STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
Michael G. Nettles, Post-Conviction Relief Judge
Kristi L. Harrington, Trial Court Judge

Appellate Case No. 2017-002121

NORRIS STEPLIGHT,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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II. Did the post-conviction relief court err by finding trial counsel was constitutionally ineffective for failing have the crack cocaine evidence independently weighed and present expert testimony to establish the crack cocaine's weight was below the ten gram threshold for trafficking in crack cocaine, where Steplight failed to establish the result of the proceeding would have been different (i.e., that the crack cocaine weighed below the ten gram threshold at the time of his trial) and failed to give sufficient weight to unanimous expert testimony that crack cocaine—an inherently moist product—can lose significant moisture weight over time?

STATEMENT OF THE CASE

Procedural History

During its October 2011 term of court, the Charleston County Grand Jury indicted Petitioner Norris Steplight for Trafficking in Cocaine Base—10-28 grams (Third Offense) (2015-CP-10-2362). He was represented by James W. Smiley, IV, Esquire. Assistant Solicitor Stephanie Linder of the Ninth Circuit Solicitor's Office prosecuted the case.

On February 4, 2013, Steplight proceeded to a jury trial in the Charleston County Court of General Sessions before the Honorable Kristi L. Harrington, circuit court judge. The jury convicted Steplight as indicted. Judge Harrington sentenced Steplight to the mandatory minimum sentence of twenty-five years.

A notice of appeal was filed and an appeal perfected on Steplight's behalf by Barry Krell, Esquire, Jerry Theos, Esquire, and Jeffrey W. Buncher, Jr., Esquire. On appeal, Steplight argued the trial court erred in proceeding forward with his jury selection and a portion of his pre-trial motions in his absence. Following briefing, the Court of Appeals addressed the merits of Steplight's claim and affirmed his conviction and sentence in a summary opinion, finding any possible error to be harmless. State v. Steplight, Op. No. 2014-UP-184 (S.C. Ct. App. filed Apr. 30, 2014). The Remittitur was sent on May 16, 2014.

Thereafter, on April 27, 2015, Steplight filed an application for post-conviction relief alleging trial counsel was ineffective for failing to inform him of his trial date. The State made its Return on February 5, 2016, requesting an evidentiary hearing be held. Thereafter, on December 14, 2016, Steplight, through counsel, filed an amended application alleging seven grounds of ineffective assistance of counsel.

An evidentiary hearing into the matter was convened August 1, 2017, at the Charleston County Courthouse before the Honorable Michael G. Nettles, circuit court judge. Steplight was present at the hearing and represented by Jerry Theos, Esquire and Jeffrey W. Buncher, Jr., Esquire. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Steplight testified on his own behalf and presented testimony from four witnesses. The State presented testimony from trial counsel and two additional witnesses.

At the conclusion of the hearing, the post-conviction relief court requested proposed orders from both parties. Steplight and the State submitted proposed orders on August 15, 2017. Following the submission of proposed orders, Steplight requested the court consider the recent opinion from the Court of Appeals, State v. Wrapp, 421 S.C. 531, 808 S.E.2d 821 (Ct. App. 2017), where the Court of Appeals reversed Wrapp's convictions and remanded his case back to the court of general sessions for a new trial after finding the trial court erred in allowing Wrapp's trial to proceed in his absence without a making a factual finding that he had actual notice of his trial date or that he could be tried in his absence. The post-conviction relief court asked both parties to submit amended orders addressing Wrapp. On September 5, 2017, both Steplight and the State submitted amended proposed orders.[1]

On September 6, 2017, the post-conviction relief court signed Steplight's proposed order granting post-conviction relief, finding trial counsel was ineffective for failing to adequately advise Steplight of his trial date and failing to have the drug evidence reanalyzed by an

[1] The State sent both proposed orders of dismissal (titled "Proposed Order of Dismissal" and "Amended Proposed Order of Dismissal") to the Charleston County Clerk of Court's office to be filed with an accompanying motion coversheets. However, the State was informed that the clerk's office refused to file either proposed order. A review of the public index for this case reflects that the clerk's office did not file either proposed order submitted by the State. The State attached a copy of each proposed order as exhibits to its motion to reconsider, alter, or amend pursuant to Rule 59(e), SCRCP.

independent expert and present that testimony at trial. This order was filed by the Charleston County Clerk of Court on September 18, 2017. Respondent received copy of the order by electronic mail on September 18, 2017, and on September 19, 2017 by U.S. Mail. On September 27, 2017, the State filed a motion to reconsider, alter, and amend pursuant to Rule 59(e), SCRCP. On October 9, 2017, the post-conviction relief court denied the State's motion to reconsider.

Factual History

On May 27, 2011, Investigator Sean Engles and Detective Jeffery Harrison of the Charleston Police Department observed Steplight, who was driving a white Dodge truck, commit two traffic violations: failing to come to a complete stop at a red light and failing to turn into the immediate lane. (Tr. 136-37, 174). Investigator Engles and Detective Harrison pulled behind Steplight and turned on the patrol vehicle's blue lights to initiate a traffic stop. (Tr. 174). Investigator Engles observed Steplight shifting in his vehicle in an apparent attempt to conceal something. (Tr. 174). When Steplight pulled over, Investigator Engles and Detective Harrison asked for his license and registration. (Tr. 175). Steplight handed Detective Harrison a route-restricted driver's license, and Detective Harrison discovered Steplight had violated the restrictions by dropping his girlfriend off at church instead of only driving to and from work. (Tr. 175, 179-83).

Detective Harrison arrested Steplight for driving under suspension. (Tr. 138, 175). Steplight consented to a search, and Investigator Engles noticed an unnatural object between Steplight's buttocks. (Tr. 154-55). When Steplight was booked into the county jail, Investigator Engles confiscated two plastic bags from between Steplight's buttocks during a strip search. (Tr. 140-41, 175). The bags contained a white rock-like substance, and a presumptive field test confirmed the substance was crack cocaine. (Tr. 140-41). Four days later, on May 31, 2011,

Criminalist Anita Moore with Charleston Police Department analyzed the rock-like substance and confirmed the two bags contained 5.266 grams and 7.216 grams of cocaine base.[2] (Tr. 204-13). Steplight was indicted for trafficking in cocaine base—10-28 grams (third or subsequent offense).

[2] At the time of Applicant's trial, Moore was no longer employed with the Charleston Police Department and was a crime scene technician for the North Charleston Police Department. (Tr. 204).

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). The reviewing court should reverse the post-conviction relief court if there is no probative evidence to support the lower court's ruling or if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must

have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The post-conviction relief court err by finding trial counsel was constitutionally ineffective for failing to provide Steplight with notice of his trial date, where the record establishes trial counsel made reasonable efforts to notify Steplight his trial was commencing and repeatedly asked the trial court to continue the matter until Steplight was present, Steplight appeared during pre-trial motions, and the Court of Appeals addressed Steplight's absence from pre-trial proceedings and deemed any possible error to be harmless.

In granting relief, the lower court found trial counsel was constitutionally ineffective for failing to provide Steplight with notice of his trial date. Certiorari is proper to review this finding, where the post-conviction relief court disregarded the record establishing counsel's reasonable efforts to notify Steplight of his trial date and repeated requests to the trial court to continue the trial until Steplight was present, Steplight appeared during pre-trial motions, and the Court of Appeals addressed Steplight's absence from pre-trial proceedings and deemed any possible error to be harmless. Based on a review of the record in its entirety as required, the lower court erred in determining counsel was constitutionally ineffective and granting Steplight a new trial.

In its order granting relief, the post-conviction relief court found trial counsel was ineffective for failing to provide the trial court with accurate information to properly determine whether Steplight waived his right to be present, and that but for this deficiency of counsel, the trial court would have continued the matter until Steplight could appear. In its ruling, the post-conviction relief court solely focuses on whether trial counsel personally provided Steplight with documentation of his trial date while failing to properly consider the numerous attempts counsel made to contact Steplight to advise him of his place on the docket and potential trial the week before his trial, and the efforts counsel made the morning of Steplight's trial (including having his bondsperson track Steplight down) to secure his appearance at trial. Counsel's performance

was reasonable and Steplight did not establish any resulting prejudice from the portion of pre-trial proceedings he missed. Moreover, the lower court's findings that the matter would have been continued but for trial counsel's failure is erroneous.

The record is replete with evidence clearly establishing counsel attempted to notify Steplight the week prior to trial to inform him his case was on the docket for the following week, and well as attempted to contact him the morning of trial as soon as he learned Steplight's case would proceed forward. At 12:00 p.m. on Monday, February 4, 2013, the State called Steplight's case for trial. (Tr. 4). Steplight's counsel appeared in court and informed the trial court that his client was not present, had always been available in the past, had a non-working phone number on which counsel had left messages, and was currently being sought by his bondsman. (Tr. 4). When the trial court suggested picking the jury right then, counsel stated, "I'll have to pick without a client." (Tr. 5). He then stated, "I'm fine to go ahead and pick a jury. I would just ask, in an abundance of caution, if the murder case does take too long, that we don't swear the jury." (Tr. 5). The trial court agreed not to swear the jury. (Tr. 5). The trial court inquired what time Steplight was told to be there, and the assistant solicitor indicated the letters defendants receive request they arrive on Monday morning at 9:00 a.m. (Tr. 6). Trial counsel informed the trial court he was certain his client "had gotten a dozen letters over the last year and a half" and he "had never had a problem with him not showing up." (Tr. 6). He elaborated, "The only reason he's not here, is the number that he—he's changed phones three or four times. The last number I had, I called. It was disconnected. I called every other number, left messages. Then this morning, I contacted the bondsman—" (Tr. 6). Trial court stated Steplight's pre-trial motions would begin at 1:30 p.m. and broke for lunch at 12:30 p.m. (Tr. 10).

The trial court began Steplight's suppression hearing at 1:30 p.m., noting counsel's vehement objection to continuing without his client present. (Tr. 10). Trial counsel thanked the court for noting his objection to going forward without Steplight present and stated,

> I surely wish [Steplight] was here, so he could hear this part because this is what he has complained about the whole time. And just for the record, he has shown up—and Ms. Linder—he has shown up at least a half dozen times. This has been on the docket for an excess of a year. One time—. . . It's been called several—it's been close to being called several—it was actually called once, when I got Rocky Mountain Spotted Fever on Memorial Day, in front of Judge Nicholson, and we weren't able to go forward. So it's had stops and starts. And my client—that's why I said, **he's not intentionally missing court**. I feel like I've—I've done something wrong because he's not here, because I know he wants to be present. I understand this Court's position too. He has a letter and all. But I've usually never had a problem reaching him.

(Tr. 11-12) (emphasis added). The court asked where the bondsperson was, and counsel explained the bondsperson had been trying to locate Steplight since 8:30 a.m. that morning. (Tr. 12).

Following this discussion, the State called Investigator Engles and began the suppression hearing. At 2:33 p.m., the trial court suspended the hearing to pick a jury for another case. (Tr. 44). At 2:50 p.m., the proceedings continued and Steplight was still not present. (Tr. 44-45). The following exchange took place:

> [Trial counsel]: I do need to put on the record that I've asked you for a continuance because my client is not present, and that you've ruled against me and that we're going forward.
>
> The Court: All right. At this stage and at every stage from now on, Mr. Smiley, I'm going to give you a continuing objection.
>
> [Trial counsel]: Thank you.
>
> The Court: We are continuing without your client, but I have heard nothing that indicates to me that [Steplight] was not given notice of today. So we are going to - - here's what we're going to do.

> We're going to pick the jury, let the jury go, and we'll start in the morning. We're going to finish our pretrial motions and then give you a chance to e-mail your client.

(Tr. 45). The trial court then began jury selection. (Tr. 45-46).

At 3:51 p.m., Steplight arrived at the courthouse. (Tr. 77). Trial counsel explained to the trial court:

> [Steplight] arrived when I was downstairs, and I had an opportunity to explain to him what has happened so far and the details. He's now present. He just didn't know. The bondsman found him; he came immediately. He apologizes, even though, I guess, technically, I need to have gotten in touch with him. He did get a letter from me. But he'd gotten so many of them, he didn't realize this case would be first this morning. We apologize, your Honor.

(Tr. 77). The trial court then continued the suppression hearing. (Tr. 77).

During the evidentiary hearing, counsel also regarding his efforts to communicate with Steplight regarding the commencement of his trial. Counsel testified he recalled telling the trial court that Steplight had changed his number multiple times during the course of his representation. (PCR Tr. 140-41). He testified Steplight "probably had gotten ten notices sent out from the solicitor's office that his case was up for trial[,]" before the term in which Steplight was tried. (PCR Tr. 141). Counsel testified he tried to contact Steplight the week prior to his trial to let him know it was once again on the docket, but was not able to get a hold of him. (PCR Tr. 158). He elaborated about his efforts to locate Steplight the morning of his trial while simultaneously trying to persuade the trial court to continue the case:

> I kept telling [Judge Harrington], I'm going to get Norris here if you can just wait, because Angelica [Steplight's bondsperson] I know knew his family. And so when I'm running around trying to qualify a jury, getting myself together, getting my second chair here, I called Angelica and said, Look, we're getting jerked up. Find Norris. **The numbers I've got aren't working today. I tried to get him, and I couldn't get through.**

> So I asked her to get in touch with him, and he --Norris had shown up every time. I mean, Norris was involved in his case. It wasn't as if he was not involved. From the day he was arrested, he asserted it was a bad search for different reasons. He claimed, and I think he probably would still claim, that he was sodomized on the side of the road, okay, and that was his word, okay? He kept saying about how the search went down. That didn't end up being the issue, per se, at trial, it was how the stop came about.
>
> So the long and short of it is **he had a notice**, but it's just like I had ten notices. I had checked into it. I didn't expect this case to go that week, and I was pretty certain it wasn't going. I was quite panicked when I was told, You're going to be it, so get ready.
>
> And I asked the judge for more time. I made a continuance motion. I think the words were I strongly asked her to wait till my client was present, and she said, Nope, we're going.

(PCR Tr. 142-43) (emphasis added). Counsel testified after making numerous objections to going forward, and eventually being informed by the trial court that his vehement objection to going forward without his client was noted and preserved for the record and did not to be made any further, he did not think there was anything else he could have done to prevent the trial from starting and was merely trying to delay for long enough to get Steplight to the courthouse in time for his trial. (PCR Tr. 143). He testified Steplight arrived before the jury was sworn and was able to hear the second witness in the suppression hearing as well as all arguments pertaining to the suppression motion and the court's ruling on the suppression motion. (PCR Tr. 145-46, 148-49). Counsel testified Steplight missed jury selection, but Steplight never told him he knew anyone on the jury. (PCR Tr. 148-49).

Based on the record, it is clear that counsel was not constitutionally ineffective for failing to inform Steplight of his trial date, as counsel made numerous attempts to contact Steplight and Steplight had notice of his trial date. Trial counsel attempted to contact Steplight the week before his trial to tell him his case was on the docket for the following week, but was unable able to

make contact with Steplight despite numerous efforts because Steplight either was frequently changing telephones or was unable to receive voice messages. Again, on the morning his trial commenced, counsel tried to reach Steplight numerous times without success before eventually asking the bondsperson to track Steplight down so that he could shift his focus to preparing for Steplight's trial while still simultaneously asking the trial court to continue the case to allow Steplight additional time to appear. Counsel vigorously argued for a continuance to secure his client's presence, which ultimately was denied by the trial court. Counsel's performance was well within the professional standards required for a defense attorney. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland).

In granting relief, the post-conviction relief court has placed an unreasonable burden on criminal defense attorneys, essentially requiring defense attorneys to act as de facto bondspersons that must be able to reach their clients at a moment's notice so that counsel can inform their clients of the precise time in which his or her case will be called for trial or else fear being found constitutionally ineffective. This is simply an unreasonable standard to impose on criminal defense counsel. See Taylor v. State, 586 S.W.2d 452, 454 (Mo. Ct. App. 1979) ("In this instance, the fact that movant was not notified of the precise time of trial until the day before proceedings were to start did not prejudice him or hamper in the preparation or defense of the case. Movant has not met his burden of establishing ground for relief by a preponderance of the evidence."). This is an unreasonable expectation to place upon defense counsel and should be rejected by the Court. Our courts have already rejected the notion that criminal defendants have the right to set the precise time or circumstances under which his case will be called for trial, and this Court should similarly reject such a notion that counsel cannot be constitutionally effective unless he provides his client with the exact time in which his trial will start. See Ellis v. State,

267 S.C. 257, 261, 227 S.E.2d 304, 306 (1976) (internal citations omitted) ("No defendant has a unilateral right to set the time or circumstances under which he will be tried. The public interest demands that criminal prosecutions be prosecuted with dispatch.")

Additionally, the post-conviction relief court erred in finding Steplight was prejudiced by his absence during jury selection and one witness's testimony during the suppression hearing. In finding Steplight was prejudiced from the short portion of pre-trial proceedings he missed, the post-conviction relief court found Steplight suffered prejudice because he was not present to inform counsel that he had "bad-blood" with one of the jurors. However, Steplight testified that he did not know this juror by sight, did not recognize her throughout his entire trial, and had never had a conversation with her. (PCR Tr. 34-36). He also acknowledged he never informed counsel or the trial court that he knew one of his jurors. (PCR Tr. 35-36). Therefore, it is highly improbable that the presence of this juror on Steplight's jury had any impact on the outcome of his case. Additionally, the post-conviction relief court's finding that Steplight was prejudiced because he was not present for the limited portion of his pre-trial suppression motion, thereby depriving him of the meaningful opportunity to listen to the arguments and consider the State's plea offer, is also without merit, as Steplight was present for the majority of the hearing, including counsel's arguments in support of suppression, and counsel testified they had discussed the suppression motion extensively prior to trial.

The post-conviction relief court also erred in finding that the trial court would have granted a continuance of the case until Steplight had appeared but for counsel's failure to provide the trial court with accurate information that Steplight was not given notice of his trial. To show prejudice stemming from the late continuance motion, Steplight must demonstrate that (1) the trial court would have abused its discretion in refusing to grant a continuance motion so that he

could be present, and (2) his presence (or lack thereof) likely would have affected the ultimate result of the proceeding. See Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 370 (1997) ("To show prejudice stemming from the late continuance motion, Wolfe would have to demonstrate that (1) the trial court would have abused its discretion in refusing to grant a continuance motion so that Wolfe could get a private competency evaluation, and (2) such a competency evaluation likely would have affected the ultimate result of the competency hearing. Wolfe presented no medical evidence at the PCR hearing suggesting he had been incompetent to stand trial or to participate in his defense. Given the absence of such evidence, Wolfe has failed to demonstrate he was prejudiced by the trial court's failure to grant a continuance."). In the present case, counsel informed the court numerous times that Steplight wished to be present for trial and was not waiving his right to be present, and with that information, the trial court exercised her broad discretion in refusing to continue Steplight's case.

Moreover, Steplight cannot establish any prejudice from the small portion of trial that proceeded in his absence, as this very issue was already addressed during Steplight's direct appeal by the Court of Appeals, who found any alleged error was harmless. See State v. Steplight, Op. No. 184 (S.C. Ct. App. filed April 30, 2014). "Harmless error review looks to the basis on which the jury actually rested its verdict." Lowry v. State, 376 S.C. 499, 508, 657 S.E.2d 760, 765 (2008) (citing Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). "From this perspective, in order to conclude that the error did not contribute to the verdict, the Court must 'find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.'" Id. (citing Yates v. Evatt, 500 U.S. 391, 403 (1991)). Because the Court of Appeals already determined any purported error from Steplight's absence during jury selection and a small portion of the pre-trial motion to suppress hearing was harmless

error not contributing to the verdict, the post-conviction relief court's findings that the result of Steplight's trial would be different (i.e., prejudice pursuant to Strickland) on those same grounds constitutes an error of law. See Arnold v. State/Plath v. State, 309 S.C. 157, 165, 420 S.E.2d 834, 838 (1992) (noting that the requirement that a constitutional error be harmless beyond a reasonable doubt "embodies a standard requiring reversal 'if there is a reasonable possibility that the evidence complained of might have contributed to the conviction' " (quoting Yates, 500 U.S. at 403)); see also Clark v. Groose, 16 F.3d 960, 964 (8th Cir. 1994) (concluding even if evidence is erroneously admitted but it constitutes at most harmless error, no ineffective performance is shown); LePage v. Idaho, 851 F.2d 251, 257 (9th Cir. 1988) (concluding that since admission of statements obtained in violation of Massiah was harmless error beyond a reasonable doubt, LePage suffered no prejudice from his counsel's failure to object to the statements).

In conclusion, the record is abundant with evidence of trial counsel's numerous efforts, starting the week prior to trial, to contact Steplight to inform him of his trial date. Trial counsel's performance was well within the established practices demanded from attorneys practicing within our State. Moreover, Steplight is unable to establish any resulting prejudice, as the Court of Appeals properly determined that any purported error in Steplight's absence from the small portion of his pre-trial matters was harmless and had no impact on his trial. Based on the foregoing, the post-conviction relief court erred in granting Steplight relief and remanding his case to the court of general sessions for a new trial. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

II. **The post-conviction relief court err by finding trial counsel was constitutionally ineffective for failing have the crack cocaine evidence independently weighed and present expert testimony to establish the crack cocaine's weight was below the ten gram threshold for trafficking in crack cocaine, where Steplight failed to establish the result of the proceeding would have been different (i.e., that the crack cocaine weighed below the ten gram threshold at the time of his trial) and failed to give sufficient weight to unanimous expert testimony that crack cocaine—an inherently moist product—can lose significant moisture weight over time.**

In granting relief, the lower court found trial counsel was constitutionally ineffective for failing to have the crack cocaine evidence independently weighed and present expert testimony to establish the crack cocaine's weight was below the ten gram threshold for trafficking in crack cocaine. Certiorari is proper to review this finding, where the post-conviction relief court erroneously determined Steplight had meet his requisite burden of proof of establishing the result of the proceeding would have been different (i.e., that the crack cocaine weighed below the ten gram threshold at the time of his trial) and failed to give sufficient weight to unanimous expert testimony that crack cocaine—an inherently moist product—can lose significant moisture weight over time.

In granting relief, the post-conviction relief court found counsel was ineffective for failing have the drug evidence independently analyzed by an expert chemist and present such testimony to establish the total weight of the crack cocaine was below the ten gram threshold required for trafficking. The post-conviction relief court found that had counsel presented this evidence, Steplight would have been able to argue for a jury instruction on the lesser-included offense of possession with intent to distribute crack cocaine. In support of these findings, the lower court relies on the testimony presented by Dr. Robert Bennett, who weighed the drug evidence during the post-conviction relief proceeding and determined the crack cocaine weighted 9.244 grams at the time of the evidentiary hearing—nearly six years after Steplight's arrest.

The post-conviction relief court erroneously determined Steplight had meet his requisite burden of proof of establishing the result of the proceeding would have been different (i.e., that the crack cocaine weighed below the ten gram threshold at the time of his trial). Steplight failed to establish the evidence weighed below the ten gram threshold for trafficking at the time of his arrest. The evidence, which was collected from Steplight's buttocks (an inherently moist area) on May 27, 2011, was weighed four days later on May 31, 2011, and had a total weight of 12.482 grams. Through Dr. Bennett's testimony, Steplight merely established the evidence weighed less nearly six years later when weighed by Dr. Bennett in a less-than-ideal testing scenario. Steplight failed to establish that the drug evidence in question was below the ten gram threshold at the time of his trial. Steplight failed to establish any errors or other violations that took place at the time the drug evidence was weighed in 2011, and therefore, has failed to establish the result of his proceeding would have been different had counsel sought an independent expert prior to his trial.

Counsel performed reasonably based on the information he had at the time of Steplight's trial. Counsel testified he did not have any reason to doubt the accuracy of the crack cocaine's weight as determined by law enforcement and the focus of his case was suppression of the drug evidence. (PCR Tr. 150-51). He testified he did not recall having a conversation with Steplight where Steplight informed him he had only purchased nine grams of crack cocaine. (PCR Tr. 150, 155, 171-72). In contrast, counsel stated at the trial and the evidentiary hearing that the sole focus and concern of both he and Steplight was suppression of the drug evidence with the ultimate goal of having the charges dismissed if the drug evidence was suppressed. This was a reasonable trial strategy based on the facts and circumstances known at the time of Steplight's trial.

Moreover, the post-conviction relief court's findings overlooks the testimony presented by two highly respected expert witnesses, Wendy Bell, Ph.D, Captain of Forensic Operations at the South Carolina Law Enforcement Division (SLED), and Judith Gordon, the Director of the Forensic Services Division at the Charleston Police Department, who both testified regarding the inherent properties of crack cocaine and the methods in which it is made that can result in significant weight loss over time. Both cited a DOJ/DEA joint study that focused on the stability of crack over time based on various production methods and concluded crack cocaine can lose significant weight (more than 30% of its total weight in certain circumstances) as time passes. Additionally, both testified to their own personal experiences with crack cocaine samples loosing over time weight, including two examples cited by Captain Bell where samples lost more than 50% of their weight within a few months after the initial analysis.

The post-conviction relief court disregarding the testimony presented by Captain Bell and Judith Gordon (and acknowledged by Dr. Bennett) that crack cocaine can lose significant weight over time. Moreover, this principle has been recognized or noted by numerous federal jurisdictions. See United States v. Roberson, 195 F. App'x 902 (11th Cir. 2006) (holding defendant failed to show that government acted in bad faith in storing crack cocaine sample, which had evaporated over time, as required to support due process violation claim; record showed that the Drug Enforcement Agency's storage practices for evidence were consistent with procedures used in other storage laboratories, and record demonstrated that some loss of a crack cocaine sample due to evaporation through the permeable plastic bags was inevitable over time); United States v. Chavis, 296 F.3d 450 (6th Cir. 2002) (finding evidence was sufficient to support defendant's conviction for possession of in excess of five grams of cocaine base, despite fact that cocaine base recovered from defendant weighed only 4.13 grams at time of trial; criminologist

who conducted testing on the cocaine base testified that when she examined it, the cocaine base weighed 5.1 grams, that a weight loss over time was not unusual, due to water evaporation, and that a small portion of the cocaine base was destroyed over time due to testing); United States v. Johnson, 434 F. Supp. 2d 301 (D. Del. 2006), aff'd 292 F. App'x 178 (3d Cr. 2008) (discussing expert testimony presented by the State to account for significant weight loss of crack cocaine over time); United States v. Thomas, 11 F.3d 620 (6th Cir. 1993) (finding the district court did not err in basing sentence in drug possession case on defendants having more than 50 grams of cocaine, even though defendants' independent expert reweighing the cocaine six months after it was initially weighed, determined that the amount was 49.535 grams; there was evidence that testing to determine that substance was cocaine had consumed a minimum of 0.8 grams, and there was evidence that cocaine was subject to weight loss due to evaporation over time); see also United States v. Fox, 189 F.3d 1115, 1120 (9th Cir. 1999) ("[Officer] Bryant testified that in a laboratory there is typically a ten percent weight loss when cooking cocaine power into crack, but that on the street one gram of powder cocaine typically converts into one gram of crack cocaine, because street cookers use baking soda and tap water to increase the weight.").

In conclusion, Steplight failed to meet his requisite burden of proof of establishing the result of the proceeding would have been different as he failed to establish the initial weight of crack cocaine was inaccurate or that counsel was deficient for failing to retain an independent expert to re-analyze the drug evidence. Based on the foregoing, the post-conviction relief court erred in granting Steplight relief and remanding his case to the court of general sessions for a new trial. Therefore, the State asks this Court to grant certiorari and ultimately reverse the lower court's grant of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court grant this petition for a writ of certiorari and reverse the post-conviction relief court's grant of a new trial.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

April 18, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

On Writ of Certiorari to Charleston County
Michael G. Nettles, Post-Conviction Relief Judge
Kristi L. Harrington, Trial Court Judge

Appellate Case No. 2017-002121

NORRIS STEPLIGHT,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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

I further certify that all parties required by Rule to be served have been served.
This 18th day of April, 2018.

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
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ALAN WILSON
ATTORNEY GENERAL

April 18, 2018

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

Re: **Norris Steplight v. State of South Carolina**
Appellate Case No. 2017-002121
Lower Court Case No. 2015-CP-10-2362

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petition for Writ of Certiorari and an original appendix and one copy. By copy of this letter, we are serving opposing counsel today.

Sincerely,

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
SC Bar No. 100108

MHJ/jaj
Enclosures

cc: Jeffrey W. Buncher, Esquire