THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
COMMON PLEAS COURT
Mark, J. Hayes, II, Circuit Court Judge

Case No. 08-CP-42-3298
Appellate Tracking No.: 2010-151195

Nathaniel Green, ... Petitioner,

v.

State of South Carolina, ... Respondent.

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In November of 2004, the Spartanburg County Grand Jury indicted Nathaniel Green on the charge of trafficking in crack cocaine, more than ten grams. On February 15, 2005, Green appeared before the Honorable J. Derham Cole for a bench trial which Green requested. App. 7, ll. 1-12. Green was represented by A.M. Boggs, Esq. Green was found guilty after the bench trial and sentenced to the mandatory minimum sentence of twenty-five years as a third offense. A notice of appeal was filed and an appeal perfected with the filing of an *Anders* brief. 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. An evidentiary hearing was held July 27, 2009 before the Honorable J. Mark Hayes, II. On November 2, 2009, Judge Hayes issued an order denying Green's PCR application and dismissing with prejudice. Green's attorney filed a notice of appeal. SCCID Appellate Division took over the case and filed a *Johnson* petition for certiorari with this Court. Subsequently Green moved to stay the petition and moved to be allowed to file for Rule 60(b) relief in the circuit court.

Pursuant to Green's motion the case was stayed by order of this Court to

allow Green to file for Rule 60(b) relief in the circuit court. An evidentiary hearing was held in which Green submitted testimony and evidence. The Rule 60 motion was subsequently denied by the circuit court. Green appealed from the denial of his motion under Rule 60 and moved to have the original petition consolidated with the issue from his Rule 60 hearing. This Court has consolidated the two matters and allowed the withdrawal of Green's initial *Johnson* petition for a writ of certiorari. The Court further ordered that Green be allowed to submit a petition and supplemental appendix so as to include the evidence presented in the Rule 60 hearing. This petition follows.

ARGUMENT

1. THE CIRCUIT COURT ERRED IN DENYING RELIEF BASED ON THE CHAIN OF CUSTODY ISSUE.

Nathaniel Green was arrested on June 30, 2004 when he allegedly sold an ounce of crack cocaine to Keith Pearson for $800. App. 7, ll. 13-25. Pearson was a confidential informant (CI) who made controlled buys for the Sheriff's Department. App. 7, ll. 13-25. On June 30, 2004, Pearson was equipped with an audio video device in preparation for a controlled buy from Green whom Pearson knew. Deputies gave the CI $800 to purchase one ounce of crack from Green. App. 11, ll. 1-25. The deputies claim to have heard and seen a drug transaction through the equipment. App. 13, ll. 1-25; 14, ll. 1-25; 15, ll. 1-24.

At the PCR hearing, Green's testimony was that his trial counsel was ineffective because he did not prevent the introduction of drug evidence by proper investigation and objection. Specifically, he alleged counsel failed to investigate the facts surrounding insufficiencies as to the chain of custody Form C. App. 80, ll. 1-25. Green explained that the wrong person was named as the person who made the original seizure on the Form C used for the drugs for which he was convicted. Pearson, the CI, was not listed as the person having made the original seizure on the Form C. Instead, the Form C lists Deputy Chris Raymond as the

person making the initial seizure of the drugs. Green offered a copy of the Form C at issue as Exhibit 3 in his PCR case. App. pp. 92-25.

Green further argued that the Form C used in his case was a signed and notarized blank photocopy that had his case information added to at a later date. Green argued that this was a violation of Rule 6(b) of the South Carolina Rules of Criminal Procedure which requires that each form be signed personally at the time it is filled out with the case information, and that to be in compliance with Rule 6, SCRCrimP, the form had to be completed and properly notarized in the presence of the notary. App. 85, ll. 10; 92, ll. 1-25. Trail counsel testified at the PCR hearing that he was not aware of any issue with the Form C leading up to the trial and that at the PCR hearing was the first time he had heard of this issue. Boggs testified at the PCR that the Form C issue was the one issue that "caught his attention". Boggs admitted that he would have had copies of the Form C before in preparing for the trial, but was not aware of the irregularities with the Form C. App. pp. 113-116.

At the initial PCR hearing Green attempted to raise an issue as to the chain of custody of the drug evidence from his trial. A. 81-83. During his initial PCR hearing, Green explained his belief that the chain of custody documents (Form C) used as a basis for the introduction of the drugs at his criminal trial were in

violation of Rule 6, SCRCrimP. A. 83. In particular, it was Green's contention that the documents used in his trial started as photocopies of blank forms that had been pre-signed and notarized. A. 84-85. Green based his belief on a visual comparison of several of the same type of forms, each from a different case, which revealed each had signatures that were exact duplicates of all the others. A. 84-85. Green's contention was that for the signatures on different forms from different cases all to bear exactly identical signatures, the forms would have had to have been photocopies of a blank original filled out in advance. Most importantly, Green contended that the signatures, including the notarization, was already on the forms when the case related information was filled out. A. 85-87.

At the initial PCR the State objected to the introduction of the exhibits, cross-examined Green about his failure to produce an original, and argued that without originals the photocopies were unreliable. 87-93. The State specifically argued that Green had not met his burden of proof because he had not produced the "originals," nor offered any testimony to substantiate his allegations. A. 117. The State argued that Green's allegations were "speculation at its very best". A. 117, l. 4-5.

Ironically, subsequent to the initial PCR and denial of relief in Green's case, and while his initial petition in this Court was pending, evidence was discovered

conclusively proving that Green's allegation as to the use of pre-signed and notarized photocopies was true. Based on this evidence this Court granted a stay and ordered the case remanded to allow Green to proceed in the circuit court under Rule 60. A hearing was held under Rule 60 and the evidence contained in the Supplemental Appendix was entered into the record in Green's case. This being numerous Form C's from different cases, and the testimony of two employees of the Sheriff's Office who purported filled out and signed or notarized each form. This testimony was from the PCR of a different individual but in which, Green's Form C was used as an exhibit. The evidence showed that the deputies did not sign the forms contemporaneously with the forms' completion. Nor was the notary valid. The forms were made to appear that each was filled out, signed and notarized contemporaneously with the receipt of evidence. Evidence proved this not to be true.

Despite proof that the Form C in Green's case was falsified by the Sheriff's Office evidence custodians, the circuit court denied Green relief. The circuit court's denial of relief was in error as as Green has established that trial counsel failed to investigate and challenge drug evidence that, given the proper scrutiny and challenge, would not have been admissible.

A criminal defense attorney has a duty to perform a reasonable

investigation, including at a minimum, the duty to interview witnesses and make an independent investigation of the facts and circumstances of the case. Lounds v. State, 380 S.C. 454, 670 S.E.2nd 646 (2008); Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007). Failure to investigate possible defenses constitutes ineffective assistance of counsel. Cobbs v. State, 305 S.C. 299, 408 S.E.2d 223 (1991).

In Green's case he has established that the Form C, in addition to other inaccuracies, was knowingly falsified by evidence custodians. As a result, the Form C in Green's case is insufficient to reliably establish either the identity of the persons involved or the handling of the evidence in question. The record shows that the evidence custodians used a stack of forms (Form C) that were all pre-signed and pre-notarized. Information and case numbers would routinely inserted on forms already signed and notarized, making them appear in compliance with Rule 6. The record shows that through the use of these forms it was possible that a Form C could reflect the receipt of evidence, or the notarization, by a person that was not present or involved in any way with the custody of the evidence. Supp. App. Under what was the standard operating procedure in Spartanburg County, the signature(s) on any particular Form C provides no guarantee that the person(s) who purportedly signed the document were involved with the evidence, or even at

work on that particular day. Supp. App.[1]

In Green's case, the existence of a Form C indicates the existence of others in the chain of custody. It fails however to provide credible evidence as to the identity of those persons or there handling of the evidence. Jane Millwood appears on Green's Form C as purportedly having handled the evidence in question. (Supp. App. 116). Robert Rosenberg appears on Green's Form C as purportedly having witnessed Millwood's signature. Rosenberg's notarial seal indicates that Millwood should have, in Rosenburg's presence, swore under oath that the information on the Form C was true and correct. As is clear now from the record, the signatures of Millwood and Rosenberg on Green's Form C can not be relied upon as proof that any of the information on the form is either true or accurate.

While the very existence of the Form C at issue indicates that there were others involved in the chain of custody, due to the circumstances, the identity of others in the chain can not be reliably determined by the Form C alone. Based on the known falsity of the Form C, the Court must look to the testimony of witnesses

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[1]Absent taking the time to request and view the evidence and original chain documents at the evidence room or at trial, defense attorneys were unlikely to ever discover this practice since the defense is provided only copies in discovery material. The practice of using pre-signed and notarized forms therefore went on undetected for a considerable period of time. Supp. App.

at Green's trial to determine the sufficiency of the chain. Since neither Millwood nor Rosenberg were presented at Green's criminal trial, the record fails to establish by reliable evidence that either Millwood or Rosenberg were responsible for the handling of the evidence. The signatures of both Millwood and Rosenberg were made on Green's Form C by photocopy months, perhaps even years, before Green's arrest. As a result, in the absence of their testimony at trial, their pre-photocopied signatures on Green's Form C can not be relied on to establish the actual identity of those in the chain. Due to the lack of reliable evidence as to identity of additional person(s) in the chain, if properly challenged by defense counsel, the evidence would have been inadmissible.

"Where the substance analyzed has passed through several hands the evidence must not leave it to conjecture as to who had it and what was done with it between the taking and the analysis." Benton, 232 S.C. at 33-34, 100 S.E.2d at 537 (citation omitted). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." Sweet, 374 S.C. at 7, 647 S.E.2d at 206 (*citing* State v. Taylor, 360 S.C. 18, 27, 598 S.E.2d 735, 739 (Ct.App. 2004)). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the

chain of custody due to an absent witness." Id. "Proof of chain of custody need not negate all possibility of tampering so long as the chain of possession is complete." State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001). "In applying this rule, we have found evidence inadmissible only where there is a missing link in the chain of possession because the identity of those who handled the [substance] was not established at least as far as practicable." *Id. See* State v. Hatcher, 392 S.C. 86 (2011).

In Hatcher this Court held that "the ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be. The record here indicates the drugs received for testing were in fact, those taken from Hatcher without any alteration, tampering, or substitution." State v. Hatcher, 392 S.C. 86, at 95 (2011). In Green's case, the record fails to establish a sufficient chain to ensure that the evidence initially seized was in fact the same evidence that was tested and offered at Green's trial. Green's Form C can not be relied on to establish the transfer of the evidence or ensure that the evidence tested was actually the evidence allegedly obtained from Green by Keith Pearson and given to Investigator Chris Raymond. This Court has noted that "[w]hether the chain of custody has been established as far as practicable clearly depends on the unique factual circumstances of each case." *Footnote 1*, S.C. Dep't of Soc. Servs. v.

Cochran, 364 S.C. 621, 614 S.E.2d 642 (2005). Due to the practice of using pre-signed and notarized documents in violation of Rule 6, the State has failed to establish the chain of custody as far "as practical."

Although there was "Best Bag" testimony in Green's case, the mere fact that evidence is sealed upon presentation for testing does not, in itself, establish a sufficient chain of custody under Hatcher. The State was required to either produce a reliable Form C under Rule 6, or the testimony of a witness identifying those known to be in the chain. In Green's case the State failed to produce reliable evidence as to the identity of those in the chain. The Sheriff's practice not only violated Rule 6, and the rules applicable to notaries, but constitutes the making of misrepresentations under oath in criminal cases a standard operating procedure.

Here, had trial counsel requested to review and inspect the original documentation as to the chain and evidence, it would have been apparent that no document existed that actually contained any original signatures. Further inquiry would have revealed the State's practice which is in violation of Rule 6, the rules applicable to notaries, and false swearing. In view of the lack of testimony of Millwood or Rosenburg, the drug evidence would not have been admissible. Where 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. *See*

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). Here, counsel's failure to investigate and challenge the admissibility of the evidence in Green's case undermines any confidence in the outcome of the trial. *See* Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Counsel's performance was therefore deficient resulting in the improper admission of drug evidence on which the conviction is based.

CONCLUSION

Based on the foregoing, the Green moves this Court to grant his Petition.

Respectfully submitted,

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February 9, 2015.

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CERTIFICATE

I certify that on February 9, 2015, I served the Applicant's Petition and Supplemental Appendix on the Respondent by placing a copy of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below:

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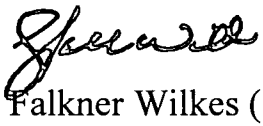
Respectfully submitted,



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