STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY

LEE S. ALFORD, CIRCUIT COURT JUDGE

JAMUL RATUB EL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Did the PCR err in finding that trial counsel did not provide deficient representation and that petitioner was not prejudiced by trial counsel's failure to make a motion to suppress the cocaine discovered and seized in violation of petitioner's right to be free of unreasonable searches and seizures as guaranteed by the Federal and State constitutions?

2. Did the PCR judge err in finding that trial counsel's representation was not deficient in failing to preserve trial error for review on appeal where counsel failed to raise an objection to the sufficiency of the curative instruction and failed to make a motion for mistrial in response to the prosecution's misstatement of fact to the detriment of petitioner's character?

3. Did the PCR judge err in finding that trial counsel was not ineffective in failing to secure the notary's presence at trial in light of the importance of Horne's exculpatory affidavit and where, as the result of counsel's failing to subpoena the notary or to make a motion for a continuance so that the notary could be present to testify, the accused was forced to testify in order to have Horne's affidavit admitted in evidence?

STATEMENT

Jamul Ratub El, petitioner, was indicated by the York County Grand Jury for trafficking in cocaine. (2006-GS-46-0851). On May 3, 2006, petitioner proceeded to trial along with co-defendant, Charles Robert Horne, before the Honorable John C. Hayes, III and a jury. Upon the jury's finding him guilty as charged, Judge Hayes sentenced petitioner to serve twenty (20) years incarceration and to pay a $50,000 fine. The South Carolina Court of Appeals affirmed petitioner's conviction and sentence by unpublished opinion. State v. El, Op. No. 2008-UP-579 (S.C.Ct.App. filed October 15, 2008).

On January 14, 2009, petitioner filed an Application for Post-Conviction Relief (PCR). The Respondent made its Return on May 7, 2009. On August 4, 2009, an evidentiary hearing was convened before the Honorable Lee S. Alford. On August 27, 2009, Judge Alford issued his Order of Dismissal.

ARGUMENT

I. The PCR erred in finding that trial counsel did not provide deficient representation and that petitioner was not prejudiced by trial counsel's failure to make a meritorious motion to suppress the cocaine discovered and seized in violation of petitioner's right to be free of unreasonable searches and seizures as guaranteed by the Federal and State constitutions?

To establish a claim of ineffective assistance of counsel, petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992). When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, defendant must show that such claim is meritorious and that the verdict would have been different absent the evidence that should have been excluded. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994). Here, counsel's failure to raise an objection to the unreasonable, warrantless, search of petitioner's vehicle constituted ineffective assistance of counsel where petitioner had a meritorious claim of a Fourth Amendment violation and where petitioner was plainly prejudiced by the admission of the cocaine in evidence.

Officers had arranged for Amanda Page, an informant, to place a phone call to Charles Horne, asking to buy two ounces of cocaine. (App. P. 39, lines 7-17). Horne responded to Page, indicating that he would contact his drug supplier in order to set up the two ounce purchase. (App. P. 381, lines 18-19). Horne informed Page that his supplier would be coming down, that the supplier was married, that he drove a truck while his wife drove a Honda, and that the supplier's house had been "shot up" by a neighbor. (App. p. 282, lines 17-21). Otherwise, Horne did not give

his supplier a name or description. In fact, petitioner did not fit Horne's description of his supplier in that petitioner had never been married, did not drive a truck, and his house had never been damaged by gunfire. (App. p. 383; pp. 237-238). Nevertheless, upon petitioner's white Expedition being discovered parked in Horne's driveway at approximately 10:30 on the evening of December 7th, 2005, the authorities believed that he was Horne's supplier.

Petitioner had called his friend, Chantell Griffin, that evening at nine o'clock, asking if she wanted to go to the mall. (App. p. 283, lines 3-5). Petitioner picked Griffin up and they went to the mall. Upon leaving the mall, at approximately 10:00, petitioner received a call from a co-worker, Charles Horne, asking petitioner if he could come to his house to take him to get something to eat. (App. p. 283, line 16-p. 284, line17). Petitioner drove his Expedition to Horne's home, where he parked in the driveway and waited for Horne to come outside. Some twenty to thirty minutes later, Horne emerged from his home and told petitioner that he was trying to find a ride to go pick up a car for a friend. (App. p. 242; 287). Petitioner eventually agreed to take Horne to pick up a car. When petitioner's vehicle was stopped by authorities, all three occupants were taken out of the car before the officers searched the car. Two ounces of cocaine were discovered in the cup holder in the back seat where Horne was sitting. Petitioner, Griffin, and Horne were all arrested and charged with trafficking cocaine.

On December 30, 2005, Horne came to Charlotte where he met petitioner in order to "right the wrong." (App. p. 276). Horne signed a handwritten affidavit exculpating petitioner which he had notarized by a lady from a bank. Horne's statement indicated:

> I, Charles Robert Horne, was on or about the 8 of December of 2005, at or around 11 p.m. illegal drugs, cocaine, found in the property of one Jamul El belonged to me and he had no knowledge of it at all. I

> called Jamul earlier to request a ride. About 30 minutes later he showed up to help me get something to eat. That was the extent of his knowledge nor his companion Chantall Griffin.

(App. p. 295, line 22-p. 296, line 7). Trial counsel agreed that all the vehicles the informant had indicated the supplier *could be* driving were "clearly distinct and not like that vehicle which Mr. El was driving, which is something that would have been visible to the police officers as they were surveilling the house when they arrived. . . ." (App. p. 487, lines 18-25). In fact, the informant had indicated that the supplier would most likely be driving a truck but that he *could be* driving a Honda or a Jaguar. Counsel agreed that, under the circumstances of this case, if any person, including trial and PCR counsel, had parked their vehicle in the area of Horne's home, the officers could have just as readily have concluded that that vehicle was the drug supplier's vehicle. (App. p. 488, lines 1-12). Trial counsel noted that the Expedition was, according to the officers, stopped for making an illegal U-turn; indicating that he believed that a pretextual stop was permitted. (App. pp. 124-125, pp. 65-68). Trial counsel mused, "What I probably should have objected to was the search more than the stop of the vehicle." (App. p. 488, lines 22-23). PCR counsel agreed that counsel should have objected to the search. (App. p. 488, line 24).

The officers maintained surveillance on petitioner's vehicle, parked in Horne's driveway for some half an hour. However, there was no activity as the car was stationary and quiet. The officers testified that, at that point, they did not know whether Horne had received any cocaine and they did not know where any such cocaine would be located. At that point, the officers had the informant call Horne to tell him that she had been stopped without a license and that she needed him to come pick up her vehicle or it was going to be towed. Horne reportedly went down his street looking for a ride before going out to his driveway where he eventually got into petitioner's Expedition.

Petitioner drove the Expedition to the location where Page had asked Horne to meet her. At that point, the Expedition commenced to turn around but the vehicle was stopped, its occupants placed under arrest, and the vehicle searched. Thus, the only information even suggesting that petitioner or his Expedition were involved in a cocaine sale to Horne was the fact that petitioner parked his car in Horne's driveway and then drove Horne in his Expedition to a second location where the informant had asked Horne to meet her. Such information was insufficient to rise to the level of probable cause, particularly where the informant's description of the supplier and of his vehicle did not match petitioner.

Trial counsel conceded that he probably should have objected to the search of petitioner's vehicle; however, counsel indicated that he did not believe that his making a motion would "have mattered much," "given the automobile exception." (App. p. 489, lines 6-9). However, trial counsel was clearly applying a much wider automobile exception to the Fourth Amendment's requirement for a warrant than could be justified under the law. In this case, at the time of the search, there were no exigent circumstances which would have prevented the officers from obtaining a warrant to search petitioner's vehicle. While the officers were waiting and watching petitioner's parked vehicle, assuming that they had probable cause, the officers could have obtained a warrant to search the vehicle. Once the vehicle was stopped, assuming the officers had probable cause, the officers could have obtained a search warrant. The vehicle had been stopped and its occupants had been taken into custody so that there was no danger that the occupants would return to the vehicle to obtain weapons or to destroy evidence.

The officers had the time, opportunity, and duty to obtain a search warrant before going through petitioner's car. Under the circumstances, the warrantless search of the vehicle was

conducted in violation of the State and Federal Constitutions' guarantees against unreasonable searches and seizures. Trial counsel was mistaken in his estimation of the supposedly exigent circumstances attending the search of petitioner's vehicle. When asked if he had made a motion to suppress the cocaine which was found and seized as the result of a warrantless search, trial counsel replied, "I did not. And looking back, I probably should have. There was exigent circumstances. This was a confidential informant calling case. I remember thinking that the police didn't have time to get a warrant, but the automobile exception to the Fourth Amendment at that point in time rode heavy on mine. And I had another valid defense that I thought was more applicable for Mr. El. It's kind of funny. If this case was being tried today, on the facts of this case, on that Arizona case that just came down from the Supreme Court, I freely admit that I think the drugs would have been suppressed now." (App. P. 481, lines 1-12).

Thus, trial counsel admitted that he "probably should have" moved to suppress the cocaine found as the result of an unreasonable, warrantless, search of his client's car. Counsel's reference to the automobile exception is unavailing where the facts of this case did not fit within the automobile exception where the occupants had been removed from the vehicle. Counsel believed and argued that the authorities were lacking probable cause at the time of the stop. Therefore, counsel's failure to make a substantive motion to suppress evidence which was discovered and seized unreasonably, without a warrant, and without probable cause constituted ineffective assistance of counsel. The totality of the circumstances in this case does not support a finding of probable cause or of exigent circumstances sufficient to overcome the requirement for a warrant. Instead, the facts showed that at the time the officers were searching petitioner's vehicle, he and his co-defendants had been removed from the car.

The legal fact that warrantless searches are, by definition, unreasonable, even in the case of an automobile, was established in the law at the time of petitioner's conviction such that trial counsel was ineffective in failing to raise the obvious objection to the search of petitioner's vehicle. As the Gant Court stated, "Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)." Gant, 129 S.Ct. at 1716.

The particular facts of this case did not give rise to probable cause to search petitioner's Expedition. The facts of this case further do not support a finding of exigency where the officers had plenty of time to get a warrant while the vehicle was parked in front of the Horne residence for a half an hour or upon the vehicle's being stopped and the occupants removed. The PCR judge's review of events and his multiple findings as to the intentions of the officers involved established that the officers had the opportunity and ability to obtain a search warrant for the Expedition but failed to do so. The PCR judge indicated that the officers' plan was to search the Expedition for drugs but if the drugs were not found in the Expedition, that they would then have proceeded to obtain a search warrant for Horne's house. (App. p. 521). However, the PCR judge erred in failing to find that, assuming that the officers had sufficient information to establish probable cause for a search warrant for Horne's home, presumably, once Horne was in petitioner's vehicle that information could also have been used to obtain a search warrant for petitioner's automobile. However, petitioner would again dispute the State's contention that there was probable cause to

search his vehicle where the State presented no evidence beyond his presence to connect him to Horne's cocaine dealings.

In fact, the State failed even to show that the telephone call Horne placed to his supplier was connected to petitioner. The State presented evidence of cell phone records which established that the first time Horne called petitioner that night was at 10:00 p.m. (App. pp. 171-172; 192). At that point, petitioner and Chantall Griffin were leaving the mall and they proceeded from the mall to Horne's home. Thus, the State's argument was that petitioner just happened to have two ounces of cocaine stowed in his back seat cup holder on the off chance that someone would call asking to purchase two ounces of cocaine. Thus, effective counsel dealing with the facts of this case would have made a motion to suppress on the basis of a Fourth Amendment violation, even before the issuance of the decision in Gant.

The PCR judge acknowledged trial counsel's admission that a motion to suppress should have been made in light of the United States Supreme Court's decision in Arizona v. Gant, 129 S.Ct. 1710, 173 Led.2d 485 (2009). However, the PCR judge found that the Gant decision did not change the law and that pre-Gant authority would properly have approved the warrantless search of petitioner's vehicle. The PCR judge denied relief upon finding, "However, this change in case law did not exist at the time of the Applicant's trial and changed the law as to the search of vehicles for weapons allegedly made for the protection of police officers when the driver or occupant was removed from the vehicle and prevented from having immediate access to the contents of the vehicle. This case did not change the law, which allows the search of a vehicle driven on a public road creating exigent circumstances when the police have probable cause to believe that contraband such as illegal drugs will be found in the vehicle." (App. 521-522).

Thus, the PCR judge found that the decision in Gant did not actually change the existing law applicable to suppression in this case and he erred in finding that under the application of the law existing at the time of the search of petitioner's vehicle, the search conducted conformed to constitutional mandates. The PCR judge erroneously found that the search of petitioner's vehicle was reasonable under pre-Gant authority upon his finding that there was probable cause to believe that evidence would be found in the vehicle. The judge indicated that his reading of Gant led him to the conclusion, "If you got probable cause to believe that drugs or other contraband might be - - illegal evidence might be found in the car, they could still search, so it didn't alleviate that issue. (App. p. 491, lines 8-13). The PCR judge wrongly found that "even if the Applicant's attorney rendered ineffective assisstance in failure to move to suppress the cocaine, he suffered no prejudice." The PCR judge explained his ruling, "The totality of circumstances clearly established probable cause to search the Expedition. A motion to suppress would have been properly denied." (App. p. 522).

In fact, the PCR judge erred in finding that a motion to suppress would necessarily have been denied. Further, the PCR judge's erroneous finding that a motion to suppress would have been "properly denied" in light of his finding that there was probable cause to search was reached without reference to the United States Supreme Court's decisions, particularly the decision in Gant. In Gant, the United States Supreme Court rejected the notion that an automobile may be searched without a warrant merely upon a finding of probable cause. The Gant Court held, "Police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the

vehicle contains evidence of the offense of arrest." Gant, 129 S.Ct. at pp. 1716 - 1724. The Gant Court explained:

> This Court rejects a broad reading of Belton that would permit a vehicle search incident to a recent occupant's arrest even if there were no possibility the arrestee could gain access to the vehicle at the time of the search. The safety and evidentiary justifications underlying Chimel 's exception authorize a vehicle search only when there is a reasonable possibility of such access. Although it does not follow from Chimel, circumstances unique to the automobile context also justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Thornton v. United States, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (SCALIA, J., concurring in judgment). Neither Chimel 's reaching-distance rule nor Thornton's allowance for evidentiary searches authorized the search in this case.
>
> In contrast to Belton, which involved a single officer confronted with four unsecured arrestees, five officers handcuffed and secured Gant and the two other suspects in separate patrol cars before the search began. Gant clearly could not have accessed his car at the time of the search. An evidentiary basis for the search was also lacking. Belton and Thornton were both arrested for drug offenses, but Gant was arrested for driving with a suspended license-an offense for which police could not reasonably expect to find evidence in Gant's car. Cf. Knowles v. Iowa, 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492. The search in this case was therefore unreasonable.

Gant, 129 S.Ct. at pp. 1718 – 1720). The Gant Court rejected the prosecution's argument in favor of the search, indicating:

> This Court is unpersuaded by the State's argument that its expansive reading of Belton correctly balances law enforcement interests with an arrestee's limited privacy interest in his vehicle. The State seriously undervalues the privacy interests at stake, and it exaggerates both the clarity provided by a broad reading of Belton and its importance to law enforcement interests. A narrow reading of Belton and Thornton, together with this Court's other Fourth Amendment decisions, e.g., Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201, and United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572, permits an officer to search a vehicle when safety or evidentiary concerns demand.

Gant, 129 S.Ct. at pp. 1719 - 1721. Thus, as the United States Supreme Court held, under a narrow reading of precedent, more favorable to the accused, and with proper value given to the privacy interests of the accused, a search such as that of petitioner's vehicle was not authorized under search and seizure law.

Petitioner would argue that defense counsel should have made his decision as to whether or not to object to the search under a narrow reading of the prior decisions, more favorable to the accused and giving proper value to his client's privacy interests. Defense counsel's failure to approach the search from a defense perspective fell well below the professional standard. Just as did the attorney for Mr. Gant, effective counsel for petitioner would have approached the issue of the vehicle search from a defense perspective, so that he would have made the motion to suppress if it was warranted under a narrow reading of the law favoring the defense rather than the prosecution. Had defense counsel effectively applied a narrow reading of precedent, favorable to the accused, and given proper value to the privacy interests involved, he would have raised an objection and a motion to suppress.

Here, there were clearly no safety concerns given that petitioner and the co-defendants had been taken out of petitioner's car at the time of the search. Further, there were insufficient grounds to believe that the vehicle would contain evidence of the crime for which petitioner was originally detained, i.e., an illegal U-turn. Just as the Supreme Court in Gant found that Gant's vehicle would not reasonably be expected to contain evidence of Gant's driving under suspension, petitioner's vehicle could not reasonably be expected to contain evidence of an illegal U-turn. Further the circumstances of this particular case show that there was insufficient evidence to suggest that

petitioner's vehicle would be found to contain evidence of a drug crime given that there was insufficient evidence even to raise reasonable suspicion or probable cause for a stop or search.

Trial counsel reviewed the evidence the State could rely on to show probable cause:

> The confidential informant called Horne's cell phone. Horne answered the phone. The confidential informant told Horne that they were with the man, the money is straight. The confidential informant asked Horne, the co-defendant, to call his man, the supplier of cocaine, later identified as Jamul El, to see if he would come down. . . . Horne told the confidential informant that El would not come this late. The confidential informant told Horne to call and talk with El and tell El he needs to come because it will be extra for him. The confidential informant told Horne to call El and tell El if it went this would be a two or three times a week deal.

(App. pp. 495-496). Petitioner stressed during his testimony that the statement counsel reviewed did not actually contain his name. (App. p. 505). Trial counsel pointed out that the first conversation between the informant and Horne took place at 10:01 and that there was no mention of the supplier being from Charlotte. (App. p. 495). Counsel indicated that it was his opinion that he should have made the motion to suppress even though he could not say whether it would have been granted. (App. p. 496, lines 23-25).

Trial counsel refused to wholly concede that the making of a motion to suppress is "pretty standard operating procedure for a criminal defense attorney in a drug case of this sort." (App. p. 481, lines 21-25). However, while counsel maintained that there are times when it is better to forgo making a motion because the judge may become aggravated by an attorney's making motions "with no validity," here, had trial counsel made a motion to suppress, the motion would have been a meritorious one which could correctly be granted under existing Fourth Amendment precedent. In fact, in hindsight, counsel agreed that the motion should have been made; counsel indicated, "Do I

think it would have been granted? Probably not, but I should have made it, yeah, probably." (App. p. 482, lines 1-2).

Given the circumstances of this case and the existing search and seizure authority, trial counsel was incorrect in assuming that a motion to suppress the search of petitioner's vehicle would have been overruled. The PCR judge erred in finding that trial counsel's performance was not deficient in that he failed to make the motion and he further erred in ruling that petitioner was not prejudiced by trial counsel's deficient failure to move to suppress the cocaine.

II. The PCR judge erred in finding that trial counsel was not ineffective in failing to preserve trial error for review on appeal where counsel failed to raise an objection to the sufficiency of the curative instruction and failed to renew his motion for mistrial in response to the prosecution's misstatement of fact to the detriment of petitioner's character.

To establish a claim of ineffective assistance of counsel, petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

The PCR judge erred in finding that trial counsel was not ineffective in failing to object to the sufficiency of the curative instruction to cure the prejudice or in failing to renew his motion for mistrial in response to the prosecution's misstatement of fact to the detriment of petitioner's character and to the defense argument. During the questioning of Chantall Griffin, the prosecutor asked her, "Did you know he was married?" Chantall answered, "No," that she didn't know that petitioner was married as defense counsel objected. Counsel made a contemporaneous objection to the prosecutor's misstatement of fact, given that petitioner has never been married. (App. p. 235).

Upon his objection being sustained, trial counsel further moved for a mistrial. (App. p. 235, lines 8-15).

The trial judge asked the prosecutor, "Well, why would you ask the question in that fashion. You made the statement, you said, did you know he was married, and you had no foundation for that. Either you did or you didn't." (App. p. 236, lines 6-9). The prosecutor conceded that he had no good faith basis for the question but that he had gotten the "impression" that petitioner was married from the officers. (App. p. 236, lines 15-19). Trial counsel pointed out that the misstatement was particularly harmful because Horne's supplier was described as a married man whereas petitioner, dating Chantall Griffin, was a single man. Counsel argued, "I don't think the damage can be fixed." (App. p. 238, lines 1-5).

However, upon the trial judge's overruling his initial motion for mistrial and the judge's giving a curative instruction, trial counsel failed to object to the sufficiency of the curative instruction to cure the prejudice and he failed to renew his motion for a mistrial. (App. pp. 239-240; p. 190, lines 10-18). The PCR judge denied relief on this round upon finding that trial counsel "was effective in that he objected to the misstatement." The PCR judge erred in deciding this issue upon finding "that the decision of whether or not to make a motion for a mistrial at this juncture was not a decision for trial counsel but instead was a question of law, more properly addressed to an appellate court." The PCR judge erroneously found:

> Whether or not a mistrial should have been granted is a legal issue that was addressed by the appellate court. Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973).

The PCR judge then concluded, "The Court finds trial counsel adequately conferred with the applicant, conducted a proper investigation, was thoroughly competent in their representation, and that trial counsel's conduct does not fall below the objective standard of reasonableness." (App. p. 523).

The PCR judge thus erred in failing to find that trial counsel's failure to preserve his objection to the prosecutor's improper misstatement of fact to the prejudice of the accused for appeal. In fact, having made the proper objection, trial counsel's failure to preserve his objection for appeal by further objecting to the sufficiency of the curative instruction was objectively unreasonable and fell well below the professional level. The issue of the prosecutor's misstatement of the facts was presented as a ground for reversal on appeal. However, on appeal, the South Carolina Court of Appeals ruled that petitioner's conviction was affirmed on the basis of:

> State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) ("No issue is preserved for appellate review if the objecting party accepts the [court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999) ("[A] trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review.") (emphasis in original)

(App. p. 552). Thus, the Court of Appeals affirmed despite the prosecution's character-attacking, supplier-describing, "misstatement" on the grounds that trial counsel accepted the trial judge's ruling and failed to make a contemporaneous additional objection to the sufficiency of the curative instruction . The Court of Appeals further found that petitioner's conviction was affirmed as the result of trial counsel's failure to contemporaneously object to the curative instruction as insufficient

and as the result of counsel's additionally failing to move for a mistrial in order to preserve the issue for review.

Trial counsel explained during PCR, "Mr. Springs, who is an extremely zealous prosecutor, took a fact out of the air, which I thought was damaging to Mr. El, who had not taken the stand at that time, when Ms. - - the young lady, her name escapes me, that was in the car was a witness for the prosecution. She was in the car with Mr. El. It's clear from my discovery in this case that she had no knowledge of any of these events. And Mr. Springs threw in the fact that Mr. El was married in front of the jury, and he wasn't, one. It was just clear abuse of prosecutorial misconduct and I moved for a mistrial. I think that's what the basis of the appeal was. . . . Let me add that what made that so egregious was the simple fact I'm in a finger-pointing contest with the co-defense counsel and it becomes a question of who you believe and - - you know." (App. p. 499, lines 7-23).

Petitioner testified during PCR, "The other issue brought up was about counsel failing to properly preserve the issue for appellate review. That was that improper comment that was made by the solicitor by him suggesting that I was married, when on the tape they was looking for somebody that was married. So by him saying that I was married later, the jury believe that I was that married man in question." (App. p. 509, lines 1-7). However, the PCR judge responded, "That's already been dealt with on appeal. It's not a matter for PCR. Move on." (App. p. 509, lines 8-9). When PCR counsel explained that he had just attempted to allow the petitioner to present his arguments, the PCR judge responded, "That's already been addressed. Move on. That was decided by the appellate court. This [proceeding] doesn't decide that." (App. p. 509, lines 8-16). Thus, the PCR judge erroneously refused even to consider the question of whether or not trial counsel was

ineffective in failing to preserve the objection to the prosecutor's misstatement attacking the defendant's character for review.

The issue was properly presented before the PCR judge through application and testimony, yet the PCR judge wrongly decided that that issue was not before him, not proper for PCR, and that the issue had already been dealt with by the appellate courts. To the contrary, the Court of Appeals' opinion dismissing petitioner's direct appeal first explains that the issue was not preserved for appellate review by trial counsel. Under these circumstances, the PCR judge's ruling that he would not consider the issue as a ground for PCR was clear error.

Plainly, trial counsel's failure to move for a mistrial or to object to the sufficiency of the curative instruction to cure the prejudice to the accused deprived petitioner of a reversal of his conviction on appeal. Counsel's failure to preserve the issue for review on appeal fell well below the professional standard. As the result of the prosecutor's misstatement before the jury, petitioner's character was improperly attacked and his identity as the supplier confirmed. However, it was as the result of trial counsel's failing to object or to move for a mistrial that petitioner's conviction was affirmed rather than it being reversed on appeal. Under these circumstances, the PCR judge erred in erroneously refusing to consider the issue and in denying the relief to which petitioner was entitled.

III. The PCR judge erred in finding that trial counsel was not ineffective in failing to secure the notary's presence at trial in light of the importance of Horne's affidavit to the defense and where, as the result of counsel's failing to subpoena the notary or to make a motion for a continuance so that she could be present, the accused was forced to testify in order to have Horne's affidavit admitted in evidence.

To establish a claim of ineffective assistance of counsel, petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced

by such deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

Trial counsel recalled that Horne had given a statement wholly exculpating petitioner. He indicated that the main thrust of his defense was based on his assumption that Horne was going to take the stand to testify, to present the affidavit Horne had signed in evidence. (App. p. 497, lines 5-9). Counsel testified that it was his belief that the affidavit given by Horne would result in petitioner's acquittal. Counsel indicated, ". . . I felt pretty good that Mr. El would be found not guilty. Obviously I was wrong." (App. p. 497, lines 1-9). Counsel incorrectly recalled at PCR that "after a good hour back and forth between me and Mr. Springs explaining my dilemma, Mr. Springs agreed to let it come in. And when that came in, I felt real good about his chances." (App. p. 497, lines 11-20). To the contrary, the State actually maintained its objection to defense counsel's putting Horne's statement in evidence.

In the end, the judge ruled that only if the defense had a witness through whom to present the statement could the statement be admitted in evidence. (App. p. 279, line 13-p. 280, line 14). At that point, counsel had not subpoenaed the notary who notarized Horne's signature on the affidavit. Therefore, given that the defense had no guarantee that Horne would take the stand, the only avenue open to entering Horne's affidavit in evidence under the judge's ruling was for petitioner to testify. Petitioner did testify and Horne's statement was admitted in evidence. (App. pp. 281). However, effective counsel would have subpoenaed the notary so that she would have been present to testify as to Horne's signature and his demeanor. The notary's testimony would have been helpful to the defense in its effort to have the statement admitted under the trial judge's ruling. The notary's testimony would also have been helpful to the defense as she could have

testified to Horne's demeanor at the time he made the statement. Such testimony would have been helpful given Horne's trial testimony that he gave the statement in exchange for money from petitioner.

Petitioner testified:

> As far as the lawyer being ineffective for failure to move for an adjournment or continuance when I sought him to introduce the evidence of the third-party guilt in the form of that notarized affidavit. It was signed by my co-defendant Horne. He admitted ownership of the drugs found in the back seat of my vehicle where he was seated at the time police discovered the drugs.
>
> If the trial court had - - based on Horne's right to confrontation an affidavit can only be admitted and corroborated through testimony by either me or the notary, which her name was Ms. Carolyn Johnson out of Charlotte. Trial counsel, he failed to subpoena that notary to corroborate the affidavit for my third-party defense, and I think counsel should have moved for an adjournment and/or continuance to subpoena this witness so I could show how additional preparation could have made a difference in the outcome. Therefore, counsel's failure to move for a continuance or adjournment in my case was ineffective assistance of counsel.

(App. p. 508, lines 6-24). When asked if he had subpoenaed the notary, trial counsel indicated, "I issued two subpoenas. That must have been one of them." (App. p. 498, lines 11-12). However, during trial, as the issue of Horne's statement was argued at length, counsel made no effort to obtain the presence of the supposedly subpoenaed notary and he did not request a continuance. In fact, counsel eventually indicated, "To tell you, I don't remember if I subpoenaed her or not." (App. p. 498, lines 24-25).

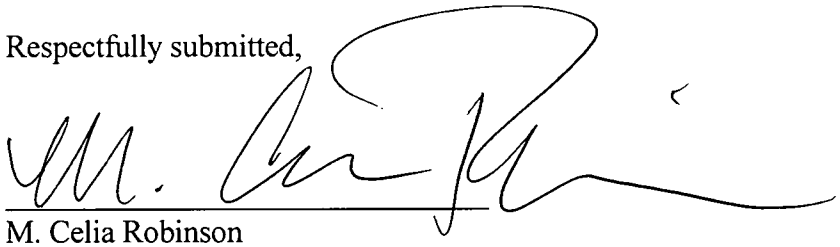
Where this was a close case, trial counsel's failure to subpoena the notary so that the affidavit of Horne could have been strongly presented through the notary who witnessed Horne's admission prejudiced the defense. In addition, had counsel obtained the notary's presence,

petitioner would not have been forced to waive his right not to testify in order to be able to present Horne's affidavit which was crucial to his defense. Therefore, the PCR judge erred in finding that trial counsel's failure to subpoena the notary was not deficient and that counsel's failure did not prejudice the defense. The PCR judge should have determined that trial counsel's failure to subpoena the notary was deficient and that it fell well below the professional standard. The PCR judge should further have determined that counsel's deficient performance so prejudiced the defense as to call the result of the proceeding in question.

CONCLUSION

This petition should be granted so that the issues may be more fully briefed.

Respectfully submitted,



M. Celia Robinson
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of April, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO YORK COUNTY
LEE S. ALFORD, CIRCUIT COURT JUDGE

JAMUL RATUB EL,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Ashley McMahan, Esquire, and Jamul Ratub El, #315406, Perry Correctional Institution, this 30th day of April, 2010.

M. Celia Robinson
Appellate Defender
ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day
of April, 2010.

(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.