STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

BRUCE WILSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001275

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. Did the PCR court err in failing to find trial counsel's ineffective for not filing a motion to challenge the adequacy of the photographic lineup that identified Wilson as the guilty robber?

2. Did the PCR court err in failing to find trial counsel ineffective for not filing a suppression motion on Wilson's statement given to police after arrest?

STATEMENT

In April 2005 and July 2005, the Richland County Grand Jury indicted Bruce Wilson on four counts of armed robbery (AR). On January 4-5, 2006, Wilson proceeded to trial before the Honorable James W. Johnson and a jury. Wilson was represented by Kathrine Hudgins, and the state was represented by Kathryn Luck Campbell and Margaret Fent. On January 5, 2006, after the trial had proceeded, Wilson entered a guilty plea before Judge Johnson to three counts of AR. App. 227,ll. 1 – 17. The fourth AR was *nolle prossed* by the state. Judge Johnson sentenced Wilson to three concurrent terms of twenty-three years on the three AR. App.242, ll. 8 – 25. Wilson did not appeal his convictions nor sentences.

Wilson filed an application for post-conviction relief (PCR) on May 23, 2006. (2006-CP-40-2981). An evidentiary hearing was held on August 1, 2007 before the Honorable James C. Williams. Wilson was represented by Charlie J. Johnson, and the state was represented by Robert L. Brown. On September 18, 2007, Judge Williams filed an order denying Wilson's PCR and dismissing it with prejudice. Supp App. 77-84. Wilson did not file an appeal. App. 345.

On September 21, 2010, Wilson filed a second PCR (2010-CP-40-6562) based on newly discovered evidence. App. 245 – 249. The state filed a return and motion to dismiss on October 4, 2011. On April 16, 2012, Judge James R. Barber, III, issued a Conditional Order of Dismissal allowing Wilson thirty days to submit his objections. App. 263-268. On August 31, 2012, Wilson filed an amendment to his PCR application based on his newly discovered evidence and also claiming his PCR attorney failed to file an appeal of the first PCR judge's order denying his PCR. App. 270-271. Based on Wilson's response, Judge Barber requested a hearing be set on Wilson's second PCR application. App. 343.

On October 18, 2012, an evidentiary hearing was held before the Honorable Clifton B. Newman. Wilson was represented by C. Clifford Rollins, and the state was represented by Robert D. Corney. App. 272. On February 19, 2013, Judge Newman filed an order denying Wilson's PCR application and dismissing it with prejudice. Judge Newman denied Wilson's request for a belated appeal of his first PCR pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

On January 16, 2013, Wilson filed a motion to reconsider under Rule 59(e), SCRCP. The state filed a return to the motion on February 27, 2013. An evidentiary hearing was held on April 2, 2013 before the Honorable Clifton B. Newman. Wilson was represented by Cliff Rollins, and the state was represented by Megan Harrigan. App. 355 – 364. On May 20, 2013, Judge Newman issued an order denying Wilson's motion to reconsider under Rule 59(e), SCRCP. Wilson filed a notice of appeal. A petition for certiorari was filed by appellate counsel. On December 10, the Supreme Court granted the petition, and directed the parties to brief the issues raised in petitioner's Statement of Issues to be Considered in the *Austin* Appeal. This brief of petitioner follows.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not filing a motion to challenge the adequacy of the photographic lineup that identified Wilson as the robber.

The Pantry Express convenience store on Farrow Road was robbed on March 29, 2004; August 20, 2004; and October 25, 2004. On August 20, 2004, money and lottery tickets were taken. When people began to try to cash these tickets in for cash, they were tracked by their vehicle license tags. When investigators talked to some of these people, they identified Franklin Dixon as the person providing these lottery tickets. Investigators interviewed Dixon who admitted committing this robbery and named Petitioner Bruce Wilson as his co-defendant. App. 160, ll. 16 – App. 163, ll. 13; App. 122, ll. 15 – App. 125, ll. 17.

Gloria Norman was working the third shift at the Pantry Express on August 20, 2004. App. 177, ll. 1 – App. 178, ll. 24. About two o'clock in the morning, two men came in asking for cigarettes. One came around the counter and told her to open the register which she did because he had a knife. Both took money form the register which was about $60, and then took lottery tickets. They left and she called the police. All of this was caught on one of the store's videotapes. App. 179, ll. 12 - App. 185, ll. 13. Wilson turned himself into police headquarters when he learned he was being sought. App. 60, ll. 18-25.

At the pretrial identification hearing, Ms. Norman described how she was shown two photo lineups. The first one was on September 24, 2004 by Sgt. McDonald. This was a six man photo lineup and she selected number six as one of the robbers. Number six was the man who robbed the store alone in March 2004. He also robbed the store in August with a co-defendant. On November 3, 2004, she was shown a second six man photo lineup. She identified number six as the second man in the August robbery. Then she said this man was actually the one who robbed her in March

and August. The individual she identified on September 24 was only involved in the August robbery. App. 107, ll. 3 – App. 122, ll. 10.

Sgt. McDonald testified that he showed a photo lineup to Gloria Norman on September 24, 2004 and she identified Franklin Dixon as the man who robbed her in March 2004, and August 20, 2004. After Dixon identified Wilson as his co-defendant in the robbery, Sgt McDonald showed a second photo lineup on November 3, 2004 to Ms. Norman. She selected number six who was Wilson. She said that Wilson was the one who had robbed her in March and then again in August. She was mistaken about the first man, Dixon, being involved in the March robbery. App. 122, ll. 15 – App. 127, ll. 23.

On cross examination, Sgt. McDonald admitted that both Dixon and Wilson had very similar characteristics and looked very similar. App. 128, ll. 1 – App. 129, ll. 25. He also admitted that both Wilson and Dixon were at the number six spot on the two photo lineups. Dixon was not in the lineup he showed Ms. Norman on November 3. He did tell Ms. Norman at the second lineup that he wanted her to identify the co-defendant. App. 130, ll. 1 – App. 132, ll. 16.

At the close of the hearings, the judge said to defense counsel:

> **The Court:** All right. Anything from the defense as far as the evidence is concerned?
>
> **Defense counsel:** No, Your Honor.

App. 136, ll. 5 – 11.

The judge ruled that taking all of the circumstances into consideration, the identification would be admissible. App. 136, ll. 17 – App. 137, ll. 11.

He then asked if there were anything else to get on the record. Defense counsel then stated:

> Your honor, I just think for purposes of the Jackson v. Denno and the ---I understand your ruling. I just think for purposes of the record, I need to clarify argument for argument purposes.

App. 137, ll. 1 – 25.

Counsel then argued that under Neil v. Biggers, the two prong test required that the identification process not be tainted and that there be no possibility of mistaken identity. These lineups were tainted due to the two suspects being in the same number six location, and the fact that the witness was mistaken in her identification of Dixon being involved in the March robbery. App. Counsel asked that the identification be excluded. 138, ll. 11 – App. 130, ll. 7.

During the trial, counsel objected when the photo lineups were admitted into evidence. App. 200, ll. 1 – 25. However, counsel did not object to the in-court identification of Wilson by Ms. Norman. App. 201, ll. 8 – 22.

At his first PCR hearing on August 1, 2007 and at his second PCR hearing on October 18, 2012, Wilson's issue was ineffective assistance of trial/plea counsel. The primary claim was counsel's failure to have evidence suppressed. He felt counsel should have filed a motion to suppress his statement and the photo identification. Supp. App. 27, ll. 4 – 8; Supp. App. 42, ll. 2 – Supp. App. 43, ll. 17; App. 281, ll. 7 – App. 282, ll. 2.

Wilson told the trial court at the beginning of his trial that he wanted a different attorney because he had had limited contact with his present counsel, and he felt that she was not going to represent him to her full ability. The judge denied his request. App. 7, ll. 14 – Ap. 12, ll. 10. The victim said the robber was armed with a knife, but Wilson was not armed. He admitted being at the scene of the crime, but no one was armed. Wilson believed that the video did not show a weapon. Supp. App. 30, ll. 16 – 23; Supp. App. 35, ll. 1 – Supp. App. 36, ll. 4.

One problem with the photo identification was that he and his co-defendant Dixon were in the same number six block on two photo lineups. The victim also identified Dixon at the first photo lineup as being the person who had robbed her twice. Then she changed when she saw the lineup with Wilson's photo and said he was the one who had robbed her twice. Supp. App. 31, ll. 2 – Supp. App. 34, ll. 18.

Trial/plea counsel testified at the first PCR hearing that there were pretrial hearings for both the identification and the statement. At the Neil v. Biggers,[1] hearing, counsel challenged the fact that both Wilson and Dixon were placed in the same number six position on the two photo lineups. She said: "I did argue that strenuously." Supp. App. 52, ll. 2 – Supp. App. 54, ll. 12. Wilson's defense was that he was not armed. Counsel viewed the videotape and did not see a weapon. The solicitor was prepared to argue that it was just the way Wilson was holding his hand. Counsel said the videotape was very unclear. Supp. App. 56, ll. 17 – Supp. App. 59, ll. 11. Counsel's testimony was that the solicitor had told her that if Wilson was convicted on this armed robbery, that the state was going to seek life without parole on one of the other three armed robberies that he was charged with committing. Counsel explained that he was charged with four armed robberies but the trial was going to be on one. Supp. App. 55, ll. 12 – Supp. 56, ll. 13.

The PCR judge, Judge James Williams, ruled that he found trial counsel's testimony to be credible and found Wilson's testimony to not be credible. He ruled that trial counsel's conduct did not fall below the objective standard of reasonableness. Counsel conferred with Wilson; conducted an adequate investigation; was thoroughly competent in her representation of Wilson. Supp. App. 82. The judge wrote that Wilson failed to prove that counsel failed to render effective assistance of

[1] Neil v. Biggers, 409 U.S. 188 (1972).

counsel, and, Wilson failed to prove that he was prejudiced by trial counsel's performance. Supp. App. 82-83.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969). The record must show with certainty that the plea is "an intentional relinquishment or abandonment of a known right or privilege." State v. Patterson, 278 S.C. 319,

295 S.E.2d 264 (1982). Judges are required to give the defendant an explanation of the defendant's waiver of his constitutional rights and a realistic picture of all sentencing possibilities. State v. Armstrong, 263 S.C. 594, 211 S.E.2d 889 (1975).

In Neil v. Biggers, 409 U.S. 188 (1972), the United States Supreme Court named a two prong process to determine if an out-of-court identification was admissible: (1) if the identification process was unduly suggestive and (2) if the identification was nevertheless so reliable that no substantial likelihood of misidentification existed. Neil v. Biggers, id.; State v. Lewis, 354 S.C. 222, 580 S.E.2d 149 (2004); State v. Moore, 343 S.C. 282, 540 S.E.2d 445 (2000); State v. Brown, 356 S.C. 496, 589 S.E.2d 781 (2003).

An in-court identification of an accused is inadmissible if an out-of court identification was so unduly suggestive that it created a very substantial likelihood of irreparable misidentification. State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001). Neil v. Biggers cites five factors to determine reliability: (1) opportunity of witness to view criminal at time of crime (2) witness' degree of attention (3) accuracy of witness's prior description of criminal (4) level of certainty by witness at time of confrontation (5) length of time between crime and confrontation. Neil v. Biggers, *supra.*

In State v. Turner, 373 S.C. 121, 644 S.E.2d 693 (2007), the South Carolina Supreme Court held that a criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. The Court also held that even assuming an identification procedure was suggestive, it did not have to be excluded as long as, under all the circumstances, the identification was reliable notwithstanding the suggestiveness.

The United States Supreme Court also wrote in Neil v. Biggers, *supra:*

> Convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on the ground of suggestiveness only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

See also State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523 (2004).

The photographic lineup in Wilson's case was irreparably suggestive to the point that there was a substantial likelihood of misidentification. The victim identified the co-defendant initially after seeing his photo that he was the man who had robbed her twice and was the robber who was armed with the knife. Then she changed her mind after seeing Wilson's photo who was the most recent identification. Both Wilson and co-defendant Dixon were placed in the same number six block. People tend to follow habit which increases the likelihood of choosing the same block. The officer admitted that Dixon and Wilson had similar features and looked very similar. Based on this, the chance of misidentification was extremely high.

Defense counsel stated on the record **after** the trial judge had ruled that she should make an argument for the sake of argument and for the record. Counsel then made a cursory argument for the record. There was no evidence that counsel made the motion prior to trial for the identification to be suppressed. Although counsel objected when the photo lineups were admitted, she then failed to object to the in-court identification by the victim. At this point, Wilson had no real choice but to plead guilty. Normally, guilty pleas waive all non-jurisdictional issues.

ARGUMENT

The PCR court erred in failing to find trial counsel ineffective for not filing a suppression motion on Wilson's statement given to police after arrest.

The Pantry Express convenience store on Farrow Road was robbed in March, August, and October 2004. On August 20, 2004, money and lottery tickets were taken. When people began to try to cash these tickets in for cash, they were tracked by their vehicle license tags. When investigators talked to some of these people, they identified Franklin Dixon as the person providing these lottery tickets. Investigators interviewed Dixon who admitted committing this robbery and named Bruce Wilson as his co-defendant. App. 125, ll. 5 – 16.

Wilson turned himself into the police when he learned he was being sought. App. 50, ll. 18 25. Wilson gave a statement to Sergeant Shawn McDaniels on December 20, 2005 concerning another armed robbery. Wilson was in custody at that time. App. 54, ll. 18 – App.55, ll. 25. Sgt. McDaniels served three warrants on Wilson then. App. 57, ll. 15 – App. 58, ll. 18.

Sergeant Scott McDonald placed three indictments for armed robbery on Wilson. App. 60, ll. 10 – App. 61, ll. 23. On December 23, 2004, Sgt. McDonald interviewed Wilson at headquarters because his first statement had a "lot of holes that he knew to be false." Wilson agreed to give a statement to Sgt. McDonald but wanted to talk to his wife (girlfriend) first. Sgt. McDonald called the wife who went to headquarters and talked privately with Wilson. Then Wilson gave a statement concerning his involvement in the August 20th robbery and also his involvement in the other three robberies at the same location in March, June and October. App. 62, ll. 2 – App. 70, ll. 18.

A Jackson v. Denno[2] hearing was held prior to trial on January 4, 2006. App. 47, ll. 23 – App. 48, ll. 7. Bruce Wilson testified in camera that Sgt McDonald told him that he might as well tell the truth because his "buddies had given him up." They also had a video of the incident on August 20, 2004. Wilson told him that he could not give a statement until he talked to his common-law wife. They made an agreement that Wilson would give the statement if they let him see his wife. Wilson called her and she came and talked to him. She told him to just tell the truth. App. 78, ll. 16 – App. 82, ll. 25.

When Wilson's wife first arrived at headquarters, she talked to Sgt. McDonald first without Wilson present. When Wilson saw her, she was crying after her meeting with Sgt. McDonald. But for her advice to Wilson based on her conversation with Sgt. McDonald, Wilson would not have given a statement. App. 95, ll. 15 – App. 96, ll. 18.

Sgt McDonald's story was that he did not remember telling Wilson's wife that he was facing forty years. He did explain the situation and the evidence to her and just "basically laid it all out for her." The he allowed her to talk to Wilson. App. 97, ll. 11 – App. 100, ll. 4.

On cross examination, Wilson said he did not give a statement saying that he committed the armed robbery. He was present at the time of the robbery but he was not armed. It was a strong armed robbery. App. 93, ll. 1 – App. 95, ll. 7.

At the close of the hearings, the judge said to defense counsel:

> **The Court:** All right. Anything from the defense as far as the evidence is concerned?
>
> **Defense counsel:** No, Your Honor.

App. 136, ll. 5 – 11.

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[2] Jackson v. Denno, 378 U.S. 368 (1964).

The judge ruled that based on the totality of the circumstances, the statement made by the defendant was freely and voluntarily given. He ruled that the statement would be admitted. App. 136, ll. 17 – App. 137, ll. 1.

The judge then ruled on the identification issue. He then asked if there were anything else to get on the record. Defense counsel then stated:

> Your honor, I just think for purposes of the Jackson v. Denno and the ---I understand your ruling. I just think for purposes of the record, I need to clarify argument for argument purposes.

App. 137, ll. 1 – 25.

Counsel then argued that it was the defendant's testimony that his statement was coerced due to the conversation with his wife, and that Sgt. McDonald said he could see his wife if he gave a statement. Therefore, the statement was involuntary. App. 138, ll. 1 – 10.

The judge stated that his ruling remained the same. App. 139, ll. 8 – App. 140, ll. 1.

In her opening statement, the solicitor told the jury:

> Bruce Wilson is now in the custody of the police and he gives a statement to law enforcement. Yes, I was with Franklin on August 2oth of 2004, and I robbed the Shell station, the Pantry Express. So you will hear from Gloria. You will hear from Franklin. You will see the videotape. And you will hear of the defendant's statement admitting to his involvement.

App. 163, ll. 14 – 21.

Following the testimony of two witnesses which included Gloria Norman, who was the clerk at the pantry Express during the robbery, Wilson entered a guilty plea to three armed robberies. App. 227, ll. 1 – App. 243, ll. 4.

At his first PCR hearing on August 1, 2007 and at his second PCR hearing on October 18, 2012, Wilson's issue was ineffective assistance of trial/plea counsel. The primary claim was

counsel's failure to have evidence suppressed. He felt counsel should have filed a motion to suppress his statement and the photo identification. Supp. App. 27, ll. 4 – 8; Supp. App. 42, ll. 2 – Supp. App. 43, ll. 17; App. 281, ll. 7 – App. 282, ll. 2.

Wilson told the trial court at the beginning of his trial that he wanted a different attorney because he had had limited contact with his present counsel, and he felt that she was not going to represent him to her full ability. The judge denied his request. App. 7, ll. 14 – Ap. 12, ll. 10.

Wilson turned himself into police after he saw himself on the news. Supp. App. 28, ll. 17 – 25. He gave a statement to police before he was appointed an attorney. Supp. App. 29, ll. 1 – 13. Wilson gave a statement admitting that he was at the robbery but said it was not an armed robbery. The videotape showed that he was not armed. The first time his attorney visited him, Wilson said she told him that the only thing wrong with his case was his statement because he confessed being there. Supp. App. 35, ll. 1 – Supp. App. 36, ll. 2.

When he was first arrested, he gave a statement about another robbery. Three days later, Sgt McDonald met with Wilson and told him that his co-defendant had given him up so Wilson might as well tell the truth. Wilson wanted to talk to his wife (girlfriend) before he gave a statement. His wife did come to see him. When Wilson first saw her, she was crying because the investigator told her Wilson was facing forty years if he did not give the police a statement. She told Wilson to help himself and give a statement. Based on that, he gave the police a statement. But he continued to say no one was armed. Supp. App. 36, ll. 3 – Supp. App. 39, ll. 8.

He decided to plead guilty during the trial when he saw his wife in the court room who was there because the solicitor had subpoenaed her to come. He was allowed to talk to her. His trial counsel told him that he would get life in prison if he went to trial. His wife told him to take the plea. Supp. App.43, ll. 18 – Supp. App. 46, ll. 25.

Trial counsel denied that she told Wilson he could get a life sentence on this one armed robbery. She admitted telling him that if he were found guilty on this one, the state could seek life on the next armed robbery. His wife was in the courtroom and the trial judge allowed her to talk with Wilson at length. Supp. App. 55, ll. 9 – Supp. App. 56, ll. 13. The girlfriend was subpoenaed by the state after Wilson had taken the stand. Trial counsel never talked with the wife. Counsel thought they could use just Wilson's testimony for the Jackson v. Denno hearing. Counsel did admit that if she had talked to the wife, it could have been helpful to learn that the police used her to persuade Wilson. Counsel also admitted that Wilson's statement was critical to his case as well as the videotape. Supp. App. 68, ll. 24 – Supp. App. 71, ll. 11.

The PCR judge, Judge James Williams, ruled that he found trial counsel's testimony to be credible and found Wilson's testimony to not be credible. He ruled that trial counsel's conduct did not fall below the objective standard of reasonableness. Counsel conferred with Wilson; conducted an adequate investigation; was thoroughly competent in her representation of Wilson. Supp. App. 82. The judge wrote that Wilson failed to prove that counsel failed to render effective assistance of counsel, and Wilson failed to prove that he was prejudiced by trial counsel's performance. Supp. App. 82-83.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland v. Washington, *supra*; Butler v. State, *supra.*

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. The applicant must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 117-118, 386 S.E.2d 624 (1989).

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). The applicant must show that there is a reasonable probability that but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985).

Due process of law requires that before a guilty plea can be entered voluntarily and intelligently, a defendant must be advised of his privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709 (1969).

In Jackson v. Denno, 378 U.S. 368 (1964), the United States Supreme Court held :

> A defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession without regard for the truth or falsity of the confession. Accordingly, a defendant has the right to object to the use of the confession and to have a fair hearing and a reliable determination on the issue of voluntariness.

See also State v. Moses, 390 S.C. 502, 702 S.E.2d 395 (Ct. App. 2010).

Trial counsel was ineffective for not questioning more thoroughly the voluntariness of Wilsons' statement to police that he was present at the crime. Counsel did not call Wilson's wife to testify at the Jackson v. Denno, *supra*, hearing. The wife could have told of the investigator telling her that Wilson was facing forty years. She could have verified that she was crying when she talked to

Wilson and the reason. She could have testified to the point of the investigator telling her that Wilson was facing forty years, and how she begged him to plead guilty.

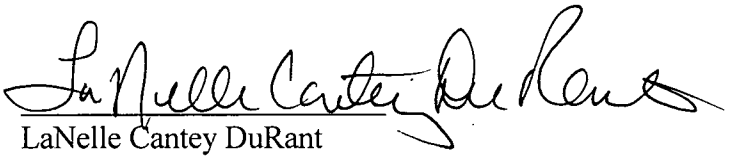
Wilson gave his statement without having an attorney. Wilson also gave a statement only because of what his girlfriend told him which was based on then investigator telling her Wilson was facing forty years. The state then subpoenaed the girlfriend and had her in the courtroom. After the trial counsel explained that Wilson could be facing life in prison, the girlfriend helped persuade him to plead guilty.

Trial counsel admitted that his statement was crucial to the case. Even so, counsel did not present any evidence or argument at the close of the hearing although the trial judge specifically asked counsel. After the judge ruled, then counsel asked to make an argument for the sake of argument. Again, counsel's argument against the admission of the statement was cursory at best regarding voluntariness. Wilson had no choice but to plead guilty at that point after his statement was going to be admitted. His guilty plea was not freely and voluntarily entered. A guilty plea is a waiver of all non-jurisdictional defects. The rulings of the trial court were so prejudicial that Wilson had to plead guilty.

CONCLUSION

Based on the above, petitioner's convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 9th day of January, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

BRUCE WILSON,

PETITIONER,

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STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Clayton Mitchell, Esquire and Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Bruce Wilson #192733, Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 9th day of January, 2015.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of January, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.