

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2013-002332

RECEIVED

OCT - 8 2014

S.C. Supreme Court

Reginald Miller, Petitioner,

v.

State of South Carolina, Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

SUZANNE H. WHITE
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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did Petitioner fail to meet his burden of proof of establishing that his due process rights were violated and that the outcome of his trial would have been different with additional time to prepare, where the evidence of guilt was overwhelming?

STATEMENT OF THE CASE

The Petitioner is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Petitioner was indicted at the May 2006 term of the Spartanburg County Grand Jury for unlawful conduct toward a child (2006-GS-42-1548), trafficking in cocaine 10-28 grams (2006-GS-42-1549), trafficking in cocaine 28-100 grams (2006-GS-42-1550), and trafficking in crack cocaine (2006-GS-42-1551). Thomas A. M. Boggs, Esquire, represented the Petitioner at trial. On June 15, 2006, the Petitioner was convicted *in absentia* of this charge by a jury. The Honorable Doyet A. Early III presided over the Petitioner's trial and issued the sealed sentence. The Honorable J. Cordell Maddox, Jr. pronounced the Petitioner's sentence on April 13, 2007, and gave him credit for time served since detention in the North Carolina Department of Corrections beginning August 1, 2006. Petitioner was sentenced to twenty-three years and a \$50,000 fine for trafficking in cocaine +28 grams (-1550) and a concurrent sentence of ten years for trafficking in crack cocaine. The other indicted charges were *nolle prosequi*.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Miller, Op. No. 2010-UP-020 (filed January 25, 2010). The Remittitur was returned on February 10, 2010.

The Petitioner subsequently filed a PCR application on December 30, 2010, and amendment on March 31, 2012. The Respondent made its Return on or about July 17, 2012. An evidentiary hearing into the matter was convened on January 11, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by J. Falkner Wilkes, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office,

represented the Respondent.

Following the hearing, the Honorable J. Derham Cole denied the PCR application by written Order dated July 10, 2013. A timely 59(e) motion was filed on Applicant's behalf, but was subsequently denied on September 23, 2013.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

- I. **Petitioner failed to meet his burden of proof of establishing that his due process rights were violated and that the outcome of his trial would have been different with additional time to prepare, where the evidence of guilt was overwhelming.**

Petitioner was convicted *in absentia* of trafficking in cocaine and received a sentence of twenty-three years. At the time of trial, Counsel had been retained to represent Petitioner for three months. At the PCR hearing, Petitioner argued Counsel was ineffective for failing to offer opening and closing statements at trial, failing to cross-examine witnesses, and failing to fully investigate the case prior to trial. Petitioner also argued that Counsel was ill prepared for trial because the case was set on the docket in such a short time following the arrest.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that “Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel

rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Applicant testified that Counsel informed him that he was unprepared for the trial because the case had come up so quickly and intended to get a continuance. (App. p. 48). Applicant testified that he fled because he was concerned that he would lose terribly because Counsel was not prepared for trial. (App. p. 49). Counsel testified that he did not remember telling Applicant that he could not be prepared to go to trial as quickly as the case was called. (App. p. 29). Counsel also testified that he has practiced law for thirty-six years with approximately sixty percent of his work being criminal. (App. p. 41). Counsel testified that he regularly handled drug cases. (App. p. 41).

The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully

prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). As Counsel noted, he believed the only possible defense option would have been to try and suppress the drugs. (App. p. 42). Counsel testified that he did not believe that offering an opening or a closing would have made a difference at Petitioner's trial based upon the evidence presented against Petitioner. (App. p. 43).

When claims of ineffective assistance of counsel are based on lack of preparation time, an Applicant challenging his conviction must also show specific prejudice resulting from counsel's alleged lack of time to prepare. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039 (1984); U. S. v. LaRouche, 896 F.2d 815 (4th Cir. 1990). The Petitioner failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared or had additional time prior to the case being called to trial.

Further, the PCR court properly found that Petitioner failed to meet his burden of proof in establishing that Counsel was ineffective at trial because of overwhelming evidence of Petitioner's guilt. (App. p. 11). As the PCR court noted, there was sufficient evidence in the record to support the conviction, including the testimony of two officers who pursued Petitioner and saw the white powdery substance when Petitioner fell and the chemist who tested the drugs. (App. p. 11). Testimony was presented at trial by both officers that observed the Applicant running from them and then observed the bag of a white powdery substance underneath his body and in his hand once he fell and was captured. (App. p. 193-206). Testimony was also presented that the white powdery substance had been tested and was cocaine. (App. p. 210-12).

No prejudice occurs, despite trial counsel's deficient performance, where there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991). The lack of prejudice does not, however, *depend* on the evidence being overwhelming. When an ineffectiveness claim is presented the defendant must show that counsel's representation was deficient. Deficient representation amounts to conduct that is not objectively reasonable under the circumstances. Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). In addition, the Petitioner must show prejudice by establishing that the outcome would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694.

Petitioner also argues now that his due process rights were violated because the State placed his case on the docket earlier than normal. Petitioner never articulated a due process violation argument to the lower court, but instead focused his argument on Counsel's lack of preparation. Additionally, the 59(e) motion was again directed at Counsel's ineffectiveness because of lack of preparation and the overall constitutionality of the Solicitor controlled docket. Therefore, Respondent first submits that the issue of a violation of due process rights is not preserved for appeal because it was never properly presented to the lower court to be ruled upon.

Although the Petitioner argues that he should be granted a new trial based upon the State v. Langford ruling, Respondent also notes that the Langford ruling specifically states that the "General Sessions docket will **henceforth** be managed pursuant to the administrative order issued in conjunction with this opinion." State v. Langford, 400 S.C. 421, 446, 735 S.E.2d 471, 484 (2012), cert. denied (Oct. 7, 2013), cert. denied, 134 S. Ct. 60, 187 L. Ed. 2d 51 (U.S.S.C. 2013) (emphasis added). It is clear that it is not retroactive and does not apply to cases under collateral review.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Attorney General

SUZANNE H. WHITE
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SC Bar #78225

By: 
ATTORNEYS FOR THE RESPONDENT

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October 8, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
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The Honorable J. Derham Cole, Circuit Court Judge

REGINALD MILLER,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Mr. J. Falkner Wilkes, Esquire
114 Whitsett St.
Greenville, SC 29601

This 8th day of October, 2014


ASHLEY HAWORTH
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

October 8, 2014

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OCT - 8 2014

S.C. Supreme Court

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Reginald Miller v. State of South Carolina
Lower Court Case No: 2010-CP-42-6870
Appellate Case No. 2013-002332

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Suzanne H. White
Assistant Deputy Attorney General
SC Bar No. 78225

SHW/ah
Enclosures

cc: J. Falkner Wilkes (2 copies)
Trisha Allen. Victim Services (1 copy)