

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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CERTIORARI TO SPARTANBURG COUNTY  
J. MARK HAYES, II, CIRCUIT COURT JUDGE

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NATHANIEL GREEN,                      PETITIONER,

v.

STATE OF SOUTH CAROLINA,      RESPONDENT.

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PETITIONER FOR WRIT OF CERTIORARI

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NATHANIEL GREEN, #307622  
PRC-SE  
PERRY CORRECTION INSTITUTION  
430 Oaklawn Road  
Pelzer, S.C. 29669

**RECEIVED**

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S.C. SUPREME COURT

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### ISSUE PRESENTED

- 1). Did the PCR Court err by failing to find trial counsel ineffective for not challenging the use of fraudulent, falsified and/or perjured chain of custody documents utilized as evidence?
- 2). Did the PCR Court err by failing to find trial counsel ineffective for not investigating the chain of custody form C by Jane Millwood as evidence officer. Her document have on it the wrong person making original seizure?
- 3). Did the PCR Court err by failing to find trial counsel ineffective for not challenging solicitor on Brady violation and for not correcting false/misleading testimony of confidential informant?
- 4). Did the PCR Court err by failing to find trial counsel ineffective for not investigating critical evidence or defense when preparing for trial regarding application of prior conviction relative to recent precedent dealing with S.C. Code of law, 17-25-50.

### STATEMENTS

In November 2004, the Spartanburg County Grand Jury indicted Plaintiff Nathaniel Green on the charge of trafficking in crack cocaine more than ten grams. On February 15, 2005, Plaintiff appeared before the Honorable J. Derham Cole for a bench trial. App.7, LL.1-12. He was represented by Thomas A.M. Boggs, Esquire, on two trafficking in crack cocaine more than ten grams less that 28. One of the charges was dismissed on the day of trial. On the other charge Judge Cole found Plaintiff guilty and sentenced him to the mandatory minimum of twenty-five years. A notice of appeal was filed. An appeal brief pursuant to Anders v. California, 386 U.S. 738 (1976). The South Carolina Court of Appeals dismissed the appeal by order filed June 11, 2007.

On June 23, 2008, Green filed an application for post-conviction-relief (PCR). The state filed a return on February 14, 2009 before the Honorable J. Mack Hayes, II. On November 2, 2009, Judge Hayed issued an order denying Green's PCR application and dismissing it with prejudice. Green's attorney filed a notice of appeal. This petition follows.

## ARGUMENT

- 1). The PCR Court erred by failing to find trial counsel ineffective for not investigating and/or challenging the use of fraudulent, falsified and/or perjured chain of custody document utilized as evidence.

Petitioner entered into evidence 3 sets of chain of custody. Two of them belongs to his case one of them belongs to an unrelated case. Those forms are entered under A-1 A-2 A-3 forms C S App.13, LL.1-25 and App.121-123. Forms on App.121 and 123 was represented by trial counsel until one was dismissed on the day of trial. The Form that was dismissed is on App.121. Trial counsel should have taken the form C (Rule 6) that was dismissed and compare it to the one that was the direct result of Petitioner's conviction. Had he investigated and compared both forms he would have seen they already had photo copied signatures already on them before being filled out. Compare both documents. Now as for the document from the unrelated case Petitioner only use them to show Spartanburg Sheriff's office use these photo copied documents as a common practice and procedure. In the judge's order of dismissal it was indicated that trial counsel testified on PCR he did not notice signature discrepancies prior to the trial. Also it was indicated that counsel did not have the benefit of the forms from the unrelated case prior to trial. As indicated above Petitioner did not need the forms from the unrelated case to find out the fraudulent signatures he simply use the two sets of forms trial counsel represented Petitioner on prior to trial and compared them both. That is how Petitioner found out about the fraudulent signatures. The same was Petitioner found out about the fraudulent signatures trial counsel could and should have done the same thing and simply compare both sets of documents he represented Petitioner on prior to trial. Due to trial counsel ineffectiveness Petitioner's due process right were violated. The reason Petitioner due process rights were violated is because the State relied on the fraudulent chain of custody instead of live testimony from chain of custody witness. Petitioner contend that a gap was created in the chain of custody because of the fraudulent document the state relied on to complete the chain of custody actually incompleting it. Therefore the drug evidence should not have

been admitted into evidence and Petitioner should not be found guilty of the crime charge. That is why Petitioner contends trial counsel was ineffective in this matter. In the judge's order of dismissal it stated Petitioner failed to provide original copies of either chain of custody forms, raising questions of authority. Petitioner has submitted with the writ of certiorari authenticated forms. Those forms are the same forms that was admitted into evidence the day of Petitioner's PCR. Those authenticated documents should answer any questions of authenticity.

- 2). The PCR Court erred by failing to find trial counsel ineffective for failing to object to the admission of faulty chain of custody in to evidence without clarification of an error.

The chain of custody document Petitioner entered into evidence on App.17 LL.15-16 and App.123 is the same chain of custody document that have the uncorrected error by chain of custody witness. The chain started with Keith Pearson form B chain of custody. The next person in the chain is C. Raymond. He have on his form the person making the original seizure is Keith Pearson. See App.20 LL.2-11. The reason Petitioner asserts the error needs corrected is because the error creates two different issues one of admissibility or one of credibility. A new trial is warranted to determine which error Jane Millwood made on her chain of custody document. The State nor the Petitioner can answer that question for Jane Millwood. That can only be answer on a new trial. The fact that trial counsel did not look through and/or investigate chain of custody documents it prejudice Petitioner. Chain of Custody witness Jane Millwood made the error of putting the wrong control number on the chain of custody document or the person making the original seizure. If she made the error of putting the error of putting the wrong control number on the document then that would create a gap in the chain and drug evidence would not have been admitted into evidence. If chain of custody witness made the error of putting the person making original seizure then that issue would be one of credibility. See exhibit A-4 Brief. As indicated exhibit A-4 App.130 State v. Chisolm, 355 S.C. 175, 584 S.E.2d 401. A gap in a chain of custody create an issue of admissibility. Prejudice in this matter is shown by the fact that a broken chain of custody would have rendered the evidence not only inadmissible but unreliable therefore

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1).

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ARGUMENT

This petition follows.

severely damaging the State's case due to a lack of evidence. The prejudice requirement is satisfied by demonstrating that but for trial counsel ineffectiveness, a defendant's trial, but not necessarily its outcome, would have been altered in a way helpful to him. Frett v. State, 298 S.C. 54, 57, 378 S.E.2d 249 (1988). Also Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984); 334 S.E.2d 813.

- 3). The PCR Judge erred by failing to find trial counsel ineffective for not recognizing and challenging solicitor on Brady violation and for not correcting false/misleading testimony of confidential informant.

Petitioner raises this claim because a witness for the state, Keith Pearson, testified that; (1) he had been paid [money] for the alleged controlled buy drug transaction conducted with Petitioner, and (2) he was not working off any criminal charges. The record will clearly show there is nothing to support the claim that the operative in the instant case was in fact working for money on June 30, 2004, other than testimony from the investigator, Chris Raymond. App.9 LL.19-25. What the record does show is that the operative was most likely working off criminal charges and not being paid in currency. App.23 LL.2-12 and App.30 LL.9-25, App.31 LL.1-12, In the judge's order of dismissal trial counsel testified Petitioner was aware of the informant being paid prior to trial. This is not true there is nothing in the record given by the state that would tell Petitioner and/or trial counsel the informant was paid by Spartanburg County Sheriff's office.

Trial counsel did not impeach informant's two inconsistent testimonies. One was given when informant was asked by solicitor Ms. Gansse have you already been paid for your work on June 30, 2004 the day of the control buy. The informant answered No, No, I haven't. The Solicitor went on to ask the informant again. You haven't -- today, as of today have you been paid for what you already did on June 30, 2004. The informant answer was, Oh, I have done some in the past and I haven't been paid exactly. Next Solicitor ask okay, so you're already paid? Informant's answer was right. App.23 LL.2-12. Due to the inconsistent, perjured testimony by the operative and Solicitor's failure to correct this known, false testimony,

and further due to defense counsel's failure to object or act upon this, Petitioner's due process rights have been violated. At the 2005 trial, the operative was asked more than once have you been paid for the controlled buy alleged to have taken place on June 30, 2004. The operative answered "No" he hasn't three times. But later in the same line of questioning, the operative answered "right", implying that he had been paid. Either the operative was paid or he was not. The operative could not have been telling the truth given the two different answers he gave the Solicitor. The Solicitor knew the testimony given by the operative was false and allowed it to go uncorrected.

The issue is not why the operative failed to tell the truth: Rather, it is why the Solicitor, who knew the operative's testimony to be false, failed to correct it. See Riddle v. State, Opinion No.: 26153. A Prosecutor's deliberate deception of a court by the presentation of known false evidence is incompatible with rudimentary demands of justice, Gioglio v. U.S., 405 U.S. 150, 153 (1972). The failure to correct false evidence is as reprehensible as its presentation. Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996).

The next inconsistent, perjured testimony by the operative Keith Pearson, was given when he was questioned by Petitioner's trial lawyer, Mr. Potts during direct examination. He committed perjury when trial counsel asked; "right after the controlled buy you had some fairly serious charges dismissed, didn't you?" His answer was affirmative, "I did." (Tr. p.30, LL.12-16). Trial counsel's next question was; "All right, some charges that have been pending since July 28 of 2003. After you became a paid informant, those charges suddenly disappeared in September right?" His answer was; "I was in the County as well, I did time in the County." The next question was; "They got dismissed though, didn't they?" His answer was; "Yeah, they was gone." Next question was; "All right and you were looking at a CDV third, which carries ten years, right?" His answer was; "right, that was dismissed." (Tr. P.30 LL.17-25). The next question by counsel was; "yeah, after you did this?" His answer was; "while I was in the county jail they was dismissed." Next question was; "after this incident they were dismissed, right?" His answer was; "not to my knowledge that I know of." The next question was; "well, it

says September 17th, isn't that right?" His answer was; "well if it says it, yeah." Trial counsel's next question was; "the point is after you became a paid informant, all of a sudden these serious charge disappear as well as you getting paid, right?" His answer was; "I guess." (Tr. p.31 LL.1-10).

According to the transcript, the operative clearly committed perjury twice, once when he was asked about having been paid for the controlled buy transaction where his answer was "no" three times, but later in questioning he answered that he had been paid, The next perjured testimony occurred when the operative was asked about why and when the operative was asked about why and when serious charges against him had been mysteriously dismissed. His answer was that the charges while dismissed while he was in the county jail, implying dismissal before his work as an informant. But the record clearly shows he was out of jail when those charges were dismissed on September 17, 2004, which was after the controlled buy with Petitioner.

The question at hand is either the operative's charges were dismissed while he was in the county jail, before becoming an informant on the instant case, or they were not. Again, the operative could not have been telling the truth when questioned by trial counsel, because he said two times, the charges had been dismissed while he was in the county jail. But trial counsel then showed him records indicating those charges were dismissed after he was released from jail. Due to the inconsistent testimonies of the operative, which were never corrected and the perjury that resulted there from, the Solicitor rendered Petitioner's trial fundamentally unfair.

The overriding theme of the Brady case is the emphasis the Supreme Court has placed on the the prosecutor's responsibility for fair play. In close cases, "the prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be, such disclosure will serve to justify trust in the prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberation, as the chosen forum for ascertaining the truth about criminal accusation."

The constitution requires only that a defendant receive a fair trial, not a perfect one. U.S. Const. Amend. VI. Due to the Solicitor's failure to correct false testimony by the operative and the failure to turn over Brady material, to the defense prior to trial, regarding agreements between the state and the operative, Petitioner's trial was rendered fundamentally unfair. In addition, trial counsel's representation should be deemed ineffective for not acting on these issues, thereby causing prejudice to and violation of Petitioner's due process rights. Therefore, for the foregoing argument(s), the court should reverse Petitioner's conviction and remand for new trial to explore the issue of a promise of immunity and whether or not the operative was in fact a paid informant.

- 4). Trial counsel was ineffective for failing to investigate critical evidence or defense when preparing for trial regarding application of prior conviction relative to recent precedent dealing with S.C. Code of Law, §17-25-50. Two of those precedents are State v. Gordon, 356 S.C. 143, 588 S.E.2d 105 and State v. Benjamin, 353 S.C. 441, 579 S.E.2d 289. Trial counsel used State v. Boyed, 288 S.C. 206, 341 S.E.2d 144, to argue Plaintiff's case at sentencing phase. The problem is, in Boyed, supra, the court of appeals had ruled, that where a defendant has been convicted on two or more counts for violation of the controlled substance act, arising out of simultaneous acts committed in the course of a single incident, the conviction will be considered as one for the purposes of sentencing upon subsequent conviction for violation of controlled substance act. S.C. Code of law §17-25-50 does not state what the court of appeals ruled on in Boyed. S.C. Code of law §17-25-50 states; "In determining the number of offenses for the purpose of imposition of sentences, the court shall treat as one offense any number of offenses which have been committed at a time so closely connected in point of time, that they may be considered as one offense, notwithstanding under the law they constitute separate and distinct offenses."

Petitioner argues that his two prior offenses qualify as one conviction because they were the result of an ongoing investigation or "sting" operation, involving the same informants, in the same geographical area, planned over a

Specifies amount of time. All of which were similar in modus operad; over the course of the operation. Pursuant to S.C. Code of law §17-225-50 and accorded dictum in Gordon supra, the prior convictions of the two (2) counts during the drug "sting", should count as one when being considered for sentencing in the subsequent conviction of the instant case. "...We hold that where a defendant has been convicted on two or count counts for the violation of the controlled substance act arising out of simultaneous acts committed in the course of a single incident, the convictions will be considered as only one for the purpose of sentencing under a subsequent conviction for a violation of the controlled substance act."

Petitioner further asserts that, in this particular case, the prior drug "sting" operation and investigation constitutes the requisite "course of a single incident" and relates to the term "simultaneous." Moreover, the prior conviction should be treated as a first offense, as it was incident to a single arrest and absent, were intervening arrests for each violative act observed during the drug "sting" operation. Therefore, making the current conviction of the instant case, a second drug conviction instead of a third; ("...Notwithstanding under the law they constitute separate and distinct offenses.") §17-25-50. What the statute does not say, is that they (the charges) would constitute "separate and distinct convictions." Therein lies the key to understanding the interpretation of the statute.

The purpose of requiring separate offenses is to ensure that those offenders being sentenced under harsh provisions of a recidivist sentencing statute have not been classified as habitual offenders, because of multiple convictions arising from a single criminal enterprise, it provides the state with some certainty that the offender has participated in multiple criminal trials and despite these opportunities to understand the gravity of his behavior and abide by the law, has continued to engage in criminal conduct, Gordon, supra.

Petitioner contends that he was never arrested, tried and sentenced at any time between the two (2) prior drug offenses which occurred during the "sting" operation between 1994 and 1995, that for the sake of furthering investigations of the "sting" operation, law enforcement allowed him to continue in that illegal drug enterprise, while being totally unaware and

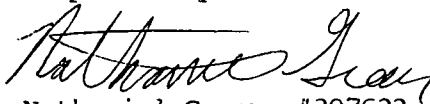
oblivious that he was being investigated or monitored. Had law enforcement intervened and arrested Petitioner after his first drug transaction, there would be no second offense to even consider in the instant case. But, because they chose to wait and make "one" arrest why should Petitioner then be further penalized as a result of their delay or inaction?

Petitioner's prior conviction clearly happened "at points so closely in time" under the Gordon standard. Gordon's convictions happened three (3) years apart and were the results of an ongoing investigation over a period of time. Petitioner's circumstances are similar if not identical. The Court of Appeals ruled they were treated as one because Gordon committed those crimes without arrest or conviction, and had no chance or opportunity to understand the gravity of his behavior and abide by the law. The same circumstances are present in Petitioner's instant case. His priors occurred during a drug "sting" operation, that lasted a year. There was one arrest, and one court date in which both charges were consolidated for adjudication and sentencing. There fore, Petitioner's prior convictions should be recognized as one for enhancement purposes, being treated as a single offense for sentencing consideration in the instant case.

If trial counsel would have investigated and or use State v. Gordon, supra, during the sentencing hearing Petitioner would have been sentenced to a second (2) offense instead of a third (3) that is why trial counsel was ineffective.

Based upon the foregoing argument and illustrations, Petitioner respectfully prays this Honorable court to make a diligent consideration in vacating, and remanding for NEW TRIAL, and/or sentencing.

Respectfully Submitted,

  
Nathaniel Green, #307622

Date:

8-10-10

Pro-Se