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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition of Writ of Certiorari to Beaufort County
Court of Common Pleas
The Honorable William H. Seals, Post-Conviction Relief Judge
The Honorable Carmen T. Mullen, Trial Judge

Appellate Case No. 2020-000276

TREVIN MILLEDGE,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

RESPONDENT’S ISSUE PRESENTED3

STATEMENT OF THE CASE4

STATEMENT OF FACTS... ..7

STANDARD OF REVIEW7

ARGUMENT13

 I. Because the post-conviction relief court properly addressed all issues in its order of dismissal as required pursuant to S.C. Code Ann. § 17-27-80, the court properly denied Petitioner’s motion to alter or amend pursuant to Rule 59(e), SCRPC.13

 II. The PCR court properly found Petitioner failed to establish he was entitled to relief based on purported Brady violations based on the State’s alleged failure to disclose the unrelated misconduct of a law enforcement officer involved in Petitioner’s case and purported evidence of third party guilt of other individuals in the residence selling drugs where neither were known or should have been known by the prosecution prior to Petitioners trial.....15

 III. The PCR court properly found Petitioner failed to establish any constitutional ineffectiveness of trial counsel regarding his investigation into the information contained in the search warrant where trial counsel had no legal basis to obtain the information Petitioner argues he should have used to challenge the search warrant, where the testimony of the confidential informant was found to not be credible, and that a challenge to the admission of the evidence seized pursuant to the search warrant would have been fruitless.....19

 IV. The PCR court properly found Petitioner failed to establish any constitutional ineffectiveness of trial counsel for purportedly failing to object to the construction possession jury instruction as an impermissible comment on the facts of the case where the charge was proper as given.22

CONCLUSION.....24

PETITIONER'S ISSUE PRESENTED

- I. Whether the PCR court erred when it denied Petitioner's Rule 59(e) SCRPC motion in a form order where the original order failed to address certain issues of law and failed to make specific findings of fact relevant to each issue presented by Petitioner at the evidentiary hearing as required by S.C. Code Ann. §17-27-80?
- II. Whether the PCR court erred in finding that the State of South Carolina did not commit a Brady violation which infringed upon Petitioner's Due Process rights where the state suppressed evidence relevant to: A) the misconduct of a law enforcement officer involved in Petitioner's case, and B) the third party guilt of other individuals in the residence selling drugs?
- III. Whether the PCR court erred in finding that trial counsel provided effective representation where counsel failed to fully investigate the information contained in the search warrant and thus failed to raise a meritorious claim pursuant to Franks v. Delaware in challenging the admission of items seized pursuant to the search warrant?
- IV. Whether the PCR court erred in finding that trial counsel provided effective representation where counsel failed to object to the constructive possession jury charge as an impermissible comment on the facts of the case?

RESPONDENT'S ISSUES PRESENTED

- I. Did the post-conviction relief court properly address all issues in its final order of dismissal, thus warranting the summary dismissal of Petitioner's 59(e) motion?
- II. Did the PCR court properly find that the State of South Carolina did not commit a Brady violation for failing to disclose the misconduct of a law enforcement officer involved in Petitioner's case and third party guilt of other individuals in the residence selling drugs where that information was not known by the prosecution?
- III. Did the PCR court properly find Petitioner failed to establish any constitutional ineffectiveness of trial counsel regarding his investigation into the information contained in the search warrant where trial counsel had no legal basis to obtain the information Petitioner argues he should have used to challenge the search warrant, where the testimony of the confidential informant was found to not be credible, and that a challenge to the admission of the evidence seized pursuant to the search warrant would have been fruitless?
- IV. Did the PCR court properly find that trial counsel was not deficient for refraining from objecting to the trial court charging the jury on constructive possession using a charge that was and is good law in South Carolina?

STATEMENT OF THE CASE

In July of 2011, Petitioner Trevin Millidge was arrested after illegal drugs were found inside his pockets and residence during the course of a narcotics investigation. In October of 2011, the Beaufort County Grand Jury indicted Petitioner for trafficking in cocaine base in an amount between twenty-eight and one-hundred grams, trafficking in cocaine in an amount equal to or greater than ten grams but less than twenty-eight grams, possession of alprazolam with intent to distribute, possession of oxycodone, and possession of a firearm during the commission of a violent crime. Thereafter, in October of 2014, the Beaufort County Grand Jury amended two of its earlier indictments and charged Petitioner with trafficking in cocaine base in an amount equal to or greater than ten grams but less than twenty-eight grams and possession of cocaine with intent to distribute. On January 26, 2015, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable Carmen T. Mullen, circuit court judge, presiding. At the conclusion of trial, the jury acquitted Petitioner of possession of alprazolam with intent to distribute and possession of a firearm during the commission of a violent crime while convicting him of trafficking in cocaine base, possession of cocaine with intent to distribute, the lesser-included offense of possession of alprazolam, and possession of oxycodone.

Following the verdict, the trial judge sentenced Appellant to concurrent terms of imprisonment of twenty-six years for trafficking in cocaine base, twenty-six years for possession of cocaine with intent to distribute, one year for possession of alprazolam, and five years for possession of oxycodone. Appellant then timely filed a notice of appeal. Following oral arguments, the Court of Appeals affirmed Petitioner's convictions and sentences on May 30, 2018. State v. Millidge, Op. No. 2018-UP-220 (Ct. App. 2018). Supp. App. 56.

Petitioner filed an application for post-conviction relief on August 10, 2018. On November 5, 2018, Respondent served its return to the application and requested an evidentiary hearing on the claims raised. A hearing was convened on April 1 and April 3, 2019, before the Honorable William H. Seals. Petitioner was present and represented by James Arthur Brown Jr. Petitioner raised the following issues at the hearing:

1. Due Process/Brady Violation
 - a. Applicant was denied due process... based upon the suppression of impeachment information concerning the officers involved in his case. Brady v. Maryland, 373 U.S. 83 (1963) and Riddle v. Ozmint, 631 S.E.2d 70 (2006).
 - b. The State presented testimony of several law enforcement officers during the Applicant's criminal trial.
 - c. The State was aware of impeachment information concerning misconduct committed by law enforcement.
 - d. The State failed to disclose this information to trial counsel.
 - e. This suppression of impeachment information, material to the case, and favorable to Applicant, deprived Applicant of due process.
2. Due process/ Brady violation- Suppression of impeachment information concerning third party guilt and actions of confidential informant used by law enforcement.
 - a. The State presented testimony concerning the constructive possession of drugs by Applicant.
 - b. The State was aware of exculpatory information and impeachment material indicating that the confidential informant purchased drugs from third parties at the same location in which Applicant was alleged to have constructively possessed the drugs in question.
 - c. The State failed to disclose this information to trial counsel
 - d. This suppression of exculpatory information and impeachment material, material to the case and favorable to Applicant, deprived Applicant of due process.
3. Ineffective assistance of counsel based on trial counsel's failure to adequately challenge admission of evidence seized pursuant to a search warrant. Strickland v. Washington, 466 U.S. 668 (1984) and State v. Gentile, 646 S.E.2d 171 (Ct. App. 2007).
 - a. The State introduced evidence seized pursuant to a search warrant.
 - b. Trial counsel failed to adequately argue the deficiencies in this warrant, including but not limited to the fact that the confidential informant was not searched before any alleged purchases, that the informant was caught carrying his own drugs in the car, would swap substances bought with substances he owned and that no real control was involved in the purchases supporting the warrant.

- c. But for counsel's deficient performance, the outcome of the proceedings would have been different.
4. Ineffective assistance of counsel based upon trial counsel failure to object to improper jury charges. Strickland; State v. Stukes, 787 S.E.2d 480 (2016).
 - a. The trial court provided jury instructions regarding constructive possession
 - b. These instructions were provided multiple times during the instructions to the jury.
 - c. These instructions constituted an improper comment on the facts.
 - d. These instructions improperly lessened the State's burden of proof by conflating the elements of the offense.
 - e. Trial counsel failed to object to these instructions.
 - f. But for counsel's deficient performance, the outcome of the proceedings would have been different.

At the hearing Edward Fields, Counsel Newman, and Assistant Solicitor Musser testified. Counsel Brown admitted five exhibits during the hearing, including an affidavit from Fields and the internal investigation summary of former officer Michaud. Counsel Brown filed a motion to reconvene on April 8, 2019.

A hearing was held on the motion to reconvene on June 24, 2019. At the hearing, Counsel Brown summarized the issues in Petitioner's case and asked the court to issue a "request to admit" that Fields was the confidential informant used in Petitioner's case. Counsel Brown renewed all of the motions made during the original hearing. Respondent was given thirty days to admit or deny that Fields was the confidential informant referenced in the search warrant affidavit. An order was issued on July 31, 2019, requiring the Beaufort County Sheriff's Office to provide the name of the confidential informant used in Petitioner's case. Respondent admitted that Fields was the name of the confidential informant referenced in the search warrant in Petitioner's case.

An order of dismissal was signed by the PCR court on November 7, 2019. Counsel Brown filed a Rule 59(e) motion on November 21, 2019. Petitioner's Rule 59(e) motion was dismissed in a form order.

STATEMENT OF FACTS

On July 28, 2011, Investigator Justyna Lindahl of the Beaufort County Sheriff's Office sought a "no knock" search warrant for a multi-room mobile home located on Miranda Circle in Beaufort, South Carolina, at the conclusion of a several-month-long narcotics investigation conducted by members of the Beaufort/Jasper Multi-Agency Drug Task Force. (App. p. 31; pp. 62-63; pp. 129-130; pp. 426-446). In seeking a search warrant for the Miranda Circle residence, Investigator Lindahl prepared a lengthy search warrant affidavit that included the following information:

1. That within the previous month the Beaufort/Jasper Multi-Agency Drug Task Force has received information from a Reliable and Confidential Informant working under the direction and control of the Beaufort/Jasper Multi-Agency Drug Task Force that illegal drugs are being sold and distributed by a black male known as Trevin Mill[i]dge AKA "Horse." Based on this information, a drug investigation was started.
2. The Reliable and Confidential Informant advised that Trevin Mill[i]dge resides at 6 Miranda Circle, Port Royal, Beaufort County, SC. The Reliable and Confidential Informant positively identified the residence at 6 Miranda Circle, Port Royal, SC to members of the Beaufort/Jasper Multi-Agency Drug Task Force as the residence from which the Reliable and Confidential [Informant] bought Crack Cocaine from. Further investigation revealed that according to the South Carolina Department of Motor [V]ehicles that Trevin Lorenzo Millidge . . . lives at 6 Miranda Circle, Beaufort, SC 29906.
3. Within the last month a Reliable and Confidential Informant working under the direction and control of the Beaufort/Jasper Multi-Agency Drug Task Force conducted multiple controlled purchases of a quantity of Cocaine from a black male known to the Confidential Informant as Trevin Mill[i]dge AKA "Horse" from within the residence at 6 Miranda Circle, Port Royal, South Carolina, 29906, in the County of Beaufort. The controlled purchase was monitored by members of the Beaufort/Jasper Multi-Agency Drug Task Force at the incident location.
4. That within the last 72 hours a Reliable and Confidential Informant working under the direction and control of the Beaufort/Jasper Multi-Agency Drug Task Force did conduct a controlled purchase of a quantity of Crack Cocaine from a black male known to the Confidential Informant as Trevin Mill[i]dge AKA "Horse" from within the residence at 6 Miranda Circle, Port Royal, South Carolina, 29906,

in the County of Beaufort. The controlled purchase was monitored by members of the Beaufort/Jasper Multi-Agency Drug Task Force at the incident location.

5. The Confidential Informant was shown an unmarked photograph of Trevin Lorenzo Mill[i]dge The Confidential Informant positively identified Trevin Lorenzo Mill[i]dge as the same black male who sold the Confidential Informant a quantity of Crack Cocaine.

6. Trevin Lorenzo Mill[i]dge . . . has numerous criminal convictions in the State of South Carolina. Mill[i]dge was convicted of Possession of Cocaine on 03-16-00, Simple Possession of Marijuana on 12-14-87, Disorderly Conduct on 06-24-88, Sale and Distribution of Crack Cocaine on 02-09-89, Sale and Distribution of Crack Cocaine on 02-23-95, Disorderly Conduct on 07-22-93 and other charges. Trevin Lorenzo Mill[i]dge has the following criminal convictions in the State of North Carolina. Mill[i]dge was convicted of Possession with Intent to Sell and Deliver Cocaine on 08-01-94.

7. Based on the ongoing criminal activity, substantiated by the controlled purchase of Crack Cocaine from the residence at 6 Miranda Circle, Port Royal, South Carolina, in the County of Beaufort, a search warrant . . . is requested for the above listed residence located at 6 Miranda Circle, Port Royal, South Carolina, in the County of Beaufort.

Based on the above statement of facts, collected by Beaufort/Jasper Multi-Agency Drug Task Force officers, it is the affiant's belief that there is an active and ongoing criminal enterprise, involving the Storage, Sale and Distribution of illegal drugs, operating via 6 Miranda Circle, Port Royal, South Carolina, in the County of Beaufort.

(App. pp. 426-446). Additionally, in the search warrant affidavit, Investigator Lindahl included information derived from her training, experience, and participation in other narcotics investigation that indicated drug traffickers commonly keep drugs, firearm, money, drug paraphernalia, ledgers, and other items connected to the drug trade in their residences. (App. pp. 426-446). After Investigator Lindahl presented that affidavit to a judge, a search warrant was issued for the Miranda Circle residence. (App. p. 130; pp. 426-446).

Thereafter, at approximately 4:54 a.m. on July 30, 2011, officers from the Drug Task Force executed the search warrant at the Miranda Circle residence with the assistance of members of the S.W.A.T. team. (App. pp. 50-51; pp. 57-58; pp. 66-67; pp. 76-77; pp. 95-96; pp. 104-105; pp.

129-130; p. 135; pp. 213-214; pp. 426-446). Inside the residence, the officers located several individuals, including Applicant Trevin Millidge. (App. p. 59; p. 67; pp. 76-77; pp. 132-133). Applicant and the other individuals were then detained, secured, and removed from the residence so a search of that location could be conducted. (App. p. 59; p. 67). Once those individuals were secured, Sergeant Kyle Strickland, an officer with the Beaufort County Sheriff's Office, searched Applicant's person and located clear plastic bags containing cocaine and crack cocaine in his pockets along with \$828 in cash and an identification that listed 6 Miranda Circle as his address.¹ (App. pp. 66-69; pp. 135-136; pp. 140-141). At that point, Applicant was handcuffed and taken into custody. (App. pp. 216-217; p. 225).

After Applicant was taken into custody, Sergeant Walker Michaud of the Beaufort County Sheriff's Office spoke with Applicant while he was seated in the front seat of an unmarked law enforcement vehicle parked in the front yard of Applicant's residence. (App. pp. 26-27; pp. 215-216). At the outset of their conversation, Sergeant Michaud informed Applicant of his rights, including his rights to remain silent, have an attorney present, have an attorney appointed if he could not afford one, and refuse to answer any questions or make any statements at any time. (App. p. 27; pp. 217-219). The officer then asked Applicant if he understood his rights and wished to speak with him, and Applicant responded that he did. (App. p. 29; pp. 219-220). At that point, Sergeant Michaud reviewed the search warrant with Applicant and questioned him about his activities. (App. pp. 222-223). During their ensuing conversation that lasted roughly thirty minutes, Applicant revealed he had returned to his home just before the officers arrived, had gone to a club and sold drugs on the preceding night, and had hidden roughly an ounce of cocaine in a

¹ While Appellant was being searched, another officer conducted a search of Tyrone Jenkins, who was also inside the Miranda Circle residence at the time the search warrant was executed, and located a crack pipe in Jenkins's pocket. (R. pp. 77-78; p. 132-133).

pair of shorts concealed in his closet. (App. pp. 29-30; pp. 222-223; p. 233). Applicant further stated there was approximately \$1,000 in cash in his dresser while claiming his girlfriend had no knowledge in regard to the drugs. (App. pp. 230-232).

Meanwhile, officers conducted a search of the Miranda Circle residence. (App. pp. 78-79; p. 96; p. 99; p. 105). During a search of the residence's master bedroom, officers located: (1) a handgun; (2) a magazine loaded with seven rounds; (3) bills addressed to Applicant; (4) quantities of cash totaling \$950; (5) a bottle of inositol powder, which is a common cutting agent used in the drug trade; (6) a bag containing approximately twenty-three alprazolam pills; and (7) several bags containing cocaine and crack cocaine, including one bag that had been hidden in a pair of shorts found in the closet. (App. pp. 79-85; pp. 143-149; pp. 155-157; p. 172; pp. 263-269). Likewise, during a search of the bathroom connected to the master bedroom, officers found \$22 in cash and a partial oxycodone pill. (App. pp. 97-99). Additionally, during a search of the residence's kitchen, officers located a digital scale covered in white residue and what appeared to be a ledger containing records of drug sales. (App. p. 86; pp. 99-100; pp. 158-159). Furthermore, in the residence's den, officers located a police scanner concealed in a desk drawer. (App. p. 106; pp. 162-163). All of the evidence discovered during the searches of Applicant's residence and person was then collected and secured, and the suspected drugs were ultimately analyzed and identified as roughly fourteen grams of crack cocaine, nine grams of cocaine, twenty-three alprazolam pills, and one tablet of oxycodone. (App. pp. 250-251; pp. 263-270).

Subsequently, Applicant was indicted for trafficking in cocaine base, possession of cocaine with intent to distribute, possession of alprazolam with intent to distribute, possession of oxycodone, and possession of a firearm during the commission of a violent crime, and he proceeded to trial. (App. pp. 21-22; pp. 447-458). At the outset of trial, defense counsel indicated

he intended to challenge the admission of Applicant's incriminating out-of-court statement, and the trial judge conducted an in camera hearing on the matter. (App. p. 23; p. 27). During the hearing, Sergeant Michaud testified about his interview of Applicant at the time the search warrant was executed at his residence, confirmed he informed Applicant of his rights at the beginning of the interview, and noted Applicant affirmatively stated he understood his rights before speaking with the officer. (App. pp. 26-29). Additionally, Sergeant Michaud indicated he did not threaten Applicant, use force on Applicant, draw his weapon on Applicant, touch Applicant, or make any promises to Applicant during the course of the interview. (App. pp. 29-30). Likewise, he indicated Applicant did not appear to be under the influence of drugs or alcohol at the time of the interview and did not ask to speak with an attorney at any point during the course of the interview. (App. p. 29; p. 31). However, Sergeant Michaud readily acknowledged Applicant's statement was not recorded in any manner. (App. p. 31).

Following the presentation of Sergeant Michaud's testimony, defense counsel contended Applicant's statement was inadmissible because no showing had allegedly been made establishing Applicant validly waived his rights before speaking with the officer. (App. pp. 32-33). In response, the solicitor noted evidence had been presented establishing Applicant had, in fact, waived his rights before making a statement. (App. p. 33). After considering the arguments of counsel, the trial judge found by a preponderance of the evidence Applicant's out-of-court statement was voluntarily made and admissible. (App. p. 33).

At that point, defense counsel moved to suppress the evidence discovered during the search of Applicant's residence. (App. pp. 34-35). In support of the suppression motion, defense counsel contended no information was included in the search warrant affidavit to establish the reliability of the confidential informant and nothing had been presented to establish the controlled drug buys

from Applicant's residence actually occurred. (App. pp. 34-35). As a result, defense counsel maintained the search warrant affidavit failed to establish a probable cause basis supporting a conclusion drugs would be found in a search of the residence. (App. p. 35). In response, the solicitor asserted the search warrant affidavit contained information establishing the officers corroborated the information provided by the confidential informant, conducted surveillance, and conducted controlled buys. (App. pp. 35-36). Based on that included information, the solicitor argued the search warrant affidavit established a probable cause basis supporting the issuance of the search warrant. (App. pp. 35-36). After considering the arguments of counsel, the trial judge denied the suppression motion and found the search warrant was properly issued based on the corroboration of the information provided by the informant, the surveillance conducted by the officers, and the controlled buys performed at the residence. (App. pp. 36-37).

Thereafter, during trial, the officers from the Drug Task Force testified about the execution of the search warrant at the Miranda Circle residence and the discovery of drugs and other incriminating evidence during searches of both the residence and Applicant's person. (App. pp. 50-69; pp. 76-86; pp. 95-99; pp. 104-106; pp. 129-172). Additionally, Sergeant Michaud testified over objection about his interview of Applicant and the incriminating statement Applicant made during that interview. (App. pp. 215-233). The officer further confirmed Applicant freely made the incriminating statement after he was informed of his rights, indicated he wished to speak with the officer, and voluntarily made a statement without being threatened, coerced, or promised anything. (App. pp. 217-221; p. 224). Furthermore, Renita Berry, the expert drug analyst who examined the evidence collected in Applicant's case, confirmed the substances discovered during the searches were crack cocaine, cocaine, alprazolam, and oxycodone, and the incriminating items

discovered during the searches were admitted into evidence over defense counsel's objection. (App. pp. 88-89; pp. 250-253; pp. 263-270; pp. 272-273).

Subsequently, at the conclusion of trial, the jury convicted Applicant of trafficking in cocaine base, possession of cocaine with intent to distribute, possession of alprazolam, and possession of oxycodone. (App. pp. 412-413). The trial judge then sentenced Applicant to an aggregate term of imprisonment of twenty-six years. (App. p. 425).

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. Smalls, 422 S.C. at 179, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013); 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).

ARGUMENT

I. Because the post-conviction relief court properly addressed all issues in its order of dismissal as required pursuant to S.C. Code Ann. § 17-27-80, the court properly denied Petitioner's motion to alter or amend pursuant to Rule 59(e), SCRPC

Petitioner alleges the PCR court's order of dismissal failed to comport with the requirements of Section 17-27-80 requiring specific findings of fact and conclusions of law to all

allegations properly raised by Petitioner, and then failed to correct these errors when the court summarily dismissed his motion to alter or amend pursuant to Rule 59(e), SCRCPP. Petitioner specifically alleges there is no factual finding regarding the testimony of Fields or Michaud's conduct, the law regarding the allegations of Brady violations, and failing to discuss the alleged failure to bring a Franks challenge. However, the PCR court properly addressed all issues presented during the evidentiary hearing in its final order of dismissal.

Petitioner's allegation is specifically refuted by the record. The PCR court specifically addressed all of the issues Petitioner alleges were not addressed. The final order of dismissal issued by the PCR court properly comports with §17-27-80 by making specific findings of fact and conclusions of law as to all allegations raised. First, the PCR court addressed the testimony of Fields in the section on Brady violations (third party guilt). App. 847-849. The PCR court discussed the testimony of Fields generally and the nature thereof. App. 848. The PCR court's order, however, focused primarily on the testimony of Solicitor Musser as her testimony was primarily relevant to the evaluation of Petitioner's allegation. The PCR court evaluated the testimony and weighed it against the factors enumerated in Wolf. Petitioner argues in a conclusory manner that this analysis did not take place, however, the record is dispositive as to this issue. Second, the PCR court evaluated and addressed the issues concerning Officer Michaud in the final order of dismissal under the section discussing Brady violations (Law Enforcement Impeachment Evidence). App. 845. The court thoroughly discussed and evaluated the issues concerning the misconduct of the officers in the case and whether or not Solicitor Musser was aware of the misconduct. App. 846. Again, the PCR court discussed the misconduct and Solicitor Musser's testimony as it related to an evaluation of Petitioner's Brady allegations. The record clearly refutes Petitioner's allegation that the PCR court did not properly address this issue. The PCR court also

discussed the law concerning both the alleged Brady violation and made appropriate findings concerning the Franks hearing allegation. App. 845-849, 849-851. Further, to the extent Petitioner is arguing specific facts or analysis were improperly omitted from the order, those issues were preserved with the filing of the 59(e) motion. The arguments are preserved for review by this Court. Therefore, this Court should deny Certiorari as to this issue as the record clearly refutes the issue.

II. The PCR court properly found Petitioner failed to establish he was entitled to relief based on purported Brady violations based on the State’s alleged failure to disclose the unrelated misconduct of a law enforcement officer involved in Petitioner’s case and purported evidence of third party guilt of other individuals in the residence selling drugs where neither were known or should have been known by the prosecution prior to Petitioner’s trial

Petitioner alleges the PCR court erred in finding that the State of South Carolina did not commit a Brady violation which infringed upon Petitioner’s Due Process rights where the state suppressed evidence relevant to: A) the misconduct of law enforcement officer involved in Petitioner’s case, and B) the third party guilt of other individuals in the residence selling drugs. However, the PCR court properly found no Brady violation occurred where there was no evidence presented by Petitioner that the evidence was suppressed by the prosecution.

The affirmative duty of the state to seek out and disclose evidence favorable to an accused is a well settled area of law. See Brady v. Maryland, 373 U.S. 83 (1963); Kyles v. Whitley, 514 U.S. 419 (1995); Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999). In Brady v. Maryland, the United States Supreme Court held that the “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady at 87. The

holding in Brady was later expanded by its progeny to cover impeachment evidence holding that a prosecutor's due process requirement included disclosure of evidence that could potentially be used to impeach or discredit a government witness. Giglio v. United States, 405 U.S. 150, 154 (1972). Significant to Petitioners argument, but distinguished below, the United States Supreme court has held that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in a case, including the police. Kyles at 437 (emphasis added).

An individual asserting a Brady violation must demonstrate that the evidence: (1) is favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was 14 impeaching. Kyles, supra; Gibson, supra. "Favorable evidence is material, and constitutional error results from its suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonably probability of a different result is accordingly shown when the Government's evidentiary suppression undermines confidence in the outcome of the trial." Gibson, supra, citing Kyles at 432-36. If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra. (emphasis added).

Although information known to investigative or prosecutorial agencies may, under certain circumstances, be imputable to the State, see United States v. Auten, 632 F.2d 478 (5th Cir.1980) (holding criminal records and convictions of its witnesses are imputable to government), the government has no "affirmative duty to take action to discover information which it does not possess.... The prosecutor has no duty to undertake a fishing expedition ... in an effort to find impeaching evidence." United States v. Jones, 34 F.3d 596, 599 (8th Cir.1994). Those cases which

find such knowledge imputable to the prosecutor involve prior convictions and/or pending charges against a witness. State v. Von Dohlen, 322 S.C. 234, 240–41, 471 S.E.2d 689, 693 (1996), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

Petitioner alleges Solicitor Musser should have disclosed Officer Michaud's past misconduct as part of the discovery in this case. The PCR court properly used the holding in Wolf (and it appears some reasoning from Von Dohlen considering the testimony of Solicitor Musser) in finding that no Brady violation occurred in this case regarding Officer Michaud's misconduct. Solicitor Musser credibly testified that she had no indication of any misconduct by law enforcement during or prior to Petitioner's case. Solicitor Musser testified that she does not go on fishing expeditions into law enforcement personnel records for potential impeachment information. Solicitor Musser testified that if she had information that there was potential misconduct she would have investigated and turned that information over to the defense. App. 847. Significantly, there is no evidence in the record to show that Solicitor Musser had a reason to know or should have known about any of the possible misconduct, and therefore, she had no duty to investigate. Further, as noted by the record and Solicitor Musser's testimony, the relevant conduct occurred after the trial and was wholly unrelated to Petitioner's case. None of the alleged misconduct involved witnesses or actions pertaining to Petitioner's case. The PCR court properly found that the prosecution was not in possession of this information and this was not the type of information that could be imputed upon the prosecution, as this is more similar to requiring the prosecution to go on a fishing expedition for information not known or should have been known. The PCR Court properly dismissed Petitioner's allegation as to the alleged Brady violation concerning misconduct by Officer Michaud.

Petitioner alleges Solicitor Musser should have disclosed information allegedly given to law enforcement by the confidential informant, Fields. First, the PCR court did not find the testimony of Fields credible at the evidentiary hearing. Fields has admitted to lying and violating the terms of his informant agreement by continuing to use drugs, trading drugs, and his testimony has no credibility. The PCR court properly found that Fields lacked credibility and his testimony was given the appropriate weight, very little to none. “We defer to the PCR court's factual findings and will uphold them if supported by any evidence in the record. Smalls v. State, 422 S.C. 174, 179–181, 810 S.E.2d 836, 839 (2018). Furthermore, we afford great deference to a PCR court's credibility findings. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Questions of law are reviewed de novo, and we will reverse the PCR court if its decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).” The PCR court specifically found the testimony of trial counsel and Solicitor Musser credible. App. 845. Solicitor Musser testified that she had no information as it related to the confidential informant and was not even aware of the informant’s real name. Solicitor Musser testified that she does not request confidential informant information and did not need to do so because this case was not a “buy and bust.” This case involved a series of controlled buys that were used to support a finding of probable cause for the issuance of a search warrant. Solicitor Musser testified that law enforcement corroborated the information given to them by the confidential informant in obtaining the search warrant. App. 848. Further, Solicitor Musser testified that even if the confidential informant had lied on this occasion law enforcement would still have reasonable belief to proceed with a warrant based on their reliance on him from past dealings. App. 848. Solicitor Musser testified that her argument was that the issuing Judge should consider the four corners of the document and that it had been corroborated by law enforcement. The PCR court properly found that the prosecution

was not in possession of the any exculpatory third party guilt information nor did they have any indication that the confidential informant may have made any misstatements to law enforcement or that law enforcement lied in an effort to obtain the search warrant. Therefore, the PCR court properly found that no Brady violation occurred as it relates to any alleged exculpatory information provided by the confidential informant to law enforcement.

III. The PCR court properly found Petitioner failed to establish any constitutional ineffectiveness of trial counsel regarding his investigation into the information contained in the search warrant where trial counsel had no legal basis to obtain the information Petitioner argues he should have used to challenge the search warrant, where the testimony of the confidential informant was found to not be credible, and that a challenge to the admission of the evidence seized pursuant to the search warrant would have been fruitless

Petitioner alleges the PCR court erred in finding that trial counsel provided effective representation where counsel failed to fully investigate the information contained in the search warrant and thus failed to raise a meritorious claim pursuant to Franks v. Delaware in challenging the admission of items seized pursuant to the search warrant. However, the PCR court properly found that trial counsel properly challenged the validity of the search warrant and that there was no basis upon which to exclude the evidence seized pursuant to the search warrant.

In reviewing a challenge to the veracity of a search warrant, South Carolina employs the two-prong test outlined in Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978). State v. Gore, 408 S.C. 237, 244, 758 S.E.2d 717, 721 (Ct. App. 2014) (citing Franks, 438 U.S. at 155– 56, 98 S.Ct. 2674); State v. Missouri, 337 S.C. 548, 553–54, 524 S.E.2d 394, 396–97 (1999) (applying the two-prong Franks test). First, there must be “allegations of deliberate falsehood or of reckless disregard for the truth as to statements included in the warrant affidavit, and those allegations must

be accompanied by an offer of proof.” Id. The burden is on the accused to prove the allegations of perjury or reckless disregard for the truth by a preponderance of the evidence. Id. “Second, if a deliberate falsehood or a reckless disregard for the truth has been established, the court must exclude the false material and consider the remainder of the affidavit to determine if it is sufficient to establish probable cause.” Id. at 245, 758 S.E.2d at 721 (citing State v. Davis, 354 S.C. 348, 360, 580 S.E.2d 778, 784 (Ct. App. 2003)). If the court determines that in light of the false material no probable cause exists, then “the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” Id. (citing Franks, 438 U.S. at 155–56, 98 S.Ct. 2674).

Even if trial counsel were to have gained access to the confidential informant’s name, which he had no legal basis to do, and the informant had made the same statements he did at the PCR hearing, this still would not have been enough to exclude the evidence seized pursuant to the search warrant as the PCR court found the testimony of the informant to not be credible. Further, the information used by law enforcement discussed below independently corroborates the information in the search warrant, thus showing why the confidential informant is not credible.

In light of the information regarding the controlled buys at the Miranda Circle residence, the officers' corroboration of certain details of the investigation, and Appellant's prior convictions for similar crimes involving cocaine and crack cocaine, the search warrant affidavit in Appellant's case established the confidential informant working with the Drug Task Force was reliable and provided the issuing judge with a substantial basis to conclude there was a probable cause basis to believe more cocaine, crack cocaine, and other incriminating evidence would be found in a search of Appellant's residence. See Gates. 462 U.S. at 233 (“[A] deficiency in [veracity or basis of knowledge] may be compensated for, in determining the overall reliability of a tip, by a strong

showing as to the other, or by some other indicia of reliability."); cf State v. Robinson. 415 S.C. 600, 605-606, 785 S.E.2d 355, 357-358 (2016) (instructing a search warrant affidavit containing the following information was sufficient on its face –if the information was true -to establish the reliability of a confidential informant: "A confidential and reliable informant working for the Horry County Police Department purchased a quantity of off white powder substance represented as being cocaine and field-testing positive for cocaine attributes from the occupants of the house identified as [the Home], That the informant has been able to make recent continuous purchases of illegal drugs from this residence leads to the affiant's belief that there is the possibility there may be more illegal drugs located at this residence." (brackets in original)); State v. Viard. 276 S.C. 147, 150-151, 276 S.E.2d 531, 532 (1981) ("Affiant alleged his informant had been at the residence, saw drugs there within the past 72 hours, and purchased drugs during a controlled buy which field tested positive for depressants. We conclude the affidavit contained sufficient underlying facts and information upon which the magistrate made her independent determination of probable cause."). As a result, the search warrant for the Miranda Circle residence was properly issued, and the trial judge correctly found the search warrant to be valid after viewing the information contained in the search warrant affidavit in a common sense fashion and in its totality. See State v. Thomas. 275 S.C. 274, 276, 269 S.E.2d 768, 769 (1980) (holding courts should consider a "common-sense reading of the entire affidavit" in determining whether probable cause exists). Accordingly, Appellant's motion to suppress the evidence discovered during the search of that residence was properly denied. See United States v. Ventresca. 380 U.S. 102, 108 (1965) ("[W]here these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hyper technical, rather than a commonsense,

manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants.")

Petitioner's argument as to this allegation is conclusory and relies on information not only not available to trial counsel, but also unattainable by trial counsel. Petitioner's argument relies on the testimony of Fields at the evidentiary hearing and the affidavit he provided to PCR counsel regarding his false statements to law enforcement. However, trial counsel had no legal basis for acquiring the name of the confidential informant, let alone acquiring the affidavit with the statements presented to the PCR court. Further, the PCR court found that the testimony of Fields was not credible and, therefore, the testimony concerning his alleged false statements to law enforcement would have been of no use to trial counsel in challenge the veracity of the search warrant.

Trial counsel was able to challenge the validity of the search warrant to the best of his ability with the information he had available to him. Trial counsel did not and could not have had access to the information Petitioner argues makes him ineffective for failing to discover. Trial counsel had no duty and no reason to believe that the confidential informant would later change his story and say that his statements to law enforcement were false, further, Petitioner has shown no prejudice where the PCR court properly determined the confidential informant was not credible at the PCR hearing. This Court, like the PCR court, should find trial counsel could not be ineffective for failing to do something he was legally incapable of doing. Therefore, Certiorari should be denied as to this issue.

IV. The PCR court properly found Petitioner failed to establish any constitutional ineffectiveness of trial counsel for purportedly failing to object to the construction possession

jury instruction as an impermissible comment on the facts of the case where the charge was proper as given

Petitioner alleges trial counsel was ineffective for failing to object to the trial court charging the jury on constructive possession, as it was an improper comment on the facts of the case. However, the PCR court properly found that trial counsel could not be found to be deficient for not objecting to a jury instruction that was and is currently good law in South Carolina.

Petitioner alleges that the constructive possession charge given by the trial court improperly equates an element of the crime charged with a fact in the case. Petitioner conceded that the charge creates an inference the jury is allowed to make about the facts and that inferences are explicitly allowed. Petitioner also conceded that there was currently no case law that would support the PCR court invalidating this specific charge, but that the Supreme Court has invalidated other charges as improperly commenting on the facts of a case. Trial counsel testified that he did not see a legal basis for objecting to the charge as given.

At the time of Petitioner's trial and now, the constructive possession charge given by the trial court was good law. Petitioner has not presented any case law specifically showing why trial counsel would be deficient for failing to object to a jury instruction that is good law at the time of the trial. Petitioner is arguing that the PCR court, in a collateral proceeding, should have found for the first time that the instruction defining constructive possession is a charge on the facts and that trial counsel was deficient for failing to object to it. The standard constructive possession instruction given by the trial court in this case is not an improper comment on the facts, it is an explanation of a legal concept. Trial counsel cannot be found to be ineffective for not objecting to a jury instruction that is a proper charge, correctly states South Carolina law, and correctly explains a legal principle. The jury instruction was not an improper comment on the facts, so Petitioner has

failed to show any deficiency by trial counsel for failing to object. Further, Petitioner has failed to show any resulting prejudice from the alleged deficiency when any objection to the charge made by trial counsel would have been overruled. Therefore, the PCR court properly dismissed this allegation and this Court should deny Certiorari as to this issue.

CONCLUSION

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

Respectfully submitted,

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