Ernest Battle, SCDC#165247
Evans Correctional Institution
610 Hwy 9 West /
Bennettsville, SC 29512-2130

December 12, 2013

South Carolina Supreme Court
Daniel E. Shearouse
Clerk's Office
Supreme Court Bldg., P.O. Box 11330
Columbia, SC 29211

RE: Ernest Battle v. State, Appellate Case No. 2013-001776

Pro-Se Petition For Writ Of Certiorari.

Dear Hon. Shearouse,

Please find enclosed Petitioner's Pro-Se Petition For Writ Of Certiorari in the above Case No. 2013-001776. Please clock-date-stamp-file upon receipt and return a copy to the Appellate at the above listed address. Thank you in advance.

Sincerely,

/s/ Ernest Battle
Ernest Battle

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Ernest Battle,

Petitioner,

v.

State of South Carolina,

Respondent.

APPELLATE CASE NO. 2013-001776

PRO SE PETITION FOR WRIT OF CERTIORARI

Ernest Battle
Pro Se Petitioner

Evans Correctional Institution
610 Highway 9 West
Bennettsville, SC 29512

INDEX

ISSUES PRESENTED

I. Whether Defense Counsel was ineffective in failing to object to requested Mere Presence Charge that did not instruct the Jury on Law of Dominion and Control?

II. Whether Defense Counsel was ineffective in failing to file Pre-Trial Hearing on Motion To Suppress Cocaine Evidence and object to it's admission during Trial, where evidence was clear from the Record that Co-Defendant not Petitioner, possessed the Cocaine found?

III. Whether Defense Counsel was ineffective in failing to object to Petitioner being subjected to Double Jeopardy after Acquittal on Conspiracy Charge?

STATEMENT

Petitioner was convicted of Trafficking in Cocaine and for Possession With Intent to Distribute Cocaine with proximity of a School on June 4, 2001, after a Jury Trial held before the Honorable Thomas L. Hughston, Jr., in Charleston County. Respective sentences of twenty-five (25) years and ten (10) years were imposed. William McGuire, Esquire, and Lesli Sarji, Esquire, represented Petitioner. Mike Bosnak, Esquire, Mark Bourdan, Esquire, and John Crout, Esquire, were the Assistant Solicitors. (App.p.1-p.515).

Petitioner appealed his convictions and the Appeal was Dismissed by the Court of Appeals on May 20, 2003, after a Review pursuant to Anders v. California, 386 U.S. 738 (1967); State v. Battle, OP.NO. 2003-UP-348, (App.p.517-p.531). Petitioner filed an application for Post-Conviction Relief on September 10, 2004, (App.p.532-577). Respondent filed a Return dated May 25, 2005, (App.p.578-p.583). An Evidentiary Hearing was held on May 30, 2006, before the Honorable William P. Kessley. Petitioner was present and represented by Colleen Dixon, Assistant Attorney General. Petitioner testified in his own behalf and called Lara Nelson, Joshua Robinson, Felicia Smalls, James Condom, Jason Wallace, and Rodney Davis to testify. William S. McGuire testified in Respondent's behalf. (App.p.585-p.752). On May 30, 2006, Judge Keesley issued an Order Granting Relief on four (4) separate Issues, but Denied the other Issues that were presented. (App.p.859-p.860).

On July 5, 2006, Judge Keesley issued a Proposed Order Granting Relief on one (1) Issue, but ruling against Petitioner on the remaining Issues presented. (App.p.753-p.771). Respondent appealed the Grant of Post-Conviction Relief and the South Carolina Supreme Court Reversed the PCR Court on April 13, 2009. (App.p.798-p.826). On October 12, 2010 Petitioner filed a second application for Post-Conviction Relief alleging his first PCR Counsel was ineffective for not Cross-Appealing on the remaining Issues. (App.p.827-p.843). Respondent filed a Return and Motion To Dismiss dated May 9, 2011. The Honorable Kristi L. Harrington issued a Conditional Order Of Dismissal dated August 16, 2011. (App.p.850-p.855). Petitioner filed an Objection And Response dated September 19, 2011. (App.p.856-p.863). On April 4, 2012, Judge Harrington issued a Final Order Denying and Dismissing Petitioner's application for Post conviction Relief. (App.p.864-p.866). Petitioner appealed and filed a Petition for Writ of Certiorari on October 15, 2012. (App.p.867-p.875). On March 15, 2013, the South Carolina Supreme Court Remanded Petitioner's Case for an Evidentiary Hearing on Petitioner's current application for Post-Conviction Relief. (App.p.877-p.878). On July 22, 2013, the Honorable Deadra L. Jefferson issued a Consent Order Granting a Belated Appeal on the Issues that were not Cross-Appealed pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d. 395 (1991) (App.p.879-p.882). Petitioner now files a Pro Se Petition For Writ Of Certiorari. This Appeal follows:

ARGUMENT I

Defense Counsel was ineffective in failing to object to requested mere presence charge that did not instruct the Jury on essential element of dominion and control.

Petitioner was accused of trafficking in excess of 28 grams of cocaine in North Charleston on July 15, 1999, while at 1855-B Reddin Road. (App.p.476). The State's key witness was Lashawn Floyd. Floyd was caught with the drugs in her actual possession while in the process of an attempt to sell it to C.I., Jason Wallace. While in hot pursuit of Floyd, officers witnessed her throw an object over her Guardrail, which later tested positive for cocaine. (App.p.130-p.135). Floyd testifies that she got the drugs from Petitioner although there was no witness to the alleged drug transaction by any Police Officer or Undercover Officer's. (App.p.80-p.81). Floyd was in actual physical custody of the drugs. Floyd is the sole proprietor of 1855-B Reddin Road. There was no special relationship between Floyd and Petitioner. A search of Petitioner's car, resident and person, revealed no drugs or illegal activity. (App.p.128-p.129).

Defense Counsel requested a Jury Charge on mere presence. The mere presence instruction was not only defective but also failed to instruct the Jury on essential element of dominion and control which was necessary for a finding of constructive possession. Since Petitioner did not have actual possession of cocaine found. The Prosecutor's Opening Statement charged that Petitioner had in his possession (72)grams of cocaine.(App.p.83).

"[B]efore" a person may be convicted of the offense of trafficking in cocaine, State must prove person knowingly possessed ten or more grams of cocaine; person's mere presence where drugs are present would be insufficient to convict without more. State v. Scott, 400 S.E.2d. 784 (S.C.App.1991). In a prosecution for trafficking in cocaine, S.C. Code Ann. :44-53-370 (e), State must prove the essential element of the offense charged in the Indictment, which is "possession".

State must prove that person charged either had actual or constructive possession of the drugs. State v. Ellis, 207 S.E.2d. 408 (S.C.1994).

Actual possession occurs when the drugs are found to be in the actual physical custody of person charged with possession. Constructive possession occurs when a person has knowledge of presence of drugs and dominion and control, or the right to exercise dominion and control over the drugs.

S.C. Code 1976, §44-53-370(a)(1). Even presence of Defendant in area containing drugs, absent his dominion and control over them is as a matter of law, insufficient to prove his possession or possession with intent to distribute drugs. Under South Carolina Law, proof of dominion and control as required to sustain drug possession conviction may include evidence that accused controlled the premises where drugs were found or had a special relationship with lessee or owner of the premises. S.C. Code 1976, :44-53-370 (a)(1). Since Petitioner did not have actual possession of the drugs found or owner or lessee of the premises upon where they were found, proof of

Petitioner's constructive possession was required to sustain drug conviction.

[W]hen a Jury is charged with mere presence, the Trial Court must give specific, proper charge. (1), Court must charge the Jury that the Defendant's presence at the location or scene where drugs are found, absent his dominion and control, as a matter of law, insufficient to find Defendant guilty of possession or possession with intent to distribute drugs beyond a reasonable doubt, (2) The charge must also inform the Jury that the State must prove beyond a reasonable doubt that the Defendant had dominion and control over the drugs or the right to exercise dominion and control over the drugs. State v. Brownlee, 318 S.C. 34, 37, 455 S.E.2d. 704(Ct.App.1995); State v. Lee, 298 S.C. 362, 365, 380 S.E.2d. 834, 836(1988); State v. Tabory, 260 S.C. 355, 196 S.E.2d. 111, 113(1973).

See also; Goldsmith v. Witkowski, 981 F.2d. 697(4thCir.1992); which held: Under South Carolina Law, mere presence of person in area containing drugs, absent evidence of his his dominion and control over them is, as a matter of law, insufficient to prove his possession of drugs. S.C.Code 1976, §44-53-370 (a)(1).

Under South Carolina Law, even presence of Defendant in area containing drugs coupled with knowledge of drugs is insufficient to sustain possession conviction; State must also prove dominion and control. S.C. Code 1976, §44-53-370 (a)(1).

In Goldsmith supra; the Defendant did not have actual possession of drugs found in apartment and because he did not

have actual possession of the drugs in the apartment, proof of his constructive possession was required. To establish constructive possession was required. To establish constructive possession, State bears the burden of proving beyond a reasonable doubt that Defendant had Dominion and Control over the drugs found or the premises upon where the drugs were found. Dominion and Control is an essential element of constructive possession.

In Petitioner's case the Trial Court failed to instruct the Jury on essential element of Dominion and Control, which is necessary to find that Petitioner constructively possessed the drugs.

Essentially, the State only proved Petitioner's presence in area containing drugs, absent his Dominion and Control which under South Carolina Law, as a matter of law, was insufficient to find him guilty beyond a reasonable doubt of possession of drugs.

In Petitioner's case, his Trial Counsel was ineffective in failing to object to the defective and incomplete mere presence instruction which failed to adequately cover the law on constructive possession.

Petitioner was prejudiced as result of counsel's failure to object and should receive a New Trial.

ARGUMENT II

Defense Counsel was ineffective in failing to file Pre-Trial Hearing or Motion To Suppress Cocaine Evidence and object to it's admission during Trial, where evidence was clear from the Record that Co-Defendant and not Petitioner possessed the cocaine.found.

Defense Counsel was well aware that Petitioner did not possess any cocaine long before Petitioner proceeded to Trial. Prior to Trial Defense Counsel was in possession of the SLED Report, Rule 6-B Chain of Physical Custody Form submitted by seizing officer; Detective Richard Glenn Campbell. In the Report Detective Campbell clearly and specifically indentified the individual that he seized the cocaine from in regard to Best Kit No. B111717, as Lashawn "Shantelle Floyd", not "Ernest Battle", the Petitioner. Petitioner, prior to Trial specifically made request Defense Counsel to file a Pre-Trial Hearing or Motion To Suppress the Cocaine, which the State intended and did introduce against Petitioner during Trial. Petitioner again specifically requested Defense Counsel file Motion To Suppress Cocaine Evidence during Trial, However, counsel stated that he had already discussed it with the Judge and he, the Judge, was going to allow it into evidence. During it's admission and introduction, Petitioner again requested that Defense Counsel object to it's admission, yet defense counsel refused and failed to objectto it's admission.

While testimony was and should have been allowed concerning

the cocaine evidence found on Co-Defendant and not Petitioner, it's admission only served the purpose for which it was intended and that was to prejudice the Petitioner. Petitioner was tried alone and the introduction and admission of the cocaine was highly prejudicial to Petitioner.

See; Hollines v. Estelle, 569 F.Supp. 146 (W.D.Tex.1983); Counsel's failure to file Motion To Suppress in a timely manner, was an abdication of counsel's duty to advocate Client's case.

Had Defense Counsel filed Pre-Trial Hearing on Motion To Suppress Cocaine Evidence and Object to it's admission during Petitioner's Trial, the Objection, at least would have preserved issue for Appellate Review.

The Record demonstrated that Petitioner was never found to be in possession of any cocaine evidence and Defense Counsel was aware of this fact but simply ignored Petitioner's requests. There is no logical explanation or strategical reason why Defense Counsel failed to file Pre-Trial Hearing on Motion To Suppress Cocaine Evidence or Object to it's admission during Petitioner's Trial.

This is not a case where counsel did not choose, strategically or otherwise, to pursue one line of defense over another. Rather, counsel here clearly abdicated his responsibility to effectively advocate Petitioner's cause. See; Washington v. Strickland, supra, 693 F.2d. 1243 at 1251, Washington v. Watkins, supra, 655 F.2d. at 1355-56. See also Beavers v. Ballcom, 636 F.2d. 114 (5thCir.1981), Gaines v. Hopper, 575 F.2d. 1147 (5thCir.1978), Gomez v. Beto, 462 F.2d.

596 (5thCir.1972).

This Circuit has now established that trial strategy can never include the failure to conduct a reasonably substantial investigation into at least one of a Defendant's plausible lines of defense.

In Petitioner's case; Defense Counsel's serious and fundamental procedural omissions, such as his failure to file Pre-Trial Hearing Motion To Suppress Cocaine Evidence and object to it's admission during Trial, object to the Prosecution's testimony before the Jury that Petitioner possessed and sold cocaine was prejudicial to Petitioner's Case.

Before it could be determined that counsel's ineffective representation prejudiced the defense so as to entitle Petitioner to relief, it would be required that counsel's ineffective representation resulted in potentially meritorious Motion To Suppress not being made and that if such Motion had been made and granted there was a reasonable possibility Petitioner would not have been convicted Chapman v. California, supra, at p.23, 87 S.Ct. 824.

ARGUMENT III

Defense Counsel was ineffective in failing to object to Petitioner being subjected to double jeopardy after acquittal of conspiracy charge.

Petitioner was indicted for Trafficking in Cocaine §44-53-370 (e)(2), conspiracy to violate South Carolina Narcotic Laws §44-53-420 and Possession with intent to Distribute Cocaine within proximity of a School §44-53-445.

Petitioner was granted a Directed Verdict of Not Guilty on the Conspiracy Indictment No. §44-53-420. The Prosecutor opened and closed before the Jury defining conspiracy and advising them that one of the charges for them to consider my guilt on was conspiracy. (App.p.83-p.84), (App.p.389). After Petitioner was granted Directed Verdict of Not Guilty on Indictment §44-53-420, the following transpired between the Court and the Prosecutor.

The Court --- You can't do that. And if the evidence was presented to the Grand Jury, saying that he conspired with somebody to purchase cocaine, to now change that to "sell cocaine", I think is a real big difference. It hasn't been considered by the Grand Jury. So I appreciate your position.

Mr. Bourdon: Yes, Sir.

The Court: But I think, looking at this, I cannot allow that amendment because it would change substantially what he was indicted for ---

Mr. Bourdon: Yes, Your Honor.

The Court: --- Which was to purchase -- to conspire with

somebody to purchase cocaine. And now change it to a conspiracy to sell cocaine, that wasn't presented to the Grand Jury. That's the way I see it.

Mr. Bourdon: Yes, Sir. Your Honor the gravamen of the offense is obviously the trafficking in the proximity. The State would just ask if you are going to Dismiss one Indictment they not draw any adverse inference.

The Court: I agree. I'm just not going to say anything about it all.

Mr. Bourdon: Yes, Sir. So that their consideration would just be the two Indictments rather than trying to read into why the Conspiracy one is not here.

The Court: I agree.

Defense Counsel, knowing that the State opened and closed before the Jury charging conspiracy and after Petitioner was Directed Verdict of Not Guilty on Indictment §44-53-420, should have but failed to request curative instructions. Instead, Defense Counsel should have also objected to the Court's witholding from the Jury that Petitioner was acquitted of the Conspiracy Charge because the Jury could still infer and consider Petitioner's guilt on the conspiracy charge although having been acquitted. Defense Counsel's failure to object and request curative instructions prejudiced Petitioner, because the Court brought the Jury back in and re-charged them on the offense of trafficking in cocaine which incorporates the conspiracy element. (App.p.430-p.431).

The Double Jeopardy Clause of the Fifth Amendment

guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Clause provides three separate protections for Criminal Defendant's: against reprosecution for the same offense after an acquittal, against prosecution for same offense after convicted, and against multiple punishment for the same offense.

In State v. Constineira, 341 S.C. at 625-26, 535 2nd at 452-53; the South Carolina Court of Appeals held: "There is no distinction between the substantive offense of trafficking in cocaine §44-53-370 (e) and the offense of conspiracy to traffick. It found that the language of :44-53-370 (e) under which the Defendant was indicted incorporates conspiracy within the substantive offense. Petitioner was also indicted under §44-53-370 (e), trafficking statue, which incorporates conspiracy within the substantive offense.

Indictment's charging a single offense in different counts are multiplicitious. Such Indictments may result in multiple sentencing for a single offense in violation of constitutional double jeopardy provisions, or otherwise prejudice the defendant. U.S. v. Sandoval, 20 F.3d. 134, 139 n.17 (5thCir.1994). (Indictment charging conspiracy to distribute cocaine and methamphetamine on two separate counts multiplicitious because each count was based on same agreement), U.S. v. Brandon, 17 F.3d. 409, 422 (1stCir.) 115 S.Ct. 80 (1994).

Double Jeopardy Clause protects against even the "risk" of being punished twice for the same offense. Abney v. U.S., 431

U.S. 651, 660-62 (1977); see U.S. v. Elliott, 849 F.2d. 886, 890 (4thCir.1998); Although multiple acts of physical delivery of a controlled substances technically distinct, when they occur essentially at same time, same place, and involve same participants, must be considered single offense under statue prohibiting participation in any aspect of distribution chain. The "Blockburger Test" determines whether multiple prosecution for single act constitutes prosecution for same offense.

Defense Counsel's failure to object to the Trial Court's witholding conspiracy acquittal from Jury and failure to request curative instructions clearly put Petitioner at risk of double jeopardy in violation of his 5th, 6th and 14th Amendment Rights to the U.S. Constitution. Counsel's performance fell below an objective standard of reasonableness, thus constituting ineffective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. at 689.

CONCLUSION

Petitioner's Writ should be granted and he should be given a New Trial.

Respectfully Submitted,

Sworn to and subscribed before me
this 17th day of December 2013

(Notary Public of South Carolina)

My Commission Expires Feb 7th 2023

/s/ Ernest Battle
Ernest Battle, SCDC#165247
Pro Se Petitioner

This 16th day of December, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Charleston County

William P. Kessely, Circuit Court Judge

Ernest Battle,

Petitioner,

v.

State of South Carolina,

Respondent.

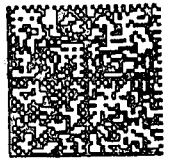
CERTIFICATE OF SERVICE

I certify that on December 16, 2013, that I, Ernest Battle, SCDC#165247, forwarded for filing one (1) original Pro Se Petition for Writ of Certiorari to the Clerk of the South Carolina Supreme Court, Hon. Daniel E. Sherouse at South Carolina Supreme Court, Supreme Court Bldg., P.O. Box 11330, Columbia, S.C. 29211.

Respectfully Submitted,

/s/ Ernest Battle
Ernest Battle, SCDC#165247
Pro Se Petitioner

SWORN to and **SUBSCRIBED** before me
This 17th day of December, 2013
Notary: Diane B
Expires: Feb 7th 2023



UNITED STATES POSTAGE
PITNEY BOWES
02 1M $ 01.52⁰
0008002055 DEC 17 2013
MAILED FROM ZIP CODE 29512

Mr. Ernest Battle # 165247
Evans Correctional Inst.
610 Highway 9 West
Bennettsville, S.C. 29512
F-2B-240A

TO: The Supreme Court of South Carolina
Hon. Daniel E. Shearouse
Clerk of Court
Post Office Box 11330
Columbia, South Carolina 29211

LEGAL MAIL USE ONLY