

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2010-151195

**RECEIVED**

JUN 22 2015

**S.C. Supreme Court**

Nathaniel Green ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## **QUESTION PRESENTED**

Did the PCR Court properly hold that Counsel was not ineffective for failing to object to the alleged improper chain of custody when Petitioner failed to demonstrate the required prejudice?

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. The Petitioner was indicted during the November 2004 term of the Spartanburg County Grand Jury for trafficking in crack cocaine (04-GS-42-4993). Thomas A. M. Boggs, Esquire, represented the Petitioner. On February 15, 2005, a bench trial was held before the Honorable J. Derham Cole. Judge Cole found the Petitioner guilty and sentenced him to confinement for a period of twenty-five (25) years with credit for time served.

A timely notice of appeal was filed and Joseph L. Savitz, III, Esquire, submitted an Anders appeal on the Petitioner's behalf. The Court of Appeals dismissed the appeal by order filed June 11, 2007. The remittitur was issued on June 27, 2007.

The Petitioner filed an Application for Post-Conviction Relief on June 23, 2008. An evidentiary hearing into the matter was convened on July 27, 2009, at the Spartanburg County Courthouse. The Petitioner was present at the hearing and represented by Vanessa Cason, Esquire. Michelle Parsons Kelley of the South Carolina Attorney General's Office represented the State.

At this PCR hearing, the Petitioner claimed the State used a chain of custody form that had been signed and notarized prior to being filled out. The Petitioner alleged this violates the rule requiring personal signature. At the PCR hearing, Petitioner submitted a memorandum alleging that the Form C in his case, dated 7-1-04 and with Control No. 5007684, bears the signature of Jane Millwood as the Evidence Officer and Robert Rosenburg as the Notary Public. Petitioner alleged that the document was not personally signed by Jane Millwood in the presence of Robert Rosenburg. The Petitioner also claimed Jane Millwood made errors to the form and

failed to come to his trial and testify. The Petitioner claimed Counsel was ineffective for disputing the chain of custody on these grounds. Counsel testified he did not know of any chain of custody issues at trial and was unaware of the chain of custody signature as a point of argument prior to the trial. Petitioner failed to produce original forms or the testimony of anyone to support those allegations.

Following the hearing, the Honorable J. Mark Hayes II denied the application on November 2, 2009. A 59(e) motion was filed by Petitioner and subsequently dismissed on December 2, 2009.

A timely notice of appeal and Johnson Petition were filed and while the matter was pending before the South Carolina Supreme Court, Counsel was substituted. Counsel then sought leave from the Supreme Court to hold the appeal in abeyance and file a 60(b) motion in the lower court. This motion was granted and Petitioner filed a 60(b) Motion on February 9, 2012. The State filed a Return and Motion to Dismiss and a hearing on the State's Motion was held. The Honorable J. Derham Cole denied the State's motion and ordered an evidentiary hearing. Following the denial of the Respondent's motion, an evidentiary hearing into the matter was convened on January 21, 2014, at the Spartanburg County Courthouse. The Petitioner 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. At the hearing, both Petitioner and Respondent agreed to submit the records from a previous case, which addressed the issue at hand, as well as memoranda regarding the matter in place of testimony<sup>1</sup>.

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<sup>1</sup> Robert Rosenburg and Jane Millwood, current and prior Evidence Custodians for the Spartanburg County Sheriff's Department, both testified at the hearing for Gibson v. State, 2008-CP-42-6126. Both Petitioner's Counsel and Respondent's Counsel were also present and questioned these witnesses at the Gibson hearing. Both Petitioner and

Following a review of the record, all applicable records, and stipulated submissions, the Honorable Roger L. Couch denied the 60(b) Motion and issued a written order on August 28, 2014. Subsequently, Petitioner filed the substituted Petition for Writ of Certiorari. This Return follows.

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Respondent agreed to submit the record of their prior testimony in place of calling them as witnesses again because the issue was the same and testimony would be identical.

## 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. The PCR Court properly held that Counsel was not ineffective for failing to object to the alleged improper chain of custody when Petitioner failed to demonstrate the required prejudice.**

Petitioner alleged that Counsel was ineffective for failing to make an argument that the forms supporting the chain of custody for the drugs purchased from Petitioner were improperly completed.

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.

At the initial PCR hearing in 2009, Petitioner alleged that the forms used to document the chain of custody of the drugs were fraudulently signed and notarized. (App. p. 87, lines 6-8; p. 92, lines 6-13). However, at the time of the hearing, his allegations were based upon a copy of his chain of custody form and copies of forms from an unrelated case. (App. p. 92-93). Applicant also alleged that Counsel was ineffective for failing to object to the fraudulently signed chain of custody forms. (App. p. 95, lines 17-20). Counsel testified that he and Petitioner did not discuss the forms prior to trial and was not aware of any issues with the forms at the time of trial. (App. p. 113). Following the testimony and review of the evidence submitted, the initial PCR Court properly held that Counsel's actions were reasonable at the time of trial based upon the fact that he had no reasons to question the authenticity of the signatures and Petitioner failed to produce original documents to meet his burden of proof. (App. p. 145).

Following this Court's grant of leave to file the 60(b) Motion, the second PCR Court properly reviewed the information provided by consent of both parties, which included the testimony of both Robert Rosenburg and Jane Millwood, evidence custodians at the time of

Petitioner's arrest and trial, during a PCR hearing for Mr. Bobby Gibson<sup>2</sup>. Both Rosenberg and Millwood testified as to their policies and procedures for handling evidence transfer from the Drop off for the Sheriff's Office to the Chemical Analysis Drop off. (Supp. App. p. 7-62). The PCR Court properly found that although the testimony and evidence presented during the Gibson PCR hearing shows a practice of pre-notarizing the signature of the evidence custodian and then using copied forms to enter each piece of evidence, there is no indication that the evidence was ever tampered with or affected by this process in Petitioner's case. (Supp. App. p. 3). The Court found that Petitioner failed to meet his burden of proving that the outcome of his trial would have been different had Counsel known of this practice and objected to the chain of custody prior to trial. In fact, the Court held that had Counsel made a pre-trial objection, the issue would have most likely been moot as soon as the State called Jane Millwood to testify. (Supp. App. p. 3).

Further, the Court properly found that in actuality neither the Form C nor testimony of Millwood was necessary according to case law. (Supp. App. p. 3). The South Carolina Supreme Court held that "where all individuals in the chain are, in fact, identified and the manner of handling is reasonably demonstrated, it is not an abuse of discretion for the trial judge to admit the evidence in the absence of proof of tampering, bad faith, or ill-motive." State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 753-54 (2011). Further, the Court held that "[t]estimony from each custodian of fungible evidence [] is not a prerequisite to establishing a chain of custody sufficient for admissibility. State v. Hatcher, 392 S.C. 86, 93, 708 S.E.2d 750, 753-54 (2011).

"The ultimate goal of chain of custody requirements is simple to ensure that the item is what it is purported to be." State v. Hatcher, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011); see Howard-Arias, 679 F.2d at 366 ("The purpose of this threshold requirement is to establish that

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<sup>2</sup> As mentioned earlier, Robert Rosenberg and Jane Millwood both testified at the PCR hearing for Gibson v. State, 2008-CP-42-6126. Both Petitioner and Respondent agreed to submit the record of their prior testimony in place of calling them as witnesses again because the issue was the same and testimony would be identical.

the item to be introduced, i.e., marijuana, is what it purports to be, i.e., marijuana seized from the ‘Don Frank.’”). Notably, “[c]ourts have abandoned inflexible rules regarding the chain of custody and the admissibility of evidence in favor of a rule granting discretion to the trial courts.” Hatcher, 392 S.C. at 94, 708 S.E.2d at 754. In order to satisfy the requirements for establishing the chain of custody, the evidence and testimony presented during trial must simply not leave to conjecture who was in possession of the fungible item and what was done with it between its seizure and analysis. State v. Johnson, 318 S.C. 194, 196, 456 S.E.2d 442, 443 (Ct. App. 1995).

At Petitioner’s bench trial, the State introduced the videotape of the confidential informant buy, a photo lineup with the Petitioner identified as the person selling drugs, as well as the crack cocaine in the BEST bag and analysis report, including chain of custody documents. At trial, Investigator Raymond, the lead investigator on the controlled buy, identified the BEST bag, State’s Exhibit #6, as the same bag he used to collect the drugs from Keith Pearson (the confidential informant) and identified his [Raymond’s] signature on the bag. (App. p. 18). Raymond testified that he placed the BEST bag in the Sheriff’s Office Evidence Locker. (App. p. 18-9). Raymond also identified his signature on the chain of custody documents, State’s Exhibit #7. (App. p. 18-9). Pearson, the confidential informant, identified his signature on the chain of custody documents as the signature he placed on the forms once he handed over the drugs to Investigator Raymond. (App. p. 29).

Also at trial, Analyst Beth Vaughn testified as to her process for reviewing the BEST bag to ensure that there has not been any tampering with the evidence prior to her analysis. (App. p. 34). Vaughn identified the BEST bag, State’s Exhibit #6, with her initials and the date the bag was opened, as well as her initials and the date she resealed the bag following her analysis.

(App. p. 35). Vaughn also identified the chain of custody documents, State's Exhibit #7, including the Form A, which was signed by Vaughn following her analysis of the drugs. (App. p. 36).

The record clearly establishes that the evidence was obtained by the confidential informant (Keith Pearson), Investigator Raymond secured the evidence and submitted it for analysis, and it was subsequently analyzed and confirmed to be crack cocaine. Even if counsel were deficient for failing to challenge the chain of custody on these grounds, Petitioner failed to produce any evidence or testimony that he was prejudiced by counsel's failure to do so. The evidence submitted at trial was overwhelming and as such, there is no prejudice. Where there is overwhelming evidence of guilt, a trial counsel's deficient representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); See also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991).

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 has failed to lay out a credible claim that would suggest a reasonable probability that, but for Counsel's alleged errors, the outcome of his trial would have been different.

**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,

ALAN WILSON  
Attorney General

SUZANNE H. WHITE  
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SC Bar #78225

By:   
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June 22, 2015

STATE OF SOUTH CAROLINA  
In The Supreme Court

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Certiorari to Spartanburg County  
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The Honorable J. Mark Hayes, II, Circuit Court Judge  
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**S.C. Supreme Court**

NATHANIEL GREEN,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT

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**CERTIFICATE OF SERVICE**

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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 22<sup>nd</sup> day of June, 2015

  
\_\_\_\_\_  
ASHLEY HAWORTH  
LEGAL ASSISTANT



ALAN WILSON  
ATTORNEY GENERAL

June 22, 2015

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

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JUN 22 2015

S.C. Supreme Court

**RE: Nathaniel Green v. State of South Carolina**  
**Lower Court Case No: 2008-CP-42-3298**  
**Appellate Case No.: 2010-151195**

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, Esquire (2 copies)  
Trisha Allen, Victim Services (1 copy)