THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

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Case No.: 2009-CP-32-1771

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James O. Senn,.....Petitioner,

vs.

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

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# PETITION FOR WRIT OF CERTIORARI

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## ISSUES PRESENTED

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II. Whether the Lower Court Erred in Finding that Trial Counsel Did Not Render Ineffective Assistance in the Rejection of the State's Plea Offer.

III. Whether the Lower Court Erred in Finding Trial Counsel Was Not Ineffective in His Preparation and Investigation Prior to Trial and Performance at Trial Related to the Drug Evidence and Legal Issues Involved.

IV. Whether the Lower Court Erred in Failing to Consider the Complete Breakdown of the Adversarial Process that Resulted in Presumed Prejudice Pursuant to U.S. v. Cronic, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043 (1984).

V. Whether the Lower Court Erred in Finding Appellate Counsel Effective When There is No Evidence in the Record to Support the Lower Court's Ruling that Appellate Counsel Exercised Reasonable Professional Judgment in Excluding Issues on Appeal.

## STANDARD OF REVIEW

The reviewing court will uphold the findings of the PCR court if there is any evidence of probative value to support those findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, if no probative evidence supports those findings, the reviewing court will not uphold the findings of the PCR court. Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003). Furthermore, the reviewing court will reverse the PCR court's decision when it is controlled by an error of law. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

## STATEMENT OF THE CASE

During the August 2005 term of the Lexington County Grand Jury, Petitioner was indicted for Trafficking in Ice, Crank or Crack, more than 400 grams (Indictment No.: 2005-GS-32-3212). On February 13-14, 2006, Petitioner proceeded to trial in front of the Honorable William P. Keesley at the Lexington County Courthouse. Petitioner was represented by Robert T. Williams, Esquire. On February 14, 2006, the jury found Petitioner guilty as indicted. The Honorable William P. Keesley sentenced Petitioner to a term of twenty-five (25) years.

A timely notice of appeal was filed and Petitioner's appeal was perfected by Kathrine H. Hudgins, South Carolina Commission on Indigent Defense. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion filed on February 12, 2009. State v. Senn, Op. No. 2009-UP-084 (S.C. Ct. App. filed February 12, 2009).

On February 23, 2009, Petitioner filed an Application for Post Conviction Relief. The State submitted a Return on or about December 22, 2009. On January 24, 2011,

Petitioner filed an Amendment to Application for Post Conviction Relief, which added the following specific allegations to his original allegation of ineffective assistance of counsel:

1. Ineffective assistance of trial counsel for failure to prepare and investigate, specifically, but not limited to the following claims:

    a. Failure to provide to the Applicant and review with him the complete discovery materials prior to trial. Specifically, but not limited to, the SLED file and drug reports.

    b. Failure to conduct an independent investigation. Specifically, but not limited to, failure to determine how the State derived a weight from the drug evidence

    c. Failure to ensure that the Applicant was fully advised regarding the plea offers and to ensure that the rejection of such offers were knowingly and understandably made by the Applicant.

    d. Failure to advise the Applicant regarding the applicable statutes and mandatory sentencing provisions.

    e. Failure to make the necessary arrangements to procure the testimony of Timothy Senn.

2. Ineffective assistance of trial counsel for failure to utilize an expert to investigate and testify regarding the drug evidence.

3. Ineffective assistance of counsel for failure to file and argue a Motion to Suppress the Evidence due to the handling, sampling, and testing of the drug evidence.

4. Ineffective assistance of trial counsel for failure to argue the Motion to Suppress Evidence, which was filed on January 9, 2006 , or raise any argument regarding probable cause for the traffic stop at issue.

5. Ineffective assistance of counsel for failure to properly prepare to cross-examine the State's experts regarding their qualifications and work in the case. Failure to ensure that the State's experts adhered to the rulings made by the Court regarding the scope and/or limits on their testimony.

6. Ineffective assistance of counsel for the failure to effectively handle the admission and explanation of the drug evidence, specifically regarding the weight of the drug evidence. Specifically, but not limited to the following:

a. Failure to cross-examine the State's witnesses regarding the sampling procedure used and method for obtaining the weight of the drug evidence.

b. Failure to enter contemporaneous objections when the State's witness testified regarding the drug amounts and mathematical equations.

7. Ineffective assistance of counsel for failure to properly address the Court's questions regarding the status of the law at issue and appropriate interpretation of such law.

8. Ineffective assistance of counsel for failure to present the testimony of Timothy Senn at trial.

9. Ineffective assistance of counsel for failure to move to have the juror (Mr. Klutz) removed due to his conversation with the extra juror (Mr. Curry).

10. Ineffective assistance of counsel for failure to make a viable argument for a directed verdict and a charge for the lesser included offense.

11. Ineffective assistance of counsel for failure to request a simple possession charge.

12. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal. Specifically, but not limited to the following:

    a. Failure to address the issue involving the extra juror and trial counsel's motion for a mistrial.

    b. Failure to address the qualifications and court's ruling on the State's experts.

An evidentiary hearing was conducted on January 31, 2011 at the Lexington County Courthouse in front of the Honorable R. Lawton McIntosh. Petitioner was present and was represented by Tricia A. Blanchette, Esquire. Respondent was represented by A. West Lee, Assistant Attorney General. During the evidentiary hearing, counsel called Jeffrey M. Hollifield, Robert T. Williams, Sr., Esquire, and Petitioner to the stand. Petitioner's counsel also provided the court a sealed transcript of the

deposition of Timothy Senn and twelve exhibits. During the evidentiary hearing, the court marked two court exhibits. The court also had before it a copy of the Application, Respondent's Return, Petitioner's Amendment, the records of the Lexington County Clerk of Court concerning the subject conviction, and Petitioner's records from the South Carolina Department of Corrections.

At the conclusion of the evidentiary hearing, the lower court took the matter under advisement. Thereafter, the State was instructed to submit an Order of Dismissal, which was signed by Honorable R. Lawton McIntosh on September 1, 2011. On September 23, 2011, Petitioner filed a Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. Respondent submitted a Return on October 27, 2011. Via Form Four Order, the Honorable Lawton W. McIntosh denied Petitioner's Motion on December 2, 2011. On January 13, 2012, Petitioner filed a Notice of Appeal from which this Petition for Writ of Certiorari follows.

## ARGUMENT

I. The Lower Court Erred in Excusing Trial Counsel's Failure to Utilize Timothy Senn as Trial Strategy When Such Failure Was Clearly Ineffective Assistance of Counsel that Greatly Prejudiced the Trial Outcome.

It is well established that a defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Petitioner submits that trial counsel violated his right to effective assistance under the Sixth Amendment when he failed to interview, subpoena, arrange transport, and utilize the testimony of Timothy Senn at trial. In the Order of Dismissal, the lower court held:

> This Court finds that counsel articulated valid strategic reasons for not calling Timothy Senn as a witness at trial, and thus this Court finds that Applicant has not shown that counsel was deficient in his choice of tactics. This Court further finds that the Applicant failed to show that he was prejudiced as Timothy Senn's deposition offered nothing more for the defense.

App p. 623. Petitioner submits that no probative evidence exists in the record to support the lower court's finding; therefore, the lower court must be reversed.

Similarly, in Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008), the lower court found trial counsel had a strategic reason to not call witnesses. In reversing the lower court, this Court noted that the validity of counsel's strategy is reviewed under "an objective standard of reasonableness." Id. at 462, 670 S.E.2d at 650 (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). This Court further reasoned that trial counsel has a duty to perform a reasonable investigation, which at a minimum includes the duty to conduct an independent investigation of the facts and circumstances of the case and interview potential witnesses. Id. at 460, 670 S.E.2d at 649; See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). After considering the facts of the case, this Court held that counsel's explanation that the witnesses would not add much to the defense was not an objectively reasonable strategic reason for not utilizing the witnesses. Id. at 462, 670 S.E.2d at 650. As a result, the lower court's ruling was reversed. Id. at 463, 670 S.E.2d at 650.

Here, Petitioner explained that Timothy Senn ("Timothy") is his cousin, and he explained that Timothy owned and asked him to drive the vehicle in which the drug evidence was located. App. pp. 424, 466-7. He testified that Timothy was listed on the trial witness list for the defense, and he requested and understood that Timothy would be called at trial. App. pp. 426-7. Petitioner identified and counsel introduced a series of

letters between trial counsel and the Lexington County Solicitor's Office arranging the transport of Timothy from the Lexington County Detention Center for Petitioner's trial. App. pp. 427-29. Despite his request, the filed notice and written transport inquiries, Petitioner noted that Timothy was not called as a trial witness. App. p. 429.

Referencing the trial transcript, Petitioner explained that Officer Mark Jones testified that Timothy was the owner of the vehicle in question. App. pp. 56-57, 466. Petitioner also explained that trial counsel asked Officer Jones if Timothy would be testifying, to which the State objected and counsel withdrew the line of questioning. App. pp. 57-8, 466-7.

Since an applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the evidentiary hearing in order to establish prejudice from the witness' failure to testify at trial, Petitioner motioned the court and obtained an Order for the telephonic deposition of Timothy Senn at the Federal Correctional Institution located in Fort Dix, New Jersey. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), App. p. 388. On November 9, 2010, a telephonic deposition was conducted at the Office of the Attorney General. Petitioner was present, with his undersigned counsel. App. pp. 694-5. Kenneth M. Matthews, Esquire, was present as Timothy Senn's attorney. App. p. 694. A. West Lee, Assistant Attorney General, was present on behalf of the Respondent. App. p. 694. At the evidentiary hearing, the sealed transcript of the deposition was admitted and the witnesses were questioned about it. App. p. 429.

During the deposition, Timothy acknowledged that he was currently incarcerated on conspiracy and drug charges at the federal penitentiary in Fort Dix, New Jersey. App.

pp. 696, 702. He also acknowledged that he is represented by Ken Matthews, Esquire, who was present at the telephonic deposition. App. pp. 696-7. Timothy explained that he was with Petitioner, his cousin, on April 9, 2005 at his friend's mechanic shop. App. pp. 697-8. Timothy also explained that he asked Petitioner to drive the vehicle in question, so he could drive his corvette home. App. p. 698. When asked, he testified that Petitioner did not know what was in the vehicle because he knew Petitioner would not have driven it if he did. App. pp. 698-9. Timothy recalled going to the Cayce Police Department to obtain the vehicle, which was registered in his deceased father's name. App. pp. 699-700. He testified that trial counsel never contacted him about Petitioner's case, but he would have "absolutely" talked with him. App. p. 700. He explained that he was housed at the Lexington County Detention Center on February 13-14, 2006, and he would have been willing to testify on Petitioner's behalf. App. p. 700-1. In closing, Timothy stated: "I know he didn't do anything. He was doing what I was asking him to do." App. p. 701, lns. 9-12.

Concerning Timothy's testimony, Petitioner explained that the deposition demonstrated why he wanted Timothy utilized at trial. App. p. 487-8. Petitioner specifically referenced Timothy's testimony that he requested that Petitioner drive the vehicle, Petitioner did not know what was in the vehicle, and he knew Petitioner would not drive the vehicle if he knew its contents. App. p. 487-8.

Regarding Timothy, trial counsel acknowledged that he was listed as a defense witness, but he explained that he never intended to use him. App. p. 522-23. When asked if he spoke to Timothy or his counsel before making the determination that he would not be utilized, counsel responded: "Well, I'm sure since he had been convicted,

he would have said that it was his methamphetamine at the time." App. p. 524, lns. 6-8. After being asked a series of follow up questions regarding Timothy's charges and location at the time of Petitioner's trial, it was clear counsel did not what Timothy had been charge with or where he was located at the time of trial. After reviewing the letters regarding Timothy's transport, trial counsel eventually admitted that he was located at Lexington County Detention Center. App. pp. 523-4. In an attempt to justify his failure to utilize Timothy, trial counsel indicated that he thought the outcome of the hearing on potential Rule 404(b) evidence would have been different. App. p. 525. Interestingly, while Petitioner was on the stand, it was made clear that the Rule 404(b) hearing was conducted to address whether the State could call witnesses on an alleged prior bad act with Timothy and the trial court ruled that the evidence was inadmissible. App. pp. 467-8. Even though trial counsel's justification for his failure to utilize Timothy was deemed valid strategy by the lower court, Petitioner submits that trial counsel's justification is merely a convenient excuse and does not properly reflect the record and the trial court's ruling on the matter.

Defense counsel admitted that Petitioner informed him that he was innocent, but failed to call the one witness that could establish Petitioner's innocence. App. pp. 532, 562. Petitioner submits that the lower court's finding that the failure to utilize Timothy was valid strategy and Petitioner was not prejudiced as a result is completely unsupported by the record. The testimony of Timothy amounts to an admission that corroborates Petitioner's claims of innocence. The Supreme Court of the United States has held:

> A confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of

> information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.

Arizona v. Fulminante, 499 U.S. 279, 296, 111 S.Ct. 1246, 1257 (1991) (Internal citations and punctuation omitted). See Johnson v. Catoe, 345 S.C. 389, 401, 548 S.E.2d 587, 593 (2001) (Pleicones, J., dissenting).

Here, Timothy's testimony amounted to a confession of his guilt and corroborated Petitioner's claims of innocence, but counsel did not even speak with him. As was held in Lounds, Petitioner urges this Court to find that there is no evidence in the record to support the lower court's ruling that counsel's obvious failure was a valid strategy since it was clearly ineffective assistance that was highly prejudicial to the outcome of Petitioner's trial.

II. The Lower Court Erred in Finding that Trial Counsel Did Not Render Ineffective Assistance in the Rejection of the State's Plea Offer.

During the evidentiary hearing, Petitioner was adamant that but for trial counsel's failure to prepare his case and advise him correctly, he would have accepted the State's written plea offer of three to ten years, non-violent. App. pp. 421-2. Petitioner testified that counsel did not advise him about the mandatory sentence he was facing and the first time he heard about it was from the court during trial. App. pp. 422, 453. Petitioner also testified that counsel had not conducted an investigation nor had he reviewed the applicable statutes with him prior to advising him to reject the plea offer. App. p. 422.

When asked about trial counsel's advice to reject the State's offer, Petitioner testified: "He said that I should be able to get eighteen months without having any weight for them to consider." App. p. 419, lns. 22-24. Petitioner explained that counsel advised him based upon the SLED report dated December 8, 2005 that the State had no weight

for the drugs and in his experience there was "no way" Petitioner could be convicted for not having any drugs. App. pp. 419-21, 433. Petitioner also recalled counsel informing him that he would work to get the plea down to eighteen months, which counsel confirmed during his testimony. App. pp. 420, 566. Instead of getting a plea to eighteen months, the State utilized a second report, with a weight, and used a calculation, considered simple math by the trial court, to exceed the amount needed to prove trafficking. App. p. 456. While on the stand, counsel admitted that he did not know what discovery he had when he presented the plea offer to Petitioner and he felt good about going to trial since the State could not prove the threshold amount of drugs. App. pp. 528, 531. He also admitted that he did not know how the State was going to get an amount. App. pp. 550-1. At the conclusion of the evidentiary hearing, the lower court concluded:

> Well, I think **all** the evidence shows, quite frankly, that Mr. Williams didn't know how they were going to establish a weight. I think he admitted that candidly from the stand. (emphasis added)

App. p. 599, lns. 12-15. This conclusion by the lower court begs the common sense question of how the court could find that trial counsel's assistance on the plea offer was not deficient or prejudicial to the Petitioner when all the evidence shows that trial counsel was clueless about the most important element of the State's case.

In Kolle v. State, 386 S.C. 578, 591, 690 S.E.2d 73, 80 (2010), this Court considered whether plea counsel was ineffective in advising Kolle to reject the State's initial plea offer, proceed with a suppression hearing and plead guilty without a negotiated sentence. This Court found that plea counsel was deficient in advising Kolle

that the State's initial plea offer was not a "good deal" and misinforming Kolle that the offer would remain open until after the suppression hearing. Id. This Court reasoned:

> Clearly, the State's offer of a sentence of ten years suspended on the service of five years with three years' probation was significantly better than the seven to twenty-five-year sentence Kolle faced for the trafficking charge. Moreover, plea counsel advised him not to plead guilty until after the suppression hearing at which time the State withdrew the plea offer. Had Kolle known that the State would withdraw this offer after the suppression hearing, he may have decided to accept it and received a lower sentence.

Id. at 591-2, 690 S.E.2d at 17-18.

In consideration of Kolle, Petitioner submits there is no evidence in the record to support the lower court's finding that trial counsel was effective in his assistance to Petitioner that resulted in rejection of the State's plea offer. As to prejudice suffered by Petitioner, this Court's analysis in Kolle is also applicable. Here, Petitioner rejected a plea offer of three to ten years non-violent and was sentenced to a mandatory twenty-five year sentence as a result of counsel's false hope for trial, which was derived from his cluelessness about the State's ability to establish the amount of drugs. Unlike trial counsel, the trial court expressed serious concern about the weight issue and having to put Petitioner away for a mandatory twenty-five years. App. pp. 146-7. Petitioner made it clear that if had been properly advised about the mandatory sentence and counsel had properly reviewed the SLED reports and ascertained the State's ability to prove a weight, he would have accepted the plea offer and not proceeded to trial with a clueless attorney. App. pp. 485-6. As a result, Petitioner urges this Court to find that there is no evidence of probative value to support the lower court's ruling that trial counsel rendered effective assistance to Petitioner regarding the rejection of the plea offer and that Petitioner was not prejudiced as a result.

III. The Lower Court Erred in Finding Trial Counsel Was Not Ineffective in His Preparation and Investigation Prior to Trial and Performance at Trial Related to the Drug Evidence and Other Legal Issues Involved.

As argued above, it is well established that trial counsel has a duty to perform a reasonable investigation, which at a minimum includes the duty to conduct an independent investigation of the facts and circumstances of the case and interview potential witnesses. Id. at 460, 670 S.E.2d at 649; See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). At the evidentiary hearing, Petitioner recalled meeting with counsel four to five times before trial. App. p. 415. During those meetings, he recalled going over some SLED documents including the latent print report, and the lab report dated December 8, 2005.[1] App. pp. 416-19. Petitioner testified that he wrote SLED for a complete copy of his file after trial, and it contained a second lab report dated January 6, 2006, which provided a weight for the vials of drug evidence. App. p. 649. Petitioner was adamant that counsel advised him that no weight equaled no conviction, and counsel failed to advise him about the weight indicated on the second report or the method the State would use to derive the total weight at trial. App. pp. 419, 455-56, 462.

Turning to the trial transcript, Petitioner noted that trial counsel failed to raise a pre-trial motion or argument regarding the weight of the drug evidence. Only after the State moved to qualify Officer Stout as an expert did counsel make an argument regarding the weight of the drugs. Counsel argued that there was no weight in discovery, yet the State was attempting to use Officer Stout to establish a total weight App. pp. 93, 101, 446. Counsel's ignorance on this key element of proof and his failure to ascertain how the State would derive the total amount was also clear when counsel objected during

[1] The latent print report indicated no value for identification and the lab report indicated no weight for the drug evidence.

Agent McCoy's testimony. App. pp. 158-169. As explained by the Petitioner and recorded in the trial transcript, counsel objected to Agent McCoy's testimony regarding the jars after the jars had already been admitted into evidence. App. pp. 455-56. Trial counsel argued that he did not receive a weight in discovery, so he was objecting to anything the State planned to use to establish a weight. App. p. 158, 455. In response, the State informed the court that counsel had been provided complete discovery and given access to the evidence. The State explained that it was not a discovery issue, but a matter of simple math. App. 456, 160-1. The court did raise several good points not raised by trial counsel but eventually ruled that the testimony regarding the total weight was a matter of simple math and admissible. App. pp. 162-9, 458-460.

When trial counsel took the stand, he readily admitted that his theory was no weight equaled no conviction and that he was not aware of the weight before trial. As quoted above, the lower court stated on the record that all the evidence showed that counsel had no idea how the State was going to establish a weight. When asked about the Petitioner's expert utilized at the evidentiary hearing, counsel surmised that it would have made him "look silly" to utilize such an expert. App. p. 579. Petitioner would urge this Court to find that what was actually beyond silly was counsel's deficient and prejudicial decision to rely on his own ignorance and not ascertain how the State planned to derive a total amount for the drug evidence.

Not only would an expert have been able to advise counsel about the total amount of drugs, but an expert could have been utilized to assist counsel in his cross examination of the State's experts and his arguments to the court. Even though counsel testified that he had the necessary expertise and an expert was not needed, Petitioner submits that

counsel's claim is clearly refuted by the testimony of Jeffrey Hollifield and the trial record of counsel's performance. App. p. 537.

At the evidentiary hearing, Jeffrey Hollifield was called by Petitioner and qualified as an expert in forensic chemistry. App. pp. 490-93. Mr. Hollifield explained that he had worked on hundreds of methamphetamine cases and testified in ten to twelve of those cases. App. pp. 492-3. Mr. Hollifield explained that he read the trial transcript and obtained the exhibits from the Lexington Clerk of Court via court order. App. p. 382, 495. He detailed how he filled and measured the containers obtained from the Clerk's Office and prepared a report with the measured amounts. App. p. 495. He expressed his concern that no original measurements of the total liquid were taken and the liquid at issue was discarded by the responding officers. App. p. 496. He further explained that the liquid, even if hazardous, could have been measured before being discarded and he had never been involved in a case where the original amount was not measured. App. p. 497, 506. When asked about SLED conducting an analysis without seeing the containers, Mr. Hollifield responded that he would be hesitant to give a mass or weight if he had not seen or analyzed the actual containers. App. pp. 496-7, lns. 15-23.

Mr. Hollifield acknowledged that he has been appointed to cases and would have been willing to assist trial counsel if requested. App. p. 501. Regarding the calculations utilized in court, Mr. Hollifield explained that the amount of the Gatorade bottle was not obtained by filling up the container but the SLED Agent used the label to ascertain the amount. App. p. 501-2. Mr. Hollifield explained why using the Gatorade label resulted in an incorrect calculation. App. pp. 512-15. As to the pickle jar, Mr. Hollifield explained that no calculations were given for it at trial. App. p. 504. Therefore, the only

amount for the pickle jar was the vial represented on the second SLED report. App. p. 504. Mr. Hollifield said he could have provided trial counsel with his calculations and informed him that there was more than four hundred grams of liquid in the Gatorade container. App. p. 517.

Clearly, Mr. Hollfield's expertise exceeded trial counsel's since trial counsel advised Petitioner that the State had no weight and his only objections were entered on the scope of Officer Stout's testimony and discovery matters. At the evidentiary hearing, counsel admitted that he did not know how the State planned to establish an amount or that the State intended to qualify two experts to establish the amount. App. pp. 533-4. It is sadly obvious that counsel was in over his head and needed the assistance of an expert to advise the Petitioner correctly, to argue a motion to suppress the evidence, to argue to the court regarding the State's calculations and methods, to cross examine the State's experts and to ensure that the State's experts stayed within their area of expertise.[2] As was clarified at the evidentiary hearing, Petitioner is not arguing that an expert needed to be called at trial, but he is arguing that counsel needed the assistance of an expert to properly prepare and present his case. Without a doubt, the record demonstrates that trial counsel was not properly prepared nor did he effectively handle the drug evidence at trial. Therefore, Petitioner submits that but for counsel's ineffectiveness in this area the outcome of his trial would have been drastically different. Unfortunately, without the assistance of an expert, Petitioner's trial was a perfect example of the blind leading the blind into a very complicated maze.

[2] Trial counsel failed to object when Officer Stout exceeded the trial court's ruling regarding the scope of his expert testimony. App. pp. 490--506.

Additionally, counsel's failure to properly prepare for trial was also evidenced on a number of other legal issues stemming from the drug evidence. At the beginning of trial, counsel failed to make a motion for suppression of the drug evidence due to probable cause for the traffic stop and counsel failed to impeach Officer Jones with his report about the stop. At trial, Officer Jones testified that he was patrolling the area due to some information that was received. App. p. 25. When asked, trial counsel testified that the reason given for the traffic stop was Petitioner's lights being off and failure to use a blinker, but the real reason for the traffic stop was "because it was in a drug area in West Columbia." App. p. 560. Despite this clear admission regarding the pre-textual nature of the stop, counsel failed to raise the matter to the court in a pre-trial motion. Furthermore, counsel failed to impeach Officer Jones when he testified that Petitioner's lights were on and later testified that his lights were off when his report indicated that Petitioner's lights were on. If counsel would have conducted a pre-trial hearing on the matter, these inconsistencies in Officer Jones testimony would have been brought to the court's attention, along with the actual reason for the stop. Clearly, if the traffic stop was not based upon probable cause, the drug evidence would have been subject to suppression. As a result, the State's case against Petitioner would have been decimated, which clearly shows the prejudicial impact of counsel's failure to prepare, investigate and provide Petitioner effective assistance.

During trial, the court informed counsel that he was very concerned about the nature of the drug evidence and the statute at issue. App. p. 543. The court explained that he had never had a case where there was not a completed product or some substantial amount of the actual drug. App. p. 543. The court asked counsel if there was another

statute for this type of situation. App. p. 543. The court explained that he was familiar with the statute regarding mixtures but he could not put someone away for twenty-five years for possession of ether. App. p. 543-44. When asked, trial counsel explained that he realized he needed to do additional research to answer the court's questions, but when he did he could "not find an answer to that question that would help." App. p. 545, lns. 11-22. Counsel's realization that he needed to do more research completely contradicts his assertion that he thoroughly reviewed the applicable statutes with Petitioner prior to trial. App. p. 541. Clearly, trial counsel failed to do the necessary research prior to trial and advise Petitioner accordingly. Furthermore, it was highly prejudicial for the court to have bring the law to counsel's attention at the end of the first day of trial before counsel did the necessary research to discover that the applicable law was not helpful to Petitioner. This research and counsel's conclusions should have been reached before the second day of trial. In contrast to the trial court, counsel's lack of concern with the applicable law and evidence in the case allowed Petitioner to be subjected to a mandatory twenty-five year sentence without the assistance of an informed advocate.

Trial counsel's lack of preparation and overall awareness of the drug evidence also reared its prejudicial head when counsel failed to request a simple possession charge. In arguing for a directed verdict, counsel argued that the only weight the State had was a small vial. App. pp. 286-91, 472. During the charging conference, counsel requested a charge on the lesser included offense. App. pp. 303, 474-5. The State responded that counsel failed to object to the expert's mathematical equations and conclusions, but he appeared to be objecting now with his request for a lesser included charge. App. pp. 303-4,. 475. As a result, the State objected to counsel's request for a charge on the lesser

included offense. App. p. 304, 476. It appears that the State was convinced that trial counsel was not making the necessary contemporaneous objections or raising arguments at the correct time. Furthermore, the State indicated that if trial counsel's theory was correct, "he could get a simple possession charge." App. p. 307, lns. 15-16. Even though the State raised the issue, counsel did not request a simple possession charge and excused his failure at the evidentiary hearing by surmising that he knew the court would not give the charge. Ultimately, the trial court denied counsel's request for the lesser included charge but due to counsel's omission did not rule on the issue of a simple possession charge. App. p. 308.

On direct appeal, appellate counsel argued that the trial judge erred in refusing to charge the lesser included offenses of possession and trafficking in an amount less than 400 grams. App. p. 361. In affirming Petitioner's conviction, the South Carolina Court of Appeals held: "As to charging the lesser included offenses, we initially note Senn never requested a "simple possession" charge at trial." App. p. 362. Therefore, the Court of Appeals did not rule on this portion of Petitioner's appellate argument. Despite appellate counsel's attempt to raise it as a meritorious issue on appeal, trial counsel's failure to request the charge and properly preserve the issue prejudiced Petitioner in the trial and appellate court.

In sum, there is no evidence in the record to support the lower court's finding that trial counsel properly investigated, prepared and represented Petitioner at trial on the above stated matters related to the drug evidence. Clearly, Petitioner could not calculate the risk of facing a mandatory sentence at trial with an advocate that had no idea how the State planned to establish the weight of the drug evidence. Without a doubt, counsel's

failure to prepare detrimentally affected his representation of Petition at trial and attributed directly to the jury's verdict and the court's imposition of a twenty-five year sentence.

IV. The Lower Court Erred in Failing to Consider the Complete Breakdown of the Adversarial Process that Resulted in Presumed Prejudice Pursuant to U.S. v. Cronic, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043 (1984).

In U.S. v. Cronic, 466 U.S. 648, 653, 104 S.Ct. 2039, 2043 (1984), the Supreme Court of the United States made it clear that "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities not luxuries.'" Citing Gideon v. Wainwright, 372 U.S. 335, 334 (1963). The Supreme Court of the United States further reasoned as follows:

> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." United States v. Morrison, 449 U.S. 361, 364 (1981). Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." Cuyler v. Sullivan, 446 U.S. at 343. Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743 (1967).

Cronic, 466 U.S. at 655-56, 104 S.Ct. at 2045.

In Nance v. Ozmint, 367 S.C. 547, 551, 626 S.E.2d 878, 880 (2006), this Court analyzed Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) and Cronic, and this Court reasoned: "Strickland and Cronic are companion cases applying the same analysis, but with a different emphasis." This Court explained:

> The Supreme Court also recognized in both Strickland and Cronic that in certain circumstances "prejudice is presumed" because prejudice "is so likely that case-by-case inquiry ... is not worth the cost." Strickland, 466

> U.S. at 692 (citing Cronic, 466 U.S. at 658). In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)).

Nance at 551-2, 626 S.E.2d at 880. After applying the above analysis, this court held: "We believe the present case represents one of the rare cases where counsel 'entirely fails to subject the prosecution's case to meaningful adversarial testing.'" Id. at 553, 626 S.E.2d at 881.

Alternatively to Petitioner's three arguments that trial counsel was ineffective pursuant to Strickland, Petitioner submits that counsel's representation taken as a whole demonstrates a complete breakdown of the adversarial process. As argued above, counsel went into trial without knowing the State's evidence against Petitioner, specifically how the State planned to derive the weight of the drug evidence, yet the lower court found that trial counsel was not ineffective nor did Petitioner suffer prejudice as a result. In contrast, Petitioner submits that counsel's lack of preparation for trial and performance at trial represented a complete failure to subject the State's case to a meaningful adversarial testing, which rendered the process presumptively unreliable.

Beyond the reasons set forth above, Petitioner also presented the following additional issues at the evidentiary hearing: 1) Counsel failed to ensure that the State's experts adhered to the rulings made by the court regarding the scope and/or limits on

their testimony, 2) Counsel failed to move to have the juror (Mr. Klutz) removed due to his conversation with the extra juror (Mr. Curry), and 3) Counsel failed to make a viable directed verdict argument.

Taken as a whole, Petitioner submits that the trial record, along with the testimony and evidence presented at the evidentiary hearing, clearly demonstrates a complete breakdown in the adversarial process as it appears that counsel was simply making it up as it went. Unfortunately, the trial court was more concerned about being required to sentence Petitioner to a mandatory term of twenty-five (25) years than counsel was about doing the research on the matter prior to trial. App. pp. 145-7. Only after the trial court's request mid-trial, did counsel perform research and conclude that an answer could not be found that was helpful to Petitioner. App. p. 545.

Clearly, counsel chose to ignore the premise underlying our judicial system that both sides have an effective advocate, when he took Petitioner to trial without a simple understanding of the State's evidence, failed to speak with or utilize Timothy Senn, failed to advise Petitioner properly before rejecting the plea offer and failed to effectively represent Petitioner at trial. In only the rarest of circumstances should there be a presumption of prejudice, but Petitioner is hopeful that counsel's utter failure in his case is a rarity in this State.

V. The Lower Court Erred in Finding Appellate Counsel Effective When There is No Evidence in the Record to Support the Lower Court's Ruling that Appellate Counsel Exercised Reasonable Professional Judgment in Excluding Issues on Appeal.

While on the stand, Petitioner alleged and explained in detail that appellate counsel was ineffective for failing to raise all meritorious issues on appeal. Petitioner testified that trial counsel entered several objections to the qualifications of Officer Stout,

which were overruled in part by the trial court. App. pp. 93-109, 444-449, 480. Petitioner also testified about trial counsel's motion for a mistrial due to a situation involving a man that wondered into the jury room and held a conversation with a juror, a conversation that the juror initially denied. App. pp. 468-471. Petitioner alleged that appellate counsel was ineffective for failing to raise these issues on appeal. App. pp. 170-225, 480. In response, the State did not call Kathrine H. Hudgins, South Carolina Commission on Indigent Defense, to address why these issues were not raised on appeal.

Despite appellate counsel's failure to testify, the lower court held:

> Applicant alleges that appellate counsel was ineffective for failing to address the issue involving the extra juror and trial counsel's motion for mistrial on this matter; and for failing to address the qualifications and the Court's ruling on the state's expert. This Court finds that Applicant's allegations are without merit. This Court finds that a defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 821 (1985). "However, appellate counsel is not required to raise every non-frivoulous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel.

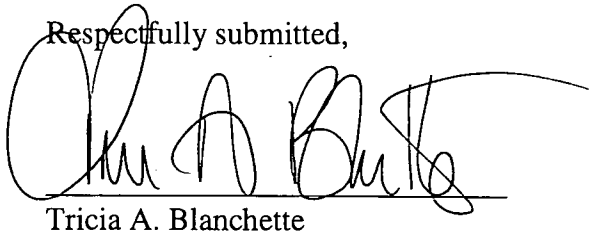
App. p. 628. Petitioner does not dispute the law relied upon by the lower court, but Petitioner does dispute that appellate counsel provided a strategic reason for her decision to exclude issues on appeal. Since appellate counsel provided did not testify at the evidentiary hearing, there is no evidence in the record to support the lower court's ruling that appellate counsel provided a strategic reason for her decision to exclude issues on appeal. See Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)The record is void of an explanation by appellate counsel. Therefore, Petitioner submits that the lower

court must be reversed pursuant to Jackson v. State, 355 S.C. 568, 570, 586 S.E.2d 562, 563 (2003), and Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

## CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant this Petition for Writ of Certiorari and allow the Petitioner to proceed to briefing the requested issues under Rule 243(j), SCACR, or reverse the Order of Dismissal and grant the Petitioner a new trial.

Respectfully submitted,



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ATTORNEY FOR PETITIONER

This 14 day of March, 2012.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief



Honorable R. Lawton McIntosh, Circuit Court Judge

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Case No.: 2009-CP-32-1771

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James O. Senn,.....Petitioner,

vs.

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

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CERTIFICATE OF SERVICE

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I, Tricia A. Blanchette, Attorney for the Petitioner, hereby certify that I that I hand delivered this 16th day of March 2012, a copy of a Petition for Writ of Certiorari and Appendix (2 volumes), to Kaelon E. May of the Attorney General's Office, at:

Office of the Attorney General
ATT: Kaelon E. May, Ast. AG
1000 Assembly Street, Room 519
Columbia, SC 29201

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March 16, 2012

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable R. Lawton McIntosh, Circuit Court Judge

Case No.: 2009-CP-32-1771

James O. Senn,.....Petitioner,

vs.

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

CERTIFICATE OF REDACTION

The undersigned hereby certifies that personal identifiers and sensitive information have been have been redacted in the Appendices pursuant to the South Carolina Supreme Court's Order dated August 13, 2007.

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March 16, 2012