RECEIVED
Mar 29 2023
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Certiorari to Oconee County

Honorable R. Lawton McIntosh, Circuit Court Judge

---

MARCUS DANIEL ALLISON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2022-001520

---

# PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

---

LARA M. CAUDY
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

# INDEX

## ISSUES PRESENTED

1.

Did the post-conviction relief judge err by finding trial counsel were not ineffective when they failed to call Stephen Holcombe, Petitioner's stepfather, as an alibi witness at trial, where Holcombe would have testified that he dropped Petitioner off at his camper around nine o'clock on the night of the burglary, which would have refuted Donald Gentile's testimony that Gentile went to Petitioner's camper around the same time and saw Petitioner with the firearms stolen during the burglary, and where Petitioner was prejudiced since there is a reasonable probability the outcome of Petitioner's trial would have been different had Holcombe testified?

2.

Did the post-conviction relief judge err by finding Petitioner failed to prove the state violated Brady v. Maryland, 373 U.S. 83 (1963), when the state did not give the defense photographs taken by law enforcement during the investigation of the burglary, and were only discovered by Petitioner after trial in response to his request pursuant to the Freedom of Information Act (FOIA), since the photographs were favorable to Petitioner, in the possession of the prosecution, suppressed by the state, and material to Petitioner's guilt or innocence?

## STATEMENT OF THE CASE

In May 2010, Bruce Kelley lived in a camper in Seneca, South Carolina. App. 83, l. 23 – 84, l. 4. Kelley was from Jonesboro, Arkansas, but travelled extensively for his job. He was away from home for about six months out of the year and lived in his camper during those periods. App. 82, l. 19 – 83, l. 22. Petitioner lived in the camper adjacent to Kelley. The two quickly developed a friendship. Kelley saw Petitioner "every night" and "had a beer or two with him." App. 84, l. 20 – 85, l. 2.

At the time, Kelley was working at the Oconee Nuclear Station. App. 83, ll. 3-5. On May 2, 2010, Kelley left his camper around 4:30 p.m. to begin a twelve hour night shift which began at 6:00 p.m. App. 84, l. 12 – 85, l. 14. When he left, his camper was locked and secured. App. 85, ll. 15-20. Kelley returned home around 6:45 a.m. the following morning, May 3, 2010. When he pulled up to his camper, Kelley noticed it had been "broken into." App. 85, l. 21 – 86, l. 6. After looking around inside, he called the police a few minutes later. App. 86, ll. 5-9.

Kelley identified his possessions that were missing: three firearms, two flatscreen televisions, a laptop, numerous DVDs, a liter bottle of Evan Williams whiskey "that was about two-thirds of the way full," a bottle of prescription pain medication, and a thousand round case of 7.62 by 39 ammunition that had five hundred rounds inside. App. 87, l. 18 – 90, l. 20; App. 117, l. 6 – 118, l. 2. Kelley claimed the titles of the DVDs that were missing included Asylum, The Hills Have Eyes, A House of a Thousand Corpses, and South Park. App. 88, ll. 9-16; App. 117, ll. 12-15.

While he was waiting for the police to arrive, Kelley saw Petitioner and his friend, Donald Gentile, known as "Rags," walk out of Petitioner's camper next door. Kelley walked over to Petitioner and Gentile, informed them about the burglary, and asked if they had seen or

heard anything. According to Kelley, they said "they had been up all night partying" and did not hear anything. Kelley claimed they both smelled of alcohol and were "acting really squirrelly." App. 86, l. 10 – 87, l. 13. Gentile said the burglary "must have happened before he got there because nothing in his truck was stolen." App. 87, ll. 3-5. Gentile "had an air compressor and a bunch of tools in the back" and "nothing was missing from his vehicle." App. 87, ll. 5-8.

After this conversation, but before the police arrived, Kelley saw Gentile walk out of Petitioner's camper carrying a small toiletry bag. Kelley claimed he saw his missing "House of a Thousand Corpses" DVD "sticking up out of the corner of it [the bag]." App. 91, ll. 10-16. Kelley also saw Petitioner carrying a large "military surplus duffle" bag. App. 91, ll. 16-17. Kelley claimed the bag was large enough to fit most of his missing possessions with the exception of one of his televisions. App. 92, ll. 13-18. Gentile and Petitioner put the bags in the back of Gentile's truck and left. App. 93, l. 23.

Shortly thereafter, Petitioner returned to the camper while Kelley was talking with Corporal Jarrett Price of the Oconee County Sheriff's Office. App. 93, l. 23 – 94, l. 7; App. 104, ll. 3-5; App. 115, ll. 1-5. Petitioner told the officer "to dust for fingerprints" and "asked what all was stolen." App. 93, l. 23 – 94, l. 7. Kelley believed Petitioner was acting "very suspicious" and later told the officer he "suspected" Petitioner. App. 94, ll. 4-12.

Later, after Corporal Price had left, Kelley claimed he saw Petitioner walk into the woods behind his camper with a shovel. Kelley also found this to be "very suspicious" since "it was raining fairly heavily at the time" and Petitioner was wearing "regular street clothes." App. 94, l. 22 – 95, l. 9. Kelley called Corporal Price who said he would "investigate" it. App. 95, ll. 10-11; App. 118, l. 19 – 119, l. 1. Price returned and walked into the woods adjacent to Petitioner's camper. He "encountered" Petitioner in the woods and when he asked Petitioner why he was

there, Petitioner allegedly said he was putting up a hammock. App. 119, ll. 7-15. However, Price did not see a hammock. App. 119, ll. 16-17. While Price was talking to Petitioner in the woods, Price claimed Petitioner "just blurted out, Do you want to search my camper?" Price "didn't at that time" so he left. App. 119, ll. 21-25.

After Price left, he received a call from Petitioner who wanted Price to return to his camper to discuss a problem Petitioner was having with his landlord. Price told Petitioner he would come back. App. 120, ll. 1-8. Price returned with Sergeant Casey Bowling. Price told Bowling that he suspected the stuff stolen from Kelley's camper "may be found in the wooded area because of [his] encounter with [Petitioner] in the woods during the rain." App. 120, ll. 9-15. Price and Bowling searched the woods, but they did not find anything. App. 120, l. 16 – 121, l. 5.

Price and Bowling then went to Petitioner's camper and talked to him. Petitioner told Price he and Gentile "had been up all night drinking and partying." Petitioner offered consent to search his camper again and, after talking to Petitioner "a little while longer" and confirming he had consent to search, Price entered Petitioner's camper and began to search. App. 121, ll. 6-23. He started with a closet. After looking in the closet, Price tried to open a drawer underneath the closet. The drawer did not open immediately, but "wiggled a little bit and moved." Assuming the drawer was stuck, Price pulled harder and "what appeared to be a [drawer] was a [drawer] facing that had been freshly glued on to . . . where the drawer goes." Behind it was a "void area." Price claimed he knew the drawer facing was freshly glued because the glue was "tacky" and "a little wet." App. 122, l. 7 – 123, l. 23. Inside the voided area, Price allegedly found an empty thousand round cardboard box of 7.62 by 39 ammunition, an empty bottle of Evan

Williams whiskey, a South Park DVD, and a DVD titled "The House on Haunted Hill." Price recognized these items as items reported stolen by Kelley. App. 123, l. 24 – 124, l. 18.

Price showed these items to Petitioner, who was outside with Sergeant Bowling. Petitioner allegedly told Price that if he wanted to search any further, he would have to obtain a search warrant. App. 124, ll. 19-23. Price contacted the investigator on call who obtained a search warrant for Petitioner's camper. App. 124, l. 24 – 125, l. 17. Once the warrant was obtained, Price went back inside Petitioner's camper and found additional items in the voided area, including a DVD set containing "The Hills Have Eyes," "The Asylum," and "Hit and Run," as well as a crowbar and a pair of gloves. App. 125, l. 18 – 126, l. 18; App. 128, ll. 8-11.

Once confronted with the items discovered in his camper, Petitioner told Price that his friend Gentile must have stolen the items and hid them in Petitioner's camper after Petitioner fell asleep in a chair while the two were drinking. App. 131, ll. 15-20. However, Price was later impeached with his police report in which he wrote Petitioner said the items were his. App. 134, ll. 6-21. Petitioner had an extensive DVD collection consisting of at least a couple hundred. App. 134, l. 22 – 135, l. 11.

After finishing the search of Petitioner's camper, Price took the crowbar he found to Kelley's camper and compared it to the "pry marks" observed on the aluminum door frame. App. 129, ll. 4-25. Price claimed the "crowbar fit perfectly in the pry marks in the door." App. 129, ll. 15-25. Sergeant Bowling likewise claimed that the crowbar found in Petitioner's camper was "a perfect match" to the pry marks found on the doorframe of Kelley's camper. App. 169, l. 1 – 170, l. 14.

Corporal Price admitted that he took photographs of the pry marks on the door as well as the stuff found in Petitioner's camper, but the photographs were lost or destroyed when he

"changed jobs shortly after this case." The photographs were stored on Price's digital camera which he turned in upon his departure from the sheriff's office. App. 130, l. 8 – 131, l. 9. Sergeant Bowling confirmed numerous photographs were taken using Price's digital camera and that the camera was misplaced when Price left the sheriff's office.[1] App. 173, ll. 8-21.

Donald Gentile was arrested a few days later "on a fugitive warrant" for an unrelated charge. App. 135, ll. 12-20. He was convicted of theft of electric current and sentenced to thirty days. App. 152, ll. 20-25. Gentile ultimately testified against Petitioner at trial. He said he went to Petitioner's camper around 9:00 p.m. on May 2, 2010 to cook out and "have a couple drinks." App. 145, ll. 2-11. Shortly after he arrived, Petitioner allegedly said "he'd got some new pistols" and showed the firearms to Gentile. According to Gentile, one was a silver "two rounder" with "an over and under barrel." The second one was black. App. 146, ll. 7-22. After cooking out, the two "sat around, shot the breeze, and drank" all night. App. 147, ll. 8-11. Gentile claimed that he eventually got tired and asked Petitioner if he could "crash on the couch" since he had been drinking. They watched a movie and Gentile allegedly fell asleep. App. 147, ll. 18-24.

That morning, as he was walking to his truck, Gentile met Petitioner's next door neighbor who told him about the burglary. Petitioner and Gentile both talked to the neighbor. App. 148, l. 20 – 149, l. 14. After this conversation, Petitioner asked Gentile to give him a ride to his friend's house about a quarter of a mile away. Petitioner allegedly had two bags: a small toiletry bag and an Army duffle bag. Gentile carried the small bag while Petitioner carried the duffle. They put the bags in the truck and then left. Gentile testified that he did not think the duffle bag was large enough to fit all the items reported stolen from Kelley's camper. App. 157, ll. 1-13. Gentile

[1] Because of the lost photographs, the trial judge instructed the jury that it may infer that evidence which was lost or destroyed by a party would have been adverse to that party. See App. 241, l. 20 – 242, l. 7.

dropped Petitioner off at his friend's house. Petitioner took both bags with him. App. 149, l. 14 – 151, l. 18. Gentile did not see Petitioner again that day. App. 151, ll. 19-20.

Gentile testified that when he was arrested a few days later on the unrelated fugitive warrant, he was told by law enforcement that Petitioner had written "a statement against [him]." App. 157, l. 20 – 158, l. 6. Gentile in return gave a statement implicating Petitioner. Gentile admitted the fact that Petitioner had allegedly implicated him "kind of did me a little wrong" and he had not spoken to Petitioner since. App. 160, ll. 7-11.

An Oconee County grand jury indicted Petitioner on August 2, 2010 for first degree burglary and grand larceny. App. 638-641. His case was called to trial on April 23, 2012 before the Honorable Benjamin H. Culbertson, and a jury. App. 1. Deputy Solicitor David Wagner represented the state. App. 1. W. Wilson Burr and Keith Denny represented Petitioner. App. 1. On April 25, 2012, the jury found Petitioner guilty as indicted. App. 262, ll. 14-21. He was sentenced to twenty-five years for first degree burglary and five years concurrent for grand larceny. App. 270, l. 18 – 271, l. 3.

The Court of Appeals affirmed Petitioner's conviction and sentence. State v. Allison, 2014-UP-473 (S.C. Ct. App. filed December 17, 2014). On April 13, 2015, Petitioner filed an application for post-conviction relief (PCR). App. 324-330. The state filed a return to this application on February 18, 2016. App. 331-335. With the assistance of counsel, Petitioner filed an amended application on July 25, 2016. App. 336-342. An evidentiary hearing was convened on February 23, 2018 before the Honorable J. Cordell Maddox, Jr. App. 343. Assistant Attorney General Lindsey McAllister represented the state. App. 343. William Yarborough represented Petitioner. App. 343.

Petitioner testified at the hearing that after he was convicted at trial, he filed a request pursuant to the Freedom of Information Act (FOIA) for a complete copy of his investigative file from the Oconee County Sheriff's Office. When he received it, included was a "hard disk" with a copy of all the photographs. He was surprised to see the photographs because they had not been turned over previously and were thought to have been lost or destroyed. App. 349, l. 17 – 351, l. 25. The photographs were marked and admitted as Applicant's Exhibit No. 1 and are on file with this Court. Petitioner asserted that he would have testified at trial if he had the photographs because they corroborated his "version of the facts." App. 352, ll. 9-23. Petitioner further testified that the photographs would have impeached the officers' testimony during his trial as to where the items were located in his camper, "especially the fact that the evidence was not all together in one cubbyhole." App. 357, ll. 1-22. He disputed that the DVDs were found in a drawer. Instead, Petitioner said they were in the stack of two hundred and fifty DVDs he had in his camper. App. 354, l. 4 – 355, l. 2. Additionally, Petitioner testified that all the items found by Corporal Price belonged to him. App. 355, ll. 15-17.

Petitioner further testified that he wanted trial counsel to call his stepfather, Stephen Holcombe, as an alibi witness. App. 362, ll. 1-10. Petitioner was at his mother and stepfather's house all day helping his mother, who had just had brain surgery, until sometime between 10:00 p.m. and 11:00 p.m. when his stepfather drove Petitioner home. App. 362, l. 12 – 364, l. 24. He remained at his camper for the rest of the night. App. 381, l. 23 – 382, l. 8. Petitioner told trial counsel about his stepfather, but counsel did not call him as a witness at trial. App. 364, l. 25 – 365, l. 6.

Stephen Holcombe, Petitioner's stepfather, testified that he picked Petitioner up from his camper early in the day on May 2, 2010 and took him to the home Holcombe shared with

Petitioner's mother. Petitioner's mother had just been released from the hospital after having a brain tumor removed and was resting at home. Petitioner visited with his mother all day. Sometime after dinner, Holcombe drove Petitioner home to his camper. Holcombe estimated the time to be around 8:30 or 9:00 p.m. App. 406, l. 12 – 407, l. 22. He would have testified at Petitioner's trial if he had been asked to do so. App. 408, ll. 10-12.

Wilson Burr, Petitioner's trial counsel, testified that he did not receive any photographs from the state in response to the motion for discovery he filed pursuant to Rule 5, SCRCrimP, and Brady v. Maryland, 373 U.S. 83 (1963). Wilson explained that because the defense did not have any photographs, the investigating officers "had a lot of leeway" in their testimony during Petitioner's trial about what items were found in Petitioner's camper and where they were found. Wilson had "no way of cross-examining" the officers since he did not have the photographs which could have been used for impeachment. App. 388, l. 1 – 389, l. 23. Additionally, Wilson remembered there was testimony from the officers at trial about a "v-shaped indentation" on the doorframe of Kelley's camper that they claimed was caused by the crowbar found in Petitioner's camper. However, Wilson testified that the photographs that are now available do not "show any v-shaped indentations." App. 401, l. 22 – 402, l. 4.

Wilson maintained Petitioner did not mention an alibi and that Petitioner said he had been at his camper all night. Wilson admitted he had never met Petitioner's stepfather. App. 393, ll. 1-19.

Keith Denny volunteered to assist Wilson *pro bono* with Petitioner's defense. App. 411, ll. 2-9. He researched the "spoilation issue" due to the lost photographs. He moved to suppress any testimony or evidence at trial concerning what items were allegedly found in Petitioner's camper and where they were found as well as any testimony claiming the crowbar allegedly

found in Petitioner's camper caused the pry marks found on Kelley's camper. App. 411, l. 4 – 412, l. 20; See App. 55, l. 20 – 61, l. 23. Denny confirmed that the trial judge denied his motion to suppress, but agreed to allow the defense to question the officers about the lost photographs and gave the jury a "spoilation charge." App. 412, ll. 1-22.

Denny testified that having seen the photographs now, the defense could have used them to cross-examine the officers. Instead, they were forced to "take them [the officers] at their word." App. 414, l. 19 – 415, l. 16. With the photographs, Denny asserted the defense could have shown another crowbar could have made the marks on the doorframe of Kelley's camper. App. 415, l. 17 – 416, l. 9. Denny maintained he would have liked to have had the opportunity to investigate the photographs and evaluate whether the defense should admit them at trial. App. 417, ll. 23-25.

Denny did not recall talking to Petitioner about an alibi before trial. However, about a year after trial, Denny received an affidavit from Petitioner's stepfather stating he had picked Petitioner up early the day of the burglary and dropped him off at his camper that night. Denny maintained that the affidavit from Petitioner's stepfather did not prove Petitioner was not at his camper during the period of time the state alleged the burglary could have happened. App. 418, l. 19 – 419, l. 8.

David Wagner, the solicitor who prosecuted the case, testified that the state did not have the photographs before or during trial. Jarrett Price, the officer who took the photographs and investigated the case, had left the sheriff's office. Price thought he had turned in his digital camera, on which the photographed were stored, when he left, but no one could find it. App. 426, l. 2 – 427, l. 10. According to Wagner, the photographs were not exculpatory. Instead, he believed they "would have made [his] job easier" by corroborating the officers' testimony. App.

427, ll. 12-25. Wagner maintained that the photographs were "discoverable" and he would have turned them over to the defense if he had them. App. 428, ll. 6-15.

By order filed April 19, 2018, the PCR judge denied Petitioner relief. App. 433-451. As to whether trial counsel were ineffective for failing to call Stephen Holcombe, Petitioner's stepfather, as a witness at trial, the PCR judge determined that counsel were not deficient because Holcombe's testimony "did not cover the entire timeframe in which the burglary could have been committed." App. 444. Consequently, the judge concluded that Petitioner did not meet "his burden of showing he had a valid alibi defense." App. 444.

As to Petitioner claim that the state violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to locate and turn over the photographs, the PCR judge found Petitioner did not meet his burden of proof because the photographs are not favorable to the accused nor material. More specifically, the judge determined the photographs were not favorable because "they are neither exculpatory or impeaching" and are not material because there is not a "reasonable probability the result of the trial would have been different had the pictures been disclosed." App. 442. Rather, the judge concluded the photographs were "inculpatory and confirm the testimony of the officers, making [Petitioner's] conviction more likely, not less." App. 442. Consequently, the judge ruled the photographs did "not fall under the scope of Brady." App. 442.

On May 4, 2018, Petitioner filed a motion to alter or amend the judgment pursuant to Rules 52(b) and 59(e), SCRCP. App. 452-457. Attached to this motion was an affidavit of Paul Silvaggio. App. 458-459. The state filed a return to the motion to alter or amend and a motion to strike on May 31, 2018. App. 460-466. By order filed October 9, 2019, the PCR judge denied the motion to alter or amend the judgment. App. 467. Petitioner did not appeal from the order of dismissal or the order denying his motion to alter or amend the judgment.

On May 20, 2020, Petitioner filed a second application for post-conviction relief. App. 469-481. The state filed a return and motion to dismiss dated August 12, 2021. App. 619-633. The Honorable R. Lawton McIntosh issued a conditional order of dismissal on October 12, 2021 provisionally denying and dismissing Petitioner's second PCR application. App. 634-648. After the conditional order of dismissal was served on Petitioner's then counsel, Charles Grose, the state agreed Petitioner was entitled to a belated appeal from the order denying his first application for post-conviction relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 649. Accordingly, by order filed October 3, 2022, Judge McIntosh vacated the conditional order of dismissal and granted Petitioner a belated appeal. App. 649-651.

This petition for writ of certiorari pursuant to Austin v. State follows.

## ARGUMENT

1.

The post-conviction relief judge erred by finding trial counsel were not ineffective when they failed to call Stephen Holcombe, Petitioner's stepfather, as an alibi witness at trial, where Holcombe would have testified that he dropped Petitioner off at his camper around nine o'clock on the night of the burglary, which would have refuted Donald Gentile's testimony that Gentile went to Petitioner's camper around the same time and saw Petitioner with the firearms stolen during the burglary, and where Petitioner was prejudiced since there is a reasonable probability the outcome of Petitioner's trial would have been different had Holcombe testified.

The state alleged Petitioner burglarized Bruce Kelley's camper sometime between 4:30 p.m. on May 2, 2010, when Kelley left for work and 6:45 a.m. the following morning when Kelley returned home. The state's theory of the case was that Petitioner acted alone and Donald Gentile, who admitted being at Petitioner's camper that night, was not involved. Gentile testified that he arrived at Petitioner's camper around 9:00 p.m. that evening to cookout and "have a couple of drinks." App. 145, ll. 2-11. Shortly after he arrived, Gentile claimed Petitioner said "he'd got some new pistols" and showed the firearms to Gentile. According to Gentile, one was a silver "two rounder" with "an over and under barrel." The second one was black. App. 146, ll. 7-22. The firearms were consistent with the firearms allegedly stolen from Kelley's camper. See App. 87, l. 20 – 88, l. 3. Consequently, according to the state's theory of the case, the burglary must have occurred before Gentile arrived at Petitioner's camper around 9:00 p.m. that evening.

Stephen Holcombe's testimony that Petitioner was at Holcombe's home all day visiting with his mother until Holcombe dropped Petitioner off at his camper around 8:30 or 9:00 p.m. would have established an alibi and refuted Gentile's testimony. Trial counsel were ineffective

for failing to call Holcombe as a witness at Petitioner's trial. Holcombe was available and willing to testify in Petitioner's defense. Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different had Holcombe testified.

In order to show ineffective assistance of counsel as a ground for relief, Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove "that counsel's performance was deficient" and fell below reasonable professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668).

"To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). "[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id.

"Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014) (quoting Strickland, 466 U.S. at 691) (cleaned up). "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." Id. (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)).

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court affirmed the PCR court's grant of post-conviction relief. Walker was convicted of first degree criminal sexual conduct and kidnapping. Id. at 403, 756 S.E.2d at 146. On Saturday, March 2, 2002, the victim stopped at a gas station and when she went to leave, her car would not start. Id. at 403, 756 S.E.2d at 145. A man agreed to help her and ultimately replaced a part in her car. Id. Because she did not have money on her person with which to repay him, she had him follow her home. Id. There, according to the victim, he blindfolded her and drove her to his home where over the course of the night he sexually assaulted her. Id. The following morning around 5:00 a.m. he blindfolded her again and drove her back to her home. Id. Law enforcement obtained a video surveillance tape from the gas station and the victim identified her assailant on the video. Officers returned to the gas station where an employee identified the assailant as Walker. Id. Walker admitted going to the gas station on March 2 but denied providing assistance to anyone there with car trouble. Id. He also denied any knowledge of the crime or the victim. Id. He stated that after leaving the BP station, he spent the afternoon and evening at a friend's home and then returned to his girlfriend's, Robina Reed's, home around 9:30 or 10:00 p.m. for the remainder of the night. Id.

The PCR court found Walker's trial counsel was ineffective for failing to call Reed as an alibi witness. Reed testified at the PCR hearing that in March 2002, she was in a romantic relationship with Walker, but he disappeared at the end of that month when, as she later discovered, he was arrested. Id. at 404, 756 S.E.2d at 146. "While she vacillated in her testimony and was unable to provide details about specific days and times she was with Walker, she was ultimately asked: 'Prior to the last time that you saw Mr. Walker did y'all spend every weekend together?' and she responded: 'Yea, we spend [sic] every weekend together.'" Id. The PCR "court found Reed was credible, counsel was deficient in failing to interview her as an alibi witness, and Walker was prejudiced because Reed's alibi testimony created the reasonable probability of a different outcome at trial had she testified." Id.

This Court affirmed the PCR court's grant of relief, holding if Reed's testimony were true and "construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147. "In other words . . . it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-07, 756 S.E.2d at 147.

In this case, trial counsel were ineffective for failing to interview Holcombe and investigate whether his testimony would aid the defense. If Holcombe's testimony were true that Petitioner was at Holcombe's house all day until Holcombe dropped Petitioner off at his camper around 8:30 or 9:00 p.m., it would be physically impossible for Petitioner to have committed the burglary and larceny. Donald Gentile, who the state maintained was not involved in the burglary, testified at Petitioner's trial that he arrived at Petitioner's camper around 9:00 p.m. and shortly thereafter, Petitioner showed Gentile two pistols that were consistent with the firearms

stolen from Kelley's camper. Consequently, according to the state's theory of the case, the burglary must have occurred prior to 9:00 p.m. when Gentile arrived at the camper. It is not possible for Holcombe and Gentile's testimony to be true and for Petitioner to have committed the burglary. Therefore, Petitioner was prejudiced by counsel's deficient performance because there is a reasonable probability the outcome of his trial would have been different if Holcombe had testified.

Respectfully, this Court should hold the PCR judge erred by finding trial counsel were not ineffective for failing to call Stephen Holcombe as an alibi witness at trial, reverse Petitioner's convictions, and remand for a new trial.

2.

The post-conviction relief judge erred by finding Petitioner failed to prove the state violated *Brady v. Maryland*, 373 U.S. 83 (1963), when the state did not give the defense photographs taken by law enforcement during its investigation of the burglary, and were only discovered by Petitioner after trial in response to his request pursuant to the Freedom of Information Act (FOIA), since the photographs were favorable to Petitioner, in the possession of the prosecution, suppressed by the state, and material to Petitioner's guilt or innocence.

Corporal Jarrett Price with the Oconee County Sheriff's Office was the lead investigator of the burglary of Bruce Kelley's camper. Price took photographs of the damage to the aluminum framing surrounding the door to Kelley's camper, including pry marks. Price also took photographs of the items located inside Petitioner's camper and where the items were allegedly found by Price during his search. Finally, Price took photographs of the crowbar allegedly found in Petitioner's camper next to the pry marks found on the doorframe of Kelley's camper. See Applicant's Exhibit No. 1. Notably, Price claimed at trial that the "crowbar fit perfectly in the pry marks in the door." App. 129, ll. 15-25. Sergeant Bowling likewise claimed at trial that the crowbar found in Petitioner's camper was "a perfect match" to the pry marks found on the doorframe of Kelley's camper. App. 169, l. 1 – 170, l. 14.

Shortly after his investigation in this case, Corporal Price left the sheriff's office. When he left, Price turned in his digital camera in which the photographs taken during the investigation of this case were stored. However, law enforcement claimed the photographs were lost or destroyed and failed to provide them to the defense before or during Petitioner's jury trial despite Petitioner's general request for discovery pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and his subsequent specific request for the photographs. Consequently, Petitioner's trial counsel

were forced "to take [the officers] at their word" when they testified during Petitioner's trial and were unable to effectively cross-examine the officers as to what items were found and where and that the crowbar found in Petitioner's camper was a "perfect match" to the pry marks found on the doorframe of Kelley's camper. See App. 389, ll. 14-23; App. 415, ll. 7-16.

The state violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to give Petitioner a copy of the photographs taken by Corporal Price during his investigation. "An individual asserting a Brady violation must demonstrate that evidence: (1) favorable to the accused; (2) in the possession of or known by the prosecution; (3) was suppressed by the State; and (4) was material to the accused's guilt or innocence or was impeaching." Riddle v. Ozmint, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006) (citing Kyles v. Whitley, 514 U.S. 419 (1995) and Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999)).

"Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police." State v. Moses, 390 S.C. 502, 517, 702 S.E.2d 395, 403 (Ct. App. 2010) (citing State v. Kennerly, 331 S.C. 442, 452-53, 503 S.E.2d 214, 220 (Ct. App. 1998)). "Evidence is material under Brady if there is a 'reasonable probability' that the result of the proceeding would have been different had the information been disclosed. Id. at 44-45, 631 S.E.2d at 73 (citing State v. Proctor, 358 S.C. 424, 595 S.E.2d 480 (2004)).

"The Brady disclosure rule is grounded in the defendant's fundamental right to a fair trial mandated by the Due Process Clause of the Fifth and Fourteenth Amendments." State v. Kennerly, 331 S.C. 442, 452, 503 S.E.2d 214, 219-20 (Ct. App. 1998). "Whether the prosecutor's failure to reveal evidence pursuant to Brady is due to negligence or an intentional

act is irrelevant because a court may find a Brady violation regardless of the good or bad faith of the prosecutor." Moses, 390 S.C. at 516, 702 S.E.2d at 402 (citing Gibson, 334 S.C. at 528, 514 S.E.2d at 327). "Because Brady is founded upon a sense of fairness and justice, the focus in a Brady analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure." Id. (citing Gibson, 334 S.C. at 528, 514 S.E.2d at 327). "If a Brady violation is found to have occurred, PCR must be granted." Riddle, 369 S.C. at 44, 631 S.E.2d at 73 (citing Gibson, 334 S.C. 515, 514 S.E.2d 320).

The photographs in this case were undisputedly in the possession of the state and suppressed by the state. The Oconee County Sheriff's Office had the photographs and failed to turn them over to the solicitor and Petitioner before trial despite specific requests. The photographs were only disclosed after Petitioner was convicted at trial in response to Petitioner's FOIA request for his investigative file.

Moreover, the photographs were both favorable to Petitioner and material under Brady. The photographs could have been used to impeach Corporal Price and Sergeant Bowling, most importantly about their conclusions that the crowbar allegedly found in Petitioner's camper "matched" the pry marks found on the doorframe of Kelley's camper. Specifically, Corporal Price claimed when he compared the crowbar to the pry marks on the door the "crowbar *fit perfectly* in the pry marks on the door." App. 129, l. 15 – 130, l. 7 (emphasis added). He asserted that the crowbar found in Petitioner's camper was "unusual" because it was "flared" at the end and "fit perfectly in the pry indentation." App. 130, ll. 1-7. Sergeant Bowling went even further in depth. He testified, "The door frame had a *very distinctive* marking on it. The very distinctive marking was almost like a V-shaped dovetail type of shaping on it, where something, whatever was pried against it had that weird V-shape. . . . So when we held up the crowbar right

up to the door, you fit the pry mark in the door with *the exact width, the exact shape as the dovetail in this crowbar*. It was one of those times in law enforcement that you look at and say, wow, I'm pretty darn certain that that was what was used to open . . . pry that door." App. 169, l. 6 – 170, l. 8 (emphasis added). He later asserted that his "observation" was that the crowbar allegedly found in Petitioner's camper was a "*perfect match*" to the pry marks on the doorframe of Kelley's camper. App. 170, ll. 9-14 (emphasis added).

However, despite this testimony, the photographs disclosed after Petitioner's trial do not support Price and Bowling's testimony. As trial counsel Wilson emphasized during Petitioner's PCR hearing, the photographs do not "show any v-shaped indentations" as Bowling claimed, and he would have used the photographs to impeach the officers. App. 401, l. 22 – 402, l. 4. Trial counsel Denny further emphasized that, after viewing the photographs, he did not believe the officers' testimony was accurate that the crowbar found in Petitioner's camper was unique and was the only crowbar that could have caused the pry marks. App. 415, l. 17 – 416, l. 9. Because of the significant impeachment value of the photographs, they were favorable to Petitioner and should have been disclosed before trial pursuant to Brady.

Additionally, the photographs were material under Brady as there is a reasonable probability the outcome of Petitioner's trial would have been different had the photographs been disclosed. There was little evidence against Petitioner presented at trial and all wholly circumstantial. Gentile claimed Petitioner showed him two pistols consistent with the firearms stolen from Kelley's camper. He further maintained that he fell asleep on the couch in Petitioner's camper because he had been drinking and was unaware of Petitioner's actions while he was asleep. Furthermore, Gentile claimed it was Petitioner's bag Gentile was seen carrying to his truck the morning the burglary was discovered. Notably, Kelley testified that he saw a DVD

bearing the title of one of the DVDs missing from his camper sticking out of this bag. However, Gentile's credibility was suspect particularly given that he was questioned by the police about his possible involvement in the burglary and only implicated Petitioner after law enforcement told him Petitioner wrote a statement against him. Besides Gentile's testimony, the only other evidence against Petitioner was the testimony of Corporal Price and Sergeant Price. If trial counsel had been able to impeach these officers' testimony with the photographs, there is a reasonable probability Petitioner would have been acquitted.

Respectfully, this Court should hold the state violated Brady v. Maryland and reverse the decision of the PCR judge denying Petitioner relief.

## CONCLUSION

Based on the foregoing argument, Petitioner respectfully requests this Court grant the petition for writ of certiorari and order further briefing on the issues presented.

Respectfully Submitted,

s/ Lara M. Caudy
Lara M. Caudy
Appellate Defender

ATTORNEY FOR PETITIONER

This 29th day of March, 2023.