

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Abbeville County  
R. Lawton McIntosh, Circuit Court Judge  
2009-CP-01-00105

Appellate Case No. 2013-001076

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MARSHALL RAY MILLER, #249557,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

**Is there probative evidence to support the lower Court's finding that defense counsel rendered effective assistance of counsel?**

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Statewide Grand Jury Clerk of Court. The Petitioner was indicted On September 10, 2002 for Conspiracy to Traffick Methamphetamine (2002-GS-47-0032). A superseding indictment was returned on March 11, 2003. Kim R. Varner, Esquire, represented him. The Petitioner proceeded to trial *in absentia* on January 20-30, 2004 and was convicted as indicted. The Petitioner's sealed sentence was opened on August 24, 2004 at which time the Honorable Wyatt T. Saunders, Jr., sentenced him to confinement for a period of twenty-five (25) years.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed the Petitioner's conviction and sentence on October 19, 2007. State v. Miller, 375 S.C. 370, 652 S.E.2d 444 (2007). The Court of Appeals denied the Petitioner's Petition for Rehearing on January 17, 2008. The Petitioner subsequently filed a Petition for Writ of Certiorari to the South Carolina Supreme Court on April 21, 2008. The Supreme Court denied the petition on November 7, 2008, and the Remittitur was issued on November 10, 2008.

The Petitioner filed an Application for Post-Conviction Relief on April 20, 2009. The Respondent made its Return on or about April 19, 2010. An evidentiary hearing into the matter was convened on November 30, 2012, at the Laurens County Courthouse. The Honorable R. Lawton McIntosh denied the Petitioner's application on or about March 25, 2013. The Petitioner's timely 59(e) motion was denied on May 7, 2013.

## 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 PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court “gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law.” Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is “any evidence of probative value sufficient to support them.” Id. The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

## ARGUMENT

**There is probative evidence to support the lower Court's finding that trial counsel rendered effective assistance of counsel.**

Respondent submits that the PCR Court correctly held that defense counsel was effective. South Carolina Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. To establish a claim of ineffective assistance of counsel, the PCR applicant must prove: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant's case. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry, 300 S.C. at 117, 386 S.E.2d at 625. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. To establish prejudice, the defendant is required "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052. Moreover, no prejudice occurs, despite trial counsel's deficient performance, where there is otherwise overwhelming evidence of the defendant's guilt. Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009).

**I. There is probative evidence to support the PCR Court's ruling that trial counsel was not ineffective regarding Petitioner's claim that trial counsel conceded "petitioner's guilty during opening and closing arguments."**

Petitioner claims that trial counsel was ineffective for "conceding Petitioner's guilt during opening and closing arguments." In support of his argument, Petitioner's plucks quotes from the opening and closing statements out of context. In reply to this argument,

trial counsel stated he knew at the outset of the trial that the State was going to use the Petitioner's full confession. App. Vol V., page 2086, lines 24-25. Trial counsel further stated:

“[W]hat the whole trial strategy was, and it was said in the opening statement, nobody was going to argue he was Boy Scout, he was not looking for his merit badge. Nobody's gonna say everything he did was polite, appropriate, or even legal. But what we're trying here is a conspiracy. The objective in the trial strategy was to convict him of a lesser-included offense...because they had not only his statement, which pretty much sealed the deal, but they had a mountain of other evidence. [I]f you read the opening statement in context...the argument was, it's not conspiracy.” App. Vol. V, page 2087, lines 5-16.

Trial counsel also testified that a lot of what he said in opening and closing was said ironically and he was mocking what the Attorney General's Office said about the Petitioner. App. Vol. V, page 2108, lines 6-10. Trial counsel further reiterated that picking out sentences takes the opening and closing out of context. “[I]t is not an admission [of guilt]. And to read it as typed and misinterpret as if you weren't there, is absolutely a misunderstanding of what was said and the context it was said and the tone it was said in. And it's out of context completely.” App. Vol. V. page 2108, lines 16-20.

Trial counsel's opening and closing statements must be read as a whole, as the PCR court properly concluded. Trial counsel's goal and strategy was to challenge the State's conspiracy evidence. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006) (recognizing when counsel provides a valid trial strategy in response to a Sixth Amendment ineffective assistance of counsel claim, counsel's performance will not be

deemed deficient). Based on the foregoing, there is evidence of probative value in the Court's ruling that trial counsel was being rhetorical and the opening and closing statements must be read as a whole.

This Court should affirm the lower court's ruling that Petitioner failed to carry his burden of proving counsel was not ineffective regarding his opening and closing statements.

**II. There is probative evidence to support the PCR Court's ruling that trial counsel was not ineffective regarding Petitioner's claim that trial counsel was ineffective for failing to object to the "trial court's constitutionally deficient hybrid reasonable doubt and circumstantial evidence charge."**

Petitioner claims that the PCR incorrectly ruled that trial counsel was ineffective for not objecting to "hybrid instructions regarding reasonable doubt and circumstantial evidence." The instructions Petitioner complains of are not hybrid jury charges. The charges he claims are hybrid are in fact, seven pages apart from each other. Petitioner again is taking snippets of sentences out of context. He cannot parse the jury instructions into bits and claim those bits are defective and then claim trial counsel was ineffective for not objecting to the jury instructions. "A jury charge is correct if, when read as a whole, the charge adequately covers the law." State v. Logan, 405 SC 83 (2013), *citing* State v. Brandt, 393 SC 526, 549, 713 SE2d 591, 604 (2011).

The PCR Court correctly ruled that while the courts have moved away from the moral certainty language, there was no prejudice to the Petitioner for trial counsel's failure to object to the moral certainty reference. Trial counsel testified that "[the judge] gave his instruction on moral certainty; you have to be convinced of someone's doubt to a moral certainty. Not according to morals, but to a moral certainty." App. Vol. V, page 2093, lines 4-7. "[F]or someone to be morally convinced someone is guilty to me is a higher standard

than an average charge. I thought it was a favorable charge.” App. Vol. V, page 2093, lines 10-12.

Furthermore, see Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009) (“In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in [a] way that violates the Constitution.”); *id.* at 204, 675 S.E.2d at 740 (finding no reasonable likelihood that “moral certainty” language in a trial court's jury instructions caused the jury to apply those instructions in a way that violated the Constitution, as the trial court repeatedly emphasized the State's burden to prove respondent's guilt beyond a reasonable doubt); Todd v. State, 355 S.C. 396, 403, 585 S.E.2d 305, 308–09 (2003) (noting that where a trial court mentions “moral certainty” language in its jury instructions, “ ‘the moral certainty language cannot be sequestered from its surroundings’ ” (quoting Victor v. Nebraska, 511 U.S. 1, 16 (1994))); *id.* at 403, 585 S.E.2d at 309 (finding that, despite the inclusion of moral certainty language, “the trial judge's careful and exhaustive articulation of the reasonable doubt and circumstantial evidence standard, when examined in its entirety, effectively communicated the high burden of proof that the state was required to establish by the Constitution”); State v. Zeigler, 364 S.C. 94, 106, 610 S.E.2d 859, 865 (Ct.App.2005) (“In reviewing jury charges for error, we must consider the court's jury charge as a whole in light of the evidence and issues presented at trial. If, as a whole, the charges are reasonably free from error, isolated portions which might be misleading do not constitute reversible error.” (internal citation omitted)).

While the Supreme Court ruled in State v. Cherry, 361 S.C. 588, 606 S.E.2d 475

(2004), that the charge approved in State v. Grippon, 327 S.C. 79, 83-84, 489 S.E.2d 462, 464 (1997) is the sole remaining charge to be used in instructing juries in cases relying, in whole or in part, on circumstantial evidence, that decision was not published until November 29, 2004, ten months after Petitioner's trial.

Therefore, this Court should affirm the lower court's ruling that Petitioner failed to carry his burden of proving counsel was not ineffective for not objecting to the jury charge on reasonable and circumstantial evidence.

**III. There is probative evidence to support the PCR Court's ruling that trial counsel was not ineffective regarding Petitioner's claim that trial counsel "failed to object to improper opinion testimony of witnesses not qualified by the trial court to give expert opinions on scientific matters."**

Petitioner contends that trial counsel was ineffective for his failure to object to the testimonies of Agent Sonnefeld and Major McCallister because they offered opinion testimony and were not qualified as experts. Specifically he alleges trial counsel should have objected to Agent Sonnefeld's testimony regarding chemicals in containers and chemical residue left in a coffee grinder, as well as her testimony of "[w]e just identified it as what I thought it was." App. Vol. I., page 306, line 21. Petitioner also alleges trial counsel was ineffective for not objecting to Major McCallister's testimony regarding the anhydrous ammonia tank.

Lay witnesses are permitted to offer opinion testimony when such testimony is rationally related to the witness's perception, does not require special knowledge, and may assist the jury's understanding of the witness's testimony. State v. Blurton (S.C.App. 2000) 342 S.C. 500, 537 S.E.2d 291, rehearing denied, certiorari granted, reversed 352 S.C. 203, 573 S.E.2d 802. Agent Sonnefeld's testimony regarding the gas can and the chemicals inside was her perception of what was in the gas can. The State asked her if she was sure

there was gas in it, or did she just identify what she thought it was. App. Vol. I, page 306, lines 17-20. She admitted that she identified it as what she thought it was – chemicals. App. Vol. I., page 306, line 21. It does not take any specialized knowledge to identify a “chemical” smell.

Petitioner again takes testimony out of context when he cites to Mr. Ford’s testimony. Mr. Ford is the SLED forensic chemist who was qualified as an expert and did the presumptive test on the tank. Mr. Ford testified that there was a presumptive confirmation on the tank that it was anhydrous ammonia. App. Vol. II, page 605. Mr. Ford further clarifies what is meant by a presumptive test, that certain chemicals that react with anhydrous ammonia are exposed to the tank, and if those chemicals change to a specific color, it is presumed that the tank contains anhydrous ammonia. App. Vol. II, page 607.

Mr. Ford explained earlier that he did not do a confirmative test because he is not allowed to bring anhydrous ammonia tanks to SLED, but that there are other tests people can do to confirm that there is anhydrous ammonia in a tank. App. Vol. II, page 606, lines 3-20. Petitioner claims that Major McAllister’s testimony regarding the anhydrous ammonia tank amounts to “unqualified expert witness testimony” and that trial counsel was further ineffective for not objecting to it. However, Major McAllister was merely testifying as to the facts of the case. The fact was that SLED did a presumptive test on the tank and determined that it was anhydrous ammonia. App. Vol. I., page 445, line 2 – page 446, line 15.

As to the loss of the tank, trial counsel testified that he didn’t consider the loss of the tank to be potentially exculpable because the tank was never linked to the Petitioner. App. Vol. V., page 2102, lines 4-9. Trial counsel stated “I don’t think that would be exculpatory

for anybody except the person who had possession and was tied to it.” App. Vol. V., page 2012, lines 9-11. Petitioner has failed to show how trial counsel was ineffective for not objecting to this line of questioning.

Therefore, this Court should affirm the lower court’s ruling that Petitioner failed to carry his burden of proving counsel was not ineffective regarding the testimony surrounding the anhydrous ammonia tank.

**IV. There is probative evidence to support the PCR Court’s ruling that trial counsel was not ineffective regarding Petitioner’s claim that trial counsel was ineffective for “failing to request a suppression hearing for evidence retrieved from Georgia in which the chain of custody was unreliable.”**

Petitioner alleges that trial counsel was ineffective for not making a motion *in limine* regarding the items that were seized from Gene Saylor’s house in Georgia and turned over to SLED. (The items include a trailer, a duffle bag, a red five-gallon jug, and a plastic container with mason jars in it. App. Vol. II p. 538, line 22 – p. 539, line 13.) Petitioner claims that the chain of custody of these items was in question because Mr. Saylor “tampered” with the evidence with he acknowledged that he moved it and when Agent Sonnefeld arrived “without contacting the Georgia authorities” to retrieve the items from Mr. Saylor.

The record reflects that Agent Sonnefeld went to Georgia accompanied by agents from the Georgia Bureau of Investigation. App. Vol. I. p. 303. Mr. Saylor testified that he received the items from the Petitioner and then hid them. He took the agents to where he hid them and Agent Sonnefeld transported them back to South Carolina. (See App. Vol. II. p. 538, line 22 – p. 544, line 10.) Petitioner’s allegation is without merit that trial counsel was not ineffective for not making a motion *in limine* regarding the chain of custody of these items, because the chain of custody is complete. Furthermore, trial counsel noted at

the PCR hearing that he didn't necessarily think a motion *in limine* would have been good strategy because he didn't "want to aggravate a judge and make a motion *in limine* on something that doesn't affect my client." App. Vol. V, page 2101, lines 9-10.

The PCR Court properly ruled there was no chain of custody issue and therefore trial counsel was not ineffective for failing to object to it. App. Vol. V., page 2112, lines 8-25. Therefore, this Court should affirm the lower court's ruling that Petitioner failed to carry his burden of proof.

**V. There is probative evidence to support the PCR's Court's denial of Petitioner's Discovery Motion.**

Petitioner claims he was denied access to Discovery materials. On the contrary, Petitioner has had access to the Discovery materials multiple times. PCR counsel filed a Discovery Motion on or about March 12, 2012. This motion simply asked "for the right to use the Discovery rules." App. Vol. IV, pages 1994. The Respondent replied on or about April 17, 2012. Generally, Discovery is not allowed in non-capital PCR cases without good cause and an order of the court permitting Discovery requests. *See* SC Code §17-27-150(A).

However, the Respondent had a Protective Order signed for PCR counsel so that PCR Counsel could view the underlying Discovery/investigative file related to the Petitioner's conviction. App. Vol. IV, pages 1998-1999. The Discovery was mailed to PCR Counsel and he admitted he had the investigative file and had "about three weeks or so" to look at it. App. Vol. V., pages 2008, lines 7-13. Further, PCR Counsel agreed to read the State Grand Jury transcripts the day of the PCR hearing. App. Vol. V, page 2006, lines 5-7. In fact, PCR Counsel was given time to read the transcripts of the Grand Jury testimony the day of the PCR hearing. App. Vol. V., page 2018, lines 24-25; page 2022, lines 1-2.

At the PCR hearing, PCR counsel also noted he was seeking "broader" discovery

than the investigative file. App. Vol. V, page 2006, lines 14-15. Rather, PCR counsel was seeking both the trial and appellate attorneys' files. App. Vol. V., page 2006, lines 20-22. As far as the PCR Court allowing access in preparation for the PCR, the Court noted "I don't see how anything in this file or either the appellate counsel or trial counsel is gonna help you or lead to anything that may help you." App. Vol. V. pages 2012, lines 4-6. Even so, the PCR Court allowed the Petitioner time to look through the files and asked the appellate and trial attorney to help out locating items in the files during the hearing. App. Vol. V., pages 2020, lines 1-23.

Petitioner was allowed access to all material related to his conviction and appeal, including the State Grand Jury transcripts of testimony, as well as both trial and appellate counsels' files. Therefore, there is probative evidence to support the PCR Court's denial of the Petitioner's Discovery Motion as being moot.

As for Petitioner's claim that he never had access to the investigative file at all, that claim is false. Trial counsel testified that Petitioner had access to all the discovery material:

[Judge Saunders] required the Abbeville County Sheriffs and all the deputies that worked at the detention center, he required them to be in Court under a protective order. Each of them had to take an oath. Mr. Miller was allowed to have his discovery documents. The requirements were it had to be kept under lock and key, that none of the people that worked at the jail could read any of the materials....Mr. Miller was allowed to go into a private room by himself...read it. And when he was through with it, he was required to return it and they were required to put it under lock and key. App. Vol. V, page 2097, line 18 – page 2098, line 4.

Petitioner was also allowed access to the Discovery during the pendency of his direct appeal while he was housed at Lieber. *See also*, Rev. Supp. App., pages 6-8. However, Petitioner never requested to see the Discovery while it was at Lieber. Rev. Supp. App page

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Furthermore, Petitioner's own written statement that was entered as Exhibit 71 at trial, confirms that he was allowed access to the underlying discovery related to his conviction. He states on one page "Lies in Motion of Discovery" and lists ten statements he believes to be lies from out of the investigative file. 2<sup>nd</sup> Supp. App. Page 33. Therefore, this Court should affirm the lower court's ruling that Petitioner's Discovery Motion is moot.

**VI. Petitioner's claims regarding the Jackson v. Denno hearing, not securing the plea agreement in writing, and a "federal constitutional claim of personal jurisdiction" are not valid PCR claims as they were not presented to the PCR court and ruled upon.**

Petitioner claims in issues VI, VII, and VIII, that the PCR Court should not have denied him the right to amend his allegations the day of the PCR hearing to address claims regarding the Jackson v. Denno hearing, ineffective assistance for not securing a plea agreement in writing, and for not letting him raise a Federal constitutional claim of personal jurisdiction. SCRCF 15(a) states in part "a party may amend his pleading only by leave of court or by written consent of the adverse party." The PCR judge denied the Petitioner's request to amend his application. A judge's denial as to whether to allow amendment to pleadings ... will not be overturned without an abuse of discretion. Berry v. McLeod (S.C.App. 1997) 328 S.C. 435, 492 S.E.2d 794, rehearing denied, certiorari denied. Petitioner has presented no evidence that the PCR Court abused its discretion.

Furthermore, these arguments are not preserved for appellate review because the order of dismissal does not address Petitioner's present arguments. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 69, 693-941 (2003). *See also*

Summersell v. S.C. Dep't of Pub. Safety, 337 S.C. 19, 22, 522 S.E.2d 144, 145-46 (1999) (“The circuit court did not specifically address the issue, and where an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review.” (*citing* Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997))); *See also* Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”)

Accordingly, these issues that are now being raised for the first time are not preserved for review by this Court. As such, this Court should affirm the lower court’s ruling.

## CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
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Assistant Attorney General

By:

  
ATTORNEYS FOR RESPONDENT

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March 9, 2015

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**RECEIVED**

MAR - 9 2015

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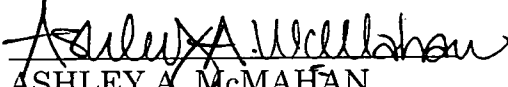
**CERTIFICATE OF SERVICE**

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I, Ashley A. McMahan, certify that I have served the within Return to Petition for Writ of Certiorari and Motion to Supplement on Petitioner by depositing copies of the same in the United States mail, postage prepaid, addressed to:

Marshal Ray Miller, #249557  
Liber Correctional Institute, SB-56  
PO Box 205  
Ridgeville, SC 29472-0205

I further certify that all parties required by Rule to be served have been served.  
This 9<sup>th</sup> day of March, 2015.

  
ASHLEY A. McMAHAN  
Assistant Attorney General  
Office of Attorney General  
Post Office Box 11549  
Columbia, SC 29211



ALAN WILSON  
ATTORNEY GENERAL

RECEIVED

MAR - 9 2015

S.C. Supreme Court

March 9, 2015

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

RE: Marshall Miller, #249557 v. State of South Carolina  
2009-CP-01-00105  
Appellate Case No.: 2013-001076

Dear Mr. Shearouse:

Please find enclosed an original and six copies of the Respondent's Return to the Petition for Certiorari. Also enclosed is a Motion to Supplement, 2<sup>nd</sup> Supplemental Appendix, and a Certificate of Service.

Should you have any questions you can contact me at the number listed below.

Best regards,

Ashley A. McMahan  
Assistant Attorney General

cc: Marshall Ray Miller, #249557