

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

CERTIORARI TO YORK COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002632

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SC Court of Appeals

TRAVIS HINES,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

BRIEF OF RESPONDENT

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INDEX

STATEMENT OF ISSUES1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW4

ARGUMENT3

 I. The Post-Conviction Relief Court correctly found Petitioner knowingly, intelligently, and voluntarily waived his right to counsel after the plea judge conducted a thorough colloquy with Petitioner regarding his desire to waive his right to counsel and warned him of the dangers of proceeding *pro se* prior to Petitioner entering his guilty plea.3

 II. The Post-Conviction Relief Court correctly denied Petitioner’s claim that the State committed prosecutorial misconduct by making his plea contingent on Petitioner not viewing the video of the drug buy in order to protect the confidential informant because the State properly provided still photographs from the video to Petitioner and, after signing a protection order, allowed Petitioner’s counsel to view the video and relay a summary of the video to Petitioner during plea negotiations.7

CONCLUSION.....10

Table of Authorities

Cases

<u>Ard v. Catoe</u> , 372 S.C. 318, 642 S.E.2d 590 (2007)	4
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	14
<u>Bridwell v. State</u> , 306 S.C. 518, 413 S.E.2d 30 (1992)	6
<u>Butler v. State</u> , 286 S.C. 441, 334 S.E.2d 813 (1985)	4
<u>Caprood v. State</u> , 338 S.C. 103, 525 S.E.2d 514 (2000)	4
<u>Cherry v. State</u> , 300 S.C. 115, 386 S.E.2d 624 (1989)	4, 5
<u>Faretta v. California</u> , 422 U.S. 806 (1975)	6
<u>Gardner v. State</u> , 351 S.C.407, 570 S.E.2d 184 (2002)	6
<u>Gibson v. State</u> , 334 S.C. 515, 514 S.E.2d 320 (1999)	16
<u>Goins v. State</u> , 397 S.C. 568, 726 S.E.2d 1 (2012)	4
<u>Hill v. Lockhart</u> , 474 U.S. 52 (1985)	5, 18
<u>Hyman v. State</u> , 397 S.C. 35, 45–47, 723 S.E.2d 375, 380–81 (2012)	14, 17
<u>Jordan v. State</u> , 406 S.C. 443, 752 S.E.2d 538 (2013)	4
<u>Osbey v. State</u> , 425 S.C. 615, 825 S.E.2d 48 (2019)	11
<u>Porter v. State</u> , 368 S.C. 378, 629 S.E.2d 353 (2006)	15
<u>Prince v. State</u> , 301 S.C.2d 575, 576 (1990)	6
<u>Roscoe v. State</u> , 345 S.C. 16, 546 S.E.2d 417 (2001)	5, 18
<u>Sellner v. State</u> , 416 S.C. 606, 787 S.E.2d 525 (2016)	4
<u>Smalls v. State</u> , 422 S.C. 174, 810 S.E.2d 836 (2018)	4, 14
<u>State v. Cash</u> , 309 S.C. 40, 419 S.E.2d 811 (Ct.App.1992)	10
<u>State v. Kennerly</u> , 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998)	15
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	4, 5
<u>United States v. Agurs</u> , 427 U.S. 97 (1976)	15

United States v. Bagley, 473 U.S. 667 (1985)15

Statutes

Rule 71.1(e), SCRPC4

RESPONDENT'S STATEMENT OF THE ISSUES

- I. Did the post-conviction relief court correctly find Petitioner was aware of his right to counsel and knowingly, intelligently, and voluntarily waived his right to counsel after being adequately informed of the dangers of proceeding *pro se* by two different judges prior to entering his guilty plea *pro se*?

- II. Did the PCR Court properly deny Petitioner's claim that the State committed prosecutorial misconduct by offering the Petitioner a plea contingent on Petitioner not viewing the video and further did not obtain a waiver of his right to view the video during his guilty plea?

STATEMENT OF THE CASE

Petitioner is presently in the South Carolina Department of Corrections pursuant to orders of commitment from the York County Clerk of Court. During the December 2015 term, the York County Grand Jury indicted Petitioner for distribution of heroin (2015-GS-46-3685). Assistant Public Defender Mike McKinnon (McKinnon) originally represented Petitioner, but was effectively relieved when Petitioner hired Christopher Wellborn, Esquire (Wellborn). Assistant Solicitor Ryan Newkirk (Newkirk) of the Sixteenth Circuit Solicitor's Office prosecuted Petitioner's case.

On December 15, 2015, Petitioner appeared before the Honorable Daniel Hall and moved to have Wellborn relieved as counsel. Prior to the court relieving Petitioner's counsel, Petitioner was informed by the State that they intended to call the case for trial on January 11, 2016. Petitioner told the court he understood his case would be called for trial the week of January 11, 2016 and intended to hire another attorney that day. The court granted Petitioner's request and relieved Wellborn as his counsel. The court informed Petitioner that it would not appoint Petitioner any more lawyers. The court further indicated that he needed to hire an attorney prior to January 4, 2016, and if he had not, the court would need to make sure he understood his right to represent himself because the State would be proceeding to trial on January 11, 2016.

On December 17, 2015, Petitioner appeared *pro se* before the Honorable John C. Hayes, III, and pled guilty as indicted. Pursuant to negotiations between Petitioner and the State, Judge Hayes sentenced Petitioner to a term of fourteen years imprisonment.¹ Petitioner signed a Plea Waiver Form, which indicated Petitioner understood and waived his rights. Petitioner did not appeal his guilty plea or sentence.

¹ Petitioner's corresponding proximity charge (warrant 2014A4610200842) was dismissed.

Petitioner filed his application for post-conviction relief on December 9, 2016 alleging ineffective assistance of counsel on the following grounds:

- 1) "Counsel procrastinated and hindered me from accepting a lesser sentence because he had not yet examined certain evidence."
- 2) "Lack of communication with me as well as the solicitor put me in a position to be forced and coerced to plead guilty."
- 3) "Motions weren't filed and evidence wasn't reviewed in a timely manner and if counsel performed adequately the results would've been different."

Respondent made its Return on May 22, 2017. On July 31, 2017, an evidentiary hearing was held at the Moss Justice Center in York, South Carolina before the Honorable R. Lawton McIntosh. Petitioner was represented by Leah Moody, Esquire. Respondent was represented by Assistant Attorney General Justin Hunter. At the evidentiary hearing, Petitioner testified on his own behalf. Wellborn, and Newkirk testified for the State. By order filed August 8, 2017, Judge McIntosh denied Petitioner's application in its entirety.

Petitioner filed a timely notice of appeal and a Petition for Writ of Certiorari.

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), SCRCP; Caprood, 338 S.C. at 109, 525 S.E.2d at 517; 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. When there has been a guilty plea, the applicant must prove counsel's representation was below the standard of reasonableness and that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001).

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

I. The Post-Conviction Relief Court properly found Petitioner was adequately informed of the dangers of self-representation and the advantages of having an attorney represent him at the time of the plea.

Petitioner asserts he was not properly informed of the dangers of self-representation prior to proceeding *pro se* in his guilty plea. However, the post-conviction relief court properly denied Petitioner post-conviction relief, as Petitioner was adequately informed by two separate judges of the dangers of proceeding *pro se* and Petitioner knowingly and intelligently waived his right to counsel. This Court should affirm the decision of the lower court.

To establish a valid waiver of counsel, Faretta requires the accused be: (1) advised of the right to counsel; and (2) adequately warned of the dangers of self-representation. Bridwell v. State, 306 S.C. 518, 413 S.E.2d 30 (1992) (citing Faretta v. California, 422 U.S. 806; Prince v. State, 301 S.C.2d 575, 576 (1990) (“Faretta requires that a defendant ‘be made aware of the dangers and disadvantages of self-representation so that the record will establish he knows what he is doing and his choice is made with eyes open.’”) (citation omitted).

In evaluating the voluntariness of a defendant’s waiver of counsel, the only standard is whether the “record demonstrates the defendant’s decision to represent himself was made with an understanding of the risks of self-representation, the requirements of a voluntary waiver will be satisfied.” Gardner v. State, 351 S.C. at 411-412, 570 S.E.2d at 186 (2002) (internal citations omitted).

Here, Petitioner was appointed McKinnon from the Sixteenth Circuit Public Defender’s Office and effectively relieved McKinnon when he retained Wellborn. (App. 116.) Then on December 15, 2015, Petitioner relieved Wellborn at a hearing before Judge Hall. During that hearing, Petitioner was informed by the State that Petitioner’s case was being called for trial the

week of January 11, 2016. Petitioner was also served with notice that the State would be seeking life without parole if Petitioner was convicted at trial. Petitioner explained he had plans on hiring Jack Swerling and indicated to Judge Hall he would be hiring him “today[.]” (App. 114.) Petitioner clearly understood the benefit of counsel as he hired one defense attorney and indicated to the court he would be hiring another prior to proceeding with his case. Petitioner was provided time to hire Jack Swerling, or any other defense attorney of his choice, however, Petitioner failed to do so. Instead, Petitioner approached Newkirk after the hearing and just two days later Petitioner knowingly, intelligently, and voluntarily, entered his guilty plea before Judge John C. Hayes, III. During his guilty plea Newkirk informed Judge Hayes, “[Petitioner] has been advised of his right to counsel indicated to me he wishes to proceed on his own and I have no doubt in his competency or his understanding.” (App. 101.) During that hearing, the following colloquy occurred:

Judge Hayes: You have a right to have an attorney represent you in regard to this charge and if you cannot afford one the State would be required to appoint an attorney to represent you within some limits. That is you would be appointed an attorney to represent you if you wish. If you could not afford one the limitation being that you are assigned an attorney and that would be your attorney. Its dangerous for you to proceed without an attorney since you’re not one and there is a benefit in having an attorney represent you. Do you understand that?

Petitioner: Yes, sir.

Judge Hayes: Do you wish to have an attorney in regard to this charge or give up that right?

Petitioner: I give up that right.

Judge Hayes: I find [Petitioner] has freely voluntarily knowingly and intelligently understanding the benefits of counsel and the danger of self representation exercises his right to proceed pro se.

(App. 102.) Petitioner then proceeded through a thorough colloquy with Judge Hayes where he waived his constitutional rights, indicated he was guilty, agreed with the facts set forth by the State, and apologized to the court for “being up here once again.” (App. 106.)

Petitioner alleges he was not adequately warned regarding the dangers of self-representation; specifically Petitioner claims he did not know he may be waiving defenses when he chose to enter his guilty plea. However, Petitioner was arrested on December 26, 2014, bonded out on December 27, 2014, and had counsel within days of his arrest as McKinnon filed a Brady motion in Petitioner’s case by January 5, 2015. Petitioner had the benefit of counsel from at least January 2015 until December 15, 2015 when he appeared before Judge Hall and voluntarily relieved his second attorney, Wellborn, whom he had retained. Petitioner was only without counsel for *one full day* prior to entering the guilty plea, which he negotiated on his own behalf on December 17, 2015. For the nearly one year prior to his guilty plea, Petitioner had the benefit of counsel. Wellborn testified he filed discovery motions and reviewed discovery and potential defenses with Petitioner. (App. 31-32.) Wellborn also testified he received copies of the drug report, viewed the CI video, and communicated to Petitioner the contents of the video. (App. 39-40.) Wellborn testified he reviewed Petitioner’s constitutional rights with him and “. . . it was certainly made clear to [Petitioner] he had a right to counsel because he hired one.” (App. 43.) Wellborn went on to testify Petitioner was fully aware of his right to trial, but he felt it was not in Petitioner’s best interest to proceed to trial. (App. 43, 48.) Wellborn testified Petitioner made the decision by “the end of November to handle a plea as of December [3, 2015]. That was a mutual decision by [Petitioner] and myself. I don’t get to make those calls whether someone pleads guilty or not. That is a client’s decision.” (App. 48.)

Based on Wellborn's testimony, it is clear Petitioner, with the full benefit of his retained counsel, had decided to enter a plea in his case prior to relieving Wellborn. Although Petitioner indicated to Judge Hall that he intended to hire Jack Swerling, Petitioner chose to forgo counsel and enter into plea negotiations with Newkirk on his own behalf. At that time, Petitioner was fully aware of his constitutional rights, potential defenses, and had reviewed discovery with Wellborn. Petitioner was fully apprised of the case against him, and had already made the decision to enter a plea prior to relieving Wellborn. Petitioner's claim that he was unaware of the dangers of proceeding *pro se* are meritless as he was only *pro se* for one full day before entering the guilty plea he had previously decided to enter while he had the benefit of counsel.

Further, during Petitioner's plea hearing, Judge Hayes conducted the following colloquy with Petitioner:

Judge Hayes: [Petitioner], how old are you?

Petitioner: Twenty-nine.

Judge Hayes: How far did you go in school?

Petitioner: I'm in college.

Judge Hayes: Were [sic] are you in college?

Petitioner: York Tech.

Judge Hayes: What do you do - - Do you have a job too?

Petitioner: Yes, sir.

Judge Hayes: What do you go?

Petitioner: I'm an electrician's helper.

(App. 101-102.) In State v. Cash, the court listed ten factors in determining whether a defendant had sufficient background to make a valid waiver of counsel. Specifically, the court listed:

(1) the accused's age, educational background, and physical and mental health; (2) whether the accused was previously involved in criminal trials; (3) whether he knew of the nature of the charge and of the possible penalties; (4) whether he was represented by counsel before trial or whether an attorney indicated to him the difficulty of self-representation in his particular case; (5) whether he was attempting to delay or manipulate the proceedings; (6) whether the court appointed stand-by counsel; (7) whether the accused knew he would be required to comply with the rules of procedure at trial; (8) whether he knew of legal challenges he could raise in defense to the charges against him; (9) whether the exchange between the accused and the court consisted merely of pro forma answers to pro forma questions; and (10) whether the accused's waiver resulted from either coercion or mistreatment.

State v. Cash, 309 S.C. 40, 43, 419 S.E.2d 811, 813 (Ct.App.1992).

In Cash this Court found Cash had a sufficient background to understand the disadvantages of self-representation. Specifically, the court noted Cash was forty-six years old, had six years of college, and had been previously involved in criminal proceedings. Id. at 44. The court noted Cash understood the nature of the charges against him and the possible penalty. Id. The court noted there was no indication Cash was represented by counsel before trial or that an attorney advised him of the difficulty of self-representation, the record showed that Cash appreciated the difficulty of his particular case. Id. The court cited to Cash's statement that he could do a better job of preparing his defense than a public defender. Id. The court cited that there was no indication Cash was attempting to delay or manipulate the proceeding in declining the assistance of counsel. Id. at 45. The trial judge appointed stand by counsel for Cash. Id. The court noted that Cash was aware that he would be required to comply with the procedural rules. Id. The court noted that Cash was aware prior to trial of possible legal challenges he could raise in defense to the charge against him. Id.

Similarly, Petitioner also has a college level education, has been involved in criminal proceedings previously, understood the charges and potential sentence in his case, and was aware of the possible defenses he could raise at trial. However, unlike Cash, Petitioner also had the

benefit of his *retained counsel*, Wellborn, for all but one full day prior to entering his guilty plea. Wellborn testified he reviewed discovery with Petitioner, viewed the CI videotape, communicated to Petitioner what was on the video, and had indicated to Petitioner he did not feel it was in his best interest to proceed to trial. (App. 31, 41, 48.) According to Wellborn, Petitioner already decided to plead guilty by the end of November prior to relieving Wellborn on December 15, 2015.

Petitioner alleges he did not proceed *pro se* with his “eyes open” because the plea judge did not inform Petitioner of his rights individually, rather he explained them in a group. (BOP. 10.) However, the record shows Petitioner was informed of his right to counsel individually at the outset of his guilty plea hearing. (App. 102.) Petitioner responded he understood that right, and stated, “I give up that right” when Judge Hayes asked Petitioner if he wished to have an attorney represent him on his charge. (App. 102.) Petitioner’s remaining rights were clearly explained by Judge Hayes, and Petitioner was provided several opportunities to ask questions. Petitioner indicated he understood his rights and wanted to plead guilty. (App. 105.)

Petitioner also asserts his case should be controlled by Osbey v. State, 425 S.C. 615, 825 S.E.2d 48 (2019). However, Petitioner’s case is distinguishable from Osbey because Osbey *never* had the assistance of counsel in his case despite his testimony that he attempted to have counsel appointed. Osbey was told by “a court official” on three separate occasions that he would have to submit an application through the public defender’s office in order to obtain a public defender. On the date of his plea, Osbey told the plea court he was trying to obtain an attorney the week before his plea, but was told it was too late. Osbey entered a guilty plea and was sentenced to eight years in prison, followed by three years probation. Id. at 617-618, 825 S.E. 2d at 49. On appeal from the denial of his post-conviction relief application, this Court found the record did not show that Osbey had been warned of the dangers of self-representation.

Here, unlike Osbey, Petitioner was appointed counsel (McKinnon) within days of his arrest in December 2014. Petitioner later retained Wellborn and enjoyed the benefit of his representation for nearly six months until Petitioner elected to have him removed just two days before entering his guilty plea. Additionally, unlike Osbey, Petitioner did not tell Judge Hayes he was trying to obtain an attorney during his guilty plea proceeding, rather Petitioner was again informed of his right to counsel, warned about the dangers of proceeding *pro se*, and elected to waive his right to counsel and enter the guilty plea he negotiated *pro se*. (App. 102.) Petitioner, unlike Osbey, had the benefit of two attorneys while his case was pending, Petitioner was also able to review and discuss the discovery with Wellborn, and, according to Wellborn's testimony, Petitioner had already decided to enter a guilty plea well before Petitioner relieved him. Further, Judge Hall gave Petitioner until January 4, 2016 to obtain his *third* attorney, but Petitioner chose to forgo hiring Jack Swerling as Petitioner testified he intended to do *that day*, and sought out Newkirk to negotiate his own plea deal, which ended up being one year *less* than the plea offer Wellborn negotiated. Petitioner chose to proceed to court on December 17, 2015, without counsel to accept that plea. Petitioner was questioned about whether he wanted counsel, and Petitioner waived his right to counsel and knowingly, intelligently, and voluntarily entered his guilty plea.

Petitioner alleges his waiver through the Plea Waiver Form is questionable because of the following statements he initialed on the form:

I have agreed to plead guilty, no contest, or enter a plea under N.C. v. Alford as part of a plea arrangement. The Solicitor, my lawyer, and I have informed the court that the following contains all of the terms of conditions of my plea.

My lawyer has reviewed with me all the factual and legal issues surrounding my case, including any defenses I may have and he or she has done everything I have asked him to do. I am satisfied with his or her services.

(App. 86-88.) Petitioner signed this form on December 15, 2015, the same day he relieved Wellborn. By that date, according to Wellborn's testimony, Petitioner had reviewed discovery with Wellborn, was provided information regarding what was on the CI videotape, and had reviewed any possible defenses with Wellborn, so, although Petitioner claims he was not satisfied with Wellborn's representation, Wellborn clearly informed Petitioner of the "factual and legal issues" surrounding his case. Further, Wellborn testified Petitioner made the decision to plead guilty at the end of November before relieving Wellborn and entering his guilty plea *pro se*. Petitioner also initialed next to several statements explaining Petitioner's various rights he is waiving by entering his guilty plea. Among the rights listed is Petitioner's right "to be represented by a lawyer at all stages of the proceedings. ...I understand an attorney would be of benefit to me, and since I am not an attorney, there is a danger in my representing myself. Understanding this, I give up this right." (App. 87.) Petitioner initialed next to each of the enumerated rights he chose to waive and signed the document. (App. 86-89.) Petitioner clearly understood his right to counsel and the benefit of counsel because on the same day he signed the Plea Waiver form he relieved his *retained* counsel and told Judge Hall he intended to hire Jack Swerling "today." It is unreasonable to believe that was Petitioner's actual intention since he sought out Newkrik immediately after his hearing and negotiated his own plea deal. The Plea Waiver Form shows Petitioner's intention was to waive his right to counsel, and take advantage of a favorable plea deal.

Petitioner further alleges Judge Hayes did not inquire as to why Petitioner dismissed his former attorney, whether that attorney had discussed the dangers of proceeding *pro se*, or if he had the opportunity to review his discovery. There is no script during Faretta hearings a judge must undertake with a defendant in order for their waiver to be valid. The record before this Court clearly shows Petitioner was aware of his right to an attorney, warned on the record regarding the

dangers of proceeding *pro se*, and elected to proceed *pro se* in entering the guilty plea he negotiated for himself with Newkirk the day he relieved Wellborn. Judge Hayes correctly found Petitioner “freely voluntarily knowingly and intelligently” invoked his right to proceed *pro se*. (App. 106.)

Ultimately, Petitioner knowingly and intelligently waived his right to counsel and proceeded *pro se* in his guilty plea. As the record shows, on the same day Petitioner relieved Wellborn, Petitioner sought out Newkirk, negotiated his plea deal, and signed the Plea Waiver Form establishing the terms of his negotiated guilty plea and waiving his rights. The record also shows, Petitioner was aware of his right to counsel, provided an opportunity to retain counsel, and elected to waive that right and proceed *pro se* in his guilty plea proceeding where he was able to take advantage of the plea offer he negotiated. Petitioner has failed to establish that he received inadequate warnings regarding self-representation and did not know the disadvantages of proceeding *pro se* in his plea. The post-conviction relief court properly denied relief and this Court should affirm the lower court’s decision.

II. The Post-Conviction Relief Court properly denied Petitioner’s assertions that the State committed prosecutorial misconduct by making his plea contingent on Petitioner not viewing the video and by not obtaining a specific waiver of his right to view the video during his guilty plea.

Petitioner argues, pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the State committed prosecutorial misconduct and his plea was not voluntarily entered because the State did not disclose the video of the drug transaction to him personally. The South Carolina Supreme Court has already rejected that such a requirement exists in Hyman v. State, 397 S.C. 35, 45–47, 723 S.E.2d 375, 380–81 (2012), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). The post-conviction relief court properly denied this allegation and this Court should affirm the post-conviction relief court’s decision.

Petitioner alleges the post-conviction relief court erred in finding Newkirk's testimony credible that he turned over "all evidence as he received it." (BOP. 14.) However, the post-conviction relief court properly found Newkirk's testimony credible as it was corroborated by Wellborn at the evidentiary hearing. Wellborn testified he received electronic discovery from the State on July 7, 2015. (App. 31.) Wellborn testified the discovery included still photos from the CI drug buy. (App. 31.) Newkirk complied with Brady and the holding in Hyman in providing that information to Wellborn at that time.

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

In Gibson, the South Carolina Supreme Court set forth "framework" to evaluate Brady violation claims. The Court held:

[An applicant] may challenge the voluntary nature of his guilty plea in a PCR action by asserting an alleged Brady violation. ...Consequently, we utilize the following framework to evaluate the success of a PCR applicant's claim: (1) whether the evidence in

question was favorable to the applicant; (2) whether the prosecution knew or had the evidence in its possession; (3) whether the prosecution suppressed the evidence; and (4) whether the evidence was material to Petitioner's guilt or punishment. We held that these factors applied in the guilty plea context to both exculpatory evidence and evidence to be used for impeachment purposes.

Gibson v. State, 334 S.C. 515, 514 S.E.2d 320, 324 (1999), (internal citations omitted).

Further, Gibson found that disclosure to Petitioner personally was not required in order for the solicitor to satisfy Brady. The Court also stated 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.

Gibson, 334 S.C. 515, 514 S.E.2d 320, 324 (1999), (emphasis in original quote).

In Hyman, the South Carolina Supreme Court found disclosure to Petitioner personally was *not required* in order for the State to satisfy Brady. Hyman also clearly states that making the video available for defense counsel to view and providing still photographs from the video to the petitioner was an "appropriate balance."

...the State not only disclosed the existence of the videotape, but also made the evidence available for inspection by defense counsel. The State even took the extra step of generating still photographs to assuage Petitioner's concerns about the contents of the videotape. ...Here, the State struck the appropriate balance by allowing defense counsel to view the videotape and providing Petitioner with stills

during negotiations. Therefore, under these circumstances, the manner and extent of disclosure to defense counsel was satisfactory under Rule 5 of the South Carolina Rules of Criminal Procedure.

Hyman, 397 S.C. 35, 47-48, 723 S.E.2d 375, 381 (2012).

The South Carolina Supreme Court further stated, “Petitioner was fully aware of the inculpatory nature of the videotape throughout the negotiations and the guilty plea proceedings. Consequently, Petitioner has failed to prove how the outcome would have been different had he chosen not to plead guilty after he watched the videotape for himself.” Id.

Here, as the record establishes, Petitioner was initially offered a ten year plea agreement based on the condition that Petitioner not view the CI video that led to his charges. The State indicated the condition was based on protecting their CI from being known to Petitioner since Petitioner had a history of witness intimidation and homicide. (App. 56-57.) As in Hyman, the State provided stills from the video to Wellborn and Petitioner for review and, after signing a “protective order,” allowed Wellborn to view the video. (App. 39-40.) After viewing the video, Wellborn advised Petitioner that “it was kind of from my standpoint if I were prosecuting the case it would not be an extraordinary circumstantial leap to connect the dots and suggest [Petitioner] had given the informant the drugs.” (App. 40.) By the time the assessment of the video had been made by Wellborn, the ten year plea offer had expired and thereafter Petitioner sought to relieve Wellborn. On December 15, 2015, Judge Hall granted Petitioner’s motion to relieve Wellborn and Petitioner immediately undertook negotiating his plea offer with the State *pro se* the same day.

Petitioner asserts the State withholding the video from Petitioner’s view is tantamount to misconduct in this case. However, the State made Petitioner aware of the existence of the video and provided still photographs from the video early in the process, which, as Hyman establishes, “struck an appropriate balance.” Additionally, after signing a protective order, Wellborn, was

allowed to view the video and provided Petitioner with information that the video was not favorable to their case. (App 40.)

Petitioner's assertion that his guilty plea was not freely and voluntarily given because he was not able to view the video is without merit. As in Hyman, Petitioner here cannot satisfy any of the factors set forth in Gibson. The record shows that Wellborn was able to view the video and believed the video to be persuasive evidence that Petitioner was involved in a drug transaction, which would make the evidence inculpatory and immune from a Brady challenge. Therefore, Petitioner is unable to meet the criteria necessary to challenge the voluntariness of his guilty plea.

Further, Petitioner has failed to establish any resulting prejudice from any alleged deficiency. Petitioner failed to establish that, but for counsel's unprofessional errors, there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 58-59 (1985); Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001). During the December 15, 2015, hearing where Petitioner relieved Wellborn, Petitioner told Judge Hall that he was going to hire Jack Swerling "today." During that same hearing, Petitioner was informed his case would be going to trial in January of 2016. Rather than hiring new counsel as he claimed he intended to do that day, Petitioner pursued Newkirk and entered into plea negotiations immediately following the hearing to relieve Wellborn. Newkirk testified Petitioner came to him, "after he had relieved [Wellborn] and he had indicated to me that if I could come down at all he would appreciate it. He told me about his family and so I told him, okay, I understand. I will lower the offer to 14 years but to be honest with you that's the best I can do and so we did the paper work and he wanted to spend the evening with his family and he came back the following day in order to enter his guilty plea." (BOP. 55.) It is clear Petitioner never intended

on hiring new counsel or proceeding to trial on his charges. Accordingly, Petitioner has failed to meet the prejudice prong of his burden set forth in Strickland.

Petitioner is unable to show actual prosecutorial misconduct. The State actions were consistent with the South Carolina Supreme Court's holding in Hyman because the State reached an "appropriate balance" by providing stills from the video and allowing Wellborn to view the video in order to protect the identity of the CI. Petitioner showed no effort on behalf of the State to hide or suppress the video from Petitioner's knowledge. Further, the video contained evidence that was not favorable to Petitioner, which would make it inculpatory evidence, and therefore, immune from a Brady challenge. The post-conviction relief court properly denied relief and this Court should affirm the post-conviction relief court's decision.

CONCLUSION

For the foregoing reasons, the decision of the post-conviction relief court should be affirmed.

Respectfully submitted,

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