ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 16 2017
SC SUPREME COURT

October 16, 2017

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

Re: <u>Norris Steplight, #279329 v. State of South Carolina</u>
Case No. 2015-CP-10-2362

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. The PCR transcript is being requested on today's date. Enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General

MHJ/jaj

cc: Jeffrey Buncher, Esquire
South Carolina Department of Corrections
Charleston County Clerk of Court
Honorable Scarlett A. Wilson
Office of Appellate Defense
Victim Advocacy Division

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO CHARLESTON COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

RECEIVED
OCT 16 2017
S.C. SUPREME COURT

Case No. 2015-CP-10-2362

Norris Steplight, #279329 .... Respondent,

v.

State of South Carolina, ... Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Michael G. Nettles' order granting post-conviction relief filed September 18, 2017. The State's subsequent motion to alter or amend was denied by written order filed on October 9, 2017, and received by the State on October 16, 2017. Copies of both orders are attached hereto.

October 16, 2017

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108
P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: [signature]
Attorneys for the Petitioner

Other counsel of record:
Jeffrey Wayne Buncher Jr., Esquire
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STATE OF SOUTH CAROLINA
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S.C. SUPREME COURT

Case No. 2015-CP-10-2362

Norris Steplight, #279329 .... Respondent,

v.

State of South Carolina, ... Petitioner.

PROOF OF SERVICE

I, Megan Harrigan Jameson, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Jeffrey Wayne Buncher Jr., Esquire
Uricchio Howe Krell Jacobson Toporek Theos & Keith, PA
PO Box 399
Charleston, SC 29402-0399

I further certify that all parties required by Rule to be served have been served this 16th day of October, 2017

MEGAN HARRIGAN JAMESON
S.C. Bar. No. 100108
Office of Attorney General
Post Office Box 11549
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(803) 734-3737
Attorney for the Petitioner

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
Norris Steplight, SCDC ID 00279329, Applicant, v. State of South Carolina, Respondent.	)	2015-CP-10-02362 **ORDER**

FILED
2017 SEP 18 PM 4:20
JULIE J. ARMSTRONG
CLERK OF COURT
BY

THIS MATTER came before the Court on August 1, 2017. Present at the hearing for the Applicant were Norris Steplight and his attorneys Jerry N. Theos and Jeff Buncher, Jr. Present at the hearing for the Respondent were attorneys Megan Jameson and Judah VanSyckel.

PROCEDURAL BACKGROUND

On May 28, 2011, Applicant was arrested and charged with Trafficking in Cocaine Base, more than 10 grams, but less than 28 grams, 3rd offense. Applicant's case was called for trial on February 4, 2013, and Applicant was found guilty of said offense on February 5, 2013. Applicant was sentenced to the mandatory minimum of 25 years and a $50,000.00 fine was imposed. Applicant filed his Notice of Intent to Appeal on February 13, 2013. On April 30, 2014, the South Carolina Court of Appeals issued an unpublished opinion affirming Applicant's conviction. On April 27, 2015, Applicant timely filed his Application for Post-Conviction Relief. Respondent's Return to the application was filed on February 9, 2016. Applicant thereafter filed an Amended Application for Post-Conviction Relief on December 16, 2016. On January 10, 2017, the Honorable William H. Seals, Jr., entered an Order allowing Applicant to have an expert inspect and/or analyze the drugs that were the subject of Applicant's underlying criminal trial. (Exhibit 1).

FACTS

At the PCR hearing, the Applicant testified that he purchased only nine (9) grams of cocaine base for a total purchase price of $300.00. Applicant further testified that he advised his trial counsel, James Smiley, that he had purchased less than ten (10) grams of cocaine base. Although he testified that he did not recall Applicant advising him as such, he did not refute it. Mr. Smiley acknowledged in his testimony that once the pre-trial motion to suppress was lost, the only defense Applicant would have had at trial was to show that he possessed less than ten (10) grams of cocaine base, such that he would have been entitled to a jury charge on the lesser included offense of possession with intent to distribute. Mr. Smiley further acknowledged in his testimony that if Applicant told him that he purchased nine (9) grams of cocaine base, that he erred in failing to pursue a different trial strategy than the one he employed.

With respect to Applicant's absence at the commencement of the trial and, in particular during the selection of the jury, Applicant's bondswoman, Angelica Desassure-Cooper, testified that she received a telephone call from Mr. Smiley on February 4, 2013, the first day of Applicant's trial. Mr. Smiley asked her to contact Applicant and advise him to go to the courthouse~~; however, to not let him know that his trial was already underway. Mrs.~~ Desassure-Cooper then called Applicant, but, notwithstanding Mr. Smiley's request, advised him that his trial was, in fact, underway. This was Applicant's first notice that his trial was scheduled for that day and that it had already commenced. Upon receiving the phone call from Mrs. Desassure-Cooper, Applicant dressed and traveled directly to the courthouse. By the time Applicant arrived at the courthouse, his jury had been selected and a substantial portion of the pre-trial motion to suppress had already been heard. Mr. Smiley testified that the notice to Applicant provided by

Ms. Desassure-Cooper was, indeed, the first and only notice Applicant received that his case was scheduled for trial that day.

Applicant testified that juror number 373, Shalanda Wright, was a juror that he knew, that he had 'bad-blood' with and that he would have stricken her as a juror had he been present. Applicant did not tell the Court or Mr. Smiley that he knew Shalanda Wright as he did not recognize her (from her appearance) at the time of trial. The first time Applicant realized that Shalanda Wright was one of the jurors was when he read his trial transcript and saw her name. Mr. Smiley testified that if Applicant had told him that he knew Shalanda Wright and that he desired her to be stricken as a juror due to 'bad-blood', he would have stricken her as a juror.

During the course of the trial, Mr. Smiley made several motions to continue the case due to Applicant's absence. In continuing with Applicant's trial, the trial judge stated "I have heard nothing that indicates to me that Mr. Steplight was not given notice of today." (Tr. Vol. I of II: 45:12-13). Mr. Smiley failed to inform the Court at that time that he did not, in fact, give Applicant notice of the trial. To the contrary, Mr. Smiley advised the Court that he had sent Applicant a letter advising him of his trial date (Tr. Vol. I of II; 77:15). Mr. Smiley testified that this was not, in fact, the case and that he had not sent Applicant such a letter. He further acknowledged that said representation to the Court was erroneous. Mr. Smiley further testified that Applicant had appeared at the courthouse on numerous other occasions when Applicant had been provided written notice to be there. Mr. Smiley testified that he had attempted to call Applicant the week before to let him know his case was on the trial docket for the week of February 4, 2013, but did not reach Applicant. Mr. Smiley further testified that he did not think he needed to immediately contact Applicant as Applicant's case was behind a 'solid' week-long murder trial. Mr. Smiley admitted in his testimony that he did not reach Applicant, either orally

or in writing, to advise him that he was on the trial docket for the week of February 4, 2013, again, despite the fact that the record reflects that Mr. Smiley advised the Court that Applicant had received a letter from him. (Tr. Vol. I. of II: 77:15). With respect to the issue associated with the weight of the drugs, the alleged weight of the drugs as set forth in trial Exhibit 4, and relied upon in the prosecution of the criminal trial, was 12.482 grams. The City of Charleston forensic laboratory report for the drugs states that the items submitted for testing were "Plastic bag with rock-like substance." (Exhibit 4). Mr. Smiley admitted that he did not consider weighing the drugs prior to trial. Pursuant to the aforementioned Court order (Exhibit 1), Dr. Robert Bennett, engaged by Applicant's PCR counsel, tested the weight of the cocaine base at the Charleston County Courthouse on February 17, 2017. The testing was captured on videotape by private investigator Dick Vance, a retired Lieutenant and former head of the Charleston Police Department Narcotics Division. (Exhibit 5). The drugs were contained in two (2) individual packages: the contents of bag 1 revealed a weight of 3.919 grams and the contents of bag 2 revealed a weight of 5.325 grams, for a combined weight of 9.244 grams. (Exhibit 3). Mr. Smiley acknowledged that if the drugs were under ten (10) grams, Applicant would have been entitled to a jury charge on the lesser included offense of Possession With Intent to Distribute Cocaine Base. Further, ~~Mr. Smiley acknowledged that, as such, he would also have attempted~~ to negotiate a better plea agreement based upon the weight of the drugs being less than ten (10) grams. In addition to Dr. Bennett's testimony, his preparation sheet (Exhibit 2) and report (Exhibit 3) were entered into evidence thereby documenting and corroborating the aforementioned test results. The State presented two expert witnesses at the hearing, Captain Wendy C. Bell, Ph.D., from SLED and Judy Gordon, Forensic Services Director at City of

Charleston. Both Dr. Bell and Ms. Gordon testified that they had no reason to dispute the weight of the drugs as set forth by Dr. Bennett.

In an effort to provide an explanation for the disparity (decrease) in the weight of the drugs between the originally tested weight and Dr. Bennett's tested weight, Dr. Bell and Ms. Gordon set forth the hypothetical theory that if the cocaine base was "wet" or contained a solvent, then the weight of the cocaine base could decrease over time. However, neither Dr. Bell or Ms. Gordon could testify that the cocaine base in this case was "wet" or contained a solvent at the time of the original testing. Further, the State did not present any witnesses regarding either the original testing of the drugs or the condition of the drugs at the time of the original testing (i.e., whether the cocaine base was "wet" or contained a solvent).

LAW

1. PCR Standard

In a PCR proceeding, the Applicant bears the burden of establishing that he is entitled to relief. *Caprood v. State,* 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR Applicant must show that his counsel's performance was deficient such that it falls below an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Alexander v. State,* 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991). Second, an Applicant must show there is a reasonable probability, but for counsel's unprofessional errors, that the result of the proceeding would have been different. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693; *Alexander,* 303 S.C. at 541-42, 402 S.E.2d at 485. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

2. <u>There is a reasonable probability that had Applicant been provided notice by trial counsel that his trial was scheduled and had he been present, the proceeding would have been different.</u>

"One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *see also, e.g., Rushen v. Spain*, 464 U.S. 114, 117 (1983), *overruled on other grounds*; *Ellis v. State*, 267 S.C. 257, 260, 227 S.E.2d 304, 305 (1976) (citing *Allen*) ("[T]he Sixth Amendment of the U.S. Constitution guarantees the right of the accused to be present at every stage of his trial, and is applicable to the States by reason of the Fourteenth Amendment. . . ."); S.C. Const. art. I, § 14 ("[A defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both.").

The Supreme Court of the United States has made clear that a defendant's right to be present extends to jury selection, because his presence at that critical stage "bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) *overruled on other grounds by Mallory v. Hogan*, 378 U.S. 1 (1964); *see also id.* (observing that "it will be in [the defendant's] power, if present, to give advice or suggestion or even to supersede his lawyers altogether." (citing *Lewis v. United States,* 146 U.S. 370, 13 S. Ct. 136, 36 L. Ed. 1011 (1892)); *Gomez v. United States*, 490 U.S. 858, 873 (1989) (affirming that jury selection is "a critical stage of the criminal proceeding during which the defendant has a constitutional right to be present," and recognizing that it is "the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice, or predisposition about the defendant's culpability."); *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (observing that defendant's presence at jury

selection has a "reasonably substantial" relation to his "opportunity to defend against the charge.").

It is equally well established that a proceeding on the admissibility of evidence against the accused constitutes a critical stage at which the defendant's presence is guaranteed. *See, e.g.*, *Iowa v. Tovar*, 541 U.S. 77, 80-81 (2004) ("The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process."); *Kimmelman v. Morrison*, 477 U.S. 365 (1986), *overruled on other grounds* (Sixth Amendment right to effective assistance of counsel mandates competent representation in connection with motions to suppress unlawfully obtained evidence); *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) ("[A] defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.").[1]

An accused's right to be present at both jury selection and a pretrial motion to suppress derives from the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution and S.C. Const. art. I, § 14, which provides that: "[a defendant has the right] to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to be fully heard in his defense by himself or by his counsel or by both."

In *Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 369, 983 N.E.2d 1227 (2013), Campbell appealed from his convictions contending that he was deprived "of his right to be present at a critical stage of the proceedings, specifically at a hearing on the motion to suppress."

[1] *See also, e.g., Commonwealth v. Campbell*, 83 Mass. App. Ct. 368, 374, 983 N.E.2d 1227 (2013) (citing *Stincer, supra*) ("The United States Supreme Court has made clear that when a hearing involves evidence that is going to be used against the defendant at trial to prove his guilt, he has the right to a fair and just hearing under due process and his presence assures that result -- because he can consult with his lawyer, listen to the evidence, and assess the credibility of the witnesses (and the evidence) against him. In addition, his ability to have the full assistance of counsel may turn on his opportunity to see the evidence against him, with counsel, and to consult with counsel about the evidence and to better defend himself at trial.").

In deciding whether Campbell's deprivation of his right to be present at the pretrial motion to suppress was harmless beyond a reasonable doubt, the court noted that in a pretrial motion to suppress, the defendant "has the opportunity to listen to the strength (or weakness) of at least a part of the government's case and to assess the witnesses. He has the ability to consult with his attorney and, as a participant in the event under examination, offer a unique perspective." *Id.* At 373-74. In finding that the Commonwealth had not met its burden proving that the error was harmless beyond a reasonable doubt, the court stated that "the motion to suppress concerned evidence that was used against the defendant at trial and was the basis for his conviction. In these circumstances it is not for an appellate court or a motion judge to determine how a defendant's presence at a critical stage which concerns the evidence against him could have assisted his over-all defense. *Id.* at 374. *See also State v. Grey*, 256 N.W.2d 74, 77 (Minn. 1977) (defendant's absence at a hearing on a motion to suppress, a critical stage, was not harmless beyond a reasonable doubt because it is impossible on the record to determine what contribution or assistance to counsel defendant could have rendered had he been present to hear the oral testimony of the officer).

In *State v. Irby*, 170 Wn.2d 874, 877, 246 P.3d 796 (2011), the issue before the court was whether the trial court violated defendant's right to be present at trial by conducting a portion of the jury selection process by e-mail in defendant's absence. The court determined that the State did not meet its burden proving that the error was harmless beyond a reasonable doubt as the State could not show that the jurors excused in Irby's absence had no chance to sit on Irby's jury. *Id.* at 886. Likewise, in *USA v. Gordon*, 829 F.2d 119, 122-23, 264 U.S. App. D.C. 334 (1987), the court had to determine whether the trial court's impaneling a jury in Gordon's absence violated Gordon's rights. The court found that Gordon had a Fifth Amendment right to be

present at voir dire and noted that " 'what may be irrelevant when heard or seen by [defendant's] lawyer may tap a memory or association of the defendant's which in turn may be of some use to his defense.' " *Id.* at 124. In finding that the government did not meet their burden of showing that the error was harmless beyond a reasonable doubt, the court noted that Gordon did not observe a prospective juror, did not hear a single response to the court's questioning of jurors and did not participate in a single peremptory challenge. *Id.* at 128. The court further stated that "A defendant [] who does not make his appearance until midway through the first day of his trial is surely noticed by the jury, and it is not beyond a reasonable doubt that 'the jury speculated adversely to the defendant about his absence from the courtroom.' " *Id.* (citation omitted).

While Mr. Smiley moved for a continuance because Applicant was not present, the trial court was not presented with the fact that Applicant had neither received oral nor written notice from Mr. Smiley to be present for trial. To the contrary, the record shows that Mr. Smiley told the court that he had given Applicant a letter to be in court. Mr. Smiley acknowledged at the PCR hearing that he did not give Applicant a letter or oral notice and thus that he had not, in fact, provided any notice to Applicant. The trial court's denial of a motion for continuance in a criminal case will not be disturbed absent a clear abuse of discretion resulting in prejudice to the appellant. *State v. Williams*, 321 S.C. 455, 459, 469 S.E.2d 49, 51 (1996).

In Applicant's direct appeal from his conviction, the Court of Appeals affirmed in an unpublished opinion dated April 30, 2014, on the basis that Applicant's absence from trial was harmless. The Court cited the cases of *State v. Fairey*, 374 S.C. 92, 100, 646 S.E.2d 445, 448 (2007), *State v. Shuler*, 344 S.C. 604, 626, 545 S.E.2d 805, 816 (2001), *State v. Gillian*, 360 S.C. 433, 455, 602 S.E.2d 62, 74 (Ct. App. 2004) and *State v. Whaley*, 290 S.C. 463, 465, 351 S.E.2d 340, 341 (1986). These cases stand for the basic proposition that: (1) a defendant cannot

voluntarily absent himself from the hearing and later claim error; and, (2) unless a defendant can show prejudice from his absence from the hearing, the error is harmless.

On August 16, 2017, the Court of Appeals issued an opinion in *State v. Wrapp*, Op. No. 5510 (S.C. Ct. App. filed August 16, 2017). The issue in *Wrapp* was whether Wrapp voluntarily waived his right to be present at trial and to be tried in his absence. Neither the State nor defense counsel provided any direct evidence indicating Wrapp had notice of the term of court in which his case would be tried. Notably, the Court of Appeals held: "It seems logical that for one to voluntarily fail to attend trial or otherwise waive his trial appearance, one must actually know when the trial is to occur." Further, the Court of Appeals stated that it "need not undertake a harmless error analysis when, as here, the trial court erred in failing to make the requisite findings and the record is devoid of facts allowing us to discern whether Wrapp had notice of the term of court." *See State v. Jackson*, 290 S.C. 435, 436–37, 351 S.E.2d 167, 167 (1986) (remanding for a new trial because there was no evidence in the record that the defendant was given notice of his trial and neither defendant nor his counsel were present at trial); *State v. Simmons*, 279 S.C. 165, 166–67, 303 S.E.2d 857, 858–59 (1983) (remanding for a new trial because the record was devoid of facts showing defendants had notice of their trial); *see also Ritch*, 292 S.C. 75, 354 S.E.2d 909; *State v. Fleming*, 287 S.C. 268, 335 S.E.2d 814 (1985).

In the instant case, the issue is not whether the trial court made the adequate findings, but whether the trial court had been provided accurate information to properly determine whether Mr. Steplight voluntarily waived his right to be present. While trial counsel represented to the trial court (Tr. Vol. I of II; 77:15) that Mr. Steplight had a letter advising him of the trial date, that was, in fact, not true. To the contrary, Mr. Smiley testified that he had not, in fact, provided Mr. Steplight with written notice or oral notice. Mr. Steplight had however appeared on

numerous other occasions for trial. The fact that Mr. Steplight did not have notice of the trial was further corroborated by the testimony of the bondswoman, Angelica Desassure-Cooper, whose testimony was that her phone call to Mr. Steplight was the first notice he had of the trial. Mr. Steplight immediately arrived at the court house upon notice that his trial was underway. Had the trial court been provided with accurate information, namely, that Mr. Steplight had not been given notice of his trial, the trial would have been continued thereby affording him the opportunity to participate in the selection of his jury and his pre-trial motion to suppress. Based upon the foregoing, the evidence is clear that Applicant did not voluntarily absent himself from his trial.

The *Wrapp* case further sets forth that a harmless error analysis need not be undertaken. Applicant can, nonetheless, show prejudice from his absence. The Court of Appeals did not have the benefit of Applicant's testimony that a juror was chosen with whom he had 'bad-blood' and whom he would have desired stricken and advised Mr. Smiley accordingly. Mr. Smiley testified that if Applicant had told him that, he would have stricken that juror. Further, Mr. Smiley acknowledged that there may have been different jurors stricken or selected had the Applicant been present to participate in jury selection. In addition, Applicant did not have an opportunity to observe, or participate in, the first phase of his motion to suppress. Indeed, if Applicant had seen the first portion of the pre-trial motion to suppress, he would, at the very least, have been in a better position to understand and evaluate the ten year plea offer which had been proposed by the State, as well as to determine whether he should testify in his own defense.

Moreover, as in *Irby*, jurors were excused in Applicant's absence. (Tr. Vol. I of II: 51:6-53:11, 57:16-59:14, 62:18–25, 63:3-9, 66:9-16, 66:19-67:1, 70:6-13). Furthermore, like *Gordon*, Applicant did not observe a single juror, did not hear the court's questioning of the prospective

jurors or their responses, nor did Applicant have the opportunity to participate in a single peremptory challenge in his trial. Finally, Applicant did not make his first appearance in front of the jurors until the day after jury selection.

Applicant was prejudiced by the denial of the continuance as he was not allowed to participate in the selection of his jury and he was not allowed to participate in the entirety of the pre-trial motion to suppress. If the trial court had been informed that Applicant had not, in fact, been notified of his trial date, there is a reasonable probability that the trial would have been continued. As such, Applicant was prejudiced by his trial counsel's failure to notify him, either orally or in writing, that his case was up for trial. Further, had the trial Court been fully and accurately informed of the facts regarding notice of Applicant's trial date, the Court would have in all probability continued the trial or not commenced the trial until Applicant appeared. Applicant would have thus been present and therefore able to observe and participate in the selection of his jurors and fully participate in the pre-trial motion to suppress.

3. <u>There is a reasonable probability that had trial counsel sought and presented expert testimony as to the weight of the cocaine base, the proceeding would have been different.</u>

Applicant was charged and convicted of trafficking in cocaine base, more than 10 grams but less than 28 grams, and sentenced to a mandatory minimum of 25 years and a fine of $50,000.00. S.C. Code § 44-53-375(C)(1). The sentence for possession with intent distribute, more than 1 gram but less than 10 grams, is no less than ten years nor more than thirty years, or a fine of no more than fifty thousand dollars, or both. S.C. Code § 44-53-375(B). The difference between the two crimes is significant in that trafficking cocaine base is classified as a violent offense.

"The test for determining when a crime is a lesser included offense of the crime charged is whether the greater of the two offenses includes all the elements of the lesser offense. If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *State v. Bland,* 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995) (internal citations omitted). Possession with intent to distribute is a lesser included offense of trafficking. There must be evidence that the defendant committed the lesser-included offense to entitle him to a jury charge on the offense. *State v. Mathis,* 287 S.C. 589, 594, 340 S.E.2d 538, 541 (1986).

Pursuant to a Court order, Dr. Bennett, Applicant's expert, inspected and analyzed the drugs on February 17, 2017. His testing revealed that the weight of the drugs totaled 9.244 grams, less than the 10 or more grams required for the offense of trafficking cocaine base. Mr. Smiley testified that he could have had the drugs weighed, but he admitted he did not. The State's witnesses set forth a theory that the drugs could have decreased in weight if they had been "wet" or contained a solvent. However, none of the State's two expert witnesses could testify that the specific drugs in this case were "wet" or contained solvent at the time they were originally tested and weighed. Further, none of the original analysts of the drugs were presented as witnesses. As such, no testimony was presented that the drugs were "wet" or contained solvent as hypothesized by the State's two expert witnesses. Further, the State presented no forensic evidence to account of the discrepancy in weights. Finally, the State's witnesses did not disagree with the weight of the drugs as determined by Dr. Bennett.

As the weight of the drugs was a key issue in the underlying case, it would have been reasonable for trial counsel to have the drugs independently weighed by an expert. Applicant was prejudiced by trial counsel's failure to have the drugs weighed as there is a drastic disparity

between a conviction for trafficking cocaine base versus possession with intent to distribute cocaine base. Applicant would have been entitled to a jury charge on the lesser included offense of possession with intent to distribute cocaine base, third offense. There is thus a reasonable probability that Applicant would have been convicted of the lesser included offense.

4. <u>There is a reasonable probability that had trial counsel presented evidence that Applicant possessed less than 10 grams of cocaine base, the proceeding would have been different.</u>

As stated in paragraph 3, possession with intent to distribute cocaine base is a lesser included offense of trafficking in cocaine base. As actual or constructive possession was not an issue in the underlying criminal trial, the only defense trial counsel had would have been to challege the weight of the drugs. Applicant testified at the PCR hearing that he purchased nine (9) grams of cocaine base. Mr. Smiley did not refute Applicant's assertion. Had Mr. Smiley presented evidence, through the testimony of Applicant and/or an expert witness, that the weight of the drugs possessed by Applicant was less than 10 grams of cocaine base, Applicant would have been entitled to a charge on the lesser included offense of possession with intent to distribute cocaine base.

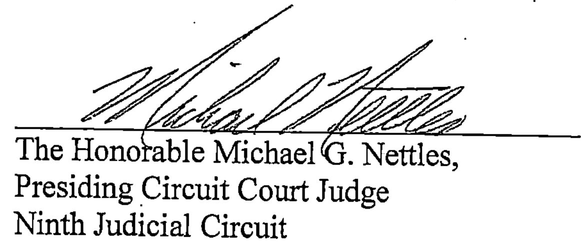
Applicant was therefore prejudiced by trial counsel's failure to introduce evidence or testimony that the weight of the drugs was less than ten (10) grams, as there are drastic distinctions between a conviction for trafficking cocaine base versus possession with intent to distribute cocaine base. Based upon the above, there is a reasonable probability that the result of the trial would have been different.

CONCLUSION

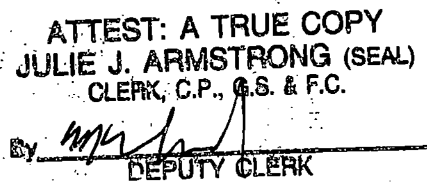
Based upon the foregoing, the Court finds and concludes that Applicant's trial counsel was ineffective and that, but for said ineffectiveness, there is a reasonable probability that the

result of the trial would have been different. As such, the Applicant was thereby prejudiced. I therefore hereby order that Applicant's Post-Conviction Relief application is GRANTED, and that Applicant is entitled to and hereby granted a new trial.

AND IT IS SO ORDERED on this the 6 day of Sept, 2017, in Charleston County, South Carolina.



The Honorable Michael G. Nettles,
Presiding Circuit Court Judge
Ninth Judicial Circuit



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing has been served upon opposing counsel, via email communication and U.S. Mail, a copy properly addressed to the following address this 18th day of September, 2017:

VIA U.S. MAIL AND EMAIL
Megan Harrigan Jameson,
Senior Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Mjameson@scag.gov

Janet Scott Hadaway
Legal Assistant to Jerry Theos

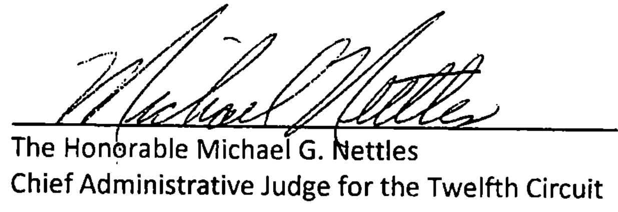
cc AG AT

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	)	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT
Norris Steplight, SCDC No. 279329, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2015-CP-10-2362 ORDER

FILED 2017 OCT -9 PM 12:02 JULIE J. ARMSTRONG CLERK OF COURT

I have reviewed the State's brief to reconsider, alter, or amend pursuant to Rule 59(e). Pursuant to the text of Rule 59(e), this court opts not to conduct a hearing. Based on the hearing on the merits and the State's brief, the motion to reconsider is denied.

IT IS ORDERED!



The Honorable Michael G. Nettles
Chief Administrative Judge for the Twelfth Circuit