

# Memorandum in Support of Petitioner's Response

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**SC Court of Appeals**

## Novel questions of law

- In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the lower court. Madison ex rel. Bryant v. Babcock center, Inc (S.C. 2006) 371 S.C. 123, 638 S.E.2d 650.
- Johnson v. Arbabi, (S.C. App. 2001) 347 S.C. 132, 553 S.E.2d 453.
- Longshore v. Saber Sec. Services, Inc, (S.C. App. 2005) 365 S.C. 554, 619 S.E.2d 5.
- In answering a certified question raising a novel question of law... Croft v. Old Republic Ins. Co. (S.C. 2005) 365 S.C. 402, 618 S.E.2d 909.
- Fontaine v. United States, 411 U.S. 213-15, 93 S.Ct. 1461-63 (1973) (holding that defendant is entitled to a hearing to determine whether or not his guilty plea was voluntary even though he had declared in open court that his plea was given voluntarily and knowingly); See also Machibroda v. United States, 368 U.S. 487, 494, 82 S.Ct. 510, 514 (1962).
- \* Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499 (1971) (holding that when pleas rest on an implied promise or on an agreement by a prosecutor that he will make no sentencing recommendations, such promises must be fulfilled).
- Johnson v. Beto, 466 F.2d 478, 479-80 (5th Cir. 1972) (holding that... defendant is entitled to resentencing or withdrawal of his guilty plea).

- Roberts v. LaVallee, 389 U.S. 40, 88 S.Ct. 194 (1967) (determining that repetitious appeals applications to State Courts are not required when defendant has already exhausted his remedies to the State Courts).
- Roy v. Lampert, (9th Cir. 2006) 465 F.3d 964 (evidentiary hearing proper where sufficient allegations that claims were diligently pursued and extraordinary circumstance existed).
- The Supreme Court disregards technical rules on appeal...  
State v. Floyd, (S.C. 1934) 174 S.C. 288, 177 S.E. 375.

### Subject matter Jurisdiction

- Subject matter Jurisdiction may be raised at any time, and thus, the Supreme Court was able to review defendant's claim that trial court lacked subject matter Jurisdiction on ground that indictment was insufficient, even though he failed to raise the issue until his petition for Certiorari.

Lack of Subject matter Jurisdiction, on basis that indictment failed to contain necessary elements of charged offense, was a Jurisdictional defect not covered by the Statute which required that objections be made...

HOOKS v. State, (S.C. 2003) 353 S.C. 48, 577 S.E.2d 211

### Statutory Construction

- When a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant.

- \* Defendant was entitled to postconviction relief (PCR) based on ineffective assistance of counsel during his guilty plea; defendant's attorney's failure to object when Solicitor recommended maximum sentence in violation of negotiated plea agreement fell below professional norms, and fact that defendant was unsure whether to plead guilty, coupled with fact that he was under impression that Solicitor would not make sentencing request, demonstrated that he would not have pled guilty but for attorney's ineffective assistance.  
Thompson v. State, (S.C. 2000) 340 S.C. 112, 531 S.E.2d 294.

- \* A defendant's counsel was ineffective during the guilty plea proceeding where the defendant initially insisted on proceeding to trial, the defendant only agreed to plead guilty when he believed the Solicitor would neither oppose nor recommend probation, and (when the Solicitor disregarded the plea agreement) the defendant's attorney failed to draw the Judge's attention to the bargain and then failed to move to withdraw the defendant's guilty plea.  
Jordan v. State, (S.C. 1988) 297 S.C. 52, 374 S.E.2d 683.

- \* Although a defendant claiming that the cumulative effect of trial counsel's errors constitute ineffective assistance of counsel must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive

opportunity to be heard and to defend [his] substantive right." Bowie v. City of Columbia, (U.S.S.C. 1964) 84 S.Ct. 1697, 378 U.S. 347.

See also Brown v. Malloy, (S.C. App. 2001) 345 S.C. 113, 546 S.E.2d 195; S.C. Dept. of Labor, Licensing and Regulation v. Girgis, (S.C. App. 1998) 332 S.C. 162, 503 S.E.2d 490.

- \* • Although trial court is allowed broad discretion in conducting restitution hearing, defendant must receive notice of a hearing and evidence intended to be used to prove amount of restitution, during hearing defendant must be given opportunity to be heard and to cross-examine witnesses, and evidence admitted during restitution hearing must be reliable and trustworthy.  
State v. Gulledge, (S.C. 1997) 485 S.E.2d 923

- \* • once Brady disclosure rule violation is established, reversal is required. State v. Kennerly, (S.C. App. 1998) 331 S.C. 442, 503 S.E.2d 214.

For the reasons set forth in this Memorandum, Petition for Writ of Habeas Corpus, Declaration in Support of Petition, Supplement, Traverse and all other documents on file, Petitioner is entitled to the requested relief.

Robert James Miller, Jr.

Other obvious defects

## Prosecutorial Suppression of evidence

- Kyles v. Whitley, 514 U.S. 491 (1995) "Because the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result, Kyles is entitled to a new trial."
- Walker v. Lockhart, 763 F.2d 942 (8th Cir. 1985) 478 U.S. 1020 (1986) prosecutorial suppression of exculpatory evidence.
- Petitioner has proved by clear and convincing evidence at least 40 instances of obstruction of Justice, the wholesale suppression of exculpatory evidence, the fabrication of inculpatory evidence by the Solicitor and Sheriff's Office, prosecutorial and law enforcement misconduct and Constitutional violations which resulted in a case that was corrupted from start to finish and convicted an innocent man.  
Solicitor Maxwell exhibited callous and deliberate disregard for the fundamental principles of truth and fairness that underlie our criminal justice system.
- Franklin v. Duncan, 70 F.3d 75 (9th Cir. 1995)  
Prosecutor's reference in closing argument to post-Miranda silence... violated 5th Amendment right

to remain silent.

- Davis v. Zant, 36 F.3d 1538 (11th Cir. 1994)  
Prosecutor's "repeated and clearly intentional misrepresentations" ... rendered trial fundamentally unfair in violation of Due Process Clause.
- Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963) (holding that the prosecution must turn over evidence to the defense if evidence is exculpatory ...)

### Ineffective Assistance of Counsel

- Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) counsel's "total failure to actively advocate his clients cause" and "repeated expressions of contempt for his client for his alleged actions" had effect of "provid[ing] [petitioner] not with defense counsel, but with a second prosecutor."

- Hendricks v. Calderon, 64 F.3d 1340 (9th Cir. 1995) despite evidence that defendant was mentally impaired, counsel failed to investigate defendant's mental condition as possible mitigating factor at Sentencing.

(Please See attached documents)

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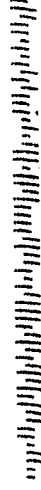
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SC Court of Appeals

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**SIXTH JUDICIAL CIRCUIT  
PUBLIC DEFENDER'S OFFICE**

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June 1, 2012

Mr. James Robert Miller, SCDC # 316047  
Broad River Correctional Institution  
4460 Broad River Road  
Columbia, SC 29210

Re: Your recent letter

Dear Mr. Miller:

I am writing in response to your recent letter dated "May 2012" that I just received yesterday. You have asked a number of different questions and I will try to address them in the order that you asked them.

You first ask "What are the next steps?" and if it is possible for you to withdraw your guilty plea. I do not know of any legal basis for you to withdraw your guilty plea. As to the next steps, I have filed an appeal as you requested. If your appeal is denied, your next procedural step would be to file an application for Post-Conviction Relief, commonly known as PCR. In a PCR application, you argue that you are entitled to a new trial because you did not receive effective representation of counsel. A lawyer (obviously not me) would be appointed to represent you and eventually a hearing would be held. If a judge decided that you did not receive effective representation of counsel and that the ineffective representation made a difference in the outcome of your case, that judge could grant you a new trial.

You ask about whether or not the sentence on indictment 2011-GS-20-2036. The notes I took the day of the hearing reflect that the judge did order ten years suspended to three years probation. My notes also reflect that he ordered \$30,000.00 in restitution. I do not have a transcript but I believe the sentence sheet accurately reflects what the judge ordered. As to the restitution amount, the judge heard from both sides and made his decision on the amount. I believe he took into account the fact that money was taken from you and that your car was seized. If you remember, that State alleged you stole significantly more money than just \$30,000.00. I believe your only way to challenge this amount would be to file a PCR application as I mentioned above and request a new trial.

as to render a particularized prejudice inquiry unnecessary  
Green v. State, (S.C. 2002) 351 S.C. 184, 569 S.E.2d 318.

- \* Appointment of Counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.  
Bearden v. State of S.C. (C.A. 4 (S.C.) 1971) 443 F.2d 1090.

Forfeiture hearing ?

- Court of Appeals may consider an ineffective assistance claim in the first instance on direct appeal only if it conclusively appears from the record that counsel was constitutionally ineffective.
- U.S. v. Alerre, (C.A. 4 (S.C.) 2005) 430 F.3d 681.
- U.S. v. Thomason, (C.A. 4 (S.C.) 2008) 272 Fed Appx 228, 2008 WL 895678, unreported.

Forfeiture : Excessive fine ?

- Medlock v. One 1985 Jeep Cherokee, (S.C. 1996) 322 S.C. 127, 470 S.E.2d 373

Right to hearing, due process

- When a state court overrules a consistent line of procedural decisions with retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an

State v. Leopard, (S.C. App. 2002) 349 S.C. 467, 563 S.E.2d 342.

- When the Supreme Court is called upon to interpret the South Carolina Constitution, it is guided by the ordinary and popular meaning of the words used. Richardson v. Town of Mount Pleasant, (S.C. 2002) 350 S.C. 291, 566 S.E.2d 523.

\* What is the meaning of FinantC/Financial Identity Fraud?

- Supreme Court cannot construe a Statute without regard to its plain and ordinary meaning and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope. Horry County School District v. Horry County, (S.C. 2001) 346 S.C. 621, 552 S.E.2d 737.

- \* → In a proceeding for postconviction relief, a defendant collaterally attacks his conviction and MAY RAISE ANY CLAIMS OF CONSTITUTIONAL VIOLATIONS relating to his conviction. Williams v. Ozmint, (S.C. 2008) 380 S.C. 473, 671 S.E.2d 600.

- \* • Plea counsel was ineffective in failing to have plea agreement between defendant and Solicitor's office enforced... Solicitor withdrew the plea offer... Custodio v. State, (S.C. 2007) 373 S.C. 4, 644 S.E.2d 36.

- Gravley v. Mills, 87 F.3d 779 (6th Cir. 1996) (holding that a prosecutor violated due process by repeatedly making references to petitioners post-arrest silence; also finding that defendant had ineffective assistance of counsel because counsel had not objected...).
- United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381-82 (1985) (finding that... favorable evidence is material, and the government violates the Constitution by suppressing such evidence "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").  
See Kyles v. Whitley, 514 U.S. 419, 421-22, 435, 115 S.Ct. 1555, 1567 (1995) (finding that once a court applying Bagley has found constitutional error, there is no need for further harmless-error review).
- Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97 (1963).
- \* Alston v. Garrison, 720 F.2d 812, 815-16 (4th Cir. 1983) (holding defendant was denied effective assistance of counsel where counsel failed to object to evidence that defendant exercised right to remain silent).
- \* Butler v. King, 781 F.2d 486, 490 (5th Cir. 1986) (finding that defendant was entitled to federal writ of habeas corpus because state district court lacked jurisdiction...).