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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County
Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2022-001520

MARCUS DANIEL ALLISON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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

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RESPONDENT'S ISSUES PRESENTED

I. Did the post-conviction relief court properly deny relief for the allegation that trial counsel were ineffective when they failed to call potential alibi witness Stephen Holcombe, Petitioner's father, at trial because his account that he dropped Petitioner back at the camper the night of the burglary does not cover the entire time frame during which Petitioner was able to commit the burglary?

II. Did the post-conviction relief court properly deny relief for the allegation that the State violated Brady v. Maryland, 373 U.S. 83 (1963), when Petitioner discovered he had not been provided with law enforcement's lost photographs taken during the course of their investigation before trial because the photographs are not exculpatory and are immaterial?

STATEMENT OF THE CASE

Factual History

Petitioner Marcus Daniel Allison is presently confined in the South Carolina Department of Corrections following his conviction in Oconee County. On May 2, 2010, Bruce Kelley left for work at about 4:30 p.m. App. 85, ll. 13-14. He worked six 12-hour shifts per week from 6 a.m. to 6 p.m. as an outage worker at the Oconee Nuclear Station. App. 74, ll. 4-5; App. 83, ll. 7-8. The next day at approximately 6:45 a.m. on May 3, 2010, Bruce Kelley came home from work to discover the camper he lived in broken into and burglarized. App. 8, ll. 3-5; App. 54, ll. 17-18; App. 74, ll. 17-18; App. 85, l. 23. He lived in his camper because, although from Arkansas, he traveled half of the year for work. App. 74, ll. 5-7. Minutes later at 6:50 a.m., Kelley called the police to report the crime as well as items missing from his camper. App. 86, ll. 6-7. Corporal Jarrett Price and Sergeant Casey Bowling responded to the scene and investigated this case. App. 75, ll. 6-8.

However, before law enforcement arrived, Kelley had an unusual interaction outside his camper with Petitioner and his friend, Donald Gentile or "Rags." App. 86, ll. 10-23. Petitioner lived in a camper on the lot next to Kelley, so the two were neighbors who met about two weeks before this incident. App. 84, ll. 1-2, 21-22. Kelley saw Petitioner often and the two shared beers on occasion. App. 84, ll. 24-25. Kelley knew he was struggling financially without a job or a car, so he even took Petitioner to the store to buy him groceries and other supplies. App. 85, ll. 2-7.

Leading up to this unusual interaction, Kelley noticed commotion coming from Petitioner's camper before Petitioner and Gentile walked out of the camper together. App. 86, ll. 10-12. Kelley asked them if they had seen or heard anything unusual the night before, to which they replied that they had not heard anything from his camper but there was a ruckus up the nearby hill at 1:00 a.m.

App. 86, ll. 16-19. They added that they were up all night drinking the night before. App. 87, ll. 9-13. After Kelley explained that someone stole three guns and other items from his camper, Gentile said that it must have happened before he arrived the night before at Petitioner's camper because nothing was stolen from the open bed of his truck which had tools and an air compressor. App. 86, l. 23-87, l. 8.

Kelley then observed Petitioner and Gentile load two bags into Gentile's truck. App. 91, ll. 10-13. Gentile had a small overnight bag while Petitioner carried a big military surplus duffle bag. App. 91, ll. 13-17. According to Kelley, the bags looked big enough to contain all of the stolen items except the larger TV. App. 92, ll. 15-16. Before they left, however, Kelley saw the "House of a Thousand Corpses" DVD sticking out of Gentile's bag. App. 91, ll. 14-16. Gentile drove off with Petitioner at approximately 9:00 a.m. before law enforcement responded. App. 92, ll. 10-12.

Soon after, Cpl. Price and Sgt. Bowling of the Oconee County Sheriff's Office arrived, and Kelley listed the items stolen and their approximate value: .38 caliber Derringer ($100), .45 caliber Rock Island 1911 ($450), Russian 7.62x25 caliber ($150), thousand-round case of Wolf 123 grain hollow point 7.62 by 39 ammunition with 500 rounds ($80), 22-inch TV ($300), 19-inch TV ($200), Acer laptop ($300), liter bottle of Evan Williams that was two-thirds full ($15), and a variety of DVDs. App. 75, ll. 4-5; App. 87, l. 20-91, l. 6. The DVD titles included "South Park," "Asylum," "The Hills Have Eyes," and "A House of a Thousand Corpses," which was the title Kelley saw sticking out of the bag Gentile carried. App. 88, ll. 10-16. The guns were hidden well around Kelley's camper, including under the mattress and under a pile of clothes, so they would have been difficult to find, according to Kelley. App. 89, ll. 11-15. Upon arrival, Cpl. Price also saw evidence of forced entry, as there were pry marks on the camper's aluminum door frame. App. 116, l. 22-117, l. 1.

During his testimony, however, Gentile recalls different details of the timeline. He arrived at Petitioner's camper around 9:00 p.m. App. 145, l. 6. Soon after he arrived, Petitioner showed him two pistols he said he had just got, both matching the descriptions of two guns Kelley told them were stolen. App. 146, ll. 7-15, 147, ll. 7-9. Gentile testified that he fell asleep late that night on Petitioner's couch and woke up in the morning, but he was unsure if Petitioner had fallen asleep as well. App. 147, l. 19-146, l. 6. He also noted that the bag he carried to his truck was not his and, instead, Petitioner asked him to carry that bag to the car. App. 149, ll. 24-25. After they loaded the bags in his truck, Gentile drove Petitioner to another friend's house about a quarter of a mile up the road. App. 150, ll. 20-21. Petitioner took both bags with him when he exited the truck, and that was the last time Gentile saw him that day. App. 151, ll. 13-20. About fifteen minutes after Gentile and the Petitioner left the lot in Gentile's truck, Petitioner returned. App. 94, ll. 17-19. As Kelley spoke with the officer in his camper, Petitioner walked in and joined the conversation, acting drunk and "suspicious." App. 94, ll. 1-4.

Later that morning after the officers left, Kelley observed unusual activity outside his camper window. App. 95, ll. 1-2. He saw Petitioner leave his camper with a shovel and head into the woods, even though it was raining. App. 95, ll. 2-7. Petitioner left for the woods and returned four or five times and was gone five to ten minutes each time. App. 95, ll. 11-14. Cpl. Price soon arrived and looked around the woods to see what Petitioner was doing out there in the heavy rain. App. 119, ll. 2-6. When Cpl. Price asked what he was doing when he found him in the woods, Petitioner claimed he was setting up a hammock, yet the officer did not see a hammock with him. App. 119, ll. 11-17. He then contacted his supervisor, Sgt. Bowling, for assistance who soon came, and neither of them found anything of note in the woods. App. 120, ll. 2-19.

As he was speaking to law enforcement about the investigation, Petitioner offered the officers to search his camper. App. 121, l. 17. During Cpl. Price's search of the camper, he pulled on what appeared to be a drawer underneath one of the closets. App. 122, l. 18, 21-22. Although it did not open at first, it moved, so he pulled harder thinking it was merely stuck. App. 122, ll. 22-25. The supposed "drawer" then came open, but it was a freshly glued drawer facing with a void area behind it. App. 123, ll. 1-2. Cpl. Price knew it was freshly glued because the glue still looked tacky and wet. App. 123, ll. 21-23. In that void space, he found a cardboard box of Wolf ammunition with writing that labeled it a thousand-round count of 7.62 by 39mm. App. 123, ll. 1-3. He also found a DVD case containing four "South Park" DVDs, "The House of Haunted Hill" DVD, and an empty bottle of whiskey. App. 124, ll. 8-18. After apprehending these items, Petitioner told the officers they were no longer allowed to search his camper. App. 124, ll. 21-23. They left the camper, but stayed on the premises until they obtained a search warrant. App. 124, l. 25-125, l. 23. In the meantime, Kelley identified these items as items stolen from his camper. App. 95, l. 23-94, l. 3. While searching the void area again with the search warrant, the officers also found a DVD with The Hills Have Eyes, Asylum, and Hit and Run, along with black gloves and a crowbar. App. 125, l. 22-126, ll. 1-9.

Upon finding the crowbar and previously identifying a pry mark on the aluminum doorframe of Kelley's camper, the officers compared the crowbar with the mark, and it was a "perfect match." App. 170, l. 14. Sgt. Bowling testified that the distinctive dovetailed V-shape of the crowbar found was an exact match in width and shape compared to the mark on the door frame. App. 170, ll. 3-5. This V-shape is also uncommon on crowbars, which made it very distinguishable to law enforcement. App. 170, ll. 9-12.

As the lead investigator on the case, Cpl. Price took photos of the items found in the trailer and the crowbar match with a department-issued camera. App. 130, l. 9. However, the photos are stored on the camera's memory, and the camera was misplaced after he left the police force to work as a security officer as Duke Nuclear Power Station. App. 114, ll. 18-23, 130, l. 23-25. While explaining how the camera could have been misplaced, Sgt. Bowling testified that, when an officer leaves Sheriff's Office, they leave their equipment for another officer to use who does not have that piece of equipment. App. 173, ll. 17-21.

A few days after this incident, Gentile was arrested on an unrelated fugitive's warrant. App. 157, l. 21. After being questioned by investigators, he testified that law enforcement told him Petitioner wrote a statement in which he listed him as a suspect in this robbery. App. 158, l. 4. While Gentile did not know Petitioner never wrote such a statement, he testified that his account would remain the same regardless of Petitioner's accusation. App. 158, ll. 11-13, 160, ll. 21-24.

Procedural History

On August 2, 2010, Petitioner was arrested and indicted by the Oconee County Grand Jury for first-degree burglary and grand larceny. App. 634-35. The jury trial took place on April 23-25, 2012, with the Honorable Benjamin H. Culbertson presiding. App. 635. Keith Denny and W. Wilson Burr represented Petitioner, and Deputy Solicitor David Wagner prosecuted the case. App. 635. The jury convicted Petitioner as indicted at the conclusion of the trial on April 25, 2012. App. 635. Subsequently, Judge Culbertson sentenced Petitioner to twenty-five years for first-degree burglary and five years for grand larceny, to be served concurrently. App. 635.

Upon filing a timely appeal, the Court of Appeals affirmed Petitioner's convictions and sentences. State v. Allison, 2014-UP-473 (S.C. Ct. App. Filed Dec. 17, 2014). Petitioner then filed his first post-relief conviction (PCR) application on April 13, 2015. App. 324. On February 8,

2016, the State filed its return to his application. App. 331. Petitioner filed an amended application for PCR relief on July 25, 2016. App. 336. The PCR court convened an evidentiary hearing before the Honorable J. Cordell Maddox, Jr. on February 23, 2018. App. 343. William G. Yarborough, III represented Petitioner, and Lindsay McCallister, of the South Carolina Attorney General's Office, represented the State. App. 343.

At this evidentiary hearing, Petitioner testified that he filed a Freedom of Information Act (FOIA) request while in prison for a copy of his investigative file by the Sheriff's Department. App. 350, ll. 14-20. Per that request, Petitioner received a hard disk of the file, including copies of all the lost photos. App. 350, ll. 21-22. These photos were submitted to the Court's file. App. 358, ll. 20-21. He then claimed that he would have chosen to testify at his original jury trial had he seen the photos. App. 352, ll. 11-15. Petitioner also claimed the photos impeach the officers' testimonies. App. 353, l. 1. He testified that one photo shows a gun, a box of ammunition, some other items lying on the floor, whereas the officer said all of the items were in a cubbyhole. App. 353, ll. 1-7. In addition, Petitioner also testified that the photos show three DVDs in the drawer area but were never in the drawer, whereas the officer explained that all the items were found together in what appeared to be a drawer. App. 353, ll. 9-12, 354, ll. 15-23. Petitioner also claimed that all of the items pictured were his. App. 355, ll. 16-17.

During this hearing, Petitioner also testified that his counsel failed to call his stepfather, Stephen Holcombe, as an alibi witness. App. 362, ll. 6-10. Petitioner stated that he was helping his mother all day at her house, and Holcombe drove him back to his camper at about 10:00-11:00 p.m. App. 364, ll. 14-24. However, Holcombe said he drove Petitioner back to his camper from his mother's house at about 8:30-9:00 p.m. App. 407, l. 17. He then dropped him off at his camper shortly thereafter. App. 407, ll. 11-12. Petitioner claimed he told his trial counsel his account of

the timeline. App. 364, l. 15-365, l. 1. However, Holcombe testified that no one, including Petitioner, asked him to share this information with his attorneys. App. 408, ll. 8-9.

One of his trial attorneys, Wilson Burr, added that Petitioner never told him that Holcombe would testify as an alibi witness. App. 396, ll. 5-9. Burr explained that he filed discovery motions for the photos, after which the Sherriff's Office explained to him that an officer took photos, but the photos were lost due to the photographing officer's departure from the force. App. 390, ll. 12-21. He also testified that, although having the photos would have been helpful in corroborating the officers' testimonies, "years later it's harder to say how we could have used any evidence, including the photographs." App. 391, ll. 1-5. After reviewing the photos, he could not say whether or not having the photos would have affected his trial strategy. App. 391, ll. 16-20. In addition, Burr agreed that the pictures show a crowbar matching the marks on the doorframe, and the crowbar in the pictures appeared to be the same as the crowbar introduced at trial. App. 401 l. 13-402, l. 15. He also conceded that law enforcement is "allowed to come and testify as to what they saw without a requirement to have photographic evidence." App. 402, ll. 21-25.

The pro bono trial attorney Keith Denny explained that, although the motion for dismissal or suppression was dismissed, the judge ultimately gave the spoliation of evidence charge to the jury. App. 412, ll. 1-10. The defense was able to examine the officers regarding the lost photos, and the jury was made aware that the lost photos were a point of issue. App. 412, ll. 11-22. Additionally, Denny also agreed that the photos showed a crowbar fitting into the marks on the doorframe, which confirmed Officer Bowling's testimony at trial. App. 415, l. 17-416, l. 4. He added that this crowbar photo "tracks with wat the testimony was...I'm not sure if I would have introduced this." App. 417, ll. 15-21. He was unsure as to the value would have had to their case. App. 418, ll. 13-15. Furthermore, although he could not recall discussing Petitioner's alibi with

him, Denny testified that the "affidavit by his stepfather did not prove that Mr. Allison wasn't at his camper during the period of time that they allege that this could have happened." App. 419, ll. 4-8.

Solicitor David Wagner, the prosecuting attorney at trial, made a request for all photos, and he did not get receive them. App. 414, ll. 1-8. He explained that he did not have the photos in his case file for trial, either. App. 427, ll. 3-10. However, he testified that, had he had the photos, he would have introduced them at trial because they were not exculpatory, confirmed the officers' testimonies, and "would have made my job a lot easier." App. 427, ll. 15-25. He would have turned over the photos had he had them as part of discovery. App. 428, ll. 9-15. His common practice was to turn over all materials in his case file that concern the defendant's guilt or innocence, even some materials he was not required to disclose. App. 429, ll. 12-16.

On April 19, 2018, the PCR judge issued an order denying Petitioner relief. App. 433. Petitioner raised two issues: (1) ineffective counsel for failing to call Holcombe as his alibi witness, and (2) Brady[1] violation for failing to provide the photos. App. 436. As to the first issue, the PCR judge ruled that trial counsel were not ineffective because Petitioner did not properly provide an alibi defense, as Holcombe's testimony did not cover the whole time frame during which Petitioner could have committed the crime. App. 444. As to the second issue, the PCR judge found that the photos were neither favorable to Petitioner nor material to his guilt or punishment. App. 442.

On May 4, 2018, Petitioner filed a motion to amend or alter the judgment pursuant to Rules 52(b) and 59(e), SCRCP. App. 452. Along with this motion, he filed an affidavit of Paul Silvaggio, a private investigator. App. 458. On May 31, 2018, the State filed a motion to the Applicant's

[1] Brady v. Maryland, 373 U.S. 83 (1963).

motion as well as a motion to strike pursuant to Rule 12(f), SCRCP. App. 460. Filed October 9, 2019, the PCR judge denied the Petitioner's motion to reconsider. App. 467. Petitioner did not appeal the dismissal or the denied motion to amend or alter.

On May 20, 2020, Petitioner filed a second PCR application. App. 469. On August 12, 2021, the State made its Return, requesting the application be dismissed. App. 619. On October 12, 2021, a conditional order of dismissal was issued, which denied and dismissed Petitioner's second PCR application. App. 634. However, the State agreed that Petitioner was entitled to a belated appeal of his first PCR application pursuant to Austin v. State[2]. App. 649. On October 3, 2022, Judge McIntosh vacated the conditional order of dismissal and granted relief pursuant to Austin. App. 649.

[2] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

STANDARD OF REVIEW

Regarding PCR cases, the standard of review depends on the specific issues raised on appeal. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). In a PCR action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813, 814 (1985). Upon reviewing factual findings by the PCR court, the appellate court will defer to those factual findings and uphold them if they are supported by probative evidence in the record. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Meanwhile, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. The post-conviction relief court properly deny relief for the allegation that trial counsel were ineffective when they failed to call potential alibi witness Stephen Holcombe, Petitioner's father, at trial because his account that he dropped Petitioner back at the camper the night of the burglary does not cover the entire time frame during which Petitioner was able to commit the burglary.

Petitioner claims the PCR court erred in denying him relief because his trial counsel was ineffective by not calling his stepfather, Stephen Holcombe, as an alibi witness. Because of trial counsel's failure to call Holcombe to testify, Petitioner contends the outcome of the trial would have likely been different. However, Petitioner's argument fails because Holcombe's testimony does not cover the entire time frame during which Petitioner could have committed the crime.

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "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, at 442, 334 S.E.2d at 814.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Ineffective assistance of trial counsel is evaluated under a two-prong test. 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.

As for the alibi, "to be successful, his alibi must cover the entire time when his presence was required for accomplishment of the crime." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). However, "since 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.

In addition, "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 (quoting Strickland, 466 U.S. at 691). This duty includes counsel's investigation of defendant's alibi witnesses, as failure to try to contact them to analyze the value of their testimony is unreasonable. Walker, 407 S.C. at 405 (citing Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)).

Trial counsel Denny and Burr testified that it was not until about a year after the trial that they learned that Holcombe could have testified as an alibi witness for Petitioner. Up until then, including leading up to trial, Petitioner told them he was at home in his camper all night without a mention of Holcombe at all.

Even still, the testimony Holcombe provided did not remove Petitioner from the area for the entire time frame in which Petitioner could have committed the crime. At the evidentiary hearing, Holcombe testified that he drove Petitioner to his mother's house to help her do chores and various tasks around the house. Holcombe then left the house and returned at about 8:30 or

9:00 p.m. to return him to his camper. While he was not sure of the exact time, he testified it was starting to get dark. Once he dropped him off, Holcombe did not see him again that night.

However, Kelley was gone from his camper from approximately 4:30 p.m. to 6:45 a.m., so his camper was burglarized between those hours. Even with Gentile's testimony that he arrived at Petitioner's house at about 9:00 p.m. that night, there are still hours unaccounted for. Therefore, Petitioner was not prejudiced by trial counsel's decision not to call Holcombe because the reasonable probability of a different outcome of the trial is non-existent, as Holcombe's testimony does not cover the entire time during which Petitioner could have committed the crime.

Respectfully, this Court should hold that the PCR properly ruled in finding that trial counsel were not ineffective in failing to call Holcombe as an alibi witness at trial.

II. The post-conviction relief court properly denied relief for the allegation that the State violated Brady v. Maryland, 373 U.S. 83 (1963), when Petitioner discovered he had not been provided with law enforcement's lost photographs taken during the course of their investigation before trial because the photographs are not exculpatory and are immaterial.

Furthermore, Petitioner claims the PCR court erred in denying him relief because the State violated Brady v. Maryland, 373 U.S. 83 (1963), when it failed to provide law enforcement's investigation photos as a part of discovery before trial. Because of the State's failure to provide the photos to the defense, Petitioner contends he chose not to testify in his defense but would have had he had the photos to corroborate his version of events. However, Petitioner's argument fails because the photos are not exculpatory and are immaterial.

Under Brady v. Maryland, the State must disclose all evidence that is in its possession, favorable to the accused, and material to the defendant's guilt or punishment. Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 268 (1993). Accordingly, "a Brady violation occurs when the

evidence at issue is: 1) favorable to the accused; 2) in the possession of or known to the prosecution; 3) suppressed by the prosecution; and 4) material to the defendant's guilt or punishment." State v. Durant, 430 S.C. 98, 107, 844 S.E.2d 49, 53 (2020).

Here, the evidence at issue is the set of photos taken by lead investigator Cpl. Price. He took photos of both the victim's and Petitioner's campers during the course of the investigation on a department-issued camera. However, when he changed jobs and turned the camera back into the Sheriff's Office, the photos were lost. Neither party had the photos for trial, and they were not entered into evidence. Upon filing a FOIA request after his conviction, Petitioner received a hard disk which included all of the lost photos. At the evidentiary hearing, these photos were presented as Applicant's Exhibit 1.

In accordance with the four-factor analysis, the photos are not exculpatory. Under this first component, both impeachment and exculpatory evidence may be considered "favorable." State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). Exculpatory evidence "creates a reasonable doubt about the defendant's guilt." State v. Hutton, 358 S.C. 622 (Ct. App. 2004). However, the photos are neither exculpatory nor impeaching. Instead, the photos confirm the officers' original trial testimonies. Specifically, the crowbar found in Petitioner's camper matched the pry marks on the victim's door frame perfectly. Also, the stolen items photographed in Petitioner's camper were the same items introduced into evidence. After reviewing the photos, Denny, one of Petitioner's trial attorneys, testified that the photos did not contradict the officers' testimonies at trial. Instead, the photos corroborated them. In his testimony, Solicitor Wagner added that he would have introduced the photos during trial because they were helpful to the State's case. Thus, the photos were not favorable to Petitioner.

Additionally, the photos are immaterial to Petitioner's guilt or punishment. Under this fourth component, "impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Clark, 315 S.C. at 388. Not only is this evidence inculpatory, but the photos also further confirm Petitioner's original conviction because they strengthen the State's case against him. Consequently, the introduction of the photos at trial would not provide a reasonable probability of a different outcome but only strengthen the original conviction. Thus, the photos are immaterial to Petitioner's case.

Respectfully, this Court should hold that the PCR properly ruled in finding that the State did not violate Brady v. Maryland because the photos are not exculpatory and are immaterial.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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