

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
Court of Common Pleas
William A. McKinnon, Post-Conviction Relief Judge
John C. Hayes, III, Trial Judge

Appellate Case No. 2018-001931

DARNELL KERI SLATON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF THE ISSUE ON APPEAL

Whether the PCR Court erred in finding trial counsel was not ineffective for failing to challenge discovery restrictions that prohibited Petitioner from viewing the video of the controlled-buy until after the plea offer had expired.

RESPONDENT'S STATEMENT OF THE ISSUE

Did the post-conviction relief court correctly find Counsel was not constitutionally ineffective for failing to challenge the discovery restrictions that prevented Petitioner from viewing the video of the controlled drug buy which gave rise to these charges prior to the expiration of the plea offer because Counsel was provided with still photographs of Petitioner's face from the video and was allowed to view the video and relay the contents of the video to Petitioner prior to the plea offer expiring; additionally Petitioner testified he was aware he was on the video and wanted to proceed to trial because he did not believe the video established he sold marijuana to the confidential informant?

STATEMENT OF THE CASE

Petitioner is currently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the York County Clerk of Court. In December 2013, the York County Grand Jury indicted Petitioner for distribution of marijuana (2013-GS-46-4422). Assistant Public Defender Melissa Inzerillo of the Sixteenth Circuit Public Defender's Office represented Petitioner. Assistant Solicitor Matthew W. Shelton of the Sixteenth Circuit Solicitor's Office prosecuted the case. On April 20, 2015, Petitioner proceeded to a jury trial before the Honorable John C. Hayes, III. Petitioner was found guilty as indicted and was sentenced to imprisonment for twelve years.

Petitioner filed a timely notice of appeal. William G. Yarborough, III, Esquire, perfected the appeal. After both parties submitted briefs, the South Carolina Court of Appeals determined the case without oral argument. The Court of Appeals affirmed Petitioner's conviction on May 17, 2017. State v. Slaton, Op. No. 2017-UP-203 (S.C. Ct. App. filed May 17, 2017). The remittitur was returned to the circuit court on June 23, 2017.

Petitioner filed his application for post-conviction relief on June 30, 2017, alleging he was being held unlawfully for the following reasons:

1. "Ineffective assistance of counsel pursuant to Strickland v. Washington. Counsel was ineffective by not objecting to the admissibility of a video recording showing a confidential informant identifying the Applicant from a photo lineup and by not objecting to the admission of the photographic lineup from the video."
2. "The trial court erred in conducting a Neil v. Biggers hearing to determine the admissibility of a video recording that showed a confidential informant identifying him from a photo lineup."
3. "There was insufficient evidence of the Applicant's guilt since the State's only evidence against the Applicant was a skewed photo lineup which was improperly admitted and the doubtful testimony of a confidential informant. Thus, the trial court erred in denying the Applicant's motion for a directed verdict in violation of the Applicant's 4th and 14th Amendment due process rights."

Respondent filed a return and partial motion to dismiss Petitioner's applicant on November 2, 2017, arguing the allegations pertaining to trial court error and insufficiency of the evidence were not proper post-conviction relief claims. On April 4, 2018, Petitioner, through counsel, filed an amended post-conviction relief application alleging:

4. "The trial court erred in conducting a Neil v. Biggers hearing to determine the admissibility of a video recording that showed a confidential informant identifying him from a photo lineup."
 - a. "Because Applicant's face is seen on the video, a photo lineup and Neil v. Biggers hearing were unnecessary and the jury could decide for itself whether it was Applicant in the video. The lineup thus improperly bolstered the credibility of the confidential informant in his testimony that a controlled buy indeed took place between the Applicant and himself."
5. "There was insufficient evidence of the Applicant's guilt since the State's only evidence against the Applicant was a skewed photo lineup which was improperly admitted and the doubtful testimony of a confidential informant. Thus, the trial court erred in denying the Applicant's motion for a directed verdict in violation of the Applicant's 4th and 14th Amendment due process rights."
 - a. "In moving for a directed verdict, trial counsel made the following unspecific and blanket motion for a directed verdict: 'May it please the Court? Your Honor, at this time, we would renew all previous motions and objections. And at this time, we would move for a directed verdict.' App. 310 . . . The trial court denied the motion and the South Carolina Court of Appeals affirmed Applicant's conviction and dismissed his direct appeal, citing 'State v. Gaster, 349 S.C. 545, 555, 564 S.E. 2d 87, 92 (2002) ('In ruling on a directed verdict motion, the trial court is concerned with the existence of evidence, not its weight.'). 'State v. Slaton, Appellate Case No. 2015-000944, No. 2017-UP-203 (Ct. App. May 17, 2017).
6. Pursuant to Strickland, trial counsel was ineffective for failing to:
 - a. "Challenge the discovery restrictions in previous plea agreement offers, which denied Applicant's access to the discovery, particularly, the denied access to view the videos and audio that were later introduced at trial. This resulted in Applicant's inability to make a complete and informed decision about whether to proceed to trial and forego an advantageous plea agreement."

- b. "request a jury instruction on the proper purpose of considering the photo lineup while deliberating (see ground II above)"
- c. "request a jury instruction on the credibility of the testimony of the CI who may benefit from a guilty verdict"
- d. "question law enforcement officers about the recoding or failure to record codes on the money given to the CI and the failure of law enforcement to recover currency matching those codes in Applicant's home or possession."

An evidentiary hearing into the matter was convened on July 30, 2018, at the Moss Justice Center before the Honorable William A. McKinnon. Petitioner was present at the hearing and represented by William G. Yarborough, III, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's mother and Counsel also testified. By order filed September 6, 2018, Judge McKinnon denied and dismissed Petitioner's application for post-conviction relief finding Petitioner failed to demonstrate how Counsel's performance was unreasonable under prevailing professional norms. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

In 2012, Sergeant John Rainier of the Rock Hill Police Department was working as an investigator with the York County Multijurisdictional Drug Enforcement Unit (DEU). (App. 266.) As a member of the DEU, Rainier investigated and enforced narcotics and vice crimes, often with the assistance of confidential informants. (App. 266-269.)

On October 19, 2012, Rainier met with Jacob "Jake" Ballard, a confidential informant who had been working with the DEU for a few months following a July 2012 arrest for possession of marijuana and driving under suspension. (App. 233-237, 267-269.) Ballard told Rainier he could purchase marijuana from an individual called "Dough" who lived in Apartment 105 in his apartment complex, located on 151 Clegan Road in Rock Hill. (App. 237-239, 245, 268-269.) Ballard had been to Dough's apartment ten times, was familiar with Dough, and knew he could purchase marijuana from Dough. (App. 183, 188.) Rainier arranged to meet Ballard at a designated location near Dough's apartment complex in a DEU car. (App. 237-239, 269.) Investigator Harrellson, an officer working with the DEU, accompanied Rainier. (App. 280.)

When Ballard arrived at the meeting spot, Rainier thoroughly searched Ballard to ensure he did not have any contraband or private money on his person. (App. 240, 270.) Rainier then equipped Ballard with two cameras (one on his shirt and another on his watch) to record the anticipated marijuana purchase from Dough. (App. 241, 270-271.) He provided Rainier with forty dollars in documented funds to be used in the controlled purchase of two grams of marijuana from Dough. (App. 240, 270.) Ballard identified Dough's vehicle in the parking lot to Rainier. (App. 169, 281). Rainier then used the vehicle's license plate to obtain utility and Department of Motor Vehicle records (including a photograph and address) of the vehicle's registered owner, Petitioner. (App. 281.) Ballard then left the DEU vehicle and walked to

Dough's apartment. (App. 241, 271.) Rainier maintained audio surveillance of Ballard through the recording equipment. (App. 271-272.) On his walk to Dough's apartment, Ballard spoke with Dough by phone and received instructions from Dough to enter his apartment through an unlocked door. (App. 244-245.)

Upon reaching Dough's apartment, Ballard entered through the unlocked front door and went into the kitchen pursuant to Dough's instructions. (App. 244-246.) Ballard then used the forty dollars given to him by law enforcement to purchase two grams of marijuana from Dough. (App. 246-247.) The two discussed the quality of the marijuana before Ballard left. (App. 247-248.) Ballard was able to record the transaction on both cameras. (App. 242, 244, 274.) Additionally, Rainier heard the entire transaction live through the recording equipment worn by Ballard. (App. 271-272.)

Ballard exited Dough's apartment with marijuana and headed directly to Rainier and the DEU vehicle. (App. 249, 273.) Upon reaching the vehicle, Ballard gave the marijuana to Rainier. (App. 249-250, 273.) Rainier searched Ballard to ensure he did not have any contraband. (App. 273.) Rainier then presented Ballard with a six-person photo lineup (including Petitioner's photograph) and asked Ballard if he could identify the person who sold him marijuana. (App. 250-252, 280-283.) Ballard identified Petitioner as the person who sold him marijuana minutes before. (App. 250-252, 283-284.) Ballard then accompanied Rainier to the police station to give a statement. (App. 250, 284-285.) Once at the station, Rainier deposited the marijuana in the secured evidence locker. (App. 279.)

On November 13, 2013, Cynthia Mitchum, a drug chemist in the York County Sheriff's Office Drug Analysis Lab, tested the marijuana Rainier had deposited in the evidence locker. (App. 292-302.) Mitchum identified the sample as marijuana and noted its total weight was 2.52

grams. (App. 301-302.)

Petitioner proceeded to a jury trial on April 20, 2015. At the start of trial, the State requested a hearing pursuant to Neil v. Biggers¹. (App. 164.) Petitioner did not object to the trial court conducting a Biggers hearing and did not argue that such a hearing was unnecessary or prejudicial to him. (App. 164.) During the Biggers hearing, the State presented testimony from Rainier and Ballard. Rainier testified he showed Ballard the lineup in the backseat of his DEU vehicle shortly after the controlled purchase. (App. 168-169.) He testified it was daylight when he showed Ballard the lineup. (App. 168-169.) He testified he received Petitioner's name and picture through utility and DMV records obtained when Ballard showed him Dough's car prior to the purchase. (App. 168-169, 176.) He testified the lineup contained six pictures, including Petitioner, and he selected the other five people based on similar physical descriptions to Petitioner. (App. 169-170.) He testified the photographs were not marked in any way. (App. 168-169.) He testified prior to showing Ballard the lineup, he advised Ballard the suspect may or may not be included in the lineup and did not suggest whom Ballard should select. (App. 169-171.) Rainier testified Ballard identified Petitioner "almost immediately." (App. 171.) He testified Petitioner was the only light skinned person included in the lineup, but noted the lineup was in black and white. (App. 177-178.)

Ballard testified he purchased marijuana from Petitioner on October 19, 2012. (App. 182.) He testified he made the controlled buy during the daylight in Petitioner's well-lit kitchen. (App. 182-183.) He testified he had known Petitioner for a year and had seen him approximately ten times, but acknowledged he only knew him by his nickname, Dough. (App. 182-183.) Ballard testified he identified Petitioner from the photo line-up "as soon as [he] got in the vehicle" after the controlled buy. (App. 184.) He testified Rainier did not suggest any particular

¹ 409 U.S. 188 (1972).

suspect to him (App. 184.) He testified he gave Rainier a description of the man who sold him marijuana, including that the man was an African-American male who was heavy set and had a full beard. (App. 185, 187.) He testified he was able to select Petitioner immediately, and he was “a hundred percent sure” Petitioner was the person who sold him marijuana. (App. 185.)

At the conclusion of the hearing, Petitioner moved to suppress Ballard’s identification, making the following argument;

Your Honor, for purposes of this hearing, I would ask the Court to make findings where—I would just make just a few points. I would ask the Court to take into consideration the photographs that has been provided and placed into evidence by the State. Mr. Slaton, who was the third photograph by the page that is listed as Image 3, or the second photograph for the first column, is the only light-skinned black male in the six-pack lineup. It’s been testified to by both witnesses that that is the only picture of both—that the confidential informant focused in on and went to. We would ask the Court to take that into consideration as to the suggestibility of that photograph.

Officer Rainier despite looking at the photo—the lineup, did not go back and ask for it to be redone in any way. He had not seen Mr. Slaton before, that—that the skin tones between the remaining pictures and Mr. Slaton is significant enough as to, I believe, rise to the level of suggestibility.

Mr. Ballard did indicate he had interacted with the person he knows as Dough prior to this. The only description, however, that he gave to officers was an African-American, heavy-set man, full beard and scruffy. So, no height weight description, nothing else that would help the officers narrow down any particular description.

Moreover, your Honor, in his own—and in his testimony he gave the ten prior instances. Less than five of those, he was under the influence of marijuana when interacting with the person he knows as Dough. I would ask the Court to take that into consideration in

terms of any findings of suggestibility in the identification procedure in this case.

(App. 191-193.) Notably, Petitioner did not argue that a Biggers hearing was improper or prejudicial. In reply, the State argued the lineup was not suggestive and noted Ballard was absolutely certain Petitioner was the person who sold him drugs minutes prior. (App. 191-193.)

The trial court found the lineup procedure was not impermissibly suggestive, noting,

Well, you never have six identical-looking individuals. In this particular lineup, Mr. Slaton does have lighter skin and a fuller beard. But looking at the totality of the circumstances I cannot find—or, I find that the Defense has not shown, by a preponderance of the evidence, that the identification procedure was impermissibly suggestive.

(App. 193.) The trial court elaborated that the manner in which Rainier presented the lineup to Ballard was also “not impermissibly suggestive looking at the totality of the entire procedure.”

(App. 193.) The trial court further found there was no substantial likelihood of irreparable misidentification and the identification was reliable. (App. 193-195.)

During its case, the State presented testimony from Ballard, Rainier, and Mitchum. Ballard and Rainier’s testimony at trial regarding Petitioner’s identification was consistent with their testimony at the Biggers hearing. The State also presented Jamie Faulkenberry, an officer with the City of Rock Hill Police Department also assigned to the DEU. (App. 307-308.) Faulkenberry arrested Petitioner on July 25, 2013. (App. 308.) When Petitioner was asked his address during booking, Faulkenberry reported Petitioner listed his address as the same apartment where Ballard purchased marijuana—151 Clegan Road, Apartment 105 in Rock Hill, South Carolina. (App. 179, 182, 239, 245, 281, 308.)

At the close of the State’s case, Petitioner moved for a directed verdict without any supporting argument. (App. 310.) The trial court denied Petitioner’s motion, finding “substantial

direct evidence or plenty of direct evidence from which a jury could conclude that a distribution of marijuana took place, and that Mr. Slaton was, in fact, the individual involved in distributing the marijuana to Mr. Ballard on the date and that the time and place in question” (App. 310-311.) Petitioner elected not to present any witnesses. The jury convicted Petitioner as indicted. (App. 352.)

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts give great deference to a post-conviction relief court’s findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 179 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove “counsel’s conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal

cases. “There is 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). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 385 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. 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. 668.

ARGUMENT

The post-conviction relief court correctly found Counsel was not constitutionally ineffective for failing to challenge the discovery restrictions that prevented Petitioner from viewing the video of the controlled drug buy which gave rise to these charges prior to the expiration of the plea offer because Counsel was provided with still photographs of Petitioner's face from the video and was allowed to view the video and relay the contents of the video to Petitioner prior to the plea offer expiring; additionally Petitioner testified he was aware he was on the video and wanted to proceed to trial because he did not believe the video established he sold marijuana to the confidential informant.

Petitioner alleges the post-conviction relief court erred in finding Counsel was not constitutionally ineffective for failing to challenge the discovery restriction preventing Petitioner from viewing the video evidence against him while a plea offer was pending. However, as Counsel testified at the post-conviction relief hearing, she was provided at least one still photograph from the video clearly depicting Petitioner's face, and she was able to view the video evidence against Petitioner and relay the inculpatory nature of the videos to Petitioner while the plea offer was pending. (App. 61-64.) Additionally, Petitioner testified he was aware he was on the video, but he chose to proceed to trial because he did not believe the videos established he sold marijuana to the Confidential Informant (CI). Petitioner's own testimony shows his claim lacks merit as Petitioner testified he may or may not have accepted the plea had he viewed the video. (App. 136.) Petitioner was clearly aware of the evidence against him, but felt it was not enough to establish beyond a reasonable doubt that he was guilty of the charged offense, which was Counsel's trial strategy. It is unreasonable to believe Petitioner's assessment of his case would have changed had he been allowed to view the video that, as Counsel testified, did not show a hand-to-hand transaction, which actually supported Counsel's trial strategy. As such, the post-conviction relief court properly denied Petitioner relief as to this claim, and this Court should deny certiorari.

The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (internal citation omitted). Brady evidence is either favorable exculpatory evidence or favorable impeachment evidence. Id. 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676 (1985)). "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Id. (citing State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998)). A "reasonable probability" is demonstrated when the suppression of a specific piece of evidence "undermines confidence in the outcome of the trial." Id. (quoting Bagley, 473 U.S. at 678). The State must disclose Brady evidence even when a criminal defendant does not specifically request the evidence. Id. (citing United States v. Agurs, 427 U.S. 97, 107 (1976)). "The definition of 'material' for purposes of Rule 5 is the same as the definition used in the Brady context." Kennerly, 331 S.C. at 453, 503 S.E.2d at 220.

Although Petitioner attempts to distinguish his case from Hyman v. State, 397 S.C. 35, 723 S.E.2d 375 (2012), the facts of Hyman are directly on point to the facts presented in Petitioner's case. Hyman was charged with distribution of cocaine, third offense, based on an undercover buy utilizing a CI. After accepting a negotiated plea offer which was conditioned on him not being allowed to view the video of the buy involving the CI, Hyman raised an ineffective assistance of counsel claim in a post-conviction relief action. Id. at 39, 723 S.E.2d at 377. Much like the allegation in the case at bar, Hyman alleged his plea counsel was ineffective because he repeatedly requested to view the video evidence as he believed it was material in making his decision as to whether he should accept the plea. Id. at 40, 723 S.E.2d at 377.

Conversely, Hyman's counsel testified her notes indicated Hyman wanted her to view the video, which she did. Id. According to testimony from the evidentiary hearing, the video clearly depicted him engaged in a drug transaction; however, he did not believe it so his attorney requested still photographs from the video. Id. at 41, 723 S.E.2d at 378. After seeing the still photographs, Hyman then agreed it was him on the video, however, much like Petitioner here, he did not believe the images showed him engaging in a drug transaction. Id. Hyman then rejected the plea offer and proceeded to trial. Id. However, after jury selection, Hyman decided to plead guilty "straight up" to his charges prior to the start of his trial. Id. The post-conviction relief court dismissed Hyman's post-conviction relief application finding, "because counsel watched the videotape, the State provided still photographs to [Hyman], and the evidence was not exculpatory . . . [Hyman] could not demonstrate that he was prejudiced by not watching the videotape himself." Id. at 41-42, 723 S.E.2d at 378.

Here, Petitioner's charges also stemmed from an undercover drug buy utilizing a CI. During the post-conviction relief hearing, Counsel testified she was provided at least one still photograph from the video clearly depicting Petitioner's face. (App. 60.) Counsel testified she discussed the discovery from the State, including the still photograph, with Petitioner. (App. 59.) Counsel further testified she viewed the video while the plea offer was pending and communicated to Petitioner that he could clearly be seen on the video. (App. 61.) Counsel testified she also told Petitioner, although he could clearly be seen on the video, she had a hard time seeing any "hand-to-hand transaction." (App. 61.) Counsel testified the video also captured a conversation between the CI and Petitioner where "the parties are talking about it tasting like fruit or being fire," but nothing that specifically referenced marijuana. (App. 61.) On April 10th, Petitioner met with Counsel and Shelton and again rejected the plea offer. (App.

63-64.) Counsel testified she received permission from Petitioner to sign a protective order and obtain the videos from the State. (App. 62.) Counsel testified once she obtained the video she attempted to reach Petitioner for three days, but he never came to her office to view the video prior to trial. (App. 62.) Counsel testified she interviewed the CI and discussed her trial strategy with Petitioner. (App. 85.) Counsel again asked Petitioner if he wanted to plead guilty and he said no. (App. 85.)

As this Court found in Hyman, disclosure to Petitioner personally was *not required* in order for the State to satisfy Brady. This Court also found Brady would not apply to the disclosure of inculpatory evidence.

Under the present facts, it is undisputed that the solicitor disclosed the videotape to defense counsel. Therefore, in order to find that this action amounts to impermissible suppression under Brady, we must first assume that the Constitution requires disclosure of Brady evidence to a criminal defendant *personally*. We are unwilling to make that sweeping assumption, and find that disclosure to defense counsel was satisfactory under the present circumstances. Further, because we deem the manner of disclosure appropriate, Petitioner cannot satisfy the materiality prong of Brady. ... Finally, Petitioner has not proven that the videotape was favorable to him. By all accounts, including defense counsel's testimony, the videotape depicted Petitioner engaged in a drug transaction with a confidential informant. Because the evidence is *inculpatory*, Brady is inapplicable.

Hyman, 397 S.C. at 46, 723 S.E.2d at 381 (emphasis in original).

In an attempt to distinguish Petitioner's case from Hyman, Petitioner misstates Counsel's testimony at the post-conviction relief hearing. Petitioner claims Counsel "did not advise Petitioner on the video's contents . . . and he thus did not have an understanding of the video's inculpatory nature or its corroborative effect of [the CI's] testimony in order to make an intelligent decision on the plea offer." (PWC. 23.) However, Counsel's testimony was that she was "allowed to view the videos and could convey to [Petitioner] general information regarding

the videos[.]” (App. 61.) Counsel also testified “I believe I told him I - - you could clearly see his face, but I had trouble seeing a hand-to-hand [transaction].” (App. 61.) Counsel went on to testify, “[S]o when I had discovery that where I could see whether it was clearly him on the video or whether or not there was a hand-to-hand, I could advise him based on that.” (App. 63.) Counsel further testified, “I think he wanted to know who the CI was, because when I shared the information with him that was on the video . . . he still continued to reject the offer, and my notes say he wanted to see the video.” (App. 79.) Although Petitioner claims he was not provided a summary of the contents of the video, it is clear from Counsel’s testimony she did watch the video and provide Petitioner with a summary of the contents and the video’s inculpatory nature.

Here, as in Hyman, Counsel was provided still photograph(s) from the videos, allowed to view the video evidence, and provide a summary regarding the inculpatory nature of the video to Petitioner while the plea offer was pending. Despite that information, Counsel testified Petitioner did not want to accept the plea. As the trial date approached, Counsel obtained copies of the video and made the videos available for Petitioner to view, which he failed to do even though he claims viewing the video was necessary for him to make a “conscience decision” in his case. (App. 98.) Petitioner argues the still shots were not informative enough for him to make a decision regarding his plea offer. Petitioner had viewed the video at least two times by the time he testified at the post-conviction relief hearing and, even after viewing the video multiple times, he still testified he *may not* have accepted the plea offer. (App. 136.)

Petitioner further alleges the State should have provided Petitioner with the video prior to trial because Petitioner already knew the identity of the CI and therefore the privilege no longer applied. In support of this claim, Petitioner cites to Roviaro v. United States, 353 U.S. 53 (1957) (overturning drug conviction where the government refused before and during the trial to

identify the informant who participated in the subject drug transaction). However, Roviaro is highly distinguishable from Petitioner's case. In Roviaro, the informant was the "sole participant, other than the accused, in the transaction charged." Id. at 64. Here, the CI was not as uniquely positioned as the informant in Roviaro. Here, based on the CI's testimony at trial, the CI leveraged his knowledge of Petitioner's marijuana distribution to hopefully get a break on his pending charges. (App. 235.) Petitioner's charges resulted from three separate undercover buys that took place between the CI and Petitioner at Petitioner's residence on different dates. As Shelton testified, the buys were not "bust and buys," meaning Petitioner was not immediately arrested, so Petitioner could not have connected the CI to his charges without viewing the video. (App. 130.) Further, Counsel testified she knew Petitioner was concerned about the identity of the CI prior to trial, so, if Petitioner did know – which seems unlikely – he clearly did not communicate that to Counsel. (App. 85.)

Further distinguishing Roviaro from Petitioner's case is the fact that, in Roviaro, the informant's identity was never disclosed and he never testified at trial. The informant was referred to as "John Doe" throughout the entire proceeding. The Court found, "Petitioner's opportunity to cross-examine Police Officer Bryson and Federal Narcotics Agent Durham was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction." Id. at 64. Here, the CI was interviewed by Counsel prior to trial and testified at Petitioner's trial where he was subject to cross-examination by Counsel. (App. 85.)

Petitioner claims that he was prejudiced by Counsel's failure to challenge the discovery restriction because he could not make an intelligent and informed decision on the plea offer since he was only able to view "scant discovery" prior to the plea offer expiring. (PWC. 21.) Petitioner claims he was only able to view "still-shots from the video, the lab report, and possibly

an incident report.” (PWC. 21.) However, Petitioner fails to mention a crucial fact - Counsel was able to view the video while the plea offer was pending and communicate the inculpatory nature of the video to Petitioner. Petitioner was therefore provided a full summary of the evidence against him while the plea offer was pending, and he chose to proceed to trial. Petitioner argues the still photographs were insufficient for him to make a decision regarding his plea offer. However, based on Petitioner’s own testimony, he was aware his face was visible on the video and aware there was no hand-to-hand transaction, which was the basis for his belief that the evidence was not sufficient against him. Therefore, any claim the video would have changed Petitioner’s mind is meritless as he was fully aware of the evidence against him when he rejected the plea offer.

Petitioner’s argues his prejudice claim only implicates Rule 5, SCRCrimP, “which requires a showing of materialness and prejudice to obtain relief,” and does not include a requirement that the evidence be exculpatory. (PWC. 24.) However, “[t]he definition of ‘material’ for purposes of Rule 5 is the same as the definition used in the Brady context.” Kennerly, 331 S.C. at 453, 503 S.E.2d at 220. “Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense.” Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing Kennerly, 331 S.C. at 453, 503 S.E.2d at 220). Here, despite Petitioner’s claim that he needed to see the video in order to make a “conscience decision,” Petitioner failed to view the video when provided the opportunity. However, Petitioner had viewed the video at least two times by the time he testified at the post-conviction relief hearing and, even after viewing the video multiple times, he still testified he *may not* have accepted the plea offer. (App. 136.) Therefore, Petitioner has failed to meet his burden as to prejudice prong because he has not proved the

result of the proceeding would have been different – i.e. that he would have pleaded guilty rather than proceeding to trial had he seen the video before the plea offer expired. See Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.”) Accordingly, the post-conviction relief court properly denied Petitioner relief on his post-conviction relief application because he failed to prove prejudice, and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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Attorney General

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SC Bar No. 103176

By: _____
ATTORNEYS FOR RESPONDENT

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October 7, 2019

result of the proceeding would have been different – i.e. that he would have pleaded guilty rather than proceeding to trial had he seen the video before the plea offer expired. See Lafler v. Cooper, 566 U.S. 156, 164 (2012) (stating “a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.”) Accordingly, the post-conviction relief court properly denied Petitioner relief on his post-conviction relief application because he failed to prove prejudice, and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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October 7, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

OCT 10 2019

S.C. SUPREME COURT

CERTIORARI TO YORK COUNTY

Court of Common Pleas

William A. McKinnon, Post-Conviction Relief Judge

John C. Hayes, III, Trial Judge

Appellate Case No. 2018-001931

DARNELL KERI SLATON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

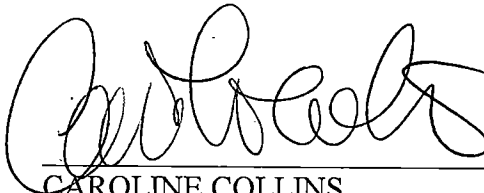
Respondent.

CERTIFICATE OF SERVICE

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

William G. Yarborough, III, Esquire
William G. Yarborough III, Attorney at Law, LLC
308 W. Stone Avenue
Greenville, South Carolina 29609

This 7th day of October, 2019



CAROLINE COLLINS

Administrative Coordinator



RECEIVED

OCT 10 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

October 7, 2019

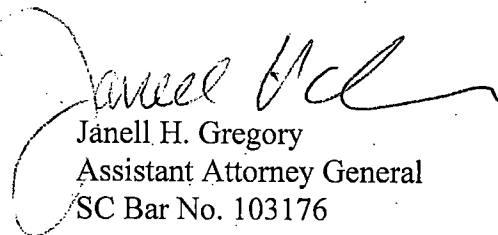
The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Darnell Keri Slaton v. State of South Carolina
Appellate Case No. 2018-001931
Lower Court Case No. 2017-CP-46-01911

Dear Mr. Shearouse:

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

Sincerely,


Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/cc
Enclosures

cc: William G. Yarborough, III, Esquire (2 copies)