

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Florence County

Honorable Paul M. Burch, Circuit Court Judge

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ONTANEY VENTRELL JACKSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001412

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PETITION FOR WRIT OF CERTIORARI

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ORIGINAL

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S.C. SUPREME COURT

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**ISSUE PRESENTED**

**Did the PCR Court err in finding that Petitioner received effective assistance of counsel, where counsel failed to notify Petitioner of his trial date in time for him to attend, remarked on his absence, stipulated to the admission of evidence, and failed to object on numerous occasions?**

## STATEMENT

Petitioner was indicted by a Florence County grand jury during its June 2010 term of court. App. 328 – 329. He was indicted on the charges of possession with intent to distribute cocaine, possession with intent to distribute cocaine base, and possession of marijuana. His case was called for trial on August 10, 2010 before the Honorable Michael G. Nettles and a jury. App. 1. Although he was not present, he was represented by Carrington Wingard. Fitzlee McEachin prosecuted the case on behalf of the State. At the conclusion of a one-day trial, the jury found Petitioner guilty as indicted. App. 202 ll. 4 – 23. After the admission of two prior drug convictions, Judge Nettles sentenced Petitioner and sealed the sentence. App. 205, l. 1 – App. 206, l. 7.

On January 31, 2012, Judge Nettles unsealed Petitioner's sentence. At that time, Matthew Ozment served as the assistant solicitor and Vick Meetze represented Petitioner. The sentences were unsealed and read as follows: fifteen years for the possession with intent to distribute cocaine third offense, fifteen years for possession with intent to distribute cocaine base third offense, and one year for possession of less than an ounce of marijuana. App. 214 l. 17 – App. 215, l. 12. Those sentences were crafted to run concurrently with one another.

Petitioner filed a timely notice of appeal; his sentence and conviction were affirmed. Soon thereafter, on or about July 7, 2014, he filed an application for post-conviction relief. It contained allegations of ineffective assistance of counsel, including a claim that counsel failed to “ascertain the term and day of court in which [P]etitioner was to be tried.” App. 219 – 253. The State made its Return on or about October 15, 2015. App. 254 – 260.

On March 15, 2017, an evidentiary hearing was held before the Honorable Paul M. Burch. App. 261. Jonathan Waller represented Petitioner, and Lindsey McCallister appeared on behalf of the State. Petitioner and trial counsel testified at the hearing.

An Order of Dismissal was filed June 12, 2017. Judge Burch found that Petitioner received effective assistance of counsel and that Petitioner was not prejudiced by any alleged deficiencies.

This petition follows.

## ARGUMENT

**The PCR Court erred in finding that Petitioner received effective assistance of counsel, where counsel failed to notify Petitioner of his trial date in time for him to attend, remarked on his absence, stipulated to the admission of evidence, and failed to object on numerous occasions.**

On November 26, 2009, Jake Chamberlain, a deputy with Florence County, was patrolling in Florence County where complaints of drug activity had been received by the Sheriff's office. Club Ponderosa was allegedly a location where crime had been recently occurring, so Chamberlain was driving nearby. App. 41 l. 18 – App. 43 l. 16.

Chamberlain noticed a man leaning against the wall near the back corner of the Club around ten o'clock that evening. App. 43 ll. 17 – 21. Chamberlain testified in the pretrial hearing that as soon as the person recognized his car as a patrol car, the person ran.<sup>1</sup> App. 43 ll. 22 – 24. Chamberlain followed the person. App. 43 l. 25 – App. 44 l. 1. When the person rounded the corner of the building, Chamberlain claimed the person then reached into his jacket pocket and threw multiple clear plastic bags on the ground. App. 43, l. 17 – App. 44, l. 9.

Chamberlain then got out of his patrol car and detained the man by putting him on the ground. After the deputy read the *Miranda* rights, the man agreed to speak with the deputy. The man told the deputy that he could search him. Chamberlain found a small clear plastic bag with a substance that turned out to be cocaine in the man's front jacket pocket. The man's driver's license was also found. App. 44, l. 10 - App. 45, l. 25; App. 50, ll. 18 – 21; App. 145, ll. 3 – 21.

As Chamberlain was walking the man to the patrol car, Chamberlain asked him what was in the bags he threw on the ground. The man replied that the deputy could not charge him with the

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<sup>1</sup> Chamberlain testified that his patrol car was "semi-marked" with "stripings" on the side App. 47 ll. 4 – 15.

bags on the ground because they were not found in his pocket. App. 60, ll. 1 – 24. After the man was placed in the patrol car, then Chamberlain collected the bags from the ground. He admitted that he did not know what was in the bags. App. 63, l. 5 – App. 64, l. 5.

During Petitioner’s trial, the SLED chemist testified that one plastic bag contained 1.32 grams of cocaine base or crack; the second bag contained 2.07 grams of powder cocaine; and the third bag contained .45 grams of cocaine. App. 145, ll. 1 – 21.

#### Evidentiary Hearing

Following his arrest, Petitioner was released on bond. App. 267 l. 17 – App. 268 l. 25. He worked in Greenwood, and he traveled with coworkers in a work van. Id. Petitioner and his fellow employees would leave Monday morning or late Sunday night and return Thursday evening or Friday morning. Id. Petitioner did not drive himself; he got on a van with other men. Id. If he had to attend roll call at the courthouse, he would miss an entire week of work. Id. In order to ascertain whether he would need to appear, he would call a hotline telephone number and listen for his name. Id.

Petitioner recalled missing work to make an appearance in the courtroom at least twice. App. 270 ll. 4 – 20. Other than his trial, he never missed a court appearance. Id. He was so diligent, he even met with the solicitor to learn about appearances and roll call. App. 272 ll. 1 – 25.

Petitioner testified at his post-conviction relief hearing that he met with trial counsel twice. App. 269 ll. 1 – 19. He indicated that at those meetings, counsel explained her representation and discussed Petitioner’s charges. Id. Petitioner was unsure whether his constitutional rights were discussed. Id.

The week of his trial, Petitioner called the hotline in order to determine whether his presence was necessary. App. 273 ll. 1 – 14. He called on a Sunday, his name was not on the list of required

attendees, so he traveled in the work van to Greenwood. Id. Petitioner received a call from his attorney advising him that his case was proceeding to trial, but he did not have a way to get back to Florence. App. 272 l. 15 – App. 274 l. 8. He was tried *in absentia*. Id.

Petitioner did not speak with counsel the week before his trial. App. 274 l. 22 – App. 275 l. 21. He was completely unaware that his case was proceeding to trial. Id. Counsel had a reliable address and telephone number for Petitioner. Id. Petitioner took the initiative and attempted to call counsel, but she did not answer. App. 276 ll. 21 – 24. He left a message but never heard back. App. 280 ll. 9 – 23.

Counsel testified that she has been practicing for over forty years. App. 283 ll. 11 – 21. At the time of her representation of Petitioner, she was a part-time public defender and managed her own practice. Id. Some of her time was spent in Family Court; she did not always appear in General Sessions. App. 284 ll. 11 – 16.

Counsel recalled the telephone system wherein individuals would call in to see if an appearance was required. App. 286 ll. 5 – 19.

Regarding Petitioner’s trial, counsel’s notes reflected the following:

The next contact I had with him was when his case was being tried and [I] have to be very candid with you and tell you that I don’t recall except for what the notes reflect and that was on ‘August 9<sup>th</sup>, [Petitioner] was not on the docket for today, but Fitzlee is calling. Defendant cannot come to court. He will be here tomorrow at 8:30. I told him that he would be tried tomorrow.’ So that suggest[s] to me that I had a conversation with him on that day.

App. 288 l. 17 – App. 289 l. 1.

Regarding Petitioner’s absence, counsel mentioned it during her opening statement and closing argument. App. 88 ll. 7 – 10; App. 180 ll. 13 – 18. She suggested that it was unfortunate that Petitioner did not come to court and suggested it was difficult to determine guilt or innocence when a defendant is absent. Id.

Regarding an alleged failure to make an objection to recalling two of the State's witnesses to admit evidence, counsel attempted to justify the lack of objection by suggesting that "the Court would have allowed it so why object to something that you know the Court is going to allow." App. 201 l. 10 – App. 302 l. 13. She testified that "[i]t was fruitless to object." App. 308 ll. 3 – 7.

Counsel also stipulated "to the marijuana" thereby allowing State's Exhibit 2 and Exhibit 3 to be entered—State's 2 was a SLED report and State's 3 was marijuana. App. 303 l. 21 – App. 158 l. 11; App. 330 – 332.

Counsel also failed to object to improper remarks made by the solicitor during opening statements. App. 86 ll. 5 – 7. The solicitor shifted the burden by remarking: "On the other hand, if I don't prove my case and you are firmly convinced of [Petitioner's] innocence, you will find him not guilty." Id.

At the conclusion of Petitioner and counsel's testimony, the PCR Court heard arguments from the parties. PCR Counsel reiterated all of the above and concluded that "[p]articularly, with Mr. Jackson being here or not being here, I think it was ... incumbent on his attorney to establish a clean record and to make the objections." App. 310 l. 17 – App. 311 l. 15.

#### Discussion

Notably, when asked by Judge Nettles at the sentencing hearing why he did not appear for his trial, Petitioner responded: "[My attorney] didn't get in touch with me, sir. " App. 214, ll. 9 – 16.

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the PCR applicant

must show that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, *supra*; Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002).

In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *E.g.*, Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). This Court will uphold the findings of the PCR court if there is any evidence of probative value to support them but 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); Cherry v. State, *supra*.

Petitioner received ineffective of counsel by virtue of the fact that he did not receive notice from his attorney of his trial date. Without advance notice of his trial date, he was unable to attend. He previously made good faith efforts to appear in the courtroom when necessary, missing an entire week's worth of work to do so. He went as far as to call the hotline in order to listen for his name. However, because he had no advance knowledge of his trial date, it was impossible for him to attend. Therefore, he was absent and unable to assist counsel with his defense. Prior to trial, counsel failed to advise the court and the solicitor of Petitioner's situation, namely that he did not have access to a vehicle and was in a different county.

Additionally, counsel provided ineffective assistance by employing a questionable approach of acquiescing to the admission of evidence, reminding the jury of Petitioner's absence, and failing to object to prejudicial burden-shifting arguments.

The resulting prejudice manifested itself in a conviction for a third drug offense, which occurred in Petitioner's absence and resulted in a lengthy sentence based on a statutory mandatory minimum.

**CONCLUSION**

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue.



\_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of March, 2018.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Florence County

Honorable Paul M. Burch, Circuit Court Judge

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ONTANEY VENTRELL JACKSON,

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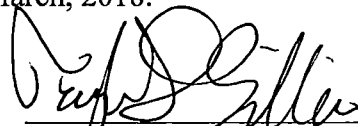
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STATE OF SOUTH CAROLINA,

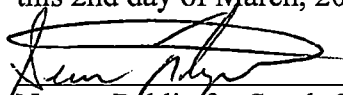
RESPONDENT

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CERTIFICATE OF SERVICE  
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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Ontaney Ventrell Jackson, #210570, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 2nd day of March, 2018.

  
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Taylor D Gilliam  
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER  
this 2nd day of March, 2018.

  
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(L.S)  
Notary Public for South Carolina  
My Commission Expires: 10/30/2022