The Supreme Ct. Clerk
Mr. Daniel E. Shearouse
P.O. Box 11330
Cola. SC 29211

Re# 2012-212581
PRO-SE BRIEF

Date 9/25/13

Dear Hon. Clerk Shearouse

Please find enclosed for filing my pro-se brief.

Would you be so kind as to send me back a filed copy.

Thank you Sincerely

Michael Miller

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Bamberg County
Edgar W. Dickson, Cir. Court Judge

Case No# 2012-212581

MICHAEL MILLER — Petitioner

VS

STATE OF SOUTH CAROLINA — Respondent

PETITIONER'S PRO-SE BRIEF

Michael Miller #259269
McCorr. Inst. / F3-211
386 Redemption Way
McCormick, SC 29899

Susan B. Hackett
Attorney for petitioner

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ISSUES PRESENTED

(1) The PCR court errored in ruling that Petitioner's trial counsel was not ineffective in faling to object to the oral waiver of presentment on the amended indictment.

(2) The PCR court errored in ruling that trial counsel's stipulation to the chain of custody of the drugs was not ineffective despite evidence of a clear break in the custodial chain

(3) The PCR court errored in ruling that trial counsel was not ineffective, in failing to present evidence/expert that the signative on the waiver of right form was not the Petitioner

STATEMENT

For the record of this brief the Petitioner agrees with his Appellate Defender's Statement upon her Johnson petition for writ of certiorari pursuant to Austin v State

ARGUMENT (I)

The PCR court errored in ruling that Petitioner's trial counsel was not ineffective in faling to object to the oral waiver of presentment on the amended indictment.

Relevant Facts

Relevant Facts from Trial

Prior to the start of trial, 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 SEE: App-p 6 L 12 - App-p 7_L 7. At one point

the trial judge ruled that the solicitor should go back and have the grand jury re-indict Petitioner SEE: App. p 8 L 15 - L 17. but decided to proceed with the trial, with allowing the solicitor to amend the indictments without taking them before the grand jury App. p. 34 L 1 - L 12

Relevant facts from PCR Order of Dismissal

The order of Dismissal filed on Oct 2, 2006 summarized the testimony of the PCR witnesses(1) the order of Dismissal revealed that the Petitioner testified that he did not understand

(1) None of the witnesses disputed the Order's summary of the testimony at the reconstruction hearing

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 SEE: App. p. 189 Also see App. p 28 L 1 – App. p 34 – L 16.

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 Petitioner had been put on regarding the charges he was facing. He further testified that he advised the Petitioner that if he objected to the waiver of presentment, then the solicitor would simply re-indict the

Petitioner, based upon that information, chose to waive presentment and proceed to trial because he did not wish for his trial date to be postponed SEE: A11 p189.

Regarding this issue the PCR found that trial counsel's testimony to be credible and the Petitioner's testimony on this issue not credible. Trial counsel testified that he discussed the waiver of presentment with the Petitioner, and that the Petitioner 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 Petitioner has / had 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 Petitioner with the inclusion of the language and the Petitioner would have again proceeded to trial. Therefore, the Petitioner has failed to meet his burden of proof to show deficient performance by counsel or prejudice resulting therefrom. SEE: App. p 191.

Relevant Facts from Reconstruction Hearing

Petitioner's trial counsel testified at the reconstruction hearing that he had no recollection of his testimony at the PCR hearing in August of 2006, however, he remembered the issue concerning the waiver of presentment or the amendment of the indictment as it arose at trial SEE: App. p 323 L13 - L17; App. p 324 L9 - L10; App. p 328 L5 - L9

Trial counsel recalled - remember taking this issue up in front of Judge Lloyd; discussing it with Petitioner and the solicitor, and then discussing it with Petitioner again. Trial counsel remember they had to go back in chambers here to deal with the waiver Initially. Petitioner waived the... any objections to the amendment of the indictment and then

his right when the trial was about ready to proceed indicated that he was not agreeable with the waiver. SEE: App p 323 L 17 _ L 25; Also see App p 28 L 1 – App p 34 _ L 16; App p 327 L 21 – App p 328 L 9

We discussed the fact that it was going to cause the case to have to be reindicted if the judge was going to allow the State to take it back to the grand jury that we would have to go in front of the judge to request some type of bond. Bond may or may not be granted. If it wasn't granted it would be maybe three or more months before trial proceeded and I remember Petitioner deciding to proceed forward and waive any objections to the indictment.

William D. Rhoad III, Petitioner's prior PCR counsel, testified that Petitioner trial counsel MR. Wilson told Petitioner that he felt it would be best to do this and while Petitioner really didn't understand it Petitioner was like well, you're my lawyer kind of response SEE: App. p 332 L 7 - L 18 Petitioner testified that the order accurately reflected his testimony at the hearing SEE: App. p 355 L 13 - L 18. Thus, that he did not understand the waiver of present-ment issue and did not wish to waive presentment of the amended indictment. And that the only reason he agreed to waive presentment was because counsel erroneously advised him SEE: App. p 189

Colleen Dixon, the assistant attorney general at the time of Petitioner's initial PCR hearing, testified in general to all other witnesses regarding this issue. SEE: App.p 337 L14 — App.p 339 — L16. Although Dixon also testified that Petitioner's character of his testimony was that he did not understand, that Mr Wilson had kind of forced him into doing that.... SEE: App.p 337 L14 — L19.

Discussion

In a post-conviction relief proceeding, a Petitioner may be granted relief based on ineffective assistance of counsel if he shows (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance SEE:

Strickland v Washington 466 U.S. 668. To prove prejudice Petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different SEE: Cherry v State 386 SE2d 624. A reasonable probability is simply a probability sufficient to undermine confidence in the outcome of the trial SEE: Johnson v State 480 SE2d 733

Petitioner argues that he has proven all points in the above cases. Because bond nor the fact that his trial would have been delayed, if he had been re-indicted, was not issues with him, as he testified at his first PCR hearing, and the order of dismissal and testimonies at the reconstruction hearing reflect. Thus, trial counsel was ineffective

which prejudiced Petitioner, when trial counsel erroneously advised him to waive presentment upon the offenses

Petitioner further argues, its not simply he would have been re-indicted. Petitioner was denied proper notice regarding the mens-rea elements of the charges he was facing — namely adding the language knowingly and intentionally, which material changed the indictments SEE: App.p 6 L12 — App.p 7 L7: S.C. Code §17-19-100 only allows an amendment which does not change the nature of the offense SEE: Cutner v State 580 SE2d 120.

Petitioner also argues that S.C. Code §: 17-23-130-140 makes it mandatory for a written waiver of presentment

SEE: State v Clarkson.

Oral waiver of indictment failed to comply with statutory requirmental. Also see Phillips v State 314 SE2d 313 Which was not sound trial strategy for counsel to erroneously advise Petitioner to waive presentment, denying Petitioner proper notice of the mens-rea elements of the charges he was facing.

ARGUMENT (2)

The P.C.R court errored in ruling that trial counsel's stipulation to the chain of custody of the drugs was not ineffective, despite evidence of a clear break in the custodial chain.

Relevant Facts

Relevant Facts from Trial

Prior to the start of trial, trial counsel stipulated to the chain of custody and the testimony of the chain witnesses. He explained that the stipulation would mean the state would not need to present testimony from the witnesses in the chain of custody SEE: App. p 12 L20 – App. p 13 – L10. As a result, the trial judge released witnesses the state had placed under subpoena. It appears the judge released "Mr Trantham" and Joe Bell as a result of the stipulation SEE: App. p 13 L 11 – L15. Ben Hay, a former employee of the City of Denmark Police Department, and

Judy Walton, a current employee of the City of Denmark Police Department testified that on July 31, 1998. they went to the train station in Denmark at 11:50 pm to intercept drugs officers believed were arriving based upon a tip SEE: App.p 64 L5 - App.p 65 - L13; App.p 76 L20 - 21; App.p 77 L 8 - L14. Hay, Walton and other officers observed two people exit the train, one of whom, Petitioner, went toward a pay phone at the station SEE: App.p. 65 L16 - L21. Three officers approached Petitioner. SEE: App.p 66 L 4 - L10; App p 77 L 17 - L 22. Officers searched Petitioner's belongings and found "big bundles of stuff wrapped in tape SEE: App 69 L 21 - L 25; App.p 78 L 20 - L 21. Walton was the officer who actually removed the package from a pillow allegedly carried by Petitioner SEE: App.p 78 L 5 - L 22.

Walton testified the drugs never left her custody and control - she secured everything at the train station and transported it to the police station SEE: App.p 79 L25 — App.p 80 - L2 Walton identified State's Exhibits #1, #2 and #3 as the bundles she removed from the pillow. Although she identified three bundles as present in court she explained there were only two bundles in the pillow SEE App.p 81 L22 — App.p 82 - L1 She did not know why there were now three items, rather than two. She speculated that the analyst may have broken them down for testing SEE: App.p 82 L2 - L8. Additionally, Walton testified testing indicated the packages were positive for cocaine in the amount of 476 grams and 461 grams SEE App.p 83 L3 - App.p. 84 - L16

At the conclusion of the testimony, the prosecutor

placed the stipulation regarding the drugs. the prosecutor stated. We have a stipulation that the chain of custody on the drugs is not in issue here, and neither are the nature and weight of the drugs. He further stated. We have agreed that what has been testified to is what the facts show SEE: App.p 100 L 20 — App.p 101 L 1. Trial counsel agreed with the recitation SEE: App p 101 L 2 - L 3. The trial judge informed the jury that the stipulation was the same as evidence taken from the witness stand. He explained the jurors were to treat it like any other piece of evidence introduced at trial and take it as a fact that has been put into evidence before you SEE: App. 101 L 4 - L 9.

Petitioner testified in his defense. He denied having a pillow in his possession when he was stopped by police at the train station

SEE: App.p 112 L 14 – L 23

During closing argument, trial counsel explained to the jury that the prosecution had entered into evidence three bags of cocaine and the defense stipulated:

> that all of this stuff was handled properly; that the police when they recovered it, wherever they recovered it from, it went to SLED and got tested properly; that it came back from SLED, and that it is cocaine and it is four hundred and some grams and four hundred and some grams. Nine hundred and some in total. We stipulated to all those things. Ladies and gentlemen, I dispute not how much cocaine it is and I dispute not that it is cocaine, Petitioner disputes that it was his cocaine SEE: App.p 127 L 19 – App.p 128 L 8

In his closing argument, the prosecutor emphasized the undisputed and stipulated evidence. The prosecutor explained the defense agreed the substance was over four hundred grams of cocaine -- leaving the only issue as to the owner of the cocaine SEE: App.p 131 L 22 – L 25.

Relevant Facts from PCR Order of Dismissal

The order of Dismissal filed on October 2, 2006 summarized the testimony of the PCR witnesses (1) The chain of custody paperwork revealed that Judy Walton seized a quantity of White powder from Petitioner and delivered it to Joe Bell. The second form indicated that Christine Simpkins of Denmark Police Police Dept. received a quantity of White power from Joe Bell. No form was signed by Joe Bell, creating a break in the Chain of custody SEE: App. p 190 .

According to the Order, Petitioner testified that trial counsel informed him there were no problems with the chain of custody and based upon this advice Petitioner agreed to

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(1) None of the witnesses disputed the Order's summary of the testimony at the reconstruction hearing

consent to the chain of custody during the trial. Petitioner further testified that if he had known of the chain's defect, he would not have consented SEE: App. p. 188 – App 189.

Trial counsel testified that he reviewed the chain of custody evidence and discussed the evidence with Petitioner. Although trial counsel did not contact Captain Joe Bell or request the missing paperwork, he advised Petitioner to consent to the chain of custody. He believed the prosecutor would be able to produce any missing link in the chain. Trial counsel did not want the chain witnesses to testify because he believed the additional testimony would emphasize the amount of

Cocaine found allegedly in Petitioner's possession SEE: App. p. 189 – App. p 190.

Regarding the issue, the PCR court found Petitioner had failed to meet his burden of proof to show that trial counsel was deficient in consenting to the chain of custody. The PCR judge found the forms did not establish a full chain of custody, but found there was "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 SEE: App. p. 190 – App. p 191 the PCR court further found that the two forms presented during the hearing served to establish who handled the white power substance. The PCR court

found 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. Additionally, the PCR court found no prejudice because Petitioner failed to show that the cocaine would not have been admitted had trial counsel not consented SEE: App. p 191 .

Relevant Facts from Reconstruction Hearing

Chris Wilson, Petitioner's trial counsel, testified at the reconstruction hearing that he had no recollection of his testimony at the PCR hearing in Aug of 2006. However, he remembered the issue concering the chain of custody as it arose at trial SEE: App p 324 L 11 – L 14. Trial counsel recalled discussing the chain of custody issues with Petitioner. Wilson recalled the issue as follows:

As I recall the officer had... who had initially seized the drugs had turned the drugs over to either the chief or the captain at the police dept. who had then turned the drugs over to the SLED box and there wasn't the chain six custody paperwork between the officer and the captain or chief SEE: App.p 324 L15 - L22.

Wilson elaborated that it was Captain Joe Bell who still lived in Bamberg County and the solicitor's office would easily bring Captain Bell to fill in the missing link on the paperwork with testimony Wilson recalled he and Petitioner decided not to proceed with the chain of custody issue SEE: App.p 324 L23 - App.p 325 - L3. Wilson also noted that Petitioner's defense was it was not his cocaine, as opposed to a challenge of whether the substance was actually cocaine SEE: App.p 325 L4 - L5 Therefore, the chain was not vital part of

his defense SEE: App. p 325 L 5. Wilson claimed Petitioner agreed to waive the chain of custody issues SEE: App. p 325 L 7 - L 8.

William D. Rhoad, IV. Petitioner's prior PCR counsel, testified that Petitioner was even more in the dark concerning the chain of custody issue. SEE: App. p 332 L 22 - L 24. Petitioner testified at the PCR hearing that he did not understand what transpired and later Petitioner was surprised to learn trial counsel stipulated to an incomplete chain of custody where the drugs would have been inadmissible as a result of the defective chain SEE: App. 333 L 2 - L 9.

Colleen Dixon the assistant attorney general at the time of Petitioner's initial PCR hearing testified that she recalled trial counsel testifying that he had reviewed the chain of custody forms. Trial counsel noted a break in the chain concerning the police chief or captain. Trial counsel did not think it was a big deal because that officer still worked

here, that he knew the officer was available to testify and that he explained that to Petitioner and said you know, we can object to it, but its not going to do anything and his testimony, basically, was that he didn't want to talk about the drugs SEE: App 339 L 17 - App 340 L 12. She then explained trial counsel's strategy was not to talk about the drugs because the amount of the drugs weighed against Petitioner. Trial counsel did not want to have each person testify as to transferring the drugs as it would damage the defense case SEE: App. p 340 L 13 - L 18.

Dixon described Petitioner as "irritated" by the chain of custody issue. Petitioner's basic testimony was that he and trial counsel discussed the chain of custody issue, but Petitioner did not understand the discussion SEE: App. p 340 L 19 - App p 341 - L 4. During Dixon's testimony, the State introduced, without objection an exhibit purporting to be two chain of custody forms. The forms indicate Walton took initial possession of the evidence on August 3, 1998. Which she

delivered to Captain Joe Bell SEE: App. p 360. The next form indicated Christine Simpkins, a police officer, received the evidence from Captain Joe Bell on August 3, 1998 and delivered the evidence to a person whose name is illegible on the same date SEE: App. p 361.

Petitioner testified that trial counsel advised him it would be irrelevant for him to go through with the chain of custody. Petitioner just went along with trial counsel's advice SEE: App. p 354 L 13 – L 20. He recalled trial counsel testifying that it was not necessary to challenge the chain of custody because the officer was available at the police dept. SEE: App. p 354 L 21 – App. p 355 L 1.

Discussion

In a post-conviction relief proceeding, a Petitioner may be granted relief based on ineffective assistance of counsel if he shows (1) That trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance

SEE: Strickland v Washington 466 U.S. 668. To prove prejudice Petitioner must show that there was a reasonable probability that but for counsel's errors, the result of the proceeding would be different SEE: Cherry v State 386 SE2d 624. A reasonable probability is simply a probability sufficient to undermine confidence in the outcome of the trial SEE: Johnson v State 480 SE2d 733.

Petitioner argues that although the/ this Court has long held that a pary offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far a practicable State v Sweet 647 SE2d 205. Although the evidence must be clear as to who handled the evidence and what was done with it between the taking and the analysis, testimony from each custodian is not a prerequisite to establishing a chain of custody sufficient for admissibility. Benton v Pedlum, 100 SE2d 534; Sweet 647 SE2d at 206. If other evidence establishes

the identity of those who handled the evidence and reasonably demonstrates the manner of handling of the evidence, courts are willing to fill gaps in the chain of custody due to an absent witness Sweet 649 SE2d at 206 Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete State v Carter 544 SE2d 835. This Court has found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the substance was not established at least as far as practicable Id. Police need not account for every transfer of the fungible evidence, but must demonstrate a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial State v Hatcher 708 SE2d 750 - quoting State v Price 731 SE2d 287

Petitioner argues that the PCR court errored in its ruling. Where Joe Bell was in fact a missing link - not a weak link

SEE: App. 190. Which the cocaine should not have been admitted at trial. Where the chain of custody paperwork revealed that Judy Walton seized a quantity of white powder from Petitioner and delivered it to Joe Bell. The second form indicated that Christine Simpkins received a quantity of white powder from Joe Bell — NO form was signed by Joe Bell, creating a break — MISSING link. The forms indicate Walton took initial possession of the evidence on August 3, 1998 which she delivered to Capt. Joe Bell SEE App 360. The next form indicated Christine Simpkins, a police officer received the evidence from Capt. Joe Bell on August 3, 1998 and delivered the evidence to a person whose name is illegible on the same date SEE: App p 361 -

Here, in the case at bar, the State did not establish a continuous chain of custody of all the persons who had custody and or control of the evidence nor the

Manner of handing the evidence – a reasonable assurance the condition of the item remained the same from the time it was obtained until its introduction at trial, ABSENT trial counsel's stipulation. Thus, the drugs was inadmissible SEE: State v Johnson 456 SE2d 442 Also see State v Chisolm 584 SE2d 401.

Judy Walton identified State's Exhibits #1, #2 and #3 as the bundles she removed from the pillow. Although, she identified three bundles as present in court, she explained there were **only two** bundles in the pillow SEE: App-p 81 L 22 – App-p 82 – L1. She did not know why there were now three items, rather than two, she was only able to speculated that the analyst may have broken them down for testing SEE: App-p 82 L 2 – L 8.

And, two case numbers L98-09313 and L98-09314 in the chain of custody was submitted allegedly to SLED dope dox on August 4, 1998. App:

The chemist swore under oath by way of Notary republic to each report on Nov 4 1999 fifteen months after reciept of each case. But there was never any testimony — Sworn in any form that the two bundles was broken down into three bundles for testing. 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, Capt. Joe Bell came into possession of the evidence. Now, on case number L98-09314, the second link, Capt. Joe Bell stated that he recieved the evidence on August 4, 1998. However, the notary shows a date of July 3, 1998 — one month prior to Petitioner's actual arrest upon the charge(s).

Not only does the procedure before analysis and the above argument raise questions as to the admissiabilty of the drugs.

But also the fifteen month delay, which caused several preliminary hearing to be rescheduled, also raise questions as to whether the drugs was stored and remained

in the same condition from the time it was obtained until its introduction at trial. which clearly was an big issue at trial SEE App p 81 L 22 – App. 82 _ L 1 ; App p 82 L 2 – L 8 . And, looking at SCR Crim. P_ Rule 6 (b) – establishing a chain of custody of a controlled substance may be established by "a certified or sworn statement signed by each successive person having custody of the evidence that he or she delivered it to the person stated" as long as the statement contained a sufficient description of the substance to distinguish it and the statement provided that the substance was delivered in substantially the same condition as it was received. Rule 6 (b) SCR Crim. P also states that if the chain is established through the sworn statement, then Rule 6 provides that the persons signing the statements need not testify in court. However the defendant may demand appearance in court of the persons within the chain of custody not later than ten days prior to the trial of the case.

Trial counsel's decision to stipulate to the chain of custody was in fact deficient performance resulting in prejudice to Petitioner. The clear testimony was Walton removed two bundles from the pillowcase. The bundles were transported to SLED, after passing through several hands at the police station. When the bundles were presented in court, there were three, rather than the two bundles initially seized. This was significant in light of the charge presented against Petitioner_trafficking cocaine, which carried a minimum sentence of twenty-five years due to the weight of the drugs. Trial counsel's stipulation permitted the prosecution to introduce the evidence despite the obvious fact that it had changed in a substantial way after being seized. Although, the paperwork identified Joe Bell as having had custody and control over the evidence at some time, neither the paperwork nor the evidence presented at

trial explained how or when the drugs were altered from two bundles to three bundles. The prosecution could not provide reasonable assurance that the evidence remained the same from the time it was obtained until its introduction at trial as it had so obviously been changed. Although, the defense theory may have been that the drugs did not belong to Petitioner, if the state had been unable to prove the chain of custody, then the drugs would have been inadmissible. Without the drugs, the prosecution had no case against Petitioner. He was simply a man who arrived at the train station in Denmark in July of 1998.

ARGUMENT (3)

The PCR court errored in ruling that trial counsel was not ineffective, in failing to present evidence/expert that the signative on the waiver of right form was not the Petitioner.

Relevant Facts

Relevant Facts from Trial/pre-trial motion.

During pre-trial motions, trial counsel told the court that he maybe have a statement issue that will require a Jackson v Denno hearing. that it was counsel's understanding that law enforcement will testify that Petitioner made an oral statement after he had been taken into custody and arrested and charged, concerning why he was in South Carolina and that his knowledge of what was recovered was drugs and why he had the drugs. SEE: App. P

34 L 18 – App. 35 – L 6.

Assistant Solicitor Gibbons, stated I guess I'll go into the suppression first because if we don't get through the suppression we don't need the Jackson v Denno SEE: App 36 L 16 – L 18

Officer Walton testified Petitioner was brought back to the police station, and interviewed by couple of other officers SEE: App. p 42 L 4 – L 11. Where Petitioner was read his right, and his rights was reduced to writing. Although Officer Walton didn't know if she did it or the DEA Agent actually read Petitioner his right SEE: App. p 42 L 13 – App. p. 43 – L 23.

Officer, Walton also testified that Petitioner understood his rights and signed, which she witnessed his signature, with no promises threats in any form or reward SEE: App. p 43 L 25 – App. p 45 – L 7. But Petitioner gave a verbat statement, which officer Walton

presented SEE: App.p 45 L 8 – App.p. 46 – L 21

Although, Officer Ben Hay testified that he was also involved in the questioning of Petitioner after he was arrested, but he was not aware of any statements Petitioner had made. SEE: App p 53 L 7 – L 21.

Counsel Wilson advised the Court Petitioner would be called to testify in that hearing concerning that Petitioner did not consent to a search of any of his belongings. But counsel said nothing about Jackson v Denno issue SEE: App p54 L 7 – L 12

But on App.p 57 L 19 – L 25 Counsel Wilson tell the Court that just on the issue of the Statement, he believed it would be his client's (Petitioner's) position not so much--- We haven't conducted a Jackson v Denno anyway to any extent, but his position is going to be more whether the statements were actually made, rather than whether they were voluntary or not.

We ask that you take that into consideration

The Judge, ruled:

I thought the stop was proper, and the length of the detention obviously--- a ten minute span-- I don't find any problem with that, the length or duration.
Based upon the circumstances taken together, the consent was given for the search of his belongings.
The drugs in this case were found and the statement was voluntary. I think, and I found the testimony of the officers was very credible, both as to the search and to the statement SEE App. p58 L1 – L8. The statement was given after proper Miranda was given and voluntarily. SEE: App. p58 L14 – L15.

Redevant Facts from Trial

Officer Hay testified did not conduct an interview with Petitioner. And, that his involvement with Petitioner was pretty much at the train station SEE: p70 L6 – L12. Counsel did not cross on statement/waiver

issue SEE: App p 71 L 5 _ App p 96 _ L 9

Officer Walton testified that Petitioner was taken back to the police Dept. her and another agent interviewed Petition, where Petitioner was read his rights SEE: App p 85 L 6 _ App p 86 _ L 11. Walton testified that Petitioner signed the waiver form, and the solicitor moved exhibit 6 into evidence without objection from trial counsel SEE: App p 86 L 14 _ App p 89 _ L 1.

Officer Walton further testified that Petitioner had made a verbal statement. And, the solicitor ask Officer Walton to tell the jury and the court the nature of the statement Petitioner made,
Counsel objected, which his objection was over ruled. SEE: App p 89 L 2 _ L 14: From Officer Walton's notes she was allowed to tell the jury and the court Petitioner alleged involvement with the drugs SEE: App p

89 L 15 — App. p 91 — L 19.

Counsel never cross on statement/waiver issue SEE: App. p 91 L 22 — App. p. 98 L 12.

Although, counsel brought up that there was no fingerprint on the bag of drugs SEE: App. p 96 — App. p 97 L 4. Officer, Walton testified that was no need for fingerprints.... because Petitioner was very cooperative SEE: App. p 98 L 14 — App p 99 L 10.

Counsel re-crossed officer, Walton on whether it was officer Hux or her who spoke/took Petitioner's alleged statement Officer, Walton testified that it was her and a DEA Agent in the room, with the door shut SEE: App p 100 L 5 — L 16.

Counsel, Wilson brought up his side-bar objection regarding Petitioner's alleged statement(s) — based on Rule 403, prejudical effect/probative value. Which the Judge

overruled counsel's objection, stating he find that the statement is not more prejudice than probative SEE: App.p 101 L 19 — App.p 103 L 7.

Petitioner testified that after he was arrested he did not make any statement to officer, Halton or any other police officer SEE: App.p 115 L 5 — App.p 116 - L 16 Nor did he say the drugs belong to him SEE: App.p 116 L 17 — L 25

Petitioner also testified that he did not sign any waiver form, it was not his signature — never seen it before, and he never made any statement SEE: App.p 120 L 15 — App.p 121 - L 9.

Relevant Facts from PCR Order of Dismissal

The Order of Dismissal filed on October 2, 2006 summarized the testimony of the PCR witnesses(1) According to the Order, the Court found trial counsel's testimony to be credible and the Petitioner's testimony on this issue not credible Trial counsel testified that the Petitioner 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. SEE: App.p 191 – App.p 192.

The PCR court further ruled that Petitioner claimed that trial counsel should have called

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(1) None of the witnesses disputed the Order's summary of the testimony at the reconstruction hearing

a handwriting expert to testify at the trial. No handwriting expert was called at the PCR hearing citing Underwood v State 425 SE2d 20: Bassette v Thompson 915 F2d 932: Clark v State 434 SE2d 266: Glover v State 458 SE2d 538 Bannister v State 509 SE2d 807: SEE: App p 192

Relevant Facts from Reconstruction Hearing

Chris Wilson, Petitioner's trial counsel, testified at the reconstruction hearing that he had no recollection of Petitioner's issue regarding his signature – not being his on the waiver form, from his prior PCR hearing SEE: App p 325 L 11 – L 17. But counsel did recall the matter coming up at Petitioner's trial – there being a Jackson v Denno hearing and there was some discussion. As counsel recall Petitioner testimony or his position was not that he was... not that he did not say the things that the officer attributed

to him. There was no written statement. there was only verbal or oral statements that law enforcement was going to testify about what Petitioner said. and in counsel's review of Petitioner's case and of that transcript it looked like our position was that he was, not going to dispute that he made some statements, just that he did not say what they said he said. but counsel could not specifically recall that and he did not recall anything about the PCR hearing on that SEE: App.p 325 L18 - App.p326_L8.

And. upon a follow-up question, counsel also did not know whether Petitioner had call an handwriting expert at his first PCR hearing App.p326 L9 _ L15.

William D. Rhoad, IV Petitioner's prior PCR Counsel, testified that he did not recall this particular issue one way or the other SEE: App.p 333 L10 _ L15. Although.

Counsel Rhoad remember that he did not call a handwriting expert to testify upon Petitioner's behalf at the PCR hearing SEE: App.p 333 L16 – L19. But he did not have any reason to believe that the order did not include a summary of all the testimony presented at the hearing SEE: App.p 333 L 25 – App.p 334 – L 4.

Dixon, the assistant attorney general at the time of Petitioner's first PCR hearing testified that she Petitioner added an allegation but she did not remember what the signature was on, did not remember if it was a waiver of right form or what the signature was, but there was some allegation that Petitioner told his PCR counsel.... that not being his signature SEE: App.p 336 L 21 – App.p 337 – L 2. But Dixon remembered

that there was no handwriting expert called App p 337 L 11 – L 13.

Dixon testified that Petitioner's testimony was that the signature on the waiver of rights form was not his. And Trial Counsel did not feel that was a meritorious issue and did not feel like it was something he needed to present to the court SEE: App p 342 L 6 – L 22. Dixon, further testified that he did not really go into on his direct examination why he felt that way because he (Dixon) did not feel it was necessary. They did not have a handwriting expert to call and so he did not delve into it any more than him saying he did not feel like it was an issue properly brought before the court. SEE: App p 342 L 19 – App p 343 L 2.

Petitioner testified that the signature on the waiver rights form was not his.

and trial counsel was ineffective for failing to challenge the handwriting. And that he had testified at his first PCR hearing that he wanted the expert — to have him to write his name down, which Petitioner testified that he had discussed this issue with trial counsel prior to trial SEE: App.p352 L18 — App.p353_L14.

Petitioner testified that Trial counsel testified at the PCR hearing, said that it wouldn't that me getting an expert at that time he said it wouldn't do no good for me to have an expert... that they didn't have an expert available at that time SEE: App353 L19_L24

Petitioner further testified that he did not present testimony from an expert at the PCR hearing SEE: App.p353 L25_ App.p354_L2.

Discussion

In a post-conviction relief proceeding, a petitioner may be granted relief based on ineffective assistance of counsel if he shows. (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance See Strickland v Washington. 466 U.S. 668 To prove prejudice petitioner must show that there was a reasonable that but for counsel's errors, the result of the proceeding would be different See Cherry v State 386 SE2d 624. A reasonable probability is simply a probability sufficient to undermine confidence in the outcome of the trial See Johnson v State 480 SE2d 733

Petitioner argues that he has proven all points in the above cases. Thus, the PCR court clearly errored in its ruling SEE: App. p 199 - App p 192. When trial counsel was the one himself that did not properly raised this issue before the

trial Court SEE: pre-trial matters App.p.57 L19 - L25. Counsel's position on this matter was that its more whether the Statement were actually made, rather than whether they were voluntary or not.

Petitioner argued that this was a meritorious issue in both ways at his PCR hearing. Where officer Ben Hay tesified that he was also involved in questing Petitioner - but he was not aware of any statement Petitioner had made App.p 53 L7 - L21. But officer Hay goes on to testify during trial, that he did not conduct any interview with Petitioner, that his involvement with Petitioner was pretty much at the train station App.p 70 L6 - L12.

Now during pre-trial matters Officer Walton testified that Petitioner was interv-

ieved by a couple of other officers SEE: App.p 42 L4 - L11. But when counsel question Officer. Walton on re-cross, she testified that it was her and a DEA Agent in the room App.p 100 L5 - L16. Although, Officer, Walton did not know if she did it, read Petitioner his right reduced to writing or the DEA Agent during pre-trial matters SEE: App.p 42 L13 - App.p 43 - L23.

Petitioner argued during his P.C.R hearing that before trial and during trial that Officer, Walton never question him, And, Counsel never questioned who was this DEA Agent nor ask about his/her name.

Although, counsel alleged during

Petitioner's reconstruction hearing that law enforcement was going to testify about what Petitioner said. When in fact Officer Walton was the only person who testified to what Petitioner allegedly said. Petitioner further argued that counsel prejudiced him, when counsel did not move the court for a handwriting expert per. S.C. Code Ann § 17-27-60 or 17-3-50 But told Petitioner, that they didn't have an expert available at that time SEE: App. 353 L 19 - L 24: Also see App. p 352 L 18 - App. p 353 - L 14

Petitioner argued and now argues an handwriting expert would have shown that it was not Petitioner's signative on the waiver of right form. Thus, it

WOuld have called into question Officer, Walton credibility upon Petitioner's alleged oral statement. Moreover, this alleged information Officer, Walton testified that she had received SEE: App.p 47 L19 – L21. Although, there was never any mention from any law enforcement, as to any details as far as race, "complexion", sex, age height etc regarding this alleged description. (When in fact Officer, Hay testified that they was looking for two (2) people SEE: App.p 65 L3 – L21 NO description of this second person.

This handwriting expert could have also caused the Officers credibility upon the Chain of custody to be question – NOT stipulated to. Also the 'consent to search' issue questable.

Here, credibility was the key issue in the trial judge's ruling SEE: App.p 58 L1–L8: App 58 L14 – L15 upon the waiver issue.

Although, there was no Jackson v Denno hearing because counsel failed to properly raise it SEE: App. p 57 L19_L25 And without it being properly raised.... Counsel's objection to what Petitioner had allegedly told officer, Walton, did not have any merits at all. Because, without the Jackson v Denno hearing the waiver of rights form "which counsel did not object to" SEE: App. p 86 L14 _ App. p 89_L1 - all came into evidence, as being voluntarily knowingly and intelligently made SEE: Miranda v Ariz 384 U.S. 436: Also see App. p 89 L 2 _ App. p 91_L19: Further see Trial court ruling App. p. 102 L 4 _ App. p 103_L 7.: Jackson v Denno 84 S.Ct. 1774

Although, the PCR court found by and that trial counsel testimony that this issue was not properly raised before the court, which is in error, due to the above arguments

Also see App.p 191 - App.p 192. Also the assistant attorney general Dixon testified that trial counsel said that he did not feel like it was something he needed to present to the court SEE: App.p 342 L6 - L22; Also see App.p 342 L19 - App.p. 343 - L2.

Which clearly trial counsel did not argue any issue in the Jackson v Denno 84 S.Ct 1774 hearing - regarding Petitioner's statement or waiver that was properly preserved, did not object to the waiver of rights form, did not hire his own handwriting expert and tried to object to Officer Walton testimony of what Petitioner had allegedly told her, which was not objectable after he had failed to have a proper Jackson v Denno hearing from the very start. Which surly prejudiced Petitioner's and Petitioner's whole trial. And this issue had an substantial and injurious effect and influence in determing the jury's verdict.

The PCR Court also ruled that Petitioner did not call a handwriting expert at his PCR hearing to prove prejudice upon this issue. SEE: App. p 192.

Petitioner argues that since South Carolina has prohibition against hybrid representation SEE: Foster v State 379 SE2d 907. And, in the face of due process See Martinez v Ryan 132 SCt. 1309 which recognize ineffective assistance of PCR Counsel. Petitioner argue that this issue should be remanded back to the PCR court, with order for a handwriting expert. Since Petitioner had no way of getting a hand-writing expert without the aid of PCR counsel.

CONCLUSION

Based on the foregoing arguments, Counsel's

Motion to be relieve as Petitioner's Counsel should be denied, and grant her petition for writ of certiorari and order full briefing on her issue, as well as add Petitioner's issues. Where Petitioner is entitled to a new PCR hearing upon issue three (3), as well as a new trial upon all issue, due to the prejudical cumulative effect of trial counsel and PCR counsel.

Date 9-25-2013

Respectfully Submitted
Michael Miller

PROOF OF SERVICE

I Michael Miller certify that I have served my Pro se brief upon the below person(s). By placing the above said into McCorr. Inst. mail room on this 25 day of SEPTEMBER to be placed in the U.S. mail with postage perpaid

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SWORN to and subscribed before me
this 25th day of September 2013
Stephanie Marshall
Notary Public
My Commission Expires
May 4th 2021

s/ Michael Miller

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