

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Bamberg County

Edgar W. Dickson, Circuit Court Judge

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S.C. Supreme Court

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212581

APPENDIX

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INDEX

INDEX	i
TRIAL TRANSCRIPT DATED JANUARY 12-14, 2004	1
FINAL <u>ANDERS</u> BRIEF OF APPELLANT	155
UNPUBLISHED OPINION NO. 2005-UP-272, FILED APRIL 8, 2005	166
REMITTITUR	168
APPLICATION FOR POST-CONVICTION RELIEF FILED FEBRUARY 7, 2006	169
RETURN DATED JUNE 22, 2006	182
ORDER OF DISMISSAL FILED OCTOBER 2, 2006	187
APPLICATION FOR POST-CONVICTION RELIEF FILED JANUARY 26, 2011	195
RETURN DATED AUGUST 26, 2011	211
POST-CONVICTION RELIEF HEARING TRANSCRIPT DATED JANUARY 25, 2012	217
ORDER GRANTING BELATED APPEAL PURSUANT TO <u>AUSTIN V. STATE</u>	229
PETITION FOR ORDER TO RECONSTRUCT THE RECORD OF PETITIONER'S POST-CONVICTION RELIEF HEARING	232
RETURN TO PETITION FOR ORDER TO RECONSTRUCTION RECORD OF PETITIONER'S POST-CONVICTION RELIEF HEARING	285
REPLY	291
ORDER GRANTING RECONSTRUCTION DATED DECEMBER 20, 2012	315
RECONSTRUCTION HEARING TRANSCRIPT DATED JANUARY 22, 2013	317
RESPONDENT'S EXHIBIT #1 (CHAIN OF CUSTODY INFORMATION)	359
INDICTMENTS AND SENTENCING SHEETS	362

COUNTY OF BAMBERG

) COURT OF GENERAL SESSIONS
) No. 00 GS 05 054, 055

STATE OF SOUTH CAROLINA

versus

TRANSCRIPT OF RECORD,

MICHAEL MILLER,

Defendant

Bamberg, South Carolina
January 12-14, 2004

B E F O R Ę Ę :

HONORABLE REGINALD LLOYD, Judge, and a Jury

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I N D E X

Direct-Redirect Cross-Recross

1		
2		
3	Motions	5
4	Stipulation	8
5	Motions	11
6	Voir Dire	13
7	Jury selection	17
8	Motion	18
9	Motions	20
10	Ruling	31
11	Motion	33
12	IN CAMERA	
13	JUDY WALTON	
14	By Solicitor	35
15	By Mr. Wilson	45
16	IN CAMERA	
17	BEN HAY	
18	By Mr. Wilson	50
19	No Cross Exam.	
20	Preliminary charge	57
21	Opening Statements:	
22	By Solicitor	58
23	By Mr. Wilson	60
24		
25		

1 INDEX CONTINUED:

2		Direct-Redirect	Cross-Recross
3	BEN HAY		
4	By Solicitor	63	
5	By Mr. Wilson		70
6	JUDY WALTON		
7	By Solicitor	75-97	
8	By Mr. Wilson		90-99
9	Stipulation	99	
10	Motions	100, 103	
11	MICHAEL MILLER		
12	By Mr. Wilson	105-120	
13	By Solicitor		117
14	Motion	122	
15	Closing Staements:		
16	By Mr. Wilson	123	
17	By Solicitor	129	
18	Charge	131	
19			
20			
21			
22			
23			
24			
25			

EXHIBITS

FOR ID IN EV.

S-1, 2, 3 Drug packages

79,80 82

S-4, 5 SLED reports o

87

S-6 Waiver of rights form

87

(13) State v. Miller

11/13/04

		11	A	JURY
106 Willie J. Sanders	BM		1	
72 Samuel J. Mack	BM			1
67 Ronald C. Kirby	WM		2	
36 Renea M. Glover	BF			2
63 Deborah A. Johnson	BF			3
55 Kenneth Hughes	WM		3	
21 Fred P. Coakley	WM		4	
12 Earl B. Buland	BM	1		
34 Lonnie J. Frasier	BM			4
70 Long	WF		5	
135 Sandra Walker	BF			5
88 Patel	IM	2		
122 James R. Stuart	BM			6
43 Leanne S. Hammond	WF			7
54 Jeanette W. Hightower	WF			8
118 Verdell H. Haley	WF			9
83 Jerry J. Odum	BM	3		
22 Mary E. Kress	WF			10
150 Christopher Zizzett	WM			11
104 Timothy E. Sanders	WM	4		
31 Veronica Ellison	BF			12

1 (The within matter came before the Court on January 12,
2 2004)

3 SOLICITOR: Your Honor, we have a couple of quick mat-
4 ters on one of the trials.

5 THE COURT: Yes, sir.

6 SOLICITOR: Your Honor, there were two cases for speedy
7 trial this week. One was Michael Miller.

8 Your Honor, Mr. Miller is set for a speedy trial this
9 week on a trafficking charge and a proximity charge.

10 He was indicted and failed to appear in 2001. He was
11 picked up, I think, last year, and we are ready to go to
12 trial, but there is an issue with the indictment.

13 Since the case was true billed, cases have come down
14 indicating that the phrase knowing and intentional be on the
15 indictments.

16 At this time, the State is making a motion to amend the
17 indictment to reflect the current law, to add the language
18 knowingly and intentionally in the possession part of the
19 indictment.

20 THE COURT: Yes, sir.

21 MR. WILSON: Judge, we would oppose the motion to amend
22 the indictment and move to quash the indictment.

23 Both indictments, the trafficking in cocaine and -- I'll
24 put a copy up here for you to see -- trafficking in cocaine
25 and possession with intent to distribute cocaine in the

1 proximity.

2 They both allege that he did unlawfully possess with in-
3 tent to distribute and that he did knowingly bring into the
4 State and knowingly have actual or constructive possession.

5 We would move to quash the indictment in that it makes
6 a material change to the indictment. We would oppose on those
7 grounds.

8 SOLICITOR: I would hand up Code Section 17 19 100, which
9 deals with amending.

10 The State's position would be that . .

11 THE COURT: These are the indictments?

12 MR. WILSON: Those are the originals.

13 SOLICITOR: The State's position is that by adding the
14 language that tracks the statute, we wouldn't be changing
15 the substance of the indictment, nor changing what he is on
16 notice that he has to defend against.

17 We would actually be adding one more element the State
18 would have to prove, adding a level of protection, rather than
19 exposing him to any more or any different level of exposure
20 or different charge.

21 We're not changing the charge. We're not adding a charge,
22 anything like that.

23 If Your Honor declines to make the amendment, we will
24 have to wait until March to pass a new indictment before the
25 Grand Jury, and then we'll be right back where we are now.

1 I've also got the State versus Williams case, dealing
2 with the issue.

3 THE COURT: They allow for an amendment of that nature?

4 SOLICITOR: I believe that they do. It hasn't come up . .

5 MR. WILSON: As I understand it, the old law didn't re-
6 quire the knowingly and intentionally language.

7 SOLICITOR: Well, it was already the statute, but there
8 was never an interpretation by the Court saying it was
9 necessary until 2001 or 2002. I believe it was 2002 when
10 the Court came down with the language being required in the
11 indictments.

12 THE COURT: In none of those cases -- they didn't cite
13 the statute in the indictment.

14 MR. WILSON: Correct.

15 THE COURT: Solicitor, I need to look over this again,
16 but out of an abundance of caution on the subject matter I'm
17 going to require you to go back to the Grand Jury.

18 I will grant you relief from the speedy trial
19 motion. It may go up and I'd rather you . .

20 SOLICITOR: I would ask that he not be released. We
21 might have a hard time getting him back.

22 If you're not going to release him, it shouldn't be any
23 problem.

24 THE COURT: Okay.

25 MR. WILSON: Your Honor, could I speak with him for a

1 moment?

2 THE COURT: Yes, sir.

3 (Defendant speaking with counsel. Other business taken
4 up by the Court for the remainder of January 12, 2004. This
5 case was resumed on January 13, 2004.)

6 (Conference at the bench between counsel and the Court
7 off the record)

8 SOLICITOR: May it please the Court?

9 THE COURT: Yes, sir.

10 SOLICITOR: I believe we have a stipulation.

11 THE COURT: Mr. Miller, we're getting ready to pick a
12 jury in your case, but there are some things your attorney
13 needs to take up with the Court.

14 We're going back in Chambers outside the presence of the
15 jury, and then we'll come back in the Courtroom.

16 (Conference in Chambers with counsel present and the
17 Defendant)

18 THE COURT: This is the State of South Carolina versus
19 Michael Miller, and Mr. Gibbons and Mr. Wilson have some
20 matters to put on the record.

21 Yes, sir.

22 SOLICITOR: On yesterday we made a motion to amend the
23 indictment to reflect the current state of the law to add the
24 required language of knowingly and intentionally.

25 The Defense objected to that on yesterday and the Court

1 has ruled it would entail waiting another few months and we
2 would be starting back where we are, and I believe the De-
3 fense is now willing to stipulate to the indictment being
4 so amended, and to consent.

5 THE COURT: Yes, Mr. Wilson..

6 MR. WILSON: Judge, just for purposes of the record, I
7 have discussed with Mr. Miller proceeding in Chambers instead
8 of in the Courtroom because of the jury being in there and
9 he is agreeable with that.

10 Your Honor, I have also discussed with him the indict-
11 ments and the motion that was made by the State yesterday in
12 open Court to amend the indictment; that we had initially ob-
13 jected to the amendment, to add the language knowingly and in-
14 tentiously to the indictment to make the indictment comply
15 with the current law.

16 I have discussed with Mr. Miller the amendments and his
17 constitutional and all rights concerning the amendment. I
18 have also discussed with Mr. Miller that if the -- that the
19 Court ruled yesterday that if we didn't agree the Solicitor
20 would have to go back for Grand Jury indictment and that would
21 entail a delay until March, during which time he may not be
22 able to be released from jail..

23 He is currently incarcerated, and that would be a sep-
24 arate issue for the Court.

25 He indicated to me that he wanted to proceed to trial

1 this week if at all possible. He's been waiting on trial and
2 under a speedy trial motion I believe it is set to be tried
3 in this Term.

4 He has indicated to me that he is agreeable with the
5 amendments to the indictment as the Solicitor has requested,
6 and he understands those, and we would agree with the amendment
7 and not object to the amendment.

8 We would ask that the indictment be amended and the case
9 proceed to trial.

10 THE COURT: Okay, thank you, sir. Mr. Miller, you heard
11 everything that the State and your counsel have said.

12 DEFENDANT: Yes, sir.

13 THE COURT: Okay, do you understand what you are agree-
14 ing to do? You are agreeing to allow the State to amend the
15 indictment and proceed with your trial today.

16 DEFENDANT: Yes, sir.

17 THE COURT: In this Term?

18 DEFENDANT: Yes, sir, to proceed with the trial.

19 THE COURT: Yes, sir. Okay, and any questions at all
20 about your rights regarding that matter?

21 DEFENDANT: Rights meaning . .

22 THE COURT: Your right to have them take those indict-
23 ments back to the Grand Jury process, which I understand will
24 be sometime in March. Is that right?

25 SOLICITOR: Yes, sir.

1 THE COURT: Sometime in March take those indictments be-
2 cause of my ruling yesterday -- take those indictments back
3 to the Grand Jury with the amendment in there.

4 You would give that up and allow them to try your case
5 this week. You understand that?

6 DEFENDANT: Yes.

7 THE COURT: Is that what you want to do?

8 DEFENDANT: Yes, sir.

9 THE COURT: You have had an opportunity to talk to Mr.
10 Wilson about that?

11 DEFENDANT: Yes, sir.

12 THE COURT: And everything you didn't understand about
13 all of this, did he explain that to you?

14 DEFENDANT: I pretty much understand.

15 THE COURT: Okay, and do you need any more time with
16 him?

17 DEFENDANT: No, I'm okay.

18 THE COURT: All right, then. With that we'll proceed.
19 Anything else?

20 SOLICITOR: A couple of issues. I have witnesses under
21 subpoena to the chain of custody of the substance that is the
22 basis for this charge, as well as the chemist who tested the
23 substance.

24 Mr. Wilson and I spoke last term of Court and again last
25 week that that wasn't going to be an issue in this case, and

1 so I have released the witnesses from the subpoena, and I
2 would like to have that put on the record today.

3 MR. WILSON: Your Honor, I discussed with my client pre-
4 viously and then again today before this hearing the chain
5 and the drug test analysis testimony.

6 We agree to stipulate to the chain and stipulate to the
7 testimony without need of the SLED chemist or the chain peo-
8 ple.

9 That's not our defense and it will not be an issue in
10 the case.

11 THE COURT: With that stipulation from counsel, I know
12 Mr. Trantham and -- you don't need him as a witness.

13 SOLICITOR: No, sir.

14 THE COURT: Let me look at it quickly here. Joe Bell
15 and that's probably it.

16 MR. WILSON: Judge, I would like for you to keep Chief
17 Jenkins on the witness list. He is also involved in the
18 search.

19 I might not use him, but if I need to then I will have
20 him.

21 I have no problem voir diring all of them.

22 THE COURT: We'll call them all out and with the stipu-
23 lation we obviously won't need to put up the chain of custody
24 witnesses, or the testing evidence.

25 It looks like it will be a lot shorter that way.

1 MR. WILSON: Judge, we don't have any witnesses at this
2 time that we intend to call on our witness list, and, Your
3 Honor, I would submit the same voir dire that was previously
4 submitted on Mr. Owens.

5 I'll get you a new copy of it.

6 THE COURT: That's fine.

7 SOLICITOR: Your Honor, I have one question about Mr.
8 Wilson. His law partner used to be with our office, . .

9 THE COURT: Okay.

10 SOLICITOR: Mr. Steve Chandler --- if you don't mind ques-
11 tioning them about him as well.

12 THE COURT: Okay, we'll do that. Thank you, counsel.

13 We'll return to the Courtroom then and select a jury.

14 (Case resumed in the Courtroom in the presence of jury)

15 THE COURT: All right, ladies and gentlemen of the jury
16 panel. I appreciate your patience with us while we took care
17 of some matters out of your presence.

18 It's a lot easier to take care of matters back there than
19 to have you all inconvenienced and moved around.

20 We're ready to select a jury for the next case, and this
21 is the State of South Carolina versus Michael Miller.

22 Mr. Miller is charged in the indictments with traffick-
23 ing in cocaine, possession with intent to distribute cocaine
24 in proximity of a park.

25 I will explain to you later what the indictments are,

1 and that indictments are merely the procedure manner or pro-
2 cedural way of bringing cases to trial.

3 They are not evidence in and of themselves of a Defen-
4 dant's guilt.

5 Ladies and gentlemen, we'll go through the same process
6 we did just a moment ago. I'll ask you all some questions,
7 and then we'll start to select the jury.

8 Beginning with Mr. Miller, I'll ask if he will stand
9 and face the jury panel.

10 Is any member of the jury panel related by blood or mar-
11 riage or otherwise have any close relationship with Mr.
12 Miller? If so, please stand.

13 (No response from jurors)

14 You all were introduced to Mr. Wilson earlier. I ask
15 you again if any member of the jury panel is related by blood
16 or marriage or otherwise has a close relationship with Mr.
17 Miller -- excuse me -- with Mr. Wilson?

18 (No response)

19 Any member of the jury panel -- let me first ask. Mr.
20 Wilson's law partner is Mr. Steve Chandler, and I'd ask if
21 any member of the jury panel is related again by blood or
22 marriage or otherwise has a close relationship with Mr.
23 Chandler, or if any member of the panel has been represented
24 by Mr. Chandler?

25 (No response)

1 Ladies and gentlemen, you all met Mr. Gibbons earlier
2 as well. I'd ask again if any member of the jury panel is
3 related by blood or marriage or otherwise has a close per-
4 sonal relationship with Mr. Gibbons?

5 (No response)

6 Ladies and gentlemen, the potential witnesses in this
7 case are Lieutenant Judy Walton of the Denmark Police
8 Department; Chief Joseph Jenkins, Denmark Police Department;
9 Deputy Ben Hay with the Bamberg County Sheriff's Office; De-
10 tective Kevin Hux of the North Charleston Police Department.

11 Any member of the jury panel related by blood, mar-
12 riage or otherwise have any close personal relationship with
13 any of those potential witnesses? If so, please stand.

14 (No response)

15 Ladies and gentlemen, I again ask -- I believe some of
16 you have already responded to some of these questions before,
17 but I'll ask again and if you do answer please stand and give
18 us your name again.

19 Is any member of the jury panel or a family member or
20 a close personal friend of anyone on the jury panel working
21 for law enforcement in any capacity?

22 Your name?

23 JUROR: Ackerman, Juror 1.

24 THE COURT: I believe you explained earlier but state for
25 the record again.

1 JUROR: I have a brother in law who is a corrections
2 officer and my son is a corrections officer.

3 THE COURT: I'll ask if the fact that you are related
4 to these individuals, given their work or occupation rather --
5 if that would in any way cause you to be biased or prejudiced
6 toward or against the State or for or against the Defendant?

7 JUROR: Yes.

8 THE COURT: I'll excuse you from service on this trial.
9 Thank you.

10 Yes, sir.

11 JUROR: Judge, my son is a part-time policemen in Bamberg
12 County, and, no, sir, it would not.

13 THE COURT: Thank you, sir.

14 Okay, is any member of the jury panel a member of any
15 crime victim organization or victim rights group? I said
16 to you before that that was MADD, Mothers against Drunk Drivers;
17 CADRE; CAVE, or anything -- any such organization?

18 If you are a member of or contributor to any crime
19 victim association or any crime victim rights group, please
20 stand?

21 (No response)

22 Any member of the jury panel a member of any neighbor-
23 hood crime watch association?

24 (No response)

25 Again, has any member of the jury panel been a victim

1 of or family member or close personal friend been the vic-
2 tim of a drug problem?

3 (No response).

4 Thank you, ladies and gentlemen. We're ready to start
5 the selection process of the jury for the State of South
6 Carolina versus Michael Miller.

7 (Whereupon, jury was struck or seated as follows by
8 counsel)

9 Number 106, Willie J. Sanders, struck by Defense

10 Number 72, Samuel J. Mack, seated

11 Number 67, Ronald Kirby, struck by Defense

12 Number 36, Renea Glover, seated

13 Number 63, Deborah Johnson, seated

14 Number 55, Kenneth Hughes, struck by Defense

15 Number 21, Fred Cogburn, struck by Defense

16 Number 12, Earl Breland, struck by the State

17 Number 34, Lonnie Frasier, seated

18 Number 70, Stacy Long, struck by Defense

19 Number 135, Sandra Walker, seated

20 Number 88, Patel, struck by State

21 Number 122, James R. Stuart, seated

22 Number 43, Leanne S. Hammond, seated

23 Number 54, Jeanette Hightower, seated

24 Number 118, Vardell Staley, seated

25 Number 83, Jerry Odum, struck by State

1 Number 22, Mary Kress, seated

2 Number 15, Christopher Zizzet, seated

3 Number 104, Timothy Sanders, struck by State

4 Number 31, Veronica Ellison, seated)

5 THE COURT: Two alternates.

6 (Whereupon, alternate jurors were struck and seated as
7 follows:

8 Number 16, William Canady, struck by Defense

9 Number 12, Larry Smith, struck by Defense

10 Number 116, Ralph Smoak, seated

11 Number 42, Frances Gunnells, struck by Defense

12 Number 86, Bernice Owens, seated)

13 (Conference at the bench between counsel and the Court
14 off the record)

15 THE COURT: We'll let the Court Reporter get set up in
16 Chambers for a brief matter we need to take up.

17 (Whereupon, matters were heard in Chambers with counsel
18 and the Defendant present, as follows:)

19 THE COURT: We'll go back on the record on State v.
20 Michael Miller. Back in Chambers again out of the presence
21 of the jury.

22 Mr. Wilson had indicated he had a motion to raise about
23 the jury selection.

24 MR. WILSON: Yes, sir. Your Honor, again my client is
25 agreeable to going forward in Chambers outside the presence

1 of the jury.

2 Judge, I planned to make a Battson Motion specifically to
3 challenge two strikes the State had made, just for purposes
4 of the record.

5 Number 12, a black male, was the same gentleman struck
6 in the first jury selection.

7 More particularly, Juror Number 83, another black male
8 that was not struck in the first but the second selection.

9 I intended it to be on Battson but I discussed it with
10 my client briefly. Then I discussed it with him in a little
11 more detail, and he indicated to me that he is agreeable with
12 the jury as it is fixed.

13 I told him that is against my practice to proceed and
14 not make a Battson motion, and for him to proceed with the
15 jury as it stands, but he has indicated to me that he likes
16 the jury as it stands.

17 Of course, it is his trial, and I will concur with his
18 decision in that regard, and we won't have a motion to make.

19 SOLICITOR: Your Honor, just for the record, the State
20 has non-racial reasons for the strikes, and I would ask to
21 put those on the record, if I could.

22 I spoke further with my officers after Juror 83. We
23 seated him on the first one but not on the second one. He is
24 from Ehrhardt where one of my officers in the first case was
25 the Chief of Police for a number of years.

1 He said he had some problems with a friend who is in
2 his crowd, and in the first case he was an alternate, the
3 second alternate, no less.

4 He didn't think there was too much chance of him getting
5 on, and he wasn't going to raise a big issue about it, but
6 when we pulled a jury on the second one he was picked near
7 the bottom and would have been juror 10 and would have actu-
8 ally sat on the case.

9 That raised a level of concern enough that he told me
10 about it finally during the second jury selection.

11 As for the first individual, it was for the same reason.
12 Officer Grimes had arrested him, and we felt there may be some
13 hard feelings there.

14 THE COURT: Then we'll go out and proceed with the Defen-
15 dant's position being not to raise a Battson motion.

16 I do think those would have been sufficient non-
17 racial reasons if we had gone to the next step.

18 The Defendant wishes to leave the jury panel as it is,
19 so we'll go back and excuse those jurors until tomorrow.

20 (Whereupon, Court was continued in the Courtroom before
21 the jury)

22 THE COURT: To those of you selected on this jury panel,
23 you are Jury Number Two, and some of you may be on Jury Num-
24 ber One. I can't remember.

25 You all on Jury Number Two, if you will call in after

1 six o'clock, there will be instructions on there as
2 to what you are to do, and when to return again.

3 You all have a good day or two and we'll see you
4 again at some point this week.

5 (Jurors were excused)

6 (The case continued on January 14, 2004, out of the pres-
7 ence of the jury)

8 THE COURT: We're on the case of the State of South
9 Carolina versus Michael Miller. You have a motion?

10 MR. WILSON: Yes, sir.

11 THE COURT: Something pre-trial before we bring the jury
12 out?

13 MR. WILSON: Your Honor, a couple of matters briefly.

14 Your Honor, the first thing is I'd just like to move in
15 limine concerning any prior record or other bad acts or what
16 have you that the State would intend to use, in connection
17 with this case against Mr. Miller.

18 Specifically, Your Honor, while Mr. Miller was waiting
19 -- this case kind of has a storied history. It is a July
20 30, 1998, incident.

21 So it is, of course, somewhat old. While Mr. Miller
22 was awaiting trial on these charges, he escaped from the Bamberg
23 County Jail and was back in custody that same day or the next
24 day.

25 He ended up pleading to the escape and then went to serve

1 his time on the escape.

2 On release from prison, he went back home to Florida,
3 believing there was nothing pending against him. Then he was
4 picked up and brought back to stand trial on this case.

5 Specifically, I'm moving to exclude any reference in
6 any officer's testimony concerning the escape or conviction
7 for the escape.

8 I don't know if the Solicitor intends to go into that
9 or not.

10 SOLICITOR: I wouldn't go into that unless there is some
11 argument about the length of time it has been since the
12 trial, or between trial and the event.

13 Or if he testifies, I believe that is impeachment.

14 THE COURT: Mr. Wilson? Do you disagree with that?

15 MR. WILSON: Your Honor, I don't intend to go into the
16 length of time until trial. It has been a long time but,
17 you know, I know of no prejudice as far as witnesses
18 being available or our inability to find a witness, or
19 the kinds of things required by law to make a length of time
20 issue.

21 Otherwise, I would be moving to dismiss the charges based
22 on that.

23 I assume what you're saying is if he testifies you are
24 going to use that conviction.

25 Your Honor, I would move in limine to have that excluded

1 based on -- I understand it may fall under the rule, but
2 under the probative-prejudicial value rule, I'd ask the Court
3 -- under Rule 404 or 403, whichever it is, I would ask the
4 Court to consider whether that is something they could go
5 into, and make an in limine ruling.

6 I would submit to the Court that it is in connection with
7 this charge and shouldn't be something they can go into. The
8 jury is going to hear the timing of it, and it is not going
9 to be hard for them to put two and two together.

10 I'm afraid if they hear that, then they will figure he
11 must be guilty of this and it will spill over into this and
12 be very prejudicial.

13 We would ask the Court to consider that.

14 THE COURT: Anything further?

15 SOLICITOR: Your Honor, I don't think that the fact that
16 he has the conviction at that prior date -- I don't think
17 that gives them any bit of -- goes to anything other than his
18 credibility.

19 I think that is clearly within the rules.

20 THE COURT: I agree with that. I would deny that. It
21 is not more prejudicial than probative, so I will allow it
22 in.

23 I would note your exception to that, Mr. Wilson.

24 MR. WILSON: Thank you. The second thing I would ask
25 the Court to allow me to do is to just place on the record

1 the plea negotiations that Mr. Gibbons and I have had, and
2 just have the Court inquire briefly of my client or allow me
3 to concerning this case.

4 I'll be frank with you. It is against my advice that
5 my client goes to trial. He wants to proceed to trial, and
6 we are prepared for trial.

7 Of course, that's his right. He is charged with traf-
8 ficking in cocaine more than four hundred grams, and I have
9 advised him of the applicable sentence, as well as the mini-
10 mum.

11 The plea negotiations the Solicitor and I have had -- they
12 have offered to allow him to plead to trafficking in cocaine
13 with a seven to ten year range of exposure, and that was some
14 time ago, prior to this week.

15 Mr. Miller indicated he was not interested in that, and
16 the Solicitor and I spoke again. He indicated to me that he
17 would be willing to allow Mr. Miller to plead to a traffick-
18 ing with a ten year negotiated sentence, and I conveyed
19 that to Mr. Miller.

20 He indicated to me that he is not agreeable with that
21 and wanted to proceed to trial.

22 I just wanted to put those on the record, since it
23 is against my advice that he go to trial. If he wants to
24 proceed to trial, we are ready to go.

25 THE COURT: Mr. Miller, do you understand, sir?

1 DEFENDANT: Yes, sir.

2 THE COURT: Stand up, please.. I just want to make sure
3 that based on Mr. Wilson's representations to this Court that
4 you do understand what has been explained to you, as well as
5 your right to go to trial. You do have a right to a trial in
6 this matter.

7 DEFENDANT: Yes, sir.

8 THE COURT: You and you alone have to make that decis-
9 ion. Do you understand?

10 DEFENDANT: Yes, sir.

11 THE COURT: You can be convicted and you alone will do the
12 time, but it has been his recommendation to you to accept the
13 plea.

14 Do you understand that?

15 DEFENDANT: Yes, sir.

16 THE COURT: And I understand that you wish not to accept
17 the plea?

18 DEFENDANT: Yes, sir.

19 THE COURT: Let me make sure you understand. Under an
20 indictment for trafficking in cocaine, given the amounts in-
21 volved, sir, the minimum sentence is twenty-five years.

22 DEFENDANT: Yes, sir.

23 THE COURT: It carries a twenty-five to thirty year sen-
24 tence plus a fine of Two Hundred Thousand Dollars. Do you
25 understand that?

1 DEFENDANT: Yes, sir.

2 THE COURT: Possession with intent to distribute co-
3 caine in proximity of a park carries ten to fifteen. Do you
4 understand that?

5 DEFENDANT: Yes, sir.

6 THE COURT: Do you understand if I run those consecutive,
7 sir, you would be doing forty-five years if you received the
8 maximum sentence?

9 MR. WILSON: Your Honor, with distribution of cocaine
10 rather than the crack . .

11 THE COURT: So it's ten?

12 MR. WILSON: Yes, sir, and it is a serious offense.

13 THE COURT: Yes, sir. I was thinking about the last
14 one which was crack. In this case, sir, your maximum on PWID
15 within proximity of a park is ten years, and if I ran those
16 consecutive, sir, you would receive forty years. Do you un-
17 derstand that?

18 DEFENDANT: Yes, sir.

19 THE COURT: You still wish to go to trial?

20 DEFENDANT: Yes, sir.

21 THE COURT: Do you have any questions at all before we
22 go to trial concerning your rights or the circumstances of a
23 potential plea arrangement, or anything like that?

24 DEFENDANT: No, sir.

25 THE COURT: All right, sir. Then we'll continue.

1 SOLICITOR: Your Honor, the other thing is the amendmen
2 that we agreed on yesterday to the indictment.

3 THE COURT: Yes, sir, we put that on the record yester-
4 day.

5 I understand that the stipulation is that you are
6 agreeing to the amendment of the indictment as we talked about
7 yesterday. Do you remember that?

8 DEFENDANT: Would you tell me that again?

9 THE COURT: You remember yesterday we talked about amend-
10 ing the indictments, rather than them going back to the Grand
11 Jury to add the language to the indictment.

12 Based upon a prior ruling of mine, they were going to
13 have to take your indictments back to the Grand Jury and have
14 the Grand Jury pass on the indictments with the added lang-
15 uage.

16 Do you remember that conversation?

17 DEFENDANT: Could I ask you something?

18 THE COURT: Yes, sir.

19 DEFENDANT: You said added language. What do you mean
20 about that?

21 I don't quite understand the added language to the in-
22 dictment.

23 THE COURT: To add knowingly and intentionally to the
24 indictment. Do you remember that?

25 DEFENDANT: Yes, sir.

1 THE COURT: You remember talking with Mr. Wilson about
2 that?

3 DEFENDANT: Yeah, he bring it to me.

4 THE COURT: He brought it to your attention and discussed
5 with you the right to have the indictment go back before the
6 Grand Jury?

7 DEFENDANT: Yes, sir.

8 THE COURT: Do you understand what he explained to you
9 about that right?

10 DEFENDANT: Yes and no, sir.

11 THE COURT: Well, there is no yes and no. Tell me what
12 you didn't understand.

13 DEFENDANT: I don't quite understand.

14 THE COURT: I'll let you talk to Mr. Wilson then, sir.
15 (Defendant and Mr. Wilson conferring)

16 THE COURT: Yes, sir.

17 MR. WILSON: Judge, Mr. Miller and I have discussed that
18 again, and he has indicated to me he is still in agreement
19 with the indictment amendment, and he wishes to proceed to
20 trial.

21 THE COURT: Thank you, sir. Mr. Miller, anything you
22 don't understand at this point?

23 DEFENDANT: Could I ask him something else?

24 THE COURT: Yes, sir.

25 (Defendant and Mr. Wilson conferring further)

1 THE COURT: Yes, sir.

2 MR. WILSON: Your Honor, now Mr. Miller, besides what we
3 discussed yesterday and what we put on the record -- he indi-
4 cates to me today that he is not agreeable with that, and I
5 am kind of at a loss, to be honest with you, as to how to
6 proceed.

7 We discussed it in detail in the jail last week and we
8 discussed it in detail yesterday before we had it put on the
9 record.

10 I believe all we were doing today is just making sure
11 it got on the record, the decision that was already made, but
12 as a matter of caution he tells me he now wants the case to
13 go back in front of the Grand Jury, and I have no choice
14 but to put that on the record.

15 THE COURT: Mr. Miller, stand up again, please. What
16 is it you did not understand yesterday?

17 DEFENDANT: Well, like my counsel just explained to me,
18 I kind of understood but I didn't fully understand the rights,
19 and I just agree with it because my client thought it would
20 be a good idea.

21 THE COURT: Do you remember me asking you if you under-
22 stood it yesterday?

23 DEFENDANT: Yes, sir.

24 THE COURT: Why did you tell me you did understand it?

25 DEFENDANT: Probably I was saying what . .

1 THE COURT: I asked you, do you understand before you
2 waived your rights there, and you told me you did understand.
3 Are you telling me that you lied yesterday?

4 DEFENDANT: No, Your Honor. I guess I'm saying that I
5 said I did when I didn't understand.

6 THE COURT: All of this is to protect your rights. Do
7 you understand that?

8 DEFENDANT: Yes, sir.

9 THE COURT: That was what that exercise was yesterday,
10 and why we put all that on the record; why your lawyer came
11 and talked to you about that.

12 You instructed him that you wished to proceed forward
13 rather than have the State go back and take the indictments
14 to the Grand Jury.

15 You instructed your attorney that you wished to go to
16 trial now and agreed to the amendment without having to do
17 that.

18 Do you understand?

19 DEFENDANT: Yes, sir.

20 THE COURT: Then we went ahead and picked a jury. You
21 remember that?

22 DEFENDANT: Yes, sir.

23 THE COURT: All of that happened and now the jury is
24 here to begin your case. All that happened after I told you
25 or asked you rather whether or not you understand what we

1 are doing.

2 I asked if you had any more questions and you said no.

3 DEFENDANT: Yes, sir.

4 THE COURT: You told me you didn't have any more ques-
5 tions and you did understand exactly what was going on?

6 DEFENDANT: Yes, sir.

7 THE COURT: Okay. So I'm asking you, sir, were you just
8 telling the Court an untruth at that point?

9 DEFENDANT: It was not true at that point.

10 THE COURT: All right, sir. I find you in contempt. You
11 have six months, consecutive to whatever happens down the
12 road.

13 I don't care whether you try the case now or whenever,
14 you have six months right now.

15 MR. WILSON: Your Honor, if you -- I understand and if I
16 could just note our objection to the contempt finding.

17 I don't remember for sure whether he was put under oath
18 or not when he was before the Court, speaking to the Court.
19 I'll be happy to go back and verify whether he was or was not,
20 and all the other notice issues and things, but I understand
21 the Court's ruling.

22 THE COURT: I note your exception to that. We
23 didn't swear him yesterday, I don't believe -- I can't remem-
24 ber if we did or not.

25 You know, he told me he intentionally said yes, that he

1 did understand it yesterday when obviously he says now that
2 he didn't. He just wanted to move things along, I guess.

3 You know, as far as giving him the six months, I did
4 give him notice that we were going to have a jury trial here
5 today.

6 I could have given him a lot longer but I'm only giving
7 him six months.

8 Mr. Gibbons, anything as to the State's position on where
9 we're at?

10 SOLICITOR: Your Honor, there were a number of things
11 addressed at that hearing, not just going forward with a trial.
12 He clearly didn't want to wait until March. He wanted his
13 day in Court.

14 Also, he stipulated to the chain, stipulated to the chem-
15 ist, and I don't believe the law would allow him, once he
16 enters into an agreement, to back out of his own volition.

17 We would want to go forward today.

18 MR. WILSON: Your Honor, we did stipulate to the chain
19 and we did stipulate to the chemist also. I discussed that
20 with Mr. Miller on more than one occasion, and we discussed
21 it yesterday and put it on the record yesterday.

22 You know, if the Court decides to proceed with trial,
23 then I would just ask you to make a decision on our stipula-
24 tions that were made as well.

25 THE COURT: We are going to proceed today with this trial.

1 You know, it was a close call and out of an abundance
2 of caution I ruled Monday, I guess it was, that the State
3 should go back and reindict with the Grand Jury and add that
4 language back in.

5 Mr. Miller decided he wanted to go to trial and was will-
6 ing to waive that on Monday. If there was any question about
7 the fact that the language needed to be in the indictment,
8 that changed the substance of the offenses, he certainly was
9 aware on Monday of what it was he was being charged with and
10 what he was going to be on trial for.

11 So we're going to -- I'll note your exception but we're
12 going to proceed on to trial.

13 Mr. Miller, good luck to you, sir. If you don't under-
14 stand anything else, sir, you had better confer with your
15 attorney. You need to tell him the truth.

16 Do you understand that?

17 DEFENDANT: Yes, sir.

18 MR. WILSON: We have one other pre-trial matter. I know
19 the jury is here but it shouldn't take very long.

20 I am going to make a motion to suppress some evidence
21 and we also have maybe a statement issue that will require a
22 Jackson v. Denno hearing.

23 With regard to the statement issue and Jackson v. Denno,
24 it is my understanding that law enforcement will testify that
25 my client made an oral statement after he had been taken into

1 custody and arrested and charged, concerning why he was in
2 South Carolina and that his knowledge of what was recovered
3 was drugs and why he had the drugs.

4 So we would request a Jackson v. Denno, and then I also
5 have a motion to suppress the drugs that were recovered in
6 this case.

7 Your Honor, it is my understanding of the law that -- I
8 am going to make a motion to suppress on several grounds, and
9 we may need to take some brief testimony.

10 My motion will be that the initial stop or detention of
11 Mr. Miller was not proper. There was not proper cause under
12 the law to make a stop, and anything that would have transpired
13 after that would, of course, be the fruit of an illegal
14 stop, stemming from that, and would, of course, be improper.

15 So any search after an improper stop would be improper,
16 an improper search, and violative of the Fourth Amendment and
17 all the other laws, and, therefore, anything recovered as a
18 result of that should be suppressed at trial.

19 Specifically in this case, it would be the drugs that
20 were recovered.

21 Your Honor, it would be my understanding from the in-
22 formation provided to me that after Mr. Miller was stopped
23 there was no warrant that was obtained for the search; that
24 the basis for the search would be a consent or alleged con-
25 sent that Mr. Miller gave.

1 It is my understanding of the law that the requirement
2 is on the State to -- the burden is on the State to show that
3 the consent was voluntary.

4 So we'll have two grounds for the motion to suppress,
5 and it might be easier to take testimony and make some
6 brief argument, but it will be on the stop and the underlying
7 consent.

8 THE COURT: Okay. Mr. Gibbons, are you prepared to pro-
9 ceed right now with those issues?

10 SOLICITOR: We are, Your Honor. The State calls Officer
11 Walton.

12 JUDY WALTON, being duly sworn,
13 testified as follows, out of the presence of the jury:

14 DIRECT EXAMINATION

15 BY SOLICITOR:

16 SOLICITOR: I guess I'll go into the suppression first,
17 because if we don't get through the suppression we don't need
18 the Jackson-Denno.

19 Q. Officer Walton, are you familiar with the case the
20 State has against Michael Miller, the Defendant in Court
21 today?

22 A. Yes, I am.

23 Q. Were you one of the investigating slash arresting offi-
24 cers on the case?

25 A. Yes.

OFR. WALTON IN CAMERA

1 Q. Where did this case take place? Where did the arrest
2 take place?

3 A. At the train station there in Denmark, South Carolina.

4 Q. And were there a number of officers present at the train
5 station?

6 A. Yes, there was.

7 Q. And what caused you all to be at the train station?

8 A. Information we had received that there were drugs coming
9 in on the train by an individual. We were given a descrip-
10 tion and everything.

11 Q. Were you given a name?

12 A. Yes, we were.

13 Q. And did you all set out to see if that person got off
14 the train?

15 A. Yes, we did.

16 Q. And were you there when the train let out the passengers?

17 A. Yes. We were there before the train even pulled up.

18 Q. Well, what happened when the train stopped?

19 A. The train stopped and passengers got off the train. We
20 noticed a subject fitting the description we were given get-
21 ting off the train as well.

22 We approached to speak to him.

23 Q. Were there a lot of people getting off the train
24 at that time?

25 A. I think there were like two people that got off the

OFR. WALTON IN CAMERA

1 train.

2 Q. Counting him, so him and one other?

3 A. Right. To the best of my knowledge, they were the only
4 two that got off.

5 Q. All right, so what did you all do at that point?

6 A. He fit the description in the information we received --
7 he fit that description and we noticed the other fellow did
8 not fit the description but he also went to a truck and it
9 didn't appear anyone was looking for him.

10 We made our approach to speak with him.

11 Q. And did you stop him at that point?

12 A. We walked up to speak with him. We did not block his
13 path or his exit or anything like that.

14 We identified ourselves and made our initial greeting.
15 We explained to him what was going on.

16 Q. All right, let me stop you. How many officers approached
17 him?

18 A. Three.

19 Q. And were they plainclothes officers or . . .

20 A. Plainclothes.

21 Q. Not in uniform?

22 A. No, sir.

23 Q. You told him who you were?

24 A. Yes, sir.

25 Q. Did you have guns drawn?

37

OFR. WALTON IN CAMERA

1 A. No, sir.

2 Q. And was he getting into a car? Did you stop him from
3 doing anything at that point?

4 A. No, He was just standing there.

5 Q. All right, and you talked to him and told him who you
6 were?

7 A. Right.

8 Q. What happened then?

9 A. We identified -- like I said, we identified ourselves
10 and told him who we were, and we asked if we could see --
11 he gave us his name and we asked to see his train ticket.

12 When he showed us his train ticket, it had the same name
13 on it that he gave us. It was also the name we were
14 given.

15 The approaching officer who was Officer Hay, while we
16 were all standing there, asked if we had permission -- if we
17 could check his luggage and his belongings, and he said, sure,
18 no problem.

19 Q. All right. What happened after that?

20 A. After that, he had his luggage right there. He sat his
21 luggage down in front of him, and he sat the pillow he was
22 carrying aside by the luggage.

23 And the officers went to check that, and I walked around
24 to check the pillow.

25 Q. Did he at any time limit his consent and say you could

OFR. WALTON IN CAMERA

1 only search certain items?

2 A. No, sir, because we made sure to ask if we could check
3 his belongings.

4 Q. And he said . . .

5 A. No problem.

6 Q. And did he put his belongings down and step away from
7 them for you to do that?

8 A. Yes, he did.

9 Q. He didn't keep any item back to himself?

10 A. No.

11 Q. And he never told you to stop searching his belongings?

12 A. No, he didn't.

13 Q. What did you find in your search?

14 A. Once I picked the pillow up, and I noticed he kind of
15 sat it down to the side or back a little bit -- I went over
16 there to check that.

17 Once I picked the pillow up, it was extremely heavy,
18 which is not normal for a pillow. So then when I kind of
19 felt the pillow, and from my experience in law enforcement
20 and with drugs, I know that it felt just like what drugs
21 normally feel like to us when we are checking for stuff like
22 that.

23 It was extremely heavy, solid, and I noticed the stitching
24 on the pillow -- the thread had been undone and stitched back
25 up.

OFR. WALTON IN CAMERA

1 So at that point I motioned to the officers that I
2 thought I had something. I went ahead and I didn't have to
3 pull very hard.

4 The pillow kind of opened up at the end, and that is
5 when I reached in and pulled out -- the first package felt
6 kind of a little bit heavy and was wrapped up in some grey
7 duct tape.

8 So I motioned to one of the officers . .

9 Q. Was he already under arrest at that point?

10 A. Not at that point he wasn't. He was still free to leave
11 and he was just standing out there.

12 Q. When you said, we've got it; this is it; what did he
13 do?

14 A. He immediately took off running and he slipped under
15 the train, and he headed down the street, and the officers
16 followed after him.

17 SOLICITOR: Do you want me to continue through the ques-
18 tioning part, or do you want to make a ruling on that?

19 THE COURT: Well, let's see if Mr. Wilson has any
20 questions. Go ahead.

21 DIRECT EXAMINATION OUT OF THE JURY'S PRESENCE CONTINUED:

22 BY SOLICITOR:

23 Q. You didn't actually place him in custody yourself, did
24 you?

25 A. No, I didn't. They had to catch him first.

OFR. WALTON IN CAMERA

1 Q. And then he was brought back to you?

2 A. I think once they got him they went ahead and placed
3 him under arrest.

4 He was brought back to the police station. I think he
5 was brought back to the police station, where we were at.

6 I stayed with the luggage and the pillow.

7 I stayed there with that. I never left that. I secured
8 that, and we met at the police station which is where they
9 brought him to.

10 Q. And did you and a couple of other officers conduct an
11 interview?

12 A. Yes, we did.

13 Q. Did you read Mr. Miller his rights?

14 A. Yes, I did.

15 Q. Was that reduced to writing?

16 A. Sir?

17 Q. Were his rights given to him in writing?

18 A. Yes, sir. I don't know if I did it or the DEA Agent
19 actually read him his rights.

20 Q. Okay.

21 A. I was there while they were being read to him. I just
22 can't remember if it was me or not.

23 Q. And you heard everything that was said?

24 A. Yes, I did.

25 Q. And you witnessed the written form?

41

OFR. WALTON ON CAMERA

1 A. Yes, I did.

2 SOLICITOR: Your Honor, I would offer State's Exhibit

3 6.

4 BY SOLICITOR:

5 Q. Was that entire document read to Mr. Miller?

6 A. Yes, it was.

7 Q. What words were read to him that day?

8 A. First he was told that we were going to read him
9 his rights. (Witness reading State's Exhibit 6 in full)

10 It started out with, before we ask you any questions,
11 you must understand your rights.

12 You have a right to remain silent.

13 Anything you say can be used against you in Court.

14 You have a right to talk to a lawyer for advice before
15 we ask you any questions and to have him with you during
16 questioning.

17 If you cannot afford a lawyer, one will be appointed
18 for you before any questioning, if you wish.

19 If you decide to answer questions now without a lawyer
20 present, you still have the right to stop answering at any
21 time.

22 You also have the right to stop answering at any time
23 until you talk to a lawyer.

24 And we asked him if he understood his rights. He said
25 he did, and he signed.

OFR. WALTON IN CAMERA

1 Q. Who witnessed his signature?

2 A. I did.

3 Q. Is there another portion at the bottom of that page?

4 A. Yes, it is. It's a waiver of rights which was also read
5 to him.

6 I have read this statement of my rights. I understand
7 what my rights are. I am going to make a statement and
8 answer questions. I do not want a lawyer at this time. I under-
9 stand and know what I am doing.

10 No promises or threats have been made to me, and no pres-
11 sure or coercion of any kind have been used against me.

12 He signed that as well.

13 Q. And you witnessed that as well?

14 A. Yes, I did.

15 Q. During this whole course of time when you were there
16 during this interview -- at any point did Mr. Miller say he
17 didn't want to talk to you?

18 A. No, he did not.

19 Q. At any point, did he say he wanted an attorney?

20 A. No, he did not.

21 Q. At any point, was he offered any reward if he would give
22 a statement?

23 A. No, he was not.

24 Q. Was he threatened in any way?

25 A. No, sir.

43

OFR. WALTON IN CAMERA

1 Q. Were his family or his relatives threatened in any way?

2 A. No, sir.

3 Q. Was he deprived of food or nourishment during that
4 time?

5 A. No, sir.

6 Q. Was he deprived of access to a restroom?

7 A. No, sir.

8 Q. Did he give a verbal statement?

9 A. Yes, he did.

10 Q. And were you present when that happened?

11 A. I was.

12 Q. Would you please tell the Court what the substance
13 of that statement was?

14 A. You want me to read it or just . . .

15 Q. Well, if you need to refresh your memory to tell the
16 Court what was said?

17 A. Oh, pretty much what he told us was that he waived his
18 rights. He said that he was out of work and a friend came up
19 who had just basically gotten a car, and he wanted to know
20 how he got the car.

21 And he was told, I have people who look out for me, and
22 he asked his friend to hook him up with these people that look
23 out for him.

24 So his friend told him, no problem, and he wanted these
25 people to look out for him as well.

He gave us some names of people. One of the persons he was
supposed to speak with that he was set up to talk to was

OFR. WALTON IN CAMERA

1 Big J, and he gave us a description of Big J, six two, two
2 hundred pounds, light skinned, clean cut and stocky.

3 He said that he mostly met him on Scott Park which is
4 Seventeenth Avenue, and he said that Big J could put him down
5 to get some work.

6 He said that he was also approached on the 29th of July
7 by a subject named Shorty Wrenn in reference to making a
8 delivery.

9 That is where he was supposed to pick up the package.
10 He said that Shorty Wrenn was driving a dark green car and he
11 said both packages were given to him and they were already
12 in the pillow when he got them.

13 He said that -- he told us he knew there were drugs in-
14 side. At that point he was -- he also was given a one way
15 train ticket and once he came to Denmark he was supposed to
16 get off the train.

17 He was supposed to meet with a female who was driving
18 a red GEO Storm, and he was supposed to -- I think she was sup-
19 posed to tell him she was one of Shorty Wrenn's people. At
20 that time he was to give her the drugs and he would receive
21 a Thousand Dollars for the work.

22 CROSS EXAMINATION OUT OF THE JURY'S PRESENCE

23 BY MR. WILSON:

24 Q. Officer Walton, when you say that you and the other offi-
25 cers approached Mr. Miller after he exited the train, you all

OFR. WALTON IN CAMERA

1 didn't immediately identify yourself as police officers, did
2 you?

3 A. As I said, we approached him and identified ourselves.

4 Yes, sir.

5 Q. Your testimony is that the first thing you or one of
6 the other officers did was to say you were with the police or
7 law enforcement?

8 A. I think what we normally do -- I can't remember what we
9 did that time, but we walk up, how you doing or something,
10 Officer so and so with Denmark Public Safety and we'd like to
11 talk to you, and go into what we normally do.

12 Q. Do you remember whether you all identified yourselves
13 first or asked him who he was first?

14 A. We identified ourselves first.

15 Q. And you said that after you all identified yourselves,
16 you told him what the purpose of approaching him was.

17 Do you remember what you specifically told him the pur-
18 pose for approaching him was?

19 A. I believe it was that we received information there were
20 some drugs coming into Denmark, and we were given a description
21 which he fit, and that was pretty much what we told him; and
22 we wanted to -- that's when we asked him if we had permission
23 -- we proceeded to talk to him a few minutes and asked to
24 look at his train ticket.

25 We asked him his name and he told us his name and that

OFR. WALTON IN CAMERA

1 also fit the description we were given as well.

2 We looked at his train ticket and that's when we asked
3 him if he had a problem with us checking his luggage or his
4 belongings.

5 Q. So from the time you first approached him to the time
6 you asked him for consent to search his bag, you said a few
7 minutes ago that a few minutes had passed.

8 How much time had passed from the time you first ap-
9 proached him to the time somebody asked him to search his bag
10 or luggage?

11 A. I can't give you an exact time because I don't know.

12 Q. Give us your best estimate.

13 A. It's been five years ago. I can't give an estimate. It
14 wasn't that long. I just can't say.

15 Q. More than five minutes or less than five minutes; ten
16 minutes, twenty minutes?

17 A. I know it was under ten minutes but I can't tell you
18 exactly how long.

19 Q. All right, and at that time I think you indicated that
20 you didn't block his way or prevent him from going to a car
21 or anything like that?

22 A. That's right.

23 Q. And in that time you had already determined that he fit
24 the description that you got?

25 A. Uh hm.

OFR. WALTON IN CAMERA

1 Q. He fit the name you got?

2 A. Yes, sir.

3 Q. He got off the train that you told him you had gotten
4 information the drugs would be coming in on?

5 A. . .

6 Q. He was being detained at that point in time, wasn't he?

7 A. No, he was not. He was free to leave at any time.

8 Q. He was free to leave any time?

9 A. Yes, sir.

10 Q. You hadn't placed him under arrest?

11 A. No, sir.

12 Q. You were in essence detaining him so you could investi-
13 gate further, weren't you?

14 A. No.

15 Q. Who asked for consent to search the belongings?

16 A. Officer Hay did.

17 Q. Officer Hay?

18 A. Uh hm.

19 Q. You heard that?

20 A. Heard him ask?

21 Q. Yes.

22 A. I was standing right beside him.

23 Q. Your testimony is that he asked for permission to search
24 the luggage and the pillow?

25 A. We didn't specify pillow. We asked him if we could search

OFR. WALTON IN CAMERA

1 his belongings.

2 Q. Okay, and you heard Officer Hay say, can we search your
3 belongings?

4 A. Right.

5 Q. And what was Mr. Miller's response?

6 A. Sure, no problem.

7 Q. You all obtained that orally? There was no written con-
8 sent or anything like that?

9 A. Correct.

10 Q. Okay, and you've seen a written consent to search before,
11 haven't you?

12 A. I sure have.

13 Q. You all have used them before, haven't you?

14 A. Not often we don't. Not often.

15 Q. But you have used them before?

16 A. I haven't used one before.

17 Q. But you know officers have used them before?

18 A. I can't say for sure.

19 Q. You say the bag or belongings were searched before he
20 was arrested?

21 A. Yes.

22 Q. And after he was stopped?

23 A. Yes.

24 Q. You said it was after you stopped him but you said it
25 was before he was put under arrest?

OFR. WALTON IN CAMERA

1 A. Correct..

2 Q. That's all the questions I have of Officer Walton.

3 THE COURT: You may step down.

4 (Witness excused from stand)

5 MR. WILSON: Your Honor, we would call one witness on
6 this issue, Officer Ben Hay.

7 BEN HAY, being duly sworn,
8 testified as follows out of the presence of the jury:

9 DIRECT EXAMINATION

10 BY MR. WILSON:

11 Q. Officer Hay, you are now with the Bamberg County Sher-
12 iff's Department, and you used to be with the Denmark Police
13 Department?

14 A. Yes, sir.

15 Q. Back in July of 1998 when this incident took place, you
16 were involved with the Denmark Police?

17 A. Yes, sir.

18 Q. I'm going to dispense with all the preliminaries and
19 get right to the meat.

20 You were involved in the stop and search of Mr.
21 Miller's belongings?

22 A. Yes, sir.

23 Q. Mr. Miller got off the train, fit the description, fit
24 the name, and you and other officers went up and approached
25 Mr. Miller?

OFR. HAY IN CAMERA

1 A. Yes, sir.

2 Q. And at the time that you approached Mr. Miller, did you
3 identify yourselves as officers?

4 A. Yes, sir.

5 Q. And what did you ?

6 A. Explained who we were; told him what we were doing and
7 why we wanted to do it, and asked for permission to search
8 his belongings.

9 Q. Are you the person who asked for consent to search his
10 belongings?

11 A. Yes, sir.

12 Q. You are the person who uttered the words asking to search
13 his belongings?

14 A. Yes, sir.

15 Q. And do you recall at that time Mr. Miller had two bags
16 with him that looked like luggage bags?

17 A. I remember he had two items and a pillow.

18 Q. So he had two items and a pillow?

19 A. Yes, sir.

20 Q. And you asked if you all could search those two items?

21 A. . .

22 Q. You didn't ask to search all his belongings but you asked
23 for consent to search his luggage?

24 A. No, sir. We go for the belongings which is coats, shoes,
25 whatever we can get to.

51

OFR. HAY IN CAMERA

1 Q. It's your testimony you asked to search all of his be-
2 longings?

3 A. Yes, sir.

4 Q. You didn't ask if he would consent to have his luggage
5 searched?

6 A. No, sir.

7 Q. All right, sir. Do you recall writing a report after
8 this back in July of 1998?

9 A. The written report, yes.

10 Q. So you could remember better today?

11 A. Yes, sir.

12 Q. Did you remember better what happened back in 1998 than
13 today?

14 A. Yes, sir.

15 Q. Officer Hay, were you involved in the questioning of
16 Mr. Miller after he was arrested?

17 A. Yes, sir.

18 Q. Or the reading of his rights before questioning?

19 A. Yes, sir.

20 Q. You are not aware of any statements he made . . .

21 A. No, sir.

22 Q. . . other than what were reviewed in the report?

23 A. Exactly.

24 Q. Just one moment, please. That's all the questions I
25 have.

OFFICER HAY IN CAMERA

1 Thank you, sir.

2 THE COURT: Anything from . . .

3 SOLICITOR: No, sir.

4 THE COURT: You may step down.

5 (Witness excused from stand)

6 THE COURT: All right, Mr. Wilson.

7 MR. WILSON: Your Honor, on the -- just a moment, please.

8 (Conferring with Defendant)

9 Your Honor, there is a matter of time. My client --
10 we would call him to testify in this hearing also, and his
11 testimony would be that he didn't consent to a search of any
12 of his belongings.

13 The Solicitor and I have agreed to stipulate to that
14 without putting up any testimony.

15 Your Honor, it would -- I would argue to the Court on
16 two grounds the motion to suppress.

17 One, that the stop and detention were not valid under the
18 law and without proper cause.

19 I think law enforcement does have the opportunity to
20 approach and law enforcement does have the opportunity to
21 briefly encounter or stop a person.

22 The longer that encounter takes place, of course, the
23 more they have to have cause as things go along to continue
24 to detain the person.

25 Oftentimes it's just a reasonable suspicion -- a brief

1 encounter would not require anything.

2 A stop would require reasonable suspicion, but the longer
3 they keep the person the more they have to get on up toward
4 a probable cause standard or further up the chain to hold the
5 person longer.

6 In this case, Officer Walton testified she didn't know
7 how long it was, but it was somewhere -- you know, ten min-
8 utes or so, that they detained or kept Mr. Miller.

9 Your Honor, if all that is being done is, hey, we put
10 in law enforcement officers there; we heard there were some
11 drugs that came in on the train; you fit the description and
12 we want to look at your bags, that doesn't take ten minutes,
13 and if he is there for ten minutes before they finally ask
14 for consent to search, there is a whole lot that's going on
15 and he's being detained.

16 We would submit they didn't have valid or proper basis
17 or cause for the stop.

18 THE COURT: The officer testified they checked his ID
19 and were able to identify him.

20 MR. WILSON: Yes, sir. I would submit that in that per-
21 iod of time they don't have basis for the stop. If they don't
22 have basis for the stop, then everything that follows it is
23 invalid and improper.

24 And, Your Honor, we would also submit to the Court that
25 he did not consent and that the evidence has not met the

1 burden of proof for consent to search.

2 They haven't met the burden and we would move to sup-
3 press everything else.

4 THE COURT: Yes, Solicitor?

5 SOLICITOR: Your Honor, we would submit there was a
6 valid consent in this case and a valid stop.

7 The United States Supreme Court has recognized there is
8 a lower standing for public places like train stations and
9 plane stations, and as long as there is an articulable sus-
10 picion they can go ahead and make the stop and investigate
11 further.

12 Once they did that in this case, then the suspicion is
13 heightened by him matching the description and the name, and
14 I believe there was a valid stop.

15 As to consent, there is a recent case dealing with con-
16 sent of this nature, where a lady agreed to search of her
17 baggage but kept her purse on her shoulder, and our Supreme
18 Court didn't like the fact that the officer then tore open
19 the lining of the purse, saying she had by her actions lim-
20 ited the consent.

21 I don't think we have that situation here where the tes-
22 timony is that the Defendant placed all his belongings down
23 together on the ground and stepped away from them after giv-
24 ing consent.

25 There was no limit to a search of just particular items,

1 so we would say there was a valid consent and a valid
2 search.

3 THE COURT: That is like the issue of -- if a suspect
4 gives a statement, you have to make a clear and articulable
5 statement to the officers that you want to invoke your right
6 to remain silent, just like you have to give some valid in-
7 dication that you want the search to stop.

8 I think there the Supreme Court has said that officers
9 don't have to start guessing when you want it to end.

10 SOLICITOR: I think the further support for the seizure
11 of these drugs is in the Dickerson line of cases. Officer
12 Walton testified as soon as she felt the pillow, she knew it
13 was drugs, and, therefore, she could have made the arrest and
14 a further search at that point.

15 So we think the totality of all the circumstances that
16 this was a valid stop and a valid consent, followed by a valid
17 seizure.

18 THE COURT: Yes, sir.

19 MR. WILSON: Judge, just on the issue of the statement,
20 I believe it would be my client's position not so much -- we
21 haven't conducted a Jackson-Deno anyway to any extent, but
22 his position is going to be more whether the statements were
23 actually made, rather than whether they were voluntary or
24 not.

25 We'd ask that you take that into consideration.

1 THE COURT: I thought the stop was proper, and the
2 length of the detention obviously-- a ten minute span -- I
3 don't find any problem with that, the length or duration.

4 Based upon the circumstances taken together, the consent
5 was given for the search of his belongings.

6 The drugs in this case were found and the statement was
7 voluntary, I think, and I found the testimony of the officers
8 was very credible, both as to the search and to the statement.

9 I will note for the record that Mr. Miller didn't help
10 his credibility on that with our exchange yesterday and today
11 before we started the hearing just now.

12 He does change his mind somewhat, but irregardless of
13 that, I find the stop, the detention -- the stop and search
14 rather were proper, and the statement was given after proper
15 Miranda was given and voluntarily.

16 Anything further before we bring the jury?

17 MR. MILLER: Nothing further.

18 SOLICITOR: No, sir. We're ready to go.

19 THE COURT: Bring them out, please.

20 (Whereupon, the jury returned to the Courtroom)

21 THE COURT: Ladies and gentlemen, I appreciate your
22 patience. We had to take up some matters outside of your
23 presence.

24 We are ready to continue. You will first hear opening
25 statements from counsel. This would not be a long trial, in

1 terms of witnesses or amount of evidence, but you will hear
2 opening statements, and then you will hear testimony and evi-
3 dence.

4 Then we will do closing arguments.

5 Before we begin, we need to swear this jury in. Please
6 stand and raise your right hands.

7 (Whereupon, the jury was sworn by the Clerk)

8 THE COURT: Thank you, ladies and gentlemen. First we
9 will hear opening statements. The opening statements and the
10 closing arguments by counsel are not evidence.

11 The only evidence that you will actually consider in your
12 deliberations will be exhibits I allow to be admitted in
13 evidence, as well as testimony from the witness stand.

14 I would ask that you pay very close attention to the
15 lawyers in their opening statements. It is their chance to
16 sort of briefly review the case and tell you a little bit
17 about what you should expect to hear in the testimony and the
18 evidence.

19 With that, Mr. Gibbons, if you're ready to proceed?

20 SOLICITOR: Yes, sir. May it please the Court?

21 THE COURT: Yes, sir.

22 SOLICITOR: Ladies and gentlemen, I want to thank you
23 again for being willing to serve as jurors, coming here to
24 decide matters that are in dispute this week.

25 The case we have before us right now is the State of

1 South Carolina versus Michael Miller. Mr. Miller is
2 charged with trafficking in cocaine. The amount in question
3 is nine hundred and thirty-seven grams of cocaine.

4 He is charged with possessing that in Denmark, South
5 Carolina, here in Bamberg County.

6 I believe the facts will show that officers were at the
7 train station in response to some information they had re-
8 ceived; that he got off the train and they went to talk to
9 him and identified him, and they got consent to search his
10 belongings..

11 He had two bags with him as well as a pillow, and I be-
12 lieve the testimony will be that they asked to search, and
13 he said, go ahead, no problem.

14 He put them down and stepped away from them and
15 one of the officers picked up the pillow and it was heavier
16 than she thought it should be, and she felt a hard object in-
17 side.

18 At that point, or shortly thereafter, Mr. Miller took
19 off running, and the officers apprehended him and brought him
20 back to the police station.

21 You are also going to hear testimony of what they did
22 when they got to the police station, and what he said on that
23 day.

24 It's not going to be a real long case, but again it is
25 a very important case for the State of South Carolina and

1 the people of Bamberg.

2 We would ask you to pay careful attention and treat this
3 with all the seriousness you would to an event that is of
4 major importance in your life.

5 The Judge is going to tell you about the law at the end
6 of the case. As I said before, in our State it is against the
7 law to have in your possession and bring into the State and
8 carry around illegal substances.

9 The Legislature said that if it is in excess -- in this
10 particular trafficking case, in excess of four hundred grams,
11 you are guilty of trafficking powder cocaine.

12 I thank you for your time and I think when you have heard
13 the evidence in this case you will come back with a verdict of
14 guilty of trafficking in powder cocaine.

15 Thank you for your time, and I'm sure you will come back
16 with the appropriate verdict.

17 THE COURT: Thank you, Mr. Gibbons. Mr. Wilson.

18 MR. WILSON: May it please the Court?

19 THE COURT: Yes, sir.

20 MR. WILSON: Ladies and gentlemen of the jury, I see some
21 familiar faces. Some of you have already rendered jury ser-
22 vice this week and been through the process, so I won't belabor
23 the point.

24 You know how the process works, and for those of you who
25 don't the Judge has already told you how things will work.

1 We will have opening statements from us and Mr. Gibbons
2 and and there will be testimony from the stand. Then we will
3 have an opportunity to make close arguments before you.

4 Just so you will know, I've already introduced myself
5 as Chris Wilson. I represent Mr. Michael Miller, seated here
6 at the table beside me.

7 Mr. Miller is charged with this very serious crime of
8 trafficking in cocaine.

9 He has pled not guilty to that charge, ladies and gen-
10 tlemen, and the law requires and the law mandates, and the
11 Judge will instruct you, that under your oaths you have sworn
12 to uphold the law, and that he is presumed innocent.

13 If he pleads not guilty on the charge, he is presumed
14 to be innocent, and the only way he can be found guilty is
15 for the State to put up through witnesses or other types of
16 testimony enough evidence to convince the twelve of you
17 unanimously that he is guilty beyond a reasonable doubt of
18 trafficking in cocaine.

19 In essence, what that means, ladies and gentlemen, is
20 you have to be convinced beyond a reasonable doubt that he did
21 bring in, or possess or have actual -- have knowledge of the
22 possession of cocaine.

23 In this case, more than four hundred grams of cocaine,
24 ladies and gentlemen, is the allegation.

25 If you listen to the testimony, hear the evidence, and

1 weigh the decisions and consider the law as the Judge gives
2 it to you, you will comply with your oath.

3 The one thing I would ask of you, ladies and gentlemen,
4 because this will be a short case -- I don't believe there
5 will be a lot of witnesses called in this case, but don't
6 let the shortness of the case, don't let the simplicity of
7 what you hear, don't let the fact that the case may move along
8 somewhat rapidly, detract from the serious nature of the case.

9 The Judge will tell you that you are not to deliberate,
10 not to start making up your mind, not start deciding the case,
11 until after you have heard all of the testimony in the case,
12 and you won't have heard all the testimony in the case until
13 after both sides have finished their case and the Judge in-
14 structs you that all the testimony is in.

15 Keep an open mind, and I look forward to working with
16 you. Keep those things in mind during the trial of the
17 case.

18 Thank you very much.

19 THE COURT: Thank you. Solicitor, call your first wit-
20 ness.

21 SOLICITOR: Yes, sir. State calls Ben Hay.

22 BEN HAY, being duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION

25 BY SOLICITOR:

OFR. HAY ON DIRECT

1 Q. Spell your last name, please.

2 A. Hay, H A Y.

3 Q. You are Deputy Hay?

4 A. Yes, sir.

5 Q. Where are you employed?

6 A. I have been employed with the Bamberg County Sheriff's
7 Department for the last three years.

8 Q. Is that the extent of your law enforcement experience?

9 A. No, sir. I started six years ago with the City of
10 Denmark. I worked there for three years.

11 Q. And back in July of 1998, where were you working?

12 A. I worked for the City of Denmark.

13 Q. And did you have occasion to be on duty on the 31st of
14 July of that year?

15 A. Yes.

16 Q. What were you doing that evening?

17 A. I was asked to help interdict some possible drugs coming
18 in the County.

19 Q. So what did you do?

20 A. I met with Officer Walton and Sergeant Hudson of the
21 North Charleston Police Department.

22 Q. And where did you go?

23 A. I went to the train station in Denmark.

24 Q. Now, what is the schedule of the train in Denmark?

25 A. It comes in approximately eleven fifty at night.

OFR. HAY ON DIRECT

1 Q. Just before midnight?

2 A. Yes, sir, coming out of Miami.

3 Q. And what were you all going to do?

4 A. We were going to set up near the train station, and when
5 the train arrived we were to meet two people.

6 Q. And what kind of information did you have about those
7 two people?

8 A. We were -- we received information there was possibly a
9 drug courier on the train.

10 Q. Did you get a description?

11 A. Yes, sir.

12 Q. And did you get a name?

13 A. Yes, sir.

14 Q. And so you were waiting at the station?

15 A. Yes, sir.

16 Q. What happened when the train came in?

17 A. Two people exited the train.

18 Q. What did they do?

19 A. One went towards a person in a vehicle, and one went
20 toward the pay phone right there at the train station in
21 Denmark.

22 Q. And where was everybody as far as law enforcement is
23 concerned?

24 A. We were far off to the side.

25 Q. Were other officers there with you that night as well?

OFR. HAY ON DIRECT

1 A. Yes, sir.

2 Q. And how many officers were at the actual platform?

3 A. At the platform, there was five or six total.

4 Q. And did you all go and question both individuals?

5 A. Yes, sir.

6 Q. And was Mr. Miller one of those individuals?

7 A. Mr. Miller was the one that myself and Judy Walton and
8 Kevin Hux approached.

9 Q. So there were three people that approached him?

10 A. Initially, yes.

11 Q. What did he do when he got off the train?

12 A. He started toward the telephone.

13 Q. Did he get to the telephone before you all got to him?

14 A. No, sir, we approached him before he got there.

15 Q. What were you all wearing that night?

16 A. Plainclothes. No gun showing, no badges.

17 Q. The three of you approached him?

18 A. Yes, sir.

19 Q. What happened when you all came up to him?

20 A. We identified ourselves as law enforcement officers.

21 Q. What did you tell him at that point?

22 A. We had received information there was a possible drug
23 courier on the train, and we were out there to try to inter-
24 dict any drugs that were there, and we asked for consent to
25 search his belongings.

OFR. HAY ON DIRECT

1 Q. Did you identify him?

2 A. Yes, sir.

3 Q. Was that before you asked for consent?

4 A. Yes, sir.

5 Q. And what did he do when you asked him for identifica-
6 tion?

7 A. He produced a train ticket.

8 Q. And did it have a name on it?

9 A. Yes, sir.

10 Q. And did that name trigger anything in your mind?

11 A. Yes, sir. Michael Miller was the name we were looking
12 for.

13 Q. That's the name in the information you had already re-
14 ceived?

15 A. Yes, sir.

16 Q. So you had a match?

17 A. Yes, sir.

18 Q. What did you do next?

19 A. We asked for consent to search his belongings.

20 Q. And what belongings did he have with him that night?

21 A. He had two bags and a pillow with him.

22 Q. By bags you're talking about suitcases?

23 A. It seems like one was like a carry-on bag and one was
24 a metal suitcase.

25 Q. And you asked him . . .

OFR. HAY ON DIRECT

1 A. To search his belongings.

2 Q. How long had you kept him there before you asked him
3 that?

4 A. Not long at all. . Less than five minutes.

5 Q. Around five minutes?

6 A. Yes, sir.

7 Q. And you already had gotten his name?

8 A. Yes, sir.

9 Q. What about the description you had gotten information
10 about?

11 A. Everything matched.

12 Q. And you said can we search . .

13 A. Your belongings.

14 Q. And he said what?

15 A. Sure, no problem.

16 Q. What did he do when he said that?

17 A. He put everything down and stepped back, the pillow too.

18 Q. When you say everything, what did he put down?

19 A. He put down the two bags and pillow and stepped back-
20 wards.

21 Q. And what did you all do at that point?

22 A. We started to search through his belongings.

23 Q. And were you all three there doing that at the time?

24 A. Yes, sir.

25 Q. Did he stay there the whole time you all were performing

67

OFR. HAY ON DIRECT

1 the search?

2 A. No, sir.

3 Q. What happened?

4 A. At some point he decided to break and run.

5 Q. And are you talking walk away?

6 A. No, sir. Run away with several officers chasing him. We
7 found him under a train.

8 Q. At the time you were first searching his luggage, was
9 he under arrest?

10 A. No, sir.

11 Q. Was he being detained?

12 A. No, sir.

13 Q. You all were conducting a check?

14 A. Yes, sir.

15 Q. And he took off running?

16 A. Yes, sir.

17 Q. Was he caught a short time later?

18 A. Yes, sir.

19 Q. And is that pretty much your involvement in the case?

20 A. Yes, sir.

21 Q. Did you see the -- what was found in his belongings?

22 A. Yes, sir.

23 Q. And what did you see?

24 A. After we got back to the station, I saw a couple of big
25 bundles of stuff wrapped up in tape.

OFR. HAY ON DIRECT

1 Q. Did you see that pulled out at the station too?

2 A. I saw Judy Walton reaching into the pillow but by that.
3 time we were running. I didn't see it until we got back.

4 Q. You took off chasing him?

5 A. Sure.

6 Q. And did you conduct an interview with Mr. Miller?

7 A. No, sir.

8 Q. Was that pretty much your involvement in the case?

9 A. Yes, sir.

10 Q. Where is this train station located?

11 A. It's located near the corner of 321 and 78. It's a lit-
12 tle bit off of 321.

13 Q. What jurisdiction is that in?

14 A. Within the City of Denmark.

15 Q. And what county?

16 A. Bamberg County.

17 Q. The person you saw getting off that train and the person
18 you came in contact with that night, is he in the Courtroom?

19 A. Yes, sir.

20 Q. Can you identify him, please?

21 A. Yes, sir. He's sitting right there, at the table.

22 Q. What's he wearing?

23 A. The Defense table. A brown jacket.

24 SOLICITOR: Your Honor, I'd ask that the record reflect
25 that he has identified the Defendant.

OFR. HAY ON DIRECT

1 THE COURT: Yes, sir.

2 BY SOLICITOR:

3 Q. Answer any questions Mr. Wilson has for you.

4 A. Yes, sir.

5 CROSS EXAMINATION

6 BY MR. WILSON:

7 Q. Officer Hay, you were with Officer Walton. Who is con-
8 sidered the main officer, investigating officer, on this
9 case?

10 A. Either/or. It wasn't . .

11 Q. So since you moved to Bamberg, she would be the officer
12 in Denmark who followed up on this case. Right?

13 A. Well, that is the case, and then she initiated -- she
14 was the contact person on the initial part of it.

15 Q. You consider this to be her case?

16 A. Yes, sir.

17 Q. If you were asked who is the main person in the case, it
18 would be her. Right?

19 A. Yes.

20 Q. All right, and you said that you all came up to Mr.
21 Miller, approached him, after he got off the train.

22 Did you ever approach the other person that got off the
23 train?

24 A. Several other individuals did.

25 Q. You weren't involved in that?

70

OFR. HAY ON CROSS

1 A. No, sir.

2 Q. Do you know whether they stopped the other person and
3 questioned the other person?

4 A. I understand they did.

5 Q. But you don't know of your own knowledge?

6 A. I do not know.

7 Q. And you say that you all immediately identified your-
8 selves as law enforcement officers?

9 A. Yes, sir.

10 Q. But you were in plainclothes?

11 A. Yes.

12 Q. No badges?

13 A. Right.

14 Q. No guns?

15 A. No guns.

16 Q. No identifying information other than . . .

17 A. No, sir.

18 Q. But you identified yourselves?

19 A. We didn't want to appear threatening to him.

20 Q. So you came up, approached him, asked him -- told him
21 what you were stopping him for, is that correct?

22 A. Yes, sir.

23 Q. You informed him you had a description that he fit and you
24 wanted to check if any drugs were involved with him?

25 A. Yes, sir.

71

OFR. HAY ON CROSS

1 Q. And then you say you asked him for consent to search
2 his bags?

3 A. Yes, sir.

4 Q. You asked for consent to search his belongings?

5 A. Yes.

6 Q. What did he have with him?

7 A. Two -- as I recall, it was two suitcases. One was
8 smaller than the other, and the pillow.

9 Q. Are you talking about duffle bags, suitcases? Do you
10 remember?

11 A. I can't remember exactly.

12 Q. So you don't know what kind of bags they were?

13 A. Not totally.

14 Q. But you remember it was two bags and a pillow case?

15 A. Yes, sir, a pillow. I remember a pillow.

16 Q. Two bags and a pillow?

17 A. Yes, sir.

18 Q. And you remember the pillow though, don't you?

19 A. Yes, sir.

20 Q. Okay. You say when you asked him for consent to search
21 he said, sure, go ahead?

22 A. Yes, sir. We run into that every day.

23 Q. He put the bags down and walked away or kind of around
24 behind the bags?

25 A. He just stepped back.

OFR. HAY ON CROSS

1 Q. And he let you all go ahead and search his bags?

2 A. Yes, sir.

3 Q. And you say at some point in time after that he took off?

4 A. Yes, sir.

5 Q. How long? A couple of seconds?

6 A. Total? From start to finish, five minutes.

7 Q. Okay, until he took off?

8 A. Yes.

9 Q. And you are saying from the time he said, sure, go
10 ahead and search my bags, to the -- from then until the
11 time he took off, that was about five minutes?

12 A. Yes.

13 Q. He took off?

14 A. Yes, sir.

15 Q. And you took off?

16 A. Yes, sir.

17 Q. So you didn't actually see anything be recovered from
18 the bags?

19 A. I saw Judy Walton when she gave the code word.

20 Q. Right.

21 A. And actually another one said it too, and that's when he
22 broke and ran and when we ran.

23 Q. But you yourself -- my question is that you, yourself,
24 did not see anything recovered from his bags?

25 A. . .

OFR. HAY ON CROSS

1 Q. You didn't see anything taken from the bags?

2 A. I saw it shortly afterward.

3 Q. I'm not talking about afterward when you got back to
4 the station. I'm talking about at the train station.

5 A. I saw it at the train station within fifteen seconds of
6 him breaking and running. I saw the drugs.

7 Q. So you saw it produced from the pillow case or bag or
8 wherever it was? Saw it removed?

9 A. No, when I come back to the train station Officer Walton
10 was holding the drugs.

11 Q. So the officer had the drugs? When you came back, the
12 officer had some drugs?

13 A. Yes, sir. I didn't trace him under the train. I went
14 the other direction.

15 Q. My question was real simple, Officer Hay. It's real
16 simple.

17 You didn't see anything, any drugs, removed from the
18 bag that Mr. Miller had put down and said, sure, go ahead
19 and search these?

20 A. I did not see any drugs in the bag. Excuse me. I did
21 not see the drugs removed from the bag. I saw the bag and
22 the drugs within fifteen seconds afterward.

23 Q. That's all I'm asking, is did you see the drugs removed
24 from the bag?

25 A. No, I didn't see the drugs come out the bag.

OFR. HAY ON CROSS

1 Q. After the drugs were removed from the bag and you all
2 stopped Mr. Miller, I assume he was placed under arrest?

3 A. Yes, sir.

4 Q. And all the evidence was gathered?

5 A. Yes, sir.

6 Q. And inventoried?

7 A. Yes, sir.

8 Q. Okay. That's all the questions I have.

9 Thank you.

10 THE COURT: Mr. Gibbons, anything further for Mr.

11 Hay?

12 SOLICITOR: No, sir.

13 THE COURT: You can step down.

14 (Witness excused from stand)

15 SOLICITOR: The State would call Officer Walton.

16 JUDY WALTON, being duly
17 sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY SOLICITOR:

20 Q. Officer Walton, where are you employed?

21 A. Denmark Police Department.

22 Q. How long have you been with the Denmark Police Depart-
23 ment?

24 A. For a little over eight years.

25 Q. Is that the extent of your law enforcement experience?

OFR. WALTON ON DIRECT

1 A. No, it's not. I was a Deputy Sheriff in Aiken County for
2 about four and a half years on the street.

3 Q. And what is your current rank at the Denmark Police
4 Department?

5 A. Captain.

6 Q. Back in 1998, were you working for Denmark?

7 A. Yes, I was.

8 Q. And did you have occasion on the night in question,
9 July 30, 1998, to be in charge of an operation?

10 A. Yes, I was.

11 Q. What was going on that night?

12 A. We received information that we possibly had a drug cour-
13 ier coming in on the train, and so we set up to make our
14 approach once the train arrived.

15 Q. Did you end up speaking with Mr. Miller that night?

16 A. Yes, I did.

17 Q. What happened when you approached him?

18 A. Once we made our approach, or as we were approaching,
19 Officer Hay asked him -- of course, after we identified our-
20 selves and told him who we were, made our initial greeting --
21 Officer Hay identified himself and asked for -- if he had any
22 ID.

23 He had a train ticket that had his name on it, and we
24 advised him that we had information that we had received that
25 match his description and his name, and Officer Hay asked him

OFR. WALTON ON DIRECT

1 if it would be possible or if he had a problem with us search
2 ing his belongings.

3 He said, sure, no problem.

4 Q. And what did you do as a result of that?

5 A. As a result of that, once Mr. Miller sat his belongings
6 down, I went around to check the pillow. Once I picked up
7 the pillow, it was heavy, a lot heavier than a pillow should
8 be.

9 Then I felt the pillow and found out there were bricks
10 or something heavy inside the pillow.

11 At that point, I noted the pillow had been stitched.
12 It had been pulled apart and re-stitched, and it wasn't
13 stitched very good.

14 So when I reached to pull the pillow, it just came right
15 open. That's when I reached in and once I felt it before I
16 saw it I knew from my experience in law enforcement and in
17 dealing with drugs that it was probably going to be the drugs
18 we were looking for.

19 Q. And what did you do when you found that?

20 A. Once I felt it, I pulled it out and found out the first
21 package I pulled out was wrapped in grey duct tape.

22 I motioned to the officer that I had the drugs in hand.

23 Q. Now, prior to that point, was Mr. Miller under arrest?

24 A. No, he was not, and we did not block his path. He was
25 free to leave at any time.

OFR. WALTON ON DIRECT

1 And after his consent, did he ever say you can search
2 some but not all of my stuff?

3 A. No, sir. We don't -- we ask for belongings because we
4 want to make sure we can search any coats, shoes, whatever they
5 have.

6 Q. Did he ever say to stop searching?

7 A. No, he did not.

8 Q. Did he say anything else after he said, sure, go ahead?

9 A. No, sir. He stood there and was real quiet.

10 Q. And when you found the substance, what did you do?

11 A. Once I motioned to the officers, he was -- I guess he
12 saw me out of the corner of his eye, . .

13 MR. WILSON: I'm going to object to her testifying about
14 anything she thinks he might have thought or what she guesses
15 he did.

16 THE COURT: I'll sustain that.

17 BY SOLICITOR:

18 Q. What did you see him do?

19 A. I saw him glance toward my way, and then he took off
20 running and ran up under the train, and the officers went
21 after him. Some went on the train and some had to go around.

22 Q. You did not take part in that pursuit?

23 A. No, I did not. He left all the property he had with him,
24 and I stayed there with it.

25 Q. Now, did the drugs leave your custody and control?

OFR. WALTON ON DIRECT

1 A. They never left my custody. I secured everything that
2 was there and went back to the Police Station. After they
3 apprehended him, Mr. Miller was brought to the police sta-
4 tion.

5 Q. Now, Officer Walton, do you have other duties now with
6 the Denmark Police Department?

7 A. Yes, I do.

8 Q. What do you do now?

9 A. Currently now, I am a school resource officer.

10 Q. This place where all this took place, is there a school
11 near that station?

12 A. Yes, there is. Right across the street.

13 Q. What would you estimate to be the distance?

14 A. Maybe less than a block.

15 Q. Is it within a half mile of the train station?

16 A. Yes, it is.

17 Q. Are there other schools also within one half mile?

18 A. Yes, I believe there is another
19 school less than a half mile of that.

20 Q. That's all in the City of Denmark?

21 A. Yes, sir.

22 Q. I'm going to show you what's been marked as State's
23 Exhibits 1, 2, and 3, and ask if you can identify those?

24 A. Yes, I can.

25 Q. State's Exhibit 2?

OFR. WALTON ON DIRECT

1 A. Yes.

2 Q. State's Exhibit 3?

3 A. Yes.

4 Q. What are they?

5 A. These are -- at the time we recover them, we always send
6 them to the State and they came back positive . . .

7 Q. I'm not asking you that. What are those items?

8 A. . . .

9 Q. Where did they come from?

10 A. They came from -- items out of the pillow. They came
11 from the bundles that were in the pillow. They were wrapped
12 up.

13 Q. Do they have any identifying marks to let you know that
14 they are the same?

15 A. Yes, the duct tape is in here.

16 Q. And is there paper work or numbers associated with those
17 items?

18 A. Yes, there is.

19 Q. And do they match up with the case we are here about
20 today?

21 A. Yes, they do.

22 Q. Now, how many bags or containers were in the pillow?

23 A. There were two containers in the pillow or two bundles
24 wrapped up in the pillow.

25 Q. All right. We've got three here today?

80

OFR. WALTON ON DIRECT

1 A. Yes.

2 Q. Why is that?

3 A. What I think we had to do when they broke them down and
4 sent them back, I think they all had the same numbers and we
5 matched them up as being the same.

6 I'm not exactly sure why -- they might have broken them
7 down for tests or something, but they all had the same num-
8 ber.

9 Q. Now, when you're talking about this number, is that a
10 number they have given you when you send them to SLED?

11 A. No, I think that is a number that SLED gives them when
12 they -- it's a number we put on it when it's sent to SLED,
13 and that same number is on the bags -- marked on the bags.

14 Q. Do the numbers in this case match up with numbers on
15 this bag?

16 A. Yes, they do.

17 Q. The items you sent? The two items you sent?

18 A. Yes, sir.

19 SOLICITOR: Your Honor, at this time we would move
20 State's 1, 2 and 3 into evidence.

21 MR. WILSON: Your Honor, we have the matters previously
22 noted.

23 THE COURT: Yes, sir. Subject to those, they will be
24 admitted.

25 (Drug packets admitted in evidence over objection as

OFR. WALTON ON DIRECT

1 State's Exhibits 1, 2 and 3 in evidence)

2 BY SOLICITOR:

3 Q. Officer Walton, did you at the Department receive a re-
4 port back from the SLED Chemist?

5 A. Yes, we did.

6 Q. I show you State's Exhibit 4. What is that piece of
7 paper?

8 A. This is what came back from SLED to let us know that
9 what we recovered . .

10 Q. Okay.

11 A. . . was cocaine.

12 Q. And what case does that line up with?

13 A. The case on the three exhibits there.

14 Q. And whose name is on that as far as the subject name?

15 A. Michael Miller.

16 Q. And that report is what you get back when you send a
17 substance to SLED?

18 A. Yes, it is.

19 Q. I show you State's Exhibit 5. What is that?

20 A. That is the report on the second item -- the same case
21 number. This second bundle that tested positive for the
22 cocaine.

23 Q. Did they test two different packages there?

24 A. Right.

25 Q. And that's reflected in the two reports?

82

OFR. WALTON ON DIRECT

1 A. Yes, sir.

2 Q. And what were the findings in each of the reports?

3 A. They tested . .

4 Q. Tell me what exhibit number it is and what the result
5 is?

6 A. These are Exhibit 4 and 5.

7 Q. What is the result in Exhibit 4?

8 A. The result says cocaine found, four hundred seventy-six
9 grams, seven thousand three hundred forty-four grains.

10 Q. All right, and Exhibit . .

11 A. Exhibit 5, cocaine found, four hundred sixty-one grams,
12 seven thousand one hundred and thirteen grains of powder co-
13 caine.

14 Q. So that is the weight and result on those two pack-
15 ages?

16 A. Yes, sir.

17 SOLICITOR: Your Honor, I'd move those in evidence as
18 well.

19 MR. WILSON: That's on our previous stipulation without
20 objection.

21 THE COURT: All right, they're admitted.

22 (SLED reports on two bundles of drugs admitted in evi-
23 dence without objection as State's Exhibits 4 and 5)

24 BY SOLICITOR:

25 Q. Officer Walton, you -- were you the lead officer in this

OFR. WALTON ON DIRECT

1 case?

2 A. Yes, sir. I was the contact person.

3 Q. Now, did you have further discussions with Mr. Miller on
4 that day?

5 A. Yes, I did.

6 Q. Tell us what happened in those discussions?

7 A. Well, after he was taken into custody he was brought
8 back to the Police Department.

9 Q. Let me stop you and ask you about that.

10 Was it long before he was caught?

11 A. No, it wasn't.

12 Q. Same day?

13 A. Same day, in a matter of maybe minutes.

14 Q. And he was taken to the police department?

15 A. Yes, he was.

16 MR. WILSON: Your Honor, I have a matter to take up out-
17 side the presence of the jury.

18 THE COURT: Why don't you approach the bench?

19 (Conference at the bench between counsel and the Court
20 off the record)

21 BY SOLICITOR:

22 Q. Officer Walton, so a little while later you were back
23 in the police department. Correct?

24 A. Correct.

25 Q. What did you do when you got back there and the Defendant

OFR. WALTON ON DIRECT

1 got back there as well?

2 A. We took him into a room, myself and another agent, and
3 we interviewed him.

4 Q. All right, was he under arrest at this point?

5 A. Yes, he was.

6 Q. He was in custody?

7 A. Yes, he was.

8 Q. What do you do before you interview a person?

9 A. We read them their rights.

10 Q. Was he read his rights that day?

11 A. Yes, he was.

12 Q. And was there any form or piece of paper that you used?

13 A. Yes, there was a form.

14 Q. I show you State's Exhibit 6 and ask you what that is?

15 A. This is the form that we read advice of rights from. We
16 read it to them and if they agree, they sign it.

17 Q. Were those rights read to him that day?

18 A. Yes, they were.

19 Q. And word for word?

20 A. Word for word.

21 Q. Off that form?

22 A. Off the form.

23 Q. And after he was read his rights, what is he asked if any-
24 thing?

25 A. He's asked if he would like to waive them and talk to us

OFR. WALTON ON DIRECT

1 and give us information, and he agreed to do that as well.

2 Q. All right. Now, after you read him his rights, you ask
3 if he understands them?

4 A. Yes, sir, we do.

5 Q. And did you ask him to do anything at that point?

6 A. We asked him to sign the form if he understands the
7 rights that we read to him.

8 Q. And did that happen that day?

9 A. Yes, it did.

10 Q. Whose signature appears on that form?

11 A. Michael Miller.

12 Q. And is there another part at the bottom?

13 A. At the bottom is the waiver of rights where he has
14 agreed to waive his rights and talk with us, and he did.

15 He signed that as well.

16 Q. And in your presence?

17 A. In my presence.

18 Q. The whole time this is going on, you are there?

19 A. Yes.

20 Q. Along with the other officer?

21 A. Yes, sir.

22 Q. And you witnessed him being -- acknowledging his rights
23 and waiving his rights?

24 A. Yes, I did.

25 SOLICITOR: Your Honor, the State would move Exhibit 6 in

OFR. WALTON ON DIRECT

1 evidence at this time.

2 THE COURT: Any objection?

3 MR. WILSON: Your Honor, no objection.

4 THE COURT: Without objection.

5 THE COURT: Without objection, it's admitted.

6 (Advice of rights form and waiver admitted into
7 evidence without objection as State's Exhibit 6)

8 BY SOLICITOR:

9 Q. So he's been read his rights, and he's agreed to give
10 up those rights and talk to you?

11 A. Yes, sir.

12 Q. At any point in time up to this point in the conversation,
13 has he been offered any reward for talking to you?

14 A. No, sir.

15 Q. Has he been threatened physically in any manner?

16 A. No, sir.

17 Q. Has he been denied food or drink or the bathroom, or
18 anything like that?

19 A. No, sir, he wasn't.

20 Q. Did he at any point in time tell you he did not want to
21 talk to you?

22 A. No, he never did.

23 Q. Did he at any point in time tell you he wanted a lawyer?

24 A. No, he did not.

25 Q. Did he make any requests that were not granted right away?

OFR. WALTON ON DIRECT

1 A. No, he did not.

2 Q. And did you all take a statement from him that day?

3 A. We took a verbal statement from him.

4 Q. Again, that was in your presence?

5 A. In my presence.

6 Q. After this all took place?

7 A. Yes, sir.

8 Q. Could you tell the jury and the Court the nature of the
9 statement he made that day?

10 A. . . .

11 MR. WILSON: Your Honor, I object. Please note my
12 objection.

13 THE COURT: Yes, sir, your objection is noted. I'm going
14 to allow the statement to be read in.

15 BY SOLICITOR:

16 Q. Just start with your notes of what he said.

17 A. What Mr. Miller explained to us was that he had just
18 lost his job and was having a hard time. He said that a
19 friend of his had just recently gotten a new car, and he asked
20 his friend, you know, how he got it, and his friend said,
21 my people look out for me.

22 So Mr. Miller asked his friend if he could get his
23 people to look out for me as well, and he said, yeah, I'll
24 put in a word for you.

25 Mr. Miller said this was the first time he ever did

OFR. WALTON ON DIRECT

1 anything like this, and he was supposed to be getting in
2 touch with a gentleman named Big J. Big J was -- he gave us
3 a description of Big J.

4 He said Big J was six two, two hundred pounds, light
5 skin, clean cut, stocky build.

6 Mr. Miller said he always met him during the course of
7 the stuff that was going on at the basketball court on Scott
8 Park in the Seventeenth Avenue area, when he'd go and play
9 basketball.

10 He told all of us that were in the room that Big J had
11 stated that he would put him down. He further told us that
12 he was approached by Shorty Wrenn who set up most of the
13 deliveries, and he said that Mr. Miller met -- Mr. Miller
14 told us he met Shorty at 1830 Twenty-Second Avenue and he was
15 driving a green Nissan pickup.

16 Mr. Miller said the packages were already inside the
17 pillow, and once he was given the pillow Mr. Miller told us
18 he was supposed to deliver the drugs to a female in Denmark.
19 He was given a one way ticket, and he said once he got the
20 package he knew there was drugs inside.

21 He also asked him to give him a smaller delivery. He
22 said he was given a one way ticket and was supposed to meet
23 with a female who was driving a red GEO Storm once he got off
24 the train.

25 That was it. He was supposed to give her the drugs and

OFR. WALTON ON DIRECT

1 he was supposed to get a Thousand Dollars for the delivery.

2 Q. He did indicate to you he knew it was drugs?

3 A. He did. He told us he knew it was drugs and he even
4 asked Shorty to give him a smaller delivery, a quarter Key.

5 Q. He never asserted to you he didn't know that he was car-
6 rying drugs?

7 A. No, he never indicated that.

8 Q. All right. Up until the end of your conversation, had
9 he at any point in time asked for a lawyer at this point?

10 A. No, sir, he never did.

11 Q. Did he ever tell you he didn't want to talk to you any
12 more?

13 A. No, he never did.

14 Q. And did he fail to cooperate in any way?

15 A. No, sir. He was very cooperative.

16 Q. And did you have any more involvement with him after
17 that point?

18 A. No, after the interview he was taken to the Bamberg
19 County Jail.

20 Q. Answer any questions Mr. Wilson has for you.

21 Thank you.

22 ~~THE COURT: Mr. Wilson.~~

23 CROSS EXAMINATION

24 BY MR. WILSON:

25 Q. Officer Walton, you're talking about the train station

OFR. WALTON ON CROSS

1 that is right there in the middle of the Town of Denmark,
2 right across from City Hall -- in that area?

3 A. Yes, sir.

4 Q. And that is the station you all went to to make this
5 approach after you got this information?

6 A. Yes.

7 Q. And you -- this is your case. You are the main investi-
8 gating officer. Right?

9 A. Yes, sir.

10 Q. You obviously recovered the drugs?

11 A. Yes, sir.

12 Q. And you said that you removed two items that were pack-
13 aged up from the pillow?

14 A. Yes, I did.

15 Q. You say Mr. Miller got off the train with it?

16 A. Yes, he did.

17 Q. Okay. State's Exhibits 2, 3 and 1 -- 1, 2, 3 -- I know
18 it was in a bag, but was the drugs -- were they in a bag like
19 this inside bag here?

20 A. We had a Best kit that we put our drugs in and sent it
21 to SLED.

22 Q. Okay. A Best kit is the bag on the inside of this bag.
23 Right?

24 A. Yes, sir.

25 Q. And then there is a bag a little bit further in. Am I

91

OFR. WALTON ON CROSS

1 seeing that right?

2 A. . . .

3 Q. A kind of cellophane looking bag, or is that the Best
4 kit, or part of the Best kit?

5 A. Yes, that's what the drugs came in.

6 Q. The drugs came in this?

7 A. Right.

8 Q. And you said they were wrapped up in tape?

9 A. Uh hm.

10 Q. Kind of like a duct tape?

11 A. It was a grey duct tape on one and the other may have
12 been black. I'm . . .

13 Q. Two things wrapped up?

14 A. Yes, sir.

15 Q. Were both of those found in the pillow?

16 A. In the pillow.

17 Q. And your testimony is that you watched Mr. Miller get
18 off the train?

19 A. Yes, sir. We saw him get off the train.

20 Q. And you saw what kind of luggage he had in his hand?

21 A. I just know some luggage and a pillow. I didn't pay much
22 attention to what the luggage actually looked like.

23 Q. You don't know whether he had two bags or five bags or
24 what, but you know he had a pillow?

25 A. He had a pillow and I'm sure he had two bags, but I'm not

OFR. WALTON ON CROSS

1 sure what kind they were.

2 Q. And you took those two bags into evidence -- took the two
3 bags in custody to put them in evidence,
4 didn't you?

5 A. We took everything. He took off running, so we took all
6 the property, and I took it with me to the police department.

7 Q. So you took those bags in custody?

8 A. Right.

9 Q. Took the pillow in custody?

10 A. Right.

11 Q. You haven't put those in evidence yet today that I see?

12 A. I think -- I'm not sure what happened to those. I think
13 they were turned over to him once the luggage was cleared and
14 we didn't have any use for it.

15 We usually give that to them at the jail because it is
16 their property and you are responsible for it.

17 Q. Are you saying those pieces of evidence were returned
18 to the Defendant?

19 A. Well, we didn't find anything in the luggage, so there-
20 fore it wasn't something we needed.

21 Q. He got off the train with two bags of luggage and a
22 pillow, and you found nine hundred thirty-seven grams of co-
23 caine?

24 A. Uh hm.

25 Q. But you didn't consider those to be evidence to take in

OFR. WALTON ON CROSS

1 custody?

2 A. We took them but once they were cleared they were given
3 back to him at the jail.

4 Q. So once the luggage was cleared, you say you think it
5 was released back to him?

6 A. We turned it all into evidence, and Chief Bell at the
7 time had all that. Once it was cleared, it may have been
8 returned to him back at the jail.

9 Q. How about the pillow where all the drugs were found?

10 A. . . .

11 Q. That wasn't cleared, was it?

12 A. No, that was turned in with the evidence.

13 Q. It's not in evidence today?

14 A. No, it is not there. I don't see it.

15 Q. Okay, and Mr. Miller wasn't present at the site when the
16 drugs were removed, was he?

17 A. Yes, he was.

18 Q. You are saying he was actually there when you removed the
19 drugs?

20 A. When I pulled the first bundle out -- I reached in and
21 felt the first bundle, and as I was pulling it up and notify-
22 ing them that I had something, he was still here, and then
23 he took off.

24 Q. He wasn't there after -- you're saying he was there when
25 you started to remove it, but he wasn't after you removed it?

MS. WALTON ON CROSS

1 A. No, we did that over at the police department.

2 Q. And it's your testimony that Officer Hay asked him for a
3 consent to search, and he just stuck his bags down on the
4 ground, stuck that pillow down on the ground, and said, sure,
5 go ahead, and then stepped back to let you all search his
6 bags?

7 A. We asked if we could search his belongings, and his
8 exact words were, sure, no problem, and he stepped back.

9 Q. Okay, and it's your testimony that you found the drugs --
10 I think you testified earlier in response to Mr. Gibbons'
11 that you all had found the drugs and he wasn't under arrest;
12 he was still free to leave; you didn't block his path; didn't
13 do anything . .

14 A. It all kind of happened at the same time. Once I noti-
15 fied them I had the drugs, before we could place him under
16 arrest he took off running.

17 Q. Okay.

18 A. We didn't have time.

19 Q. Nothing has been done to try to fingerprint the bag that
20 the drugs were in, or somehow do any kind of forensic test-
21 ing on the bag, to try to link them to Mr. Miller by fibers
22 or fingerprints or anything like that?

23 A. Not to my knowledge.

24 Q. Okay. Nothing you have requested?

25 A. No.

OFR. WALTON ON CROSS

1 Q. You . . .

2 A. They were in his possession.

3 Q. But you didn't request any testing like that?

4 A. No.

5 Q. You are the leading investigating officer in this case.
6 Right?

7 A. Yes.

8 Q. And you say that Mr. Miller -- you asked him for his
9 ticket and he gave you the train ticket?

10 A. Yes.

11 Q. And his name, Michael Miller, was on the ticket?

12 A. Yes.

13 Q. And he put the bags down and said, sure, go ahead and
14 search?

15 A. Right.

16 Q. And you got back to the police station and he freely
17 signed this rights warning form presented as State's Exhibit
18 Number 6?

19 A. Yes, sir.

20 Q. And he told you about Shorty and all these people that
21 had given him stuff to bring up here and told him he's get a
22 Thousand Dollars to get a car?

23 All those things you testified he just started talking
24 about all that?

25 A. Right. I didn't make it up.

OFR. WALTON ON CROSS

1 Q. Okay. Just one moment, please.

2 Officer Walton, after you reached in the pillow to pull
3 out the items you say Mr. Miller took off running.

4 Were you the only officer that would have been left there
5 when everybody else went after him?

6 It was you, Hux and Hay?

7 A. Correct.

8 Q. And Hux and Hay took off running?

9 A. Correct.

10 Q. So that left you as the only officer there?

11 A. That's correct.

12 Q. That's all the questions I have. Thank you.

13 SOLICITOR: I just have a few things, Your Honor.

14 REDIRECT EXAMINATION

15 BY SOLICITOR:

16 Q. Officer Walton, after you got the statement from the
17 Defendant, you didn't submit fingerprints on any of these
18 items, did you?

19 A. No, I didn't.

20 Q. Based on his story that he told you, would you expect
21 to find . . .

22 MR. WILSON: Your Honor, I'm going to object to the lead-
23 ing.

24 THE COURT: Sustained.

25 BY SOLICITOR:

97

OFR. WALTON ON REDIRECT

1 Q. Did you see any reasons to submit fingerprints?

2 A. No, I didn't.

3 MR. WILSON: Still leading, Your Honor.

4 THE COURT: I'll allow it.

5 A. No, I did not see any reason to ask for prints.

6 Q. Why is that?

7 A. Because he was very cooperative. He's the one that told
8 us what was going on. He said he knew there were drugs and the
9 pillow was in his possession. It was underneath his arm as
10 he got off the train.

11 So since it was in his possession, and it was an awful
12 heavy pillow . .

13 Q. Mr. Wilson was asking you about the location of this
14 train station. He asked a few questions about that.

15 You told me there were schools in that area?

16 A. Yes, sir.

17 Q. Are there any parks in that area? Public parks?

18 A. Yes, I think we have one park right across from City
19 Hall.

20 Q. What is the name of that park?

21 A. I'm not real sure on the name. Jim Hassley Park,
22 maybe.

23 Q. And how far -- is that a public park?

24 A. Yes, it is.

25 Q. How far would that be from the train station?

OFR. WALTON ON REDIRECT

1 A. Maybe a block.

2 Q. Was it within half a mile?

3 A. Within half a mile from the train station.

4 Q. Thank you.

5 RECROSS EXAMINATION

6 BY MR. WILSON:

7 Q. Ofr. Walton, are you sure it wasn't Officer Hux -- are
8 you sure it was you that spoke to Mr. Miller and not Officer
9 Hux?

10 A. You mean, who took the statement in the room?

11 Q. Yes.

12 A. It was me, and there was a DEA Agent in the room. In
13 my office.

14 Q. You and the DEA?

15 A. In my office, with the door shut.

16 Q. That's all I have.

17 THE COURT: Officer, you can step down. Thank you.

18 (Witnesses excused from stand)

19 THE COURT: Solicitor, call your next witness.

20 SOLICITOR: Your Honor, I would like at this time to put
21 on the record the stipulation. We have a stipulation that
22 the chain of custody on the drugs is not in issue here, and
23 neither are the nature and weight of the drugs.

24 THE COURT: Okay.

25 SOLICITOR: We have agreed that what has been testified

1 to is what the facts show.

2 THE COURT: Okay. Thank you. Counsel?

3 MR. WILSON: That's correct.

4 THE COURT: Okay. Let me just explain to you that a
5 stipulation between counsel is the same thing as evidence
6 that was taken by testimony from the witness stand.

7 You are to treat it just like any other piece of evi-
8 dence that has been introduced during this case, and take
9 it as a fact that has been put into evidence before you.

10 Anything further from the State?

11 SOLICITOR: Your Honor, I believe we've moved all items
12 into evidence. At this time, the State would rest.

13 THE COURT: Okay, thank you. Ladies and gentlemen, I
14 have to take up a few matters with the attorneys.

15 I would ask you all to return to your jury room briefly.
16 Do not discuss the evidence and testimony you have heard be-
17 tween yourselves, and we'll bring you back out.

18 (Jury excused from Courtroom)

19 THE COURT: Just for the record, Mr. Wilson, at some
20 point you made an objection. We had a side bar and I told
21 you I would give you an opportunity to put further argument
22 on the record concerning that.

23 I'm going to note for the record that your objection --
24 when we discussed the matter at side bar, it was just to save
25 the jury from going out and being brought back in.

1 I continued on, and told you that I would let you pre-
2 sent further argument on the record.

3 Go ahead.

4 MR. WILSON: Thank you, Your Honor. I had objected at
5 the introduction of the drugs into evidence based on our pre-
6 vious motion to suppress. I think I put that on the record
7 and you had already ruled, so there was no need to go any
8 further and send the jury out.

9 Your Honor, the second objection that we raised was to
10 statements that Officer Walton testified that Mr. Miller made
11 to her after he had been taken back to the station.

12 I objected and indicated at side bar that that objection
13 was based on Rule 403, prejudicial effect/probative value
14 rule, in that those statements when taken and considered had
15 more prejudicial effect than probative value, especially con-
16 sidering all the other evidence in the case that may tend to
17 prove Mr. Miller's guilt, or that the State submitted in
18 support of his guilt.

19 We felt like that would violate Rule 403, and that was
20 the basis of the motion.

21 THE COURT: You did state all of those grounds in our
22 conversation at side bar. The arguments by counsel were all
23 timely made and the grounds stated, and I find that the
24 statement is not more prejudicial than probative.

25 I overruled the objection.

1 MR. WILSON: Judge, I think that is indicated in the
2 -- that's part of Rule 403. also, and I think you denied that
3 also.

4 THE COURT: Thank you, Mr. Wilson. Just for the record,
5 those grounds and arguments were made in a timely fashion,
6 and we delayed this for the sake of not sending the jury out
7 to put it on the record.

8 Anything further from Defense?

9 MR. WILSON: Your Honor, if you would just note our motion
10 for directed verdict. I won't belabor the testimony or the
11 grounds.

12 If you would just note that I made a motion for direction
13 of a verdict, on the grounds that the evidence was not suffi-
14 cient to prove guilt.

15 I submit that to the Court, and it is my understanding
16 that Mr. Miller intends to testify. We have discussed those
17 issues, and if he does testify he will be the only witness
18 we will call.

19 If you want to go ahead and handle that, we can do that
20 and proceed on with the trial.

21 THE COURT: Okay. I will deny the motion for a
22 directed verdict, and I obviously believe they have met the
23 standard with their evidence so that it becomes an issue for
24 the jury to decide, taken in the light most favorable to
25 State.

1 I will send it to the jury.

2 Mr. Miller, if you would stand, sir.

3 Mr. Miller, once again I'll ask you, sir -- I know Mr.
4 Wilson has had discussions with you regarding your right to
5 testify and not testify during the course of the trial,
6 sir.

7 Again, I caution you, sir, that if you do not understand
8 or there is something you do not agree with, you need to tell
9 us now.

10 Do you understand that?

11 DEFENDANT: Yes, sir.

12 THE COURT: Okay, you do understand that you do have a
13 right to testify in this trial in your own behalf, if you
14 wish to. Do you understand?

15 DEFENDANT: Yes.

16 THE COURT: This is your constitutional right, sir, to
17 testify, and the decision of whether or not to testify is
18 yours and yours alone. You make that in consultation
19 with your attorney, sir, but ultimately the decision is yours.
20 Do you understand?

21 DEFENDANT: Yes, sir.

22 THE COURT: Do you understand if you choose to testify
23 you will be treated like any other witness up there. Do you
24 understand that?

25 DEFENDANT: Yes, sir.

1 THE COURT: I'm sure Mr. Wilson has gone over with you,
2 sir, that you also have a right not to testify. Do you under-
3 stand that?

4 DEFENDANT: Yes, sir.

5 THE COURT: Do you understand, sir, that if you chose
6 not to testify, you would in fact have a right and I would
7 instruct the jury that they are not to consider at all in
8 your deliberations the fact that you did not testify.

9 Do you understand that?

10 DEFENDANT: Yes, sir.

11 THE COURT: I will instruct the members of the jury that
12 they cannot consider that or hold it against you in any way.
13 Do you understand that? .

14 DEFENDANT: Yes, sir.

15 THE COURT: Not only that, but I will tell them they
16 cannot even discuss the fact that you did not testify during
17 the course of their deliberations. Do you understand that?

18 DEFENDANT: Yes, sir.

19 You do not have to say anything right now. You can make
20 the decision with your attorney, but when the jury comes back
21 out it will be stated to be the Defense's turn to put up their
22 case. Do you understand that?

23 DEFENDANT: Yes, sir.

24 THE COURT: At that time, you will have to give the de-
25 cision you have made..

1 MR. WILSON: Judge, if I could just make it clear for
2 Mr. Miller's understanding that he could make an informed de-
3 cision.

4 If he testifies, as I understand your ruling, the State
5 would be -- the escape conviction would be something that the
6 Solicitor could admit in evidence to impeach his credibility.

7 THE COURT: Yes, sir. You understand that?

8 DEFENDANT: Yes, sir.

9 THE COURT: You understand they would be allowed to bring
10 that out on cross examination?

11 DEFENDANT: Yes, sir.

12 THE COURT: All right, let's take five minutes while you
13 talk to Mr. Wilson, and when we come back you can ask any
14 questions you might have before we bring in the jury.

15 Then we will proceed with the trial.

16 (Court took brief recess and resumed.)

17 (The jury returned to the Courtroom)

18 THE COURT: You're the last one, so you may act as our
19 Foreperson. I will explain to you your duties when I charge
20 you on the law.

21 Ladies and gentlemen, I appreciate your patience.

22 Mr. Wilson?

23 MR. WILSON: Your Honor, we would call the Defendant,
24 Michael Miller, to the stand.

25 MICHAEL MILLER, being duly

1 sworn, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. WILSON:

4 Q. Michael, tell the jury how old you are, please.

5 A. Thirty-three.

6 Q. And where are you originally from?

7 A. Miami, Florida.

8 Q. Please talk into the microphone. You're 33 years old,
9 and you're originally from Miami, Florida?

10 A. Yes, sir.

11 Q. Have you got family down in Florida?

12 A. Yes, sir.

13 Q. What kind of family?

14 A. Three kids.

15 Q. How old are they?

16 A. Six -- my daughter is six and my son is ten and my
17 oldest son is twelve.

18 Q. Tell me where they live.

19 A. Miami, Florida. My mom has them now.

20 Q. Who do they usually live with?

21 A. My daughter lives with her mother, and my son lives with
22 his mother.

23 Q. How about the third child?

24 A. The third child is back and forth. He is originally from
25 Albany, Georgia.

DEFENDANT ON DIRECT

1 Q. Do you work down in Florida?

2 A. Do I work down there?

3 Q. Yes.

4 A. Yes, I work. I have my own business.

5 Q. What kind of business.

6 A. I'm a car detailer. I have my own business.

7 Q. Do you have any family in South Carolina?

8 A. I have distant relatives.

9 Q. What type relatives?

10 A. On my grandmother's side. Now it's her husband.

11 Q. On July 30, 1998, did you come to South Carolina?

12 A. Yes, sir.

13 Q. Did you come on the train into Denmark?

14 A. Yes, sir.

15 Q. Were you stopped by the Denmark police officers?

16 A. Yes, I was.

17 Q. And were you ultimately charged with these drugs?

18 A. Yes, I was.

19 Q. You want to tell the jury why you were coming to South
20 Carolina?

21 A. I was coming to visit some relatives and friends.

22 Q. And do what?

23 A. Well, I was just taking about two weeks because I had
24 talked to one of my relatives prior to that in Miami and asked
25 if it was okay if I come see him, and I got permission to

DEFENDANT ON DIRECT

1 come to South Carolina.

2 Q. And were you traveling with anybody else or were you
3 alone?

4 A. I was by myself.

5 Q. And what were you traveling with?

6 A. I was traveling with my two luggages..

7 Q. With what?

8 A. Two handbags.

9 Q. Okay. You remember what they were or what they looked
10 like?

11 A. Yes, I do.

12 Q. Tell me about them.

13 A. Well, the larger bag was a gold handbag with burgandy
14 stripes, and the smaller bag was a blue Polo handbag.

15 Q. Okay, and when you got -- when you left Florida, you put
16 those bags on the train with you?

17 A.. Yes, sir.

18 Q. And were you riding in the passenger seat or in a sleep-
19 ing compartment or what?

20 A.. I had a sleeping compartment.

21 Q. And what did you do with the bags while you were tra-
22 veling along?

23 A. I had them with me.

24 Q. Were those bags with you the whole time from Miami?

25 A. Yes, sir.

DEFENDANT ON DIRECT

1 Q. So they were either in your hands or in the sleeping
2 compartment with you?

3 A. Yes, sir.

4 Q. And then when the train got to Denmark and stopped,
5 what did you do?

6 A. I got off the train and I was heading in the station to
7 wait for one of the relatives to pick me up.

8 Q. So you got off the train and you were walking to the
9 station?

10 A. Yes, sir.

11 Q. And then what happened?

12 A. I was approached by an individual.

13 Q. Do you remember who it was?

14 A. . .

15 Q. Can you describe them, whether it was a man or a woman?

16 A. A man -- a white male.

17 Q. What happened?

18 A. He asked me what was my name.

19 Q. What did you tell him?

20 A. I told him Michael Miller.

21 Q. And did he ask you for anything else?

22 A. Yes, he asked if I could identify myself.

23 Q. And did you tell him whether you did or didn't have iden-
24 tification?

25 A. I did.

DEFENDANT ON DIRECT

1 Q. What did you have for identification?

2 A. I had my wallet with my birth certificate, driving
3 license, social security.

4 Q. Did you produce any of that stuff for his review?

5 A. Yes, I did.

6 Q. Did you know who this person is yet?

7 A. No, I don't have no idea who he was.

8 Q. Did he tell you why he was stopping you?

9 A. No, he did not.

10 Q. Say who he was?

11 A. No, he did not.

12 Q. Did you show him some identification?

13 A. Uh hm.

14 Q. What happened next?

15 A. He asked me for my train ticket.

16 Q. Did you have your train ticket?

17 A. Yes, I did.

18 Q. Did you show him your train ticket?

19 A. I presented it to him.

20 Q. Okay, and then what happened next?

21 A. Once I presented the train ticket to the individual, as
22 we continued to talk, I noted other individuals around us.

23 Q. So this individual came up to you, asked who you were,
24 for your identification, and for your train ticket?

25 A. Yes.

DEFENDANT ON DIRECT

1 Q. Was he alone?

2 A. At first he was by himself.

3 Q. And you say after that went on, you noticed other peo-
4 ple coming around?

5 A. Yes, I did. Other people were approaching.

6 Q. And then what happened? What did he say or do next?

7 A. When he asked me for my ticket, I presented that ticket
8 to him, and I proceeded to see other people approaching, and
9 that didn't look too comfortable for myself, me being from
10 Miami, Florida, coming to South Carolina.

11 I don't know who these people are and I'm in a strange
12 place. I thought he was the ticket master checking my ticket
13 to make sure it was legit.

14 Q. All right. When you got off the train, what did you
15 carry off the train with you?

16 A. My two handbags.

17 Q. Okay. Just the two handbags?

18 A. Yes, I did.

19 Q. And did you have a pillow or any other items, any other
20 bags with you?

21 A. No, I did not.

22 Q. Did you take a pillow onto the train with you?

23 A. No, I did not.

24 Q. What did you use as far as sleeping on the train?

25 Did you have a pillow on the train?

111

DEFENDANT ON DIRECT

1 A. It was a pillow in the sleeper on the top bunk and the
2 bottom bunk.

3 Q. And did you take any of those with you when you left the
4 train?

5 A. No, I did not.

6 Q. When you got off the train with your bags, the person
7 comes up and asks you these questions.

8 Then you noticed other people coming around?

9 A. Yes, I did.

10 Q. Okay, what happened next?

11 A. After seeing other people coming and surrounding me like
12 they did, I panicked.

13 The first thing that came to my mind was that it look like
14 these people might be up to something, so I panicked and I
15 ran out of fear.

16 Q. Okay. Did you put the two bags down at any point in
17 time?

18 A. Yes, I put the bags down in front of me.

19 Q. At any point in time, did this gentleman who was talking
20 to you identify himself as an officer?

21 A. No, he didn't.

22 Q. And did he ever ask you for consent to search your bag
23 or search your items?

24 A. No, he didn't ask me until after the fact that I was
25 arrested.

DEFENDANT ON DIRECT

1 Q. All right, and so what happened next. You said the crowd
2 was coming around and you were nervous. What did you do
3 next?

4 A. I flee.

5 Q. Okay, and did the person chase you?

6 A. The person talked to me and I just kept going.

7 Q. And did you run very far from where you got stopped?

8 A. No, I didn't.

9 Q. All right. Mr. Miller, after you got stopped, were you
10 notified you were being placed under arrest for a drug
11 offense?

12 A. Yes, I was.

13 Q. And were you brought back to where your bags were?

14 A. No, I was not.

15 Q. You found out ultimately that the people chasing you were
16 cops, right?

17 A. Eventually I did.

18 Q. And when they stopped you, they told you you were under
19 arrest?

20 A. Yes, they did.

21 Q. They took you back over to where you were and where your
22 bags were and told you they were placing you under arrest for
23 drugs. Right?

24 A. No, that's not right.

25 Q. What were you told you were being put under arrest for?

113

DEFENDANT ON DIRECT

1 A. They told me I was being put under arrest for drugs but
2 they didn't take me back to my bags.

3 Q. You didn't go back to where you dropped the bags?

4 A. No, I did not.

5 Q. All right. Then what happened?

6 A. Well, after they tell me I was under arrest, they brought
7 me to the Denmark Police Department.

8 Q. All right, and you say they -- who took you to the Denmark
9 Police Department?

10 A. It was -- I think it was Officer Hux, but I don't know.

11 Q. Man or woman?

12 A. A white male.

13 Q. The same man that was questioning you at the train sta-
14 tion?

15 A. Exactly.

16 Q. Okay, and you were taken into the police station?

17 A. Yes, sir.

18 Q. And they asked if they could interview you?

19 A. Yes, they did.

20 Q. Okay, and, Mr. Miller, there has been some testimony --
21 you have been present throughout the trial. There has been
22 some testimony from Officer Walton that you made an oral state-
23 ment to her.

24 That she took some notes and she testified that you had
25 gotten in touch with somebody down in Florida who gave you

DEFENDANT ON DIRECT

1 some drugs and told you to bring them up; that you liked the
2 person's car and wanted to get in, and asked the person to
3 give you a smaller amount to bring up; that you brought
4 them and you were going to meet some woman at the train sta-
5 tion and get paid a Thousand Dollars.

6 You heard all that testimony from Officer Walton?

7 A. Yes, sir.

8 Q. What I'm asking you is did you make any statement along
9 those lines to Officer Walton or any other police officer those
10 thing?

11 A. No, I did not.

12 Q. Is there any part of that that you told any police offi-
13 cer?

14 A. No.

15 Q. Did you say anything such as that to any police officer?

16 A. None whatsoever.

17 Q. All right. In connection therewith, Officer Walton tes-
18 tified that you told her that you knew that there were drugs
19 in the belongings; that you knew there were drugs; and did
20 you ever tell Office Walton or any other officer that?

21 A. No, I did not.

22 Q. She also said you told her that you asked the guy down
23 in Florida to give you a smaller amount to carry, like a
24 quarter key. Did you ever tell her that?

25 A. No, that's incorrect.

DEFENDANT ON DIRECT

1 Q. Michael, these drugs that have been entered as State's
2 Exhibits 1, 2 and 3, the allegation is that these
3 drugs were recovered from a pillow that you carried off of
4 the train.

5 Your testimony is you didn't carry a pillow off the
6 train?

7 A. No, sir.

8 Q. Okay, you have seen these drugs before?

9 A. I never saw them before.

10 Q. Did you carry these drugs from Florida?

11 A. No, I did not.

12 Q. If these drugs were found in your belongings, did you
13 know these drugs were there?

14 A. No, I did not. They were not in my belongings.

15 Q. Okay. Why would you run when this individual approached
16 you and asked you questions and then these other people came
17 up? Why would you take off?

18 A. Because I had no idea who these people were until after
19 I was arrested.

20 Q. Michael, you have been convicted of escape before,
21 haven't you?

22 A. Yes, sir.

23 Q. You're telling the jury you didn't know anything about
24 those drugs and you didn't bring those drugs from Florida on
25 the train to South Carolina?

DEFENDANT ON DIRECT

1 A. Yes, sir.

2 Q. That's all the questions I have. Answer any questions
3 Mr. Gibbons has.

4 CROSS EXAMINATION

5 BY SOLICITOR:

6 Q. Mr. Miller, you have lived your whole life down in Florida
7 pretty much?

8 A. Yes, sir.

9 Q. And you said you had some distant relatives up this way?

10 A. Yes, sir.

11 Q. Where do they live?

12 A. Holly Hill -- Holly Hill, South Carolina.

13 Q. And you had made arrangements for them to come and pick
14 you up that night?

15 A. Yes, I did.

16 Q. Did they come pick you up?

17 A. No, I never phoned them. I never met with them to pick
18 me up at the station.

19 Q. You never told them what time you were coming in?

20 A. Well, they already knew what time the train was going
21 to arrive. I spoke with them about three days prior to leav-
22 ing Miami.

23 Q. And so they were sitting there waiting for you at the
24 train station?

25 A. I have no idea because I never made it to the station,

DEFENDANT ON DIRECT

1 and I didn't see any cars out there waiting at the time:

2 Q. After this all went down, they came to the police
3 department?.

4 A. No. I talked with them.

5 Q. You never saw them that night?

6 A. No, I never did see them.

7 Q. What is their name?

8 A. Johnny Robinson.

9 Q. How are you related to Johnny Robinson?

10 A. My grandmother -- my father's -- that's my grandmother's
11 husband, Johnny B. Robinson.

12 Q. And have you visited there before?

13 A. Yes, sir, quite a few times.

14 Q. You were going to stay a couple of weeks?

15 A. Yes, sir.

16 Q. And -- but you run a business down there in Miami?

17 A. Yes, I have my own business.

18 Q. And you were going to leave that for a couple of weeks
19 and come up here to visit?

20 A. Yes, sir.

21 Q. Had you already purchased the ticket to go back?

22 A. No reason to buy a ticket because one of the relatives
23 of mine was going to drive back down with me, so I didn't
24 have need for a ticket.

25 Q. You bought that ticket yourself?

DEFENDANT ON CROSS

1 A. Yes, sir.

2 Q. How much did it cost to ride up from Miami?

3 A. I can't recall that exact price of the train
4 ticket.

5 Q. And your testimony is when you got off the train some
6 people started crowding you and you didn't know who they were?

7 A. That's correct.

8 Q. Nobody ever told you they were police officers?

9 A. Nobody identified themselves as a police officer.

10 Q. And you didn't have a pillow on the train?

11 A. No, I did not.

12 Q. You just ran because you thought you might be mugged or
13 robbed or something like that?

14 A. Correct.

15 Q. You went to the police station. Correct?

16 A. Pardon?

17 Q. You went to the police station after you were caught.
18 Right?

19 A. . .

20 Q. They took you to the police station?

21 A. They took me to the Denmark Police Department.

22 Q. And you put your signature on this form, State's
23 Exhibit 6? Did you sign that form?

24 A. That is not my signature.

25 Q. That is not your signature?

DEFENDANT ON CROSS

1 A. No.

2 Q. At either place?

3 A. No, sir.

4 Q. You've never seen that before in your life?

5 A. No, I did not.

6 Q. They didn't read you any rights that night?

7 A. My rights wasn't read at the Denmark Police Department.

8 Q. And you made no statement whatsoever of any kind?

9 A. No, I did not.

10 Q. And you don't know any of these people that were mentioned
11 or you didn't meet the people at the basketball courts, or
12 none of that?

13 A. Exactly. I have no idea who these people were.

14 Q. Are you the same Michael Miller who was convicted of
15 escape from a county detention facility?

16 A. Yes, I am him.

17 Q. You've never seen these drugs before in your life?

18 A. I never saw those drugs before in my life.

19 Q. I have nothing further.

20 REDIRECT EXAMINATION

21 BY MR. WILSON:

22 Q. Just one thing. Michael, you indicated you had
23 purchased a one way ticket to South Carolina?

24 A. Yes, sir.

25 Q. And you had family in Holly Hill, and you were going to

DEFENDANT ON REDIRECT

1 stay with some family who would drive you back down to
2 Florida?

3 A. Yes, sir.

4 Q. Who was going back with you to Florida?

5 A. Celone.

6 Q. Celone?

7 A. Johnny Robinson's second oldest daughter. She never
8 been down there so she wanted to go down there just to
9 visit.

10 Q. But you were arrested that night before these people
11 made it to the train station?

12 A. Exactly.

13 Q. They might have been at the train station but you just
14 didn't see them?

15 A. Exactly.

16 Q. Okay, and when you got arrested and were taken to the
17 Denmark Police Station, the solicitor asked if any of your
18 family ever showed up there.

19 Would anybody have had any reason that you know of to
20 know you had been arrested and taken to the Denmark Police
21 Station?

22 A. No, sir.

23 Q. Were you able to call anybody and tell them where you
24 were?

25 A. I didn't have the number. The number I had for them was
121

DEFENDANT ON REDIRECT

1 in my wallet and I was going to call once I got to the . .

2 Q. What I'm asking you though is after you got arrested, .
3 while you were taken to the station or immediately upon
4 getting to the station, were you allowed to call these fam-
5 ily members and tell them where you were?

6 A. No.

7 Q. So they wouldn't have known to come to the police sta-
8 tion, would they?

9 A. No.

10 Q. That's all the questions I have.

11 SOLICITOR: I have nothing else.

12 THE COURT: You may step down.

13 (Witness excused from stand)

14 THE COURT: Anything further?

15 MR. WILSON: That would be the Defense's case.

16 THE COURT: All right.

17 MR. WILSON: We would just renew our motions made -- the
18 directed verdict motions.

19 THE COURT: Okay, and the ruling would be the same.

20 We'll add that for the record later.

21 Ladies and gentlemen, that concludes all the evidence
22 and testimony you are going to hear in this case.

23 In just a moment, we will have closing arguments from
24 counsel, after which I will instruct you on the law to apply
25 to this case.

1 Then you can begin your deliberations.

2 Closing arguments, like I said, and the opening state-
3 ments are not evidence. It is a chance for the lawyers to
4 summarize the case for you and argue their case to you.

5 I'll ask that you pay very close attention to their argu-
6 ment, after which I will instruct you on the law.

7 Thank you..

8 Mr. Gibbons, you may proceed.

9 SOLICITOR: I would waive opening.

10 THE COURT: Mr. Wilson.

11 MR. WILSON: Your Honor, may it please the Court?

12 THE COURT: Yes, sir.

13 MR. WILSON: Ladies and gentlemen, as we had told you,
14 this has been a short trial and without a lot of witnesses,
15 but I ask you not to let that detract from the seriousness
16 of what we're talking about.

17 What we're talking about is a trafficking in cocaine
18 charge and Mr. Miller's freedom, and that is his right -- his
19 freedom.

20 It is a serious situation, and unless you are convinced
21 beyond a reasonable doubt that Mr. Miller is guilty of traf-
22 ficking in cocaine, then you as a juror have a duty under the
23 oath to find him not guilty.

24 Now, if you have been convinced by the testimony and the
25 evidence you have heard that he did traffic in crack cocaine,

1 and all that is is legal language with regard to the charges,
2 and some of you have been on a jury. All that is is legal
3 language which means that he in his possession knowingly and
4 intentionally more than four hundred grams of cocaine.

5 If you have been convinced of that from the testimony,
6 then you will find him guilty.

7 But if you haven't been convinced beyond a reasonable
8 doubt by the testimony and the evidence that has been placed
9 before you, then as a juror under your oath you have an obli-
10 gation to find him not guilty.

11 Now, it has been such a short trial that I'm not going
12 to go back through all the evidence and testimony. It is
13 still fresh in your mind.

14 There have only been three witnesses. Two officers and
15 Mr. Miller.

16 The Judge is going to tell you that Mr. Miller didn't
17 have any obligation to testify. The Fifth Amendment to the
18 Constitution of the United States and the State of South
19 Carolina say that a criminal defendant, a person charged, at
20 a trial cannot be compelled to testify in their case.

21 If the person chooses not to testify, if he does not put
22 up any evidence whatever, you can't consider that against the
23 Defendant.

24 The State has the burden of proof, and their burden of
25 proof is beyond a reasonable doubt.

1 It is their burden to prove their case.

2 But in this case, Mr. Miller has gotten up and testi-
3 fied. He has come before you and put himself under oath,
4 put his hand on the Bible to tell the truth, tell you these
5 drugs were not his.

6 He told you he hadn't seen them; that he didn't bring
7 them; they weren't his.

8 In doing that, ladies and gentlemen, he didn't just get on
9 the witness stand, put his hand on th Bible and swear to tell
10 the truth, but what he did, ladies and gentlemen, is he
11 opened himself up in two ways.

12 He opened himself up for cross examination from the
13 Solicitor, to his questions, but if you noticed the questions
14 I asked him, you know, they were kind of open ended and that
15 made the questions a little bit easier maybe to answer.

16 But by getting on the witness stand, he subjected him-
17 self to further questioning by the Solicitor, the more
18 pointed questions.

19 The second thing he did, ladies and gentlemen, is open
20 himself up so you would hear his previous criminal record,
21 the escape conviction.

22 Ladies and gentlemen, the Judge is going to tell you
23 that that conviction cannot be used as evidence against Mr.
24 Miller to determine whether he is guilty of trafficking drugs
25 or not.

1 You can consider that conviction in determining his credi-
2 bility or his believability, but you cannot use that and
3 say, well, he's guilty of escape, so he must be guilty of
4 this too.

5 It can only be used to determine his credibility, but
6 he opened himself up two ways, and that's not an easy thing
7 to do, ladies and gentlemen, but he did.

8 He opened himself up to be questioned by the Soli-
9 citor, and he set himself up for you to hear about his re-
10 cord.

11 But he wanted to sit on that witness stand and he wanted
12 to tell you -- he didn't want to go away from the trial not
13 having an opportunity to tell you the drugs were not his; that
14 he didn't bring those drugs.

15 I want you to take those things into consideration and
16 I want you to think about that hard when you go back in your
17 jury room and decide what the State has proven him guilty or
18 not guilty.

19 The one thing that I think is of importance or take
20 note of is that the State has gone to great extremes to place
21 into evidence three bags of cocaine, State's 1, 2 and 3.

22 It's nine hundred some odd grams of cocaine, and we stip-
23 ulated, ladies and gentlemen, that all this stuff was handled
24 properly; that the police when they recovered it, wherever they
25 recovered it from, it went up to SLED and got tested properly;

1 That it came back from SLED, and that it is cocaine and
2 it is four hundred and some grams and four hundred and some
3 grams. Nine hundred and some in total.

4 We stipulated to all those things. Ladies and gentle-
5 men, I dispute not how much cocaine it is and I dispute not
6 that it is cocaine. Mr. Miller disputes that it was his
7 cocaine -- says it was not his cocaine; that he did not have
8 the cocaine.

9 Ladies and gentlemen, they went to great lengths to put
10 that cocaine in evidence, show you the cocaine, wave the co-
11 caine around.

12 But what's missing, ladies and gentlemen, from this
13 trial is the bag or pillow that it was recovered from, and
14 that's a pretty important piece of evidence, a very important
15 piece of evidence.

16 That's where this stuff really was recovered from, and
17 I submit, ladies and gentlemen, wherever they got the drugs
18 from, it was important enough that they took it into cus-
19 tody, and if they took it into custody, it is important enough
20 that it ought to be put in evidence in this trial.

21 And if it is not in evidence in this trial, then you as
22 jurors are free to go back and think about why isn't that
23 pillow in the trial, in evidence. Where is the bag?

24 I submit to you that if it's important enough that they
25 took the drugs out of it, it is important enough that they

1 put it in evidence and bring it in here.

2 Ladies and gentlemen, the Judge is going to instruct
3 you about the law, and he's going to tell you what trafficking
4 in cocaine means.

5 He's going to tell you how to weigh the facts, how to
6 judge the credibility of the witnesses, how to determine who
7 you can believe and who you cannot believe.

8 He will instruct you on all the law, and he will talk
9 to you about presumption of innocence.

10 Everybody that comes to trial is presumed to be inno-
11 cence until they are proven guilty beyond a reasonable
12 doubt. I think the Judge likens it to a white cloak or a
13 white robe of innocence, and unless that white cloak is tot-
14 ally ripped away from the Defendant, the Defendant is inno-
15 cent.

16 The only way it can be stripped away or the only way it
17 can be removed is by proof from the evidence that the State
18 submits -- proof by evidence the State submits. They have
19 to produce evidence to convince you beyond a reasonable doubt.

20 The Judge will tell you that a reasonable doubt is a
21 doubt that causes a person to hesitate to act. That's a
22 reasonable doubt.

23 A doubt that causes a person to hesitate to act.

24 If that's the type doubt you have, ladies and gentlemen,
25 when you go back in that jury room, you are sworn to uphold

1 the law, and you must return a verdict of not guilty.

2 It is not a difficult case, and the issues are not dif-
3 ficult. If you believe Michael Miller knowingly had drugs in
4 his possession, then you will find him guilty.

5 If you believe he didn't have the drugs, didn't put the
6 drugs in there, didn't know the drugs were there, ladies and
7 gentlemen, you will find him not guilty.

8 I would ask you on behalf of my client to return a ver-
9 dict of not guilty. We have the utmost respect of what you
10 have to do, and just ask you to please consider the position
11 of the parties and apply that to the law.

12 It is an important case for the State and it is an impor-
13 tant case for Mr. Miller. It is an important case for every-
14 body that is involved.

15 We would ask you to give it the consideration that it
16 deserves, and we know that you will.

17 Thank you very much.

18 THE COURT: Mr. Gibbons.

19 SOLICITOR: May it please the Court?

20 THE COURT: Yes, sir.

21 SOLICITOR: Ladies and gentlemen of the jury, there are
22 two indictments you will be taking back with you into the
23 jury room.

24 There is an indictment for trafficking in powder cocaine
25 and also an indictment for possession with intent to distribute
129

1 cocaine in proximity of a school or park.

2 We have heard testimony of a school being in the area
3 and also testimony it is within a block of the park in that
4 area.

5 There are just a few things I would like to remind you
6 of in this case. The officers testified completely differ-
7 ently from the Defendant. He gave details about who the
8 people were the drugs came from and the addresses, where they
9 met, what they said, a discussion about what was going to be
10 done, who was going to do it, where they would go -- a lot of
11 details.

12 If you believe the Defendant, the officers would have had
13 to come up with that out of the air.

14 Again, the Judge will tell you some things to consider
15 when deciding whether a witness who took the stand is believ-
16 able or not.

17 You will look at who has a reason to tell you something
18 that is not the truth, and he has over nine hundred reasons
19 right here.

20 He has many reasons to tell you a story that differs
21 from the story that would make him guilty of this crime.

22 It is agreed that this is cocaine, and that is not an
23 issue.

24 It is agreed that it is over four hundred grams.

25 The only issue is, is it his, or is it someone else's?

1 Now, you have got to decide whether to believe the De-
2 fendant or the officer. There is no way they are both
3 telling you the truth.

4 So that is going to be your job, cut and dried, to decide
5 which side is telling you the truth.

6 Now, I submit when you go back in that room in order to
7 find him not guilty of this trafficking charge, you just about
8 have to say Officer Walton is a liar, Officer Hay is a liar,
9 the Defendant is telling the truth.

10 The burden is reasonable doubt. What is reasonable? Who
11 has the most reason to tell you what really happened, and who
12 has reason to tell you another story?

13 Thank you for your time. I know you will make a con-
14 scious effort and take the necessary time you need to decide
15 this case, and I know you will do the right thing.

16 I think the only appropriate verdict in this case is
17 guilty of both counts.

18 Thank you.

19 THE COURT: All right, ladies and gentlemen. You have
20 heard all the evidence and testimony you are going to hear in
21 this case, as I told you before, and you have heard closing
22 arguments now.

23 I'm going to instruct you on the law that you are to
24 apply to the facts as you find them as a jury collectively.
25 I tell you first of all that the Defendant, as you have heard

1 many times, is charged in two indictments in this case, and
2 the fact that the Defendant was arrested, charged and indicted
3 in this case is not evidence to be considered by you.

4 It is not evidence of the Defendant's guilt and should
5 not be construed by you as being any presumption or inference
6 of guilt.

7 The indictments are literally the formal documents by
8 which the State brings the case to a Court, and that is the
9 only purpose for which you consider the indictments.

10 Ladies and gentlemen, the indictments in this case allege
11 that Mr. Miller did in Bamberg County on or about July 31, 1998,
12 knowingly bring into this State and did knowingly have in
13 actual or constructive possession nine hundred thirty-seven
14 grams of cocaine, and he is therefore charged under the indict-
15 ment with trafficking in cocaine.

16 The second indictment, ladies and gentlemen, charges him
17 with possession with intent to distribute cocaine within proxim-
18 ity of a park.

19 Each indictment charges a separate and distinct offense,
20 so you must decide each indictment separately from the evi-
21 dence and the law, uninfluenced by your decision as to the
22 other indictment.

23 The Defendant may be convicted or acquitted on any or
24 all of the offenses charged in the indictments.

25 You will be asked to write a separate verdict of guilty

1 or not guilty, for both indictments.

2 Ladies and gentlemen, Mr. Miller has pled not guilty to
3 this indictment, and that plea puts the burden on the State
4 of South Carolina to prove the Defendant guilty.

5 I tell you that a person charged with committing a crim-
6 inal offense in South Carolina is never required to prove
7 himself innocent. I tell you that it is an important rule
8 of the law that the Defendant in a criminal trial, no matter
9 what the severity of the charges against him, will always be
10 presumed to be innocent of the charges for which the indict-
11 ment or indictments were issued, unless guilt has been proven
12 to you as a jury by evidence satisfying you of that guilt
13 beyond a reasonable doubt.

14 The presumption of innocence does not end when you begin
15 your deliberations as a jury. It continues and accompanies
16 the Defendant throughout the trial until you reach a verdict
17 of guilt based upon evidence satisfying you of the Defendant's
18 guilt beyond a reasonable doubt.

19 The presumption of innocence has been compared to a robe
20 of righteousness placed about the shoulders of the Defendant,
21 which remains with him until it has been stripped by evidence
22 satisfying you, the jury, of the Defendant's guilt beyond a
23 reasonable doubt.

24 The presumption of innocence is not mere legal theory, and
25 ladies and gentlemen, it is not just a legal phrase, but it

1 is a substantial right to which every Defendant is entitled,
2 unless you, the jury, are satisfied of the Defendant's guilt
3 from the evidence beyond a reasonable doubt.

4 What is a reasonable doubt under the law? A reasonable
5 doubt is the kind of doubt that would cause a reasonable per-
6 son to hesitate to act.

7 Described another way, some of you may have served as
8 jurors in a civil case and are familiar with the standard of
9 proof in civil cases where it is only necessary to prove a
10 fact is more likely true than not true.

11 That is a standard of proof called preponderance of the
12 evidence or greater weight of the evidence.

13 In criminal cases, the State's proof must be more
14 powerful than that. In fact, it must be proved beyond a rea-
15 sonable doubt.

16 Proof beyond a reasonable doubt, ladies and gentlemen,
17 to describe it further, is proof that leaves you firmly con-
18 vinced of the Defendant's guilt, and I tell you that there
19 are very few things in this world that we know with absolute
20 certainty, and in criminal cases the law does not require
21 proof that overcomes every possible doubt.

22 If, based on your consideration of the evidence, you are
23 firmly convinced that the Defendant is guilty of the crimes
24 charged, you must find the Defendant guilty.

25 If, on the other hand, you think there is a real

1 possibility that the Defendant is not guilty, you must give
2 the Defendant the benefit of the doubt and find him not
3 guilty..

4 Ladies and gentlemen, you and I have certain rules and
5 duties to fulfil during the course of this trial. As the
6 Trial Judge, it is my responsibility to preside over the trial
7 of this case and also to rule on the admissibility of
8 evidence.

9 You are to consider only the competent evidence that has
10 been admitted before you. If any testimony was ordered to be
11 stricken from the record in this case, you must disregard that
12 testimony.

13 You are to consider only testimony which has been pre-
14 sented from the witness stand and any exhibits which have
15 been made a part of the record in this case, as well as any
16 stipulations of counsel.

17 Ladies and gentlemen, I have the additional duty to
18 charge you on the law applicable to this case. As the presid-
19 ing judge, I am the sole judge of the law in this case, and
20 it is your duty as jurors to accept and apply the law as I
21 now state it to you.

22 I must tell you that if you have any idea as to what the
23 law is or what the law ought to be, and it does not agree with
24 what I tell you the law is, you must abandon your ideas because
25 under your oath you are sworn to accept the law and apply the

1 law exactly as I state it to you.

2 Now, as to your role and duties, in every case tried in
3 this case before the jury, the jury becomes the sole and the
4 exclusive judges of the facts in the case.

5 I tell you that a trial judge cannot intimate or state
6 or comment on or make any statement to the trial jury about
7 the facts of the case.

8 You, as the jury, are the sole judges of the facts in the
9 case, and you may not infer from anything I have said during
10 the progress of this trial or anything I say to you during
11 the course of this charge on the law that I have any opinion
12 about the facts in this case, or any opinion about the evi-
13 dence in this case.

14 Simply, ladies and gentlemen, the law does not allow me
15 to have such an opinion and I tell you I do not have such an
16 opinion. Those are matters solely for you, the jury, to de-
17 termine.

18 As jurors, it is your duty to determine the effect, value,
19 weight and truth of the evidence presented during the trial.

20 Ladies and gentlemen, there are generally two types of evi-
21 dence which are presented during the course of a trial, direct
22 evidence and circumstantial evidence.

23 Direct evidence is the testimony of a person who claims
24 to have actual knowledge of a fact, such as an eye-witness.
25 It is evidence which immediately establishes the main facts

1 to be proved.

2 Circumstantial evidence, on the other hand, is proof of
3 a chain of facts or circumstances indicating the existence of
4 a fact.

5 It is evidence that immediately establishes collateral
6 facts on which the main facts may be inferred.

7 Circumstantial evidence is based on inferences and not
8 on personal knowledge or observation.

9 I tell you further that the law makes absolutely no
10 distinction between the weight or value to be given to direct
11 or circumstantial evidence, nor is a greater degree of cer-
12 tainty required of circumstantial evidence than of direct
13 evidence.

14 You should weigh all the evidence in this case and, after
15 weighing all the evidence, if you are not convinced of the
16 guilt of the Defendant beyond a reasonable doubt, you must
17 find the Defendant not guilty.

18 Necessarily, ladies and gentlemen, you must determine
19 the credibility of witnesses who are testifying in the case.
20 Credibility simply means believability.

21 It becomes your duty as jurors to analyze and evaluate the
22 evidence and determine which evidences convinces you of its
23 truth.

24 In determining the believability of witnesses who have
25 testified, you may believe one witness over several witnesses,

1 or several witnesses over one witness.

2 You may believe a part of the testimony of a witness
3 and reject the remaining part of the testimony of that same
4 witness.

5 You may believe testimony of a witness in its entirety
6 or reject the testimony of a witness in its entirety.

7 You may consider whether any witness has exhibited to you
8 any interest, bias, prejudice or other motive in this case.

9 You may also consider the appearance and manner of the
10 witness while on the witness stand.

11 Ladies and gentlemen, in a criminal case, in order to
12 establish criminal liability, criminal intent is required.
13 For example, the mental state as required to be proven by
14 the State for a particular crime might be purpose, intent,
15 knowledge, recklessness, criminal negligence.

16 I tell you that criminal intent must be proven by the
17 State beyond a reasonable doubt. Criminal intent is a matter
18 that must be determined by the jury from the circumstances
19 surrounding the situation.

20 There is no way to prove intent to a mathematical cer-
21 tainty. There is no way that medical science can dissect a
22 person's brain and determine what the person had in mind, but
23 the law says that criminal intent may be inferred from the
24 circumstances shown to have existed.

25 This is how you would make a determination of whether or

1 not the element requiring intent is present.

2 It is not necessary to establish intent by direct
3 and positive evidence, but intent may in fact be established
4 by inference in the same way as any other fact, by taking into
5 consideration the acts of both parties and all the facts and
6 circumstances of the case.

7 Criminal intent is a mental state of conscious wrongdoing,
8 and it is up to you as the jury to determine what the De-
9 fendant intended to do based on the circumstances shown to
10 have existed.

11 Criminal intent can arise from an action or a failure to
12 act. It may arise from negligence, recklessness, or indiffer-
13 ence to duty or the consequences. That is considered by the
14 law to be the equivalent of criminal intent.

15 Ladies and gentlemen, you heard evidence that the De-
16 fendant was convicted of a crime other than the one for which
17 the Defendant is now on trial before you. This evidence may
18 be considered by you if you conclude it is true only in
19 deciding whether the Defendant's testimony is believable and
20 for no other purpose.

21 You must not consider the Defendant's prior record as
22 any evidence of the Defendant's guilt of the charges we
23 are trying today.

24 Ladies and gentlemen, further, a statement alleged to
25 have been made by the Defendant has been admitted into

1 evidence in this case.

2 While the Court has determined that the statement is
3 admissible, I instruct you that you make the ultimate decis-
4 ion of whether or not the Defendant made the statement.

5 If the Defendant did make the statement, you must de-
6 termine whether the statement was made by the Defendant volun-
7 tarily and of his own free will.

8 This means that the statement was not caused by pressure,
9 force, threat, coercion or intimidation, or by hope or prom-
10 ise of leniency or reward of any kind.

11 In determining whether the State was voluntary, you con-
12 sider both the characteristics of the Defendant and the de-
13 tails of the questions.

14 Some of the factors you must consider are, the age of
15 the Defendant, the Defendant's education or lack of education,
16 the Defendant's mental ability or capacity, the Defendant's IQ
17 or intelligence, the Defendant's background or environment,
18 place and length of detention, nature of the questioning, and
19 advice or lack thereof to the Defendant of his constitutional
20 rights, including but not limited to the right to remain sil-
21 ent, that any statement could be used against him in a Court of
22 Law, the right to have a lawyer present, and if he could not
23 afford a lawyer that one would be appointed to represent him
24 without any cost, and that he could stop making a statement at
25 any time.

1 You must carefully consider all the surrounding circum-
2 stances before you give any weight to an alleged statement.

3 The State has the burden of proving beyond a reasonable
4 doubt that the alleged statement was voluntary. If you de-
5 termine that it was, you may give the statement any consider-
6 ation that you deem proper.

7 You must decide what weight, if any, should be given to
8 the alleged statement.

9 If you determine the alleged statement was not the free
10 and voluntary statement of the alleged Defendant, you should
11 not consider the statement at all.

12 Ladies and gentlemen, as stated to you earlier, the De-
13 fendant is charged with possession with intent to distribute
14 cocaine within proximity of a park on the one indictment.

15 Simply, the State must prove beyond a reasonable doubt that
16 the Defendant possessed cocaine with intent to distribute it.

17 The State must prove that the Defendant had both the
18 power and the intent to control the disposition or use of the
19 cocaine.

20 I tell you that possession may be either actual or con-
21 structive. Actual possession means that the cocaine was in
22 the actual, physical custody of the Defendant.

23 Constructive possession on the other hand means that the
24 Defendant had dominion and control, or the right to exercise
25 dominion and control over either the cocaine itself or the

1 property on which the cocaine was found.

2 Mere presence at the scene where drugs are found is not
3 enough to prove possession.

4 Actual knowledge of the presence of cocaine is strong
5 evidence of the Defendant's intent to control its disposition
6 or use.

7 The Defendant's knowledge and possession may be in-
8 ferred when a substance is found on property under the Defen-
9 dant's control.

10 However, this inference is simply an evidentiary fact to
11 be taken in consideration by you along with the other evidence
12 in the case, and to be given the weight you decide that it
13 should have.

14 Ladies and gentlemen, the State must also prove beyond
15 a reasonable doubt that the Defendant intended to distribute
16 the cocaine.

17 Distribute simply means to deliver, other than by admin-
18 istering or dispensing a drug. Intent may be shown by acts
19 and conduct of the Defendant and other circumstances from
20 which you may naturally and reasonably infer intent.

21 In determining whether the Defendant had the intent to
22 distribute cocaine, you may consider the circumstances sur-
23 rounding the Defendant's alleged possession.

24 You may consider the amount of the substance alleged to
25 have been possessed, the manner in which it was alleged to

1 have been possessed, places it was allegedly possessed, and
2 other factors that you consider to be important.

3 You must find that the Defendant did not intend to have
4 the cocaine strictly for his own use.

5 Ladies and gentlemen, I tell you that possession of more
6 than ten grams of cocaine creates an inference that the De-
7 fendant possessed the cocaine with intent to distribute it.

8 This inference does not relieve the State from proving
9 beyond a reasonable doubt that the Defendant had the intent
10 to distribute. It is simply an evidentiary fact that may be
11 taken into consideration by you, along with the other evi-
12 dence in this case, and given the weight you decide it should
13 have.

14 Ladies and gentlemen, as I said, that indictment, posses-
15 sion with intent to distribute also includes a part that says
16 within proximity of a park.

17 So in addition to the charge I just gave you on the law
18 of possession with intent to distribute, the State must also
19 prove beyond a reasonable doubt that the Defendant did dis-
20 tribute, sell, purchase, manufacture or unlawfully possess,
21 with intent to distribute, cocaine while in, on or within
22 one half mile of a public park.

23 Ladies and gentlemen, the second indictment charges the
24 Defendant, Mr. Miller, with trafficking in cocaine.

25 The State must prove beyond a reasonable doubt that the

1 Defendant knowingly sold, manufactured, cultivated, deliv-
2 ered, purchased, brought into this State, provided financial
3 assistance, or otherwise aided abetted and attempted or con-
4 spired to sell, manufacture, cultivate, deliver, purchase or
5 bring into this State, cocaine, and was knowingly in actual or
6 constructive possession, and did knowingly attempt to become in
7 actual or constructive possession of the cocaine.

8 Ladies and gentlemen, I tell you that the State must
9 prove beyond a reasonable doubt that the amount of cocaine --
10 in this instance the Defendant is charged with trafficking
11 in cocaine with an amount over four hundred grams, so you
12 must find that the State did prove beyond a reasonable doubt
13 that the cocaine was four hundred grams or more.

14 Now, ladies and gentlemen, you all will deliberate on
15 these two indictments, and you will come back -- you must come
16 back with a verdict of guilty or not guilty on both charges.

17 As I stated to you, the Defendant can be acquitted or
18 convicted on one or both of the indictments separately, with-
19 out regard to the other.

20 So it will be your duty to deliberate and to come back
21 with a unanimous verdict as to each indictment separately.

22 Madam Forelady, it will be your job to actually mark the
23 verdict form which identifies the verdict of the jury, and
24 you will mark it either guilty or not guilty as to both
25 charges.

1 Further, it will be your job once you have reached a
2 unanimous verdict as to these two charges to knock on the
3 door and let the bailiff know that the jury has reached a
4 verdict, and you will return so that we may accept your ver-
5 dict.

6 Should you have any question in the course of your de-
7 liberations, if you would, Madam Forelady, just write the
8 question down, and, again, knock on the door and let the
9 bailiff know, and we will return and take the question and
10 deal with it.

11 Ladies and gentlemen, shortly I will send you back to the
12 jury room. I don't intend to keep you here late. If the
13 jury deliberates a little bit and decides they would rather
14 come back in the morning and continue deliberations certainly
15 that is your right.

16 Just write a note again and let the bailiff know and we
17 will come back here and deal with that.

18 I will let you all continue to deliberate as long as you
19 feel comfortable. If you want to continue deliberating to-
20 night, and feel comfortable that you can reach a verdict, I
21 will certainly let you do that.

22 I just wanted to let you know before you go in to
23 deliberate that you are not going to be kept hostage here
24 tonight and you don't have to believe that you must rush to
25 a verdict.

1 Let me just check with counsel before I send you back to
2 the jury room and my two alternates I will call back out
3 shortly and dismiss you once the jury begins deliberations.
4 You all are not allowed to be in the room when they start to
5 deliberate.

6 Let me check with counsel to see if there is anything
7 that we need to add.

8 (Conference at the bench between counsel and the Court)

9 THE COURT: Ladies and gentlemen, I would ask that you
10 return to the jury room.

11 (Further conference with counsel at the bench)

12 Return to the jury room right now and we'll send the
13 evidence in along with the verdict forms, and let you begin
14 deliberations. I'll ask in the meantime that you do not be-
15 gin deliberating.

16 (jury excused from Courtroom)

17 THE COURT: Counsel anything further we need to take up?

18 MR. WILSON: Nothing from the Defendant.

19 SOLICITOR: We have nothing.

20 THE COURT: As to the verdict form, we had some discussion
21 as we did last time into just sending a copy of the indictments
22 in. Take a look and see if you are agreeable to the lang-
23 uage.

24 I'm not sure the actual indictments have been amended yet
25 so we will do that now.

1 Make sure everybody is agreeable to the language. We'll
2 take a short break and get that done and then send the evidence
3 back to the jury.

4 (Whereupon, after a short break, the indictment copies
5 and verdict forms, along with evidence, were taken to the
6 jury to commence deliberations. The alternate jurors were
7 excused by the Court. Deliberations began at 5:19 P.M.)

8 THE COURT: Does either side want me to bring them back
9 in or can we just tell them they've got all the evidence.

10 MR. WILSON: Just that they have all the evidence from
11 which to make a decision.

12 THE COURT: If you don't mind I'll have the bailiff do it.
13 Tell them the Court said all the evidence that has been
14 admitted is back there with them.

15 I'll mark this as Court's Exhibit 1.

16 (Court stood in recess until 5:39 P.M.)

17 THE COURT: Gentlemen, I understand we have a verdict.
18 (Jury returned to Courtroom)

19 THE COURT: Madam Forelady, I understand the jury has
20 reached a verdict?

21 FORELADY: Yes, sir, we have.

22 (Verdict form given to bailiff and then exhibited to
23 the Court)

24 THE COURT: The verdict forms appear to be in proper
25 order. The Clerk will publish the verdict. The

1 Defendant will rise.

2 CLERK: This is Indictment 2000 GS 05 055, State of South
3 Carolina versus Michael Miller, indictment for trafficking in
4 cocaine.

5 We, the jury, find the Defendant guilty. Signed by the
6 Foreperson. January 14, 2004.

7 Indictment 2000 GS 05 054, State versus Michael Miller,
8 indictment for possession with intent to distribute cocaine
9 within proximity of a park.

10 We, the jury, find the Defendant guilty. Signed by the
11 Foreperson. January 14, 2004.

12 Madam Forelady and members of the jury, is this your
13 verdict and is it still your verdict? If so, please raise
14 your hand.

15 (Jurors raising their hands)

16 THE COURT: Counsel, anything further from the jury?

17 SOLICITOR: Nothing from the State.

18 MR. WILSON: Nothing except that the record note that all
19 the jurors raised their hands.

20 (Whereupon, jury was excused by the Court)

21 (Forelady signed verdicts on back of the indictments)

22 THE COURT: Do you have any other motions?

23 MR. MILLER: If you would just note for the record that
24 I made a motion for a new trial, and make that motion by renew-
25 ing all of the motions earlier made and the objections made

1 at trial.

2 We wish to submit all those as grounds for the record
3 for a new trial and the arguments made in connection with our
4 motion for directed verdict.

5 We submit to the Court that the evidence was not suffi-
6 cient to allow the jury to reach the verdict that they
7 reached, and we would renew that objection as well.

8 THE COURT: Okay. I would respectfully deny the motion
9 for new trial. If you feel there is anything else you need
10 to add, I will certainly grant you the time to submit something
11 in writing.

12 Obviously, I would also give the State time to respond
13 to anything you submit.

14 For the same reasons, I would deny your motions.

15 MR. WILSON: Thank you.

16 THE COURT: Anything else?

17 MR. WILSON: Your Honor is aware of his prior record and
18 aware of the facts of the case.

19 THE COURT: His total prior was the escape?

20 MR. WILSON: That's correct.

21 SOLICITOR: Yes, sir.

22 THE COURT: Mr. Wilson?

23 MR. WILSON: Your Honor, with the addition of the traf-
24 ficking in cocaine, I know that Mr. Miller is well aware as to
25 the amount of the sentence that can be imposed.

1 What I would ask the Court to do is impose the minimum
2 sentence on the trafficking in cocaine and run the conviction
3 for distribution in proximity concurrent with any sentence you
4 hand down on the trafficking in cocaine.

5 The facts and evidence show this was all one transac-
6 tion, and I would submit that concurrent sentencing is appro-
7 priate. It would allow Your Honor to give a sentence
8 that is appropriate under the seriousness of the charges, but
9 allow Mr. Miller also to put it behind him, pay his debt to
10 society, and get out and live some of his life.

11 He has testified he is 33 years old, and he testified
12 about his family and his job and background in Florida. I
13 won't go back through that.

14 His total criminal record consists of an escape and he
15 has no prior drug convictions.

16 Another thing I'd ask you to take into account and con-
17 sider, and would submit this in support of a minimum sentence,
18 if you believe the testimony -- the testimony that came out and
19 what the jury had to take in consideration and seemed to have
20 considered is that Mr. Miller's statement that he was down
21 and out financially and he had a friend in Florida who said
22 I know a way you can make some money, and he made a run up
23 here trying to make some money.

24 There is no excuse and as stupid as that may be, we don't
25 have a situation where it appears that he has been a career

1 drug dealer or supplier here.

2 We'd ask you to take that in consideration.

3 THE COURT: Thank you, sir. Mr. Miller, anything you
4 wish to add to what Mr. Wilson has said on your behalf?

5 DEFENDANT: No, sir.

6 MR. WILSON: The only other thing I neglected is that by
7 my calculations he has served five hundred fifty-one days on the
8 charge.

9 Five seventy-one, I'm sorry. We'd ask that he be given
10 credit for that.

11 THE COURT: He will be given credit for time served.

12 Mr. Miller, you know you have a minimum of twenty-five
13 years. You understand that?

14 DEFENDANT: Yes, sir.

15 THE COURT: Is this your first time?

16 DEFENDANT: It is my first time to be involved.

17 THE COURT: Mr. Miller, the best I can do for you, sir,
18 on the one hand is -- I charged you with contempt of Court,
19 and gave you six months. Considering what you're facing, sir,
20 I tell you that you don't have to worry about that six months.

21 The sentence on the trafficking indictment, sir, is
22 twenty-five years and Two Hundred Thousand Dollar fine..

23 On the indictment for possession with intent to distribute
24 in proximity of a park, sir, I give you fifteen years and a
25 Ten Thousand Dollar fine and run that concurrent.

1 I give you credit for the time you have already served.
2 It is regrettable that you decided to get involved in this
3 endeavor.

4 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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CERTIFICATE

I, HARRIET P. BENNETT, Official Court Reporter for South Carolina Court Administration, do hereby certify that the foregoing transcript of record was prepared from the records of Ronda Cummings, to the best of my ability, having been heard in the Court of General Sessions for Bamberg County, January 12-14, 2004.

FURTHER, I certify that I am neither of kin or counsel to any party to this action, nor do I have any interest in the outcome of the same.



DATED:

April 21, 2004

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Bamberg County
Reginald I. Lloyd, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL MILLER,

APPELLANT

FINAL ANDERS BRIEF OF APPELLANT

ROBERT M. PACHAK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS.....	1
TABLE OF AUTHORITIES	2
STATEMENT OF ISSUE ON APPEAL	3
STATEMENT OF THE CASE	4
ARGUMENT I.....	5
ARGUMENT II	6
CONCLUSION.....	7
PETITION TO BE RELIEVED AS COUNSEL	8

TABLE OF AUTHORITIES**Cases**

Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003) 5, 6

Statutes

S.C. Code §17-19-100 5, 6

STATEMENT OF ISSUES ON APPEAL

1. Whether the trial court erred in failing to quash indictments which failed to allege that appellant knowingly and intentionally trafficked in cocaine and that he knowingly and intentionally possessed the same within proximity of a park?
2. Whether the trial court lacked subject matter jurisdiction to try appellant for possession with intent to distribute cocaine within proximity of a school when he was only indicted for proximity of a public park?

STATEMENT OF THE CASE

Appellant was convicted of trafficking in cocaine and possession with intent to distribute cocaine within proximity of a park at a jury trial held in Bamberg County before the Honorable Reginald Lloyd on January 14, 2004. Appellant was sentenced to twenty-five (25) years and was fined \$200,000 for trafficking and to fifteen (15) years and a fine of \$10,000 for proximity to a park.

This appeal follows.

ARGUMENT I

The trial court erred in failing to quash indictments that failed to allege that appellant knowingly and intentionally trafficked in cocaine and that he knowingly and intentionally possessed the same within proximity of a school.

The solicitor sought to amend the two indictments for trafficking in cocaine and for possession with intent to distribute cocaine within proximity of a park. Defense counsel opposed any amendments and moved to have the indictments quashed. Adding the words knowingly and intentionally would be material changes to the indictments. (Tr. p. 5, line 12 – p. 6, line 7).

At one point the trial judge ruled that the solicitor should go back and have the grand jury re-indict appellant, but decided to proceed with the trial with allowing the solicitor to amend the indictments without taking them before the grand jury. (ROA p. 33, lines 1–12).

The trial court's ruling failing to quash the indictments was error. S.C. Code §17–19–100 only allows an amendment which does not change the nature of the offense. Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003). The state was allowed to add elements to the offenses which were not there when presented to the grand jury and thus changed the nature of the offense.

ARGUMENT II

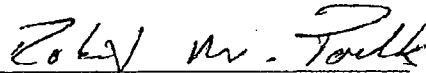
The trial court lacked subject matter jurisdiction to try appellant for possession with intent to distribute cocaine within proximity of a school when he was only indicted for proximity of a public park.

Appellant was indicted for possession with intent to distribute cocaine within proximity of a public park, "to wit: Jim Harrison Park." At trial, the solicitor instead tried to prove that appellant possessed with intent to distribute cocaine within one-half mile of a school rather than the Jim Harrison Park. (ROA p. 79, lines 10-19). While the state did present evidence that appellant was in possession of the drugs within one-half mile of a school, it failed to present any evidence that he possessed the drugs within one-half mile of Jim Harrison Park -- the charge for which he was indicted. Thus, the trial court lacked subject matter jurisdiction to try appellant for possession with intent to distribute within proximity of a school. S.C. Code §17-19-100; Cutner v. State, 354 S.C. 151, 580 S.E.2d 120 (2003).

CONCLUSION

Petitioner's convictions should be vacated.

Respectfully submitted,



Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of October, 2004.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Bamberg County

Reginald I. Lloyd, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL MILLER,

APPELLANT

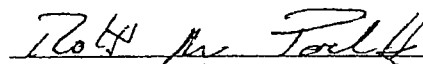
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Michael Miller states:

1. He is Assistant Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge Reginald I. Lloyd, which was held on January 14, 2004, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Michael Miller.

Respectfully submitted,



Robert M. Pachak
Assistant Appellate Defender

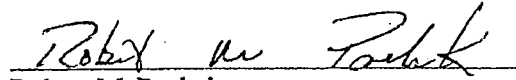
ATTORNEY FOR APPELLANT

This 27th day of October, 2004.

CERTIFICATE OF COUNSEL

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

October 27th, 2004

A handwritten signature in dark ink, appearing to read "Robert M. Pachak", is written over a horizontal line.

Robert M. Pachak
Assistant Appellate Defender

S. C. Office of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, SC 29201
(803) 734-1330
Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Bamberg County

Reginald I. Lloyd, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL MILLER,

APPELLANT

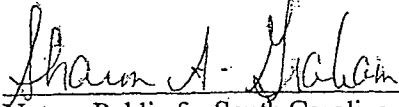
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire this 27th day of October, 2004.


Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of October, 2004.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: April 8, 2012

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,

Respondent,

v.

Michael Miller,

Appellant.

Appeal From Bamberg County
Reginald I. Lloyd, Circuit Court Judge

Unpublished Opinion No. 2005-UP-272
Submitted April 1, 2005 – Filed April 8, 2005

APPEAL DISMISSED

Assistant Appellate Defender Robert M. Pachak, of Columbia,
for Appellant.

Attorney General Henry D. McMaster, Chief Deputy Attorney
General John W. McIntosh, and Assistant Deputy Attorney
General Salley W. Elliott, all of Columbia; and Solicitor Barbara
R. Morgan, of Aiken, for Respondent.

PER CURIAM: Michael Miller was convicted of trafficking in cocaine, greater than 400 grams, and for possession of cocaine with intent to distribute within proximity of a park. He was sentenced to twenty-five years and a \$200,000 fine for trafficking and fifteen years and a \$10,000 fine, concurrently, for the proximity charge. He appeals.

Pursuant to Anders v. California, 386 U.S. 738 (1967), counsel for Miller attached to the final brief a petition to be relieved as counsel, stating he had reviewed the record and concluded that Miller's appeal is without legal merit sufficient to warrant a new trial. Miller did not file a separate pro se response.

After thorough review of the record pursuant to Anders and State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991), we dismiss the appeal and grant counsel's petition to be relieved.

APPEAL DISMISSED.¹

ANDERSON, BEATTY, and SHORT, JJ., concur.

¹ Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rule 215, SCACR.



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MAY 12 2005

Close

The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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TELEPHONE: (803) 734-1890
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www.sccourts.org

May 11, 2005

REMITTITUR

The Honorable James B. Hiers
2959 Main Highway
PO Drawer 150
Bamberg, SC 29003-0150

Re: The State v. Miller, Michael
2000-GS-05-00054
2000-GS-05-00055

Dear Mr. Hiers:

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

Very truly yours,

A handwritten signature in cursive script, appearing to read "Kenneth A. Richstad".

Kenneth A. Richstad
Clerk of Court

KAR/mc

cc: Assistant Appellate Defender Robert M. Pachak
Mr. Michael Miller, #259269
Assistant Deputy Attorney General Salley W. Elliott
Barbara R. Morgan, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

County of BAMBERG)2006-CP-05-00023Michael R. Miller #259269)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

2006 FEB -7 PM 1:57

FILED

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention McCormick Correctional Institution
386 Redemption way, McCormick South Carolina 29899
2. Name and location of Court which imposed sentence Bamberg County General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2000-GS-05-055, Trafficking in Cocaine (25) years, \$200,000 fine.

RECEIVED

FEB 10 2006

Referred to Magargle ds

- (b) 2000-GS-05-054, Possession With Intent to Distribute Cocaine Within
The Proximity of Park (15) years, \$10,000. fine.
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 14, 2004.
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Yes
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied/ sentence affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 1, 2005
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Anders V. California 386 U.S. 738 (1967)
- ii. State V. Williams 305 S.C. 116, 406 S.E.2d 357 (1991).
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel (SEE ATTACHED)
- (b) Jail Credit (SEE ATTACHED)
- (c) Petitioner reserves the right to amend this application.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED
- (b) SEE ATTACHED
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? SEE SUBPARAGRAPH (9)
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. SEE ATTACHED
- ii. SEE ATTACHED
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. See Paragraph (9)

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. See Attached Paragraph (9)

ii. _____

iii. _____

iv. _____

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

i. Same

ii. _____

iii. _____

iv. _____

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

No

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

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

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

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Applicant's first PCR and issues raised are not proper for Direct Appeal.
 - (b) _____
 - (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Richard B., Ness Esq.
 - (b) your trial, if any? J. Christopher wilson Esq.
 - (c) your sentencing? J. Christopher Wilson Esq.
 - (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Robert M. Pachak Esq Office of Appellate Defense.
 - (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
 - i. Richard B. Ness (Public Defender's Office)
 - J. Christopher Wilson (Public Defender's Office)
 - ii. Robert M. Pachak (Office of Appellate Defense)
 - _____
 - iii. _____
 - _____
 - (b) the proceedings at which each such attorney represented you:
 - i. Richard B. Ness (Preliminary Hearing and Arraignment from 1998-March 17,00).
 - J. Christopher Wilson (Trial and Sentencing) from 2000-2004.
 - ii. Robert Pachak, Appeal from conviction. (Court of Appeals S.C.).
 - _____
 - iii. _____
 - _____

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

Vacation of conviction and sentence and remand for new trial

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

County of BAMBERG)

VERIFICATION

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

Michael Miller

SWORN to and subscribed before me this 3
day of Feb, 2006

[Signature] (L.S.)
Notary Public

My Commission Expires: 7 28 2011

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

I, Michael R. Miller #259269, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Michael Miller

Applicant

SWORN or affirmed to and subscribed before me this
3 day of Feb, 2006

Joyce L. Young
Notary Public

My Commission Expires: 8/28/2011

STATEMENT OF FACTS

The Applicant was arrested on July 31, 1998, for Trafficking Cocaine and Possession with intent to distribute within the Proximity of a Park. While awaiting trial on the Trafficking and PWID within Proximity charges, applicant was sentenced and convicted by way of guilty plea, of escape in violation of S.C. Code §24-13-410 from the Bamberg County Detention Center on July 17, 1999, by the Honorable Gary C. Clay, and sentenced to five years in the Department of Corrections.

On December 1999, the Applicant was brought to Bamberg County for a preliminary hearing on the Trafficking Charges and the PWID within a Proximity charges, the hearing was rescheduled due to problem with the evidence. The court ordered that the Solicitor's office present its case against the Applicant within (90) ninety days or the charges would be dismissed for failure to present a case.

While awaiting rescheduling for the preliminary hearing Trial Counsel Richard B. Ness, motioned to be relieved as counsel due to a conflict in representation the court granted counsel's motion March 17, 2000, however a week after counsel's release and amply Prior to appointment of counsel to replace mr. Ness, Applicant made parole on the escape charge and was released from SCDC on March 22nd, 2000. SCDC records did not indicate a detainer or hold at that time and granted Applicant out of state parole to Florida.

The Applicant was arrested for a bench warrant issued by the Bamberg County General Sessions Court on December, 9, 2002, for failure to appear at roll call on December 2000, for the Trafficking and Possession with intent within a proximity charges.

On February 3, 2003 J. Christopher Wilson Esq, was appointed to represent the Applicant. On March 21, 2003, after appointment of counsel a preliminary hearing was rescheduled before the Honorable Danny Singleton however the hearing was continued to April and scheduled to be heard by the Honorable James R. Barber III, which was subsequently rescheduled to be heard in September. Each Hearing was rescheduled due to an issue of evidence. Trial Counsel waived the Applicant's Preliminary Hearing and the charges were scheduled for jury trial.

On January 14, 2004, a jury trial was held before the Honorable Reginald Lloyd. The jury found the Applicant guilty of the charges and the Court sentenced the applicant to twenty five (25) years and a \$200,000, dollar fine to run concurrent to fifteen years and a \$10,000 dollar fine, on each charge.(Transcript Page 151, Lines 17-25).

10. (a), The Applicant's sentence was in violation of the United States Consitution and South Carolina Constitution and Code of Laws depriving the applicant of due process rendering his conviction unlawful.

11 (a), The Applicant's conviction and sentence is in violation of the United States Constitution and South Carolina Constitution and code of laws for the following reasons:

A.1.) Generally amendments are permitted for purpose of correcting an error of form to an indictment such as an a scrivener's error. Otherwise, if the defendant objects to an amendment on grounds that the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the necessity of reindictment "OR OBTAIN A WAIVER OF PRESENTMENT FROM THE DEFENDAT". The Solicitor in the present case sought to amend the two indictments for trafficking in cocaine and for possession with intent to distribute within the proximity of a park. Defense counsel opposed any amendments and moved to have the indictments quashed. Adding the words knowingly and intentionally would be material changes to the indictments. (Tr. p. 5, line 12-p. 6, line 7).At one point the trial judge ruled that the Solicitor should go back and have the grand jury re-indict appellant, but decided to proceed with the trial with

allowing the Solicitor to amend the indictments without taking them before the grand jury. Trial Counsel failed to object to the court's oral waiver to the amendments., South Carolina Criminal Code requires a defendant to "SIGN A WRITTEN WAIVER OF INDICTMENT", Phillips V. State, 281 S.C. 41, 42, 314 S.E. 2d 313, 314. (1984), By their plain language S.C. Code §17-23-130-140, makes it mandatory for a written waiver of presentment, State V. Clarkson, [Oral waiver of indictment failed to comply with statutory requirements], Counsel should have objected to such oral waiver.

A.2.) Rule 6 (a)(2)(c) SCRCrim.P. provides that Trial Court "shall" require the presence of the chemist upon objection by the defendant, such provision of the Rule is mandatory not permissive. State V. Joesph, _____ S.C. _____, 491 S.E.2d 275, 281 (Ct. App. 1997). In the present case trial counsel stipulated to the chain of custody and testimony without need of the SLED chemist, or other custodians. (Tr. P. 11, Lines 20-25, P. 12, Lines 1-10, Tr. P. 99 Lines 19-25, P. 26, Lines 1-10, Tr. P. 126-127.). The Trial Court agreed to the stipulation vouching for the credibility of the SLED chemist. However during trial the first link to the chain of custody, (Judy Walton), testified that she recovered two items believed to be drugs from a pillow, that she secured the drugs and went back to the police station, during trial the state moved to introduce the drugs as evidence,. In questioning officer Walton as to the paperwork and identification numbers, the state introduced three containers of drugs instead of two as earlier testified to by Officer Walton. Officer Walton claimed that the chemist must have broken them down into three separate quantity's for testing, then sent them back with the same identification numbers on them (Tr. P. 70 Lines 22-25, P. 80 Lines, 1-25, P. 81, Lines 1-18.): Applicant contends that counsel rendered ineffective for failing to object to the introduction of this evidence under Rule 6 (a) (2) (c), and the testimony entered, further counsel's stipulation to the chain of custody and chemist report has prejudiced the Applicant, where such testimony by Officer Walton contradicts the evidence presented in the chemist reports submitted to the jury, which stipulates that only two quantities of drugs were tested.

A.3.) Custodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce "Sworn" statements pursuant to Rule 6 (b) S.C.R.Crim.P.. As an alternative to presenting testimony of the intervening custodians, the State utilized Rule 6 (b), as stipulated and agreed to by trial counsel (Tr. p. 11, lines 20-25, p. 12, lines 1-10). The chain of custody was admitted into evidence without objection (Tr. P. 83, lines 21-24), in the present case there are two reports on the chain of custody, case number L98-09314, and L98-09313. Both reports state that on August 4, 1998, the SLED drug box submitted both cases for examination and testing. The chemist swore under oath by way of notary republic to each report on November 4, 1999, fifteen months after receipt of each case. Further on case number L98-09313 the initial link in the chain is not a sworn affidavit by way of notary republic, nor does it indicate when, Captain Joe Bell came into possession of the evidence. On case number L98-09314, the second link, Captain Joe Bell, stipulated that he received the evidence on August 4, 1998, however the notary shows a date of July 3, 1998, one month prior to actual arrest on the charges the applicant is accused of. Furthermore Christine Simpkins the last chain in the custody doesn't give or state who received the delivery to the drug box for SLED. A complete chain of custody, tracing possession from the initial control to it's final analysis, must be established as far as practicable State V. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001), if a substance has passed through multiple custodians, it must not be left to conjecture concerning who had the evidence and what was done with it between taking and analysis. State V. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), not only does the procedure before analysis, as shown above, raise questions as to admissibility, but the fifteen month delay, which has caused several preliminary hearings to be rescheduled, raises a question as to whether the evidence was stored in the same condition and returned in the same condition as well as where, which evidently was an issue at trial (Tr. p. 79-81, lines 1-18). Applicant contends that trial counsel was ineffective for failing to make a proper objection pursuant to Rule 6 (b) S.C.R.Crim.P., and prejudiced the Applicant when he waived the Applicant's prelim-

inary hearings, where prior counsel Richard B. Ness, made such objections pursuant to Rule 6(b), before being relieved as counsel.

A.4.) Section §24-13-40; mandates a prisoner be given credit for all time served prior to trial unless one of two exceptions exist, (1.) Either the prisoner was an escapee or, (2.) The prisoner was already serving a sentence on one offense, However, neither exception applies as applicant was neither an escapee, nor was he serving any sentence at the time of arrest, Crooks V. State, 326 S.C. 171, 485 S.E.2d 374 (1997). Allen V. State, 529 S.E.2d 541 (S.C. 2000). On the contrary, Applicant was awaiting trial and sentencing on the pending Trafficking cocaine and possession with intent to distribute within the proximity of a park, when released by S.C.D.C. on parole March 22nd, 2000, for escape, S.C. Code §24-13-410, which the Applicant pled guilty to during pre trial detention. The trial court excepted trial counsel's recommendation on the concurrency of the Trafficking cocaine and Possession with intent to distribute within proximity of a park charges which the jury found Applicant guilty of, however trial counsel was ineffective for failing to bring to the court's attention that Applicant was entitled to a sentence start date of July 31, 1998, on the two offenses, therefore depriving the applicant of jail credit.

THE APPLICANT HEREBY RESERVES THE RIGHT TO AMEND THIS APPLICATION UPON APPOINTMENT OF COUNSEL PURSUANT TO RULE 71.1 (d) SCRCIV.P. AND S.C.CODE §17-27-90.

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

IN THE COURT OF COMMON PLEAS

C/A NO:

Michael R. Miller #259269,)
)
Applicant,)
)
Vs..)
)
State of South Carolina,)
)
Respondents.)
)
)

NOTICE OF MOTION AND MOTION FOR
DISCOVERY PURSUANT TO S.C.CODE
§17-27-10-150, RULE 26, SCRCIV.P.
FOR PRODUCTION OF DOCUMENTS.

The above named Applicant hereby moves this Honorable Court upon receipt of this PCR Application, under S.C. Code §17-27-70, to compel the Respondents to produce a true copy of the Applicant's preliminary hearing transcripts, by so notifying the Court of Administration to have the Court Reporter to prepare such transcripts, to act as evidence to the allegations in the Applicant's PCR Application.

The Applicant would further ask this Honorable Court to compel the Clerk of Court to produce a true copy of the order for destruction of evidence in the case of 2000-GS-05-054, and 055.

SWORN AND SUBSCRIBED BEFORE ME
THIS 3 DAY OF Feb 2005.

Janet L. Gentry
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 8-28-2011

RESPECTFULLY SUBMITTED
s/ Michael Miller
MICHAEL R. MILLER
APPLICANT.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	
	)	
	)	06-CP-05-0023
Michael Miller, #259269,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for Post-Conviction Relief filed February 7, 2006, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. The Applicant was indicted at the February 2000 term of the Bamberg County Grand Jury for Possession with Intent to Distribute Cocaine within Proximity of a Park (00-GS-05-054) and Trafficking in Cocaine (00-GS-05-055). He was represented by J. Christopher Wilson, Esquire. On January 14, 2004, the Applicant underwent trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Reginald Lloyd to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Miller, Op. No. 2005-UP-272 (S.C. Ct. App. filed April 8, 2005).

Attached herewith and incorporated herein by reference are the records of the Bamberg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the transcript of the Applicant's trial, and the opinion of the Court of Appeals denying the Applicant's direct appeal. Any of the above not so attached will be forwarded upon receipt.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Trial counsel was ineffective for failing to bring to the court's attention that Applicant was entitled to a sentence start date of July 31, 1998, on the two offenses, therefore depriving the applicant of jail credit."

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's trial counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be

relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel’s performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland, 466 U.S. at 668. 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.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. *See* Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The State therefore requests that this Court convene an evidentiary hearing on the issue of ineffective assistance of counsel. As to all other allegations, the State moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

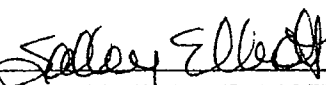
WHEREFORE, having made its Return, the State requests that a hearing be held.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

June 22, 2006.

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG

Michael Miller, 259269,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2006-CP-05-0023

ORDER OF DISMISSAL

FILED
BAMBERG COUNTY

2006 OCT -2 AM 11:01
JAMES P. HERS
CLERK OF COURT
BAMBERG, SC

A TRUE COPY

Attest *J. B. H.*
CLERK OF COURT
BAMBERG COUNTY, SC

PROCEDURAL HISTORY

W.D. Rhoad
This matter comes before the Court by way of an application for post conviction relief filed February 7, 2006. An evidentiary hearing into the matter was convened on August 10, 2006, at the Barnwell County Courthouse. The Applicant was present at the hearing and was represented by W.D. Rhoad, IV, Esquire. The Respondent was represented by Colleen E. Dixon of the South Carolina Attorney General's Office.

This Court had before it a copy of the application, the respondent's return, the trial transcript, the records of the Bamberg County Clerk of Court, the transcript of Applicant's trial, the opinion of the Court of Appeals denying the Applicant's direct appeal, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment from the Bamberg County Clerk of Court. The Applicant was indicted at the February 2000 term of the Bamberg County Grand Jury for possession with intent to distribute cocaine within proximity of a park (00-GS-05-054) and trafficking in cocaine (00-GS-05-055). He was represented by J. Christopher Wilson, Esquire. On January 14, 2004, the Applicant underwent trial by jury pursuant to which he was found

guilty as charged. He was sentenced by the Honorable Reginald Lloyd to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals confirmed the Applicant's conviction and sentence. State v. Miller, Op. NO. 2005-UP-272 (S.C. Ct. App. filed April 8, 2005).

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that:

- a. Counsel failed to object to the oral waiver of presentment on the amended indictment
- b. Counsel erred by stipulating to the chain of custody
- c. Counsel failed to get credit for time served

WBC #2
At the hearing, the Applicant withdrew allegation 1(c) as to time served credits. The Applicant further amended his allegations to include the following:

- d. Counsel failed to present evidence that the signature on the waiver of rights form was not the Applicant's

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

At trial, testimony was presented from both the Applicant and trial counsel, Christopher Wilson, Esquire. The Applicant testified that trial counsel informed him that there were no problems

with the chain of custody and that based upon this advice, he agreed to consent to the chain of custody during his trial. He further testified that had he known of the alleged problem with the chain of custody he would not have consented and instead would have made the prosecution present the chain of custody witnesses. The Applicant further testified that he did not understand the waiver of presentment issue and did not wish to waive presentment of the amended indictment. He testified that the only reason he agreed to waive presentment was because counsel erroneously advised him to do so. The Applicant also alleged that he informed trial counsel that the signature on the waiver of rights form was not his own signature and offered to sign a piece of paper that could have been introduced into evidence to prove such.

YMC
Trial counsel also testified at the hearing. He testified that he filed for and received discovery, entered into extensive plea negotiations on behalf of the Applicant, and reviewed the multiple plea offers with the Applicant. He testified that the Applicant was offered a plea to 7 - 10 years, which was refused. Trial counsel also stated that during the trial the solicitor offered a ten (10) year plea deal which was also refused by the Applicant. Trial counsel testified that the change of language in the indictments (namely adding the language "knowingly or intentionally") did not change his trial strategy or otherwise affect the notice that the Applicant had been put on regarding the charges he was facing. He further testified that he advised the Applicant that if he objected to the waiver of presentment, then the solicitor would simply re-indict the Applicant but that this trial would not go forward for at least a few months. His testimony indicated that the Applicant, based upon that information, chose to waive presentment and proceed to trial because he did not wish for his trial date to be postponed.

Trial counsel also testified that he received and reviewed the chain of custody evidence. His testimony indicated that he discussed the decision of consenting to the chain of custody with the

Applicant on numerous occasions. Trial counsel testified that his trial strategy did not include challenging that the powder substance was cocaine, but only that it was the Applicant's cocaine. He did not recall speaking with Captain Joe Bell or requesting the missing paperwork from the solicitor's office. However, he testified that he would have reviewed the chain of custody with the Applicant, along with any problems relating thereto, and that the Applicant agreed to consent to the chain of custody. He further testified that he did not want chain of custody witnesses to testify at trial because he believed it emphasized to the jury the amount of cocaine that was found on the Applicant and that would have a negative effect on his case. It was trial counsel's belief that the solicitor would be able to bring in any missing link in the chain of custody to testify had the chain been challenged.

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At the hearing, the Applicant presented evidence relating to the chain of custody. The first, a "Form B (Rule 6)", was signed by Judy Walton of the Denmark Police Department. The form indicated that Judy Walton seized a quantity of white powder from the Applicant and delivered it to Captain Joe Bell. The second form, also a "Form B (Rule 6)" indicates that on the same date (August 8, 1998), Christine Simpkins of the Denmark Police Department received the quantity of white powder from Captain Joe Bell of the Denmark Police Department. No evidence was introduced at the PCR hearing of a form signed by Captain Joe Bell.

A. Chain of Custody

The Applicant alleges that had his trial counsel not consented to the chain of custody, it is possible that the State would have been unable to prove the chain and the drugs would have been excluded, resulting in a not guilty verdict. This Court initially finds that the Applicant has failed to meet his burden of proof to show that trial counsel was deficient in consenting to the chain of custody. Although the forms presented at the hearing did not establish a full chain of custody, there

has been no evidence admitted to dispute trial counsel's assertion that Captain Joe Bell would have been able to testify to complete the chain of custody had it been necessary.

Further, this Court finds that the two forms presented at the hearing serve to establish who handled the white powder substance. Where the identity of the persons handling the specimen has been established, evidence regarding its care goes only to the credibility of the evidence and not to the admissibility. State v. Mathis, 359 S.C. 450 (S.C. App. 2004) Therefore, trial counsel was not deficient in consenting to the admissibility of the drugs because the alleged "weak link" would not have affected the admissibility of the evidence at trial. Further, this Court finds that no prejudice has been shown as a result from the alleged deficiency, since the Applicant has failed to meet his burden to show that the cocaine would not have been admitted had trial counsel not consented.

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B. Waiver of Presentment

This Court finds trial counsel's testimony to be credible and the Applicant's testimony on this issue not credible. Trial counsel testified that he discussed the waiver of presentment with the Applicant, and that the Applicant indicated that he wished to consent so that his trial date would not be delayed. A review of the transcript supports this testimony. Further, the Applicant has failed to meet his burden to prove that any alleged deficiency on trial counsel's part resulted in prejudice to him. The solicitor would have reindicted the Applicant with the inclusion of the language and the Applicant would have again proceeded to trial. Therefore, the Applicant has failed to meet his burden of proof to show deficient performance by counsel or prejudice resulting therefrom.

C. Signature on waiver of rights form

This Court finds trial counsel's testimony to be credible and the Applicant's testimony on this issue not credible. Trial counsel testified that the Applicant claimed that the signature on the waiver of rights form was not his. However, counsel testified that after looking into the matter, he

did not feel that it was meritorious and did not feel it was properly raised before the Court. The Applicant further claimed that trial counsel should have called a handwriting expert to testify at the trial. No handwriting expert was called at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCPP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. 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 that 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, citing Strickland. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

CONCLUSION

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Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

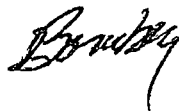
This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25th day of Sept, 2006.


Doyet A. Early
Presiding Judge
Second Judicial Circuit

, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF Bamberg
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

195

CASE NO. 06 -CP- 05 - 27

Michael Miller

State of S.C.

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at _____, South Carolina, this _____ day of _____, 20_____.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 20_____, and a copy mailed first class this 2 day of Oct, 20 06 to attorneys of record or to parties (when appearing pro se) as follows:

Norman Jeff

ATTORNEY(S) FOR THE PLAINTIFF(S)

Coleen E. Dixon

ATTORNEY(S) FOR THE DEFENDANT(S)

J. B. Hill
CLERK OF COURT

STATE OF SOUTH CAROLINA)

County of Bamberg)2011-CP-05-00020
IN THE COURT OF COMMON PLEASMichael Miller #259269)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

Attorney General
Office
Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick Corr inst 386 Redemp-
tion Way
2. Name and location of Court which imposed sentence Bamberg Court of
General Sessions
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which
sentence was imposed:
(a) _____

- (d) _____
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 14, 2004
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty YES
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Confirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 8, 2005
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 2005-4p-272
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) 6th Amendment
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel ineffective failed seek Austin Review; (see Attachment Memorandum of Law. Support:
- (b) _____
- (c) _____
12. Prior to this application have you filed with respect to this conviction: NO
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NO
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. NO
- ii. _____
- iii. _____

iv. _____

(c) the disposition thereof:

i. _____ ND

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____ NO

ii. _____

iii. _____

iv. _____

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

i. _____ NO

ii. _____

iii. _____

iv. _____

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

NO

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

(a) which grounds have been presented:

i. _____ NO

ii. _____

iii. _____

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

i. _____ NO

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Counsel failed seek Austin Review.
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? NA
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Trial Counsel J. Christopher Wilson
- ii. Sentence J. Christopher Wilson
- iii. S.C. Appellate Defense Office
- (b) the proceedings at which each such attorney represented you:
- i. Trial
- ii. Sentence
- iii. notice of Appeal

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

Granted A Belated Appeal Austin
Review.

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

NA

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of McCormick)

I, Michael Miller, 259269, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Michael Miller

SWORN to and subscribed before me this 25
day of January, 2011.

J. Franklin (L.S.)
Notary Public

My Commission Expires: 12-16-2019

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

I, Michael Miller 259269, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Michael Miller
Applicant

SWORN or affirmed to and subscribed before me this

25 day of 2011 January 2011

J. L. Kentlin
Notary Public

My Commission Expires: 12-16-2019

State of South Carolina	)	In the Court of Common Pleas
	)	
County of Bamberg	)	C/A No. <u>2011-CP-05-00020</u>
	)	
Michael Miller, #259269,	)	
	)	
Applicant,	)	
	)	MEMORANDUM OF LAW IN
v.	)	
	)	SUPPORT OF POST-CONVICTION
State of South Carolina,	)	
	)	RELIEF APPLICATION
Respondent.	)	
	)	

To Respondent:

Now comes the Applicant in support of his Post-Conviction Relief (PCR), to include the following action based on Austin appeal. The South Carolina Code of Law Ann. § 17-27-100 (2008); Supreme Court Rule 50 (9) (2008); and the Procedural guidelines regarding Austin appeals, respectfully request this Honorable Court to grant a belated appeal.

HISTORY OF THE CASE

Applicant was convicted of trafficking in cocaine and possession with intent to distribute cocaine within proximity of a park at a jury trial held in Bamberg County before the Honorable Reginald Lloyd on January 14, 2004. Applicant was sentenced to twenty five (25) years and was fined \$200,000.00 for trafficking and to fifteen (15) years and a fine of \$10,000.00 for proximity to a park.

A timely Notice of Appeal was filed on the Applicant's behalf and the appeal was perfected.

The South Carolina Court of Appeals confirmed the Applicants conviction and sentence: State v. Miller, Op. No. 2005-UP-272 (S.C.Ct.App. filed April 8, 2005).

Applicant filed a Application for PCR February 7, 2006, an Evidentiary hearing into matter was convened on August 10, 2006, at the Barnwell County Courthouse:

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that;
 - a. counsel failed to object to the oral waiver of presentment on the amended indictment;
 - b. counsel erred by stipulating to the chain of custody;
 - c. counsel failed to get credit for time served;
 - d. counsel failed to present evidence that the signature on the waiver of right form was not the Applicants.

MEMORANDUM OF LAW

Ineffective assistance of counsel failed to timely seek review on his first PCR Application of appeal.

In this case State v. Miller, Applicant filed a second Application for Post-Conviction Relief correctly stated a claim of ineffective assistance of counsel where the Applicant alleged that he expressed a desire to seek review of the denial of his first Application, but that his counsel failed to timely seek

review; thus the matter would be remanded for an Evidentiary hearing on the sole issue of whether the Applicant requested and was denied an opportunity to seek appellate review; cite at, Austin v. State, (S.C. 1991) 305 S.C. 453, 409 S.E.2d 395.

STATUTE OF LIMITATIONS

The Honorable Supreme Court of South Carolina has allowed successive PCR Applications where the Applicant has been denied complete access to the Appellate process. Austin v. State, 409 S.E.2d 395 (1991). "That court held, the one year statute of limitations pursuant to S.C. Code Ann. § 17-27-45. (A) is not applicable to appeals filed pursuant to Austin appeals, cite as Odom v. State, 523 S.E.2d at 756 (1999). Austin appeals are considered "belated appeals" and are used to ratify unjust procedural defects, such as when an attorney does not file a timely appeal. Cite as Aice v. State, 409 S.E.2d at 392; Hope v. State, 492 S.E.2d 76 n. 1 (1997) (permitting a belated appeal pursuant to Austin in 1992 from a denial of a (PCR Application in 1989).

An Austin appeal is used when an Applicant is prevented from seeking appellate review of a denial of his or her first PCR Application, such as when an attorney fails to seek timely review, cite as, Aice v. State, supra; Hope, supra, at 76 (permitting an Austin appeal where original PCR counsel failed to appeal from the first denial of PCR courts order.

In the case at bar, it is irrefutable from the record and

Exhibits presented, that counsels performance was ineffective where counsel failed to give effective assistance as to make the belated appeal fair.

CONCLUSION

Wherefore, PCR counsel was ineffective assistance failed to timely seek review for Austin appeal.

State of South Carolina

County of Bamberg

Michael Miller, #259269,

Applicant,

v.

State of South Carolina,

Respondent.

In the Court of Common Pleas

C/A No. 2011-CP-05-00020

SUMMONS

To Respondent:

You are hereby summoned and required to service upon the Applicant Michael Miller, #259269, whose address is listed below, an answer to the Post-Conviction Relief which is herewith served upon you, within ninety (90) days after service of this summons upon you, exclusive of the day of service if you fail to do so a Judgement by default will be taken against you in this cause of action.

January 25, 2011/s/ Michael Miller

McCormick Corr. Inst. F3B-211

386 Redemption Way

McCormick, SC 29899

State of South Carolina)

County of Bamberg)

Michael Miller, #259269,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

In the Court of Common Pleas

C/A No. 2011-CP-05-00020

PROOF OF SERVICE

FILED
JAN 25 AM 10:04
CLERK OF COURT

To Respondent:

I certify that Michael Miller, #259269, has served a true copy of the original Post-Conviction Relief upon the Clerk of Court Bamberg County by placing a copy in the United States mail address below.

Bamberg County Clerk of Court,

James B. Hiers

P.O. Box 150

Bamberg, SC 29003

Sworn to and subscribed before me
this 25 day of January, 2011

JCF Rankin

Notary Public for South Carolina

My Commission Expires 12-16-2019

151 Michael Miller

McCormick Corr. Inst. F3B-211

386 Redemption Way

McCormick, SC 29899

Michael Miller, #259269
McCormick, Corr. Inst. F3B-211
386 Redemption Way
McCormick, SC 29899

January 25, 2011

Bamberg County Clerk of Court,

James B. Hiers

P.O. Box 150

Bamberg, SC 29003

RE: C/A No. 2011-CP-05-00020

Dear Honorable Clerk,

Enclosed please find for filing within an original copy of Post-Conviction Relief Application, along with Summons and Proof of Service.

Respectfully submitted,

/s/ Michael Miller

SC Attorney General
RECEIVED

JAN 28 2011

Referred to M. W. [Signature]
Answered _____

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Michael Miller, #259269,

2011-CP-05-0020

Applicant,

v.

RETURN

(Appointment of Counsel Requested)

State of South Carolina,

Respondent.

In response to the post-conviction relief application filed January 26, 2011, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. The Applicant was indicted during the February 2000 term of the Bamberg County Grand Jury for Trafficking in Cocaine and Possession with Intent to Distribute Cocaine within Proximity of a Park (2000-GS-05-0054/0055) J. Christopher Wilson, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Reginald Lloyd and was found guilty of both charges. On January 14, 2004, he was sentenced to twenty-five (25) years imprisonment and a two-hundred thousand dollar (\$200,000) fine for Trafficking in Cocaine, More Than 400 grams, and to fifteen years (15) imprisonment and a ten-thousand dollar (\$10,000) fine for Possession with Intent to Distribute within Proximity.

A timely notice of appeal was filed and an appeal perfected. On April 18, 2005, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Miller, Op. No. 2005-UP-0272 (S.C. Ct. App. April 8, 2005)¹

Applicant filed his first application for post-conviction relief on February 7, 2006. On August 10, 2006, a hearing was convened at which Applicant was represented by W.D. Rhoad, IV. The application was denied and dismissed with prejudice on September 25, 2006.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Counsel failed to seek Austin review of prior PCR (See attachment)

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Court should summarily dismiss any allegation Applicant may raise other than a belated Austin appeal because it would be successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the

¹ This information is according to the information given by Applicant on his PCR Application. After receipt of all relevant documents, Respondent will correct any necessary errors contained herein.

basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised any of these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised any new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised any such allegation in his previous post-conviction relief applications. Accordingly, Respondent will strictly oppose any additional allegation brought forward by Applicant other than one seeking a belated Austin appeal of his previous PCR.

IV.

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient

reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation . . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, Respondent requests an evidentiary hearing be convened to address solely the issue of whether Applicant is entitled to a belated appeal of his previous PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

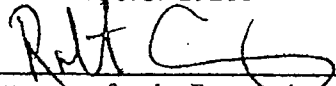
SALLEY ELLIOTT
Assistant Deputy Attorney General

[Signature on Next Page]

ROBERT D. CORNEY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina
AUGUST 26, 20 11

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	
	)	
	)	2011-CP-05-0020
	)	
MICHAEL MILLER, 259269,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Nicole Singletary, Esquire
 4511 Main Street
 Columbia, SC 29203

DATED this 26th day of August, 2011.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

1 STATE OF SOUTH CAROLINA

2 COUNTY OF BAMBERG

CIRCUIT COURT
2011-CP-05-00020

3
4 MICHAEL MILER,
5 Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9
10 Post Conviction Relief Hearing

11 Heard on Wednesday, January 25, 2012

12 Aiken, South Carolina
13

14 BEFORE:

15 THE HONORABLE EDGAR W. DICKSON
16

17 APPEARANCES:

18 Counsel on Behalf of the Applicant:
19 Nicole L. Singletary, Esq.

20 Counsel on Behalf of the Respondent, State of SC:
21 Mary S. Williams, Esq.
22

23 Cheri L. Young, RPR
24 Circuit Court Reporter
P O Box 5232
25 Aiken, SC 29803-5232

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EXHIBIT INDEX

(NO EXHIBITS IDENTIFIED/INTRODUCED.)

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EXAMINATION INDEX

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4

MICHAEL MILLER

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DIRECT BY MS. SINGLETARY

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1 ON WEDNESDAY, JANUARY 25, 2012 AT 11:05 A.M.:

2 MS. WILLIAMS: May it please the Court. We're going
3 to have Michael Miller. We're going to -- this is just a
4 brief matter.

5 Mr. Miller filed his PCR application and he was
6 alleging that he's entitled to a belated direct appeal.
7 I'm sorry. I should let him get up here first.

8 (Applicant enters courtroom.)

9 THE COURT: How are you doing?

10 MS. WILLIAMS: I've spoken with his prior PCR
11 attorney, Mr. Rhoad. Mr. Rhoad tells me that it was an
12 oversight on the part of his office that when this order
13 came in that they did not send it to him within 30 days.

14 He's waited several years to file this application.
15 I'm hoping that the transcript is available. He'd like to
16 put some testimony in the record about the wait for that,
17 but in terms of Mr. Rhoad's side of things I don't think
18 that there's really any meritorious claim in that
19 respect. He just tells me it was an oversight that he did
20 not send Mr. Miller his order in time to determine whether
21 he would like to appeal.

22 THE COURT: You believe filing a belated appeal would
23 be in order?

24 MS. WILLIAMS: Yes, sir. And if we could maybe
25 develop the record just a little bit with the delay of

1 time for filing this matter.

2 THE COURT: Okay.

3 MS. WILLIAMS: I've had several recently where
4 transcripts may or may not be available.

5 THE COURT: How long ago was this? They only have to
6 hold the transcript for a certain number of years.

7 MS. WILLIAMS: Yes, sir. The application, he was
8 denied in September of 2006. His hearing was August
9 2006. So this is going to be one of those luck of the
10 draw.

11 THE COURT: Is this Michael Miller?

12 THE APPLICANT: Yes, sir.

13 THE COURT: We've got the transcript here.

14 MS. WILLIAMS: Well, that's his trial transcript, Your
15 Honor.

16 THE COURT: Oh.

17 MS. WILLIAMS: Not the PCR transcript. So, that's --
18 I'm not sure whether I put in the return a laches defense,
19 but -- it doesn't look like we did.

20 So just if we could develop the record in that
21 regard.

22 THE COURT: All right.

23 MS. WILLIAMS: Just have him tell us briefly about
24 that. But I don't think in terms of Mr. Rhoad's conduct
25 that we have anything there --

MICHAEL MILLER - DIRECT

1 THE COURT: Okay.

2 MS. WILLIAMS: -- to propose on.

3 THE COURT: Okay. You can put whatever in the record
4 you need to.

5 MS. SINGLETARY: Mr. Miller, would you please relate
6 to the Court --

7 THE COURT: Has he been sworn in yet?

8 THE CLERK: No.

9 THE COURT: Angel, would you mind swearing Mr. Miller
10 in?

11 MICHAEL MILLER, having been duly sworn, was examined
12 and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. SINGLETARY:

15 Q. Mr. Miller, would you relate to the Court when you
16 actually received the order of dismissal from your PCR
17 hearing that was held in September 2006?

18 A. I don't know the exact date but, I believe it was a
19 few months after, after that, the date from when I got the
20 dismissal.

21 Q. And would you also relate to the Court, when did you
22 actually ask your PCR attorney to actually appeal the
23 order of dismissal?

24 A. The last time -- the first time we met at my first PCR
25 hearing.

MICHAEL MILLER - DIRECT

1 Q. And that was back in September of 2006?

2 A. Yes, ma'am.

3 Q. Okay. And after you got the order of dismissal which
4 you're testifying to the fact that you got it several
5 months after --

6 A. Yes, ma'am.

7 Q. -- the order was actually signed?

8 A. Yes, ma'am.

9 Q. Did you ever write your attorney asking your attorney
10 to again appeal the decision?

11 A. I did.

12 Q. And about how many times would you say that you wrote
13 your attorney back in 2006?

14 A. I wrote him twice.

15 Q. And did you ever receive a response from the attorney,
16 PCR attorney at the time?

17 A. No, I didn't.

18 Q. And based on this information, you are asking the
19 Court to grant you a belated appeal?

20 A. Yes, ma'am.

21 THE COURT: Okay. And Ms. Singletary?

22 MS. SINGLETARY: Yes, Your Honor.

23 THE COURT: Do you have copies of the letters that he
24 wrote in 2006?

25 MS. SINGLETARY: Your Honor, he does not have copies of

MICHAEL MILLER - DIRECT

1 the letters he wrote in 2006.

2 THE COURT: And he did not -- you did not make copies
3 of those letters that you sent?

4 THE APPLICANT: I wrote them. I meant to get it --

5 THE COURT: Return receipt?

6 THE APPLICANT: Uh-huh.

7 THE COURT: Yes, sir.

8 THE APPLICANT: And I sent it to him, but I forgot to
9 bring it because I didn't know I was coming to court today
10 so they rushed me out. I didn't have it with me.

11 THE COURT: But you say you have those documents in
12 your possession?

13 THE APPLICANT: Yes, ma'am -- I mean, yes, sir. I'm
14 sorry.

15 THE COURT: That's okay. All right. And you -- when
16 you sent those letters out to your attorney, how long
17 after you received the, your notice that the PCR had been
18 denied did you send those letters out? When did you send
19 the first letter out? Was it a week later? Months
20 later? Days later?

21 THE APPLICANT: Months.

22 THE COURT: Months later?

23 THE APPLICANT: I don't know exactly how many months,
24 but it was months later.

25 THE COURT: Why was it months later?

MICHAEL MILLER - DIRECT

1 THE APPLICANT: I couldn't answer that. I don't know
2 why it took them so long to get back to me.

3 THE COURT: Okay. Maybe I didn't ask that right.
4 Ms. Singletary, anything else I need to clear up.

5 MS. SINGLETARY: Your Honor, if I may to make the
6 record clear?

7 THE COURT: Yeah.

8 BY MS. SINGLETARY:

9 Q. It's your testimony, Mr. Miller, that in September
10 2006 when this PCR was actually held you spoke to your
11 attorney at that time and told him that if the Judge would
12 have -- would dismiss the PCR that you would like to
13 appeal the issue?

14 A. Yes, ma'am.

15 Q. And so that was on the date of the --

16 A. The date of the PCR.

17 Q. But at that time you did not know whether or not the
18 Judge was going to actually dismiss?

19 A. No, I did not.

20 Q. And when did you actually receive -- from the time of
21 the PCR hearing to the time you received the order of
22 dismissal, what was the time lapse?

23 A. A few -- it had been quite a few months.

24 Q. So it was a few months --

25 A. After that.

MICHAEL MILLER - DIRECT

1 Q. -- after the actual PCR hearing --

2 A. Yes, ma'am.

3 Q. -- that you received the actual order of dismissal?

4 A. Yes, ma'am.

5 Q. So that was longer than 30 days?

6 A. Yes, ma'am.

7 Q. And once you received the PCR dismissal, how long did
8 it take for you to send a letter to your attorney
9 requesting -- your PCR attorney requesting in writing that
10 you wished to appeal?

11 A. I wrote him, like, two weeks.

12 Q. So two weeks after you received --

13 A. Uh-huh.

14 Q. -- the order of dismissal you wrote --

15 A. I wrote --

16 Q. -- your attorney?

17 A. -- my attorney.

18 Q. And you asked him to appeal?

19 A. Yes, ma'am.

20 THE COURT: Okay. All right. So you had told him at
21 the PCR hearing that if it was dismissed you wanted to
22 appeal. And then two weeks after you received the order
23 you told him to appeal it again?

24 THE APPLICANT: Yes, sir.

25 THE COURT: Okay. And to your knowledge it was never

1 appealed?

2 THE APPLICANT: It was never appealed.

3 THE COURT: Okay. Anything else, Ms. Singletary?

4 MS. SINGLETARY: No, Your Honor.

5 THE COURT: Any questions of this witness?

6 MS. WILLIAMS: Nothing further, sir.

7 THE COURT: All right. I'm going to allow a belated
8 appeal. Okay?

9 MS. WILLIAMS: Yes, sir. I'll prepare an order.

10 MS. SINGLETARY: Thank you, Your Honor.

11 THE COURT: Thank you all.

12 THE APPLICANT: Thank you.

13 END OF CASE: 11:10 A.M.

14 * * * *

15 CERTIFICATE OF REPORTER

16

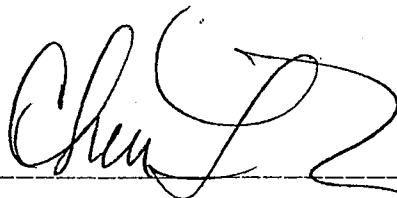
17 STATE OF SOUTH CAROLINA)

18 COUNTY OF AIKEN)

19 I, Cheri L. Young, Registered Professional Reporter
20 and Official Court Reporter for the State of South
21 Carolina, do hereby certify that the foregoing is a true,
22 accurate and complete transcript of record of the
23 proceedings had and evidence introduced in the hearing of
24 the captioned case, relative to appeal, in the Court of
25 Common Pleas for Bamberg County, on the 25th day of

1 January, 2012.

2 I do further certify that I am neither of kin,
3 counsel, nor interest to any party hereto. I have
4 hereunder set my hand this 18th day of October, 2012.

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8 Cheri L. Young, RPR
9 Official Court Reporter
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SECOND JUDICIAL CIRCUIT
COUNTY OF BAMBERG	)	Case No.: 2011-CP-05-0020
Michael Miller, #259269,	)	
	)	
Applicant,	)	
	)	
v.	)	ORDER GRANTING BELATED
	)	APPEAL PURSUANT TO
State of South Carolina,	)	<u>AUSTIN V. STATE</u>
	)	
Respondent.	)	
	)	

FILED
BAMBERG COUNTY
JAMES B. HENRICH
CLERK OF COURT
BAMBERG, SC
2012 MAR 29 AM 11:20

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed January 26, 2011. An evidentiary hearing into the matter was convened on January 25, 2012, at the Aiken County Courthouse. Applicant was represented by Nicole Singletary, Esquire. Mary S. Williams, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

This Court had before it the records of the Bamberg County Clerk of Court, the appellate records, the prior PCR records, and the Applicant's records from the South Carolina Department of Corrections.

I.

The records before this court indicate that The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. The Applicant was indicted during the February 2000 term of the Bamberg County Grand Jury for Trafficking in Cocaine and Possession with Intent to Distribute Cocaine within Proximity of a Park (2000-GS-05-0054/0055) J. Christopher Wilson, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Reginald Lloyd and



was found guilty of both charges. On January 14, 2004, he was sentenced to twenty-five (25) years imprisonment and a two-hundred thousand dollar (\$200,000) fine for Trafficking in Cocaine, More Than 400 grams, and to fifteen years (15) imprisonment and a ten-thousand dollar (\$10,000) fine for Possession with Intent to Distribute within Proximity.

A timely notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Miller, Op. No. 2005-UP-0272 (S.C. Ct. App. April 8, 2005). The Remittitur was sent on May 11, 2005.

Applicant filed his first application for post-conviction relief on February 7, 2006. (2006-CP-05-0023). On August 10, 2006, a hearing was convened before the Honorable Doyet A. Early, III. Applicant was present and represented by W.D. Rhoad, IV, Esquire. Judge Early denied and dismissed the application with prejudice in a written order dated September 25, 2006, and filed October 2, 2006.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "6th Amendment."
 - a. "Counsel ineffective failed seek Austin Review. ..."

II.

In the Applicant's current PCR application, he argues that Rhoad failed to file a timely notice of appeal from Judge Early's order denying post-conviction relief dated September 25, 2006, and filed October 2, 2006. Rhoad was unable to recall why an appeal was not filed. I therefore find that the Applicant did not knowingly and voluntarily waive his right to appellate review and is therefore entitled to a belated review of the denial of his first PCR application. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant's denial of an appeal



can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) with regard to C.A. No. 2006-CP-06-0106.

III.

It appearing that Applicant is entitled to the grant of a belated appeal, and in light of the fact that this Court has not been made aware of any violations of the Applicant's constitutional rights, this Application for Post-Conviction Relief is dismissed.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is **DENIED AND DISMISSED WITH PREJUDICE**. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR, for the appropriate procedure for a belated appeal.
2. The Applicant is remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21st day of March, 2012.



EDGAR W. DICKSON
Presiding Judge
Second Judicial Circuit

Orangeburg, South Carolina.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg CountyEdgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212581

PETITION FOR ORDER
TO RECONSTRUCT THE RECORD OF
PETITIONER'S SENTENCING HEARING

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, the undersigned counsel requests an order requiring the parties to reconstruct the record of Petitioner's post-conviction relief hearing held on August 10, 2006 before the Honorable Doyet A. Early.

In accordance with Rule 240(c)(3), SCACR, Petitioner submits the following documents to support this Petition: Post-Conviction Relief Application filed February 7, 2006 (Exhibit 1); the Order of Dismissal filed October 2, 2006 (Exhibit 2); Post-

The transcript of the post-conviction relief proceeding conducted on August 10, 2006 is necessary in order to allow review of the post-conviction relief proceedings as it contains the evidence presented to support Petitioner's claims that he is entitled to relief. It is the transcript that will be reviewed by the appellate court for the belated appeal. Additionally, it is part of the lower court record and is necessary for inclusion in the appendix to be complied in accordance with Rule 227(e), SCACR. As a result, counsel request reconstruction of the hearing.

When a trial transcript has been lost or destroyed, the Court may remand to have the record reconstructed. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002); China v. Parrott, 251 S.C. 329, 162 S.E.2d 276 (1968); see also Deaton v. Leath, 279 S.C. 82, 302 S.E.2d 335 (1983) (granting the appellant's motion to set aside convictions and remand for a new trial where the court reporter's equipment malfunctioned and there was no transcript of the trial court proceedings in the case from which to base an appeal).

WHEREFORE, the undersigned counsel requests an order for the reconstruction of the record of Petitioner's post-conviction relief proceeding in order to perfect Petitioner's PCR appeal in the case. In addition, undersigned counsel requests the time periods for filing Petitioner's petition for writ of certiorari be held in abeyance pending this Court's decision on this petition.

Respectfully submitted,

Susan B. Hackett
Susan B. Hackett
Appellate Defender

November 5, 2012

Conviction Relief Application filed January 26, 2011 (Exhibit 3); Order Granting Belated Appeal (Exhibit 4); and Letter from Court Reporter dated September 8, 2012 (Exhibit 5).

The procedural history of Petitioner's case is as follows. During its February 2000 term, the Bamberg County Grand Jury indicted Petitioner for possession with intent to distribute cocaine within proximity of a park and trafficking in cocaine. Petitioner, who was represented by J. Christopher Wilson, was tried on January 14, 2004. After the jury found Petitioner guilty, the Honorable Reginald Lloyd sentenced Petitioner to twenty-five years on the trafficking in cocaine conviction and fifteen years on the possession with intent to distribute conviction. Petitioner filed a direct appeal thereafter. The Court of Appeals affirmed his convictions and sentences in an unpublished opinion. State v. Miller, 2005-UP-272 (Ct. App. filed April 8, 2005). Petitioner filed an application for post-conviction relief on February 7, 2006. Exhibit 1. An evidentiary hearing convened before the Honorable Doyet A. Early on August 10, 2006. W.D. Rhoad, IV represented Petitioner, and Colleen E. Dixon represented the state. Judge Early denied Petitioner relief by order filed on October 2, 2006. Exhibit 2. No appeal was taken. Petitioner filed another application for post-conviction relief on January 26, 2011. Exhibit 3. The matter proceeded to a hearing before the Honorable Edgar W. Dickson on January 25, 2012. Nicole Singletary represented Petitioner, and Mary Williams represented the state. By order dated March 21, 2012, Judge Dickson granted Petitioner a belated appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Exhibit 4.

Undersigned counsel has been unable to obtain the transcript of the sentencing proceedings. In response to counsel's request for the sentencing transcript, the court reporter indicated the transcript was unavailable. Exhibit 5.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Affidavit of Susan B. Hackett

I am the attorney assigned to represent Michael Miller. My office contacted the court reporter to request the transcript from the August 10, 2006 PCR hearing. The court reporter stated the transcript was no longer available.

Susan B. Hackett
Susan B. Hackett

SWORN TO BEFORE ME this 5th day
of November, 2012.

[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: October 2, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

PETITIONER,

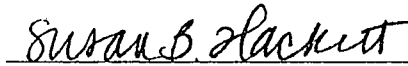
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies the petition for order to reconstruct the record of petitioner's post-conviction relief hearing in the above referenced case has been served upon Megan Harrigan, Esquire, Assistant General, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, and Michael Miller, #259269, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 5th day of November, 2012.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 5th day of November, 2012.

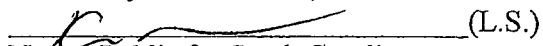
 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.

Exhibit #1

FORM 5

STATE OF SOUTH CAROLINA)

County of BAMBERG)

IN THE COURT OF COMMON PLEAS

2006-CP-05-00023Michael R. Miller #259269)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

2006 FEB -7 PM 1:57

FILED

INSTRUCTIONS B READ CAREFULLY

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

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

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

1. Place of detention McCormick Correctional Institution
386 Redemption way, McCormick South Carolina 29899
2. Name and location of Court which imposed sentence Bamberg County General Sessions
3. Name(s) of co-defendant(s) (if any) N/A
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
(a) 2000-GS-05-055, Trafficking in Cocaine (25) years, \$200,000 fine.

RECEIVED

FEB 10 2006

Referred to Magargle & LS

- (b) 2000-GS-05-054, Possession With Intent to Distribute Cocain Within
 The Proximity of Park (15) years, \$10,000. fine.
- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) January 14, 2004.
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty Yes
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered Ayes@ to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied/ sentence affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. April 1, 2005
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. Anders V. California 386 U.S. 738 (1967)
- ii. State V. Williams 305 S.C. 116. 406 S.E.2d 357 (1991).
- iii. _____
9. If you answered Ano@ to (7), state your reasons for not so appealing:
- (a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective assistance of counsel (SEE ATTACHED)
- (b) Jail Credit (SEE ATTACHED)
- (c) Petitioner reserves the right to amend this application.
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) SEE ATTACHED
- (b) SEE ATTACHED
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? SEE SUBPARAGRAPH (9)
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. SEE ATTACHED
- ii. SEE ATTACHED
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Court of Appeals
- ii. _____
- iii. _____

- iv. _____
- (c) the disposition thereof:
- i. See Paragraph (9)
- ii. _____
- iii. _____
- iv. _____
- (d) the date of each such disposition:
- i. See Attached Paragraph (9)
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. Same
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- No
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. N/A
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. N/A
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Applicant's first PCR and issues raised are not proper for Direct Appeal.
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? Richard B., Ness Esq.
- (b) your trial, if any? J. Christopher Wilson Esq.
- (c) your sentencing? J. Christopher Wilson Esq.
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Robert M. Pachak Esq Office of Appellate Defense.
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A
18. If you answered Ayes@ to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Richard B. Ness (Public Defender's Office)
- J. Christopher Wilson (Public Defender's Office)
- ii. Robert M. Pachak (Office of Appellate Defense)
- _____
- iii. _____
- _____
- (b) the proceedings at which each such attorney represented you:
- i. Richard B. Ness (Preliminary Hearing and Arraignment from 1998-March 17,00).
- J. Christopher Wilson (Trial and Sentencing) from 2000-2004.
- ii. Robert Pachak, Appeal from conviction. (Court of Appeals S.C.).
- _____
- iii. _____
- _____

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

Vacation of conviction and sentence and remand for new trial

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

NO

Revised 3/2003

STATE OF SOUTH CAROLINA)

VERIFICATION

County of BAMBERG)

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

Michael Miller

SWORN to and subscribed before me this

day of

Feb, 2006

Jose L. Young (L.S.)
Notary Public

My Commission Expires:

7 28 2011

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

I, Michael R. Miller #259269, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

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

Michael Miller

Applicant

SWORN or affirmed to and subscribed before me this

3 day of Feb, 2006

Joyce L. Young
Notary Public

My Commission Expires: 8-28-2011

STATEMENT OF FACTS

The Applicant was arrested on July 31, 1998, for Trafficking Cocaine and Possession with intent to distribute within the Proximity of a Park. While awaiting trial on the Trafficking and PWID within Proximity charges, applicant was sentenced and convicted by way of guilty plea, of escape in violation of S.C. Code §24-13-410 from the Bamberg County Detention Center on July 17, 1999, by the Honorable Gary C. Clay, and sentenced to five years in the Department of Corrections.

On December 1999, the Applicant was brought to Bamberg County for a preliminary hearing on the Trafficking Charges and the PWID within a Proximity charges, the hearing was rescheduled due to problem with the evidence. The court ordered that the Solicitor's office present its case against the Applicant within (90) ninety days or the charges would be dismissed for failure to present a case.

While awaiting rescheduling for the preliminary hearing Trial Counsel Richard B. Ness, motioned to be relieved as counsel due to a conflict in representation the court granted counsel's motion March 17, 2000, however a week after counsel's release and apply Prior to appointment of counsel to replace Mr. Ness, Applicant made parole on the escape charge and was released from SCDC on March 22nd, 2000. SCDC records did not indicate a detainer or hold at that time and granted Applicant out of state parole to Florida.

The Applicant was arrested for a bench warrant issued by the Bamberg County General Sessions Court on December, 9, 2002, for failure to appear at roll call on December 2000, for the Trafficking and Possession with intent within a proximity charges.

On February 3, 2003 J. Christopher Wilson Esq, was appointed to represent the Applicant. On March 21, 2003, after appointment of counsel a preliminary hearing was rescheduled before the Honorable Danny Singleton however the hearing was continued to April and scheduled to be heard by the Honorable James R. Barber III, which was subsequently rescheduled to be heard in September. Each Hearing was rescheduled due to an issue of evidence. Trial Counsel waived the Applicant's Preliminary Hearing and the charges were scheduled for jury trial.

On January 14, 2004, a jury trial was held before the Honorable Reginald Lloyd. The jury found the Applicant guilty of the charges and the Court sentenced the applicant to twenty five (25) years and a \$200,000, dollar fine to run concurrent to fifteen years and a \$10,000 dollar fine, on each charge. (Transcript Page 151, Lines 17-25).

10. (a), The Applicant's sentence was in violation of the United States Consitution and South Carolina Constitution and Code of Laws depriving the applicant of due process rendering his conviction unlawful.

11 (a), The Applicant's conviction and sentence is in violation of the United States Constitution and South Carolina Constitution and code of laws for the following reasons:

A.1.) Generally amendments are permitted for purpose of correcting an error of form to an indictment such as an a scrivener's error. Otherwise, if the defendant objects to an amendment on grounds that the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the necessity of reindictment "OR OBTAIN A WAIVER OF PRESENTMENT FROM THE DEFENDANT". The Solicitor in the present case sought to amend the two indictments for trafficking in cocaine and for possession with intent to distribute within the proximity of a park. Defense counsel opposed any amendments and moved to have the indictments quashed. Adding the words knowingly and intentionally would be material changes to the indictments. (Tr. p. 5, line 12-p. 6, line 7). At one point the trial judge ruled that the Solicitor should go back and have the grand jury re-indict appellant, but decided to proceed with the trial with

allowing the Solicitor to amend the indictments without taking them before the grand jury. Trial Counsel failed to object to the court's oral waiver to the amendments., South Carolina Criminal Code requires a defendant to "SIGN A WRITTEN WAIVER OF INDICTMENT", Phillips V. State, 281 S.C. 41, 42, 314 S.E. 2d 313, 314. (1984), By their plain language S.C. Code §17-23-130-140, makes it mandatory for a written waiver of presentment, State V. Clarkson, [Oral waiver of indictment failed to comply with statutory requirements], Counsel should have objected to such oral waiver.

A.2.) Rule 6 (a)(2)(c) SCRCrim.P. provides that Trial Court "Shall" require the presence of the chemist upon objection by the defendant, such provision of the Rule is mandatory not permissive. State V. Joesph, _____ S.C. _____, 491 S.E.2d 275, 281 (Ct. App. 1997). In the present case trial counsel stipulated to the chain of custody and testimony without need of the SLED chemist, or other custodians. (Tr. P. 11, Lines 20-25, P. 12, Lines 1-10, Tr. P. 99 Lines 19-25, P. 26, Lines 1-10, Tr. P. 126-127.). The Trial Court agreed to the stipulation vouching for the credibility of the SLED chemist. However during trial the first link to the chain of custody, (Judy Walton), testified that she recovered two items believed to be drugs from a pillow, that she secured the drugs and went back to the police station, during trial the state moved to introduce the drugs as evidence,. In questioning officer Walton as to the paperwork and identification numbers, the state introduced three containers of drugs instead of two as earlier testified to by Officer Walton. Officer Walton claimed that the chemist must have broken them down into three separate quantity's for testing, then sent them back with the same identification numbers on them (Tr. P. 70 Lines 22-25, P. 80 Lines, 1-25, P. 81, Lines 1-18.): Applicant contends that counsel rendered ineffective for failing to object to the introduction of this evidence under Rule 6 (a) (2) (c), and the testimony entered, further counsel's stipulation to the chain of custody and chemist report has prejudiced the Applicant, where such testimony by Officer Walton contradicts the evidence presented in the chemist reports submitted to the jury, which stipulates that only two quantities of drugs were tested.

A.3.) Custodial signatures on an evidence bag fail to establish an adequate chain of custody where the custodians do not provide testimony under oath or produce "Sworn" statements pursuant to Rule 6 (b) S.C.R.Crim.P.. As an alternative to presenting testimony of the intervening custodians, the State utilized Rule 6 (b), as stipulated and agreed to by trial counsel (Tr. p. 11, lines 20-25, p. 12, lines 1-10). The chain of custody was admitted into evidence without objection (Tr. P. 83, lines 21-24), in the present case there are two reports on the chain of custody, case number L98-09314, and L98-09313. Both reports state that on August 4, 1998, the SLED drug box submitted both cases for examination and testing. The chemist swore under oath by way of notary republic to each report on November 4, 1999, fifteen months after receipt of each case. Further on case number L98-09313 the initial link in the chain is not a sworn affidavit by way of notary republic, nor does it indicate when, Captain Joe Bell came into possession of the evidence. On case number L98-09314, the second link, Captain Joe Bell, stipulated that he received the evidence on August 4, 1998, however the notary shows a date of July 3, 1998, one month prior to actual arrest on the charges the applicant is accused of. Furthermore Christine Simpkins the last chain in the custody doesn't give or state who received the delivery to the drug box for SLED. A complete chain of custody, tracing possession from the initial control to its final analysis, must be established as far as practicable State V. Carter, 344 S.C. 419, 544 S.E.2d 835 (2001), if a substance has passed through multiple custodians, it must not be left to conjecture concerning who had the evidence and what was done with it between taking and analysis. State V. Joseph, 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997), not only does the procedure before analysis, as shown above, raise questions as to admissibility, but the fifteen month delay, which has caused several preliminary hearings to be rescheduled, raises a question as to whether the evidence was stored in the same condition and returned in the same condition as well as where, which evidently was an issue at trial (Tr. p. 79-81, lines 1-18). Applicant contends that trial counsel was ineffective for failing to make a proper objection pursuant to Rule 6 (b) S.C.R.Crim.P., and prejudiced the Applicant when he waived the Applicant's prelim-

inary hearings, where prior counsel Richard B. Ness, made such objections pursuant to Rule 6(b), before being relieved as counsel.

A.4.) Section §24-13-40; mandates a prisoner be given credit for all time served prior to trial unless one of two exceptions exist, (1.) Either the prisoner was an escapee or, (2.) The prisoner was already serving a sentence on one offense, However, neither exception applies as applicant was neither an escapee, nor was he serving any sentence at the time of arrest, Crooks V. State, 326 S.C. 171, 485 S.E.2d 374 (1997). Allen V. State, 529 S.E.2d 541 (S.C. 2000). On the contrary, Applicant was awaiting trial and sentencing on the pending Trafficking cocaine and possession with intent to distribute within the proximity of a park, when released by S.C.D.C. on parole March 22nd, 2000, for escape, S.C. Code §24-13-410, which the Applicant pled guilty to during pre trial detention. The trial court excepted trial counsel's recommendation on the concurrency of the Trafficking cocaine and Possession with intent to distribute within proximity of a park charges which the jury found Applicant guilty of, however trial counsel was ineffective for failing to bring to the court's attention that Applicant was entitled to a sentence start date of July 31, 1998, on the two offenses, therefore depriving the applicant of jail credit.

THE APPLICANT HEREBY RESERVES THE RIGHT TO AMEND THIS APPLICATION UPON APPOINTMENT OF COUNSEL PURSUANT TO RULE 71.1 (d) SCRCIV.P. AND S.G.CODE §17-27-90.

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

IN THE COURT OF COMMON PLEAS

C/A NO:

Michael R. Miller #259269,

Applicant,

Vs..

State of South Carolina,

Respondents.

NOTICE OF MOTION AND MOTION FOR
DISCOVERY PURSUANT TO S.C.CODE
§17-27-10-150, RULE 26, SCRCIV.P.
FOR PRODUCTION OF DOCUMENTS.

The above named Applicant hereby moves this Honorable Court upon receipt of this PCR Application, under S.C. Code §17-27-70, to compel the Respondents to produce a true copy of the Applicant's preliminary hearing transcripts, by so notifying the Court of Administration to have the Court Reporter to prepare such transcripts, to act as evidence to the allegations in the Applicant's PCR Application.

The Applicant would further ask this Honorable Court to compel the Clerk of Court to produce a true copy of the order for destruction of evidence in the case of 2000-CS-05-054, and 055.

SWORN AND SUBSCRIBED BEFORE ME
THIS 3 DAY OF Feb 2005.

Janet L. Young
NOTARY PUBLIC OF SOUTH CAROLINA
MY COMMISSION EXPIRES: 8-28-2011

RESPECTFULLY SUBMITTED

s/ Michael Miller

MICHAEL R. MILLER
APPLICANT.

Exhibit #2

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG

Michael Miller, 259269,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

2006-CP-05-0023

ORDER OF DISMISSAL

FILED
BAMBERG COUNTY

2006 OCT -2 AM 11:01

JAMES P. HERS
CLERK OF COURT
BAMBERG, SC

A TRUE COPY

Attest *J. B. Hiers*
CLERK OF COURT
BAMBERG COUNTY, SC

PROCEDURAL HISTORY

W.D. Rhoad
This matter comes before the Court by way of an application for post conviction relief filed February 7, 2006. An evidentiary hearing into the matter was convened on August 10, 2006, at the Barnwell County Courthouse. The Applicant was present at the hearing and was represented by W.D. Rhoad, IV, Esquire. The Respondent was represented by Colleen E. Dixon of the South Carolina Attorney General's Office.

This Court had before it a copy of the application, the respondent's return, the trial transcript, the records of the Bamberg County Clerk of Court, the transcript of Applicant's trial, the opinion of the Court of Appeals denying the Applicant's direct appeal, and the Applicant's records from the South Carolina Department of Corrections.

The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to the orders of commitment from the Bamberg County Clerk of Court. The Applicant was indicted at the February 2000 term of the Bamberg County Grand Jury for possession with intent to distribute cocaine within proximity of a park (00-GS-05-054) and trafficking in cocaine (00-GS-05-055). He was represented by J. Christopher Wilson, Esquire. On January 14, 2004, the Applicant underwent trial by jury pursuant to which he was found

guilty as charged. He was sentenced by the Honorable Reginald Lloyd to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals confirmed the Applicant's conviction and sentence. State v. Miller, Op. NO. 2005-UP-272 (S.C. Ct. App. filed April 8, 2005).

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel in that:

- a. Counsel failed to object to the oral waiver of presentment on the amended indictment
- b. Counsel erred by stipulating to the chain of custody
- c. Counsel failed to get credit for time served

 At the hearing, the Applicant withdrew allegation 1(c) as to time served credits. The Applicant further amended his allegations to include the following:

- d. Counsel failed to present evidence that the signature on the waiver of rights form was not the Applicant's

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

At trial, testimony was presented from both the Applicant and trial counsel, Christopher Wilson, Esquire. The Applicant testified that trial counsel informed him that there were no problems

with the chain of custody and that based upon this advice, he agreed to consent to the chain of custody during his trial. He further testified that had he known of the alleged problem with the chain of custody he would not have consented and instead would have made the prosecution present the chain of custody witnesses. The Applicant further testified that he did not understand the waiver of presentment issue and did not wish to waive presentment of the amended indictment. He testified that the only reason he agreed to waive presentment was because counsel erroneously advised him to do so. The Applicant also alleged that he informed trial counsel that the signature on the waiver of rights form was not his own signature and offered to sign a piece of paper that could have been introduced into evidence to prove such.

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Trial counsel also testified at the hearing. He testified that he filed for and received discovery, entered into extensive plea negotiations on behalf of the Applicant, and reviewed the multiple plea offers with the Applicant. He testified that the Applicant was offered a plea to 7 - 10 years, which was refused. Trial counsel also stated that during the trial the solicitor offered a ten (10) year plea deal which was also refused by the Applicant. Trial counsel testified that the change of language in the indictments (namely adding the language "knowingly or intentionally") did not change his trial strategy or otherwise affect the notice that the Applicant had been put on regarding the charges he was facing. He further testified that he advised the Applicant that if he objected to the waiver of presentment, then the solicitor would simply re-indict the Applicant but that this trial would not go forward for at least a few months. His testimony indicated that the Applicant, based upon that information, chose to waive presentment and proceed to trial because he did not wish for his trial date to be postponed.

Trial counsel also testified that he received and reviewed the chain of custody evidence. His testimony indicated that he discussed the decision of consenting to the chain of custody with the

Applicant on numerous occasions. Trial counsel testified that his trial strategy did not include challenging that the powder substance was cocaine, but only that it was the Applicant's cocaine. He did not recall speaking with Captain Joe Bell or requesting the missing paperwork from the solicitor's office. However, he testified that he would have reviewed the chain of custody with the Applicant, along with any problems relating thereto, and that the Applicant agreed to consent to the chain of custody. He further testified that he did not want chain of custody witnesses to testify at trial because he believed it emphasized to the jury the amount of cocaine that was found on the Applicant and that would have a negative effect on his case. It was trial counsel's belief that the solicitor would be able to bring in any missing link in the chain of custody to testify had the chain been challenged.

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At the hearing, the Applicant presented evidence relating to the chain of custody. The first, a "Form B (Rule 6)", was signed by Judy Walton of the Denmark Police Department. The form indicated that Judy Walton seized a quantity of white powder from the Applicant and delivered it to Captain Joe Bell. The second form, also a "Form B (Rule 6)" indicates that on the same date (August 8, 1998), Christine Simpkins of the Denmark Police Department received the quantity of white powder from Captain Joe Bell of the Denmark Police Department. No evidence was introduced at the PCR hearing of a form signed by Captain Joe Bell.

A. Chain of Custody

The Applicant alleges that had his trial counsel not consented to the chain of custody, it is possible that the State would have been unable to prove the chain and the drugs would have been excluded, resulting in a not guilty verdict. This Court initially finds that the Applicant has failed to meet his burden of proof to show that trial counsel was deficient in consenting to the chain of custody. Although the forms presented at the hearing did not establish a full chain of custody, there

has been no evidence admitted to dispute trial counsel's assertion that Captain Joe Bell would have been able to testify to complete the chain of custody had it been necessary.

Further, this Court finds that the two forms presented at the hearing serve to establish who handled the white powder substance. Where the identity of the persons handling the specimen has been established, evidence regarding its care goes only to the credibility of the evidence and not to the admissibility. State v. Mathis, 359 S.C. 450 (S.C. App. 2004) Therefore, trial counsel was not deficient in consenting to the admissibility of the drugs because the alleged "weak link" would not have affected the admissibility of the evidence at trial. Further, this Court finds that no prejudice has been shown as a result from the alleged deficiency, since the Applicant has failed to meet his burden to show that the cocaine would not have been admitted had trial counsel not consented.

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B. Waiver of Presentment

This Court finds trial counsel's testimony to be credible and the Applicant's testimony on this issue not credible. Trial counsel testified that he discussed the waiver of presentment with the Applicant, and that the Applicant indicated that he wished to consent so that his trial date would not be delayed. A review of the transcript supports this testimony. Further, the Applicant has failed to meet his burden to prove that any alleged deficiency on trial counsel's part resulted in prejudice to him. The solicitor would have reindicted the Applicant with the inclusion of the language and the Applicant would have again proceeded to trial. Therefore, the Applicant has failed to meet his burden of proof to show deficient performance by counsel or prejudice resulting therefrom.

C. Signature on waiver of rights form

This Court finds trial counsel's testimony to be credible and the Applicant's testimony on this issue not credible. Trial counsel testified that the Applicant claimed that the signature on the waiver of rights form was not his. However, counsel testified that after looking into the matter, he

did not feel that it was meritorious and did not feel it was properly raised before the Court. The Applicant further claimed that trial counsel should have called a handwriting expert to testify at the trial. No handwriting expert was called at the PCR hearing. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at post conviction relief. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). The Applicant's mere speculation as to what a witnesses' testimony would have been cannot, by itself, satisfy his burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. 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 that 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, citing Strickland. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

CONCLUSION

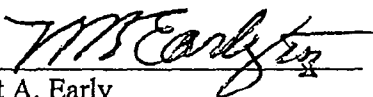
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Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 227 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 25th day of Sept, 2006.


Doyet A. Early
Presiding Judge
Second Judicial Circuit

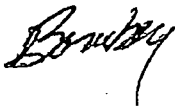
, South Carolina.

Exhibit #3

FORM 5

STATE OF SOUTH CAROLINA)

County of Bamberg)2011-CP-05-00020
IN THE COURT OF COMMON PLEASMichael Miller #259269)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

Attorney General
Office
Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention McCormick Corr inst 386 Redemp-
tion Way
2. Name and location of Court which imposed sentence Bamberg Court of
General Sessions
3. Name(s) of co-defendant(s) (if any) NA
4. The indictment number or numbers (if known) upon which and the offenses for which
sentence was imposed:
(a) _____

- (d) _____
(e) _____
5. The date upon which sentence was imposed and the terms of the sentence:
(a) January 14, 2004
(b) _____
(c) _____
6. Check whether a finding of guilty was made:
(a) after a plea of guilty _____
(b) after a plea of not guilty YES
(c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
YES
8. If you answered "yes" to (7), list:
(a) the name of each Court to which you appealed:
i. South Carolina Court of Appeals
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. Confirmed
ii. _____
iii. _____
(c) the date of each such result:
i. April 8, 2005
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. 2005-4p-272
ii. _____
iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
(a) _____

- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) 6th amendment
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Counsel ineffective failed seek Austin
- (b) Review. (see attachment memorandum
- (c) of LAW. Support.
12. Prior to this application have you filed with respect to this conviction: NO
- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. NO
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. NO
- ii. _____
- iii. _____

was found guilty of both charges. On January 14, 2004, he was sentenced to twenty-five (25) years imprisonment and a two-hundred thousand dollar (\$200,000) fine for Trafficking in Cocaine, More Than 400 grams, and to fifteen years (15) imprisonment and a ten-thousand dollar (\$10,000) fine for Possession with Intent to Distribute within Proximity.

A timely notice of appeal was filed and an appeal perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Miller, Op. No. 2005-UP-0272 (S.C. Ct. App. April 8, 2005). The Remittitur was sent on May 11, 2005.

Applicant filed his first application for post-conviction relief on February 7, 2006. (2006-CP-05-0023). On August 10, 2006, a hearing was convened before the Honorable Doyet A. Early, III. Applicant was present and represented by W.D. Rhoad, IV, Esquire. Judge Early denied and dismissed the application with prejudice in a written order dated September 25, 2006, and filed October 2, 2006.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "6th Amendment."
 - a. "Counsel ineffective failed seek Austin Review. ..."

II.

In the Applicant's current PCR application, he argues that Rhoad failed to file a timely notice of appeal from Judge Early's order denying post-conviction relief dated September 25, 2006, and filed October 2, 2006. Rhoad was unable to recall why an appeal was not filed. I therefore find that the Applicant did not knowingly and voluntarily waive his right to appellate review and is therefore entitled to a belated review of the denial of his first PCR application. Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). The Applicant's denial of an appeal



can be remedied by a petition for belated review by his current PCR attorney pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) with regard to C.A. No. 2006-CP-06-0106.

III.

It appearing that Applicant is entitled to the grant of a belated appeal, and in light of the fact that this Court has not been made aware of any violations of the Applicant's constitutional rights, this Application for Post-Conviction Relief is dismissed.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief is **DENIED AND DISMISSED WITH PREJUDICE**. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction relief action. Counsel and the Applicant are directed to King v. State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR, for the appropriate procedure for a belated appeal.
2. The Applicant is remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 21st day of March, 2012.



EDGAR W. DICKSON
Presiding Judge
Second Judicial Circuit

Orangeburg, South Carolina.

Exhibit #5

RECEIVED

SEP 12 2012

SC OFFICE OF
APPELLATE DEFENSELisa H. Davenport, RPR
Post Office Box 5485
Aiken, SC 29804

September 8, 2012

Sharon A. Graham
SecID
Post Office Box 11589
Columbia, SC 29211In Re: Michael Miller v. State of South Carolina
2011-CP-05-0020
August 10, 2006 Hearing
2012-212581 Appellate Case Number

Dear Ms. Graham:

I received your request for a transcript of record in the above referenced case. The records for that hearing are not available. Court reporters only keep the records for five years.

Thank you.

Sincerely,


Lisa H. Davenport



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 5, 2012

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

Re: Michael Miller v. State, Appellate Case No. 2012-212581

Dear Mr. Shearouse,

Enclosed please find the original and six copies of the petition for order to reconstruct the record of petitioner's post-conviction relief hearing in the above case and supporting documents.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/eab

Enclosures



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
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Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 5, 2012

Megan Harrigan, Esquire
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

Re: Michael Miller v. State of South Carolina, Appellate Case No. 2012-212581

Dear Megan:

Enclosed are two copies of the petition for order to reconstruct the record of petitioner's post-conviction relief hearing in the above case that I filed today with the S.C. Supreme Court.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

SBH/eab

Enclosures



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

November 5, 2012

Mr. Michael Miller, #259269
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

Re: Your appeal

Dear Mr. Miller:

Enclosed please find a copy of the petition for order to reconstruct the record of petitioner's post-conviction relief hearing that I filed today with the S.C. Supreme Court on your behalf.

If you have any questions concerning this matter, please contact me.

Sincerely,

Susan B. Hackett
Appellate Defender

SBH/cab

Enclosures

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BAMBERG COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson

Appellate Case No. 2012-212581

Michael Miller, ...Petitioner,

v.

State of South Carolina, ...Respondent.

**RETURN TO PETITION FOR ORDER TO
RECONSTRUCTION RECORD OF PETITIONER'S
POST-CONVICTION RELIEF HEARING**

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General
SC BAR No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

The Respondent, through undersigned counsel, makes this return in opposition to Petitioner's "Petition for Order to Reconstruct the Record of Petitioner's Sentencing Hearing¹" and would respectfully show this Court:

STATEMENT OF THE CASE

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. The Applicant was indicted during the February 2000 term of the Bamberg County Grand Jury for Trafficking in Cocaine and Possession with Intent to Distribute Cocaine within Proximity of a Park (2000-GS-05-0054, -0055) J. Christopher Wilson, Esquire ("Counsel"), represented him. Applicant proceeded to a jury trial before the Honorable Reginald Lloyd and was found guilty of both charges. On January 14, 2004, he was sentenced to twenty-five years imprisonment and a two-hundred thousand dollar fine for Trafficking in Cocaine, More Than 400 grams, and to fifteen years imprisonment and a ten-thousand dollar fine for Possession with Intent to Distribute within Proximity.

A timely notice of appeal was filed and an appeal perfected. On April 18, 2005, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Miller, Op. No. 2005-UP-0272 (S.C. Ct. App. April 8, 2005).

Petitioner filed an application for post-conviction relief on February 7, 2006, alleging that he was being held in custody unlawfully based on ineffective assistance of counsel. Specifically, Petitioner alleged that Counsel was ineffective for:

¹ While the title of the Petition states that Petitioner seeks to reconstruct Petitioner's sentencing hearing, the petition references the need for the transcript of Petitioner's 2006 post-conviction relief action evidentiary hearing, held on August 10, 2006 before Judge Early. However, page two of the petition also references that "[u]ndersigned counsel has been unable to obtain the transcript of the sentencing proceedings." Respondent interprets these inconsistencies as scrivener's errors and addresses the lack of transcript from Petitioner's 2006 post-conviction relief evidentiary hearing in this Return.

1. Failing to object to oral waiver of presentment on the amended indictment;
2. Erring by stipulating to the chain on custody;
3. Failing to get credit for time served; and
4. Failing to present evidence that the signature on the waiver of rights form was not the Applicant's.

An evidentiary hearing into the matter was held on August 10, 2006 before the Honorable Doyet A. Early, III. Petitioner was present at this hearing and represented by W.D. Rhoad, IV, Esquire. The State was represented by Colleen E. Dixon, Esquire, of the Attorney General's Office. By written order filed October 2, 2006, Judge Early denied and dismissed Petitioner's application for post-conviction relief with prejudice. This order notified Petitioner that he had thirty days to file an appeal of the denial of his application. Petitioner did not file an appeal.

Petitioner filed a second application for post-conviction relief on January 26, 2011, alleging that his former post-conviction relief counsel, W.D. Rhoad, IV, was ineffective for failing to file an appeal from the denial of his post-conviction relief action. An evidentiary hearing was convened on January 25, 2012 before the Honorable Edgar W. Dickson. Petitioner was present and represented by Nicole Singletary, Esquire. The State was represented by Mary S. Williams, Esquire, of the Attorney General's Office. By written order dated March 21, 2012, Judge Dickson granted Petitioner a belated appeal of his post-conviction relief action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

On November 5, 2012, Petitioner petitioned this Court to reconstruct the record of Petitioner's 2006 post-conviction relief hearing. This Return follows.

ARGUMENT

Petitioner's unexplained delay in challenging the denial and dismissal of his 2006 Post-Conviction Relief application has greatly prejudiced Respondent and therefore this motion should be denied as barred by laches.

Respondent submits that Petitioner's claim for a belated Austin appeal from his August 10, 2006, post-conviction relief evidentiary hearing is barred by the doctrine of laches. The post-conviction relief from which Petitioner wishes to appeal was dismissed by order of the court on October 2, 2006. Petitioner filed this application on January 26, 2011, more than five years after his first post-conviction relief application was denied and dismissed. A copy of the transcript from that post-conviction relief hearing is now unavailable due to Petitioner's unexplained delay in challenging the post-conviction relief court's order. If Petitioner had not waited more than five years to bring forth this issue, the absence of the transcript would not be an issue.

Absent some explanation or justification for the delay, laches will prevent Petitioner from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2d. Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). Petitioner's delay has greatly prejudiced Respondent and, therefore, this Court should deny Petitioner's Petition because any issue that Petitioner could raise in an Austin appeal at this point is barred by laches.

CONCLUSION

For the reasons stated above, this Court should deny Petitioner's "Petition for Order to Reconstruct the Record of Petitioner's Sentencing Hearing²" because all issues that could be raised are barred by the doctrine of laches.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN E. HARRIGAN
Assistant Attorney General
S.C. Bar. No. 100108

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

By: Megan E. Harrigan
ATTORNEYS FOR THE RESPONDENT

November 8, 2012.

² See footnote 1.

STATE OF SOUTH CAROLINA

SUPREME COURT

Certiorari to Bamberg County
The Honorable Edgar W. Dickson, Circuit Court Judge
Case No. 2011-CP-05-0020
Appellate Case No. 2012-212581

MICHAEL MILLER,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PROOF OF SERVICE

I, Lauren Meara, certify that I have served the within **Return to Petition for Order to Reconstruct the Record of Petitioner's Post-Conviction Relief Hearing** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan Hackett, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 8th day of November, 2012.

Lauren Meara
LAUREN MEARA
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-212581

REPLY TO RESPONDENT'S RETURN
TO THE PETITION FOR ORDER
TO RECONSTRUCT THE RECORD OF
PETITIONER'S POST-CONVICTION RELIEF HEARING

Pursuant to Rule 240(c) of the South Carolina Appellate Court Rules, the undersigned counsel files this Reply to Respondent's Return to Petitioner's Petition for an Order to Reconstruct the Record of Petitioner's Post-Conviction Relief Hearing. As an initial matter, undersigned counsel admits to multiple scrivener's errors in the initial filing as indicated in Respondent's footnote. Undersigned counsel apologizes for the errors. The Petition should read to request reconstruction of the record of Petitioner's

post-conviction relief hearing held on August 10, 2006 before the Honorable Doyet A. Early.

In support of his Reply, Petitioner includes the following exhibits: State's Return to the PCR application dated August 26, 2011 (Exhibit 6); and the transcript from the January 25, 2012 hearing (Exhibit 7).

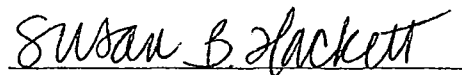
In her Return, Respondent asserts "Petitioner's claim for a belated Austin appeal from his August 10, 2006 post-conviction relief evidentiary hearing is barred by the doctrine of laches." Return p. 4. However, Respondent waived the assertion of the laches defense by not asserting the defense in her Return to the PCR application and by consenting to the grant of the belated appeal during the evidentiary hearing convened on the matter.

Specifically, Respondent's Return to the PCR application requested an evidentiary hearing on Petitioner's request for a belated appeal and made no reference to the defense of laches. Exhibit 6. Additionally, during the hearing the PCR judge asked Respondent: "You believe filing a belated appeal would be in order?" Exhibit 7 at p. 4, ll. 22-23. Respondent responded affirmatively, and asked to develop the record on the delay in the time for filing. Exhibit 7 at p. 4, l. 24 – p. 5, l. 1. The court permitted such. Thereafter, Petitioner's PCR counsel inquired of Petitioner concerning his filing of a request for a belated appeal. Despite Respondent's request to develop the record on the issue, Respondent posed no questions to Petitioner. Exhibit 7 at p. 11, l. 6. When the PCR judge ruled orally that he would allow the belated appeal, Respondent failed to object or assert the defense of laches. Exhibit 7 at p. 11, l. 7-9.

Laches is an affirmative defense and must be pleaded pursuant to Rule 8(c) of the South Carolina Rules of Civil Procedure. In light of Respondent's failure to plead laches in her Return to the PCR application or make an appropriate objection at the PCR hearing, Respondent has waived the defense of laches. Dearybury v. State, 367 S.C. 34, 625 S.E.2d 212 (2006); Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2000).

Petitioner respectfully requests this Court order reconstruction of the 2006 PCR evidentiary hearing.

Respectfully submitted,

A handwritten signature in cursive script that reads "Susan B. Hackett". The signature is written in dark ink and is positioned above the printed name and title.

Susan B. Hackett
Appellate Defender

November 14, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Bamberg County

Edgar W. Dickson, Circuit Court Judge

MICHAEL MILLER,

PETITIONER,

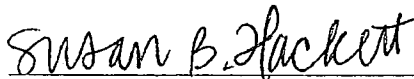
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

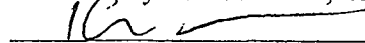
The undersigned attorney hereby certifies the petition for order to reconstruct the record of petitioner's post-conviction relief hearing in the above referenced case has been served upon Megan Harrigan, Esquire, Assistant General, Office of the Attorney General, at Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, and Michael Miller, #259269, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 14th day of November, 2012.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: October 2, 2013.

Exhibit #6

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Michael Miller, #259269,

2011-CP-05-0020

Applicant,

Y.

RETURN

(Appointment of Counsel Requested)

State of South Carolina.

Respondent.

In response to the post-conviction relief application filed January 26, 2011, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Bamberg County. The Applicant was indicted during the February 2000 term of the Bamberg County Grand Jury for Trafficking in Cocaine and Possession with Intent to Distribute Cocaine within Proximity of a Park (2000-GS-05-0054/0055) J. Christopher Wilson, Esquire, represented him. Applicant proceeded to a jury trial before the Honorable Reginald Lloyd and was found guilty of both charges. On January 14, 2004, he was sentenced to twenty-five (25) years imprisonment and a two-hundred thousand dollar (\$200,000) fine for Trafficking in Cocaine, More Than 400 grams, and to fifteen years (15) imprisonment and a ten-thousand dollar (\$10,000) fine for Possession with Intent to Distribute within Proximity.

A timely notice of appeal was filed and an appeal perfected. On April 18, 2005, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Miller, Op. No. 2005-UP-0272 (S.C. Ct. App. April 8, 2005)¹

Applicant filed his first application for post-conviction relief on February 7, 2006. On August 10, 2006, a hearing was convened at which Applicant was represented by W.D. Rhoad, IV. The application was denied and dismissed with prejudice on September 25, 2006.

II.

In his current application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Counsel failed to seek Austin review of prior PCR (See attachment)

For the purpose of this Return, the Respondent incorporates the Clerk of Court records, the South Carolina Department of Corrections' records and the prior PCR records by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

The Court should summarily dismiss any allegation Applicant may raise other than a belated Austin appeal because it would be successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the

¹ This information is according to the information given by Applicant on his PCR Application. After receipt of all relevant documents, Respondent will correct any necessary errors contained herein.

basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised any of these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant could have raised any new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised any such allegation in his previous post-conviction relief applications. Accordingly, Respondent will strictly oppose any additional allegation brought forward by Applicant other than one seeking a belated Austin appeal of his previous PCR.

IV.

There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient

reason' warranting a successive PCR application under § 17-27-90." Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation . . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent requests an evidentiary hearing solely on the matter of the Applicant's entitlement to an Austin Review.

V.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

VI.

WHEREFORE, Respondent requests an evidentiary hearing be convened to address solely the issue of whether Applicant is entitled to a belated appeal of his previous PCR application.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

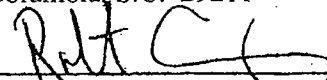
SALLEY ELLIOTT
Assistant Deputy Attorney General

[Signature on Next Page]

ROBERT D. CORNEY
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina
AUGUST 26, 20 11

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG	)	
	)	
	)	2011-CP-05-0020
	)	
MICHAEL MILLER, 259269.	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Nicole Singletary, Esquire
 4511 Main Street
 Columbia, SC 29203

DATED this 26th day of August, 2011.

Lauren Meara
 Lauren Meara, Legal Assistant
 For Respondent

Exhibit #7

1 STATE OF SOUTH CAROLINA

2 COUNTY OF BAMBERG

CIRCUIT COURT
2011-CP-05-00020

3
4 MICHAEL MILER,
5 Applicant,

6 -vs-

TRANSCRIPT OF RECORD

7 STATE OF SOUTH CAROLINA,
8 Respondent.

9
10 Post Conviction Relief Hearing

11 Heard on Wednesday, January 25, 2012

12 Aiken, South Carolina

13
14 BEFORE:

15 THE HONORABLE EDGAR W. DICKSON

16
17 APPEARANCES:

18 Counsel on Behalf of the Applicant:

19 Nicole L. Singletary, Esq.

20 Counsel on Behalf of the Respondent, State of SC:

21 Mary S. Williams, Esq.

22
23 Cheri L. Young, RPR
24 Circuit Court Reporter
P O Box 5232
25 Aiken, SC 29803-5232

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EXHIBIT INDEX

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(NO EXHIBITS IDENTIFIED/INTRODUCED.)

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EXAMINATION INDEX

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MICHAEL MILLER

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DIRECT BY MS. SINGLETARY

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1 ON WEDNESDAY, JANUARY 25, 2012 AT 11:05 A.M.:

2 MS. WILLIAMS: May it please the Court. We're going
3 to have Michael Miller. We're going to -- this is just a
4 brief matter.

5 Mr. Miller filed his PCR application and he was
6 alleging that he's entitled to a belated direct appeal.
7 I'm sorry. I should let him get up here first.

8 (Applicant enters courtroom.)

9 THE COURT: How are you doing?

10 MS. WILLIAMS: I've spoken with his prior PCR
11 attorney, Mr. Rhoad. Mr. Rhoad tells me that it was an
12 oversight on the part of his office that when this order
13 came in that they did not send it to him within 30 days.

14 He's waited several years to file this application.
15 I'm hoping that the transcript is available. He'd like to
16 put some testimony in the record about the wait for that,
17 but in terms of Mr. Rhoad's side of things I don't think
18 that there's really any meritorious claim in that
19 respect. He just tells me it was an oversight that he did
20 not send Mr. Miller his order in time to determine whether
21 he would like to appeal.

22 THE COURT: You believe filing a belated appeal would
23 be in order?

24 MS. WILLIAMS: Yes, sir. And if we could maybe
25 develop the record just a little bit with the delay of

1 time for filing this matter.

2 THE COURT: Okay.

3 MS. WILLIAMS: I've had several recently where
4 transcripts may or may not be available.

5 THE COURT: How long ago was this? They only have to
6 hold the transcript for a certain number of years.

7 MS. WILLIAMS: Yes, sir. The application, he was
8 denied in September of 2006. His hearing was August
9 2006. So this is going to be one of those luck of the
10 draw.

11 THE COURT: Is this Michael Miller?

12 THE APPLICANT: Yes, sir.

13 THE COURT: We've got the transcript here.

14 MS. WILLIAMS: Well, that's his trial transcript, Your
15 Honor.

16 THE COURT: Oh.

17 MS. WILLIAMS: Not the PCR transcript. So, that's --
18 I'm not sure whether I put in the return a laches defense,
19 but -- it doesn't look like we did.

20 So just if we could develop the record in that
21 regard.

22 THE COURT: All right.

23 MS. WILLIAMS: Just have him tell us briefly about
24 that. But I don't think in terms of Mr. Rhoad's conduct
25 that we have anything there --

MICHAEL MILLER - DIRECT

1 THE COURT: Okay.

2 MS. WILLIAMS: -- to propose on.

3 THE COURT: Okay. You can put whatever in the record
4 you need to.

5 MS. SINGLETARY: Mr. Miller, would you please relate
6 to the Court --

7 THE COURT: Has he been sworn in yet?

8 THE CLERK: No.

9 THE COURT: Angel, would you mind swearing Mr. Miller
10 in?

11 MICHAEL MILLER, having been duly sworn, was examined
12 and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. SINGLETARY:

15 Q. Mr. Miller, would you relate to the Court when you
16 actually received the order of dismissal from your PCR
17 hearing that was held in September 2006?

18 A. I don't know the exact date but, I believe it was a
19 few months after, after that, the date from when I got the
20 dismissal.

21 Q. And would you also relate to the Court, when did you
22 actually ask your PCR attorney to actually appeal the
23 order of dismissal?

24 A. The last time -- the first time we met at my first PCR
25 hearing.

MICHAEL MILLER - DIRECT

1 Q. And that was back in September of 2006?

2 A. Yes, ma'am.

3 Q. Okay. And after you got the order of dismissal which
4 you're testifying to the fact that you got it several
5 months after --

6 A. Yes, ma'am.

7 Q. -- the order was actually signed?

8 A. Yes, ma'am.

9 Q. Did you ever write your attorney asking your attorney
10 to again appeal the decision?

11 A. I did.

12 Q. And about how many times would you say that you wrote
13 your attorney back in 2006?

14 A. I wrote him twice.

15 Q. And did you ever receive a response from the attorney,
16 PCR attorney at the time?

17 A. No, I didn't.

18 Q. And based on this information, you are asking the
19 Court to grant you a belated appeal?

20 A. Yes, ma'am.

21 THE COURT: Okay. And Ms. Singletary?

22 MS. SINGLETARY: Yes, Your Honor.

23 THE COURT: Do you have copies of the letters that he
24 wrote in 2006?

25 MS. SINGLETARY: Your Honor, he does not have copies of

MICHAEL MILLER - DIRECT

1 the letters he wrote in 2006.

2 THE COURT: And he did not -- you did not make copies
3 of those letters that you sent?

4 THE APPLICANT: I wrote them. I meant to get it --

5 THE COURT: Return receipt?

6 THE APPLICANT: Uh-huh.

7 THE COURT: Yes, sir.

8 THE APPLICANT: And I sent it to him, but I forgot to
9 bring it because I didn't know I was coming to court today
10 so they rushed me out. I didn't have it with me.

11 THE COURT: But you say you have those documents in
12 your possession?

13 THE APPLICANT: Yes, ma'am -- I mean, yes, sir. I'm
14 sorry.

15 THE COURT: That's okay. All right. And you -- when
16 you sent those letters out to your attorney, how long
17 after you received the, your notice that the PCR had been
18 denied did you send those letters out? When did you send
19 the first letter out? Was it a week later? Months
20 later? Days later?

21 THE APPLICANT: Months.

22 THE COURT: Months later?

23 THE APPLICANT: I don't know exactly how many months,
24 but it was months later.

25 THE COURT: Why was it months later?

MICHAEL MILLER - DIRECT

1 THE APPLICANT: I couldn't answer that. I don't know
2 why it took them so long to get back to me.

3 THE COURT: Okay. Maybe I didn't ask that right.
4 Ms. Singletary, anything else I need to clear up.

5 MS. SINGLETARY: Your Honor, if I may to make the
6 record clear?

7 THE COURT: Yeah.

8 BY MS. SINGLETARY:

9 Q. It's your testimony, Mr. Miller, that in September
10 2006 when this PCR was actually held you spoke to your
11 attorney at that time and told him that if the Judge would
12 have -- would dismiss the PCR that you would like to
13 appeal the issue?

14 A. Yes, ma'am.

15 Q. And so that was on the date of the --

16 A. The date of the PCR.

17 Q. But at that time you did not know whether or not the
18 Judge was going to actually dismiss?

19 A. No, I did not.

20 Q. And when did you actually receive -- from the time of
21 the PCR hearing to the time you received the order of
22 dismissal, what was the time lapse?

23 A. A few -- it had been quite a few months.

24 Q. So it was a few months --

25 A. After that.

MICHAEL MILLER - DIRECT

1 Q. -- after the actual PCR hearing --

2 A. Yes, ma'am.

3 Q. -- that you received the actual order of dismissal?

4 A. Yes, ma'am.

5 Q. So that was longer than 30 days?

6 A. Yes, ma'am.

7 Q. And once you received the PCR dismissal, how long did

8 it take for you to send a letter to your attorney

9 requesting -- your PCR attorney requesting in writing that

10 you wished to appeal?

11 A. I wrote him, like, two weeks.

12 Q. So two weeks after you received --

13 A. Uh-huh.

14 Q. -- the order of dismissal you wrote --

15 A. I wrote --

16 Q. -- your attorney?

17 A. -- my attorney.

18 Q. And you asked him to appeal?

19 A. Yes, ma'am.

20 THE COURT: Okay. All right. So you had told him at

21 the PCR hearing that if it was dismissed you wanted to

22 appeal. And then two weeks after you received the order

23 you told him to appeal it again?

24 THE APPLICANT: Yes, sir.

25 THE COURT: Okay. And to your knowledge it was never

1 appealed?

2 THE APPLICANT: It was never appealed.

3 THE COURT: Okay. Anything else, Ms. Singletary?

4 MS. SINGLETARY: No, Your Honor.

5 THE COURT: Any questions of this witness?

6 MS. WILLIAMS: Nothing further, sir.

7 THE COURT: All right. I'm going to allow a belated
8 appeal. Okay?

9 MS. WILLIAMS: Yes, sir. I'll prepare an order.

10 MS. SINGLETARY: Thank you, Your Honor.

11 THE COURT: Thank you all.

12 THE APPLICANT: Thank you.

13 END OF CASE: 11:10 A.M.

14 * * * *

15 CERTIFICATE OF REPORTER

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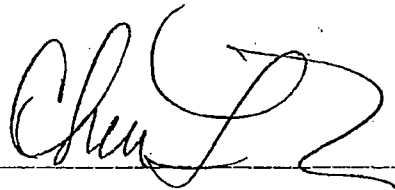
17 STATE OF SOUTH CAROLINA)

18 COUNTY OF AIKEN)

19 I, Cheri L. Young, Registered Professional Reporter
20 and Official Court Reporter for the State of South
21 Carolina, do hereby certify that the foregoing is a true,
22 accurate and complete transcript of record of the
23 proceedings had and evidence introduced in the hearing of
24 the captioned case, relative to appeal, in the Court of
25 Common Pleas for Bamberg County, on the 25th day of

1 January, 2012.

2 I do further certify that I am neither of kin,
3 counsel, nor interest to any party hereto. I have
4 hereunder set my hand this 18th day of October, 2012.

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8 Cheri L. Young, RPR
9 Official Court Reporter
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The Supreme Court of South Carolina

Michael Miller, Petitioner,

v.

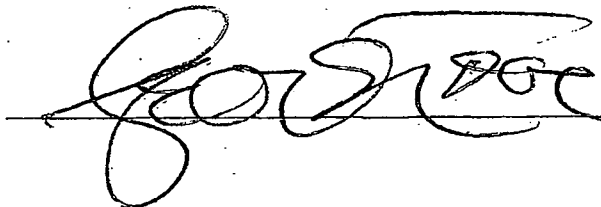
State of South Carolina, Respondent.

Appellate Case No. 2012-212581

ORDER

Petitioner has filed a notice of appeal from an order of the circuit court granting him an *Austin* review of the denial of his first application for post-conviction relief (PCR). However, a transcript of the hearing on petitioner's first application is not available. Petitioner moves this Court to remand the matter to the circuit court for reconstruction of the record of that hearing. The State has filed a return in opposition to the motion.

We grant the motion and remand this matter to the Honorable Doyet A. Early, III, to reconstruct the record of the August 10, 2006 hearing on petitioner's first PCR application. See *Koon v. State*, 358 S.C. 359, 595 S.E.2d 456 (2004), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002); *China v. Parrott*, 251 S.C. 329, 162 S.E.2d 276 (1968); *State v. Ladson*, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007). A hearing should be held within 45 days of the date of this order. If Judge Early determines reconstruction is not possible, he shall notify this Court and the parties within 15 days of the reconstruction hearing. If the record is reconstructed, the parties shall notify this Court and the matter will proceed upon petitioner's receipt of the transcript from the reconstruction hearing.

 C.J.

Art. Seneca J.
Charles Beatty J.
Frank K. Heger J.
James L. Hearn J.

Columbia, South Carolina

December 20, 2012

cc:

Megan Elizabeth Harrigan

Susan Barber Hackett

James Hiers

RECEIVED

DEC 20 2012

SC OFFICE OF
APPELLATE DEFENSE

State of South Carolina)
County of Bamberg)

Court of Common Pleas
2011-CP-05-00020

Michael Miller)
Applicant)
vs.)
State of South Carolina)
Respondent)

Transcript of Record

January 22, 2013
Bamberg, South Carolina

B E F O R E:

The Honorable Doyet A. Early, III, Judge.

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

Susan B. Hackett, Esq.
Attorney for the Applicant

Megan E. Harrigan, Esq.
Attorney for the Respondent

Lisa H. Davenport, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

1	J. Christopher Wilson,	
2		
3	Direct by Ms. Hackett.....	6
4	Cross by Ms. Harrigan.....	10
5	W. D. Rhoad, IV,	
6	Direct by Ms. Hackett.....	12
7	Cross by Ms. Harrigan.....	17
8	Colleen E. Dixon,	
9	Direct by Ms. Hackett.....	18
10	Cross by Ms. Harrigan.....	27
11	Redirect by Ms. Hackett.....	31
12	Michael Miller,	
13	Direct by Ms. Hackett.....	32
14	Cross by Ms. Harrigan.....	39
15		
16		
17		
18		

E X H I B I T S

19	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EV</u>
20	R-1	Chain of custody information		42
21				
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1 (Whereupon, on January 22, 2013 the following
2 proceedings were held:)

3 THE COURT: Okay. Good morning, everyone. This is
4 the matter of Michael Miller, M-I-L-L-E-R, versus the
5 State of South Carolina, appellate case number
6 2012-212581. I have been ordered by Chief Justice Toal to
7 reconstruct a hearing of a post-conviction hearing that we
8 conducted previously on August 10, 2006.

9 Who wants to start?

10 MS. HARRIGAN: Your Honor, would you like to get a
11 brief procedural background into the record?

12 THE COURT: That would be great.

13 MS. HARRIGAN: Okay. May it please the court.

14 THE COURT: Please identify yourself for the record.

15 MS. HARRIGAN: This is Megan Harrigan from the
16 Attorney General's office. This is the matter of Michael
17 Miller versus the State of South Carolina. Mr. Miller was
18 indicted at the February of 2000 term of the Bamberg
19 County Grand Jury for trafficking in cocaine and
20 possession with intent to distribute cocaine within
21 proximity of a park. He was represented by J. Christopher
22 Wilson.

23 On January 14, 2004 applicant proceeded to a trial
24 before the Honorable Reginald Lloyd.

25 THE COURT: Reginald...

1 MS. HARRIGAN: Lloyd.

2 THE COURT: I thought you said Boyd.

3 MS. HARRIGAN: Lloyd. I'm sorry, Your Honor.

4 Applicant was convicted as indicted and was sentenced to
5 25 years imprisonment and a \$200,000 fine for trafficking
6 in cocaine and a 15 years and a \$10,000 fine for
7 possession with intent to distribute cocaine with
8 proximity of a school -- those sentences to be served
9 concurrently. Applicant filed a timely notice of appeal
10 and the South Carolina Court of Appeals affirmed
11 applicant's conviction and sentence.

12 Applicant filed his first application post-conviction
13 relief on February 7, 2006. He was represented in this
14 action by W. D. Rhoad, IV. On August 10, 2006 an
15 evidentiary hearing was held before Your Honor. Applicant
16 was present and testified. Trial counsel Chris Wilson
17 also testified. The state was represented by Colleen
18 Dixon. By written ordered dated September 25, 2006 this
19 court denied and dismissed applicant's post-conviction
20 relief application. No appeal was taken.

21 On January 26, 2011 applicant filed a second
22 post-conviction relief application seeking a belated
23 appeal from the denial of his first post-conviction relief
24 action. An evidentiary hearing was held on January 25,
25 2012 before the Honorable Edgar W. Dixon. By written

1 order dated March 21, 2012 Judge Dixon granted applicant a
2 belated appeal pursuant to Austin v State.

3 On November 5, 2012 applicant through his appellate
4 counsel Susan Hackett petitioned the Supreme Court for a
5 reconstruction of applicant's first post-conviction relief
6 hearing held before Your Honor on August 10, 2006. By
7 ordered dated December 20, 2012 the court granted
8 applicant's petition for reconstruction. As this hearing
9 is applicant's motion, I'll turn it over to Ms. Hackett
10 now.

11 THE COURT: Ms. Susan Hackett.

12 MS. HACKETT: Yes, Your Honor. We have no dispute
13 with the procedural history as read into the record by the
14 attorney general's office. We would now ask to call the
15 witnesses.

16 THE COURT: You may.

17 MS. HACKETT: The first witness is J. Christopher
18 Wilson. Just a moment of housekeeping; the attorney
19 general and I have agreed that I will call the witnesses
20 and engage in direct examination and the attorney general
21 will cross examine those witnesses.

22 J. CHRISTOPHER WILSON, after being duly sworn,
23 testified as follows:

24 DIRECT EXAMINATION

25

1 BY MS. HACKETT:

2 Q Mr. Wilson, what is your current occupation?

3 A I'm a practicing attorney here in Bamberg.

4 Q And are you licensed to practice in South Carolina?

5 A Since 1994.

6 Q What is your area of practice?

7 A Now primarily it's civil cases, personal injury with
8 some criminal and real estate. Back around 2006 I was
9 doing a good bit more criminal work than I do now. At one
10 time I was the part-time public defender for Bamberg
11 County. I think this was a public defender case as I
12 recall.

13 Q Have you ever represented be Mr. Miller?

14 A I did. I represented him at the trial on his
15 trafficking charges.

16 Q And do you recall Mr. Miller filing a post-conviction
17 relief application?

18 A I do.

19 Q Do you recall receiving notice of that application?

20 A I'm sure I did.

21 Q And do you remember attending a post-conviction
22 relief hearing?

23 A I don't have any real recollection of attending. I
24 mean, I remember there was a post-conviction relief
25 application filed and I remember we had a hearing. I

(J. Christopher Wilson-Direct by Hackett)

7

1 thought it took place here. I can't remember if it took
2 place here or in Barnwell. Yea, I remember attending.

3 Q Can you just briefly tell me any and everything that
4 you can recall about that PCR hearing?

5 A I don't have any specific recollections of the PCR
6 hearing at all. I'm sure I was called to testify, but I
7 don't recall questions that were asked or answers that
8 were given or areas that were explored. I have reviewed
9 the order from that hearing and I don't have any
10 recollection of specifically about the hearing.

11 Q I'm going to probe your memory just a little bit --

12 A Sure.

13 Q -- using that order and the PCR application as
14 guides. Do you recall testifying at the post-conviction
15 relief hearing about the waiver of presentment or the
16 amendment of the indictment?

17 A I remember that issue at trial. I remember taking
18 it up in front of Judge Lloyd, discussing it with
19 Mr. Miller and the solicitor, and then discussing it with
20 Mr. Miller again. I remember we had to go back in
21 chambers here to deal with the waiver. Initially
22 Mr. Miller waived the -- any objections to the amendment
23 of the indictment and then he right when the trial was
24 about ready to proceed indicated that he was not agreeable
25 with the waiver.

1 We discussed the fact that it was going to cause the
2 case to have to be reindicted; if the judge was going to
3 allow the state to take it back to the grand jury that we
4 would have to go in front of the judge to request some
5 type of bond. Bond may or may not be granted. If it
6 wasn't granted it would be maybe three or more months
7 before trial proceeded and I remember Mr. Miller deciding
8 to proceed forward and waive any objections to the
9 indictment. I remember the trial, but I don't remember
10 the PCR hearing.

11 Q Do you have any recollection of testimony at the PCR
12 hearing regarding the chain of custody specifically as it
13 related to the cocaine?

14 A No, I remember the trial. I mean, I remember the
15 trial and I remember that we discussed the chain of
16 custody issues and there was paperwork. As I recall the
17 officer had -- who had initially seized the drugs had
18 turned the drugs over to either the chief or the captain
19 at the police department who had then turned the drugs
20 over to the SLED box and there wasn't the chain six
21 custody paperwork between the officer and the captain or
22 the chief and I remember discussing with Mr. Miller that
23 the solicitor's office -- It was Captain Joe Bell who
24 still lives in Bamberg County and that the solicitor's
25 office would easily bring Captain Bell to fill in the

(J. Christopher Wilson-Direct by Hackett)

9

1 missing link on the paperwork with testimony and I
2 remember us deciding not to proceed with the chain of
3 custody issue.

4 It was not Mr. Miller's defense that it was not
5 cocaine. It was his defense that it was not his cocaine
6 and so the chain issue was not a vital part of the defense
7 and he agreed and we agreed to waive the chain of custody
8 issues. I remember that from trial, but I do not remember
9 what testimony or what questions were asked about it from
10 the PCR hearing.

11 Q And one final question regarding information we have
12 gathered from the order. The third issue that's presented
13 in the order is that Mr. Miller's signature as it appears
14 on the waiver of rights form is not, in fact, his
15 signature. Do you recall that issue coming up at the
16 post-conviction relief hearing?

17 A I do not, no.

18 Q Do you recall whether that came up at trial at all?

19 A I reviewed the trial transcript before I came to
20 testify today and I remember there being a Jackson v Denno
21 hearing and there was some discussion. As I recall
22 Mr. Miller's testimony or his position was not that he was
23 -- not that he did not give any statement. His position
24 was that he did not say the things that the officer
25 attributed to him. There was no written statement. There

1 was only verbal or oral statements that law enforcement
2 was going to testify about that Mr. Miller said and in my
3 review of his case and of that transcript it looked like
4 our position was that he was not going to dispute that he
5 made some statements; just that he did not say what they
6 said he said, but I cannot -- I don't specifically recall
7 that and I don't recall anything about the PCR hearing on
8 that.

9 Q One follow-up to that. I know I said that was the
10 final question; so I apologize. A follow-up to that: Do
11 you recall if Mr. Miller presented an expert perhaps in
12 handwriting at the post-conviction relief hearing?

13 A I don't. I don't even know if I stayed after I
14 testified -- if I would have stayed for the rest of the
15 hearing or not.

16 Q All right. Thank you, Mr. Wilson. Those are all the
17 questions I have.

18 MS. HARRIGAN: Just briefly, Your Honor.

19 CROSS-EXAMINATION

20 BY MS. HARRIGAN:

21 Q Mr. Wilson, you have had an opportunity to review the
22 order of dismissal from the first PCR?

23 A I did.

24 Q Did you read the summary of the testimony given by
25 yourself and by Mr. Miller?

1 A I mean, I read the order; so I'm sure I read that.

2 Q Do you recall whether this accurately reflects your
3 testimony from the hearing?

4 A Can I look at it?

5 Q Certainly.

6 A You're talking about what's on page three?

7 Q Three and into four, I believe.

8 A Okay.

9 Q Starting at the bottom of page two, three and into
10 four.

11 A Okay.

12 (Pause.)

13 A I mean, I don't recall the PCR hearing. I don't
14 recall what questions were asked or what answers I gave.
15 The summary of my testimony seems to be indicative of my
16 recollection of the trial and those issues of how they
17 were handled at trial. My discussions of the chain of
18 custody issue with Mr. Miller and our decision to waive
19 the chain of custody issue and allow the solicitor to
20 proceed without bringing in every witness in the chain and
21 the indictment issue -- his waiver of the indictment.

22 I mean, I very vividly recall Mr. Miller agreeing to
23 waive the issue of reindictment to allow the trial to
24 proceed to avoid having to sit in jail for three or four
25 more months waiting on trial without bond. I mean, the

1 chances -- we did not feel like his chances of getting out
2 on bond with his having had a prior escape from the
3 Bamberg County jail were going to be good -- that he was
4 going to sit there for three or four more months.

5 So, I remember those issues from trial and that
6 summary of the testimony that's in this order tracks those
7 matters as I recall from trial which I'm sure coincides
8 with my testimony at the PCR hearing, but I do not
9 remember my testimony at the PCR hearing.

10 MS. HARRIGAN: No further questions, Your Honor.

11 THE COURT: Anything on redirect?

12 MS. HACKETT: No, Your Honor.

13 THE COURT: Thank you. May he be excused?

14 MS. HACKETT: No objection from the applicant.

15 MS. HARRIGAN: No objection from the state.

16 THE WITNESS: I am just going to the office; so if
17 you need me just call me back.

18 THE COURT: Ms. Hackett?

19 MS. HACKETT: We'll call William D. Rhoad, IV.

20 WILLIAM D. RHOAD, IV, after being duly sworn,
21 testified as follows:

22 DIRECT EXAMINATION

23 BY MS. HACKETT:

24 Q Good morning, Mr. Rhoad.

25 A Good morning.

1 Q What is your current occupation?

2 A I am an attorney practicing here in Bamberg.

3 Q And have you ever represented Mr. Miller?

4 A I have. I represented Mr. Miller at the prior PCR
5 hearing which from the records indicated it was back in
6 '06.

7 Q And were you appointed to represent Mr. Miller in
8 that case?

9 A Yes, ma'am.

10 Q And if you could just tell us generally, what do you
11 remember from the post-conviction relief hearing?

12 A At the hearing we had -- I'd looked over the
13 transcript beforehand and, quite frankly, did not feel
14 that there was anything at that time that was gonna be
15 very meritorious; however, as we started to go through the
16 post-conviction relief Mr. Miller and I were talking there
17 at the table and I don't have an independent recollection
18 of it outside of looking at the order -- the
19 post-conviction relief order that was subsequently
20 prepared and issued -- but it did appear that there was
21 some legitimate questions about some decisions that
22 Mr. Wilson had made as far as trial strategy on behalf of
23 Mr. Miller that warranted a further review and moving
24 forward to determine whether or not Mr. Miller would be
25 able to be successful in that claim and get some relief on

1 his sentence.

2 That was -- as I recall, that was his biggest issue
3 in there is that, you know, he kind of in hindsight looked
4 back and realized, well, there was 10 years and then after
5 having gone through trial he got a very severe sentence in
6 relation to what had been offered prior to trial.

7 Q And did you discuss with Mr. Miller that at most a
8 post-conviction relief success would be a new trial?

9 A Yea, putting him in the same position that he would
10 have been, but as I recall Mr. Miller kind of felt like at
11 that time he had nothing to lose. He'd just as well go
12 ahead and roll the dice because in his mind he didn't feel
13 like it would be as bad the second time around as it would
14 have been the first.

15 Q Do you recall what issues you raised on behalf of
16 Mr. Miller?

17 A Outside of this order, I do not. I did talk with the
18 young lady from the attorney general's office and I did
19 remember that this hearing was held in Barnwell -- I mean
20 prior to even looking at my file because ordinarily we
21 have PCR's in Aiken, but I remember going over to Barnwell
22 with Mr. Miller and there being at least an issue that you
23 would kind of raise an eyebrow and say, hmm, that might be
24 something that they would move forward on.

25 You know, most of these PCR's that you do it's kind

(W. D. Rhoad, IV-Direct by Hackett)

15

1 of a joke. They are almost cookie-cutter like somebody in
2 the system is telling them what to write down and what to
3 put, but this was one that there were at least some
4 arguable grounds.

5 Q Mr. Miller -- according to the records that we have
6 Mr. Miller presented a claim regarding credit for time
7 served in his application but at least pursuant to the
8 order that issue did not come up at the hearing. Do you
9 remember how that transpired?

10 A No, ma'am, I don't.

11 Q All right. Let's get into the issues a little bit
12 that do appear in the order. Do you recall which
13 witnesses testified?

14 A For who?

15 Q In total.

16 A My recollection of it is is that Mr. Wilson got up
17 and testified and that he was the only witness that was
18 called on behalf of the state. His testimony as I recall
19 and have reviewed this pretty much was fairly accurately
20 summarized in the order. Most of the things that he was
21 talking about were trial strategy type issues such as the
22 indictment and the chain of custody.

23 Mr. Miller was the only witness that we had called
24 that I could remember calling for him and Mr. Miller when
25 he testified indicated that these were just decisions that

1 his attorney made and he just kind of went along with it
2 without really having understood it or having it fully
3 explained to him.

4 Q All right. Let's move into one of the issues about
5 the indictment --

6 A Uh-huh.

7 Q -- and what do you recall Mr. Wilson and Mr. Miller
8 testifying regarding the indictment issue?

9 A I recall Mr. Wilson testifying consistently kind of
10 like he did here today and that Mr. Miller's response to
11 that was, well, he didn't really understand that and it
12 wasn't explained to him. I believe -- I cannot be sure
13 with this -- that he said these were things that came up
14 relatively soon or either during the trial -- the day
15 before, that kind of stuff -- and, you know, that
16 Mr. Wilson told him that he felt it would be best to do
17 this and while he really didn't understand it he was like,
18 well, you're my lawyer kind of response.

19 Q And how about the chain of custody issue?

20 A The same with that. Mr. Miller -- Please understand
21 it's been a little over six years since we were down
22 there, but I am wanting to say that Mr. Miller indicated
23 that he was even more in the dark concerning the chain of
24 custody issue and discussions about that than he was with
25 the indictment because the indictment was something, you

1 know, they had gone and discussed with the judge, but the
2 chain of custody he really did not -- he indicated that he
3 really didn't know a lot or understand a whole lot about
4 that and I remember that I explained when we talked a lot
5 about that at the post-conviction relief hearing and as
6 memory serves me he was kind of surprised that, you know,
7 if they couldn't make the chain of custody the drugs
8 wouldn't have come in and that his lawyer had stipulated
9 to an incomplete chain of custody.

10 Q And moving to the third issue that appears in the
11 order, Mr. Miller alleged that it was not his signature on
12 the waiver of rights form. How did that issue arise at
13 the PCR hearing?

14 A I do not recall that particular issue one way or the
15 other.

16 Q And just to probe a little bit deeper on that, do you
17 recall if you called an expert witness to testify
18 regarding the handwriting?

19 A I did not.

20 Q Those are all the questions from the applicant.

21 Thank you, Mr. Rhoad.

22 THE COURT: Ms. Harrigan?

23 CROSS-EXAMINATION

24 BY MS. HARRIGAN:

25 Q Mr. Rhoad, do you have any reason to believe that

1 this order does not include a summary of all the testimony
2 presented at the hearing?

3 A As far as I can tell the order pretty much covers
4 everything.

5 Q No further questions.

6 THE COURT: Thank you. Anything else?

7 MS. HACKETT: No, Your Honor.

8 THE COURT: You may step down. Next witness, please.
9 May he be excused?

10 MS. HARRIGAN: No objection.

11 MS. HACKETT: None.

12 THE COURT: Thank you.

13 THE WITNESS: Thank you, Your Honor.

14 MS. HACKETT: The applicant's next witness is Colleen
15 Dixon.

16 COLLEEN E. DIXON, after being duly sworn,
17 testified as follows:

18 DIRECT EXAMINATION

19 BY MS. HACKETT:

20 Q Ms. Dixon, what is your current occupation?

21 A I'm an assistant solicitor in Berkeley County Ninth
22 Circuit.

23 Q And were you ever employed by the attorney general's
24 office?

25 A I was. I started at the attorney general's office in

1 post-conviction relief in August of 2005 before I was
2 sworn in and continued there until February of 2007.

3 Q And are you licensed to practice law in South
4 Carolina?

5 A I am.

6 Q And in August of 2006 it sounds like you were then
7 employed at the attorney general's office; is that right?

8 A I was. I was still in the post-conviction relief
9 division. My assigned circuits were the ninth and
10 fourteenth circuits, but we on occasion did cover other
11 counties and circuits for other people in the office.

12 Q Is that how you became involved in this case?

13 A The attorney who handled this circuit Paula Magargle
14 I believe had just left the office and I think I handled
15 one day out of the term that this case was heard. It may
16 have been the whole week, but that's how I got involved in
17 this case.

18 Q So concerning Mr. Miller's post-conviction relief
19 application you were the assistant attorney general
20 assigned to defend the conviction and sentence?

21 A I did not do the initial paperwork. I believe Sally
22 Elliott from our office did that, but as far as the
23 hearing I was the attorney who handled the hearing for the
24 attorney general's office.

25 Q All right. Can you tell the court what you recall

1 from the post-conviction relief hearing?

2 A Because of the unusual kind of circumstances me not
3 being in this circuit very much I actually do remember
4 this hearing. After I reviewed the transcript and the
5 order I have a pretty clear recollection of what happened
6 in the hearing. I don't know if you want me just to go
7 over everything or break it down.

8 Q If you wouldn't mind going through a narrative and
9 then I will probe your narrative a little more deeply.

10 A Sure. The initial application I believe only had a
11 couple of issues. As I said, I did not do the return for
12 that. When we got to Barnwell County I spoke with
13 Mr. Wilson, I believe, was the defense attorney as well as
14 PCR counsel and as is often the case in PCR hearings there
15 were some changes to the allegations the applicant was
16 making or the petitioner was making that day.

17 I believe that there was an allegation about credit
18 for time served. I spoke with PCR counsel about that. We
19 both agreed that PCR wasn't really where that would be
20 handled appropriately and on the record they withdrew that
21 allegation. They also -- PCR counsel after speaking with
22 his client added an allegation about -- I don't remember
23 what the signature was on. I don't remember if it was a
24 waiver of rights form or what the signature was, but there
25 was some allegation that his client just told him about

1 that we consented to be added to the hearing about that
2 not being his signature. The other two allegations had to
3 deal with chain of custody on the drugs as well as a
4 waiver to some change in the language for indictment.

5 Q Do you recall who were the witnesses who testified?

6 A Yes. PCR counsel called Mr. Miller. He testified
7 first and then I cross-examined him. That was their only
8 witness and then I called -- defense counsel I think is
9 Mr. Wilson. I called Mr. Wilson who testified and he was
10 the state's only witness.

11 Q Just to follow up on that, I take that to mean there
12 was no expert in handwriting?

13 A There was not.

14 Q And do you recall what Mr. Miller's testimony was
15 regarding the amendment to the indictment or the waiver of
16 presentment of the indictment?

17 A I do -- obviously, not verbatim, but the only
18 character of his testimony was that he did not understand;
19 that Mr. Wilson had kind of forced him into doing that;
20 that he -- I remember cross-examining him and pointing out
21 the different places in the transcript. My recollection
22 is that there were two different place in the transcript
23 where there was a discussion about the waiver of
24 indictment and I remember cross-examining him regarding
25 those two different places and he remained just very

1 adamant. I did not know what they were talking about was,
2 basically, his only testimony. He was just -- you know,
3 asked him if his attorney had talked to him and he said,
4 yes, but he didn't understand was his basic testimony.

5 Q And what was Mr. Wilson's testimony regarding that
6 same issue?

7 A Mr. Wilson testified on direct examination that he
8 didn't -- I think it wasn't until the day that the case
9 was called for trial, the beginning of that term, that the
10 issue even came up about the I think it's knowingly --
11 that kind of language that was added to the indictment;
12 that they just hadn't talked about it; that when the
13 solicitor, I guess, noticed it that morning or made the
14 motion in the morning -- maybe Monday morning whenever the
15 trial term started -- that initially he had spoken with
16 Mr. Miller; that Mr. Miller had objected to them amending
17 the indictment and that the case was just going to be
18 continued.

19 At some point he had -- I guess Mr. Miller asked him
20 if that meant he could get out on bond and when he
21 explained to him, no, that he probably still wasn't going
22 to get out on bond Mr. Miller -- I'm sorry, Mr. Wilson
23 testified that Mr. Miller said, well, I don't want to put
24 it off any more. I want to go ahead. The
25 characterization of defense counsel's testimony I would

(Colleen E. Dixon-Direct by Hackett)

23

1 say was that if it didn't mean Mr. Miller was going to get
2 out of jail on bond he wanted to go forward and that he
3 explained to him basically the state would do a new
4 indictment that the next grand jury which -- it may have
5 been two months before the next grand jury and that the
6 likelihood was it would get true-billed again and that
7 after having those conversations with Mr. Miller
8 Mr. Miller said he wanted to go forward and he would waive
9 the language.

10 His defense counsel's other testimony was that it
11 really didn't change their strategy. I believe he
12 testified earlier it wasn't -- it was just kind of a
13 it's-not-my-drugs kind of trial strategy and that the
14 language -- changing the language in the indictment really
15 didn't do anything to change the way they were going to
16 defend the case.

17 Q Turning to the second issue that's presented in the
18 order it is a chain of custody relating to the cocaine,
19 what is your recollection of Mr. Wilson's testimony from
20 the post-conviction relief hearing on the chain of custody
21 issue?

22 A Mr. Wilson testified that he had reviewed and I
23 believe -- I'm not certain if we actually entered the
24 forms in that had the drugs, but I know we had them and
25 discussed them on the record. Mr. Wilson testified that

1 the form that was basically missing my recollection is the
2 officer collected it turned it over to a captain I think
3 at the police department or the chief -- someone higher
4 up -- and that that captain or chief then turned them over
5 the SLED or put them in whatever SLED box they use here in
6 Bamberg; that he didn't have that form but he wasn't -- he
7 didn't think it was a big deal because that officer still
8 worked here; that he knew the officer was available to
9 testify and that he explained that to Mr. Miller and said,
10 you know, we can object to it, but it's not going to do
11 anything and his testimony, basically, was that he didn't
12 want to talk about the drugs.

13 His trial strategy was that he didn't want to talk
14 about the drugs any more than he had to because he felt
15 that just the amount of drugs weighed against his client
16 and so challenging the custody and making them bring in
17 each person to talk about transferring the drugs would
18 have damaged their case.

19 Q Regarding Mr. Miller's testimony on that issue what
20 do you recall?

21 A I recall Mr. Miller -- I think he was irritated at
22 that issue. I remember him being kind of angry about that
23 just because he wanted that person to come in and testify.
24 On cross-examination I did -- I think there was a part in
25 the record again that I cross-examined him and pointed out

1 where he had said on the record that he had spoken with
2 his attorney, but, again, his basic testimony was, yes, we
3 talked about it, but I didn't understand what he was
4 saying.

5 Q Back up to your statements regarding what Mr. Wilson
6 testified regarding this issue on chain of custody and you
7 mentioned some forms. Can you just explain a little bit
8 what you recall about any forms relating to the chain of
9 custody?

10 A Sure. Any time drugs are collected or evidence is
11 collected -- usually drugs -- I think they call it a form
12 six and it's filled out to say here is who had the drugs
13 and here is who they gave them to. In this case there
14 were two forms that we had that I remember getting -- I
15 don't know if I had the prosecution file or if it was in
16 the defense attorney's file. Normally all I had was the
17 defense attorney's file.

18 There was a form from the officer who collected the
19 drugs that turned them over to the chief or captain and
20 then there was a form that was from the person that the
21 captain gave the drugs to turning them over to SLED.

22 There was not that form from the captain saying I received
23 the drugs and here's who I gave them to; so it was the one
24 in the middle that was missing, but, again -- excuse me --
25 Mr. Wilson testified that practicing here, knowing that

1 officer, knowing the prosecution that he was certain even
2 without seeing the form that the testimony could have been
3 provided. They could have just called that captain in who
4 would have testified based on just those forms saying he
5 got them and who he gave them to.

6 Q Turning to the last issue in the order regarding
7 Mr. Miller's signature on the waiver of rights form, what
8 is your recollection of the testimony of Mr. Wilson and
9 Mr. Miller at the PCR hearing?

10 A Mr. Miller's testimony -- and, again, I can't
11 remember exactly what form it was. I think it was the
12 waiver of rights form was just that that wasn't his
13 signature and that he had told Mr. Wilson that wasn't his
14 signature and that Mr. Wilson didn't do anything about it.
15 Mr. Wilson testified that Mr. Miller did tell him that
16 that wasn't his signature; testified that he looked into
17 it and a lot of times defense counsel has to be very
18 careful how they testify on the stand.

19 Without disparaging his client he said as an officer
20 of the court he did not feel that was a meritorious issue
21 and did not feel like it was something he needed to
22 present to the court. I didn't really go into on my
23 direct examination why he felt that way because I didn't
24 feel it was necessary. They didn't have a handwriting
25 expert to call and so I didn't delve into it any more than

1 him saying he didn't feel like it was an issue properly
2 brought before the court.

3 Q And my last question to you, Ms. Dixon, do you have
4 any notes from the PCR hearing?

5 A I'm certain that I took notes. I have no idea what
6 happened to them. My general practice was to basically
7 write down everything that was said and to put all of that
8 in the order. I have reviewed the order. I don't -- I
9 put everything in the order whether it was good for my
10 case or not. So I don't know what happened to my actual
11 handwritten notes, but my general practice was to take
12 everything from my notes and put them in the order in
13 summary form -- not verbatim, obviously, but, no, I have
14 no idea what happened to those notes.

15 Q Those are all the questions from the applicant.
16 Thank you, Ms. Dixon.

17 MS. HARRIGAN: Court's indulgence. May it please the
18 court. May I approach the witness, Your Honor?

19 CROSS-EXAMINATION

20 BY MS. HARRIGAN:

21 Q Ms. Dixon, I am going to show you this and ask you if
22 you have ever seen that form before.

23 THE COURT: Mr. Guard, are you with me?

24 THE POLICE OFFICER: Yes, sir.

25 THE WITNESS: This form appears to be the form B

1 forms that we would have used in this case.

2 Q Do you recall whether they were admitted or not into
3 evidence?

4 A I don't recall whether they were admitted. I know
5 that we talked about them. I know that I showed them to
6 Mr. Wilson. I don't remember whether or not I entered
7 them into evidence. I'm sure that I showed them to the
8 judge, but it may just have been an oversight if I didn't
9 admit them, but we definitely talked about them.

10 Q Could you describe for the court where it appears
11 those documents came from?

12 A These look like they came from Rhoad Law Firm which I
13 am assuming is the defense attorney's law firm. Brooke
14 would have been my assistant back at that time; so,
15 obviously, I had requested them, spoken with Mr. Wilson,
16 and requested that he send them to me prior to the hearing
17 so that I would have them. Again, I'm not sure if I
18 entered them but that's who they would have been sent from
19 and to.

20 MS. HARRIGAN: And, Your Honor, I apologize. This is
21 the only copy. If we could get a copy of this and have it
22 introduced into evidence.

23 THE COURT: Why don't you just do it before we leave
24 today so we don't have to worry about---

25 MS. HACKETT: No objection from the applicant.

1 THE COURT: Go ahead and mark that and we'll make a
2 copy of it.

3 (Whereupon, Respondent's Exhibit No. 1 was marked for
4 identification and received into evidence.)

5 Q And you have had an opportunity to review the order
6 of dismissal prior to coming to court today?

7 A Yes. I read the order and kind of skimmed over the
8 transcript and petition, all the paperwork.

9 Q Do you recall whether you prepared this order or not?

10 A I did.

11 Q Would you describe your standard practice for
12 preparing orders of dismissal?

13 A What I would do -- and I don't remember if it
14 happened in this case, but normally we would get a ruling
15 the day of the hearing and the judge would direct me to
16 prepare the order. If it wasn't that day it would be very
17 shortly thereafter PCR counsel and I would get either a
18 phonecall or an e-mail.

19 So what I would do is immediately after I got back
20 from a term of court all the notes that I had in the file
21 I would take those notes out, do our standard summary of
22 the facts, give the procedural history, and then take
23 those notes and basically transcribe any notes that I had
24 and put them in the summary of the hearing to try and
25 cover all the testimony that was given just to make a good

1 record for any appeal that may have happened -- generally
2 didn't leave anything out.

3 Like I said, whether it was good for my case or bad
4 for my case I kind of wanted everything in there and then
5 would do -- after I did the summary of the testimony,
6 would break down the issues that were presented and
7 sometimes more specifically talk about the testimony that
8 was given on that one issue. Sometimes it had already
9 been covered in my summary, but I would have worked
10 straight off of my notes because, you know, we had so many
11 hearings in a week that if I didn't take good notes I
12 wouldn't remember one case from another.

13 Q Do you recall anything abnormal or unique about this
14 hearing?

15 A I remember it was -- I mean, it was kind of just like
16 any other PCR hearing. I spoke with Mr. Wilson
17 beforehand, but, you know, kind of only dug into it that
18 morning, very briefly spoke with PCR counsel about the
19 issues. I remember Mr. Miller was irritated at
20 Mr. Wilson -- I mean, no more than any other defendant,
21 but there wasn't anything that really sticks out as far as
22 it being unusual.

23 Q And you do recall taking notes at this hearing?

24 A Yes. I definitely would have taken notes. I had
25 usually by the end of the term a legal pad full of notes

1 and I would write the name of the hearing, the date that
2 we were doing it, and just basically everything that came
3 out of anybody's mouth. Whether it was on direct or cross
4 examination I would write down, obviously, in shorthand,
5 but any facts pertinent to the issues that had been raised
6 I would write down just to help me when I did the order
7 later.

8 Q No further questions, your Honor.

9 THE COURT: Anything on redirect, ma'am?

10 REDIRECT EXAMINATION

11 BY MS. HACKETT:

12 Q Just to quickly follow up on the notes, when you left
13 the attorney general's office you left the notes with your
14 file; is that correct?

15 A I'm not sure. We purged files when the cases were
16 closed. My general practice was not to throw away my
17 notes, but I wasn't always the one that was going through
18 and purging the files. I mean, I know we had a space
19 issue; so it's possible that some of the assistants would
20 have gone through and since the case would have been
21 closed may have thrown away the notes. Generally, I would
22 have left them in the file just in case.

23 MS. HACKETT: No further questions from the
24 application.

25 MS. HARRIGAN: The state would just like to put on

1 the record we have ordered all the closed files for
2 Mr. Miller including his direct appeal, his first PCR, his
3 second PCR, and this appeal file and no notes were found
4 in any of them. We did diligently look for notes, though.

5 THE COURT: You may step down. Be careful going back
6 to the big city.

7 THE WITNESS: Yes, sir.

8 THE COURT: Tell Judge Dennis I said hello.

9 THE WITNESS: I will.

10 THE COURT: Next witness.

11 MS. HACKETT: We first ask that Ms. Dixon be released
12 from her subpoena.

13 MS. HARRIGAN: No objection.

14 THE COURT: Thank you.

15 THE COURT: The applicant calls Michael Miller to the
16 stand.

17 MICHAEL MILLER, after being duly sworn,
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MS. HACKETT:

21 Q Mr. Miller, are you currently incarcerated?

22 A Yes, ma'am.

23 Q Where are you incarcerated?

24 A At McCormick Institution.

25 Q If you could speak up a little bit for us.

1 A McCormick Correctional Institution.

2 Q All right. And what is your conviction?

3 A I'm convicted of trafficking cocaine.

4 Q Do you have a secondary charge as well?

5 A Proximity of distribution in a school zone and
6 somewhat in that fashion.

7 Q So you have a trafficking cocaine conviction as well
8 as a possession with intent to distribute within a
9 proximity of the school or park conviction?

10 A Yes, ma'am.

11 Q Okay. And do you recall if you were indicted for
12 those charges?

13 A No, ma'am. I don't recall being indicted.

14 Q Okay.

15 A I don't recall the date on that.

16 Q Do you recall how those charges were resolved? Did
17 you go to trial or did you have a guilty plea?

18 A I went to trial.

19 Q All right. And do you recall who represented you at
20 trial?

21 A Mr. Wilson.

22 Q All right. After you were convicted did you file an
23 appeal?

24 A Yes, ma'am.

25 Q And what was the result of your appeal?

1 A The appeal -- it was denied.

2 Q And who represented you in your appeal?

3 A Mr. Wilson.

4 Q Mr. Wilson represented you in your appeal?

5 A In my appeal Mr. Rhoad and Mr. -- Mr. Rhoad
6 represented me on the appeal.

7 Q All right. I think we may be a little bit confused.

8 A Okay.

9 Q Did Mr. Rhoad represent you in your post-conviction
10 relief application?

11 A Mr. Rhoad?

12 Q Yes.

13 A Yes, ma'am.

14 Q Okay. We'll skip ahead to your post-conviction
15 relief application. When you filed that initially did you
16 file that on your own? Did you have any assistance from
17 counsel?

18 A Yes, ma'am.

19 Q All right. Mr. Rhoad was appointed to represent you
20 in your post-conviction relief?

21 A Yes, ma'am.

22 Q Correct?

23 A Yes, ma'am.

24 Q And do you remember that case going to a hearing?

25 A Yes, ma'am.

1 Q Tell me what you remember from that hearing.

2 A Well, basically, they just granted me an appeal to
3 move forward because I was represented by Nicole
4 Singletary.

5 Q All right. You're talking about the second PCR
6 hearing. Yes, sir.

7 A Uh-huh.

8 Q Let's back up. Let's talk a little bit about
9 August 2006.

10 A Okay.

11 Q Do you recall appearing in front of Judge Early who
12 is here today?

13 A Yes, ma'am, I do.

14 Q All right. Let's talk about what you remember from
15 that hearing.

16 A Basically, the questions that my attorney
17 representing me Mr. Rhoad was asking me and Chris Wilson
18 testified. Other than that, I can't vividly say that I
19 recall everything that went on that day.

20 Q All right. So you recall that you testified and you
21 recall that Mr. Wilson testified; is that right?

22 A Yes, ma'am.

23 Q Do you recall if anyone else testified at your PCR
24 hearing?

25 A No, it was nobody else.

1 Q And do you recall the lady who testified before you
2 being the attorney general?

3 A Yes, I remember her.

4 Q Okay. Do you recall any of the substance of your
5 testimony?

6 A I beg your pardon?

7 Q Do you recall anything that you said that day? What
8 did you testify about?

9 A I can't recall. I can't remember.

10 Q Okay. Do you remember what Mr. Wilson may have
11 testified about?

12 A He testified about the chain of custody and that I
13 waived my rights and then I told him at the time like I
14 said I did not understand at that point. That's why I
15 waived it because he asked -- from my understanding he
16 told -- he gave me that advice to waive that and that was
17 the only reason why I took the waiver.

18 Q And which issue are you talking about?

19 A On my -- the waiver rights for the handwriting.

20 Q All right. So, what issue did you present to the PCR
21 court regarding your handwriting on the waiver of rights
22 form?

23 A That the handwriting was not mines.

24 Q So your allegation was that Mr. Wilson was
25 ineffective for failing to challenge the handwriting on

1 the waiver of rights form?

2 A Yes, ma'am.

3 Q And what was your testimony at the PCR hearing about
4 that?

5 A I testified that the handwriting was not mine and
6 that I wanted the expert to tell -- to give me -- to have
7 me to write my name down and that was, basically, what I
8 was on the stand to tell them because I told them that it
9 was not my handwriting --

10 Q And---

11 A -- that was on the waiver.

12 Q And did you discuss that issue with Mr. Wilson prior
13 to your trial?

14 A Yes, I did.

15 Q And when you testified at your post-conviction relief
16 hearing did you testify about your conversation with
17 Mr. Wilson?

18 A I believe so.

19 Q All right. And what was Mr. Wilson's testimony at
20 the PCR hearing about the signature?

21 A He said that it wouldn't -- that me getting an expert
22 at that time he said it wouldn't do no good for me to have
23 an expert -- that they didn't have an expert available at
24 that time.

25 Q Okay. Did you present testimony from an expert at

1 the PCR hearing?

2 A No, ma'am.

3 Q Okay. Let's move to the issue regarding the
4 indictment. What is your recollection of what your
5 allegation was about the indictment?

6 A They mentioned that they had to go back and redo the
7 indictment over by a certain specific word knowing intent
8 and that if I didn't go through with it that they would
9 postpone that and that's all I knew about that indictment.

10 Q Okay. And let's move to the next issue which was the
11 chain of custody.

12 A Yes, ma'am.

13 Q What is your recollection about your testimony at the
14 PCR hearing about the chain of custody?

15 A From what I can remember I asked them about the chain
16 of custody and Mr. Wilson told me that the chain of
17 custody -- it would be irrelevant for me to go through
18 with the chain of custody. He said he's already been
19 through the chain of custody already. So when he
20 mentioned that to me I just went along with him.

21 Q What was Mr. Wilson's testimony at the PCR hearing
22 regarding the chain of custody issue?

23 A That he didn't feel no need -- that it wasn't
24 necessary to go through with the chain of custody because
25 the officer was available at the police department and

1 they could have brought him in.

2 Q All right. Those are all the questions I have for
3 you, Mr. Miller. Please answer any questions that
4 Mrs. Harrigan may have.

5 CROSS-EXAMINATION

6 BY MS. HARRIGAN:

7 Q Good morning, Mr. Miller. Have you had an
8 opportunity to review the order of dismissal from your
9 2006 PCR before coming to court today?

10 A Yes, ma'am.

11 Q Have you read it?

12 A I've read it.

13 Q Did you read the summary of the testimony given by
14 yourself and Mr. Wilson?

15 A I went over it, but I put it in my other legal work.

16 Q Do you believe this accurately reflects your
17 testimony at the hearing?

18 A Yes, ma'am.

19 Q Do you recall anything that is different from your
20 recollection based on what's in the order?

21 A Not really.

22 Q Do you recall anything that's missing from this
23 order?

24 A No, other than talking about the chain of custody,
25 that's probably it.

1 Q And the chain of custody was addressed in the 2006
2 order; correct?

3 A Yes, ma'am.

4 Q No further questions, Your Honor.

5 THE COURT: Anything on redirect?

6 MS. HACKETT: No, Your Honor.

7 THE COURT: You may step down. Next witness, please.

8 MS. HACKETT: The applicant has no other witnesses.

9 THE COURT: Anything else by the applicant for the
10 record?

11 MS. HACKETT: We have no motions, Your Honor.

12 THE COURT: Anything by the state?

13 MS. HARRIGAN: No, Your Honor. The state has no
14 witnesses to call.

15 THE COURT: All right. I find that the record has
16 been properly reconstructed and that Chief Justice Toal's
17 order requires that both of you -- both parties, the
18 parties plural -- shall notify the Supreme Court. I would
19 ask that y'all do that by joint -- I assume letter is how
20 we normally do it, is it not?

21 MS. HARRIGAN: I believe that's how we did it before.
22 I believe Ms. Hackett wrote the letter and copied the
23 state and your chambers.

24 MS. HACKETT: That's exactly what I'll do, Your
25 Honor.

1 THE COURT: And the appeal will proceed upon
2 Mr. Miller's counsel's receipt of the transcript from
3 today's hearing. So, when Mrs. Davenport provides that to
4 you, then you will move forward in a timely fashion.

5 Anything else I can do for any of you?

6 MS. HACKETT: No, Your Honor. Thank you.

7 MS. HARRIGAN: No, Your Honor. Thank you.

8 THE COURT: Thank you both very much. Have a nice
9 day.

10 (End of Transcript of Record.)

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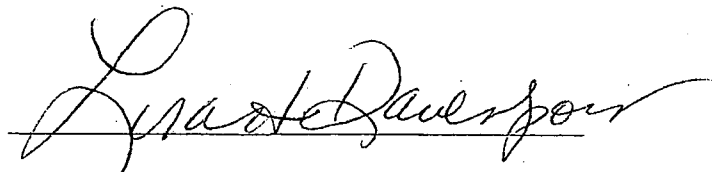
CERTIFICATE OF REPORTER

State of South Carolina)
County of Aiken)

I, Lisa H. Davenport, Official Court Reporter for the
Second Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Bamberg County, South Carolina, on the 22nd day of
January, 2013.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

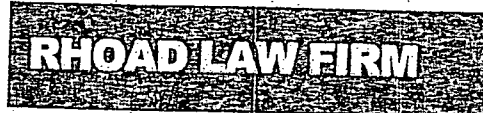
March 21, 2013



Lisa H. Davenport, Court Reporter

2CD

Post Office Drawer 508
Bamberg, SC 29003
(803) 245-5119



Fax

To: Brooke @Atty General

From: Kelly

Fax: 734-4113

Pages: 3

Phone:

Date: 9/8/2006

Re: Michael Miller

X

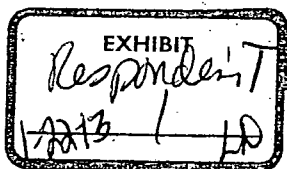
x Urgent

☒ For Review

☐ Please Comment

☐ Please Reply

• **Comments:** Please find a copy of the change of custody regarding the above noted matter.



CONTROL NO. B88902

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM B (RULE 6)

CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL

(Initial Custody)

This is to certify that I Juan WARD am employed by

(Name)

DENMARK P.D.

(Name of Agency or Department)

and that on

7-31

(Date)

, 1998, I seized fromMichael Miller

(Name)

pursuant to

LAWFUL ARREST

(State Whether Subject to a Warrant, Lawful Arrest or Otherwise)

at or near AM TRAIL DOWWOOD AVE

(Place Where Seized)

the following substance(s) or container(s):

(Describe substance or container with sufficient particularity to distinguish it.)

Quantity of White Powder substance believed
to be COCAINEOn 8-3, 1998, I made delivery of the above described

(Date)

substance(s) or container(s) to CAPT. JOE Bell of

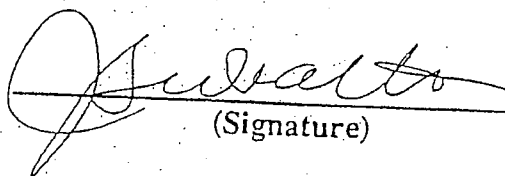
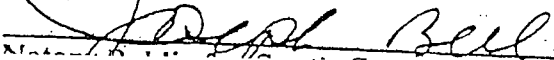
(Name)

DENMARK P.D.

(Law Enforcement Agency)

in substantially the same condition

as when I received it.

Place: DENMARK SC.Date: 8-3-98
(Signature)Sworn before me on this 3 day of July, 1998
Joseph Bell

CONTROL NO. B081902

PRINT ALL INFORMATION EXCEPT WHERE SIGNATURE IS REQUIRED

FORM C (RULE 6)

CERTIFICATE OF PROOF OF CHAIN OF PHYSICAL
CUSTODY OR CONTROL

(Subsequent Change of Custody)

This is to certify that I Christine Simpkins am employed by
(Name)Denmark Police Department as Police Officer and that on
(Name of Agency or Department) (Capacity of Employment)Aug 3, 1995, I received In Person
(Date) (Specify Whether by Mail or in Person)from Cpt. Joe Bell of Denmark Police Department
(Name of Person) (Law Enforcement Agency)

the following substance(s) or container(s) which were originally seized by

Judy Walton
(Name of Person Making Original Seizure)
(Describe substance or container with sufficient particularity to distinguish it.)
Quantity of White powder substance believed
to be cocaineOn 8-3, 1995 I made delivery of the above described
(Date)
substance(s) or container(s) to Dmy Bep of
(Name)SCED in substantially the same condition
(Law Enforcement Agency)

as when I received it.

Place: _____

Date: _____

Sworn before me on this 3 day of Aug, 1995R
Notary Public for South Carolina

(Signature)

WITNESSES

J. Walton, D.P.D.

DOCKET NO. 2000-GS-05- 055

The State of South Carolina

County of Bamberg

ARREST WARRANT NUMBER

F614497

ACTION OF GRAND JURY

Foreperson of Grand Jury
Date: February 14, 2000

VERDICT

COURT OF GENERAL SESSIONS

FEBRUARY 14, TERM 2000

THE STATE
vs.

MICHAEL ROOSEVELT MILLER

Indictment for

TRAFFICKING IN COCAINE

SC Code: 44-53-370(e)(2)(e)
CDR Code: 0281
Class FEL/EXM(V)

Foreperson of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

INDICTMENT

At a Court of General Sessions, convened on February 14, 2000, the Grand Jurors of Bamberg County present upon their oath:

TRAFFICKING IN COCAINE

That MICHAEL ROOSEVELT MILLER did in Bamberg County on or about July 31, 1998, knowingly bring into this State, ^{or intentionally} or did knowingly have in actual or constructive possession, 937 grams of Cocaine or any mixtures thereof.

202
11/14/04

We, the Jury, find the Defendant:
☒ Guilty
☐ Not Guilty

LeAnne S. Hammett
Foreperson

January 14, 2004.

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

for J. R. Morgan
BARBARA R. MORGAN, SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Bamberg
STATE VS.Michael Miller

AKA:

Race: BSex: MAge: 33DOB: 6-21-70SS#:

Address:

City, State, Zip

MIAMI, FLDL# SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

2000-GS- 05055

A/W#:

F 614497

Date of Offense:

7-31-98

S.C. Code §:

44-53-370 (e)(2)(e)

CDR Code #:

0 1 2 1 9 1 1☐ CASE RESTORED

SENTENCE

☐ PLEA ☒ TRIALIn disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADSTO: Traff. Coc. > 400 gmsin violation of § 44-53-370(e) of the S.C. Code of Laws, bearing CDR Code # 0 1 2 1 8 1 1☐ NON-VIOLENT☒ VIOLENT☒ SERIOUS☐ MOST SERIOUS☐ 17-25-45The charge is: ☐ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 25 days/months/years or ☐ under the Youthful Offender Act not to exceed yearsand/or to pay a fine of \$200,000; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: ☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

§14-1-206 (Assessments 107.5%) \$ §14-1-211(A)(1) (Conv. Surcharge) \$100 \$ §14-1-211(A)(2) (DUI Surcharge) \$100 \$ §56-5-2995 (DUI Assessment) \$12 \$ § 35.13 (Public Def/Prob) \$500 \$ §73.3, 1B TP (Law Enforce. Funding) \$25 \$ §33.7, 1B TP (Drug Court Surcharge) \$100 \$ §50-21-114(BUI-Breath Test Fee) \$50 \$ §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ 3% to County (if paid in installments) \$ TOTAL \$

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender FundOther: ☒ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code: 2 1 1 1 3 1 3Sentence Date: 11/14/04

A TRUE COPY

Clerk of Court/ Deputy Clerk

Court Reporter:

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)

WITNESSES

J. Walton, D.P.D.

DOCKET NO. 2000-GS-05-

054

The State of South Carolina

County of Bamberg

COURT OF GENERAL SESSIONS

FEBRUARY 14, TERM 2000

ARREST WARRANT NUMBER

F614396

COPY

ACTION OF GRAND JURY

MICHAEL ROOSEVELT MILLER

THE STATE

vs.

VERDICT

Foreperson of Grand Jury
Date: February 14, 2000

Indictment for

POSSESSION WITH INTENT TO
DISTRIBUTE COCAINE WITHIN
PROXIMITY OF PARK

SC Code: 44-53-445(B)(1)

CDR Code: 0107

Class FEL/E

Representative of Petit Jury
Date:

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

INDICTMENT

At a Court of General Sessions, convened on February 14, 2000 the Grand Jurors of Bamberg County present upon their oath:

POSSESSION WITH INTENT TO DISTRIBUTE COCAINE WITHIN
PROXIMITY OF PARK

214
11/14/04
That MICHAEL ROOSEVELT MILLER did in Bamberg County on or about July 31, 1998, unlawfully ^{Knowingly or Intentionally} possess with intent to distribute a controlled substance, to wit: Cocaine while in, on, or within a one-half mile radius of the grounds of a public playground or park, to wit: Jim Harrison Park.

We, the Jury, find the Defendant:

☒ Guilty

☐ Not Guilty

LeAnne S. Hammett
Foreperson

January 17, 2004.

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

De Ill JO
BARBARA R. MORGAN, SOLICITOR

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF
STATEBamberg
VS.
Michael Miller

AKA:

Race: B Sex: M Age: 33

DOB: 6-21-70 SS#:

Address:

City, State, Zip

DL#

SID#

2000 INDICTMENT/CASE#: 054
 -GS- 05
 A/W#: F614496
 Date of Offense: 7/31/98
 S.C. Code §: 44-53-445(B)(1)
 CDR Code #: 011017
☐ CASE RESTORED
☐ SENTENCE
☐ PLEA ☒ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADS

TO: PWID Coc. Prox. Park

in violation of § 44-53-445(B)(1) the S.C. Code of Laws, bearing CDR Code # 011017

☒ NON-VIOLENT ☐ VIOLENT ☒ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is: ☐ As Indicted ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.
 The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

At TEST:

Solicitor

Defendant

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
 for a determinate term of 15 days/months/years or ☐ under the Youthful Offender Act not to exceed ____ years
 and/or to pay a fine of \$10,000; provided that upon the service of ____ days/months/years and/or payment
 of \$____; plus costs and assessments as applicable*; the balance is suspended with probation for ____
 months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation,
 which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 1/14/04
☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the State
 Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered
 Total: \$____ plus 20% fee: \$____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:

\$14-1-206 (Assessments 107.5%)
 \$14-1-211(A)(1) (Conv. Surcharge)
 \$14-1-211(A)(2) (DUI Surcharge)
 \$56-5-2995 (DUI Assessment)
 \$35.13 (Public Def/Prob)
 \$73.3, 1B TP (Law Enforce. Funding)
 \$33.7, 1B TP (Drug Court Surcharge)
 \$50-21-114(BUI Breath Test Fee)
 \$56-5-2942(J) (Vehicle Assessment)
 3% to County (if paid in installments)
 TOTAL

\$10,000.00
 \$10,000.00
 \$100 \$
 \$100 \$
 \$12 \$
 \$500 \$
 \$25 \$
 \$100 \$
 \$50 \$
 \$40/ea \$
 \$1623.25
 \$21398.25

PTUP

____ days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$____ beginning

\$____ paid to Public Defender Fund

Other: _____

☒ Appointed PD or appointed other counsel, \$35.13 TP
 Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

Clerk of Court/ Deputy Clerk

Court Reporter:

A TRUE COPY

White - Clerk

Green - Corrections

Canary - Probation

Pink - Defendant

SCCA/217 (7/2003)