ORIGINAL

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

BRIEF OF PETITIONER

SUSAN BARBER HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

ISSUES PRESENTED

I. Did the PCR judge err in finding that trial counsel did not provide deficient representation and that Petitioner was not prejudiced by trial counsel's failure to move 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?

II. 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 object 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?

III. 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, Petitioner was forced to testify in order to have Horne's affidavit admitted into evidence?

STATEMENT

Petitioner was indicted by the York County Grand Jury for trafficking in cocaine pursuant to indictment 2006-GS-46-0851. App. 561-562. On May 1, 2006, Petitioner and his co-defendant, Charles Robert Horne, proceeded to trial before the Honorable John C. Hayes, III and a jury. App. 1. E.B. Springs, IV and Jenny Desch prosecuted Petitioner. App. 1. Michael Brown represented Petitioner, and Stacey Coleman represented Horne. App. 1. The jury found Petitioner guilty as charged. App. 447 lines 21-23. Judge Hayes sentenced Petitioner to serve twenty years incarceration and to pay a $50,000 fine. App. 452 lines 7-8. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence by unpublished opinion.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). App. 454-468. The state made its Return on May 7, 2009. App. 470-473. On August 4, 2009, an evidentiary hearing was convened before the Honorable Lee S. Alford. App. 475. Ashley McMahan represented the state, and Jermey T. Canipe represented Petitioner. App. 475. On August 27, 2009, Judge Alford issued his Order of Dismissal. App. 517-524.

On April 30, 2010, Petitioner filed a petition for writ of certiorari with this Court. By order dated August 19, 2011, this Court granted his petition and ordered briefing. This brief follows.

ARGUMENT

I. The PCR court erred in finding that trial counsel did not provide deficient representation and that Petitioner was not prejudiced by trial counsel's failure to move 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.

Amanda Page's husband and best friend were arrested for trafficking methamphetamines. App. 178 lines 4-11. Eleven days later, in an effort to assist her best friend with her charges, Page approached narcotics officers and offered to arrange to buy two ounces of cocaine from Charles Horne. App. 60 lines 10-18; App. 101 lines 16-18; App. 170 lines 2-3; App. 178 lines 12-14; App. 182 lines 18-19; App. 183 lines 2-9; App. 186 lines 1-17. On December 7, 2005 between 9 and 9:30 in the evening, Page called Horne asking to buy two ounces of cocaine. App. 75 lines 15-18; App. 169 line 24 – App. 170 line 3; App. 171 lines 15-18; App. 190 lines 12-15. This was Page's first job for the police as a confidential informant. App. 131 lines 8-22; App. 137 lines 13-17; App. 184 lines 22-23. Twenty to thirty minutes later, Page, who had gone to the police department, contacted Horne again. App. 101 lines 21-24; App. 171 line 19 – App. 172 line 1. Horne repeatedly refused to make the requested arrangement. App. 173 lines 18-22; App. 193 lines 11-16; App. 194 lines 1-7. Finally, Horne relented and promised to call someone. App. 170 lines 22-23; App. 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. 167 line 23 – App. 168 line 2; App. 237 line 25 – App. 238 line 4; App. 295 line 14 – App. 296 line 18; App. 383 lines 15-25; App. 486 lines 17-24. Otherwise, Horne did not give his supplier a name or description. Horne told Page to be at his house in twenty-five minutes. App. 174 lines 12-13. Thereafter, Page left the police station with a

female officer, Tina Truesdale. App. 53 lines 11-14; App. 165 lines 11-13. The two went riding around the county eventually ending at the museum on Mount Gallant Road. App. 166 lines 9-14.

Officers traveled to Horne's house to conduct surveillance, arriving at 10:30 p.m. App. 53 lines 7-10; App. 53 lines 20-22; App. 77 lines 8-11. Officers observed a white Ford Expedition with a North Carolina license tag parked in the driveway of Horne's home with at least one occupant, who was on a cell phone. App. 53 line 22 – App. 54 line 2; App. 77 lines 12-16; App. 62 line 23 – App. 63 line 11; App. 103 line 19 – App. 104 line 2. Police watched the Expedition for twenty or twenty-five minutes in the driveway. App. 77 lines 12-13. During that time, the driver of the Expedition did not exit the car, and Horne did not exit the home. App. 77 lines 14-16; App. 120 line 19 – App. 121 line1; App. 142 lines 15-23.

Officer Marvin Brown testified that because the Expedition arrived before the surveillance began, the police "didn't have control over the drugs, that they could have been anywhere at that point." App. 55 lines 16-20. Officer Chuck Grant testified that the police weren't "sure if the cocaine would be in the house or in the Expedition. It was not controllable at that point." App. 128 lines 11-13. Officers devised a ruse to lure Horne out of the house and the Expedition away from the house. The police directed Page to call Horne and claim she had been stopped by police. She then told Horne to pick up her car, which contained the money for the drug buy, as she was being arrested. App. 55 line 23 – App. 56 line 2; App. 79 lines 14-19; App. 105 lines 2-6. Shortly afterwards, Horne exited the home. He walked to the Expedition, opened a door, then retreated and walked down the sidewalk out of sight of the officers. Eventually, Horne walked back to the Expedition and got in the back passenger seat. App. 56 lines 8-12; App. 78 lines 7-22; App. 105 lines 6-19; App. 121 lines 19-21; App. 209 lines 2-18. The Expedition then left Horne's house. App. 56 lines 14-17; App. 105 line 19.

Officers followed the Expedition for some distance, and then directed Officer Kyle Quinn, who was in a marked patrol car, to effectuate a stop of the Expedition. App. 56 lines 19-20; App. 106 lines 14-25. Quinn testified that as he was following the Expedition, it stopped at a stop sign at the intersection of Glendale and Alexander. Quinn pulled in behind the Expedition, stopped, and turned on his blue lights. App. 158 lines 5-15. As soon as he activated his blue lights, the Expedition turned toward the left and Quinn began to follow. However, the Expedition continued in a turning pattern like it was making a U-turn. App. 158 lines 15-19. Quinn testified that he had another car of officers behind him and knew they had just turned their blue lights on also. App. 158 lines 19-21. Quinn stopped his car in the street, and the Expedition made a complete circle around him. The Expedition then traveled down Alexander Road. App. 158 line 23 – App. 159 lines 2.[1] Eventually, the Expedition stopped. App. 56 lines 21-23; App. 159 lines 22-25.

When Petitioner's vehicle was stopped by authorities at 11 p.m., all three occupants were taken out of the car before the officers searched the car. App. 57 lines 20-22; App. 100 lines 21-24; App. 108 lines 1-2; App. 160 lines 3-9. Officers searching the vehicle discovered two ounces of cocaine in the cup holder in the back seat where Horne was sitting. App. 58 lines 2-8; App. 112 lines 1-3; App. 210 lines 9-24.

During PCR proceedings, 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. 489 lines 6-9.

[1] The testimony at trial conflicted as to whether Petitioner committed any traffic violations. Officer Quinn testified that he engaged his blue lights prior to Petitioner making any U-turns. App. 158 lines 11-19. However, Officer Grant testified that there were no traffic violations except turning around in the middle of the street, but he admitted that Quinn's blue lights were on when Petitioner started the U-turn. App. 124 lines 3-9.

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 were 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 [Petitioner]. 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. 481 lines 1-12.

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. 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.

During the PCR hearing, 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. 487 lines 18-25.[2] Counsel agreed that, under the circumstances of this case, if any person, including trial and PCR counsel, had parked his or her 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. 488 lines 1-12.

---

[2] In fact, trial counsel argued this fact to the jury. During closing argument, trial counsel encouraged the jurors to listen to the tape and determine if Petitioner is the person described.

The PCR court concluded the "totality of the circumstances clearly established probable cause to search the Expedition." Thus, the PCR judge determined "[a] motion to suppress would have been properly denied." App. 522. The PCR court's recitation of facts included that the supplier was supposed to come from Charlotte. App. 520. However, the trial transcript clearly indicates the supplier was "coming down." Additionally, during the PCR hearing, trial counsel made it clear that there was no mention of Charlotte in the phone call between the informant and Horne. App. 495 lines 23-24. In addition to misstating the facts, the PCR court omitted any facts indicating the Expedition did not fit the description of the possible cars in which the supplier could be driving or that Petitioner was unmarried where as the supplier was married.

To establish a claim of ineffective assistance of counsel, Petitioner must show counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by such deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984); Gallman v. State, 307 S.C. 273, 275-276, 414 S.E.2d 780, 781-782 (1992). When a defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, the 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, 375 (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 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.

Trial counsel impresses upon the jury that Petitioner did not drive a truck, did not own a BMW, was not married, and his home did not get "shot up." App. 383 lines 11-25.

"[S]earches 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 (1967); see also State v. Peters, 271 S.C. 498, 501, 248 S.E.2d 475, 476 (1978). One of these exceptions is the automobile exception, which provides that police officers may conduct a warrantless search of an automobile when the officers have probable cause to believe the automobile contains evidence of criminal activity. Carroll v. United States, 267 U.S. 132, 153 (1925); see also State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). In United States v. Ross, 456 U.S. 798, 800 (1982), the Court defined the scope of the search in such situations as permitting officers to search as thorough as a magistrate could authorize in a warrant "'particularly describing the place to be searched.'" The Ross Court also explained that the probable cause determination must be made based upon objective facts that could justify the issuance of a search warrant by a magistrate. Id. at 808. In other words, the facts must justify the issuance of a warrant, even though a warrant was not actually obtained. Id. at 809. As explained by this Court, the standard for probable cause to conduct a warrantless search is the same as that for a search with a warrant. Peters, 271 S.C. at 502, 248 S.E.2d at 477 (1978); see also State v. Bultron, 318 S.C. 323, 332, 457 S.E.2d 616, 621 (Ct. App. 1995).

Probable cause is a good faith belief that an individual is guilty of a crime. The good faith belief must rest upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise. Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992); State v. Blassingame, 338 S.C. 240, 250, 525 S.E.2d 535, 540 (Ct. App. 1999). Probable cause is a justifiable determination, based upon the totality of the circumstances as available to law enforcement at the time of the search, that a crime is being committed or has been

committed and incriminating evidence is involved. Bultron, 318 S.C. at 332, 457 S.E.2d at 621 (Ct. App. 1995).

When a confidential informant is involved, it is necessary to examine the reliability and credibility of the informant for determining the existence of probable cause. Illinois v. Gates, 462 U.S. 213, 230-235 (1983). In determining whether the information relied upon by law enforcement is reliable, no one factor is necessary or sufficient to establish probable cause. Instead, probable cause arises from the totality of the circumstances, and "[a] deficiency in one [factor] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." Id. The Court explained:

> If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. . . . Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity – which if fabricated would subject him to criminal liability – we have found rigorous scrutiny of the basis of his knowledge unnecessary. . . . Conversely, even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case.

Id.; see also State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964).

In Ross, 456 U.S. at 800-801, the Court found probable cause existed where a confidential informant, who had proved to be reliable previously, provided specific detailed information and officers observed corroborating evidence. The informant gave a detailed description of the drug dealer, the drug dealer's nickname, the specific address where the drug sales took place, the fact that the informant just witnessed a buy, and a statement by the dealer to the informant that the trunk of the car contained additional drugs. The officers were able to confirm that a car matching the description provided by the informant was at the address given, the car was registered to an

individual who used the alias provided by the informant, and the person seen driving the car matched the description provided by the informant. Id.

In Peters, 271 S.C. at 500-502, 248 S.E.2d at 476-477 (1978), this Court determined probable cause existed to search a car where a confidential informant, who had provided reliable information previously, told police that a yellow Grand Prix automobile with a white top and a South Carolina license tag with the digits "308" would leave Folly Beach soon with a quantity of marijuana and officers observed a car fitting the description leaving the beach and recognized the driver and passenger as having been involved in illicit drug use previously. Similarly, in State v. Hayden, 268 S.C. 214, 218, 232 S.E.2d 889, 890-891 (1977), this Court held officers had probable cause to search a vehicle based upon a paid informer's tip that a specific make and color of car, which belonged to the informer, would be coming into Columbia at an approximate time along a probable route, and would contain illegal drugs.

In Bultron, 318 S.C. at 327, 457 S.E.2d at 619, the Court of Appeals determined officers had probable cause to search a vehicle for contraband based on information garnered from a confidential informant and observations of police officers. The informant stated he saw cocaine in a specific hotel room and there would be a maroon colored van with Florida license plates in front of the hotel room. The police officer testified this informant had provided information on approximately forty occasions during an eighteen month period. Id. Officers then watched the hotel room for approximately five hours. During the last thirty minutes of the surveillance, officers observed one man exit the room and sit in the driver's seat of the van, and a second man, who was carrying a pistol, exit the room and act suspiciously by walking up and down the corridor and looking up and down the road multiple times. Id. at 327-328, 457 S.E.2d at 619. The officers observed three additional men entered the van, and finally two others entered the van carrying luggage bags. Id. at

328, 457 S.E.2d at 619. Officers followed the van to a gas station where officers observed a hand gun on the floor of the van. The police then arrested the occupants. Id. A subsequent search of the van revealed a leather carrying case containing cocaine and a second gun. Id. The Court of Appeals determined the officers had probable cause to search the van based upon the tip from the reliable informant and the officer's observations of the men's suspicious behavior and "highly orchestrated exit from the hotel with bags that could reasonably conceal cocaine." Id. at 333, 457 S.E.2d 622.

Although State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) does not involve a confidential informant, the case is instructive on probable cause supporting a warrantless search of an automobile. Officers developed the defendant as a murder suspect at the scene of the crime and learned defendant had been driving a green Jeep around the time of the murder. Officers located the Jeep, which smelled of bleach and had a wet interior. This Court concluded that to officers, it seemed apparent there had been an attempt to destroy evidence in the Jeep. Thus, probable cause existed to search the Jeep where the vehicle had been connected to the suspect, the investigation revealed evidence would be in the Jeep, and the condition of the Jeep could result in the loss of the evidence. Id. at 320, 649 S.E.2d at 482.

In the instant case, probable cause to search the vehicle simply did not exist. The record contained no evidence that the informant was reliable. The informant had not provided reliable or credible information to police officers previously as this was her first buy. The record contained ample evidence that the informant was not credible due to her own drug addiction and criminal history. In fact, one of the officers testified that she was a "street person" meaning she had knowledge of the streets and knew people involved in illegal activity and that people involved in the criminal element lie frequently. App. 134 line 11 – App. 135 line 1. The observations of officers

did not corroborate the informant's tip. Petitioner was not in any of the vehicles mentioned by the informant, and officers did not gather any additional data to determine if he were married or owned a house that was recently "shot up." The PCR judge erred in finding there was probable cause to search Petitioner's vehicle where the State presented no evidence beyond his presence to connect him to Horne's cocaine dealings.

Another of those well-delineated exceptions to the warrant requirement is a search incident to a lawful arrest. Weeks v. United States, 232 U.S. 383, 392 (1914); California v. Carney, 471 U.S. 386, 390-391 (1985); see also State v. Cox, 290 S.C. 489, 491, 351 S.E.2d 570, 571 (1986). In Chimel v. California, 395 U.S. 752, 763 (1969), the Supreme Court defined the boundaries of a search incident to arrest as only "the arrestee's person and the area 'within his immediate control' – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." The Court explained that the justifications for allowing a warrantless search incident to an arrest - protection of arresting officers and protecting any evidentiary items – provided the appropriate limitations on the scope of the search. Id.

In New York v. Belton, 453 U.S. 454, 460 (1981), the Court considered how the search incident to arrest exception applied in the automobile context. Ultimately, the Court concluded that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. Id., 453 U.S. at 460. Relying upon the twin aims explained in Chimel, the Court explained officers may search a vehicle when the arrestee is within reaching distance of the vehicle. Id. The Court reasoned that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" Id. (quoting

Chimel, 395 U.S. at 763). The Court explained that logically, if the police could search the passenger compartment, then it followed that officers could search containers found in the passenger compartment, "for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." Id. at 460-461. The Court noted that it was merely determining the meaning of Chimel's principles in the automobile context and in no way altering the fundamental principles established in that case concerning the basic scope of searches incident to lawful custodial arrests. Id. at 460 n.3.

Petitioner recognizes that Belton "has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." Arizona v. Gant, 556 U.S. 332, __, 129 S.Ct. 1710, 1718 (2009). Nevertheless, this was not the holding of the Belton Court. In fact, multiple jurisdictions recognized this expansive view went beyond the constitutional mandate. For example, the Fifth Circuit held that searching an arrestee's vehicle was prohibited when the arrestee was facedown on the ground surrounded by police and over six feet from the automobile. United States v. Green, 324 F.3d 375, 379 (5th Cir. 2003). Similarly, the Ninth Circuit held a search of an arrestee's automobile over thirty minutes after the arrest and after the arrestee had been handcuffed and placed in a police car was unconstitutional. United States v. Vasey, 834 F.2d 782, 787 (9th Cir. 1987). Recently, the Supreme Court clarified the scope of a search of an automobile incident to an arrest. In Gant, the Court

> reject[ed] 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.

Gant, 556 U.S. at ___, 129 S.Ct. at 1719.

Applying the Belton line of cases to Petitioner's case reveals the warrantless search of Petitioner's vehicle was unconstitutional. At the time of the search, Petitioner had not been placed under arrest. According to the testifying police officers, the vehicle was stopped and the individuals removed from the car. None of the officers testified the individuals were placed under arrest prior to the discovery of the drugs. Thus, no search incident to arrest was permissible.

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.

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?" App. 232 line 25. Chantall answered, "No," that she didn't know that Petitioner was married as defense counsel objected. App. 233 lines 1-5. Counsel made a contemporaneous objection to the prosecutor's misstatement of fact, given that Petitioner has never been married. The trial judge sustained the objection and instructed the jury to "disregard any testimony about whether she did or did not know whether he is or is not married." App. 233 lines 6-8. Ultimately, trial counsel moved for a mistrial based upon the prosecutor's conduct. App. 234 line 23 – App. 235 line 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. 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. 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 was a single man. Counsel argued, "I don't think the damage can be fixed." App. 237 line 25 – App. 238 line 10. 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. 238 line 11 – App. 239 line 25.

The PCR judge denied relief on this ground upon finding that trial counsel "was effective in that he objected to the misstatement." App. 522. The PCR judge erred in deciding this issue upon finding "[w]hether or not a mistrial should have been granted is a legal issue that was addressed by the appellate court." App. 522.

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. 552. Thus, the Court of Appeals affirmed Petitioner's conviction 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. App. 552.

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.

App. 499 lines 7-17. Trial counsel continued: "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. 499 lines 20-23.

Petitioner testified as to this issue during his PCR hearing as follows:

> 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. 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. 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. 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.

On December 30, 2005, Horne went to Charlotte where he met Petitioner in order to "right the wrong." App. 275 line 25 – App. 276 line 3. Horne testified that he felt responsible for what happened to his friend. App. 337 lines 19-22; App. 346 lines 23-25. 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. 295 line 22 - App. 296 line 7.

During the PCR proceedings, 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. 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 [Petitioner] would be found not guilty. Obviously I was wrong." App. 497 lines 7-9. 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. 497 lines 11-20. To the contrary, the state actually maintained its objection to defense counsel's putting Horne's statement in evidence. App. 267 lines 3-5. Rather,

the prosecutor withdrew his motion to exclude the statement based upon a discovery violation. App. 266 lines 15-16; App. 267 lines 3-5.

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. 279 line 13 – App. 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. 281 line 25 – App. 320 line 4. 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.

On this issue, Petitioner testified during the PCR hearing:

> 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, the 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. 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. 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 during the PCR hearing, "To tell you, I don't remember if I subpoenaed her or not." App. 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

Petitioner respectfully requests this Court reverse the decision of the lower court, vacate his conviction, and order a new trial.

Respectfully submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of January, 2012

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 brief of Petitioner, in this case has been served on J. Rutledge Johnson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 19th day of January, 2012.

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day
of January, 2012.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013