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June 4, 2014

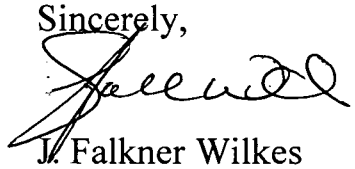
Daniel E. Shearouse, Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Reginald Miller v. State of South Carolina
C.A. No.: 2010-CP-42-06870

Dear Mr. Shearouse,

Enclosed please find the original and six copies of the Petitioner's Petition for Writ of Certiorari and two copies of the Appendix, one of which is bound. I am also enclosing a Certificate of Service and a Certificate of Redaction.

Sincerely,



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Suzanne White, Assistant Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for Respondent

Reginald James Miller, 00261476
McCormick Correctional Inst.
386 Redemption Way
McCormick, SC 29899

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM SPARTANBURG COUNTY
COMMON PLEAS COURT
J. Derham Cole, Circuit Court Judge

Case No. 2010-CP-42-6870

Reginald J. Miller, 261476, ... Petitioner,

v.

State of South Carolina, ... Respondent.

CERTIFICATE

I certify that the Appendix has been redacted in compliance with the Supreme Court's Order on personal identifiers, financial information and private data.

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Counsel for Petitioner

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PROOF OF SERVICE

I certify that I have served the Respondent with the Petitioner's *Petition for Writ of Certiorari*, and the *Appendix* by depositing a copy in the United States Mail, postage prepaid, on June 4, addressed to counsel of record as follows:

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June 4, 2014.

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SPARTANBURG COUNTY
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Reginald J. Miller, 261476, ... Petitioner,

v.

State of South Carolina, ... Appellant.

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

Statement of the Case

Reginald J. Miller was indicted by grand jury in Spartanburg County for the offense of trafficking in cocaine (2006-GS-42-1550) and trafficking in cocaine base (2006-GS-42-1551). A trial by jury was had June 15, 2006, the Honorable Doyet A. Early, III, presiding. The Petitioner did not appear at the trial. Miller was represented at trial by Thomas A. M. Boggs of Spartanburg, South Carolina. The State was represented at trial by Sara Ganss, Assistant Solicitor. Miller was found guilty and a sealed sentence was entered. Miller was later detained and brought before the court and the sealed sentence opened and announced. Miller was sentenced to a period of twenty three years. Miller was remanded to the custody of the Carolina Department of Corrections where he is presently confined. Miller timely filed a direct appeal. Miller's conviction was affirmed by the Court of Appeals (2010UP-020). The Remittiur was issued on February 10, 2010.

Miller timely filed an application for post-conviction relief on December 30, 2010, and amendment filed March 31, 2012. The Respondent made a return on July 17, 2012. An evidentiary hearing was held on January 11, 2013, at the Spartanburg County Courthouse. The Applicant was represented by J. Falkner Wilkes, Greenville, and the Respondent by Suzanne White of the South Carolina Office of the Attorney General. A written order denying post conviction relief was signed July 10, 2013. Miller filed a timely post trial motion pursuant to Rule 59(e).

An order denying Petitioner's post trial motion was signed on September 23, 2013. Notice of appeal was timely served and filed on October 23, 2013. This Petition follows.

Questions Presented for Review

The questions presented for review are whether the Petitioner was denied due process by the State rushing the case to trial four months after the Petitioner's arrest and, whether the Petitioner is entitled to relief based on ineffective assistance of trial counsel.

Argument

I. The Petitioner Was Denied Due Process Due to the State Rushing the Defendant's Case to Trial Only Four Months after His Arrest.

The record shows that the Solicitor, at the request of the police officers involved in the case, rushed the prosecution of the Petitioner's case. The Petitioner's case was only four months old when it was placed on the trial docket. It was rushed ahead of 5,000 other, substantially older cases. Defense counsel testified that he did not expect the case to go to trial so quickly and only found out it was on the trial docket a week prior to the trial. During the same term he had five other trials for which he was preparing. As a result, he was unable to file pretrial motions or otherwise prepare adequately for the trial. At the beginning of the case, counsel did not even familiar enough with the case to give an opening statement. At the PCR hearing counsel indicated that due to the rush of the trial that he would not have been able to file pretrial motions.

Answer: .....I probably would not have filed any motions that may be associated in that short of a time.

Question: In other words, would you agree that it would be unusual at four months to really have been prepared and expecting to go to trial?

Answer: Without any more notice than I had, yeah.

Question: Okay.

Answer: And with the fact that they had me on the docket for two murder trials, one of which was going to trial that week.

(App. p. 8, l. 1-23).

Counsel was not aware that the case had been placed on the docket until a week before the trial. (App. p. 29. l. 9-16). At the call of the criminal case counsel informed the trial judge that he had not had time to prepare because he had been preparing for two other trials that had been called that week. (App. p. 14, l. 1-10). It appears that the State released a significant amount of discovery to the defense only one day before the trial. (App. p. 143). Examination of further details of the representation was limited by counsel's destruction of his file. (App. p. 25). Counsel did recall clearly that the Petitioner's case had been rushed ahead of 5000 other cases, and that the State was effectively committing "trial by ambush". (App. p. 184, l. 14-20; p. 45).

The testimony of the Petitioner and his girlfriend further indicate counsel was ill-prepared:

Question: Okay. And did Mr. Boggs indicate anything abuot his preparedness or ability to go to trial?

Answer: Yes. He said he wasn't prepared because he wasn't expecting it to go that fast.

(App. p. 47, l. 4-7 Ebany Scruggs).

Question: Okay. when you met with him what was -- what were you told as far as this case going to trial?

Answer: He told me that he wasn't prepared and that he was going to try to push his weight around to get a continuance.

Question: Okay. And did he say why he would not be prepared?

Answer: He didn't -- he didn't voice his opinion to me on why he wasn't prepared no more than it was quickly and that he hadn't had time to look into my -- he hadn't had time to look into my case.

(App. p. 48, l. 16-24 Petitioner).

The record shows that at the police officer's request the Petitioner's case was rushed to trial with defense counsel only having a week's notice of the trial. It further shows that counsel was preparing for numerous other cases on the trial docket and that he was not able to prepare for the case.

The Petitioner raised the issue of counsel's preparedness as well as the State's rushing the case to trial at his PCR hearing. Although the PCR judge did not directly address the issue of the State's timing for the trial, the Petitioner raised the issue again by way of Rule 59(e) motion requesting a specific ruling by the court. (App. p. 56-57; p. 18-19). Despite his post trial motion, the PCR court failed to specifically address the issue. (App. p. 15). The issue has been sufficiently

preserved for the purposes of appeal.

As a general rule, to warrant reversal a defendant must demonstrate that he sustained prejudice as a result of the solicitor's setting of the case for trial. *See* State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012). Here, the Petitioner was denied due process as the State rushed the case to trial, surprising defense counsel and giving him only a week to prepare. By further setting five or more of counsel's other cases for trial the same week, defense counsel did not have sufficient time to devote to the preparation of the Petitioner's case. In addition to preventing counsel from adequately preparing and filing pre-trial motions, the lack of notice and time to prepare resulted in a general failure of counsel to effectively represent the Petitioner as more fully set forth below.

II. Counsel Was Ineffective and Failed to Conduct a Meaningful Defense.

The Petitioner was constructively denied the right to counsel at the trial of his case. While Petitioner was represented by counsel, counsel failed to subject the prosecution's case to a meaningful adversarial testing. Petitioner's attorney waived opening statement and failed to cross examine the arresting officers or the chemist. (App. p. 193; p. 201, l. 5; p. 207, l. 2; p. 221, l. 14). The only cross examination conducted by counsel during the trial consisted of three questions of the evidence

custodian. (App. p. 225, l. 22- p. 226, l. 13). Counsel made only two objections during the course of the entire trial. (App. p. 194; p. 213-218). Counsel failed to move for a directed verdict at the close of the State's case. (App. p. 228). Then, at the close of the trial, counsel indicated that he would waive closing argument if the State waived its argument. Although the State did not waive argument, despite being entitled to last argument, Defense Counsel still waived his closing. (App. p. 229-231).

Where counsel presented no case in defense, the failure to make any closing argument has been held to be clearly unreasonable. Elliott v. Williams, 248 F.3d 1205 (10th Cir. 2001). As in Williams, the record in this case fails to establish any valid trial strategy for counsel's waiver of both opening statement or closing argument. Rather, the record shows that counsel was unprepared, and was completely unfamiliar with the facts of the case at the beginning of the trial.

Question:	Okay. Now, during the trial I noticed that you did not make an opening argument. When did you make the decision not to make an opening argument?
Answer:	Probably when the case was called.
Question:	Okay.
Answer:	I didn't feel that it would benefit me getting up and saying anything to a jury when I didn't know exactly what the testimony was going to be.

(App. p. 32, l. 5-12).

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). " ... [I]f counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable." Cronic at 659. The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). Not knowing the facts of the case sufficiently to give an opening argument is clear evidence that counsel was not advocating for the Petitioner as required by the Sixth Amendment.

The right to the effective assistance of counsel is the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors —the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. *See* United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d

657 (1984); *See also* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To satisfy the Constitution, counsel must function as an advocate for the defendant, as opposed to a friend of the court. Jones v. Barnes, 463 U.S. 745, 758, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). An indispensable element of the effective performance of defense counsel's responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. Ferri v. Ackerman, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979). In the Petitioner's case, defense counsel simply failed to act as the Petitioner's advocate at all stages of the trial.

Prejudice is presumed if "counsel entirely fails to subject the prosecution's case to a meaningful adversarial testing." When there has been no meaningful adversarial testing, then "the adversary process itself [is] presumptively unreliable." Cronic, 466 U.S. at 658-659, 104 S.Ct. at 2039. In Bell v. Cone, the U.S. Supreme Court explained further that "the attorney's failure [to test the prosecutor's case] must be complete" for this standard to be met. 535 U.S. 685, 697, 122 S.Ct. 1843, 1851, 152 L.Ed.2d 914 (2002). Nance v. Frederick, 358 S.C. 480, 596 S.E.2d 62 (2004). In the Petitioner's case, there was no adversarial challenge to the State's case. As a result, the Petitioner is entitled to a new trial.

CONCLUSION

Based on the foregoing the Petition of the Applicant should be granted and his case reverse and remanded.

Respectfully,

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Counsel for Applicant

June 4, 2014.