later. (App. 640-41). In

[2] On this, the testimony concerning the authenticity of the drugs as nearly immediately determined at the scene, and on the testimony concerning receipt of a verbal threat to continue acting as CI, Petitioner offered no corroboration. The chemical and audio-recorded evidence presented at trial otherwise contradicts Ainsworth's assertions. The State called a series of witnesses who verified the substance and weight of the drugs seized and the location in which they were found to have exchanged hands. (App. 253-301; App. 327-33; App. 350-55).

addition to the South Carolina charges, Ainsworth subsequently incurred charges in Georgia, Tennessee, and North Dakota. (App. 640). As to the alleged threat by law enforcement, Ainsworth testified he began to file a complaint to report it but never followed through with it. (App. 633-34). Ainsworth concluded he was in the custody of the South Caroline Department of Corrections at the time of Petitioner's trial and was never contacted to testify either for Petitioner or for the State, despite being transported the courthouse on the day of the trial. (App. 634-35).

On this record, Petitioner cannot demonstrate that the PCR court's Order of Dismissal is controlled by an error of law. (*See* App. 733-41). Trial counsel's testimony demonstrates a series of strategic decisions made only after a reasonable investigation into the facts and circumstances of his client's engagement with a CI who proved unpredictable, difficult to locate, ridden with criminal charges across jurisdictions, and who by his own admission elected to work with law enforcement to set up his friend. Petitioner has failed to distinguish deficient performance on this record, as trial counsel articulated reasonable grounds for failing to interview and call Ainsworth as a witness at Petitioner's trial. *Edwards v. State*, 392 S.C. at 457, 710 S.E.2d at 64-65.

Petitioner has also failed to demonstrate prejudice flowing from trial counsel's failure to interview and call Ainsworth as witness, because each witness presented at the PCR hearing offered testimony supportive of a finding that Petitioner was predisposed to the drug trade. *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004) ("the entrapment defense consists of two elements: (1) government inducement, and (2) lack of predisposition"). And, the record includes ample evidence from which the jury could conclude drugs were exchanged as a result of Petitioner's engaging in a deal with the undercover agent. At trial, Agent Carver testified about his role as the undercover drug dealer who bartered fifty pounds of marijuana for twenty-seven ounces of cocaine. (App. 225-89). The audiotape produced from the undercover

agent provided evidence of Petitioner's participation in the drug deal. (*See* App. 258-61). As Carver testified to, Petitioner was even heard asking for 1,000 pounds of marijuana for the next deal. Petitioner also gave Agent Carver two extra ounces of cocaine and told him how to work with the cocaine to keep it in a brick when unwrapped. (App. 236-40). Petitioner talked to Carver about how "he can't get any marijuana from any of his other connections." (App. 240). The details of the drug deal itself demonstrate Petitioner's dominion and control over the drugs when he invited Agent Carver and the CI into the home and engaged in an exchange of marijuana for cocaine. (App. 234-61). Petitioner pulled a big bag of cocaine from his own cardboard box to effectuate the exchange and added on a small baggie with two additional ounces. (App. 238-39). Ainsworth's PCR testimony at least corroborates that the invitation into the home for purposes of the deal did occur. (App. 627, 637-38). The cocaine ended up in the bookbag brought to the deal by law enforcement and Carver, the only law enforcement agent in the room at the time of the buy-bust, did not put it there. (App. 244-49). The State also 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. (App. 333; App. 354-55). It is clear from the testimony at trial and the presentation of the audiotape of the exchange that Petitioner accepted the marijuana brought to the exchange and provided the cocaine, making him an active participant in deal for which he was convicted. *See State v. Muhammed*, 338 S.C. 22, 26-27, 524 S.E.2d 637, 639 (Ct. App. 1999) (discussing actual and constructive possession as element of trafficking).

Based upon this record, the PCR court was correct to conclude that trial counsel made a strategic decision entitled to deference by the standard attaching to this action, and that no error or prejudice resulted. *McHam v. State*, *supra*; *Suber v. State*, *supra.*

CONCLUSION

Considering the foregoing, the State requests this Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,

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Petitioner,

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STATE OF SOUTH CAROLINA,

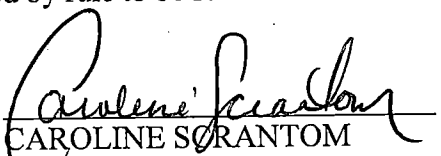
Respondent.

PROOF OF SERVICE

I, Caroline Scrantom, counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same via U.S. Mail, first class, postage prepaid, and addressed to his attorney of record at:

Tricia A. Blanchette, Esquire
PO Box 2147
Leesville, SC 29070

I further certify that all parties required by rule to be served have been served this 19th day of February, 2019.



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