

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Nov 01 2023

On Writ of Certiorari to Spartanburg County
Honorable Brian M. Gibbons, Circuit Court Judge
Appellate Case No. 2023-000378

S.C. SUPREME COURT

GABRIEL RIOS,

Respondent,

vs.

THE STATE,

Petitioner.

APPENDIX

ALAN WILSON
Attorney General

LARA M. CAUDY
Appellate Defender

MARK R. FARTHING
Senior Assistant Deputy Attorney General

S.C. Commission on Indigent Defense
Office of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1330

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3727

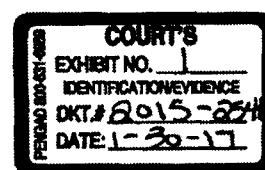
ATTORNEYS FOR PETITIONER

ATTORNEY FOR RESPONDENT

INDEX

Index	i
Appendix from First Post-Conviction Relief Action.	1
<u>Index</u>	2
Petition for Writ of Certiorari.	575
Return to Petition for Writ of Certiorari.	593
Order Denying Petition for Writ of Certiorari.	615
Remittitur.	616
Second Post-Conviction Relief Application.	618
“Amended P.C.R. Supplement.”	633
Petition for Writ of Mandamus.	644
Letter Requesting Return to Petition for Writ of Mandamus.	658
Return and Motion to Dismiss.	659
Return to Petition for Writ of Mandamus.	668
Amended Post-Conviction Relief Application.	676
Motion to Dismiss Hearing Transcript (April 5, 2021).	678
Order Denying State’s Motion to Dismiss.	695
Post-Conviction Relief Hearing Transcript (October 18, 2022).	698
Order Granting Post-Conviction Relief.	756
State’s Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e).	762
Motion to Reconsider Hearing Transcript (February 13, 2023).	770
Order Denying State’s Motion to Reconsider, Alter, or Amend Pursuant to Rule 59(e).	785

Judge



STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

C/A No.2015-CP-42-2541

Gabriel Jon Rios -- Applicant,

-vs-

State of South Carolina -- Respondent,

AMENDED POST CONVICTION RELIEF

APPLICATION PURSUANT TO:

RULE 15, SCRCiv.P.

Gabriel J. Rios
SCDC# 344751
Perry Corr. Inst.
430 Oaklawn Rd.
Pelzer, SC. 29669

Applicant,

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

C/A No.2015-CP-42-2541

Gabriel J. Rios -- Applicant,

-vs-

State of South Carolina -- Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of the enclosed Amended Post-Conviction Relief Application was served on parties whose name and address appear below, by placing the aforesaid in the U.S. Mail properly addressed, with first-class post-affixed this _____ day of _____, 2016.

Those Served:

Respectfully Submitted,

Alan Wilson
S.C. Attorney General
P.O. Box 11549
Columbia, SC. 29211

/s/ _____
Gabriel J. Rios

M. Hope Blackely
Spartanburg County
Clerk of Court
P.O. Box 3483
Spartanburg, SC. 29304-3483

INDEX

INDEX,.....	i
MEMORANDUM,.....	1
ISSUE (A),.....	2
ISSUE (B),.....	7
ISSUE (C),.....	10
CONCLUSION,.....	15
EXHIBIT (A),.....	16
EXHIBIT (B),.....	17

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

Gabriel J. Rios) C/A No.2015-CP-42-2541
Applicant,)
 -vs-) AMENDED POST CONVICTION RELIEF
State of South Carolina) APPLICATION PURSUANT TO:
Respondent,) Rule 15, SCRCiv.P.
_____)

COMES NOW, above captioned Applicant, Gabriel Rios, by and through attorney of record, respectfully moving this Honorable Court to amend the Original application in case number 2015-CP-42-2541 pursuant to Rule 15, of the South Carolina Rules of Civil Procedure.

Respectfully Submitted,
/s/ _____
Gabriel J. Rios
Applicant,

ISSUES PRESENTED

ISSUE (A)

WAS COUNSEL INEFFECTIVE FOR CONCEDED APPLICANT'S GUILT DURING CLOSING SUMMATION TO THE JURY, THAT WAS A FACT TO BE DETERMINED BY THE JURY?

FACTS

At the onset of the trial, the Trial Court made the following statement to the jury, as was recorded:

Now, let me remind you that the fact that this defendant has been charged and indicted, again is not evidence of his guilt. In fact, in this case he says I'm not guilty. What that means is the defendant -- I mean the State has the burden of proving each and every element of all charges against him by proof of, of beyond a reasonable doubt. Each charge stands on it's own, and will be considered by you at the end of this on its own. It will be your decision to determine whether or not the State has proven all or any of it's case by proof beyond a reasonable doubt at the end of this case.

Tr.p.91, L.5-15.

Again, the State has the burden of proving the defendant guilty by proof beyond a reasonable doubt.

Tr.p.91, L.21-22.

As is seen in the above the Court has instructed the jury that Applicant has entered a plea of [not guilty], and that pleas puts the burden of proof on the State. (emphasis original).

During opening statements to the jury the Prosecution told the jury that "on the morning of August the 14th of 2010 a woman was left alone in her home, face down on her bedroom floor, hands bound behind her back with tape, terrified, trembling and stunned ." Tr.p.99, L.13-16.

During the State's case in chief the State called Mrs. Gail Holt, the alleged victim. ("Holt" hereafter) as a witness. Holt was asked "what did he do with your hands behind your back?", to which Holt replied "he taped them." Tr.p.111, L.23-24.

As is seen the victim also testified that the perpetrator had "taped" her hands behind her back during the incident. Therefore, the burden here was on the State in this regards. However, during closing summation to the jury trial counsel made the following comments to the as was recorded:

Ladies and gentlemen, the tape at issue is painter's tape. Everybody's testified my client is a trained construction worker. He's been doing construction for years and years and years. He knows what painter's tape is.

It's easily taken off. You're not gonna use that in these circumstances unless you don't know what it is. It just doesn't make any sense, and they want you to just assume well, just -- yeah, but maybe it's just the only tape he had.

Surely there was other tape in that house. Surely, he knew it was cause they testified he knew that house intimately. But he didn't use that.

Tr.p.305, L.17-p.306, L.3.

As is seen in the above counsel has told the jury that Applicant used painter's tape to bound Holt's hands behind her back as that was "the only tape he had." Here the jury could have easily interpreted this statement as counsel telling the jury that his client used painter's tape because it was the only tape he had.

DISCUSSION

Applicant submits he was denied the effective assistance of counsel when counsel conceded to the jury that Applicant had taped the victim's hands behind her back with [painter's tape] because it was the only tape he had. (emphasis original).

The adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743 (87 S.Ct. 1396, 1399)(1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing.

When a true adversarial criminal trial has been conducted -- even if defense counsel may have made demonstrable errors -- the kind of testing envisioned by the Sixth Amendment has occurred.

But, if it loses it's character as a confrontation between adversaries, the constitutional guarantee is void. *Cronic v. United State*, 466 U.S. at 656-57, 104 S.Ct. at 2045-46 (footnotes - mitted).

A criminal defendant is also protected from unfairness in the criminal process by due process that his guilt be proved beyond a reasonable doubt [by the Prosecution].

The U.S. Supreme Court has explicitly held the Due Process Clause protects "the accused" against conviction except upon proof beyond a reasonable doubt of [every fact] necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072 (1970).

The Supreme Court has also stated that [due process commands no man shall lose his liberty unless the Government has borne the

burden of producing the evidence and convincing the fact-finder of his guilt. *Spiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 LE.2d 1460 (1958)(emphasis added). When, as here a defense attorney concedes that there is [no] reasonable doubt concerning the only factual issue in dispute, the Government has not been held to it's burden of persuading the jury that the defendant is guilty.

The U.S. Supreme Court recognized in Cronic, supra, that there are "circumstances that are so likely to prejudice the accused cost of litigating their effect in a particular case is unjustified. Id 466 U.S. at 658, 104 S.Ct. at 2046. The Court identified the complete denial of counsel or the deprivation of effective representation at a critical stage of an accused's trial as justifying a presumption of prejudice. Id at 659, 104 S.Ct. at 2047.

Here counsel's statement to the jury conveyed the impression that Applicant no doubt bound Holt's hands with tape. This statement during a critical stage of the proceeding (conceding guilt); caused a breakdown in the adversarial proceeding, that compels an application of the Cronic exception to the Strickland requirement of showing that the outcome of the proceeding would have been different without counsel's errors or omissions. See Cronic, 466 U.S. at 659-60, 104 S.Ct. at 2047.

In *Herring v. New York*, 422 U.S. 853, 95 S.Ct. 2550 (1975), the U.S. Supreme Court recognized the importance of the closing argument to a criminal defendant. The Court found that a New York law which allowed every judge in a non-jury criminal trial to deny counsel any opportunity to make a closing argument deprived

the accused of his constitutional right to the assistance of counsel. Id at 865, 95 S.Ct. at 2556.

The Court stated:

the very premise of our adversary system of criminal justice is the partisan advocacy on [both] sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free. In a criminal trial, which is in the end basically a fact-finding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case for judgment.

Id, at 862, 95 S.Ct. at 2555.

The Tenth Circuit has also recognized that an "attorney who adopts and acts upon the belief his client should be convicted [fails] to function in a meaningful sense as the government's adversary. *Osborn v. Shillinger*, 801 F.2d 612, 625 (10th Cir.1988)(quoting *Cronic*, 466 U.S. at 666, 104 S.Ct. at 2051.

In the instant case the State was trying to prove Applicant bound the victim's hands with [tape], thus essentially kidnapping which was one of the offenses for which Applicant was on trial for. Counsel's inept attempt failed when counsel told the jury "yeah maybe it's just the only tape he (Applicant) had. (emphasis)

Applicant submits he was denied the effective assistance of counsel at a critical stage of the trial and counsel's inactions undermined confidence in the outcome of the trial. Applicant should be granted a new trial on this issue.

ISSUE (B)

WAS COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER COMMENTS DURING CLOSING SUMMATION THAT SHIFTED THE BURDEN OF PROOF IN VIOLATION OF THE DUE PROCESS CLAUSE?

FACTS

During closing summation to the jury the Prosecution made the following comments without objection from counsel, as was recorded:

He's had over two and a half years, since this incident happened, to come up with this story and that is all it is is just a story. No one said they were with him that morning. Nobody, nobody that testified for him accounted for his whereabouts. Nobody.

If you believe the defense's story, you either believe, one, that Mrs. Holt is just flat outlying or, two, that she is dead wrong. If you believe their side, that's what you're basically saying to Mrs. Holt.

Can you look at her and say you're lying? Can you look at her and say you're dead wrong? Think about that?

Tr.p.322, L.24-p.323, L.12

Ask yourselves who are you going to believe, Mrs. Holt of his people?

Tr.p.323, L.18-19.

As is seen in the above cited summation the Prosecutions has invited the jurors to take sides against Applicant. Applicant submits this argument by the Prosecution's statements asking the jury "who are they going to beleive, Mrs. Holt or his (applicant) people", impermissibly shifted the burden of proof to Applicant.

The bears the burden of proof at [all] times and this argument cannot be construed in any other way than shifting the burden to Applicant. Applicant submits counsel should have objected to this line of argument.

DISCUSSION

A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and it's contents should stay within the record and reasonable inferences to it. *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002); accord *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998); see also *State v. Cooper*, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1991) ("A solicitor's closing must be carefully tailored so it does not appeal to the personal biases of the jurors."); *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) (holding that because the solicitor's duty is not to convict the defendant but to see justice done, the solicitor's closing argument must be "carefully tailored" to not appeal to the personal biases of jurors nor calculated to arouse their passions or prejudices); *State v. Rudd*, 355 S.C. 543, 548, 586 S.E.2d 153, 156 (Ct.App.2003) (same).

The solicitor's comments here "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, (1974). This determination requires the Court to look to "the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." *Bennett v. Angelone*, 92 F.3d 1336, 1345-46 (4th Cir.1996) (internal quotation marks omitted).

The State had last argument. These comments by the solicitor were the last things the jury heard from the attorneys. The solicitor did not just make an isolated remark, but deliberately

violated established rules regarding closing argument. Trial counsel could not have had any reasonable strategy for failing to object to these arguments and giving the trial judge a chance to cure the error. The State's closing contained four (4) egregiously improper arguments which, when taken as a whole, satisfies the Donnelly standard.

Applicant respectfully prays this Court will grant a new trial on the solicitor's improper closing argument that in effect impermissibly shifted the burden of proof.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

GABRIEL JON RIOS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001549

APPENDIX

DAVID ALEXANDER
Appellate Defender

ALAN WILSON
Attorney General

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

VALERIE GARCIA GIOVANOLI
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

ATTORNEY FOR PETITIONER

PAGES 501 – 570

INDEX

INDEX	i
TRIAL TRANSCRIPT (dated February 26 – 28, 2013).....	1
FINAL BRIEF OF APPELLANT	381
FINAL BRIEF OF RESPONDENT	395
FINAL REPLY BRIEF OF APPELLANT.....	415
APPLICATION FOR POST-CONVICTION RELIEF	426
RETURN.....	434
POST-CONVICTION RELIEF HEARING TRANSCRIPT (dated January 30, 2017).....	440
APPLICANT’S EXHIBIT 2 (PHONE RECORDS).....	485
COURT’S EXHIBIT 1 (AMENDED PCR APPLICATION).....	488
ORDER OF DISMISSAL.....	517
MOTION TO ALTER OR AMEND JUDGEMENT	531
MOTION FOR RECONSIDERATION PURSUANT TO RULE 59(e), SCRCF	537
RETURN TO APPLICANT’S MOTION TO ALTER OR AMEND THE JUDGMENT	541
AMENDED ORDER OF DISMISSAL.....	544
INDICTMENTS	561

THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:
Applicant’s Exhibit 1 (CD of 911 call)

ISSUE (C)

WAS COUNSEL INEFFECTIVE FOR FAILING TO IMPEACH THE STATE'S STAR WITNESS THAT CONTRADICTED HER TRIAL TESTIMONY IN REGARDS TO THE IDENTITY OF THE PERPETRATOR?

FACTS

Petitioner submits he was denied the effective assistance of counsel during trial when counsel allowed Gail Holt to identify Petitioner as the perpetrator when she had told 911 that she did not know who the perpetrator was and as a result of this deficiency Petitioner was denied his right to cross-examination that is guaranteed by the Sixth Amendment.

During trial Gail Holt testified that getting ready to take the dog out and it had been day light for some time, and she heard glass break, Tr.p.107, L.20-23. She said she had thought something had broken and fallen, so she started down the hall to check and that's when she encountered a man, who she identified as Petitioner, Tr.p.107, L.25-p.108, L.11.

This identification testimony was crucial for the State and trial counsel should have impeach her in regards to this damaging testimony.

IN support of this contention Petitioner submits exhibit (A), and (B) attached hereto. Exhibit (A) is the Forensic Report where Deputy Welch had responded to a home invasion where a unknown suspect had forced entry into the victim's home. Exhibit (B) is Deputy Welch's Narrative Report, where Deputy Welch states that he responded to the victim's home and spoke to Phillip (Gail Holt's husband) and Phillip told Deputy Welch he received a call from his wife Gail that an unknown suspect broke into the residence and

tied her up.

Counsel's failure to impeach Gail Holt's direct identification of Petitioner as the perpetrator in the eyes of the jury was very damaging to Petitioner and had a substantial and injurious affect on the jury in reaching their verdict against Petitioner.

DISCUSSION

The test formulated in *Strickland v. Washington*, 466 U.S. 668, the Court identified two components to any ineffective assistance of counsel claim: (1) deficient performance and (2) prejudice. IN the instant case counsel's performance fell below and objective standard of reasonableness when counsel failed to impeach a star witness for the State. The prejudice incurred is easily seen because Petitioner was denied the right to adequately confront the witness against him that denied him a fair trial.

In *Bruton v. United States*, 391 U.S. 123 (1968), the U.S. Supreme Court clearly established the general right to confront one's accusers, and the right to adequately cross-examination of witnesses against him.

In *Pointer v. Texas*, 380 U.S. 400, the U.S. Supreme Court had confirmed "that the right of cross-examination [is] included in the right of an accused in a criminal trial to confront the witnesses against him" secured by the Sixth Amendment, *Id* at 404; [a] major reason underlying the constitutional confrontation rule is to give the defendant charged with a crime an opportunity to cross-examine the witness against him. *Id* 406-07.

Prior inconsistent statements may be found from [any] number of sources and they may be written or oral. Sources for prior inconsistent statements include, (1) statements made to a friend or

or acquaintance, *State v. Galloway*, 263 S.C. 585, 211 S.E.2d 885 (1975); or (2) statements made to an investigator. See *Varnadore v. Nationwide Mut. Ins.*, 239 S.C. 155, 345 S.E.2d 711 (1986); also see *State v. Thompson*, 305 S.C. 496, 409 S.E.2d 420 (Ct.App.1991) (law enforcement investigator).

The South Carolina Supreme Court recently reversed a murder conviction in PCR because of trial counsel's failure to impeach a key witness with prior inconsistent statements. *Rutland v. State*, 415 S.C. 570, 785 S.E.2d 350 (2016). In Rutland, trial counsel failed to cross-examine the State's star witness with prior inconsistent statements. Id at 573-74, 785 S.E.2d at 351. The Court held trial counsel was ineffective and the defendant was prejudiced because of the failure to impeach the witness with the prior statements. Id at 577-78, 785 S.E.2d at 353-54. The S.C. Supreme Court stated in Rutland that "had trial counsel discredited [the witness's] testimony by raising the prior inconsistent statements on cross-examination, [the witness's] credibility would have suffered." Id.

The Court noted that the solicitor in Rutland relied heavily on the key witness in closing argument. Id at 578, 785 S.E.2d at 354 ("Any question as to whether petitioner was prejudiced may be answered by looking to the solicitor's reliance on Kestner's trial testimony.").

The solicitor in Petitioner's case repeatedly relied on Holt's testimony during closing argument. Based on Gail Holt's testimony, the solicitor argued that:

You have Mrs. Holt's testimony and identification. She told you she knew it was him., Tr.p.320, L.17-18

She knew him. She had been around him at the business. He had been inside her home. She had plenty of opportunities to see him.

Tr.p.320, L.21-24.

She knew his voice. She knew his accent. She knew his face. She immediately saw him when she came face-to-face. There is no doubt in her mind whatsoever. She got up there and she told you that she did not hesitate one bit.

Tr.p.320, L.25-p.321, L.3.

She knew him as Gabe and all she's ever testified to is Gabe.

Gabe is Gabriel Rios. That's the man she knew. That's the man she knew worked for her husband. That's the man who attacked her. That's the man who did this.

Tr.p.321, L.5-10

She made a solid identification, ladies and gentlemen, and it's up to you to believe that. But I would submit to you that her identification is pretty darn solid.

Tr.p.321, L.19-21.

Mrs. Holt told you that she's absolutely sure

Tr.p.321, L.25.

If you believe the defense's story, you either believe one, that Mrs. Holt is just flat out lying, or two, that she is dead wrong. If you believe their side, that's what you're basically saying to Mrs. Holt.

Can you look at her and say you're lying?

Can you look at her and say you're dead wrong?

Tr.p.323, L.6-11

Ask yourselves who are you going to believe Mrs. Holt or his people?

Tr.p.323, L.18-19

As is seen in the instant case the solicitor here just as in Rutland, supra heavily relied on the State's star witness's testimony in closing argument. The same factors the Court used to find prejudice in Rutland exist in Petitioner's case. This Court should reverse and grant a new trial and allow the jury to assess

Gail Holt's impaired credibility with the knowledge that she initially told her husband and 911 that she did not know who the perpetrator was. Id.

CONCLUSION

WHEREFORE, based on the foregoing statement of issues presented and citations of authorities relied on Applicant respectfully prays this Honorable Court will find that counsel rendered ineffective assistance of counsel and as a result the Applicant was denied a fair trial.

THEREFORE, Applicant respectfully asks this Court to grant a new trial.

Respectfully Submitted,

/s/ _____

Gabriel J. Rios

Applicant,

Enlight
A

09/13/10
10:06

Spillman Data Systems, Inc.
Deputy Supplemental Report

723
Page: 4

Forensic Report
Spartanburg County Sheriff's Office

Case No: 2010080848
Offense Type: Home Invasion
Victim: Holt, Gail
Location: 639 Perrin Dr.
Patrol Ofc: Welch, D.
Forensic Ofc: Howard, B.
Date/Time: 08/14/10 9:32 AM

I responded to the above address at the request of Deputy Welch, D. in regards to a home invasion. Inv. Williams, L. was also on seen when I arrived. Some unknown suspect forced entry into the victim's home by breaking out a door panel in the carport door leading into the kitchen of the home. I photographed the incident scene along with the damage to the home and several objects the suspect had left behind or had moved. There was a window pane broken out of the door in the carport leading to the kitchen. There was glass in the kitchen floor with a small piece of purple tape (item 1.) mixed in with it. In the living room on an end-table between two chairs was a ball of purple tape (item 2) the victim stated the suspect used to tie her up. Down the hall leading to the master bedroom was a black gun case (item 14), a triangular shaped piece of broken glass (item 3), and a brown rock (item 4). In the office bedroom, the first bedroom on the left down the hall the suspect had attempted to take a large water container filled with coins. In that same room there was a brown gun case (item 15) that the suspect moved and opened. In the master bedroom at the end of the hall there were several items scattered about and drawer from a large jewelry (item 13) box pulled out and on the floor. On the dresser in the master bedroom was a roll of purple tape (item 5) that appeared to match the same tape used to tie up the victim. In the master bedroom on the floor was the victim's wallet (item 10) and check book (item 9) she stated the suspect took out of her purse and removed money from. Touch DNA samples were taken from the lid of a small jewelry box on the dresser (item 6) and the handles of the large jewelry box (item 8) both in the master bedroom. A touch DNA sample was taken from the handle/locks (item 7) of the black gun case in the hallway. Mr. Phillip Holt gave a buccal swab (item 11), as well as Mrs. Gail Holt (item 12). The entry and exit points, along with various items were processed for latent prints. Two partial latent prints (A,B) were removed from the glass door in the carport leading to the kitchen. One partial latent print (C) was removed from a ball canister lying in the floor of the master bedroom. All the above items were collected as evidence and taken to the Sheriff's Office for processing. See property sheet for further details. The items were secured in the evidence room in the Crime Lab at the Sheriff's Office till they could be processed. Item #'s 1, 2, 3, 5, 9, 10, 13, 14, and 15 were processed at the Sheriff's Office for latent prints. A DNA swab was taken from the edges of item 3 the triangular piece of glass collected at the incident location. A hair (item 17) was found in the balled up piece of tape that was used to tie up the victim. The hair sample was collected and placed into evidence. A partial latent print was removed from the triangular piece of glass item 3 that Mrs. Holt stated the suspect confronted her with. Inv. Shaffer took elimination prints from Mr. and

Exhibit
C

Narrative

Narrative

08/13/2010 Page 4 of 8

I RESPONDED TO 639 PERRIN DR IN REF TO A HOME INVASION. UPON ARRIVAL PHILLIP STATES HE LEFT THE RESIDENCE AT APPROX 0630 THIS MORNING. HE RECIEVED A CALL FROM HIS WIFE GAIL THAT AN UNKNOWN SUSPECT BROKE INTO THE RESIDENCE AND TIED HER UP. PHILLIP RECIEVED THE CALL FROM GAIL AT APPROX 0809 HRS THIS DAY. PHILLIP INTURN WENT HOME AND CALLED 911 WHILE STILL ENROUTE. OFFICERS ARRIVED AT APPROX 0836 HRS. GAIL STAES SHE WAS IN BED WHEN SHE HEARD GLASS BREAKING. GAIL GOT UP TO INVESTIGATE AND WAS MET IN THE HALLWAY BY A BLACK MALE GAIL DESCRIBED AS A MIDDLE AGED MALE WITH A BALL CAP ON. HE ASKED HER WHERE THE SAFE WAS AND CONTINUED ASKING ABOUT MONEY. THE SUSPECT ORIGINALLY CONFRONTED GAIL IN THE HALLWAY WITH A LARGE PIECE OF GLASS. THE SUSPECT TOOK HER BACK TO THE BEDROOM WHERE HE BOUND HER HANDS WITH BLUE TAPE. SUSPECT TOOK A SMITH AND WESSON .357 HANDGUN WHICH WAS ON THE BEDPOST AND CONTINUED TO DEMAND MONEY, THE SAFE COMBINATION, AND THE LOCATION OF HER PURSE. SUSPECT RETRIEVED HER PURSE AND TOOK HER CELLPHONE UNKNOWN MAKE, \$220 IN CASH FROM HER PURSE ALONG WITH THE KEYS TO THE BELOW LISTED VEHICLE. SUSPECT THREATENED TO KILL HER IF SHE GOT UP. GAIL HEARD THE SUSPECT LEAVE AND WAITED SEVERAL MINUTES BEFORE LEAVING THE BEDROOM WHERE SHE WAS ABLE TO UNDO THE TAPE AND CALL HER HUSBAND. ID OFFICER HOWARD ARRIVED ON SCENE, INV L. WILLIAMS ARRIVED ON SCENE. VEHICLE TAKEN WAS A 2001 LEXUS 300RX WHITE IN COLOR BLACK LEATHER INTERIOR, TAG #EHD844, VIN # JTJGF10U610101547. THIS VEHICLE WAS ENTERED NCIC WITH NIC# V094787186.

Signature

Officer Welch D

Badge/ID # 3491

Date 08/14/2010

Signature

2016 WL 1239869

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION HAS NOT BEEN
RELEASED FOR PUBLICATION IN THE
PERMANENT LAW REPORTS. UNTIL RELEASED,
IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of South Carolina.

Fred R. **RUTLAND**, Petitioner,

v.

STATE of South Carolina, Respondent.

Appellate Case No. 2014-000381.

No. 27614.

Submitted Jan. 15, 2016.

Decided March 30, 2016.

Synopsis

Background: Defendant filed post-conviction relief action, following his conviction for murder, possession of a firearm during the commission of a violent crime, and pointing a firearm. The Circuit Court, Lexington County, L. Casey Manning, Post-Conviction Relief Judge, denied relief. Defendant sought certiorari review.

[Holding:] The Supreme Court, Pleicones, C.J., held that defendant was prejudiced by trial counsel's deficient performance.

Reversed.

West Headnotes (7)

[1] **Criminal Law**

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[2] **Criminal Law**

In a post-conviction relief proceeding, the burden is on the applicant to prove the allegations in his application.

Cases that cite this headnote

[3] **Criminal Law**

Factual findings of the post-conviction relief court will be upheld if there is any evidence of probative value to support them; however, the findings of a post-conviction relief court will not be upheld if no probative evidence supports those findings.

Cases that cite this headnote

[4] **Criminal Law**

In order to prove trial counsel was ineffective, the post-conviction relief applicant must show: (1) counsel's performance was deficient, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[5] **Criminal Law**

Regarding the deficiency prong of a claim for ineffective assistance of trial counsel, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[6] **Criminal Law**

Regarding the prejudice prong of a claim for ineffective assistance of trial counsel, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different; a reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

[7] **Criminal Law**

Trial counsel's deficient performance in failing to cross-examine State's witness regarding prior inconsistent statements that victim was armed prejudiced defendant in murder trial, and thus, amounted to ineffective assistance; credibility of witness, who was only independent witness to events, would have suffered if confronted with prior statements that supported defendant's claim of self-defense, solicitor relied on and emphasized witness's testimony during closing arguments, and jury asked question about whose fingerprints were on gun that defendant claimed victim used and solicitor suggested could have been planted, indicating jury focused on whether victim was armed. U.S.C.A. Const.Amend. 6.

Cases that cite this headnote

ON WRIT OF CERTIORARI.

Appeal from Lexington County; L. Casey Manning, Post-Conviction Relief Judge.

Attorneys and Law Firms

Appellate Defender Susan Barber Hackett, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General Patrick Lowell Schmeckpeper, both of Columbia, for Respondent.

Opinion

CHIEF JUSTICE PLEICONES.

*1 Petitioner was convicted of murder, possession of a firearm during the commission of a violent crime, and pointing a firearm. He was sentenced to life imprisonment without parole. This Court affirmed petitioner's convictions and sentences on direct appeal. *State v. Rutland*, Op. No. 95-MO-263 (S.C. Sup.Ct. filed Aug. 25, 1995).

Petitioner filed a post-conviction relief ("PCR") action,¹ and sought certiorari to review the PCR judge's order denying relief. We granted the petition for a writ of certiorari on two issues: (1) whether the PCR judge erred in finding trial counsel was not ineffective by failing to cross-examine the State's "key" witness regarding prior inconsistent statements;² and (2) whether the PCR judge erred in finding trial counsel was not ineffective by failing to preserve for appellate review the trial judge's refusal to charge the jury on the defense of others. Because we find the PCR judge erred as to the first issue, we reverse the PCR judge's decision.³

FACTS

Petitioner was romantically involved with the victim's estranged wife, Sally Peele ("Peele"), and both contend the victim was abusive and violent. On the morning of the victim's death, an altercation occurred at the Peele residence between petitioner, Peele, and the victim. Later that day, Peele and petitioner drove to Bow Wow Boutique ("Boutique"), a pet grooming business, to inquire about purchasing a vehicle from employee Kimberly Kestner ("Kestner"). The victim subsequently arrived at the Boutique, where he was shot and killed by petitioner. The only individuals in the Boutique at the time of the shooting, in addition to petitioner and the victim, were Peele and Kestner.

Prior to trial, Kestner gave a written and signed statement to law enforcement to the effect that the victim was armed when he was shot inside the Boutique. In the signed statement, Kestner attested, "[The victim] came in. He reached behind him and pulled a gun. I heard two shots and [the victim] fell." Kestner gave a similar statement to a newspaper reporter, who later wrote a published article quoting Kestner as stating, "[the victim] said nothing. He pulled his gun out and was fixing to shoot, ... It scared me to death. I couldn't understand why he was doing this."

At trial, Kestner testified she had a good view of the victim as he walked into the Boutique,⁴ and the only thing she saw in the victim's hands was a pack of cigarettes, which he placed on the counter as soon as he walked in. Kestner testified that as the victim entered the Boutique, petitioner put his pack of cigarettes in his mouth and reached behind his back, at which point the victim also reached behind his back. Kestner testified she then heard two gunshots, and that she never saw the victim possess a gun, or utter a word during the quick exchange. Kestner testified that after the victim was shot, she witnessed petitioner holding a handgun, and saw a second handgun lying on the floor.⁵

*2 On cross-examination, trial counsel failed to question Kestner as to her prior inconsistent statements made to law enforcement and to the newspaper reporter.

Peele testified the victim entered the Boutique, drew his 9mm handgun, chambered a round,⁶ and pointed the handgun at Peele. Peele stated the victim had a "strange" look in his eyes she had seen before.⁷ Peele described that as she started moving toward the victim, she heard petitioner beg him, "Please don't," repeatedly. Peele testified that, in shock, she turned to look at petitioner, who was holding a .25 caliber handgun pointed towards the floor. Peele testified that when the victim saw petitioner's handgun, he shifted his aim to petitioner, at which point Peele saw the victim pull the trigger of the 9mm handgun. Peele testified that at that moment, she heard gunshots, and the victim collapsed.

Petitioner's testimony largely corroborated Peele's version of events. However, petitioner added he had concealed the .25 caliber handgun and carried it into the Boutique due to threats made earlier that day by the victim to "blow [petitioner's] shit away, fuck [petitioner's] world up." Petitioner explained that as he saw the victim quickly approaching the front door of the Boutique, he tried to avoid a confrontation by exiting through the back of the building, but when petitioner could not find an escape route, he removed the .25 caliber handgun from his belt. Petitioner recalled that when he then encountered the victim, the victim reached behind his back, pulled out a handgun, cocked it, and aimed it at Peele from less than one foot away. Petitioner testified the victim appeared "wild," and was unresponsive to petitioner's verbal attempts to calm him down.

Petitioner stated the victim then aimed the 9mm handgun at petitioner and pulled the trigger. Petitioner explained seeing

the victim pull the trigger prompted him to shoot the victim once, which did not faze the victim, and as petitioner saw the victim continue to pull the trigger, petitioner shot the victim three more times. Petitioner described that in the moment, he believed he himself had been shot.

At the PCR hearing, petitioner argued, *inter alia*, trial counsel was ineffective for failing to cross-examine Kestner as to her prior inconsistent statements that the victim was armed at the time of the shooting.

Trial counsel agreed Kestner's testimony at trial was important as she was the only disinterested, objective witness to the shooting. Trial counsel testified he was aware of Kestner's prior inconsistent statements, and acknowledged they could have been used to impeach her trial testimony, but explained he was unable to locate the newspaper article prior to trial, and admitted his failure to use the police report was due to his "oversight." Trial counsel further acknowledged that whether the victim was armed was an important issue at trial, and agreed the statement given under oath to law enforcement could have been used not only to impeach Kestner, but also could have been entered into evidence if she had denied giving it.

*3 The solicitor testified he was aware of Kestner's prior inconsistent statements, and agreed her trial testimony was essential as she was the only independent witness, and any inconsistencies in her statements could have negatively affected her credibility.

Although Kestner did not testify at the PCR hearing, petitioner produced the signed police statement wherein Kestner stated the victim was armed at the time of the shooting. Petitioner also produced affidavits by several individuals swearing that after the incident, Kestner stated to them the victim was armed when he was shot.

In his order denying relief, the PCR judge determined trial counsel was deficient for failing to impeach Kestner with her prior inconsistent statements; however, the PCR judge further found petitioner failed to prove he was prejudiced by trial counsel's deficient performance. We granted petitioner's petition for a writ of certiorari to review the PCR judge's decision.

ISSUE

Did the PCR judge err in finding trial counsel was not ineffective by failing to cross-examine the State's "key" witness as to her prior inconsistent statements?

LAW/ANALYSIS

The PCR judge found that although trial counsel was deficient in failing to cross-examine Kestner as to her prior inconsistent statements, petitioner failed to meet his burden of proving trial counsel's deficiencies were prejudicial. We disagree.

[1] [2] [3] A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 669, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citation omitted). This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them. *Webb v. State*, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984) (citation omitted). However, this Court will not uphold the findings of a PCR court if no probative evidence supports those findings. *Holland v. State*, 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996) (citing *Cartrette v. State*, 323 S.C. 15, 323 S.C. 15, 448 S.E.2d 553 (1994)).

[4] In order to prove trial counsel was ineffective, the PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Ard*, 372 S.C. at 331, 642 S.E.2d at 596 (citing *Strickland*, 466 U.S. at 687; *Rhodes v. State*, 349 S.C. 25, 30–31, 561 S.E.2d 606, 609 (2002)).

[5] [6] Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases. *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013) (quoting *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985)). Regarding the prejudice prong, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (citing *Strickland*, 466 U.S. at 694). A reasonable

probability is a probability sufficient to undermine confidence in the outcome of the trial. *Strickland*, 466 U.S. at 694.

*4 [7] In denying petitioner's PCR application, the PCR judge relied on petitioner's failure to present Kestner as a witness at the PCR hearing and to produce extrinsic evidence as to her prior inconsistent statements.

We agree with the PCR judge's finding that there is substantial evidence trial counsel was deficient for failing to cross-examine Kestner as to her prior inconsistent statements. See *Strickland*, 466 U.S. at 688; *Webb*, 281 S.C. at 238, 314 S.E.2d at 839. However, we find the PCR judge's ruling as to the prejudice prong is not supported by the evidence in the record. See *Holland*, 322 S.C. at 113, 470 S.E.2d at 379 (stating the Court will not uphold findings of a PCR court if no probative evidence supports those findings). Principally, the PCR judge was incorrect in finding petitioner failed to produce extrinsic evidence of Kestner's statements at the PCR hearing. To the contrary, petitioner produced both the written copy of Kestner's statement to law enforcement, as well as affidavits from individuals attesting to have heard Kestner state the victim was armed at the time of the shooting. Accordingly, there is no evidence of probative value supporting the PCR judge's ruling that petitioner failed to present extrinsic evidence of Kestner's prior inconsistent statements. See *Holland*, 322 S.C. at 113, 470 S.E.2d at 379; *Webb*, 281 S.C. at 238, 314 S.E.2d at 839.

Further, had trial counsel discredited Kestner's testimony by raising the prior inconsistent statements on cross-examination, Kestner's credibility at trial would have suffered. Notably, petitioner admitted to shooting the victim, but maintained his actions were in self-defense; both petitioner and Peele testified at trial that the victim entered the Boutique and immediately brandished his 9mm handgun; and the only other witness to the shooting—and the only disinterested, objective witness—was Kestner. As a result, we find there is a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting. See *Strickland*, 466 U.S. at 694; see also, e.g., *Thomas v. State*, 308 S.C. 123, 124, 417 S.E.2d 531, 532 (1992) (finding trial counsel's performance was deficient and prejudicial in failing to call as witnesses medical personnel who were the only individuals that could cast doubt on the victim's identification of the petitioner). Moreover, had Kestner denied making the

statements during cross-examination, trial counsel could have introduced as evidence the police report or the newspaper article, which we find also would have damaged Kestner's credibility as to her version of events leading up to the shooting. See Rule 613(b), SCRE.

Any question as to whether petitioner was prejudiced may be answered by looking to the solicitor's reliance on Kestner's trial testimony, and the questions posed by the jury upon deliberation. During closing arguments, the solicitor emphasized Kestner was the only "independent witness," and relied upon her testimony to argue the victim was never armed, stating, "[The victim] never ever pulled that weapon. [Kestner] didn't see it.... Kim Kestner independent witness. Kim Kestner never ever saw [victim] with [a gun] ever." The solicitor further insinuated the victim never possessed the 9mm handgun, suggesting it could have been planted at the scene of the shooting. We find the solicitor's reliance on Kestner's uncontroverted trial testimony highlights trial counsel's deficient performance, and supports a finding the deficient performance undermines confidence in the outcome of the trial. See *Strickland*, 466 U.S. at 694 (establishing the prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the result of the trial would have been different, which requires a probability sufficient to undermine confidence in the outcome of the trial).

*5 Additionally, it is clear the jury was focusing on whether the victim was armed. Out of several questions asked by the jury, one of the initial questions was whose fingerprints were on the 9mm handgun. We find this inquiry indicates the jury was considering the State's argument the victim was never armed, and was focusing "critical attention" on the sequence of events surrounding the shooting, which was undoubtedly impacted by Kestner's trial testimony, and would

have been impacted by trial counsel's impeachment of those statements. See *State v. Blassingame*, 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978) (finding when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked). Moreover, although the jury was re-charged on the elements of murder, manslaughter, mutual combat, and self-defense at its request at least twice, the jury foreperson indicated she was unsure the jury could reach a unanimous verdict on any indictment except one.⁸

The trial judge informed the foreperson he did not want to keep the jury from their families, but instructed the jury that it was important for them to work together to agree on a verdict, and asked that they continue to deliberate. Although the jury had been deliberating over six hours at that point, the jury returned a verdict on all indictments ten minutes later. Our finding that trial counsel's deficient performance undermines confidence in the outcome of petitioner's trial is supported by the jury's struggle to reach a unanimous verdict on all indictments in this case. See *Strickland*, 466 U.S. at 694.

CONCLUSION

For the reasons given above, we reverse the PCR judge's order denying petitioner PCR relief.

BEATTY, KITTREDGE and HEARN, JJ., concur. FEW, J., not participating.

All Citations

— S.E.2d —, 2016 WL 1239869

Footnotes

- 1 The State consented to petitioner filing his PCR application after the statute of limitations had run. See S.C.Code Ann. § 17-27-45(A) (2014).
- 2 Prior inconsistent statements are admissible pursuant to Rule 613, SCRE.
- 3 We decline to address petitioner's second argument as our holding on the first issue is dispositive. See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting an appellate court need not address remaining issues on appeal when the disposition of a prior issue is dispositive (citation omitted)).
- 4 The State presented testimony by Robin Hunt that the encounter at the Boutique was prearranged by Peele; however, that testimony was recanted in 1997 in a sworn affidavit.
- 5 The 9mm handgun was recovered on the floor four to five feet from the victim with one bullet in the chamber and a full magazine. Peele later testified she moved the 9mm after the shooting in order to roll the victim over and administer CPR with petitioner's assistance.

- 6 Specifically, Peele's testimony was, "He come through the front door fairly quick; stopped in front of the gate; put his hands behind him; pulled that nine out; shhh, shhh; loaded."
 - 7 Peele had previously testified as to the victim's demeanor when he was angry and abusive, **stating**, "I've seen him angry plenty of times. You can see it in his—you can see it in his eyes when he was angry."
 - 8 The foreperson did not disclose on which indictment she believed the jury could reach a unanimous verdict.
-

End of Document

© 2016 Thomson Reuters. No claim to original U.S. Government Works.

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
 OF THE SEVENTH JUDICIAL CIRCUIT

Gabriel Jon Rios,
 S.C.D.C. No. 344751,

2015-CP-42-2541

Applicant,

ORDER OF DISMISSAL

v.

State of South Carolina,

Respondent.

2017 MAR 27 PM 1:03
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 3, 2015. Respondent made its Return on February 11, 2016. An evidentiary hearing was held on January 30, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Caitlin B. Hastings represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel Matthew Shealy, Esquire, also testified. Additionally, Applicant's daughter testified at the evidentiary hearing. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, Applicant's records from the South Carolina Department of Corrections, the 911 tape, AT&T phone records, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for burglary—1st degree (2010-

GS-42-6830), armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6831, counts one and two), grand larceny, value \$10,000 or more (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and assault and battery, first degree (2010-GS-42-6834). Matthew Shealy, Esquire, represented Applicant. On February 26, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Applicant guilty as indicted. Judge McIntosh sentenced Applicant to imprisonment to concurrent terms of 40 years for burglary, 30 years for armed robbery and kidnapping, and ten years for assault and battery, and a consecutive term of five years for possession of a weapon.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 1, 2015. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). The remittitur was returned on April 10, 2015.

ALLEGATIONS

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of trial counsel in that:
 - a. "prior and during trial [in violation] of his rights pursuant to the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution"
 - b. Counsel "failed to object to Solicitor shifting the burden" during his closing argument
 - c. Counsel "failed applicant by conceding his guilt" in his closing argument
 - d. Counsel failed to adequately advise Applicant
 - e. Counsel failed to adequately investigate
 - f. Counsel failed to admit the 911 tape and AT&T phone records at trial

¹ The State elected to proceed on the armed robbery charge and dismissed the grand larceny charge before trial.

- g. Counsel failed to advise Applicant that he should testify at trial
- h. Failure to impeach
- i. Failure to put forth an alibi defense

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. As a matter of general impression, this Court finds Counsel's testimony to be credible and Applicant's testimony to be neither credible nor legally relevant. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Summary of the Testimony

Applicant testified that he met with Counsel approximately three times. Applicant testified that the solicitor's closing argument included burden-shifting statements because the solicitor said Applicant had no proof that he was innocent but was merely telling a story. Tr. p. 323. Applicant testified that he believes Counsel failed to object to this statement but should have. Applicant further testified that Counsel failed him by making statements that conceded his guilt during his closing argument. Specifically, Applicant testified that the statements regarding the use of painter's tape to bind the victim conceded Applicant's guilt. Tr. p. 305. Applicant testified that Counsel did review the Rule 5 discovery materials with him; however, Applicant testified that Counsel never reviewed the 911 tape with him nor did he admit it into evidence. Applicant testified that he believes the 911 tape shows his innocence because the victim did not identify him during the call even though she claimed to recognize him right away because he used to work for her husband. Applicant additionally testified that he believes Counsel was

ineffective for failing to admit into evidence the 911 tape and the AT&T phone records of Ester Boyd because he claims that he made about eight phone calls to his wife from Ester Boyd's home phone during the time of the crime. Applicant testified that if Counsel had admitted the tape and phone records into evidence, it would have established an alibi defense for Applicant. Applicant testified that he believes Counsel was ineffective for failing to use this evidence to establish an alibi defense. Applicant further alleged that Counsel was ineffective for failing to advise Applicant that he should testify at his trial. Applicant stated that if he had testified during the trial he would have talked about how there was no DNA evidence that matched him except for the thumbprint on the broken glass. Applicant testified that this thumbprint could have been from previous visits to the victim's home since he used to work for her husband. Applicant further testified that he would have argued to the jury that this lack of DNA evidence at the scene showed that he could not be in two places at once since he alleges he was at Ester Boyd's home calling his wife. Applicant admitted that Counsel explained to him that it was his decision as to whether he would testify at trial. Applicant testified that Counsel advised him against him testifying but agreed that Counsel explained it was ultimately his decision.

Applicant's daughter also testified at the PCR hearing. She testified that she remembered speaking with her father on the phone the morning of the incident. She testified that she believed she spoke with him around 7:02 A.M.

Counsel testified that he has been practicing law for a little over nine years, the majority being criminal law. Counsel testified that, at the time of Applicant's trial, he had previously handled other trials with similar charges. Counsel testified he became involved with Applicant's case about four months before trial—other attorneys within his office had handled different stages of Applicant's case. During these four months, Counsel testified he met with Applicant

four times and also spoke with various members of his family. Counsel testified he reviewed all discovery with Applicant. He also discussed with Applicant the elements of the charges and possible defenses to those charges and advised Applicant concerning his right to testify. Counsel investigated the leads that Applicant provided to him, including a possible alibi defense. However, Counsel testified that there were problems with this defense, specifically, Applicant was only able to establish a possible partial alibi.

Counsel testified Applicant's alleged timeline that he was calling his wife from Ester Boyd's home still allowed time for him to be at the scene of the crime. Counsel testified that he conducted a drive test run of Applicant's chain of events on the day of the incident. He stated that test run showed that Applicant could only establish a partial alibi, at best. Additionally, Applicant was unable to provide Counsel with any alibi witnesses that saw him during the time of the crime. However, Counsel still attempted to have the trial judge charge the jury with a partial alibi instruction, which the trial judge ultimately refused to do. Tr. p. 288.

Counsel further testified that he did not attempt to admit the 911 tape into evidence because the call was made by the victim's husband. Counsel said he felt the tape bared greater risks than potential benefits, and he felt he introduced the beneficial information of the 911 tape through other evidence. Counsel also testified that he did not attempt to introduce the phone records because they don't indicate who was making the call only that a call was made.

Counsel also testified regarding the comments in his closing argument referring to the use of painter's tape during the crime. Counsel testified the theme of his closing argument was that the State wanted the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily

broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06.

Counsel testified that he remembered making a couple motions in limine, a motion to suppress the in-court identification and the alleged rock that was used to break the window, and motions for a directed verdict and a new trial. Counsel also testified that he objected to the trial judge's refusal to charge a partial alibi instruction and to the introduction of the piece of glass bearing the thumbprint. Tr. pp. 16, 24, 46, 198, 254, 288, 371. Additionally, Counsel testified that he maybe should have objected to the solicitor's remarks during his closing statement but also testified that if he had noticed something troublesome at the time, he would have objected.

Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at

690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Failure to Object to Solicitor's Alleged Burden-Shifting Statements

Applicant alleged that Counsel was ineffective for failing to object to the alleged burden-shifting statements made by the solicitor during his closing argument. This Court finds Applicant has failed to show that Counsel's failure to object to these statements resulted in a deficiency that prejudiced the outcome of his trial. Counsel is an experienced criminal defense attorney who has handled many cases similar to Applicant's. Counsel testified that if at the time of the trial, the solicitor's statements appeared troubling to Applicant's case, he would have objected. Counsel admits in hindsight he possibly should have objected to those statements. However, this Court finds that Counsel's performance was still within the range of reasonable competence required for criminal cases. Further, this Court finds Applicant has failed to show any resulting prejudice. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Alleged Concession of Applicant's Guilt

Applicant alleged Counsel was ineffective for allegedly making statements that conceded

his guilt during his closing statement. This Court finds Applicant has failed to show that Counsel's statements were deficient or resulted in any prejudice. Counsel testified the theme of his closing argument was that the State wanted to the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06. This Court finds Counsel's statements during his closing argument were part of Counsel's strategy and within the range or reasonableness for criminal representation. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Further, this Court finds Applicant did not suffer any prejudice from these statements. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Adequately Investigate

Applicant alleged at the evidentiary hearing that Counsel failed to conduct a proper investigation. This Court finds Applicant has failed to show that Counsel was deficient or that he was prejudiced by any alleged deficiency. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and

making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Here, Counsel testified that he conducted a test run and explored the possibility of an alibi defense. Counsel also testified he spoke with Applicant's family members. Additionally, the testimony reflects that Counsel reviewed all the evidence in the case, discussed possible defenses with Applicant, and pursued leads that Applicant provided. Specifically, Counsel pursued a possible alibi defense. Such an investigation was reasonable under the circumstances. See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). This Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, Applicant has failed to show Counsel was deficient in investigating or developing a defense.

Likewise, Applicant has failed to demonstrate any prejudice resulting from Counsel's alleged failure to investigate. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). This Court can only speculate as to what additional investigation could have been done and what evidence that investigation would have uncovered. Applicant testified on his own behalf but presented no other witnesses and produced no evidence of what Counsel might have uncovered had he conducted any additional investigation. Therefore,

Applicant has failed to demonstrate any alleged deficiency prejudiced him. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Accordingly, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Admit 911 Tape and AT&T Phone Records into Evidence

Applicant alleged that Counsel was ineffective for failing to introduce the 911 tape and Ms. Ester Boyd's AT&T phone records into evidence. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel explained that although Applicant was not identified by the victim during the 911 call, he didn't feel this was especially helpful since it was the victim's husband who made the call. Further, Counsel testified that he felt that introducing the 911 tape posed more risks than benefits, and he felt he could introduce the helpful information from the tape through other evidence. Counsel also stated that he did not believe that Ms. Boyd's phone records would be especially helpful either because it is unclear from the records who placed a call. They only indicate that a call was made. This Court finds Counsel's decision to leave the 911 tape and phone records out of evidence to be part of a trial strategy that falls within the scope of reasonable criminal representation. Further, Applicant has failed to

show that this alleged deficiency prejudiced him. Accordingly, this Court finds Applicant failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Advise Applicant to Testify

Applicant alleged that Counsel was ineffective for failing to advise him to testify at trial. Both Applicant and Counsel's testimony reflect that Counsel advised Applicant of his right to testify at trial. While Counsel advised Applicant against testifying, he made it clear that the ultimate decision was Applicant's to make. Applicant admitted that he understood it was his decision and ultimately decided to follow Counsel's advice not to testify. Further, the trial court thoroughly advised Applicant of his right to testify, and Applicant told the trial judge that it was his personal decision to exercise his Fifth Amendment right. Tr. pp. 255-58. This Court finds that Applicant has failed to show Counsel's conduct in advising him not to testify was unreasonable under prevailing professional norms. Counsel testified he did not believe it was in Applicant's best interest to testify. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Therefore, Applicant has failed to satisfy his burden of proving deficiency as to this allegation. Further, this Court finds Applicant has failed to show there is a reasonable probability that but for Counsel's advice not to testify, he would not have been convicted. Accordingly, this Court finds Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. Therefore, this allegation is denied and dismissed with prejudice.

Failure to Put Forth an Alibi Defense

Applicant alleged that Counsel was ineffective for failing to put forth an alibi defense

before the trial court. Counsel's testimony at the PCR hearing and the trial transcript reflect that Counsel did attempt to put forth the defense of a partial alibi through his opening and closing arguments and requesting a jury instruction. Tr. pp. 102-04, 290-92, 303-14. However, the trial judge ultimately decided to exclude such an instruction. Tr. pp. 290-92. Further, Counsel made a motion for a new trial based on the denial of this charge. Tr. p. 371. Accordingly, this Court finds Counsel did attempt to put forth an alibi defense, and Applicant has failed to show Counsel acted deficiently. Moreover, this Court finds Applicant has failed to show that this alleged deficiency resulted in prejudice to Applicant. This Court also notes that the issue of the trial judge's refusal to charge the jury with a partial alibi instruction was directly addressed on appeal, and has been ruled on by the South Carolina Court of Appeals. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). Therefore, this Court denies and dismisses this allegation with prejudice.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21 day of March, 2017.



EDWARD W. MILLER
Presiding Judge
Seventh Judicial Circuit

, South Carolina

FILED
2017 MAR 27 PM 1:03
KATHLEEN BLANCHARD

Spartanburg County

Spartanburg County Court House
180 Magnolia Street
P. O. Box 3483
Spartanburg, SC 29304-3483



Phone (864) 596-2391
Fax (864) 596-2239

M. Hope Blackley

Clerk of Court

March 28, 2017

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Cabriel Gon Dias
344257

Applicant

7TH JUDICIAL CIRCUIT

CASE # 2015CP42-2541

Steel ^{VS}

Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the

In this action dated

3-21

2017

on

3-28-17

Cabriel Gon Dias

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Obby Haines

Alvin Oliver

Cabriel Dias

3-28-17

(Date)

Cabriel

(Signature)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	CASE NO. 2015-CP-42-2541
GABRIEL JON RIOS,	)	
APPLICANT,	)	
	)	MOTION TO ALTER OR AMEND
VS.	)	THE JUDGMENT
STATE OF SOUTH CAROLINA,	)	
RESPONDENT.	)	

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on March 27, 2017. The Applicant takes issue with the findings of fact and conclusions of law set fourth resulting in the denial of post-conviction relief in his case. He argues each allegation set fourth amounted to undue prejudice. He further argues that if each allegation did not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's performance was deficient and prejudiced him to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989)

The Order of Dismissal addresses the Applicant's argument of ineffective assistance of trial counsel for failure to admit a tape of the 911 call and certain AT & T phone records into evidence on page ten. It states that the decision was strategic because trial counsel testified that the 911 call was not particularly helpful because the victim's husband, Phil Holt, made the call and it posed more risks than benefits. The Applicant testified that counsel had not made him aware of the 911 tape prior to his trial and argued

that trial counsel was ineffective for failing to effectively impeach Gail Holt by using the 911 call.

In trial, Ms. Holt testified that she immediately recognized the man robbing her as "Gabe" who worked for her husband and so she had met Gabe several times. (Trial transcript p. 108) She testified that during the robbery she knew his name but a guardian angel or something told her not to say his name to his face but address him instead as sir. (Trial transcript p. 111) Without objection, the State bolstered Ms. Holt's identification in closing by arguing that Ms. Holt knew Gabe, knew his voice, knew his accent, knew his face, and immediately identified him as the robber. (Trial transcript p. 320) The recording of the 911 call shows she did not recognize or name the Applicant. While it is mostly Mr. Holt's voice on the recording, you can hear him question Ms. Holt and her responses, none of which name Gabe or demonstrate any recognition of who attacked her. While trial counsel did present evidence of the first responding officer who testified that Ms. Holt did not name or say she knew the suspect to him, his failure to use the primary evidence of the 911 call substantially weakened the case. During deliberations, the jury asked to review Ms. Holt's and Officer Welch's trial testimony. (Trial testimony p. 351)

The 911 tape significantly strengthens the Applicant's case and stands in strong contrast to Ms. Holt's sworn testimony and the Solicitor's argument to the jury. The fact that the jury asked to review her testimony suggests that the credibility of Ms. Holt's identification was a close issue. Failure to use the 911 recording as impeachment amounted to ineffective assistance of counsel and likely effected the outcome of the case. The prejudice of counsel's failure to use the evidence was compounded by counsel's

failure to object during the State's closing when the assistant solicitor argued that Ms. Holt's identification was stronger because she immediately recognized her attacker as her husband's employee, Gabe. The State then argues without objection that the Applicant presented no witnesses to account for his whereabouts and finally asks the jury whether they can "look at Ms. Holt and say, 'you're lying'." (Trial transcript p. 323)

In addition to any allegation relating to AT&T phone records, the Applicant argued that counsel was ineffective for failing to authenticate or enter into evidence the T-Mobile phone records showed two calls were made on the date of the burglary at 7:16 AM and 7:22 AM to Sonia Rios, the defendant's wife. Sonia Rios testified as an alibi witness. The T-Mobile records are important because they show the calls made to Sonia Rios came from phone number 864-582-2858. Estar Byrd testified 864-582-2858 was her land line at her home which she allowed Mr. Rios to use from time to time. While she could not recall if he used her land line the morning of the incident, the records provided strong evidence that he had. (Trial transcript p. 268-9) Furthermore, while Ms. Rios testified she was unsure of the time when she spoke to her husband the morning of the robbery, the records would clearly indicate the time the calls were made. Trial counsel was allowed to use the records to refresh Sonia Rios recollection but did not enter them into evidence after the State objected to their authenticity. (Trial transcript p. 274) The State argued in closing without objection that no one said they were with him that morning or could account for his whereabouts. He argued that one of the Applicant's alibi witnesses was unsure when calls were made from her phone and the other was his biased wife with a false information to police conviction. (Trial transcript p. 322-3) The T-Mobile phone records showed that two calls were made between Ms. Byrd's home

telephone line and Ms. Rios cell phone that morning which would have clarified and substantiated the Applicant's alibi. They also showed that the argument made by the State in closing was likely untrue. The failure to enter the T-Mobile records into evidence effected the outcome of the case. The order fails to address these arguments.

Trial counsel admitted that he probably should have objected to the above comments made in the State's closing. He was ineffective for failing to do so. Not only were burden shifting comments made, the argument went beyond reasonable inferences of what the Solicitor knew to be the facts, and in fact contradicted the records the Solicitor knew to exist. The solicitor must confine his arguments to the evidence in the record and its reasonable inferences. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). The 911 call recording and T-mobile records would have shown the Solicitor's comments in closing were not reasonable inferences but misstatements of the facts which so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v. Coleman, 301 S.C. 57, 389 S.E.2d 659 (1990). See also Darden v. Wainwright, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). The order fails to address this argument.

The allegation that counsel was ineffective for advising the Applicant not to testify at trial is addressed on page eleven of the Order of Dismissal. While the Applicant did testify at the PCR hearing that counsel and the Court advised him that the decision whether to testify was ultimately his, he alleged that his decision not to testify was based on trial counsel's advice that he would be impeached by the State on his prior record without determining whether his prior criminal charges would be impeachable under Rule 609 of the South Carolina Rules of Evidence. Furthermore, trial counsel failed to

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

GABRIEL JON RIOS,
APPELLANT,

VS.

THE STATE OF SOUTH CAROLINA,
RESPONDANT.

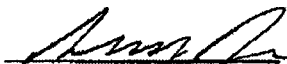
IN THE COURT OF COMMON PLEAS

CASE NUMBER 2015-CP-42-2541

AFFIDAVIT OF SERVICE
BY MAIL

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the Motion to Alter or Amend on the above-captioned matter on the following person by depositing the same in the United States mail with proper postage affixed thereto:

Office of Attorney General Alan Wilson
P.O. Box 11549
Columbia, SC 29211


Attorney for Defendant

Greenville, South Carolina
This 6 day of April, 2017.

2017 APR 11 AM 8:47
CLERK OF COURT
CLERK OF COURT
CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)

Gabriel J. Rios) C/A No.2015-CP-42-2541
Applicant,)
-v-) MOTION FOR RECONSIDERATION
State of South Carolina) PURSUANT TO RULE 59(e), SCRPC
Respondent,)

2017 APR 13 PM 12:08
H. HOPE C. ACHERY

Introduction

PLEASE TAKE NOTICE, that the above captioned Applicant by and through attorney of record, pursuant to applicable case and statutory law, hereby moves this Honorable Court to reconsider the judgment entered in the above captioned case on March 21, 2017. The Order was received via U.S. Mail April 3, 2017, see attached envelope). Therefore this request for reconsideration is timely made.

IN support of this request the Applicant will show unto this Court the following:

(1). This matter comes before this Court by way of an application for post conviction relief filed June 3, 2015. An evidentiary hearing was convened on January 30, 2017 at the Spartanburg County Courthouse. Subsequently thereafter this Court issued an Order of dismissal on March 21, 2017, filed March 27, 2017 and received April 3, 2017.

(2). The Order issued by this Court has overlooked a critical issue in it's order. The order omits any reference to the issue

of counsel rendering ineffective assistance in failing to impeach State's witness' Gail Holt and her husband Phillip Holt during trial.

(3). Applicant presented this issue by way of an amended PCR application and testified to such during the hearing, and further in support Applicant submitted (2) exhibits with the amendment and are part of the record.

(4). The exhibits contain sufficient evidentiary support and should be addressed by this Court. Specifically, during trial Gail Holt was allowed to identify Applicant as the perpetrator, when the police reports and 911 call reveal that Gail Holt actually stated an "unknown" suspect forced entry and further reveal Phillip Holt told Deputy Welch he also received a call from his wife Gail Holt who said that an "unknown" suspect broke into their house. This was critical information for impeachment purposes.

(5). Impeaching these witnesses was critical. The prejudice incurred is easily seen by the solicitor's strong reliance on Gail Holt's testimony during closing summation. See Tr.p.320, L.17-18; p.320, L.21-24; p.320, L.25-p.321, L.3; p.321, L.5-10; p.321, L.19-21; p.321, L.25; p.323, L.6-11; p.323, L.18-19. This was found extremely prejudicial in Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016). The Court noted that in Rutland the solicitor relied heavily on the key witness in closing argument. Id at 578, 785 S.E.2d at 354). The same is true in the instant case and the analysis from Rutland should apply as well.

CONCLUSION

For the foregoing reasons, Applicant respectfully requests this Court to alter/amend and/or reconsider the judgment entered in this case.

Respectfully Submitted,

/s/ Gabriel J. Rios

Gabriel J. Rios

2017 APR 13 PM 12:08
CLERK OF COURT

STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG
 IN THE COURT OF COMMON PLEAS
 C/A No. 2015-CP-42-2541

RECEIVED

JUL 19 2017

S.C. SUPREME COURT

Gabriel J. Rios -- Applicant,

-vs-

State of South Carolina -- Respondent,

2017 APR 13 PM 12:07
 M. HOPE BLACKLEY

CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served a true and correct copy of the parties who appear below. By placing the enclosed Rule 59(e), SCRPC motion in properly addressed, first-class postage affixed envelopes and placed in the U.S. Mail this 10th day of April 2017.

Those Served:

SpartanBurg County Clerk
 M. Hope Blackley
 P.O. Box 3483
 Spartanburg, SC. 29304-3483

Law Clerk for
 The Hon. Edward W. Miller
 P.O. Box 3483
 Spartanburg, SC. 29304-3483

Assistant Attorney General
 Caitlin B. Hastings
 P.O. Box 11549
 Columbia, SC. 29211

Respectfully Submitted,

/s/

Gabriel J. Rios

Sworn to and Subscribed Before Me
 this 10th day of April 2017

Dancy C. Murchant
 NOTARY PUBLIC

MY COMM. EXPIRES 1-23-2023

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	
Gabriel Jon Rios, #344751,	)	2015-CP-42-2541
	)	
Applicant,	)	
	)	
v.	)	RETURN TO APPLICANT'S
	)	MOTION TO ALTER OR AMEND
State of South Carolina,	)	THE JUDGMENT
	)	
Respondent.	)	
_____	)	

This matter comes before the Court by way of Applicant's Motion to Alter or Amend the Judgment¹ in which Applicant asks the Court to reconsider its Order dismissing his Application for post-conviction relief (PCR). Respondent (the State) would submit the following:

I.

Respondent submits that the Order of Dismissal of the Honorable Edward W. Miller, dated March 21, 2017, contains the findings of facts and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003), and Rule 52(a) SCRCP. See also, McCray v. State, 305 S.C. 329, 408 S.E.2d 241 (1991). However, Respondent concedes Applicant's claim of ineffective assistance of counsel for failing to impeach was not addressed in the Order of Dismissal. Therefore, the motion should be granted by amending the Order of Dismissal to address this claim and denied on every other ground.

II.

Applicant's *pro se* motion states that the Order issued in this case omits any reference to the issue of trial counsel failing to impeach the State's witnesses Gail Holt and her husband,

¹ Counsel for Applicant served this motion on Respondent April 6, 2017. Shortly thereafter, on April 14, 2017, Respondent received a *Pro Se* "Motion for Reconsideration Pursuant to Rule 59 (e), SCRCP." Respondent responds herein to both motions.

Phillip Holt. Respondent agrees. Respondent submits that Applicant's motion be granted to amend the Order of Dismissal to address Applicant's allegation that trial counsel failed to impeach the State's witnesses.

III.

Respondent submits the remainder of Applicant's Motion to Reconsider should be denied. Applicant is not requesting either an alteration or amendment to the final order. Rather, Applicant is asking the Court to reverse its decision. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to, but not ruled upon by, the trial court).

IV.

WHEREFORE, having made its Return to Applicant's motion to reconsider, the State requests that the relief requested in the Motion be granted in part and denied in part.

Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

VALERIE GARCIA GIOVANOLI
Assistant Attorney General

BY:



ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

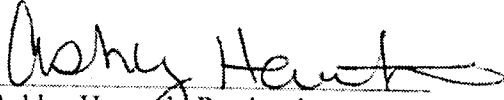
April 17th, 2017

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	
	)	
	)	2015-CP-42-2541
GABRIEL JON RIOS, #344751,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return to Applicant's Motion to Alter or Amend the Judgment** on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Ms. Susannah C. Ross, Esquire
 Ross & Enderlin, PA
 330 East Coffee St.
 Greenville, SC 29601

DATED this 17th day of April, 2017.


 Ashley Haworth, Paralegal
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

Gabriel Jon Rios,
S.C.D.C. No. 344751,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
OF THE SEVENTH JUDICIAL CIRCUIT

2015-CP-42-2541

**AMENDED
ORDER OF DISMISSAL**

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
M. HOPE BLACKLEY

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 3, 2015. Respondent made its Return on February 11, 2016. An evidentiary hearing was held on January 30, 2017, at the Spartanburg County Courthouse. Applicant was present and represented by Susannah C. Ross, Esquire. Assistant Attorney General Caitlin B. Hastings represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel Matthew Shealy, Esquire, also testified. Additionally, Applicant's daughter testified at the evidentiary hearing. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's direct appeal records, Applicant's records from the South Carolina Department of Corrections, the 911 tape, AT&T phone records, and the pleadings. The Court finds as follows:

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Applicant was indicted at the November 2010 term of the Spartanburg County Grand Jury for burglary—1st degree (2010-

GS-42-6830), armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6831, counts one and two), grand larceny, value \$10,000 or more (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and assault and battery, first degree (2010-GS-42-6834). Matthew Shealy, Esquire, represented Applicant. On February 26, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Applicant guilty as indicted. Judge McIntosh sentenced Applicant to imprisonment to concurrent terms of 40 years for burglary, 30 years for armed robbery and kidnapping, and ten years for assault and battery, and a consecutive term of five years for possession of a weapon.

Applicant filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on February 1, 2015. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). The remittitur was returned on April 10, 2015.

ALLEGATIONS

In his Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of trial counsel in that:
 - a. "prior and during trial [in violation] of his rights pursuant to the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution"
 - b. Counsel "failed to object to Solicitor shifting the burden" during his closing argument
 - c. Counsel "failed applicant by conceding his guilt" in his closing argument
 - d. Counsel failed to adequately advise Applicant
 - e. Counsel failed to adequately investigate
 - f. Counsel failed to admit the 911 tape and AT&T phone records at trial

CLERK OF COURT
 SPARTANBURG COUNTY
 2017 JUN 29 AM 10:16
 M. HOPE BLACKLEY

¹ The State elected to proceed on the armed robbery charge and dismissed the grand larceny charge before trial.

- g. Counsel failed to advise Applicant that he should testify at trial
- h. Failure to impeach
- i. Failure to put forth an alibi defense

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
M. HOPE BLACKLEY

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. As a matter of general impression, this Court finds Counsel's testimony to be credible and Applicant's testimony to be neither credible nor legally relevant. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

Summary of the Testimony

Applicant testified that he met with Counsel approximately three times. Applicant testified that the solicitor's closing argument included burden-shifting statements because the solicitor said Applicant had no proof that he was innocent but was merely telling a story. Tr. p. 323. Applicant testified that he believes Counsel failed to object to this statement but should have. Applicant further testified that Counsel failed him by making statements that conceded his guilt during his closing argument. Specifically, Applicant testified that the statements regarding the use of painter's tape to bind the victim conceded Applicant's guilt. Tr. p. 305. Applicant testified that Counsel did review the Rule 5 discovery materials with him; however, Applicant testified that Counsel never reviewed the 911 tape with him nor did he admit it into evidence. Applicant testified that he believes the 911 tape shows his innocence because the victim did not identify him during the call even though she claimed to recognize him right away because he used to work for her husband. Applicant additionally testified that he believes Counsel was

ineffective for failing to admit into evidence the 911 tape and the AT&T phone records of Ester Boyd because he claims that he made about eight phone calls to his wife from Ester Boyd's home phone during the time of the crime. Applicant testified that if Counsel had admitted the tape and phone records into evidence, it would have established an alibi defense for Applicant. Applicant testified that he believes Counsel was ineffective for failing to use this evidence to establish an alibi defense. Applicant further alleged that Counsel was ineffective for failing to advise Applicant that he should testify at his trial. Applicant stated that if he had testified during the trial he would have talked about how there was no DNA evidence that matched him except for the thumbprint on the broken glass. Applicant testified that this thumbprint could have been from previous visits to the victim's home since he used to work for her husband. Applicant further testified that he would have argued to the jury that this lack of DNA evidence at the scene showed that he could not be in two places at once since he alleges he was at Ester Boyd's home calling his wife. Applicant admitted that Counsel explained to him that it was his decision as to whether he would testify at trial. Applicant testified that Counsel advised him against him testifying but agreed that Counsel explained it was ultimately his decision.

Applicant's daughter also testified at the PCR hearing. She testified that she remembered speaking with her father on the phone the morning of the incident. She testified that she believed she spoke with him around 7:02 A.M.

Counsel testified that he has been practicing law for a little over nine years, the majority being criminal law. Counsel testified that, at the time of Applicant's trial, he had previously handled other trials with similar charges. Counsel testified he became involved with Applicant's case about four months before trial—other attorneys within his office had handled different stages of Applicant's case. During these four months, Counsel testified he met with Applicant

four times and also spoke with various members of his family. Counsel testified he reviewed all discovery with Applicant. He also discussed with Applicant the elements of the charges and possible defenses to those charges and advised Applicant concerning his right to testify. Counsel investigated the leads that Applicant provided to him, including a possible alibi defense. However, Counsel testified that there were problems with this defense, specifically, Applicant was only able to establish a possible partial alibi.

Counsel testified Applicant's alleged timeline that he was calling his wife from Ester Boyd's home still allowed time for him to be at the scene of the crime. Counsel testified that he conducted a drive test run of Applicant's chain of events on the day of the incident. He stated that test run showed that Applicant could only establish a partial alibi, at best. Additionally, Applicant was unable to provide Counsel with any alibi witnesses that saw him during the time of the crime. However, Counsel still attempted to have the trial judge charge the jury with a partial alibi instruction, which the trial judge ultimately refused to do. Tr. p. 288.

Counsel further testified that he did not attempt to admit the 911 tape into evidence because the call was made by the victim's husband. Counsel said he felt the tape bared greater risks than potential benefits, and he felt he introduced the beneficial information of the 911 tape through other evidence. Counsel also testified that he did not attempt to introduce the phone records because they don't indicate who was making the call only that a call was made.

Counsel also testified regarding the comments in his closing argument referring to the use of painter's tape during the crime. Counsel testified the theme of his closing argument was that the State wanted the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily

broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06.

Counsel testified that he remembered making a couple motions in limine, a motion to suppress the in-court identification and the alleged rock that was used to break the window, and motions for a directed verdict and a new trial. Counsel also testified that he objected to the trial judge's refusal to charge a partial alibi instruction and to the introduction of the piece of glass bearing the thumbprint. Tr. pp. 16, 24, 46, 198, 254, 288, 371. Additionally, Counsel testified that he maybe should have objected to the solicitor's remarks during his closing statement but also testified that if he had noticed something troublesome at the time, he would have objected.

Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 692).

CLERK OF COURT
 SPANISHBURG COUNTY
 2017 JUN 29 AM 10:16
 M. HOPE BLACKLEY

690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Failure to Object to Solicitor's Alleged Burden-Shifting Statements

Applicant alleged that Counsel was ineffective for failing to object to the alleged burden-shifting statements made by the solicitor during his closing argument. This Court finds Applicant has failed to show that Counsel's failure to object to these statements resulted in a deficiency that prejudiced the outcome of his trial. Counsel is an experienced criminal defense attorney who has handled many cases similar to Applicant's. Counsel testified that if at the time of the trial, the solicitor's statements appeared troubling to Applicant's case, he would have objected. Counsel admits in hindsight he possibly should have objected to those statements. However, this Court finds that Counsel's performance was still within the range of reasonable competence required for criminal cases. Further, this Court finds Applicant has failed to show any resulting prejudice. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Alleged Concession of Applicant's Guilt

Applicant alleged Counsel was ineffective for allegedly making statements that conceded

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
M. HOPE BLACKLEY

his guilt during his closing statement. This Court finds Applicant has failed to show that Counsel's statements were deficient or resulted in any prejudice. Counsel testified the theme of his closing argument was that the State wanted to the jury convict Applicant merely on inference. He explained that he used the specific example of painter's tape as an illustration of reasonable doubt. Counsel testified that someone who was trying to bind another person would not use painter's tape because it's easily broken. He testified that Applicant knew the consistency of painter's tape from his construction work and would, therefore, know not to use it for that purpose. Tr. pp. 305-06. This Court finds Counsel's statements during his closing argument were part of Counsel's strategy and within the range or reasonableness for criminal representation. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Further, this Court finds Applicant did not suffer any prejudice from these statements. Therefore, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Adequately Investigate

Applicant alleged at the evidentiary hearing that Counsel failed to conduct a proper investigation. This Court finds Applicant has failed to show that Counsel was deficient or that he was prejudiced by any alleged deficiency. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and

making an independent investigation of the facts and circumstances of the case. Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). Failure to conduct an independent investigation is not *per se* ineffective assistance of counsel, especially where an investigation would not have uncovered any helpful information. See Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998).

Here, Counsel testified that he conducted a test run and explored the possibility of an alibi defense. Counsel also testified he spoke with Applicant's family members. Additionally, the testimony reflects that Counsel reviewed all the evidence in the case, discussed possible defenses with Applicant, and pursued leads that Applicant provided. Specifically, Counsel pursued a possible alibi defense. Such an investigation was reasonable under the circumstances. See Edwards, 392 S.C. at 457, 710 S.E.2d at 65 (citing Daniels v. State, 676 S.E.2d 13 (Ga. 2009)). This Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in his representation. Accordingly, Applicant has failed to show Counsel was deficient in investigating or developing a defense.

Likewise, Applicant has failed to demonstrate any prejudice resulting from Counsel's alleged failure to investigate. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))). This Court can only speculate as to what additional investigation could have been done and what evidence that investigation would have uncovered. Applicant testified on his own behalf but presented no other witnesses and produced no evidence of what Counsel might have uncovered had he conducted any additional investigation. The Court

CLERK OF COURT
PARANBORG COUNTY
JUN 29 AM 10:16
M. HOPE BLACKLEY

Applicant has failed to demonstrate any alleged deficiency prejudiced him. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Accordingly, this Court finds Applicant has failed to satisfy either prong of the Strickland analysis. Accordingly, this allegation is denied and dismissed with prejudice.

Failure to Admit 911 Tape and AT&T Phone Records into Evidence

Applicant alleged that Counsel was ineffective for failing to introduce the 911 tape and Ms. Ester Boyd's AT&T phone records into evidence. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not effective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Counsel explained that although Applicant was not identified by the victim during the 911 call, he didn't feel this was especially helpful since it was the victim's husband who made the call. Further, Counsel testified that he felt that introducing the 911 tape posed more risks than benefits, and he felt he could introduce the helpful information from the tape through other evidence. Counsel also stated that he did not believe that Ms. Boyd's phone records would be especially helpful either because it is unclear from the records who placed a call. They only indicate that a call was made. This Court finds Counsel's decision to leave the 911 tape and phone records out of evidence to be part of a trial strategy that falls within the scope of reasonable criminal representation. Further, Applicant has failed

FILED
CLERK OF COURT
SARASOTA COUNTY
2015 JUN 29 AM 10:16
HOLLY BLACKLEY

show that this alleged deficiency prejudiced him. Accordingly, this Court finds Applicant failed to satisfy either prong of the Strickland analysis and denies and dismisses this allegation with prejudice.

Failure to Advise Applicant to Testify

Applicant alleged that Counsel was ineffective for failing to advise him to testify at trial. Both Applicant and Counsel's testimony reflect that Counsel advised Applicant of his right to testify at trial. While Counsel advised Applicant against testifying, he made it clear that the ultimate decision was Applicant's to make. Applicant admitted that he understood it was his decision and ultimately decided to follow Counsel's advice not to testify. Further, the trial court thoroughly advised Applicant of his right to testify, and Applicant told the trial judge that it was his personal decision to exercise his Fifth Amendment right. Tr. pp. 255-58. This Court finds that Applicant has failed to show Counsel's conduct in advising him not to testify was unreasonable under prevailing professional norms. Counsel testified he did not believe it was in Applicant's best interest to testify. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."). Therefore, Applicant has failed to satisfy his burden of proving deficiency as to this allegation. Further, this Court finds Applicant has failed to show there is a reasonable probability that but for Counsel's advice not to testify, he would not have been convicted. Accordingly, this Court finds Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. Therefore, this allegation is denied and dismissed with prejudice.

Failure to impeach

Applicant alleged that Counsel was ineffective for failing to impeach the state

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
M. HOPE BLACKLEY

witnesses, specifically, the victims: Gail Holt (Mrs. Holt) and Phillip Holt (Mr. Holt). Applicant testified that he believes the 911 tape shows his innocence because the victim did not identify him during the call even though she claimed to recognize him right away because he used to work for her husband. Counsel testified that he did not attempt to use the 911 tape to impeach Mrs. Holt, because the call was made by the victim's husband. Counsel said he felt the tape bared greater risks than potential benefits, and he felt he introduced the beneficial information of the 911 tape through other evidence.

The record shows that the victim, Mrs. Holt, testified at trial that she recognized the home intruder. Tr. 108; ll. 4-5. Mrs. Holt also testified she knew his name to be Gabe. Tr. 108, l. 11. She knew Applicant because he worked for her husband and she had met him several times at her husband's shop and at her home. Tr. 108, ll. 12-21. She recognized Applicant immediately and also recognized his voice. Tr. 108, l. 22 – p. 109, l. 4. Mrs. Holt came face-to-face with Applicant during the incident. Tr. 109, ll. 17-20. She testified that she did not call him by name, but rather, "sir," to let him know he was in control. Tr. 111, ll. 3-6. After the incident, Mrs. Holt called her husband, who then called 911. Tr. 114, ll. 15-16. After Mrs. Holt testified that the police arrived shortly after her husband, the State asked her if she gave them a description of who did this, to which Mrs. Holt responded, "yes, I told them who." Tr. 131, ll. 2-6. Mrs. Holt further testified that Investigator Williams presented her with a lineup of pictures and from those pictures she made an identification of Applicant with absolute certainty. Tr. 131, l. 11 – p. 133, l. 12. Additionally, she testified that the home invader's name was Gabe and pointed him out in the courtroom. Tr. 134, ll. 1-14.

Based on the record and the testimony presented to this Court, Counsel was not ineffective for failing to impeach witness Gail Holt. Applicant has failed to meet his burden of

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
MICHELLE BLACKLEY

proving any deficiency on the part of Counsel for failing to impeach Mrs. Holt using the 911 tape. Counsel's strategic decision not to impeach Mrs. Holt using the 911 recording was reasonable in light of the circumstances. Even assuming *arguendo* that Counsel's decision not to use the 911 recording to impeach Mrs. Holt was unreasonable, Applicant fails to demonstrate any prejudice. Not only did Mrs. Holt testify that she recognized the intruder because he worked for her husband and had met him several times, she also picked him out of a photo lineup shortly after the incident without anyone else's influence and identified him in open court. Additionally, it was Mr. Holt who called the police to his house after receiving a frantic call from his wife. Although no identity was given during the 911 call, this Court fails to see how the recording would impeach the testimony of Mrs. Holt to the extent it would affect the outcome of Applicant's trial.

Applicant also contends that Counsel was ineffective in failing to impeach Mr. Holt for the same reasons. This Court finds no testimony in the record that would warrant impeachment on the basis that no identity was given during the 911 call. Mr. Holt was not present in the house during the incident. He received a call from his wife immediately after, who was hysterical. Tr. 149, ll. 3-5. He called the police on his drive to his home, suggested the police get there quickly, hung up and called his wife back. Tr. 149, ll. 19-23. Mr. Holt never testified that his wife had identified her assailant at any time prior to the photo lineup provided by investigators. Therefore, Counsel could not have impeached him using the 911 recording that contained no identification – because the identification was made after the police arrived to the scene.

Because Applicant has failed to prove any deficiency on the part of Counsel, and
prejudice flowing therefrom, this Court denies and dismisses this allegation with prejudice.

CLERK OF COURT
SEABOARD COUNTY
2017 JUN 29 AM 10:16
J. HOPE BLACKLEY

Failure to Put Forth an Alibi Defense

Applicant alleged that Counsel was ineffective for failing to put forth an alibi defense before the trial court. Counsel's testimony at the PCR hearing and the trial transcript reflect that Counsel did attempt to put forth the defense of a partial alibi through his opening and closing arguments and requesting a jury instruction. Tr. pp. 102-04, 290-92, 303-14. However, the trial judge ultimately decided to exclude such an instruction. Tr. pp. 290-92. Further, Counsel made a motion for a new trial based on the denial of this charge. Tr. p. 371. Accordingly, this Court finds Counsel did attempt to put forth an alibi defense, and Applicant has failed to show Counsel acted deficiently. Moreover, this Court finds Applicant has failed to show that this alleged deficiency resulted in prejudice to Applicant. This Court also notes that the issue of the trial judge's refusal to charge the jury with a partial alibi instruction was directly addressed on appeal, and has been ruled on by the South Carolina Court of Appeals. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). Therefore, this Court denies and dismisses this allegation with prejudice.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application.

CLERK OF COURT
 SPARTANBURG COUNTY
 2015 JUN 29 AM 10:16
 M. HOPE BLACKLEY

Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21 day of June, 2017.


EDWARD W. MILLER
Presiding Judge
Seventh Judicial Circuit

, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
M. HOPE BLACKLEY

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP4203862

Michael Anthony Rogers, #348110 [Applicant]

State of South Carolina, [Respondent]

PLAINTIFF(S)

DEFENDANT(S)

Attorney for: ☐ Plaintiff ☐ Defendant

Submitted by:

☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
- ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
- ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

Applicant filed an application for post-conviction relief (PCR). An order dismissing the Applicant's PCR case was entered into on March 29, 2017. The Applicant moved to alter or amend the Order of Dismissal pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. After considering the Applicant's motion, the requested relief is hereby **DENIED.**

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional

Available costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.



Circuit Court Judge

2130

Judge Code

6/8/2017

Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Susannah C. Ross

Valerie Garcia Giovanoli
Caitlin B. Hastings

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CLERK OF COURT
SPARTANBURG COUNTY
2017 JUN 29 AM 10:16
M. HOPE BLACKLEY

WITNESSES

Spartanburg County Sheriff's Office

NOTED

FILED

WITNESSES

WITNESSES

STATE
GENERAL

ARREST WARRANT COPY

ARREST WARRANT NUMBER

M424613- Count One

M424611- Count Two

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: NOV 24 2010

VERDICT

GUILTY

Foreperson of Petit Jury
Date: 12.28.2013

DOCKET NO.

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

TERM

THE STATE

vs.

Gabriel Jon Rios

Indictment for

ARMED ROBBERY AND POSSESSION OF
WEAPON DURING COMMISSION OF A
VIOLENT CRIME

SC Code: 16-11-330 (A); 16-23-490

CDR Code: 139: 549

Class FEL/A: FEL/F

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2010 DEC -2 PH 1:54

M. HOPE BLACKLEY

APPX 565

561

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

✓
INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010 the Grand Jurors of Spartanburg County present upon their oath:

COUNT ONE---ARMED ROBBERY

That Gabriel Jon Rios did in Spartanburg County on or about August 14, 2010, while armed with a deadly weapon, being a handgun and a broken piece of glass, did feloniously take from the person or presence of Gail Holt, by means of force, violence, and/or intimidation, goods or monies, such goods or monies being described as follows: a 2001 Lexus vehicle, a handgun, and US currency, with intent to deprive the owner permanently of such property, in violation of §16-11-330 (A), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

**COUNT TWO---POSSESSION OF WEAPON DURING
COMMISSION OF A VIOLENT CRIME**

That Gabriel Jon Rios did in Spartanburg County on or about August 14, 2010, possess or visibly display a handgun and a broken piece of glass during the commission of a violent crime, to-wit: ARMED ROBBERY, in violation of Code §16-23-490, *CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

DOCKET NO.

6832

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 24 2010

TERM

THE STATE
vs.

Gabriel Jon Rios

Indictment for

GRAND LARCENY

SC Code: 16-13-30 (B)
CDR Code: 3421
Class FEL-E

WITNESSES

1. SENTENCE MADE

Spartanburg County Sheriff's Office

2. CARD FOLDED

3. CHECKED WARRANT

4. CHECKED SIGNATURE

5. ASSESSMENT AND

6. CARD MADE

TRAFFIC VIOLATIONS COPY

ARREST WARRANT NUMBER

M424612

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury NOV 24 2010
Date:

VERDICT

Foreperson of Petit Jury
Date:

FILED
CLERK OF COURT
SPARTANBURG COUNTY

20 DEC -2 PM 1:55

M. HOPE BLACKLEY

Not processed -
Defendant convicted
on other charges
related to this
crime -

2/28/13
Tami Poulos
Asst. Solicitor

FILED
MAR -1 AM 10:50
M. HOPE BLACKLEY

563

APPX 567



STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010 the

Grand Jurors of Spartanburg County present upon their oath:

GRAND LARCENY

That Gabriel Jon Rios, did in Spartanburg County on or about August 14, 2010, feloniously take and carry away the goods of Gail Holt, valued at more than Ten Thousand Dollars, described as follows: a .357 Smith & Wesson handgun, US currency, and a 2001 Lexus vehicle, with the intent to deprive the owner permanently of such property, all in violation of Section 16-13-30 (B), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

1. PRESENCE MADE ☒

2. REPORT MADE ☒

3. CARD FILLED ☒

4. INDEXED ☒

5. INDEXED WARRANTS ☒

6. INDEXED SIGNATURES ☒

7. ASSESSMENT AND
FINE CARD MADE ☒

8. INDEXED COPY ☒

ARREST WARRANT NUMBER

M424615

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date: NOV 24 2010

VERDICT

GUILTY 2/26/13

Foreperson of Petit Jury
Date: 10.28.2013

DOCKET NO.

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 27 2010

TERM

THE STATE

vs.

Gabriel Jon Rios

Indictment for

KIDNAPPING

SC Code: 16-03-910

CDR Code: 0095

Class FEL-A

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2010 DEC -2 PM 1:55

M. HOPE BLACKLEY

APPX 569

565



STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010, the
Grand Jurors of Spartanburg County present upon their oath:

KIDNAPPING

The Defendant, Gabriel Jon Rios, did in Spartanburg County, on or about August 14, 2010, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, Gail Holt, without authority of law, all in violation of Section 16-3-910, Code of Laws of South Carolina (1976, as amended).

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

WITNESSES

1. SENTENCE MADE ☒ *PN*
2. REPORT FILED ☒ *Computer*
3. SPARTANBURG COUNTY SHERIFF'S OFFICE ☒
4. SIGNATURE *PN*
5. PRESENT AND FINE CARD MADE ☒
6. TRAFFIC VIOLATION COPY ☒

ARREST WARRANT NUMBER

Direct Indictment (M424614)

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury *PN*
Date: NOV 24 2010

VERDICT

Warrant, DC
6/11/11 2/28/13

Warrant, DC
Foreperson of Petit Jury
Date: FEB. 28, 2013

DOCKET NO. 10-88-1-6834

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

JUN 24 2010

TERM

THE STATE

vs.

Gabriel Jon Rios

Indictment for
ASSAULT AND BATTERY
FIRST DEGREE

SC Code: 16-3-600
CDR Code: 3412
Class FEL-E

CLERK OF COURT
SPARTANBURG COUNTY

2010 DEC -2 PM 1:55

M. HOPE BLACKLEY

APPX 571

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

INDICTMENT

NOV 24 2011

At a Court of General Sessions, convened on _____ the

Grand Jurors of Spartanburg County present upon their oath:

ASSAULT AND BATTERY FIRST DEGREE

That Gabriel Jon Rios did in Spartanburg County on or about August 14, 2010 commit an act causing an unlawful injury to Gail Holt, and the act:

(1) involved nonconsensual touching of the private parts of an adult with lewd and lascivious intent, or

(2) occurred during the commission of a robbery, burglary, kidnapping, or theft, or

(3) involves an offer or attempt to injure another person with the present ability to do so, and the act is accomplished by means likely to produce death or great bodily injury, or occurred during the commission of a robbery, burglary, kidnapping, or theft,

all in violation of § 16-3-600, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

APP'X 572

WITNESSES

1. ☒ MADE *Computer*
2. REPORT ENDED
Spartanburg County Sheriff's Office
3. INDEXED *Computer*
4. CHECKED WARRANTS *Computer*
5. CHECKED SIGNATURE
6. ASSESSMENT AND FINE CARD MADE
7. NOTICE VIOLATION
ARREST WARRANT NUMBER

M424610

ACTION OF GRAND JURY

True Bill

Foreperson of Grand Jury
Date:

NOV 24 2010

VERDICT

GUILTY

2/28/13

Foreperson of Petit Jury
Date:

FEB. 28, 2013

DOCKET NO.

10-GS-42-6830
The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

NOV 24 2010

TERM

THE STATE
vs.

Gabriel Jon Rios

Indictment for

BURGLARY FIRST DEGREE
(DWELLING)

SC Code: 16-11-0311

CDR Code: 0079

Class: FEL/EXM (V)

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2010 DEC -2 PM 1:54

M. HOPE BLACKLEY

APPX 573

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

INDICTMENT

At a Court of General Sessions, convened on NOV 24 2010, the Grand Jurors of Spartanburg County present upon their oath:

BURGLARY FIRST DEGREE (DWELLING)

That the Defendant, Gabriel Jon Rios, did in Spartanburg County on or about August 14, 2010 willfully and intentionally enter a dwelling belonging to Gail Holt located at [REDACTED] without consent and with intent to commit a crime therein, and either in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime:

- (1) was armed with a deadly weapon, and/or
 - (2) caused physical injury to any person who was not a participant in the crime, and/or
 - (3) used or threatened the use of a dangerous instrument, and/or
 - (4) displayed what was or appeared to be a knife, pistol, revolver, rifle, shotgun, machine gun, or other firearm, and/or
 - (5) entered the dwelling during the nighttime, and/or
 - (6) committed the crime while possessing a prior record of two or more convictions for burglary or housebreaking or a combination of both,
- all in violation of Section 16-11-0311 of *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


 Assistant Solicitor

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

GABRIEL JON RIOS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001549

PETITION FOR WRIT OF CERTIORARI

DAVID ALEXANDER
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

INDEX	i
ISSUES PRESENTED.....	1
STATEMENT.....	2
ARGUMENT	
1.	
Trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment.....	3
2.	
Trial counsel's failure to impeach the victim's claim that she recognized petitioner as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment	10
3.	
Trial counsel's failure to object to the solicitor's burden-shifting closing argument that petitioner had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment	13
CONCLUSION.....	15

ISSUES PRESENTED

1.

Whether trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment?

2.

Whether trial counsel's failure to impeach the victim's claim that she recognized appellant as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment?

3.

Whether trial counsel's failure to object to the solicitor's burden-shifting closing argument that appellant had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment?

STATEMENT

On November 24, 2010, petitioner Gabriel Jon Rios was indicted by a Spartanburg County grand jury for armed robbery, a weapons charge, grand larceny, kidnapping, first-degree assault and battery, and first degree burglary. App. 561 – 570. On February 26, 2013, petitioner was tried before the Honorable R. Lawton McIntosh and a jury. App. 1. Timi Poulos and Russell Ghent represented the State. App. 1. Matthew Shealy represented petitioner. App. 1. Petitioner was convicted and sentenced to a total of forty-five years' imprisonment. App. 376, ll. 11 – 22. The Court of Appeals affirmed petitioner's convictions. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. Mar. 11, 2015).

On June 3, 2015, petitioner filed a PCR application. App. 426. On January 30, 2017, a hearing was held before the Honorable Edward W. Miller. App. 440. Susannah C. Ross represented petitioner. App. 440. Caitlin B. Hastings represented the State. App. 440. Judge Miller denied petitioner's application in an amended order after a timely Rule 59(e) Motion. App. 544. This petition follows.

ARGUMENT

1.

Trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment.

Introduction

Petitioner's defense to this home invasion was alibi. App. 288, l. 6 – 292, l. 6. At trial, the jury heard the victim testify that she “[i]mmediately” recognized petitioner as her attacker because he worked for her husband's construction company. App. 108, ll. 4 – 24. The jury also heard the solicitor discredit petitioner's wife's testimony that she received a call from him on a landline sixteen minutes away from the crime scene near the time of the break-in. App. 322, ll. 8 – 15. The solicitor called petitioner's phone call alibi “just a story.” App. 322, ll. 8 – 15.

The jury did not see phone records substantiating petitioner's alibi. App. 460, ll. 6 – 20. App. 485 – 487. The jury did not hear a 911 call that would have discredited the victim's claim that she “immediately” recognized petitioner during the attack. (Applicant's Ex. 1). Nor did trial counsel object to the solicitor's burden-shifting closing about petitioner's alibi. App. 322, l. 24 – 323, l. 3. Trial counsel's failure to ensure the jury heard this crucial evidence undermines confidence in this verdict and creates a reasonable probability that the outcome of petitioner's trial would have been different. See Tappeiner v. State, 416 S.C. 239, 249, 785 S.E.2d 471, 476 (2016) (reciting burden of proof in a PCR case).

Factual and Procedural Background

The Trial and Appeal

The victim in this case, Gail Holt, claimed that on the morning of August 14, 2010, a man broke into her house, held “a sharp object” to her neck, and demanded she open a safe. App. 106, l. 9 – 111, l. 2. She did not know the combination. App. 110, ll. 17 – 23. The man then taped her hands behind her back, stole her car, and left. App. 111, l. 9 – 114, l. 7. Ms. Holt freed her hands of the tape in “a few minutes” and called her husband, Phil Holt. App. 114, ll. 4 – 16. Mr. Holt called the police. App. 114, ll. 15 – 16. App. 149, ll. 16 – 23.

Mr. Holt testified that petitioner worked “off and on” for his foam insulation business. App. 149, l. 24 – 150, l. 11. Petitioner helped Mr. Holt install the safe to which the intruder led Ms. Holt. App. 150, l. 12 – 151, l. 4. After his wife broke free and called him, Mr. Holt called the police, told them about the break-in, and “suggested they get there quickly, too.” App. 149, ll. 16 – 23. Mr. Holt then hung up and called his wife. App. 149, ll. 16 – 23. Mr. Holt beat the police to his house. App. 129, l. 25 – 130, l. 5. Ms. Holt claimed at trial that she “immediately” recognized petitioner during the attack. App. 108, ll. 4 – 24.

The timing of the break-in was approximately 7:30 AM. App. 312, l. 11 – 314, l. 11. Ms. Holt woke up “a little bit before 7:30.” App. 107, ll. 4 – 5. She had been awake “for a little bit” when she heard glass break. App. 107, ll. 18 – 23. A neighbor, Marie Ollinger, took her routine morning walk at 7:30 that morning and noticed a man she had not seen before walking in the neighborhood towards the Holts’ house. App. 163, ll. 3 – 24. App. 164, l. 20 – 165, l. 4. She lived “about seven houses away” from the Holts. App. 162, ll. 17 – 23. She described the person as an “unremarkable” black man and made no in-court identification of petitioner. App. 164, ll. 1 – 5.

Contrary to the vast majority of criminal trials, the State did not call the first officer to respond to the scene. App. 264, ll. 9 – 19. Petitioner called the officer, David Welch. App. 264, ll. 9 – 19. Trial counsel failed to ask Officer Welch what time he arrived. App. 264, l. 6 – 266, l. 17. Officer Welch testified that Mr. and Ms. Holt failed to give him petitioner’s name when he arrived. App. 264, l. 6 – 266, l. 17.

The next defense witness was Mrs. Estar Byrd. App. 267, l. 20 – 269, l. 2. Mrs. Byrd testified that she did not “really” know petitioner, but let him use her landline phone from time to time. App. 267, l. 20 – 269, l. 2. She testified her phone number was 864-____-2858. App. 267, l. 20 – 269, l. 2. She told the jury she had no memory of the date of the crime, August 14, 2010. App. 269, ll. 1 – 2. On cross-examination, she told the solicitor, “I can’t honestly speak on that,” when asked if she knew for sure whether petitioner used her phone that day. App. 269, ll. 19 – 25.

Petitioner’s wife then testified that she received a telephone call from her husband on Mrs. Byrd’s land line the morning of the crime at 7:25 AM. App. 271, l. 10 – 277, l. 5. Trial counsel then attempted to use the phone records at issue in this PCR. App. 271, l. 10 – 277, l. 5. The State strenuously objected, arguing the records had not been authenticated. App. 271, l. 10 – 277, l. 5. During this argument, the court ruled trial counsel could use the records to refresh recollection, but they could not be admitted unless they were properly authenticated. App. 271, l. 10 – 277, l. 5. Trial counsel told the court, “I have no plans on entering it into evidence.” App. 275, ll. 10 – 11.

The defense’s last witness was trial counsel’s investigator, Curtis Jones. App. 280, l. 1 – 283, l. 7. Jones drove the route from Mrs. Byrd’s house to the Holts’ house. App. 280, l. 1 – 283, l. 7. The distance was 5.2 miles and took sixteen minutes. App. 280, l. 1 – 283, l. 7.

Trial counsel asked the court to instruct the jury on alibi, but Judge McIntosh refused. App. 288, l. 6 – 292, l. 5. The court reasoned that the evidence only showed a partial alibi, which did not warrant giving the charge. App. 288, l. 6 – 292, l. 5. However, Judge McIntosh allowed petitioner to argue the defense of alibi to the jury. App. 288, l. 6 – 292, l. 5. Trial counsel argued that petitioner could not have committed the crime because testimony (not phone records) showed petitioner was at Mrs. Byrd’s house which was too far away for him to have committed the crime during the time window alleged by the State’s witnesses. App. 312, l. 11 – 314, l. 11.

During its closing argument, the State attacked petitioner’s alibi defense with great effect. App. 322, l. 1 – 323, l. 3. The solicitor addressed Ms. Byrd’s testimony about the phone: “But she couldn’t say for sure if she let him borrow it that morning or not. She told you she couldn’t even say that she saw him that morning.” App. 322, ll. 3 – 7. The solicitor then attacked petitioner’s wife, arguing:

... she thinks that she got a phone call from her husband around 7:20 something from a number that she believes was Ms. Byrd’s number. She wasn’t with him. She didn’t even see him that morning, and let’s not forget that yeah, she was convicted in 2008 of giving false information to police, for lying to police. So, you, you guys take that for what it’s worth.

App. 322, ll. 8 – 15. Again, entering the phone records would have taken these powerful arguments away from the solicitor that the phone calls were a fiction.

On direct appeal, petitioner raised the failure to charge alibi. App. 384. The State argued petitioner never established a complete alibi. App. 398. In its brief to the Court of Appeals, the State argued:

Notably, the cell phone record was never admitted into evidence. Furthermore, there is no other evidence presented by the defense which would warrant a charge on the defense of alibi—no testimony, no one mentioned Rios

was in their presence during the commission of the crime. **The entire closing argument on the alibi defense is a hypothetical theory based on nothing but the alleged phone call.**

App. 407, n.2 (emphasis added). The Court of Appeals affirmed the failure to give an alibi charge.

The PCR Hearing

Petitioner entered the vital phone records into evidence at the PCR hearing. App. 460, ll. 6 – 20. App. 485 – 487. The phone records show calls between petitioner’s wife and Mrs. Byrd’s landline at 7:16 and 7:22 AM. App. 485 – 487. Petitioner testified at PCR that trial counsel failed to enter the phone records into evidence because he neglected to subpoena a phone company representative to authenticate the records. App. 459, ll. 11 – 18. The State did not object when petitioner entered the records into evidence. App. 460, ll. 6 – 20.

Trial counsel inexplicably testified that calling a phone company witness to authenticate the records would also have required petitioner to testify—even though the records were those of his wife (who did testify). App. 472, ll. 9 – 24. He also claimed the jury would have “tuned that out.” App. 472, ll. 9 – 24. He said his witnesses adequately covered the substance of the records and he “suggested their existence by kind of sneaky-peek.” App. 472, ll. 9 – 24.

The PCR court credited trial counsel with a strategic reason for not admitting the phone records. App. 553. The court found trial counsel’s strategy to be reasonable because “he did not believe that Ms. Boyd’s phone records would be especially helpful either because it is unclear from the records who placed a call. They only indicate that a call was made.” App. 553. The court also found petitioner did not satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). App. 553-554.

Discussion

The PCR court erred in crediting trial counsel with a reasonable strategy and in finding no prejudice. Unlike a legitimate trial strategy where counsel must make a choice between defenses, the phone records here provided additional support for the defense that counsel actually presented. Introducing the phone records would have been completely in line with the strategy used by counsel—presentation of alibi. Presenting the phone records would have prevented the State from making the powerful argument that the phone calls were a recent invention. The Attorney General, in its brief in the direct appeal, specifically pointed out trial counsel's failure to introduce the records during the trial.

Trial counsel's failure to introduce the phone records is similar to the deficiencies in Putnam v. State, 417 S.C. 252, 789 S.E.2d 594 (Ct. App. 2016) and Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991). In Putnam, trial counsel performed deficiently when he failed to serve subpoenas on witnesses to secure their attendance at trial. Putnam at 264-66, 789 S.E.2d at 600-01. Like Putnam, trial counsel here failed to subpoena the necessary witness to authenticate and introduce the phone records.

Even more like petitioner's case is Martinez. Martinez was a rape case and the victim reported the crime immediately afterwards, somewhere between 2:00 and 2:15 AM. Martinez at 40, 403 S.E.2d at 113. The police found a wallet containing the defendant's driver's license at the victim's home. Id. at 40, 403 S.E.2d at 113. The defendant presented evidence he reported the wallet stolen at a lounge between 12:00 AM and 1:00 AM. Id. at 40-41, 403 S.E.2d at 113. The defendant testified he left the lounge at 1:45 AM. Id.

Trial counsel neglected to call a witness who would have corroborated the defendant's evidence that he left the lounge "fifteen minutes prior to the conclusion of the rape." Id. at 41, 403 S.E.2d at 113-14. This Court found both deficient performance and prejudice under Strickland and reversed. Id. The witness did not provide the defendant in Martinez with a complete alibi, but corroborated the defendant's testimony that his presence elsewhere would have made it difficult for him to commit the crime. Just like in Martinez, the phone records do not provide a complete alibi, but they do prove that the phone calls from Mrs. Byrd's landline to petitioner's wife's phone were not a complete invention. The records demonstrate that petitioner was sixteen minutes away, making his commission of the crime difficult. Under Martinez, trial counsel was deficient and failing to enter the records made petitioner's defense seem like an invention, especially in the modern age when juries are certainly aware of the existence of phone records that can substantiate such claims.

If trial counsel thought the records were valuable enough to give the jury a "sneaky-peek" at them, then they were valuable enough to enter into evidence. Like Putnam and Martinez, the failure to enter these records was through negligence, not part of any reasonable trial strategy. See also Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014) (reversing in PCR because trial counsel failed to present alibi defense). Petitioner was prejudiced because the State could claim his defense was entirely fiction, especially given his wife's conviction of a crime of dishonesty. This Court should grant certiorari and reverse.

Trial counsel's failure to impeach the victim's claim that she recognized petitioner as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment.

Unlike the vast majority of criminal trials, the solicitors in this case did not introduce the 911 call into evidence. Undoubtedly the reason the solicitors did not use the 911 call was because it undercut their key piece of evidence—Ms. Holt's claim that she "immediately" recognized petitioner during the attack. App. 108, ll. 4 – 24. Had the jury heard the 911 call, this key claim would have been disproved and the result of this trial would have been different.

Petitioner introduced the recording of the 911 call at the PCR hearing. App. 451, l. 7 – 452, l. 11. App. 460, ll. 6 – 20. Applicant's Ex. 1. Mr. Holt is the primary speaker on the 911 call recording, but Ms. Holt can be heard in the background. Applicant's Ex. 1. The dispatcher asks, **"Who is he? Do you know who he was?"** Applicant's Ex. 1 (emphasis added). Mr. Holt responds, **"Don't know."** Applicant's Ex. 1 (emphasis added).

Trial counsel testified he did not admit the 911 call "because I had Investigator Welch, ultimately." App. 471, l. 11 – 472, l. 1. He thought the jury hearing from a police officer who only testified that Ms. Holt did not initially identify petitioner was "a little more powerful" than hearing from Mr. Holt's own mouth that they did not know the intruder's identity. App. 471, l. 11 – 472, l. 1. Without identifying any specific "risks," the PCR court credited trial counsel with a reasonable strategic decision because "he felt that introducing the 911 tape posed more risks

than benefits, and he felt he could introduce the helpful information through other evidence.” App. 553.

The purported trial strategy, much like the phone records, is illogical because the 911 call substantiated a strategic decision trial counsel actually made. Trial counsel used Officer Welch to show that Ms. Holt did not immediately identify petitioner as she powerfully claimed during her testimony, which meant that he knew he needed to discredit her identification. Omitting recorded evidence from Mr. Holt’s own mouth that would also have impeached the State’s key witnesses was, like in Issue 1, important evidence that supported trial counsel’s chosen strategy. Nothing in the 911 call is inflammatory and was cumulative to the Mr. and Ms. Holt’s testimony, except for the critical impeachment evidence. Failing to enter this evidence constituted deficient performance. See Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016) (reversing in PCR because of trial counsel’s failure to impeach a witness with a prior inconsistent statement).

The failure to impeach a witness is deficient performance that prejudices a defendant. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (trial counsel failed to impeach with inconsistent eyewitness identifications). In Driscoll, defense counsel’s failure to impeach an eyewitness with prior inconsistent statements was held prejudicial. Id. The defendant was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach a prosecution witness who claimed at trial that the defendant confessed to the murder with a prior statement omitting the confession. Id. at 709-12. The centrality of the witness’s testimony was an important factor in the court’s consideration. Id.

Here, Ms. Holt’s “immediate” identification was the key fact for the prosecution and the failure to impeach her testimony could not have been more prejudicial. See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) (holding that defendant was prejudiced by trial counsel’s

failure to impeach a witness with a prior denial that a crime occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) (remanding case for prejudice inquiry because of trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

The solicitors' decision to omit the 911 call from their case-in-chief further demonstrates its value for the defense. The State routinely admits 911 calls into evidence. The State declined to do so in this case because it would have discredited their own witness. Trial counsel's failure prejudiced petitioner under the Sixth Amendment and this Court should grant certiorari and reverse.

Trial counsel's failure to object to the solicitor's burden-shifting closing argument that petitioner had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning. Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment.

Trial counsel admitted at the PCR hearing that he should have objected to the solicitor's burden-shifting closing argument. App. 474, ll. 9 – 18. Trial counsel conceded, "It sounded like it was burden shifting. I missed that." App. 474, ll. 9 – 18.

The solicitor made his burden-shifting argument during his attack on petitioner's alibi defense. App. 322, l. 1 – 323, l. 3. The solicitor told the jury, "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody." App. 322, l. 1 – 323, l. 3.

Despite trial counsel's admission that he should have objected, the PCR court found neither deficient performance nor prejudice. App. 550. This conclusion was error. The Due Process Clause requires the proof of every fact necessary to convict a defendant to meet the beyond-a-reasonable-doubt standard. U.S. Const. amends. V, XIV. In re Winship, 397 U.S. 358 (1970). "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. at 364. The prosecution bears this burden of

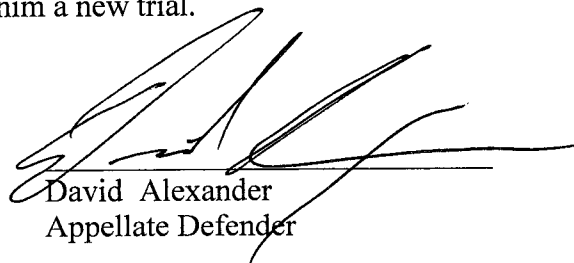
proof. Mullaney v. Wilbur, 421 U.S. 684, 703 (1975); Tot v. United States, 319 U.S. 463, 469-70 (1943).

A criminal defendant may stand silent throughout the trial. U.S. Const. amends, V, XIV. Doyle v. Ohio, 426 U.S. 610 (1976). It is always the State's responsibility to overcome the presumption of innocence and dispel reasonable doubts. The solicitor's argument that petitioner had years "to come up with this story" and that "nobody testified for him" was improper and the failure to object constituted deficient performance.

The solicitor's burden-shifting argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This satisfies the prejudice prong of Strickland. The prejudice is magnified in this case because the improper argument concerned petitioner's alibi defense and gave the jury the impression that it was petitioner's burden to prove alibi, not the State's burden to disprove it. Combined with trial counsel's errors to admit the crucial evidence described in Issues 1 and 2, the improper argument allowed the State to not only discredit petitioner's defense, but to foist an additional erroneous burden of proof on his case. This Court should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate result of reversing petitioner's convictions and granting him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

GABRIEL JON RIOS,

PETITIONER

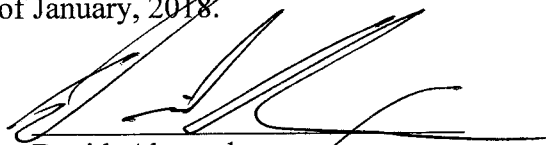
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Gabriel Jon Rios, #344751, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 16th day of January, 2018.


David Alexander
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 16th day of January, 2018.



(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001549

Gabriel Jon Rios,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
S.C. Bar #79054

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT’S QUESTIONS PRESENTED.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	4
STANDARD OF REVIEW.....	7
ARGUMENT.....	9
I. There is probative evidence in the record to support the PCR court’s finding Counsel was not deficient because he made a strategic decision not to introduce phone records to corroborate Petitioner’s wife’s testimony that she received a phone call from him the morning of the crime, nor was Petitioner prejudiced because the records do not establish a complete alibi such as to change the result at trial or on direct appeal.	9
II. There is probative evidence in the record to support the PCR court’s finding Counsel was not deficient because he articulated a valid trial strategy for not introducing the 911 tape as impeachment evidence where the victim’s husband, not victim, called 911, and where Counsel impeached the victim’s testimony through another witness.	13
III. There is probative evidence in the record to support the PCR court’s finding Petitioner was not prejudiced by the solicitor’s allegedly burden-shifting comments in closing because the solicitor is entitled to comment on the evidence introduced by the defense, and because, in any event, the comments were not so egregious as to render the trial fundamentally unfair.	17
CONCLUSION.....	19

RESPONDENT'S QUESTIONS PRESENTED

- I. Is there any probative evidence in the record to support the PCR court's finding Counsel was not deficient because he made a strategic decision not to introduce phone records to corroborate Petitioner's wife's testimony that she received a phone call from him the morning of the crime, nor was Petitioner prejudiced because the records do not establish a complete alibi such as to change the result at trial or on direct appeal?
- II. Is there any probative evidence in the record to support the PCR court's finding Counsel was not deficient because he articulated a valid trial strategy for not introducing the 911 tape as impeachment evidence where the victim's husband, not victim, called 911, and where Counsel impeached the victim's testimony through another witness?
- III. Is there any probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by the solicitor's allegedly burden-shifting comments in closing because the solicitor is entitled to comment on the evidence introduced by the defense, and because, in any event, the comments were not so egregious as to render the trial fundamentally unfair?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Petitioner was indicted at the November 2010 term of the Spartanburg County Grand Jury for burglary – first degree (2010-GS-42-6830), armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6831), grand larceny – value \$10,000 or more (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and assault and battery – first degree (2010-GS-42-6834). Matthew Shealy, Esquire, represented Petitioner. On February 26, 2013, Petitioner proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Petitioner guilty as indicted. Judge McIntosh sentenced Petitioner to imprisonment to concurrent terms of 40 years for burglary, 30 years each for armed robbery and kidnapping, and ten years for assault and battery, plus a consecutive term of five years for possession of a weapon.

Petitioner filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on February 1, 2015. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). The remittitur was returned on April 10, 2015.

Petitioner timely filed his application for post-conviction relief (PCR) on June 3, 2015. An evidentiary hearing was convened on January 30, 2017, at the Spartanburg County Courthouse before the Honorable Edward W. Miller. Susannah C. Ross, Esquire, represented Petitioner. Caitlin B. Hastings, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's trial counsel testified for the State. The PCR court found Petitioner received effective assistance of

¹ The State elected to proceed on the armed robbery charge and dismissed the grand larceny charge before trial.

counsel and dismissed Petitioner's application in its entirety by order signed March 21, 2017, and filed March 27, 2017. Petitioner filed a Petition for a Writ of Certiorari to this Court on January 16, 2018. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

On the morning of August 14, 2010, Gail Holt (“Mrs. Holt”) testified she woke up shortly before 7:30 a.m. App. p. 107. Sometime between 7:30 and 8:00 a.m., as she was preparing to take her dog out, she heard the sound of glass breaking somewhere in the house. App. p. 107, 116. Mrs. Holt went to investigate and came face-to-face with an intruder in the hallway of her home. App. pp. 107-08. At trial, Mrs. Holt testified she “immediately” recognized the man as “Gabe,” a man who previously worked for her husband both at his business and in their home. App. p. 108.

According to Mrs. Holt, the intruder held a sharp object at her neck, forced her down the hall to her husband’s office, and demanded she open the safe. App. pp. 109-10. When she was unable to open the safe, the man forced her into the bedroom, tied her hands behind her back while she was lying face down, and pulled the Holts’ gun from its holster. App. pp. 111-12. The man then demanded Mrs. Holt’s money and her purse. App. p. 112. He told Mrs. Holt not to move and threatened to kill her. App. pp. 112-13. The man ultimately took her money, cell phone, and stole her car. App. p. 113. Mrs. Holt testified she was able to free herself from the restraints a short time later, and she immediately called her husband, who then called the police. App. p. 114.

Mrs. Holt testified she identified Petitioner to the responding officers as “Gabe.” App. p. 131. However, the first officer on the scene testified for the defense, and he stated Mrs. Holt was initially unable to identify the intruder. App. pp. 264-65. However, she identified Petitioner as the perpetrator in a photo line-up later that morning on the same day the crime occurred. App. pp. 131-34, 138.

Phil Holt (“Mr. Holt”), the victim’s husband, he was at work when he received a call from his wife about the robbery. App. p. 148-49. According to Mr. Holt, he immediately set out for their house, called police along the way to report the crime, and then called his wife again. App. p. 149. He testified he knew Petitioner, who had worked for him on and off for a number of years. App. pp. 149-150. Specifically, Petitioner helped Mr. Holt install the safe that the intruder attempted to open and rob. App. p. 150. Mr. Holt also testified, several months earlier he had broken the same pane of glass in the door the intruder smashed, and Petitioner had not been to the Holts’ home since Mr. Holt replaced the pane. App. pp. 153-54.

The Holts’ neighbor, Mrs. Ollinger, testified she left her house around 7:30 a.m. that morning to go on a walk, and she encountered a black male she had never seen before walking in the direction of the Holts’ home. App. pp. 164-65, 167. Mrs. Ollinger testified she saw the man approximately six or seven minutes into her walk. App. p. 167.

Investigator Lorin Williams with the Spartanburg County Sherrieff’s Department testified he responded to the Holts’ home and spoke with Mrs. Holt. App. p. 176. Investigator Williams testified Mrs. Holt provided a description of the intruder and identified him as “Gabe.” App. p. 117. Williams explained Mr. Holt was able to give him Petitioner’s full name, so he prepared a photo line-up and presented it to Mrs. Holt later that day. App. pp. 178-79. According to Investigator Williams, Mrs. Holt unequivocally identified Petitioner in the line-up. App. pp. 179-80. Finally, Investigator Williams testified Petitioner was arrested later that evening, approximately a quarter mile from where Mrs. Holt’s vehicle was recovered the next morning. App. pp. 181-83, 187-88.

Officer Brandon Howard testified he responded to the scene at the Holt residence as part of the crime scene unit. App. pp. 191-92. Officer Howard testified he found a large piece of

broken glass from the door in the kitchen, which appeared to be the intruder's point of entry, laying in the hallway. App. p. 193. Officer Howard collected the glass and took it back to the Sheriff's Office where he dusted it for fingerprints. App. pp. 197, 208, 210. According to Officer Howard, he recovered one fingerprint from the glass and made a fingerprint card, which was then sent to another division within the office to be identified. App. pp. 210-14. Officer Theo Saar testified as an expert in fingerprint analysis, and identified Petitioner's fingerprint on the glass shard from the hallway. App. pp. 229-30, 233-34, 238.

Petitioner presented an alibi defense. Deputy David Welch, the first officer on the scene, testified neither of the Holts gave Petitioner's name when he first made contact with them. App. pp. 264-65. Next, the defense called Estar Byrd (Ms. Byrd), who testified she occasionally let Petitioner, along with several other people on her street, use her phone to make and receive calls. App. pp. 267-68. However, she could not say whether she let Petitioner use the phone on the day of the incident. App. p. 269. Sonia Rios, Petitioner's wife, testified she received a call from Petitioner that morning from Ms. Byrd's phone number at approximately 7:25 a.m. App. pp. 271, 276. Counsel's investigator testified he drove the route from the Holts' house to Florida Avenue, where Ms. Byrd lives, and the quickest route was approximately 5.2 miles and took 16 minutes. App. pp. 281-82.

Counsel then requested a jury charge on alibi, which Judge McIntosh declined to give, finding Petitioner had only established a partial alibi. App. pp. 288-91. However, he allowed Counsel to argue alibi and point out the potential problems with the timeline in closing, which Counsel did, arguing Petitioner was at Ms. Byrd's house, which was too far away from him to have committed the crime. App. pp. 291, 312-14.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (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)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Petitioner 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. at 443, 334 S.E.2d at 814. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The PCR court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688).

Second, counsel's deficient performance must have prejudiced Petitioner 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.

ARGUMENT

- I. There is probative evidence in the record to support the PCR court's finding Counsel was not deficient because he made a strategic decision not to introduce phone records to corroborate Petitioner's wife's testimony that she received a phone call from him the morning of the crime, nor was Petitioner prejudiced because the records do not establish a complete alibi such as to change the result at trial or on direct appeal.

Petitioner's defense to this crime was alibi. PWC p. 3; App. pp. 288-91. To this end, Counsel called witnesses at trial to establish Petitioner made a phone call to his wife from a house on Florida Avenue around 7:25 a.m. on the morning of the crime. Counsel's investigator testified the victim's home was approximately 5.2 miles away, which equated to a sixteen minute drive. In his closing argument, Counsel argued Petitioner had an alibi for the morning of the crime. Specifically, he stated:

We presented Ms. Byrd who testified that she had a landline phone, what her phone number was. It's [xxx-xxxx]. And Mrs. Rios testified that she got this phone call around 7:22. I don't believe that she testified to the duration of that call. But she did speak with her husband, she testified to, and she, she received that phone call from that number, [xxx-2858], that that happened at 7:22. . . .

Mr. Jones testified that it takes about 16 minutes from Florida Avenue to get over to Hillbrook, and that that drive was – it was in a car and it was the fastest way he could figure out, and the State had the opportunity to call a witness to reply to that and they didn't. So, that's – you just have to go with that. That's the only evidence in the record as to the distance between the one, the two points. . . .

And if this happened about 7:30, then even if he caught a ride, he couldn't get over there because 16 minutes, plus 22, is 7:38. So, if he called her, immediately hung up, gotten into the car, driven over there, all of that without anytime in-between, he certainly couldn't have done it now.

App. pp. 260-62. However, Counsel did not introduce into evidence Petitioner's

wife's phone records, which show a four-minute phone call between the wife and Ms. Byrd's number at 7:10 a.m. and a one-minute phone call at 7:22 a.m. App. pp. 481-82. Petitioner alleges these records "substantiate Petitioner's alibi" and create a reasonable probability the outcome of trial would have been different had Counsel introduced them. PWC p. 3.

These records, however, do not solve the problem with Petitioner's defense – he has no alibi for the entire time period in which the crime was committed; thus, he has no alibi at all. As this Court explained in State v. Robbins:

Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission. In other words, by an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. To be successful, *his alibi must cover the entire time when his presence was required for accomplishment of the crime.* 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. . . . [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.

275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (emphasis added).

The timeline established by the State at trial showed the robbery occurred sometime between approximately 7:30 a.m. and 8:30 a.m. At trial, the victim testified she woke up shortly before 7:30 a.m. and had been awake for "a little while" when she heard the sound of glass breaking somewhere in the house. App. p. 107, 116. When she went to investigate, she encountered Petitioner in the hallway of her home. App. pp. 107-08. Specifically, the victim testified this occurred sometime between 7:30 and 8:00 a.m. App. p. 116. The man then tied her up and rummaged through several rooms in the house, and she waited several minutes after he left before freeing herself and calling her husband. App. pp. 111-14, 116.

At the evidentiary hearing, Counsel pointed out the records did not establish a complete alibi. App. p. 472. Counsel also testified he made a conscious decision not to admit the phone records because “a record doesn’t show who made the phone call. The real, live person can testify that, yeah, it was [Petitioner] using this phone.” App. p. 477. Counsel specifically testified the decision not to subpoena someone to authenticate the phone records was a strategic decision, and therefore, Counsel was not deficient.

There is a strong presumption that counsel’s decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). “Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). “Courts must be wary of second guessing counsel’s trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel.” Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel’s strategy is reviewed under “an objective standard of reasonableness.” Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

Because Counsel articulated a valid strategy for using Petitioner’s wife to establish both that a phone call was made around 7:25 a.m. and it was Petitioner who made the call, the PCR

court correctly found Counsel was not deficient for choosing not to admit the records. App. p. 553. Petitioner takes issue with this finding and seems to argue this was an unreasonable strategic decision because Petitioner's wife was not credible, as she had a previous conviction for giving false information to law enforcement. PWC p. 7; App. p. 277. Petitioner also characterizes Counsel's explanation that any benefit from introducing the phone records would have been outweighed by requiring Petitioner to testify as "inexplicable." PWC pp. 7-8. However, Counsel could not call *only* a representative from the phone company because he needed to establish it was Petitioner who made the call. Petitioner cannot have it both ways – either Petitioner or his wife would have had to testify, and both had credibility issues.² Counsel's decision to elicit both pieces of information (i.e. the fact that a phone call occurred and who made it) from the same witness is not unreasonable.

Further, as Counsel noted, even if these records had been introduced at trial, the most they do is establish Petitioner was not at the victim's home between 7:23 a.m. and 7:39 a.m., which is not a complete alibi. In his ruling denying Counsel's request to charge alibi, Judge McIntosh specifically pointed out this issue. He stated, "Now, even in the light most favorable to [Petitioner], if you look at the 7:22 or 7:24 timeframe, there's still time for him to have gotten from the Florida [Avenue] address to the Perrin Street address, and therefore, there's insufficient evidence in the record for alibi because the entire time period in which the crime occurred. . . at least based on the evidence in the record, is not covered by the other evidence presented in this matter." Nothing presented at the PCR hearing changes this analysis; the phone records do not

² Counsel testified he did not feel it was in Petitioner's best interest to testify because "the way [Petitioner] said all this happened or the motivations for it being made up were going to be difficult for us, quite frankly." App. pp. 478-79. In any event, both Petitioner and Counsel agreed it was ultimately Petitioner's decision not to testify. App. pp. 466-67, 479.

expand the amount of time covered by Petitioner's "alibi," and he did not present the testimony of any witness who could account for his whereabouts after 7:39 a.m.³

Therefore, the PCR court correctly found Petitioner cannot establish any prejudice as a result of Counsel's decision not to introduce the phone records. App. pp. 553-54. The trial judge's analysis as to the applicability of the alibi charge is unchanged by the records, so logically, the outcome of Petitioner's direct appeal would also be no different. See, e.g., McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam))).

Because Counsel was not deficient and Petitioner suffered no prejudice from Counsel's decision not to admit the phone records, the Petition should be denied and dismissed as to this issue.

II. There is probative evidence in the record to support the PCR court's finding Counsel was not deficient because he articulated a valid trial strategy for not introducing the 911 tape as impeachment evidence where the victim's husband, not victim, called 911, and where Counsel impeached the victim's testimony through another witness.

Petitioner contends Counsel was deficient and Petitioner was prejudiced by Counsel's decision not to introduce the 911 tape at trial, because on the tape, the 911 operator immediately

³ Other than Petitioner's own testimony, he offered only the testimony of his daughter, who said she talked to her father on the day in question at 7:02 a.m. – well before the window of time at issue in the case. App. p. 468.

asks Mr. Holt, the caller, if he knew who the intruder was, and Mr. Holt replies, “Don’t know.” PWC p. 10. Petitioner contends this statement would have impeached Mrs. Holt’s testimony at trial that she recognized Petitioner “immediately.” PWC p. 10.

Counsel testified he had three reasons for not introducing the tape. First, because it was Mr. Holt’s statement, and Mr. Holt was not present during the robbery, which created problems with admissibility, as he had no personal knowledge of the identity of the perpetrator. App. pp. 471-72. Second, Counsel testified there were a number of statements made by Mr. Holt during the conversation with the 911 operator which Counsel felt “were bad” and “suggested that parts of his story were true.” App. p. 471. Third, Counsel testified he introduced the same information – that neither Mr. or Ms. Holt immediately identified Petitioner to law enforcement – in through his own witness, the first responding officer, and that testimony was “a little more powerful than Mr. Holt. . . .” App. p. 471. Accordingly, the PCR Court correctly found Counsel was not deficient because he articulated valid trial strategies for choosing not to introduce the tape. App. p. 555-56.

First, Mr. Holt’s statement is not impeachment evidence against Ms. Holt. The plain language of Rule 801 contemplates the prior statement being made by the testifying witness, i.e. the declarant. South Carolina Rules of Evidence, Rule 801(c) (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”); Rule 801(d)(1)(A) (“A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant’s testimony.”) See also State v. Caulder, 287 S.C. 507, 513, 339 S.E.2d 876, 880 (Ct. App. 1986) (“A prior inconsistent statement is admissible as substantive evidence when the declarant testifies at trial and is subject

to cross-examination.”). Petitioner implies that because Ms. Holt can be heard in the background during portions of the tape, the statement can be used against her.⁴ PWC p. 10. However, Petitioner does not cite any case law for the proposition that one witness’s statement can be used to impeach another, and in fact, the only cases he cites in support of this argument are instances where trial counsel failed to use a witness’s own statement against him. PWC pp. 11-12.

At most, the 911 tape could have been used to impeach Mr. Holt’s testimony only.⁵ However, as Counsel pointed out at the PCR hearing, other aspects of the Holts’ testimony are confirmed by the tape – for example, that the intruder threw a rock through the carport window and came down the hall looking for money. App. pp. 112, 193-94. Most importantly, Mr. Holt and the 911 operator discuss that the time frame for the robbery, and Mr. Holt says their best estimate is “eight o’clock.” This statement pushing the crime closer to 8:00 a.m. rather than 7:30 a.m. undermines Petitioner’s already weak “alibi” defense, and Counsel could reasonably choose not to introduce that statement.

Finally, Counsel was able to impeach Mrs. Holt’s claim she recognized Petitioner “immediately” by calling the first officer to arrive at the scene to testify about his interaction with the Holts. App. pp. 264-66. That officer, Welch, testified he spoke to Mr. Holt first who “did not know the suspect at that time” and described him as “an unknown suspect,” which is the exact same statement Petitioner claims makes the 911 call so important. App. p. 264. Welch

⁴ Notably, Mrs. Holt is not heard at the beginning of the tape, when the 911 operator asks Mr. Holt if he knows who the intruder was.

⁵ In addition, in order for Counsel to be permitted to introduce the 911 tape for impeachment, Mr. Holt first would have to be asked about his statements on the tape and deny making them. Rule 613(b), SCRE. If Mr. Holt agreed he made the prior statement, the 911 tape would not be admissible anyway. *Id.* Other than Mrs. Holt’s statement that she recognized Petitioner right away (but purposely did not call him by his name), nothing in either Mr. or Mrs. Holt’s testimony suggested they identified Petitioner by name until sometime after law enforcement arrived at the house. App. pp. 106-61.

testified he then spoke with Mrs. Holt who initially gave him only a physical description of the robber, but did not give a name. App. pp. 265-66. Welch also impeached Mrs. Holt's testimony that the intruder already knew the location of the safe in the home, testifying instead that Mrs. Holt reported he asked her where the safe was. App. pp. 137, 265.

As noted above, "judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. "Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Strickland, 466 U.S. at 691). Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy).

Counsel offered myriad reasons why he chose not to introduce the 911 tape, all of which are valid trial strategy considerations supported by the record. Accordingly, the PCR court correctly found Counsel was not deficient, and this Court should deny the petition as to this issue.

III. There is probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by the solicitor's allegedly burden-shifting comments in closing because the solicitor is entitled to comment on the evidence introduced by the defense, and because, in any event, the comments were not so egregious as to render the trial fundamentally unfair.

Petitioner argues Counsel was deficient for failing to object to the part of the State's closing which was allegedly a burden-shifting argument, and this failure prejudiced Petitioner. As part of solicitor argued Petitioner "has had two and a half years, since this incident happened, to come up with this story, and that is all this is is [sic] just a story." App. p. 322. She also argued, "No one said that they were with him that morning. . . . [N]obody who testified for him accounted for his whereabouts. Nobody." App. p. 322. At the evidentiary hearing, Counsel testified he "probably" should have objected to that argument because it "sounded like it was burden shifting." App. p. 474. Nonetheless, the PCR court found Counsel was not deficient, nor was Petitioner prejudiced by Counsel's lack of objection. App. p. 550.

The PCR court correctly found Counsel was not deficient, as these statements were made in the context of a larger argument rebutting Petitioner's partial alibi defense. App. pp. 322-23. She was specifically rebutting Petitioner's argument "that [Petitioner] was on the phone before this happened. So, he couldn't have been there." App. p. 322. She pointed out that Petitioner's wife was not with him at the time and did not see him at all that morning, and noted "it was absolutely possible" for Petitioner to have committed the crime, despite the defense's contention "that there's no way he could have been on Perrin Drive between 7:30 and 8:00 when Mrs. Holt says this incident happened because he was on the phone with his wife at 7:20 something." App. p. 322. Her argument to the effect that "no one said that they were with him" and "nobody. . . accounted for his whereabouts" was appropriate in the context of responding to the witnesses

presented by the defense. She was merely pointing out the same hole in Petitioner's case recognized by the trial judge, the Court of Appeals, Counsel, and the PCR court – no one can account for his whereabouts during the entire timeframe the crime could have taken place.

“A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument.” Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (citing Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002)). “[I]t ‘is not enough that the prosecutors’ remarks were undesirable or even universally condemned.’ The relevant question is whether the prosecutors’ comments ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’” Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

Here, the solicitor's allegedly objectionable comments were a small fraction of her closing argument, approximately five lines out of nine pages of the transcript. App. pp. 315-324. See also Randall, 356 S.C. at 643, 591 S.E.2d at 611 (“[T]he objected-to argument consists of only 10 lines of the transcript. This is not akin to other situations in which we have reversed for repeated improper references throughout trial.”); State v. Tubbs, 333 S.C. 316, 509 S.E.2d 815 (1999) (“We hold that the solicitor's references to ‘Cobra’ during summation, though undesirable, constituted an occasional use of Defendant's nickname and did not infect the entire trial with unfairness as to deprive Defendant due process of law.”). Further, the trial judge gave a lengthy charge on what constitutes evidence, including an admonition that:

any things the attorneys told you in their opening statements, in their closing statements. . . or whatever else during the course of this trial is not evidence. Now, they're not sworn witnesses. They do not take this witness stand. And so

what they say is not technically evidence. It is helpful, and it is designed to help you understand the issues and what is in this case, but it is not evidence.

App. p. 328. See also State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009) (“The comment was not so grievous that its alleged prejudicial effect could not be removed in any other way. After reviewing the record in its entirety, we do not believe the solicitor's comments so infected the trial with unfairness as to make Goodwin's conviction a denial of due process. Moreover, any alleged error was cured by the trial court's extensive jury charge. . .”).

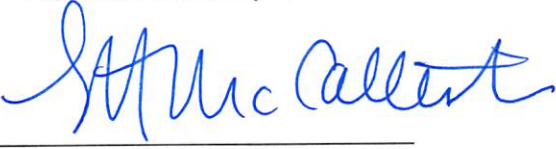
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not deficient in declining to request a competency evaluation, nor was Petitioner prejudiced by the lack of one, and Petitioner's guilty plea was freely and voluntarily given. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
Lindsey A. McCallister

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

July 2, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001549

Gabriel Jon Rios,.....Petitioner,

v.

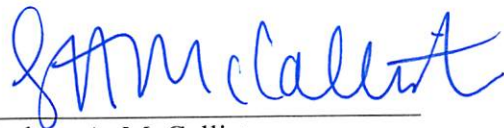
State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Lindsey A. McCallister, certify that I have today served the within **Motion for Fourth Extension to File Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589**

This 2nd day of July, 2018.



Lindsey A. McCallister
S.C. Bar # 79054
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

APP'X 614

The South Carolina Court of Appeals

Gabriel Jon Rios, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-001549

ORDER

This matter is before the court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. Based on the vote of the panel, the petition for a writ of certiorari is denied.

FOR THE COURT

BY *V. Claire Allen, Deputy*
CLERK

Columbia, South Carolina

cc:

David Alexander, Esquire

Lindsey Ann McCallister, Esquire

The Honorable Edward W. Miller

Gabriel J. Rios

FILED

2019
APPX 615



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

April 26, 2019

The Honorable Amy W. Cox
PO Box 3483
Spartanburg SC 29304-3483

REMITTITUR

Re: Gabriel J. Rios v. State
Lower Court Case No. 2015CP4202541
Appellate Case No. 2017-001549

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

The exhibit being returned is:

Applicant's Exhibit 1.

Please sign the enclosed copy of this letter and return to acknowledge receipt of this item.

Very truly yours,

V. Claire Allen, Deputy

CLERK

APP'X 616

Enclosure

cc: David Alexander, Esquire
Lindsey Ann McCallister, Esquire

Receipt Acknowledgement:

Name _____

Date _____

Name: _____

Please print

Appellate Case No. 2017-001549

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Spartanburg

Gabriel Jon Rios, # 344751
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2019CP4202536

APPLICATION FOR

POST-CONVICTION RELIEF

pursuant to § 17-27-45(c);
S.C.R.Civ.P. Rule 15(c)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Corr. Inst. 386 Redemption Way
2. Name and location of Court which imposed sentence Spartanburg County Court
3. Name(s) of co-defendant(s) (if any) None
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) (2010-GS-42-6830) Burglary 1st; Armed Robbery (2010-GS-42-6831)
 - (b) Possession of weapon during violent crime (2010-GS-42-6832)
 - (c) Kidnapping (2010-GS-42-6833), Assault & Battery 1st (2010-GS-42-6834)
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) February 26, 2008 40 years Burglary 1st, 30 yr. Armed Robbery
 - (b) 30 yr Kidnapping, 10 yr Assault and Battery and

Revised 3/2003

(c) Consecutive Possession of weapon

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty _____
(b) after a plea of not guilty ✓
(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

- i. Appellate Court - Direct Appeal
ii. _____
iii. _____

(b) the result in each such Court to which you appealed:

- i. Affirmed
ii. _____
iii. _____

(c) the date of each such result:

- i. April 1, 2015
ii. _____
iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. No: 2015-UP-135
ii. _____
iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

- (a) _____
(b) N/A
(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: See: Attached Sheets

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 AM 10:42

- (a) Actual & Factual Innocence §17-27-45(c) Newly Discovered
 (b) Investigative & Prosecutorial Misconduct
 (c) See: Attached sheets. Due Diligence; Due Process
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) See: Attached Sheets: Due Diligence; Due Process
 (b) Actual & Factual Innocence §17-27-45(c) Newly Discovered
 (c) Investigative & Prosecutorial Misconduct
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? NO
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? NO
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Application for Habeas Corpus §2054
 ii. _____
 iii. _____
 iv. _____
- (b) the name and location of the Court in which each was filed:
- i. S.C. Carolina U.S. District Court
 ii. _____
 iii. _____
 iv. _____
- (c) the disposition thereof:
- i. pending
 ii. _____
 iii. _____

FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 2019 JUL 17 AM 10:42

iv. _____

(d) the date of each such disposition:

i. pending

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. pending

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. N/A

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. N/A

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Newly Discovered Jan 1st 2019 § 17-27-45(c) Due Diligence
(b) of 1 yr of Discovery is Applied of Investigative
(c) Prosecutorial Misconduct of Actual? Factual Innocence

17. Were you represented by an attorney at any time during the course of:

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 AM 10:42

- (a) your arraignment and plea? N/A
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? No
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Matthew Shealy 366 N. Church St. Suite 3000
- ii. Spartanburg SC 29303
- iii. 1st P.C.R. Counsel
- (b) the proceedings at which each such attorney represented you:
- i. TRIAL & Sentence
- ii. P.C.R.
- iii. _____
19. State clearly the relief you seek in filing this application:
Vacation of Judgment And Sentence, Applicant Seeks Rehearing.
20. Are you now under sentence from any other court that you have not challenged?
No

FILED
CLERK OF COURT
SPARTANBURG, SC
2019 JUL 17 AM 11:42

STATE OF SOUTH CAROLINA

County of

Spartanburg

VERIFICATION

I, ^{Cabriel} ~~Rios~~ being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

1st Cabriel Rios

SWORN to and subscribed before me this 12th
day of July, 2019.

Stephane Marshall (L.S.)
Notary Public

My Commission Expires: May 12, 2021

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 AM 10:42

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, Cabriel hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

/s/ Cabriel
Applicant

SWORN or affirmed to and subscribed before me this

17th day of July, 2019

Stephanie Marshall
Notary Public

My Commission Expires:

May 12, 2021

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 AM 10:42

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Gabriel Jon Rios, #344751
Applicant,

v.

State of South Carolina
Respondents

IN THE COURT OF COMMON PLEAS
C/A NO. 2019CP4202536
Questions 10.(a)(b)(c); 11.(a)(b)(c) 19
ATTACHMENT TO
APPLICATION FOR
POST-CONVICTION RELIEF

Pursuant to §17-27-45(c)
Newly Discovered Evidence
Investigative Misconduct &
Actual & Factual Innocence
S.C.R. Civ. P. Rule 15(c) Relation Back
of Amendments Original Pleadings

JURISDICTION

The Applicant timely Files his Application
for Post-Conviction Relief Pursuant to S.C.
Code Ann § 17-27-45(c) Newly Discovered
Evidence; Actual & Factual Innocence;
Investigative Misconduct. FRAUD of Court.
S.C.R. Civ. P. Rule 15(c) Relation Back of Amendment Original Pleadings
Sees Attached Affidavit of Applicant Exhibit A

Affidavit of Gabriel Jon Rios, S.C.D.C. #344751
Investigative Misconduct Officer Williams Investigator
Over this Case He was 1. of 5. Fired for Fraudulent at as mine.

APP'X 625

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 AM 10:00

LEGAL MAIL
MAIL ROOM

FACTS

Mr. Williams told the Jurors that Mrs Holt stated that she knew him as Gabe (Tr. T. p. 39 lines 7-12)

7. A: She did. She stated that she knew him as Gabe.
8. Q: Okay. And through your investigation, would you
9. were you able to determine a full name for Gabe?
10. A: Yes
11. Q: And what was the name that you had determined?
12. A: It was Gabriel Rios. It's actually -- it's Gabriel Jow
13. Rios

During Cross-examination Mr. Williams testified he got information from the first officer on the scene and then speaking with Mrs. Holt. (Tr. pp. 43; lines 1-25 pp. 44 lines 1-25 Tr. pp. 103 line 16-25)

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 AM 10:42

Officers Welch & Brandon Howard was there when Officers Williams got there and was told a UNKNOWN SUSPECT had Broken a glass & entered the House. Officer Williams admitted he was told it was Mrs Holt who told him it was Gabriel Rios Before he talks to the wife who told the husband that it was a UNKNOWN SUSPECT. Who Mr. Holt told Officers Welch Mr. Williams knew this and Convinced the wife to go along with it. Mr. Williams was Fired From

LEGAL MAIL
MAIL ROOM

the Spartanburg County Sheriff's Office in January 2019
For Falsifying Documents to Frame Defendants &
to obtain a Warrants. The Courts & The Attorney General
office was from this Point on to 30 years Back are
being investigative for Fraudulent Misrepresentation by
Officer Williams; Cases Are being looked into by the
Spartanburg County Sheriff's Dept. & Solicitors Office;
And the Attorney General's Office.

The Applicant is Actually & Factually Innocent
& was Convicted By Fraudulent Misrepresentation
of Fred. Mr. Williams he Clearly Framed me
as the Records Supports it. And if he will
be honest at the Evidentiary Hearing it will be
proven also. see: 911 tape - Exhibit B in Possession
of By the Respondents

D.N.A. Evidence from Crime scene Applicant Negative
Exhibit C - In possession by the Respondents.

LEGAL MAIL
MAIL ROOM

Discussion

Actual Innocence, see: McQuiggin v. Perkins,
569 U.S. 383 (2013) A federal habeas Court,
faced with An Actual-Innocence gateway claim,
Discovered Jan. 1st, 2019 within the statute-
of limitation of the Discovery of Investigative
Misconduct of Officer Williams.

See: Schlup v. Delo (1995); House v. DeLo
(2006),

Also known as "Plain Error", is a special
standard of review in legal cases to Prove
that a Charged Defendant he is accused of,
which is often applied by Courts to Prevent a
MisCarriage of Justice. FRAUD Upon the Court.
See: State v. Quattlebaum (338 S.C. 441,
557 S.E. 2d 105) (2001) 4. of 5.

FILED
CLERK OF COURT
SPARTANBURG COURT
2019 JUN 02
AM 10:42
LEGAL MAIL
MAIL ROOM

Conclusion

WHEREFORE, based on the foregoing statement of Facts & Record on Appeal & Affidavit of Applicant and Statute § 17-27-45(c); Newly Discovered Evidence & Actual & Factually Innocence of Investigative Misconduct relied on Applicant Respectfully prays this Honorable Court will find Newly Discovered Evidence & Actual Innocence; And Investigative Misconduct and as a result Applicant was denied a Fair Trial & Due Process of Law & Equal Protection By Fraudulent Falsified Case Against Applicant.

THEREFORE, Applicant Respectfully asks this Court to Grant a New Trial; Vacation of Conviction & Sentence.

Respectfully Submitted,
151 Gabriel Ries
Gabriel Jon Ries, #344751

LEGAL MAIL
MAIL ROOM

5. of 5.

APP'X 629

FORTIOR

EXHIBIT

A

Affidavit of Applicant

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 AM 10:42

LEGAL MAIL
MAIL ROOM

APP'X 630

Gabriel Jon Rios, #344751
AFFIDAVIT OF APPLICANT

Mr. Williams told the jurors that Mrs. Holt stated that she knew him as Dale (TR PP. 39 lines 7-12), doing cross-examination. Mr. Williams testified he got information from the first officers on the scene and then speaking with Mrs. Holt. (TR PP. 43, line 1-25 PP. 44 lines 1-25 TR PP. 183 line 16-25). Officers Welch and Brandon Howard was these whom officers Williams got there and was told a Unknown suspect had broken a glass and entered the house. Officers Williams admitted he was told it was Mrs. Holt who told him it was Gabriel Rios before she talk with the wife who told the husband that it was a Unknown suspect who Mrs. Holt told officers Welch. Mr. Williams knew this and convinced the wife to go along with it. Mr. Williams was fired from the Spartanburg County Sheriff's office in January of 2019 for falsifying documents to obtain a warrant. Mr. Williams case from this point to 20 years back are being look into by the Solicitor's office and Attorney General office. Mr. Williams has stage a act of wrong doing to me stating that it be the me to call the Holt's when Mr. Holt was not there.

AFFIANT SAYETH NOT

SWORN TO AND SUBSCRIBED Before me

On this 1st Day of July 2019

151/ Stephanie K. Jarshall

Notary Public For South Carolina

My Commission Expires May 12, 2021

151/ Gabriel Rios

Gabriel Jon Rios #344751

Affiant

APP'X 631

Gabriel Jon Rios, #344751
McCormick Corn Inst F-3-A-187
396 Redemption Way
McCormick, S.C. 29899

July 12, 2019

Spartanburg County Clerk of Court
Attn: Mrs. Gail Moffitt, Asst. Clerk
P.O. Box 3483
Spartanburg, S.C. 29304-3483

RE: Filing of Application for P.C.R.

Dear Mrs. Moffitt,

Please find my P.C.R. & Attachment to
Forfeiture Exhibit A - Affidavit of Applicant. Please
Clock-Stamp it And Return to me for
my Files a Clock-Stamped Copy. I thank
you for all your time & help Appointing
Counsel as I'm Indigent.

Respectfully Submitted
JS/ ~~Gabriel Rios~~
Gabriel Jon Rios #344751
LEGAL MAIL
MAIL ROOM
APPX 632

CLERK OF COURT
SPARTANBURG COUNTY
2019 JUL 17 PM 10:47

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Gabriel Jon Rios, #344751,
Applicant,

vs.

State of South Carolina,
Respondent.

C/A No.: 2019-CP-42-02536

AMENDED P.C.R.

SUPPLEMENT

Pursuant to S.C. Code
Ann. §17-27-45(c)

S.C.R.C.P. - Rule 15

JURISDICTION

The Applicant filed a timely application for post-conviction relief pursuant to S.C. Code Ann. §17-27-45(c), and this amendment is in support of application.

EXHIBITS A, B, C, D, E FACTS

See: HERETO ATTACHED insupport of Investigative and Prosecutorial Misconduct, Newly Discovered Evidence of lead investigator Lorin Williams, Sheriff's Investigator fired on or about January 1, 2019. Cases stretching back two decades under review.

Investigator Lorin Williams did the very same thing in my case to get illegal arrest warrants, as Applicant has always maintained his innocence. Exhibit - B: Supporting Documents

2019 AUG 29 PM 2:02
CLERK OF COURT
SPARTANBURG

2019 AUG 19 PM 2:03
CLERK OF COURT
SPARTANBURG

FACTS, continued

On August 14, 2010, police was called to a home invasion on Perrin Street. When officers arrived the officers were met by the husband who told the officers that his wife called him and told him that a unknown suspect came into the house and robbed her. The officer took the information and talked to the wife who told him that a black guy with a ball cap came in and tied her and robbed her. With the information the officer passed it on to the lead investigator Williams. Mr. Williams along with officer Welch, was there when the Forensic Officer Brondon Howard arrived and was told that an unknown suspect had broken into the house through the carport. At this time Investigator Williams (tr. p. 183, lines 16-25) talked to the husband who told him that Gabriel Rios robbed his wife. After talking to the husband who was not there at the time of this crime, he went into the house and talked to the wife. When Investigator Williams showed the wife some pictures she immediately recognized Mr. Rios as a person she knew who worked for her husband, never the person who robbed her. At this time Mr. Williams requested that the wife give a statement, while he go and get a warrant for Gabriel Rios. The wife gave a hand written statement that a black guy with a base ball cap came in and robbed her and her husband say his name is Gabriel Rios, Mr. Williams took information from a person that was not there and who had already told the first officer on the scene that it was an unknown suspect. Mr. Williams did not have proper

2019 AUG 18 PM 2:43

SPRINT
08/18/2019

cause to get a warrant for Mr. Rios and this case should be dismissed. On and about January, 2019 Detective Williams was arrested and fired from the Spartanburg County Sheriff's Office for falsifying documents to get warrants to arrest people. The Solicitor's Office, along with the Attorney General's Office has requested that every case Mr. Williams handled be looked into all the way back twenty (20) years. Mr. Williams went and obtained a warrant for my arrest by falsifying documents stating that M [REDACTED] identified me when he got information from the husband, who was not there. During trial they came up with a story that she immediately recognized Mr. Rios after telling her husband she didn't know who it was. Mr. Williams' statement along with the warrant he used should be thrown out. This is Applicant's second (2nd) P.C.R. pending in the Court of Common Pleas. Case No.: 2019-CP-42-02536/Pending

DISCUSSION

In State v. Quattlebaum, 338 S.C. 441, 557 S.E.2d 105 (2001) where the whole integrity of the judicial system was called into question, just as lead investigator Lorin Williams has done in my case. This Court should appoint legal counsel as soon as possible and grant an evidentiary hearing as a matter of law and judicial equal protection and due process is being applied.

2019 AUG 19 PM 2:03

CLERK OF COURT
SPARTANBURG COUNTY

CONCLUSION

Applicant prays this Court will appoint legal counsel and grant an evidentiary hearing because he has presented evidence to warrant and support his claim.

Respectfully submitted,

Gabriel Jon Rios

Gabriel Jon Rios #344751
McCI F-3 A-side
386 Redemption Way
McCormick, SC 29899

Applicant, pro-se

2019 AUG 19 PM 2:03
SPRINT

①

Sheriff's investigator fired; Cases stretching back two decades under review

By
Conor Hughes

Posted Feb 1, 2019 at 6:28 PM

Criminal cases stretching back more than 20 years across three Spartanburg County law enforcement agencies are under review after an investigator with the Spartanburg County Sheriff's Office was terminated last week.

Investigator Lorin Williams was fired Jan. 24 after he was accused of using false information to obtain a search warrant, according to records on file with the state Criminal Justice Academy.

Seventh Circuit Solicitor Barry Barnette sent a letter Monday to every member of the Spartanburg County Bar Association, informing attorneys that his office is re-examining all current and past cases Williams was involved in.

During his 13-year tenure at the Sheriff's Office, Williams was involved in many cases, from murder investigations to drug busts. Williams also served two stints — together, about five years — with the Landrum Police Department and about two years at the Chesnee Police Department before starting at the Sheriff's Office, his training records show.

On Jan. 11, Williams was issued a search warrant based on an affidavit in which he swore he had received information from a reliable confidential informant, according to the termination notice from the Sheriff's Office. The warrant was executed Jan. 15.

In the affidavit, Williams said that law enforcement had gathered verified information from the informant in the past to seize drugs and arrest people involved in illegal narcotics sales, according to the notice.

But that person had not been signed up as a confidential informant, and Williams had not confirmed information that person provided before obtaining the warrant, according to the termination notice. No criminal charges have been filed against Williams.

APP'X 637

Spartanburg County Sheriff Chuck Wright declined to comment on Williams' termination or the Solicitor's Office's review.

Murray Glenn, a spokesman for the Solicitor's Office, said the review will be rigorous. "It will be an intensive process," he said. "We're going to do our due diligence during our review."

Glenn could not speak to the exact number of cases the office would be reviewing. "It's impossible to put a timeline on it," he said.

According to Barnette's letter, the state Attorney General's Office has been notified of the review.

CLERK OF COURT
SPARTANBURG, SC
2019 AUG 19 PM 2:03

APP'X 638

SPARTANBURG COUNTY (FOX Carolina) - SLED confirmed Tuesday that they have opened an investigation into a terminated Spartanburg County investigator.

Investigator Lorin Williams, who has worked with the Sheriff's Office since 2005 and previously worked for Landrum and Chesnee police departments, is accused of using false information to obtain a search warrant, according to documents obtained from the SC Criminal Justice Academy.

Solicitor Barry Barnette wrote a letter on January 28, 2019 notifying attorneys that all cases Williams worked on, open or closed, will be reexamined.

According to the letter, Williams was fired in January after he reportedly secured a search warrant on Jan. 11 using a sworn statement about an informant that turned out to be inaccurate.

Barnette said the South Carolina Attorney General's Office has also been contacted about the matter.

The Solicitor's Office couldn't confirm an exact number of cases that will be reexamined but said it was "substantial," and could take an extended amount of time.

The solicitor's office said they are looking for "any and all problems attacking the credibility of a case."

Administrators with the Spartanburg County Sheriff's Office confirmed Williams had been terminated.

SLED confirmed Tuesday that, at the request of the Spartanburg County Sheriff's Office, they opened an investigation on January 29 into the incident. Agents tell us at this time it is an active and open investigation.

Copyright 2019 FOX Carolina (Meredith Corporation). All rights reserved.

2019 AUG 19 PM 2:03

APP'X 639



Spartanburg County Sheriff's Office
CHUCK WRIGHT, SHERIFF

AFFIDAVIT OF PHOTOGRAPH IDENTIFICATION

Case Number: 2010080848

Date: 8-14-10

Time: 10:38 AM

Location: 639 PERAIN DR.
Spartanburg, SC

I, [REDACTED], have viewed a group of 6
 photographs this 14 day of Aug, 2010, from which I have positively
 identified photograph number 1628793 displayed to me by
L. Williams of the Spartanburg County Sheriff's Office
 as the person who I know as Gab. He worked for
my husband. He has done work at my
home in the past.

on the 14 day of August, 2010.

Signature: [REDACTED]

Print Name: [REDACTED]

Address: [REDACTED]

Phone: [REDACTED]

SWORN to before me this 14 day of

August, 2010.

[Signature]
 Notary Public for South Carolina

My commission expires: 6-2-20

P.O Box 771 * Spartanburg, SC 29304 * (864) 503-4500 * (864) 503-4509

APP'X 640

2010 AUG 19 PM 2:03
 CLERK OF COURT
 SPARTANBURG, SC

Narrative

Narrative

08/13/2010 Page 4 of 8
I RESPONDED TO 639 PERRIN DR IN REF TO A HOME INVASION. UPON ARRIVAL PHILLIP STATES HE LEFT THE RESIDENCE AT APPROX 0630 THIS MORNING. HE RECIEVED A CALL FROM HIS WIFE [REDACTED] THAT AN UNKNOWN SUSPECT BROKE INTO THE RESIDENCE AND TIED HER UP. PHILLIP RECIEVED THE CALL FROM [REDACTED] AT APPROX 0809 HRS THIS DAY. PHILLIP INTURN WENT HOME AND CALLED 911 WHILE STILL ENROUTE. OFFICERS ARRIVED AT APPROX 0836 HRS [REDACTED] STATES SHE WAS IN BED WHEN SHE HEARD GLASS BREAKING [REDACTED] GOT UP TO INVESTIGATE AND WAS MET IN THE HALLWAY BY A BLACK MALE [REDACTED] DESCRIBED AS A MIDDLE AGED MALE WITH A BALL CAP ON. HE ASKED HER WHERE THE SAFE WAS AND CONTINUED ASKING ABOUT MONEY. THE SUSPECT ORIGINALLY CONFRONTED [REDACTED] IN THE HALLWAY WITH A LARGE PIECE OF GLASS. THE SUSPECT TOOK HER BACK TO THE BEDROOM WHERE HE BOUND HER HANDS WITH BLUE TAPE. SUSPECT TOOK A SMITH AND WESSON .357 HANDGUN WHICH WAS ON THE BEDPOST AND CONTINUED TO DEMAND MONEY, THE SAFE COMBINATION, AND THE LOCATION OF HER PURSE. SUSPECT RETRIEVED HER PURSE AND TOOK HER CELLPHONE UNKNOWN MAKE, \$220 IN CASH FROM HER PURSE ALONG WITH THE KEYS TO THE BELOW LISTED VEHICLE. SUSPECT THREATENED TO KILL HER IF SHE GOT UP. [REDACTED] HEARD THE SUSPECT LEAVE AND WAITED SEVERAL MINUTES BEFORE LEAVING THE BEDROOM WHERE SHE WAS ABLE TO UNDO THE TAPE AND CALL HER HUSBAND. ID OFFICER HOWARD ARRIVED ON SCENE, INV L. WILLIAMS ARRIVED ON SCENE. VEHICLE TAKEN WAS A 2001 LEXUS 300RX WHITE IN COLOR BLACK LEATHER INTERIOR, TAG #EHD844, VIN # JTJGF10U610101547. THIS VEHICLE WAS ENTERED NCIC WITH NIC# V094787186.

Signature

Officer Welch D

Badge/ID # 3491

Date 08/14/2010

Signature

2019 AUG 19 PM 2:03

LEPAC
SPARIANEG

09/13/10
10:06Spillman Data Systems, Inc.
Deputy Supplemental ReportPage: 723
4Forensic Report
Spartanburg County Sheriff's OfficeCase No: 2010080848
Offense Type: Home Invasion
Victim: [REDACTED]
Location: [REDACTED]
Patrol Ofc: Welch, D.
Forensic Ofc: Howard, B.
Date/Time: 08/14/10 9:32 AM2010 AUG 19 PM 2:03
SPARTANBURG COUNTY
SHERIFF'S OFFICE

I responded to the above address at the request of Deputy Welch, D. in regards to a home invasion. Inv. Williams, L. was also on seen when I arrived. Some unknown suspect forced entry into the victim's home by breaking out a door panel in the carport door leading into the kitchen of the home. I photographed the incident scene along with the damage to the home and several objects the suspect had left behind or had moved. There was a window pane broken out of the door in the carport leading to the kitchen. There was glass in the kitchen floor with a small piece of purple tape (item 1.) mixed in with it. In the living room on an end-table between two chairs was a ball of purple tape (item 2) the victim stated the suspect used to tie her up. Down the hall leading to the master bedroom was a black gun case (item 14), a triangular shaped piece of broken glass (item 3), and a brown rock (item 4). In the office bedroom, the first bedroom on the left down the hall the suspect had attempted to take a large water container filled with coins. In that same room there was a brown gun case (item 15) that the suspect moved and opened. In the master bedroom at the end of the hall there were several items scattered about and drawer from a large jewelry (item 13) box pulled out and on the floor. On the dresser in the master bedroom was a roll of purple tape (item 5) that appeared to match the same tape used to tie up the victim. In the master bedroom on the floor was the victim's wallet (item 10) and check book (item 9), she stated the suspect took out of her purse and removed money from. Touch DNA samples were taken from the lid of a small jewelry box on the dresser (item 6) and the handles of the large jewelry box (item 8) both in the master bedroom. A touch DNA sample was taken from the handle/locks (item 7) of the black gun case in the hallway. [REDACTED] gave a buccal swab (item 11), as well as [REDACTED] (item 12). The entry and exit points, along with various items were processed for latent prints. Two partial latent prints (A,B) were removed from the glass door in the carport leading to the kitchen. One partial latent print (C) was removed from a ball canister lying in the floor of the master bedroom. All the above items were collected as evidence and taken to the Sheriff's Office for processing. See property sheet for further details. The items were secured in the evidence room in the Crime Lab at the Sheriff's Office till they could be processed. Item #'s 1, 2, 3, 5, 9, 10, 13, 14, and 15 were processed at the Sheriff's Office for latent prints. A DNA swab was taken from the edges of item 3 the triangular piece of glass collected at the incident location. A hair (item 17) was found in the balled up piece of tape that was used to tie up the victim. The hair sample was collected and placed into evidence. A partial latent print was removed from the triangular piece of glass item 3 that [REDACTED] stated the suspect confronted her with. Inv. Shaffer took elimination prints from Mr. and

APP'X 642

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
S SEVENTH JUDICIAL CIRCUIT

Gabriel Jon Rios, #344751,)
Applicant,)
vs.)
State of South Carolina,)

C/A No.: 2019-CP-42-02536

AFFIDAVIT OF SERVICE

The above-named Applicant certify that on this day he has served a copy of the attached amended application for post-conviction relief on the Respondent by delivering a copy of same to the McCormick Correctional Institution mail room, with sufficient postage prepaid, and addressed as follows:

Alan Wilson
Attorney General for South Carolina
Post Office Box 11549
Columbia, SC 29211-1549

Attorney for Respondent

SWORN to and subscribed before me this

26th day of August, 2019

[Signature]
Notary Public of South Carolina

My Commission Expires 8/5/2024

[Signature]

Gabriel Jon Rios, #344751
McCI F-3 A-side
386 Redemption Way
McCormick, SC 29899

Applicant, pro-se

2019 AUG 29 PM 2:02
CLERK OF COURT
SPARTANBURG

RECEIVED

OCT 15 2020

S.C. SUPREME COURT

PETITION FOR WRIT OF MANDAMUS

APP'X 644

Case #

Petitioner

VS

The State of South Carolina;
The Spartanburg County Clerk
of Court Amy W. Cox and
The Administrative Judge of
Spartanburg County,

Respondent

PETITION FOR WRIT OF MANDAMUS

The Petitioner, is requesting this Court for a Writ of Mandamus in order to compel the above caption Respondents to follow various provisions of the uniform Post-Conviction procedures Act, such as SC Code {17-27-45(c), {17-27-70, and {17-27-80, along with Rule 12(A) of the South Carolina Rules of Civil procedures, and SC Clerk of Court manual 6.2.3. This statutes and Rules of Court are ministerial in nature and provides the Petitioner a Specific right to be heard on his PCR in a timely fashion.

The Petitioner bases this petition on the following facts:

BACKGROUND FACTS

In the November 2010 term of Court, the Spartanburg Grand Jury indicted the petitioner for Burglary 1st degree (2010-GS-42-6830), for Armed Robbery, for Possession of a weapon during a violent crime(2010-GS-42-653), for kidnapping (2010-GS-42-6833) and for Assault and Battery (2010-GS-42-6834).

On February 26, 2013, the Petitioner had gone to trial in front of the Honorable R. Lawton McIntosh. The Petitioner was represented by Mathew Shealy, Esq. The jury had found the Petitioner guilty of all charges. The trial judge had sentenced the Petitioner concurrently on all charges, of which total 40 years.

The Petitioner appealed his case to the South Carolina Courts of Appeals. The Petitioner was represented by Katherine H. Hudgins, Esq. The Petitioner issue on appeal was the following:

“Did the trial judge err in refusing to charge the jury with the law on alibi when Appellant presented alibi evidence at trial?”

On March 11th, 2015 the Courts of Appeals had denied the Petitioner's appeal. The Petitioner did not appeal to the State Supreme Court nor to the United States Supreme Court on direct appeal.

On June 3rd, 2015, the Petitioner had filed his first Post-Conviction Relief (PCR) petition in the Spartanburg County Clerks' office.

On January 30th, 2017, the Petitioner had an Evidentiary PCR hearing in front of the Honorable Edward W. Miller. The Petitioner was represented by Attorney Susannah L. Ross, Esq. on PCR.

On March 27th, 2017 the PCR court denied the Petitioner relief on PCR.

On April 11th, 2017, the Petitioner per Council had filed a motion to Alter and Amend Judgment.

On June 29th, 2017, the PCR judge had amended his dismissal order but still denied the Petitioner relief.

On January 16th, 2018, the Petitioner filed an appeal of his PCR in this Court. The Petitioner raised in this Court the following issues:

1. Whether trial Counsel failure to use cell phone records to substantiate Petitioners' alibi constitutes ineffective assistance under the Six Amendment?
2. Whether trial Counsel failure to impeach the victim claims that she recognized the Appellant as the intruder "immediately" with the 911 call made by the victim's husband with the victim's voice audible in the background on which the 911 operator asks, "Who is he? Do you know who he was?", and the husband replied, "Don't know", constitutes ineffective assistance under the Sixth Amendment?
3. Whether trial council failure to object to the Solicitor burden-shifting closing argument that the Appellant had "over two and a half years since this incident happened to come up with this story, and that is all this is, just a story. No one said they were with him that morning, nobody. Nobody that testify for him accounted for his whereabouts. Nobody", constitutes ineffective assistance under the Sixth Amendment?

On April 10th, 2019 this Court denied the Petitioner relief. This Court issued a remittitur to the Spartanburg County Clerk's office on April 26th, 2019.

FACTS

In June of 2019, the Petitioners' family members had sent the Petitioner a Spartanburg newspaper article that the Lead Spartanburg County Sheriff's Investigator, Lorin Williams, who was over the investigation of the Petitioner's case, was fired because of inappropriate misconduct in office. The Petitioner discovered that the Spartanburg County Solicitor's office was investigating twenty (20) years of the Spartanburg County investigator's criminal cases, including the Petitioner's, for misconduct.

Pursuant to SC Code 17-27-45(c), on July 17th, 2019, the Petitioner had filed a second Post-Conviction Relief (PCR) petition on newly discovered evidence of actual innocence, attaching the Spartanburg County newspaper as evidence of material fact.

Instead of the South Carolina Attorney General, W. Joseph Maye, responding to the Petitioners' PCR petition according to Rule 12(A), within 90 days of the petitioner filing the petition, on December 6th, 2019, the Attorney General wrote a letter to the Petitioner that states in full:

"In light of your petition for writ of Federal Habeas Corpus, I wanted to take this opportunity to disclose certain matters recently brought to respondent attention.

"By letter dated January 28th, 2019, our office was advised of the termination of investigator Lorin Williams from the Spartanburg County Sheriff's office. I am providing that letter to you as investigator Williams testified at your trial. Based upon the claims set forth in your PCR application and your petition for writ of Habeas Corpus, it would appear that you are already aware of investigator Williams termination. As the letter indicates, investigator Williams termination was in connection with a separate matter, unrelated to your case. I am not in possession of any further information regarding the matter at this time.

"I will be addressing these issues in Respondent return and memorandum of law in support of motion for summary judgement"

LEGAL ANALYSIS FOR THIS COURT TO GRANT THIS WRIT OF MANDAMUS

The Supreme Court has the power to issue writs of mandamus pursuant to the Constitution. See *Edwards vs State* 678 S.E. 2d 412 (2009) (citing S.C. Const. Art. V {14-3-310.

The writ of mandamus is the highest judicial writ known to the law and according to long approved and well-established authorities, only issues with cases where there is a specific legal right to be enforced or where there is a positive duty to be performed, and there is no other specific remedy. *William vs City of Greenville*, 132 S. E. 2d 169,170-71 (1963).

The primary purpose or function of a writ of mandamus is to enforce and established right, and to enforce a corresponding imperative duty created or imposed by law. (Id) It is designed to promote justice, subject to certain well-defined qualifications. (Id) Its principal function is to command and execute and not to inquire and adjudicate; therefor, it is not the purpose of the writ to establish a legal right, but to enforce one which has already been established. Id

Element 1- A duty of Respondent to perform the Act

The Spartanburg Clerk has several duties under the Clerk Rules and PCR statute as follows:

South Carolina clerk manual 6-2-3. Application for Post-Conviction Relief:

Duty 1: Within five (5) days of filing, forward a copy of the application to the Attorney General office and the Circuit Solicitor,
and

Duty 2: SC Code {17-27-40 (A) states in part:

“... The Clerk shall docket the application upon its receipt and promptly bring it to the attention of the Court and deliver a copy to the Solicitor of the Circuit in which the applicant was convicted and a copy to the Attorney General”.

Furthermore, the state of South Carolina has a duty under Rule 12(A) of the South Carolina Civil Rules of procedure to timely respond to the petitioner PCR petition. Rule 12 (A) states in part:

“... The State of South Carolina shall answer or otherwise respond to an application for Post-Conviction Relief within ...90 days if it arises out of trial”.

Also, the Spartanburg County judge has a duty pursuant to SC Code {17-27-70 (A)

“within thirty (30) days after the docketing of the application, or within any further time the Court may fix, the State shall respond by answer or by motion which may be supported by affidavits”

The Respondent: The State of South Carolina, has never went for an extension of time after the Respondent exceeded the time frame to file either an answer or a motion to the petitioner PCR petition.

Nor has the Spartanburg County judge fixed any time after the State of South Carolina exceeded its time to respond to the petitioner PCR petition. Pursuant to

{17-27-40 (A), it is the duty of the Spartanburg County Clerk to promptly bring (PCR petition) to the attention of the Court.

Element (2): **The ministerial nature of the Act**

The mandatory language such as will, must, shall in Rule 12(A), and {17-27-40 (A) , and the Clerk of Court manual shows the ministerial nature of the PCR rules and statutes that the above captioned respondents are ignoring.

Element (3): **The petitioner specific legal rights for which discharge of the duty is necessary**

The petitioner has a specific right to a second PCR under newly discovered evidence of actual innocence pursuant to SC Code {17-27-45 (L). See District Attorney office for Third Judicial Dist. vs Osborne 129 S.C T 2308 (2009) (The due process clause imposes procedural limitations on a State's power to take away protected entitlements) see e.g. Jones vs Flowers 547 US 220, 226-239 (2006).

Pursuant to SC Code {17-27-70 (A) the Respondent Judge must issue, after thirty (30) days of the petitioner filing the PCR petition, an extension of time “only” if the respondent, State of South Carolina, request the Respondent Judge for more time in order to respond to the petitioner

PCR petition. The Respondent, State of South Carolina, have not requested the Respondent Judge, for an extension of time under both {17-27-70 (A) and Rule 12 (A). Lastly, the Respondent Judge has a ministerial duty, and the petitioner has a specific right, under the South Carolina Constitution Article I {9 to give the petitioner a speedy PCR remedy.

Article I section 9 of the South Carolina Constitution states:

“All Courts shall be public and every person shall have speedy remedy therein for wronged sustain”.

Id

A PCR action is a civil action. See Wade vs State 559 S.E. 2d 843, 844 (2002) (citing 17 S.C. Jur {2 (1993) (state Post-Conviction Relief is a civil action.../ Article I, section 9 applies to civil remedies only. State vs Lagerquist 176 S.E. 2d 141, 143 (1970), Certiorari denied 91 S. Ct 912, 401 US 937.

Element (4): **A lack of any other legal remedy**

The petitioner lacks a legal remedy, especially, an appeal in this Court because SC Code {17-27-80, specifically states that the PCR judge must make specific finding of fact and state expressly the conclusions of law relating to each issue presented. In Marlar vs State 656 S.E. 2d 266 (2007), this Court held that the PCR judge failure to specifically rule on the issues precludes appellate review of the issues. See Pruitt vs State 423 S.E. 2d 127 (1992).

Conclusion

The petitioner prays that this Court grant this petition and/or such other and further relief this Court sees just and proper.



Gabriel Jon Rios
#344751
McCormick CI
386 Redemption Way
McCormick, SC 29899

RECEIVED

OCT 15 2020

S.C. SUPREME COURT

Date:

Petition for Writ of Mandamus

See Exhibit One (1)

Spartanburg Newspaper Article

Sheriff's investigator fired; Cases stretching back two decades under review

By
Conor Hughes

Posted Feb 1, 2019 at 6:28 PM

Criminal cases stretching back more than 20 years across three Spartanburg County law enforcement agencies are under review after an investigator with the Spartanburg County Sheriff's Office was terminated last week.

Investigator Lorin Williams was fired Jan. 24 after he was accused of using false information to obtain a search warrant, according to records on file with the state Criminal Justice Academy.

Seventh Circuit Solicitor Barry Barnette sent a letter Monday to every member of the Spartanburg County Bar Association, informing attorneys that his office is re-examining all current and past cases Williams was involved in.

During his 13-year tenure at the Sheriff's Office, Williams was involved in many cases, from murder investigations to drug busts. Williams also served two stints — together, about five years — with the Landrum Police Department and about two years at the Chesnee Police Department before starting at the Sheriff's Office, his training records show.

On Jan. 11, Williams was issued a search warrant based on an affidavit in which he swore he had received information from a reliable confidential informant, according to the termination notice from the Sheriff's Office. The warrant was executed Jan. 15.

In the affidavit, Williams said that law enforcement had gathered verified information from the informant in the past to seize drugs and arrest people involved in illegal narcotics sales, according to the notice.

But that person had not been signed up as a confidential informant, and Williams had not confirmed information that person provided before obtaining the warrant, according to the termination notice. No criminal charges have been filed against Williams.

7/18/2019

Sheriff's investigator fired; Cases stretching back two decades under review - News - GoUpstate - Spartanburg, SC

(2)

Spartanburg County Sheriff Chuck Wright declined to comment on Williams' termination or the Solicitor's Office's review.

Murray Glenn, a spokesman for the Solicitor's Office, said the review will be rigorous. "It will be an intensive process," he said. "We're going to do our due diligence during our review."

Glenn could not speak to the exact number of cases the office would be reviewing. "It's impossible to put a timeline on it," he said.

According to Barnette's letter, the state Attorney General's Office has been notified of the review.

2019 AUG 19 PM 2:03
SPARTANBURG
SHERIFF'S OFFICE

SPARTANBURG COUNTY (FOX Carolina) - SLED confirmed Tuesday that they have opened an investigation into a terminated Spartanburg County investigator.

Investigator Lorin Williams, who has worked with the Sheriff's Office since 2005 and previously worked for Landrum and Chesnee police departments, is accused of using false information to obtain a search warrant, according to documents obtained from the SC Criminal Justice Academy.

Solicitor Barry Barnette wrote a letter on January 28, 2019 notifying attorneys that all cases Williams worked on, open or closed, will be reexamined.

According to the letter, Williams was fired in January after he reportedly secured a search warrant on Jan. 11 using a sworn statement about an informant that turned out to be inaccurate.

Barnette said the South Carolina Attorney General's Office has also been contacted about the matter.

The Solicitor's Office couldn't confirm an exact number of cases that will be reexamined but said it was "substantial," and could take an extended amount of time.

The solicitor's office said they are looking for "any and all problems attacking the credibility of a case."

Administrators with the Spartanburg County Sheriff's Office confirmed Williams had been terminated.

SLED confirmed Tuesday that, at the request of the Spartanburg County Sheriff's Office, they opened an investigation on January 29 into the incident. Agents tell us at this time it is an active and open investigation.

Copyright 2019 FOX Carolina (Meredith Corporation). All rights reserved.

2019 AUG 19 PM 2:03

Petition for Writ of Mandamus

See exhibit one (2)

**Letter From South Carolina Attorney General W. Joseph May
on December 6, 2019**

Letter from Seventh Circuit Solicitor on January 28, 2020



ALAN WILSON
ATTORNEY GENERAL

December 6, 2019

Gabriel Jon Rios, #344751
McCormick Correctional Institution
386 Redemption Way
McCormick, South Carolina 29899

Re: Gabriel Jon Rios vs. Warden Williams
C/A No. 1:19-2329-HMH-SVH

Dear Mr. Rios:

In light of your Petition for Writ of Federal Habeas Corpus, I wanted to take this opportunity to disclose certain matters recently brought to Respondent's attention.

By letter dated January 28, 2019, our office was advised of the termination of Investigator Lorin Williams from the Spartanburg County Sheriff's Office. I am providing a copy of that letter to you as Investigator Williams testified at your trial. Based upon the claims set forth in your PCR Application and your Petition for Writ of Habeas Corpus, it would appear that you are already aware of Investigator Williams termination. As the letter indicates, Investigator Williams termination was in connection with a separate matter, unrelated to your case. I am not in possession of any further information regarding the matter at this time.

I will be addressing these issues in Respondent's Return and Memorandum of Law in support of Motion for Summary Judgment.

Sincerely,

W. Joseph Maye
Assistant Attorney General

WJM:dmd
Enclosures

cc: Johnny James, Assistant Attorney General (w/copy of encl.)
Jacob Isenberg, Assistant Attorney General (w/copy of encl.)
Megan Jameson, Senior Assistant Deputy Attorney General (w/copy of encl.)

State of South Carolina

Spartanburg County Court House
180 Magnolia Street
Spartanburg, S.C. 29306
Phone (864) 596-2575
Fax (864) 596-2386



Cherokee County Court House
Floyd Baker Blvd.
Gaffney, S.C. 29340
Phone (864) 487-2576
Fax (864) 487-2753

BARRY J. BARNETTE
Solicitor, Seventh Judicial Circuit

January 28, 2019

To Whom It May Concern:

I am writing to notify all attorneys that have present cases or previous cases involving Inv. Lorin Williams from the Spartanburg County Sheriff's Office concerning information provided to our office. This past Friday afternoon, our office received notification from the Spartanburg County Sheriff's Office that Inv. Williams was terminated for the following reason:

"On January 11, 2019 you (Inv. Williams) were issued a search warrant on CRI information. This warrant was executed on January 15, 2019. In the affidavit, you swore to the facts that the information came from a confidential reliable informant and this CRI had provided information in the past to law enforcement that has been verified as truthful and has led to the seizure of illegal narcotics as well as the arrest of persons involved in illegal narcotics sales. This is not accurate, as this person claimed to be a CI was never signed up for that purpose. You neglected to confirm this information before using this person's information to secure a search warrant.

This is a serious violation of Sheriff's Office Policy and has potential for other serious repercussions. It is a very unfortunate situation as this is going to result in the termination of your employment. The SO is also required to report this to the SCCJA and your certification is in jeopardy."

Under Rule 3.8 of the South Carolina Rules of Professional Conduct and Brady v. Maryland, our office is notifying you of the above information. Our office is timely reviewing all cases in our office that Inv. Williams was involved in and will contact you as these reviews are complete. The South Carolina Attorney General's Office has also been contacted about this matter. If you have any questions or need any additional information, please feel free to contact our office.

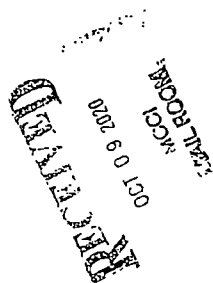
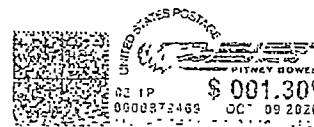
Sincerely,

A handwritten signature in cursive script that reads "Barry Barnette".
Barry Barnette
Solicitor

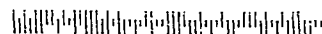
BJB:sop

APP'X 656

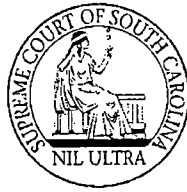
GABRIEL RIOS
344751 MCCI F-4
MCCOMMICK SC 29899



SC SUPREME COURT
PO BOX 11330
COLUMBIA SC 29201



APP'X 657



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

February 02, 2021

Chelsey Faith Marto, Esquire
1000 Assembly Street
Room 519
Columbia SC 29201

Re: Gabriel Jon Rios, #344751 v. The State of South Carolina
Appellate Case No. 2020-001384

Dear Counsel:

This will acknowledge receipt of a Petition for Writ of Mandamus filed by Mr. Rios. A copy is enclosed.

Please file a return to this petition no later than ten (10) days from the date of this letter. Please be sure to show proof that you have served your return on Mr. Rios.

Very truly yours,

CHIEF DEPUTY CLERK

cc: Mr. Gabriel Jon Rios, 344751

APP'X 658

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

Gabriel Rios, #344751,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2019-CP-42-02536

**RETURN AND MOTION TO DISMISS
AND MOTION TO FILE RETURN
OUT OF TIME**

NOW COMES Respondent, making its return and moving to dismiss the post-conviction relief (hereafter "PCR") application, filed on July 17, 2019 by Gabriel Rios (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In November 2010, the Spartanburg County Grand Jury indicted Applicant for first degree burglary (2010-GS-42-06830), armed robbery (count one) and possession of weapon during commission of a violent crime (count two) (2010-GS-42-07831), grand larceny (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and first degree assault and battery (2010-GS-42-6834). Matthew Shealy, Esquire represented Applicant. Assistant Solicitors Timi Poulos and Russell Ghent of the Seventh Circuit Solicitor's Office prosecuted the case. On February 26-28, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh, circuit court judge, and a jury. The jury found him guilty as indicted. Judge McIntosh sentenced Applicant to forty years' imprisonment for first degree burglary, thirty years' imprisonment for armed robbery, thirty years' imprisonment for

¹ This charge was dismissed by the State prior to trial.

kidnapping, ten years' imprisonment for first degree assault and battery, and five years' imprisonment for the weapons possession charge, with the weapons sentence running consecutively to the remaining charges, which ran concurrently.

Applicant filed a notice of appeal on March 11, 2013. Appellate counsel Katherine Hudgins, Esquire filed a brief in the South Carolina Court of Appeals on behalf of Applicant on June 3, 2014. Respondent made its return on April 4, 2014. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. On March 11, 2015, by written order the South Carolina Court of Appeals affirmed the conviction. *State v. Rios*, 2015-UP-135 (Ct. App. Mar. 11, 2015). The remittitur was issued on April 10, 2015.

First PCR Action: (2015-CP-42-2541)

Applicant subsequently filed his first PCR application on June 3, 2015, alleging:

1. Ineffective assistance of counsel
 - a. "prior and during trial involution [sic] of his rights pursuant to the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution";
 - b. Counsel "failed to object to Solicitor shifting the burden";
 - c. Counsel "failed applicant by conceding his guilt."

Respondent served its return to the application on February 11, 2016. An evidentiary hearing into the matter was convened on January 30, 2017, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Susannah Ross, Esquire. Caitlin B. Hastings, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On March 21, 2017, the Honorable Edward W. Miller issued the order of dismissal denying Applicant's PCR application. An amended order of dismissal was issued June 21, 2017. Applicant filed a motion to alter or amend, which was dismissed.

Applicant filed a timely notice of appeal on July 19, 2017, that was perfected by David Alexander, Esquire, through filing a petition for writ of certiorari, raising the following issues:

1. Whether trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment?
2. Whether trial counsel's failure to impeach the victim's claim that she recognized appellant as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment?
3. Whether trial counsel's failure to object to the solicitor's burden-shifting closing argument that appellant had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment?

The South Carolina Court of Appeals denied the petition for writ of certiorari on April 10, 2019. The remittitur was issued on April 26, 2019.

First Habeas Corpus Action: (1:19-cv-02329-SAL)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 15, 2019. Applicant set forth the following grounds for relief:

1. "The Applicant is actually and factually innocent due to investigative and prosecutorial misconduct and it is pending in PCR court at the time under newly discovered evidence pursuant to S.C. Code Ann. § 17-2745(c) / 2019-CP-42-02536."
2. "The trial court and subsequent reviewing courts erred in ruling the trial judge did not err[] in refusing to charge the jury with the law on alibi when Petitioner presented alibi evidence at trial."
3. "The PCR Court and subsequently reviewing courts erred in failing to find counsel rendered ineffective assistance of counsel when counsel conceded Petitioner's guilt during closing summation to the jury, that was a fact to be determined by the jury."
4. "The PCR Court and subsequent reviewing courts erred in failing to find counsel rendered ineffective assistance of counsel, in failing to object to the prosecution improper comments during closing summation that shifted the burden of proof in violation of the Due Process Clause."
5. "The PCR Court and subsequently reviewing courts erred in failing to impeach the State's star witness that contradicted her trial testimony in regards to the identity of the perpetrator?"
6. "The PCR Court and subsequent reviewing court erred in failing to find trial counsel rendered ineffective assistance of counsel, prior and during trial (in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article 1, Section 14 of the South Carolina Constitution."

Respondent filed its return and motion for summary judgment on or around December 9, 2019. On May 19, 2020, Magistrate Judge Shiva V. Hodges issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Rios v. Warden Williams*, 1:19-2329-SAL-SVH (D.S.C. filed May 19, 2020). Applicant's objection to the report and recommendation was received on June 22, 2020.

On July 13, 2020, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgment and dismissed Applicant's petition. *Rios v. Warden Williams*, 1:19-cv-02329-SAL (D.S.C. filed July 13, 2020). A motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure was entered by Petitioner and denied by the Honorable Sherri A. Lydon, United States District Judge, on October 5, 2020.

II. Statement of Facts

On August 14, 2010, the victim, Gale Holt, came face to face with Applicant when he broke into her home. (Tr. 107-08). Holt recognized Applicant because he previously worked for her husband at both his business and the home. (Tr. 108-09). Applicant held a knife to her throat, forced her down the hall, and demanded she open the safe. (Tr. 109-11). When she could not open the safe, he tied her arms behind her back and pulled his gun. (Tr. 111-12). Applicant demanded money in her purse, rummaged through the purse, and stole her jewelry. (Tr. 112-13). Applicant told her not to move or he would kill her. (Tr. 113). Applicant took money, the cell phone, and stole the car. (Tr. 113). Holt identified Applicant to the police when she called the police and identified him in a phot line-up. (Tr. 131-33). Holt testified at trial concerning the events surrounding the incident and identified Applicant as the perpetrator. (Tr. 131-34). Phil Holt, the victim's husband, identified Applicant at trial and testified to the events surrounding the

incident, including how he called the police. (Tr. 148-50).

Investigator Williams testified that he responded to the scene, that Holt described the invader and identified him by name, that he arranged the photo line -up, and stated around what time Applicant was apprehended that night. (Tr. 175-82).

III. Current Action before the Court

In his PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. "Actual & Factual Innocence § 17-27-45(c), Newly Discovered."
 - a. Investigator Lorin Williams was fired for fraud and Applicant, who was innocent of the charges, was only convicted because of fraudulent misrepresentation by Mr. Williams.
2. "Investigative & Prosecutorial Misconduct."
3. "Due Diligence; Due Process."²

The amended PCR application was filed August 29, 2019, alleging he is entitled to appointment of counsel and an evidentiary hearing be convened because Investigator Williams was fired based upon fraud related to his work on cases. Applicant claims this firing calls into question every single case the person worked on, including his.

Attached to and incorporated herein are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections records, the trial transcript, the current PCR application, and prior appeal, PCR, PCR appeals, federal habeas records. Respondent reserves the right to amend this return based upon receipt of additional relevant information.

² Respondent interprets all of these allegations as derivatives of the main allegation of newly discovered evidence that Investigator Williams was fired for fraud.

IV. Motion to Dismiss

Respondent contends that Applicant's application should be dismissed, however, because the allegations may raise an issue of material fact, Respondent requests a hearing on this motion to dismiss. A person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Beyond stating that newly discovered evidence exists, Applicant has not shown that fraud occurred in this case. Past investigatory misconduct does not, by itself, establish a *prima facie* case of newly-discovered evidence warranting an evidentiary hearing. Again, outside of making unsubstantiated blanket allegations concerning the veracity of William's investigations in this case, Applicant has presented no evidence, through affidavits or otherwise, to confirm or otherwise substantiate the claims of fraud upon the court, as it relates to his case specifically. Thus, Respondent contends that the lack of evidence presented indicates that Applicant's claim cannot be corroborated. Further, given that the victims knew Applicant personally and testified,

concerning the incident themselves and that Williams' testimony at trial was limited in scope, it is unlikely a finding of fraud in this case would impact the jury's finding of guilt, nor is it material. Consequently, Respondent urges this court to find that Applicant has not met his burden of proof, requiring the motion to be denied.

Respondent asserts Applicant has not and cannot establish he is entitled to relief based on newly discovered evidence. However, because viewing this claim in the light most favorable to Applicant, may present a genuine issue of material fact as to whether Applicant can establish newly discovered evidence, Respondent respectfully requests a hearing on this motion to dismiss to determine whether Applicant has made a *prima facie* showing of newly discovered evidence. Should this Court be declined to dismiss this action, respondent requests an evidentiary hearing to fully resolve the matter.

V. Motion to File Out of Time and Response to Motion for Summary Disposition

Respondent moves the Court accept this return for filing out of time. Respondent received the application on or about July 17, 2019, such that the return to the application was originally due October 17, 2019. *See* Rule 12(a), SCRPC (“[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.”). Respondent did not previously move for an extension of time to file the return. Having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent moves the Court accept the return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that “respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application.”); *Guinyard v. State*, 260 S.C.

220, 195 S.E.2d 392 (1973) (Holding the trial court may extent the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

Additionally, the grant of post-conviction relief due to the State's failure to reply or lateness of reply is not appropriate. *See* Rule 55(e), SCRPC ("No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof unless the claimant establishes his claim to relief by evidence satisfactory to the Court[.]"). A colorable claim for relief must be supported by evidence and testimony on record and a meritless application cannot be saved by the State's inaction. Therefore, Applicant's motion should be denied.

VI. Other Allegations Denied

Each and every other allegation in Applicant's PCR application not explicitly admitted, qualified, or explain in this return is hereby denied by Respondent.

VII. Conclusion

WHEREFORE, Respondent moves to dismiss this action for failure to establish a *prima facie* case of newly discovered evidence.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO
Assistant Attorney General

By: s/ Chelsey F. Marto
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

February 4, 2021

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

GABRIEL RIOS, #344751

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON
PLEAS

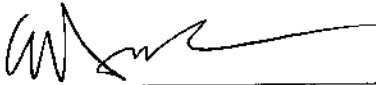
2019-CP-42-02536

CERTIFICATE OF SERVICE BY
MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss and Motion to File Return Out of Time** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Gabriel Rios, #344751
Dorm-Room-Bunk: F3B-0151-B
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899**

DATED this 4th Day of February, 2021



Eva D. Cook, Legal Assistant
For Respondent

APP'X 667

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

IN THE ORIGINAL JURISDICTION

GABRIEL J. RIOS,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO THE PETITION FOR MANDAMUS

This matter comes before this Court pursuant to a “Petition for Writ of Mandamus” filed by Petitioner Gabriel J. Rios. Respondent makes the following return:

I. Statement of the Case

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In November 2010, the Spartanburg County Grand Jury indicted Petitioner for first degree burglary (2010-GS-42-06830), armed robbery (count one) and possession of weapon during commission of a violent crime (count two) (2010-GS-42-07831), grand larceny (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and first degree assault and battery (2010-GS-42-6834). Matthew Shealy, Esquire represented Petitioner. Assistant Solicitors Timi Poulos and Russell Ghent of the Seventh Circuit Solicitor’s Office prosecuted the case. On February 26-28, 2013, Petitioner proceeded to trial before the Honorable R. Lawton McIntosh, circuit court judge, and a jury. The jury found him

¹ This charge was dismissed by the State prior to trial.

guilty as indicted. Judge McIntosh sentenced Petitioner to forty years' imprisonment for first degree burglary, thirty years' imprisonment for armed robbery, thirty years' imprisonment for kidnapping, ten years' imprisonment for first degree assault and battery, and five years' imprisonment for the weapons possession charge, with the weapons sentence running consecutively to the remaining charges, which ran concurrently.

Petitioner filed a notice of appeal on March 11, 2013. Appellate counsel Katherine Hudgins, Esquire filed a brief in the South Carolina Court of Appeals on behalf of Petitioner on June 3, 2014. Respondent made its return on April 4, 2014. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. On March 11, 2015, by written order the South Carolina Court of Appeals affirmed the conviction. *State v. Rios*, 2015-UP-135 (Ct. App. Mar. 11, 2015). The remittitur was issued on April 10, 2015.

First PCR Action: (2015-CP-42-2541) and Subsequent Appeal (2017-001549)

Petitioner subsequently filed his first PCR application on June 3, 2015, alleging:

1. Ineffective assistance of counsel
 - a. "prior and during trial involution [sic] of his rights pursuant to the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution";
 - b. Counsel "failed to object to Solicitor shifting the burden";
 - c. Counsel "failed applicant by conceding his guilt."

Respondent served its return on February 11, 2016. An evidentiary hearing into the matter was convened on January 30, 2017, at the Spartanburg County Courthouse. Petitioner was present at the hearing and was represented by Susannah Ross, Esquire. Caitlin B. Hastings, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On March 21, 2017, the Honorable Edward W. Miller issued the order of dismissal denying Petitioner's PCR application. An amended order of dismissal was issued June 21, 2017. Petitioner filed a motion to alter or amend, which was dismissed.

Petitioner filed a timely notice of appeal on July 19, 2017, and was represented by appellate counsel David Alexander, who filed a petition for writ of certiorari, raising the following issues:

1. Whether trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment?
2. Whether trial counsel's failure to impeach the victim's claim that she recognized appellant as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment?
3. Whether trial counsel's failure to object to the solicitor's burden-shifting closing argument that appellant had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment?

The South Carolina Court of Appeals denied the petition for writ of certiorari on April 10, 2019. The remittitur was issued on April 26, 2019.

Second PCR Action: (2019-CP-42-02536)²

Petitioner filed his second PCR application on July 17, 2019, alleging:

1. "Actual & Factual Innocence § 17-27-45(c), Newly Discovered."
 - a. Investigator Lorin Williams was fired for fraud and Applicant, who was innocent of the charges, was only convicted because of fraudulent misrepresentation by Mr. Williams.
2. "Investigative & Prosecutorial Misconduct."
3. "Due Diligence; Due Process."³

Respondent made its return and motion to dismiss for failure to establish newly discovered evidence on February 4, 2021, and requested the court schedule a hearing on the

² This is the underlying action upon which the writ of mandamus is based.

³ Respondent interprets all of these allegations as derivatives of the main allegation of newly discovered evidence that Investigator Williams was fired for fraud.

State's motion to dismiss because the newly discovered evidence claim may have raised an issue of material fact. This matter is still pending before the circuit court and will be placed upon an upcoming post-conviction roster for a hearing on the State's motion to dismiss. Because this matter will be proceeding forward with a hearing, Respondent has requested the clerk of court appoint counsel to represent Petitioner in this matter pursuant to this Court's Administrative Order *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008 and Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing).

First Habeas Corpus Action: (1:19-cv-02329-SAL)

Thereafter, while his second PCR action was still pending, Petitioner filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 15, 2019. Petitioner set forth the following grounds for relief:

1. "The Applicant is actually and factually innocent due to investigative and prosecutorial misconduct and it is pending in PCR court at the time under newly discovered evidence pursuant to S.C. Code Ann. § 17-2745(c) / 2019-CP-42-02536."
2. "The trial court and subsequent reviewing courts erred in ruling the trial judge did not err[] in refusing to charge the jury with the law on alibi when Petitioner presented alibi evidence at trial."
3. "The PCR Court and subsequently reviewing courts erred in failing to find counsel rendered ineffective assistance of counsel when counsel conceded Petitioner's guilt during closing summation to the jury, that was a fact to be determined by the jury."
4. "The PCR Court and subsequent reviewing courts erred in failing to find counsel rendered ineffective assistance of counsel, in failing to object to the prosecution improper comments during closing summation that shifted the burden of proof in violation of the Due Process Clause."
5. "The PCR Court and subsequently reviewing courts erred in failing to impeach the State's star witness that contradicted her trial testimony in regards to the identity of the perpetrator?"
6. "The PCR Court and subsequent reviewing court erred in failing to find trial counsel rendered ineffective assistance of counsel, prior and during trial (in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article 1, Section 14 of the South Carolina Constitution."

Respondent filed its return and motion for summary judgment on or around December 9,

2019. On May 19, 2020, Magistrate Judge Shiva V. Hodges issued the report and recommendation that Respondent's motion for summary judgment be granted and Petitioner's petition be denied. *Rios v. Warden Williams*, 1:19-2329-SAL-SVH (D.S.C. filed May 19, 2020). Petitioner's objection to the report and recommendation was received on June 22, 2020.

On July 13, 2020, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Petitioner's petition. *Rios v. Warden Williams*, 1:19-cv-02329-SAL (D.S.C. filed July 13, 2020). A motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure was entered by Petitioner and denied by the Honorable Sherri A. Lydon, United States District Judge, on October 5, 2020.

II. Statement of Facts

On August 14, 2010, the victim, Gale Holt, came face to face with Petitioner when he broke into her home. (Tr. 107-08). Holt recognized Petitioner because he previously worked for her husband at both his business and the home. (Tr. 108-09). Petitioner held a knife to her throat, forced her down the hall, and demanded she open the safe. (Tr. 109-11). When she could not open the safe, he tied her arms behind her back and pulled his gun. (Tr. 111-12). Petitioner demanded money in her purse, rummaged through the purse, and stole her jewelry. (Tr. 112-13). Petitioner told her not to move or he would kill her. (Tr. 113). Petitioner took money, the cell phone, and stole the car. (Tr. 113). Holt identified Petitioner to the police when she called the police and identified him in a phot line-up. (Tr. 131-33). Holt testified at trial concerning the events surrounding the incident and identified Petitioner as the perpetrator. (Tr. 131-34). Phil Holt, the victim's husband, identified Petitioner at trial and testified to the events surrounding the incident, including how he called the police. (Tr. 148-50).

Investigator Williams testified that he responded to the scene, that Holt described the invader and identified him by name, that he arranged the photo line -up, and stated around what time Petitioner was apprehended that night. (Tr. 175-82).

III. Timeline and Status of the Application

On October 15, 2020, Petitioner filed his petition for writ of mandamus, asserting the State, the Spartanburg County Clerk of Court, and the circuit court had all failed to respond to his successive post-conviction relief action and requesting this Court grant relief. Thereafter, this Court instructed Respondent to file a return to the mandamus petition within ten days.

As an initial matter, Respondent filed its return and motion to dismiss the successive application on February 4, 2021, and accordingly, this petition for mandamus is now moot as the relief requested by Petitioner has been provided.⁴ Respondent has responded to the action, requested a hearing on its motion to dismiss, and requested the clerk of court appoint counsel pursuant to this Court's Administrative Order *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008 and Rule 71.1(d), SCRCPP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). Accordingly, Respondent submits this action should be dismissed as moot. The claims raised in Petitioner's underlying successive post-conviction relief application can and should be resolved in the circuit court pursuant to the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq.⁵

⁴ Undersigned Counsel's failure to respond to Petitioner's application in a timelier manner is not the result of intentional delay, but the result of a tremendous workload. Undersigned Counsel is expeditiously working to resolve all pending cases in her assigned circuits.

⁵ See *Key*, 305 S.C. at 116, 406 S.E.2d at 357 (1991) ("[T]he Court will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State."); Rule 245, SCACR (explaining the Court "will not entertain matters in its original jurisdiction

IV. Conclusion

WHEREFORE, as Respondent has now filed its return in the subject post-conviction relief matter, Respondent requests the Court dismiss the petition for writ of mandamus as moot.

Respectfully submitted,

ALAN WILSON
Attorney General

CHELSEY F. MARTO
Assistant Attorney General

BY: /s Chelsey F. Marto
Chelsey F. Marto
S.C. Bar No. 104191
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

February 5, 2021

when the matter can be determined in a lower court in the first instance, without material prejudice to the rights of the parties.”).

APP'X 674

STATE OF SOUTH CAROLINA
In the Supreme Court

IN THE ORIGINAL JURISDICTION

Appellate Case No. 2020-001384

GABRIEL J. RIOS, #344751,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to the Petition for Mandamus** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Gabriel Rios, #344751
Dorm-Room-Bunk: F3B-0151-B
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899**

This 5th Day of February, 2021.



Eva D. Cook
Legal Assistant for Respondent

APP'X 675

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

Gabriel Rios,)
S.C.D.C. No: 344751)
Applicant,)

vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMONS PLEAS
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No: 2019-CP-42-2536

**AMENDED
POST-CONVICTION RELIEF APPLICATION**

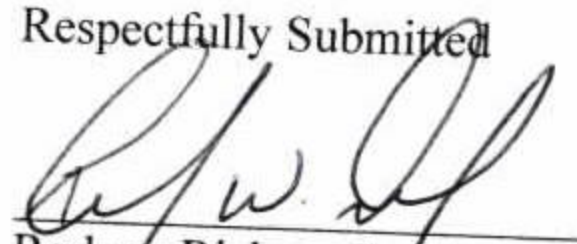
FILED
2021 MAR 25 AM 11:36
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

The Applicant, Gabriel Rios, through his undersigned attorney, Rodney Richey, Esquire amends his Post-Conviction Relief applications as follows:

1. Applicant was convicted of Burglary 1st Degree, Armed Robbery, Kidnapping, Assault and Battery 1st Degree. He received a sentence of 40 years for the Burglary 1st Degree, 30 years for Kidnapping, 30 years for Armed Robbery and 10 years for Assault and Battery 1st Degree.
2. Applicant believes that Detective Lorin Williams fraudulently obtained arrest warrants against him.
3. The victim of these crimes told the police at the scene that an unknown person broke into her home and robbed her.
4. Applicant believes that the victim was told by officer Williams that the person was the Applicant. Thus, he tainted the victim's identification of the suspect. He believes that this fraud by officer Williams caused him to get convicted.
5. The applicant alleges that DNA taken from the home did not match him. The Applicant was not identified on the 911 tape on the date of the incident. Therefore, he believes that officer Lorin Williams fraud caused him to be convicted.

Wherefore Applicant request a hearing on all the above issues and issues already plead in is application.

Respectfully Submitted



Rodney Richey, Esquire
RICHEY AND RICHEY, P.A.
Post Office Box 10916
Greenville, SC 29603
864-467-0503
864-467-0646 (fax)

Dated: March 22, 2021

FILED

2021 MAR 25 AM 11:36

CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

1 STATE OF SOUTH CAROLINA)
) IN THE COURT OF
 2) GENERAL SESSIONS
) OF THE SEVENTH
 3 COUNTY OF SPARTANBURG)
) JUDICIAL CIRCUIT
)
 4))
))
 5 GABRIEL J. RIOS,)
))
 Applicant,) TRANSCRIPT OF RECORD
 6) 2019-CP-42-02536
))
 7 vs.)
))
 8 THE STATE OF SOUTH CAROLINA,)
))
))
 9 Respondent.)
))
 10 -----
 11
 April 5, 2021
 12 Spartanburg, South Carolina
 13 B E F O R E:
 14 HONORABLE GRACE G. KNIE, Judge.
 15
 16 A P P E A R A N C E S
 17 RODNEY W. RICHEY, ESQUIRE
 For The Applicant
 18
 19 CHELSEY F. MARTO, ASSISTANT ATTORNEY GENERAL
 For Respondent
 20
 ALSO PRESENT: Ashley Searcy, AA
 21 Brittany Biggs, Law Clerk
 22
 23
 Julie A. Cendroski,
 24 Circuit Court Reporter III
 Seventh Judicial Circuit
 25

I N D E X

<u>WITNESS</u>	<u>PAGE</u>
ANNOUNCEMENT OF CASE By The Court	4
MOTION TO DISMISS By Ms. Marto	7
REPLY TO MOTION TO DISMISS By Mr. Richey	9
REBUTTAL By Ms. Marto	15
COURT TAKES UNDER ADVISEMENT	15
CERTIFICATE OF COURT REPORTER	17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

APP'X 680

1 GABRIEL J. RIOS VS. THE STATE OF SOUTH CAROLINA

2 THE DEFENDANT: I need to consult with my
3 attorney to make sure he have all the -- everything that
4 I required of him.

5 THE COURT: Okay. Let me first just put the case
6 on the record, all right?

7 THE DEFENDANT: Yes.

8 THE COURT: Good morning, I am Judge Knie and
9 this is a Common Pleas non-jury term of court for the
10 purpose of hearing postconviction relief matters. Our
11 host is my assistant, Ashley Searcy. My law clerk is
12 Brittany Biggs. The court reporter is Julie Cendroski.

13 And so, the first matter, as I understand it, on
14 the roster is civil action number 19-CP-42-2536, Gabriel
15 Rios versus the State of South Carolina. Mr. Rios is
16 represented by Rodney Richey. And the State is
17 represented by Chelsey Marto. And is William Ray also
18 involved with this hearing?

19 MS. MARTO: No, Your Honor.

20 THE COURT: Okay. All right. And so, let me,
21 first, direct my questions or my statements to Mr. Rios.
22 Sir, can you hear me?

23 THE DEFENDANT: Yes, ma'am.

24 THE COURT: Okay. And, sir, do you understand
25 that it has been agreed by counsel that this hearing

1 would be conducted today via video conference?

2 A. Yes, ma'am.

3 Q. Sir, you have just stated that you want to speak
4 with your attorney; is that correct?

5 THE DEFENDANT: Yes, ma'am.

6 THE COURT: Okay. Mr. Richey, do you have the
7 telephone number for the facility?

8 MS. SEARCY: Judge, I can do a sidebar, if I need
9 to. That way everybody -- just Mr. Richey and Mr. Rios
10 can speak.

11 THE COURT: I'm not sure that -- I would probably
12 prefer that they are able to talk to each other
13 privately off of Webex.

14 MS. SEARCY: Yes, ma'am.

15 THE COURT: If that's possible. Mr. Richey, sir,
16 do you have any suggestions?

17 MR. RICHEY: It depends where he's at, and if the
18 lady with him, she can tell us if we have a phone in
19 that room, i can call that room.

20 THE COURT: Okay. Okay. Is the detention
21 officer in there with you, Mr. Rios?

22 THE DEFENDANT: Do you want me to go get her?

23 THE COURT: Yes, sir.

24 THE DEFENDANT: Okay.

25 THE COURT: Okay. Ma'am, Mr. Rios has requested

1 that he speak with his legal counsel. And so, his
2 lawyer is Mr. Richey, the gentleman here, and he needs a
3 way to contact the room that you're in or that facility.

4 DETENTION OFFICER: Okay.

5 THE COURT: Okay. So, Rodney, what we'll do, why
6 don't we take about ten minutes and I'll let you try to
7 talk to him, and you can update me as to where you are,
8 okay?

9 MR. RICHEY: Judge, can we get her to tell us the
10 number where they're at?

11 THE COURT: Yes.

12 DETENTION OFFICER: Mr. Richey, call this number,
13 803-542-4424.

14 MR. RICHEY: 4424?

15 DETENTION OFFICER: Yes.

16 MR. RICHEY: Thank you.

17 THE COURT: Thank you, ma'am. Okay. Everyone
18 we'll come back up at 9:50, okay?

19 MR. RICHEY: Okay. Thanks, Judge

20 (Recess was had from 9:41 - 9:53 a.m.)

21 THE COURT: Okay, thank you. Okay. So, this is
22 a hearing on the State's Motion to Dismiss; is that
23 correct, Ms. Marto?

24 MS. MARTO: Yes, Your Honor.

25 THE COURT: Okay. And so, I will hear from the

1 State and then Mr. Richey, and then I'll let Ms. Marto
2 reply to anything new, okay?

3 MS. MARTO: Thank you, Your Honor. May it please
4 the Court? We're here today in the case of Gabriel
5 Rios. Docket number 2019-CP-42-2536. He was originally
6 indicted November 2010 for first degree burglary, armed
7 robbery, possession of a weapon during the commission of
8 a violent crime, grand larceny, kidnapping, and first
9 degree assault and battery. Represented by Mr. Matthew
10 Shealy. He went to trial, was found guilty before the
11 Honorable R. Lawton McIntosh, February 26th to the 28th,
12 2013, and sentenced to 40 years in prison.

13 He appealed, which was then denied March 11th,
14 2015. The first PCR application was filed June 3rd,
15 2015, which was denied by the Honorable Edward Miller on
16 June 21st, 2017. That was appealed and then again
17 denied April 10th, 2019.

18 The application this time was filed July 17th,
19 2019, and he's alleging newly discovered evidence,
20 because he's claiming that fraud was found on the part
21 of Investigator, Warren Williams, in what was seemingly
22 an unrelated case. And then through an amendment filed
23 through counsel, he's alleging that Mr. Williams told
24 the victim, who was unsure who committed the crime
25 initially, that it was, in fact, Mr. Rios, and that that

1 was fraudulent. And that she instructed the victim who
2 to blame the crime upon.

3 And it would be the State's contention that that
4 is not enough to establish a prima facie case of newly
5 discovered evidence, given the facts that it's only
6 being backed up by his own mere speculation that there's
7 no set timeline concerning the discovery of the
8 evidence, and that we cannot determine for sure whether
9 he discovered it within a year.

10 And then additionally, it does seem to be refuted
11 by the record, specifically both Warren Williams and the
12 victim stated that she was able to identify the
13 perpetrator immediately, given the fact that Mr. Rios
14 used to work for the victim's husband and that she was
15 able to determine who it was immediately.

16 Additionally, she stated that when it came to
17 doing an identification of the individual that she was
18 able to determine it was Mr. Rios without any prompting
19 or help from anybody else. And so, because of those
20 reasons, we would state that the evidence being
21 presented here today doesn't rise above the level of
22 mere speculation, that isn't substantiated by anything
23 in the record and, in fact, contradicts testimony
24 elicited at trial.

25 THE COURT: Okay, thank you. And I guess, Ms.

1 Marto, we also need to put on the record that I was
2 provided a copy of the file electronically prior to
3 today's hearing. And, thank you. I have had an
4 opportunity to review some of the trial transcript, as
5 well as the documents, the motion, and the attachment.
6 Thank you.

7 Okay. Mr. Richey, sir, I'm happy to hear from
8 you.

9 MR. RICHEY: Thank you, Your Honor. Your Honor,
10 Investigator Williams was found to provide further
11 information in cases. And I think that one was like in
12 February 2019. He was the investigator on Mr. Rios'
13 case.

14 Mr Rios, Your Honor, the thing about this is, on
15 the evidence that needs to be presented in this case,
16 will take a substantial amount of time, at least three
17 to four hours. There's a 911 tape that Mr. Rios and I
18 have talked about, where they cannot identify this
19 perpetrator.

20 Also, there were reports that at the time that
21 this happened the wife could not identify who actually
22 had robbed her, walked into her home. Mr. Rios'
23 contention is at that point, Officer Williams got with
24 these folks and told them, based off of his prior --
25 some prior, alleged prior interactions with Mr. Rios

1 that he's actually the perpetrator.

2 So Mr. Rios, he's asking the Court to grant him a
3 full evidentiary hearing so he can attempt to subpoena
4 Warren Williams, who's out there somewhere, and bring
5 forth this, this evidentiary hearing so he can put all
6 this evidence into the record.

7 I will tell the Court, and the Court heard, he
8 has a substantial sentence of forty years. And as the
9 State told Your Honor that, that he did work with these
10 people.

11 And Mr. Rios' contention is when the officer
12 originally showed up to the house, that she could not
13 identify him and that he had worked in the home for a
14 substantial period with the husband doing construction
15 work. And it's his position that an evidentiary hearing
16 should be held so he can provide multiple witnesses and
17 testimony as to this issue, because we believe that it
18 was fraud on the part of the officer, and that's his
19 newly discovered evidence.

20 THE COURT: And, Mr. Richey, sir, with regard to
21 the timeliness of it, can you tell me more about when
22 Mr. Rios learned of the allegations against Mr.
23 Williams?

24 MR. RICHEY: Your Honor, I believe that it was
25 around February of last year. I think that's when all

1 this came out. He put an attachment in the PCR around
2 February of 2019. Somewhere around there this article
3 came up that he had made an attachment to the
4 application that he found out about this newly
5 discovered evidence, which is on par with his filing of
6 this application.

7 His application was filed in 2019, in July. I
8 believe that's what it is. Let me check that. But he
9 filed it within a year of July. He filed it within a
10 year of him finding out this information.

11 THE COURT: Okay. Anything else, sir?

12 MR. RIOS: Could I speak?

13 THE COURT: Sir, you have to -- I know this is a
14 little bit awkward. You need to do that through your
15 lawyer, so if you all need to talk again, I'm happy to
16 let you all do that, okay?

17 MR. RICHEY: Your Honor, I will tell the Court,
18 I'm not opposed to Mr. Rios speaking in this hearing, if
19 the Court would allow it. I talked to him about this
20 and I think there's some issues he wanted to bring to
21 the Court's attention. I think that's ---

22 THE COURT: Okay, sir. Well, let me ask Ms.
23 Marto. Ms. Marto, do you object to Mr. Rios addressing
24 me? I haven't, I haven't placed him under oath and he's
25 not giving testimony. This is a little bit awkward.

1 MR. RIOS: Okay. Well...

2 THE COURT: But I'm happy for you -- for us to
3 allow Mr. Rios to talk to Mr. Richey, which I would do
4 in a hearing anyway. I would try to make sure that Mr.
5 Richey did bring everything to the Court's attention,
6 sir, that you want me to hear. But this isn't the type
7 of hearing where we take testimony. This is just a
8 motion hearing today regarding, quite frankly, whether
9 or not you'll be able to have an evidentiary hearing
10 concerning the postconviction relief, based upon the
11 newly discovered information concerning Investigator
12 Williams.

13 So, Ms. Marto, let me make sure, ma'am, is there
14 anything else you want to tell me before I let them --
15 I'm gonna let you all confer again, Rodney, okay?

16 MR. RIOS: Okay.

17 MR. RICHEY: Okay.

18 THE COURT: We've got plenty of time this
19 morning, all right? So...

20 Ms. Marto, anything else before I let Mr. Richey
21 confer with Mr. Rios?

22 MS. MARTO: I do have a couple of points I did
23 want to address in response to Mr. Richey, but I can do
24 that after they speak, if you would prefer, Your Honor.
25 I don't need to go immediately.

1 THE COURT: Okay. All right. So, we'll take
2 another recess and let you all talk. I'm assuming it's
3 the same number, okay.

4 MR. RICHEY: Yes, ma'am.

5 THE COURT: Okay. We'll come back on -- why
6 don't we come back at 10:15, give you all 15 minutes.

7 MR. RICHEY: Okay, thank you, Your Honor.

8 THE COURT: Okay. Mr. Rios, sir, take your time.
9 All right.

10 MR. RICHEY: Thank you, Your Honor.

11 MR. RIOS: Yes, ma'am.

12 THE COURT: All right.

13 (Recess was had from 10:04 a.m. - 10:17 a.m.)

14 THE COURT: Okay. Okay. There's Mr. Richey.
15 Okay. Mr. Richey, sir, are we ready?

16 MR. RICHEY: Yes, ma'am.

17 THE COURT: Okay, yes, sir.

18 MR. RICHEY: Okay. Your Honor, I spoke to my
19 client and, Your Honor, some of the things that he
20 wanted to make sure the record clearly indicates in
21 February, he referenced an inquiry that the attorney
22 general from the solicitor's office was gonna go through
23 the -- all of Mr. Williams cases in more than 20 years.

24 It's his position that his case needed to be one
25 of those cases that the State goes back through. Also,

1 in this case, there was evidence taken from the crime
2 scene. DNA that did not match him. There was a car
3 taken and DNA was swabbed from that car. That did not
4 match him.

5 He also had a phone record at the time that he
6 was on the phone when all this occurred. And, and more
7 importantly, he referenced a trial transcript on Page
8 168. He showed Mr. Holt, and told the investigator it
9 was him. So it's his position the wife could not
10 identify him until this officer got into the case,
11 because the two people first on the scene, he had told
12 them that she couldn't -- it was an unknown individual
13 and which is outlined position on a 911 tape. So, he's
14 just asking for an evidentiary hearing so he can bring
15 all this in and have a hearing on it.

16 THE COURT: Okay, thank you.

17 MR. RICHEY: Thank you, Your Honor.

18 THE COURT: Ms. Marto?

19 MS. MARTO: Yes, Your Honor. It would be the
20 State's position that even if Mr. Rios did discover
21 newspaper articles concerning fraudulent activity in
22 Investigator Williams, we would again point out, none of
23 this has been specifically linked to his case in
24 particular.

25 And, in fact, the distinction between the initial

1 911 call where they weren't able to label who the victim
2 was in a trial where they stated that they immediately
3 identified the victim. This has already been brought
4 out at both trial, and the first PCR, and now the
5 distinction would be Investigator Williams accusing him
6 of, like, the reason why there was a distinction here.

7 But, again, at trial his attorney did argue that
8 there was -- the 911 call didn't implicate Mr. Rios in
9 particular. And then at trial they did implicate him,
10 stating they identified him immediately and stated that
11 there was a difference and that, again, at the first PCR
12 hearing they stated that -- they tried to make an
13 argument that counsel was ineffective for failure to
14 point out these prior inconsistent statements.

15 And so, the basis of the knowledge being
16 presented here today isn't new. Rather, what is new is
17 the argument against Mr. Williams. And, again, that is
18 unsubstantiated by anything really in the record. And
19 so it's for these reasons we would argue a prima facie
20 case was not established here.

21 THE COURT: Okay. Okay. Anything else from
22 either party?

23 MR. RICHEY: Nothing, Your Honor.

24 MS. MARTO: No, Your Honor.

25 THE COURT: Thank you. I, I say this mainly for

1 Mr. Rios's benefit because these lawyers have appeared
2 me before and they understand it. Sir, I want to review
3 everything, and I am going to issue either the order or
4 instructions for an order as soon as possible. But I do
5 want to review everything again now with having the
6 benefit of their argument.

7 Sir, I know this is very important to you, and I
8 take it very seriously. Look to Mr. Richey for guidance
9 as to my decision, okay? And I wish you the very best
10 in the future. That will conclude the hearing. Thank
11 you.

12 THE DEFENDANT: Thank you, Your Honor.

13 MS. MARTO: Thank you, Your Honor.

14 (Hearing concluded at 10:22 a.m.)

15
16 --- THIS ENDS REQUESTED TRANSCRIPT ---

17
18 COURT REPORTER CERTIFICATE

19
20 I, the undersigned Julie A. Cendroski, Court
21 Reporter for the Seventh Judicial Circuit Court of the
22 State of South Carolina, do hereby certify that to the
23 best of my ability the foregoing is a true, accurate,
24 and complete transcript of record of all the proceedings
25 and evidence introduced in the hearing and/or trial of

1 the captioned case, relative to appeal, in the Court of
2 General Sessions for Spartanburg County, South Carolina,
3 on the 13th day of February, 2023.

4 I do further certify that I am neither of kin,
5 counsel, nor interest to any party hereto.

6
7
8
9
10 s/Julie A. Cendroski

11 Julie A. Cendroski
12 Circuit Court Reporter III
13 Seventh Judicial Circuit
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG))
)
Gabriel Jon Rios,)
Applicant,)
)
v.)
)
The State of South Carolina,)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
Case No: 2019-CP-42-02536

ORDER
(Denying State's Motion to Dismiss)

FILED
2021 APR 26 PM 1:13
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COOK
AMY.W.COOK@SCJUDS.COM

This matter come before the Court by way of an Application for Post-Conviction Relief. The Court convened a hearing via Judge Grace Gilchrist Knie virtual courtroom on April 5, 2021. The State was represented by Chelsey F. Marto, Esquire of the South Carolina Attorney General's Office. The Applicant was represented by Rodney Richey, Esquire. The Applicant was present via video conference from McCormick Correctional Institution. The hearing was regarding the State's Motion to Dismiss.

Procedural History

Applicant is presently confined to the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In November 2010, the Spartanburg County Grand Jury indicted Applicant for first degree burglary (2010-GS-42-06830), armed robbery (count one) and possession of weapon during commission of a violent crime (count two)(2010-GS-42-07831), grand larceny (2010-GS-42-6834), kidnapping (2010-GS-42-6833), and first degree assault and battery (2010-GS-42-6834). Matthew Shealy, Esquire represented Applicant. Assistant Solicitors Timi Poulos and Russell Ghent of the Seventh Circuit Solicitor's Office prosecuted the case. On February 26-28, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh, circuit court judge, and a jury. The jury found him

①

APP'X 695

guilty as indicted. Judge McIntosh sentenced Applicant to forty years imprisonment for first degree burglary, thirty years imprisonment for armed robbery, thirty years imprisonment for kidnapping, ten years imprisonment for first degree assault and battery, and five years imprisonment for the weapons possession charge, with the weapon sentence running consecutively to the remaining charges, which ran concurrently.

FILED
2021 APR 26 PM 4:13
CLERK OF COURT
SPARTANBURG COUNTY
JAY W. COX

FINDINGS OF FACT AND CONCLUSION OF LAW

1. The Court has reviewed the State's Return and Motion to Dismiss filed with the Court February 10, 2021, the Application for Post Conviction Relief (PCR) filed on July 17, 2019, and the Amended PCR Application filed on March 21, 2021, in which one of the allegation is that the "Applicant believes that Detective Lorin Williams (formerly with the Spartanburg County Sheriff's Department) fraudulently obtained arrest warrants against Applicant." And that fraud caused him to be convicted. The Court has reviewed the record from the underlying action, the hearing transcript of February 26, 2013, wherein the Defendant was tried by jury for, and convicted of the crimes outlined in the procedural history of the case. The Court has also taken into consideration all arguments of Counsel presented at the hearing.
2. Applicant asserts in the most recent application that he is relying on newly discovered evidence of material fact not previously presented which became known to Applicant after his trial and could not have been discovered prior to the trial. The evidence is that the Applicant believes Detective Lorin Williams (formerly with the Spartanburg County Sheriff's Department) fraudulently obtained arrest warrants against Applicant.

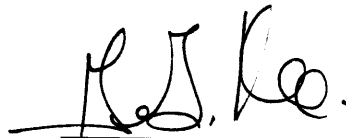


3. Based upon the newly discovered evidence, the Court is denying the State's Motion to Dismiss.

CONCLUSION

The Court finds that the State's Motion to Dismiss the Applicant's Post Conviction Relief application is hereby denied. The Applicant shall have an evidentiary hearing on the issues raised in his application.

AND IT IS SO ORDERED this 26th day of April, 2021.



Grace Gilchrist Knie
Judge of the Seventh Judicial Circuit

2021 APR 26 PM 4:13
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. DOK

FILED

Spartanburg, South Carolina



APP'X 697

STATE OF SOUTH CAROLINA	)	
	)	COURT OF GENERAL SESSIONS
COUNTY OF SPARTANBURG	)	2019-CP-42-2536
	)	
	)	
	)	
	)	
GABRIEL RIOS,	)	
	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
THE STATE OF SOUTH CAROLINA,	)	
DEFENDANT.	)	
	)	

October 18, 2022
Spartanburg, South Carolina

B E F O R E:

THE HONORABLE BRIAN M. GIBBONS, JUDGE.

A P P E A R A N C E S:

CHELSEY MARTO, ESQ.
Assistant Attorney General

RODNEY RICHEY, ESQ.
Attorney for the Applicant

AMBER PAYNE, CVR
Circuit Court Reporter

APP'X 698

I N D E X

(SW) - Denotes State's Witness

(AW) - Denotes Applicant's Witness

Page No.

Exhibits.....	3
Proceedings.....	4
(AW) GABRIEL RIOS:	
Direct Examination by Mr. Richey.....	7
Cross-Examination by Ms. Marto.....	15
Redirect Examination by Mr. Moroney.....	21
(AW) PHILLIP HOLT:	
Direct Examination by Mr. Richey.....	25
Cross-Examination by Ms. Marto.....	32
(AW) GAIL HOLT:	
Direct Examination by Mr. Richey.....	34
Cross-Examination by Ms. Marto.....	38
Redirect Examination by Mr. Richey.....	39
(SW) MATTHEW SHEALY, ESQ.:	
Direct Examination by Ms. Marto.....	41
Cross-Examination by Mr. Richey.....	42
Closing Arguments by Mr. Richey.....	43
Closing Arguments by Ms. Marto.....	44
Certificate of the Court Reporter.....	58

INDEX

E X H I B I T S

There were no exhibits entered during this hearing.

P R O C E E D I N G S

(Whereupon, the hearing began at
10:53 a.m.)

THE COURT: All right. Madam AG, if you'll
introduce your case.

MS. MARTO: Yes, Your Honor. Good morning. May it
please the Court. We are here today in the case of
"Gabriel Rios vs. The State of South Carolina,"
2019-CP-42-2536. He's presently confined in the
South Carolina Department of Corrections. In
November 2010, he was indicted for first degree
burglary, armed robbery, and possession of a weapon,
grand larceny, kidnapping, first degree assault and
battery.

He was represented by Mr. Matthew Shealy and
prosecuted by Timi Poulos and Russell Ghent.
February 26th through the 28th, 2013, he proceeded
to trial before Judge McIntosh and was found guilty
as indicted. He was sentenced to 40 years for first
degree burglary, 30 for armed robbery, 30 for
kidnapping, ten for first degree assault and
battery, and five for the weapons possession. The
weapons possession ran concurrent -- consecutive to
all other charges which ran concurrently.

And then he filed a notice of appeal, and this

1 was dismissed, and the remittitur was issued April
2 10th, 2015. Filed his first PCR application June
3 3rd, 2015, and that was heard before Judge Miller,
4 who issued an order of dismissal March 21st, 2017.
5 This was appealed and then denied; the remittitur
6 issued April 26th, 2019. He also filed a habeas
7 petition, and that was also denied and summarily
8 dismissed.

9 And so the second PCR application was filed
10 July 17th, 2019. The State moved to dismiss
11 February 5th, 2021. The PCR application was amended
12 March 22nd, 2021. The motion to dismiss hearing was
13 held April 5th, 2021. This was denied at a full
14 evidentiary hearing ordered on April 26th, 2021,
15 concerning the claim of newly discovered evidence
16 that there was allegation -- there's an allegation
17 on Mr. Rios's part that Lorin Williams committed
18 fraud in his case.

19 So we're proceeding upon that claim, and with
20 that, I'll turn it over to Mr. Richey.

21 MR. RICHEY: Yes, Your Honor. There was an
22 investigator that was fired in this county over
23 presenting false evidence to the Magistrate to get a
24 warrant, and -- and he was on these cases, and my
25 client -- there was an identity issue in this case.

1 And it's my client's position that that identity was
2 fraudulently given through the coercion of this
3 officer. So we're here this morning -- we have the
4 people who gave the identity, and we have the 911
5 tape and Mr. Rios, and we're going to play that, and
6 we want some type of, I guess, determination of
7 whether we met our burden to show that that
8 testimony was -- was not valid. I'll use that
9 phrase, "not valid." So that's the issue before the
10 Court.

11 THE COURT: All right. So the only issue before the
12 Court is whether or not this evidence would count as
13 newly discovered evidence, which would entitle him
14 to a new trial?

15 MR. RICHEY: Yes, sir.

16 THE COURT: And the evidence which you seek to offer
17 concerns identity being falsely given?

18 MR. RICHEY: Yes, sir.

19 THE COURT: All right. So that -- that -- I mean,
20 is it -- that looks like -- I'm looking at his
21 application. He's also alleged prosecutorial
22 misconduct, due diligence, and due process, but
23 really those have been -- as I briefly reviewed the
24 record and I heard the AG introduce the case, have
25 those been thoroughly vetted?

1 MR. RICHEY: Your Honor, there have been several
2 hearings, and -- and this hearing -- this identity
3 is a real problem in this case, because that was the
4 evidence -- the critical evidence that convicted him
5 in this case.

6 THE COURT: Okay. Well, call your witness.

7 MR. RICHEY: Okay. I call Mr. Rios. (To Mr. Rios)
8 Take the stand.

9 (WHEREUPON, the applicant was sworn.)

10 THE COURT: Thank you, sir. You may have a seat
11 there, and speak loudly. Thank you.

12 **DIRECT EXAMINATION OF GABRIEL RIOS**

13 BY MR. RICHEY:

14 Q Sir, you can state your name, please.

15 A Gabriel Rios.

16 Q Mr. Rios, are you in the Department of Corrections?

17 A I am.

18 Q And is -- is it for the charges that the State listed?

19 A Yes.

20 Q Okay. All right. Mr. Rios, I want you to listen to
21 something. Hey, I want you to look up here and listen to
22 something.

23 MR. RICHEY: (To Ms. Marto) Can you start that?

24 Q I want you to listen to this tape.

25 (WHEREUPON, a 911 tape recording was played in

1 open court.)

2 Q Now, Mr. Rios, you -- you've heard that tape. This is
3 not the first time you've heard that tape, correct?

4 A No. I heard it in my first PCR.

5 Q Okay. And in this tape, do you know who that is talking
6 on the tape?

7 A Yeah. That's my boss man talking to the 911 operator.

8 Q Okay. And what's his name?

9 A Phillip Holt.

10 Q You've got to say it, again. I'm sorry, sir.

11 A Phillip Holt.

12 Q Okay. And -- and at the time that he's on this tape, is
13 he familiar with you?

14 A They know me. I done -- I done been to they house
15 (verbatim.) I done been to home builder's associations.
16 I done been to Roland Martin Marina wide-mouth bass
17 fishing. I've -- I was at a (inaudible.) Him, my wife,
18 his wife, along with other guys on the job, we sat at a
19 home builder's association, so they know me. I done work
20 in his home. I've been to his home many times. I've
21 been around him, his wife many times.

22 Q Okay. So -- so these folks would -- they would know who
23 you are pretty much instantly, correct?

24 A Instantly.

25 Q And so you listened to this tape where Mr. Holt is

1 saying, "It's a black man," you know, "We don't know who
2 he is." Okay. Isn't that your position that this
3 identity was not procured properly; is that correct?

4 A That is correct.

5 Q And -- and the problem you have with this is
6 that -- is that these folks told the 911 people,
7 initially, that they didn't know who it was, correct?

8 A Correct.

9 Q And -- and after their conversation with this officer, is
10 -- is that when this identity changed?

11 A After -- can I look here?

12 THE COURT: Yeah. Look --

13 MR. RICHEY: Go ahead.

14 THE COURT: -- at whatever --

15 MR. RICHEY: Go ahead.

16 THE COURT: -- you need to look at.

17 MR. RICHEY: Go ahead.

18 A Okay. After the 911, he stayed on the phone with the 911
19 operator until the initial officer arrived. When the
20 initial officer arrived, he was met by Mr. Holt who told
21 him that he got a call from his wife at 8:09 that a
22 unknown suspect had broke into the house and robbed her.
23 And return -- the officer went and talked to the wife,
24 who in return told him it was just a black guy with a
25 baseball cap on.

1 Now, when Mr. Williams arrived on the scene, I don't
2 -- I -- I can say he has suggested or - or suggested or
3 mentioned my name in some type of way in this scene,
4 because the whole story changed, and they deviated from
5 the initial statements and stated that it was Gabriel
6 Rios per se Mr. Williams.

7 Q Well, let me ask you this.

8 THE COURT: (To Mr. Richey) Well, let me stop and -
9 - and interrupt there. Did that issue come up at
10 the trial?

11 MR. RICHEY: Yes, sir.

12 THE COURT: All right. So that 911 tape was heard -
13 -

14 THE APPLICANT: (To the Court) No. No, sir. It
15 wasn't.

16 THE COURT: Hang on -- hang on a minute. I'm -- I'm
17 talking to your lawyer. I'll -- I'm gonna get to
18 you in second.

19 MR. RICHEY: No. That 911 tape was first played at
20 that first PCR.

21 THE COURT: Okay. Got it.

22 MR. RICHEY: Okay.

23 THE COURT: That -- that answered my question, sir.

24 MR. RICHEY: Yeah.

25 THE APPLICANT: Okay.

1 MR. RICHEY: That's -- that's --

2 THE COURT: I understand that.

3 MR. RICHEY: Yes, sir.

4 THE APPLICANT: Yes, sir. Yes, sir. Yes, sir.

5 Q And -- and, Mr. Rios, that -- that in itself is an issue
6 to you this tape was not played; is that correct?

7 A That was my first issue on my first PCR along with the --
8 with the first officer on the scene narrative, the
9 initial report. The initial report was more important to
10 me, because you gotta start from the beginning in order
11 to see, you know, to see where the crime led up to.

12 And I'm not -- I'm not legally-minded. I just read;
13 I comprehend. The initial report stated that these
14 people didn't know who it was, but they know me. I done
15 worked in they home. I done did many a things. They
16 even know my kids. But they did not know who committed
17 this act until this officer got on the scene and -- and
18 allowed them to deviate from their initial statement
19 stating they didn't know, and to him saying that this man
20 told him
21 it -- it was me when this man was not even there.

22 THE COURT: Okay. And that issue -- was that issue
23 vetted, Mr. Richey, in the initial PCR application?

24 MR. RICHEY: Yes. That was -- it was
25 played -- the tape was played kind of similar to

1 what we're doing now.

2 THE COURT: All right. But then, I -- I guess, the
3 issue in this subsequent application is because this
4 investigator was fired --

5 MR. RICHEY: Right.

6 THE COURT: -- for fraud or whatever he did that
7 should be opened back up?

8 MR. RICHEY: Yes.

9 THE COURT: Okay. I -- I see where you're going
10 with this, okay.

11 MR. RICHEY: Yeah. The tape --

12 THE COURT: I mean, there's a lot of stuff. I'm just
13 going to take whatever I'm doing today, and whatever
14 I'm gonna do under advisement, because there's a lot
15 of stuff I wanna read and flesh out. I'm just
16 trying to get at the heart of the issue right now,
17 because we only have so much court time, and I wanna
18 make sure I understand exactly what it is you're
19 seeking and why you're seeking it. All right.
20 Thank you.

21 (To Mr. Richey) Go ahead. I'm sorry --

22 MR. RICHEY: Yes, sir.

23 THE COURT: -- to interrupt.

24 MR. RICHEY: Thank you, Your Honor.

25 Q Mr. Rios, let me ask you: At the time this tape was

1 played, Mr. Holt was at home?

2 A Mr. Holt?

3 Q When he called 911?

4 A Yes. You could hear his wife in the background. You

5 could hear her right there on the side of him when they

6 was talking to the 911 operator, you know. If they

7 really listen to it, you could hear her, and he's telling

8 her to, "Calm down, honey. Just sit right here. Just

9 sit right here." It's in -- it's on the -- it's on the

10 CD.

11 Q Well, I'm -- I'm gonna -- I'm -- let -- let me ask you

12 questions, okay?

13 So -- so she's there beside him at the time --

14 A Yes, sir.

15 Q -- and she's the one that got robbed, broke into, all the

16 stuff, correct?

17 A Correct.

18 Q And so, it is your position that she could have easily

19 told him right there it was you?

20 A "It was Gabe," or -- or --

21 Q Right.

22 A -- "It was the guy that worked for you," even if she was

23 --

24 Q Right.

25 A -- yeah.

1 Q And -- and so that -- so that didn't happen?

2 A No, sir. It didn't.

3 Q Okay. And so it's your position that this identification
4 was faulty, and that these officers conspired somehow to
5 get your name in this --

6 A That's correct.

7 Q -- because your name was not in it initially?

8 A That's correct. And -- and we know for a -- we know that
9 this guy has this capability of doing it, because he
10 breeched his duty to tell the truth under oath to get a
11 warrant anyway, you know.

12 Q And you have testimony that you pulled to substantiate
13 that, correct?

14 A Yes. I do.

15 Q Okay. Could you get that testimony, please?

16 A That's this (indicates)?

17 Q Yeah. You --

18 A Can I read it to the Court?

19 Q No, no, no. Let me -- I'll do it. What you're -- this
20 is -- this is already a part of the record. It's
21 attached to his application, and this is the article that
22 talks about the sheriff -- the sheriff deputy being
23 terminated, correct?

24 A That's correct.

25 Q Okay. All right.

1 A Could we get it put into evidence?

2 Q It's already in the record. You attached it to your
3 application.

4 MR. RICHEY: Your Honor, this is -- this article is
5 on his amended application, so it's already a part
6 of the --

7 THE COURT: Yes, sir.

8 MR. RICHEY: -- record. Okay.

9 Q So you believe that because of this faulty identification
10 and that the alleged fraud of these officers out there
11 inducing them to come up with your name, that you should
12 be entitled to a new trial, correct?

13 A That is -- that is correct.

14 Q Okay. Thank you.

15 MR. RICHEY: (To the Applicant) Answer any
16 questions the Attorney General will have.

17 **CROSS-EXAMINATION OF GABRIEL RIOS**

18 BY MS. MARTO:

19 Q Good morning, sir.

20 A So Mr. Holt wasn't present at the time of the home
21 invasion, right?

22 Q He was not even there to give a identity.

23 A Only Mrs. Holt was, right?

24 Q And she told him she didn't know who it was because
25 that's what he gave the initial officers what his wife

1 told him she did not know who it was.

2 A But she testified at the trial she recognized
3 you --

4 Q Well, hey --

5 THE COURT: (To the applicant) Hang on. Let her
6 ask the question, then you can --

7 THE APPLICANT: Yes, sir.

8 THE COURT: -- you can answer --

9 THE APPLICANT: Yes, sir.

10 THE COURT: -- as fully as you can.

11 THE APPLICANT: I apologize, Your Honor.

12 THE COURT: (To the State) Go ahead. Repeat your
13 question.

14 MS. MARTO: Yeah.

15 Q She testified at trial that she recognized you
16 immediately, correct?

17 A Yes.

18 Q Okay. And she picked you out of a lineup, correct?

19 A She picked me out in a photo lineup as a person who
20 worked for her husband, not as the person who committed
21 the act. She only gave me a . . .

22 THE APPLICANT: Excuse me, Your Honor.

23 THE COURT: Yes, sir. Take your time.

24 THE APPLICANT: Yes, sir.

25 A I have the affidavit right here, and it -- it clearly

1 states that she stated that she only knew me as a person
2 who worked for her husband, never the person who
3 committed the act upon her. If you give me a minute,
4 just let me look through this paperwork.

5 Q So you're saying that Mr. William --

6 A Excuse me, ma'am. Let me just find this paperwork. I'm
7 -- I'm one-track mind.

8 And Mr. Williams stated that he went and got a photo
9 lineup after the husband told him it was Gabriel Rios,
10 and that's when he went and got the photo lineup and
11 brought it back to his wife.

12 Q And she stated that she told the police that she --

13 A No.

14 Q -- recognized you --

15 A No.

16 Q -- as Gabe --

17 A No.

18 Q -- correct?

19 MR. RICHEY: (To the Applicant) Let her --

20 THE COURT REPORTER: (To the Applicant) I'm sorry.
21 I -- I can't understand.

22 MR. RICHEY: No. No.

23 THE COURT: Right. One at a time.

24 THE COURT REPORTER: (To the State) Can you repeat
25 that?

1 Q She -- she stated she told the officers that she
2 recognized you as Gabe, correct?

3 A I can't hear you.

4 Q She stated she told the officers that she recognized you
5 as Gabe, correct? That's what she testified to at trial?

6 A No. She told the officers she knew me as Gabe --

7 Q Right.

8 A -- who worked for her husband. That was her affidavit
9 and the photo -- when she seen me in that photo. She
10 never stated to the officers that I was the guy. Mr.
11 Holt told the officers that it was Gabriel Rios per se
12 Mr. Williams.

13 Q Okay. So are --

14 A That's --

15 Q -- are you disputing that she said that at trial?

16 A No. I can't dispute what she said at trial, because she
17 also said she believed in angels at trial, you know. So,
18 no. She did say she immediately recognized me in this --
19 where she had recognized me at was in the photo as a
20 person who worked for her husband.

21 Q And this identification issue, was that brought up at
22 trial by your counsel?

23 A My -- my counsel had a Neil's-Bigger (as spoken) hearing
24 when it shouldn't have been a Neil's-Bigger hearing,
25 because there was an unknown suspect.

1 Q And this was also brought up at your first PCR hearing,
2 right?

3 A No. None of this was brought up.

4 Q The issue of her identifying you or not was not brought
5 up at all in PCR?

6 A Not to my recollection.

7 Q Was the 911 call played?

8 A The 911 was played.

9 Q Do you recall whether or not this issue was raised in
10 your PCR appeal?

11 A No. The only thing I remember was the trial when she got
12 on the stand and testified that she immediately
13 recognized me, yes.

14 Q So you're stating that Lorin Williams caused them to
15 single you out specifically; is that --

16 A These people know me, okay. So if I walk through that
17 door, you're gonna say, "That's Gabe." "Gabe came in."
18 But you don't -- you can't remember, "Oh, the guy worked
19 for you; that's who robbed me." She called her husband
20 and told her husband she did not know who it was, but,
21 yet, they know me. I worked for them.

22 Q But are you saying that Lorin Williams's involvement
23 caused them to identify you?

24 A Well, we know that he would breach his duty to tell the
25 truth under oath. He -- he will go in front of Your

1 Honor and -- and breech his duty to get a warrant from
2 Your Honor to have people arrested, convicted, and
3 sentenced to prison. He has a track record of this;
4 that's why we are going back now, 20 years, on all of his
5 cases. This man (as spoken) credibility cannot be --
6 it's no good in a court of law or in anywhere, because we
7 don't know when he (as spoken) telling the truth or when
8 -- when he ain't, because he's known to breech his duties
9 and they terminated him from the Spartanburg County
10 Sheriff (as spoken) Office doing so.

11 So, yes, I feel that with this man's testimony and
12 him getting on there and allowing them to deviate from
13 their initial statements, yes. I feel that I do deserve
14 a new trial.

15 Q Do you have any knowledge as to why Mr. Williams would
16 cause them to single you out as the perpetrator?

17 A I have no knowledge of why he would go in front of a
18 judge and breech his duty to tell the truth under oath.

19 Q But --

20 A I don't have -- I -- I mean, this -- this guy breeched
21 his duty to tell the truth under oath to a judge. He did
22 it; he did it to mine. If we go back and -- if we could
23 go back, which we can't. I -- I'm showing you now at
24 this -- he took information from a person that was not
25 there when he got a photo lineup and brought it to his

1 wife, who knew me.

2 Q So, again, sir, do you have any knowledge as to why Mr.
3 Williams would cause them to single you as the
4 perpetrator in the crime?

5 A I -- I've been in a lot of things out there in the
6 streets, and I think I ran -- to run across him one or
7 two times.

8 Q So he recognized you from prior interactions?

9 A Well, he brought me to that crime scene, because they
10 didn't know who I was.

11 Q Okay. Despite their testimony at trial, correct?

12 A Sir (as spoken)?

13 Q Despite their testimony that they did recognize you at
14 trial, right?

15 A They -- they did not know who the person was who
16 committed the act upon them. This man either suggested
17 or brought my name to this crime scene and allowed them
18 to deviate from their initial statement into saying, "It
19 was Gabriel Rios."

20 MS. MARTO: No further questions.

21 THE COURT: Mr. Richey, redirect?

22 MR. RICHEY: Yes, sir. Just a few questions.

23 **REDIRECT EXAMINATION OF GABRIEL RIOS**

24 BY MR. RICHEY:

25 Q Mr. Rios, in this case, there was limited evidence

1 against you, other than this, correct, of this --

2 A There was no evidence.

3 Q And -- and --

4 A None, whatsoever.

5 Q -- and you had been in that home before doing work,
6 correct?

7 A I was in that home January the 18th on my son's birthday
8 who's sitting out there, because me and my wife had got
9 into a little -- a little argument. So I went over there
10 and -- and cooled out with him, because we were sitting
11 under the carport and drank a few beers and stuff like
12 that there.

13 Q Okay. And -- and that morning -- you had talked with
14 your daughter that morning on the phone, correct?

15 A Me and my daughter had a phone call that morning, because
16 a situation happened that I needed to get back home with
17 my -- my youngest daughter that I was trying to get back
18 home to, you know, and -- and I never made it. I wound
19 up in prison.

20 Q Okay. Well, let me ask you this: This first PCR that
21 you did on this issue, okay, where -- where in this case,
22 you discussed that the lawyer didn't do it at trial, and
23 that would have proved you're innocent. At the time you
24 litigated this issue previously in the previous PCR, you
25 didn't have the information about Mr. Williams at that

1 time, correct?

2 A I could not contest this man's credibility at the time.

3 Q No, no, no. Listen to my question. Listen to my
4 question. The first time you did it, you didn't know
5 anything about Mr. Williams being fired; is that correct?

6 A No. No.

7 Q And so --

8 A No.

9 Q -- you could not bring this issue at the time --

10 A I could not have brought this issue up.

11 Q -- well, let me ask the question, okay? Because you
12 didn't have knowledge of his situation, correct?

13 A You -- that's correct, sir.

14 Q And -- and after --

15 THE COURT: (To Mr. Richey) Sorry. Let me
16 interrupt. So you brought the situation of the ID
17 up, but this was before he knew about Lorin Williams
18 getting terminated and under investigation of
19 fraudulent activity?

20 MR. RICHEY: Yes, sir.

21 THE COURT: So that's why we're having an
22 evidentiary hearing?

23 MR. RICHEY: Yes, sir.

24 THE COURT: Whether -- now that that fact is known -
25 -

1 MR. RICHEY: Yes, sir.

2 THE COURT: -- whether or not that gives rise to the
3 credibility of evidence issue concerning the ID,
4 whether or not he should be entitled to a new trial?

5 MR. RICHEY: Yes, sir.

6 THE COURT: All right. Yeah.

7 MR. RICHEY: Yes, sir.

8 THE COURT: Go ahead.

9 Q And, Mr. -- Mr. Rios -- I lost my train of thought.

10 And so -- so you knew that this ID was faulty, but
11 once you got this wind of this information on this
12 officer, then you kind of put two and two together; is
13 that correct?

14 A I went back and I did all my homework. I read the whole
15 trial transcript, I think, about two times -- two or
16 three times just to clarify what I was reading was
17 correct.

18 Q Right. Right. I'm just -- okay.

19 MR. RICHEY: (To the Court) No other questions.

20 MS. MARTO: (To the Court) Nothing further.

21 THE COURT: (To the Applicant) Thank you, sir. You
22 can step down.

23 (WHEREUPON, the Applicant was excused.)

24 THE APPLICANT: You're welcome, sir.

25 THE COURT: Yes, sir.

1 MR. RICHEY: Call Mr. Holt.

2 (WHEREUPON, the witness was sworn.)

3 THE COURT: Thank you, sir. If you're comfortable,
4 you can lower your mask. That's up to you. And
5 could you spell your last name for me?

6 THE WITNESS: Phil Holt, H-o-l-t.

7 THE COURT: Thank you, sir. All right.

8 MR. RICHEY: Thank you.

9 THE COURT: Mr. Richey?

10 **DIRECT EXAMINATION OF PHILLIP HOLT**

11 BY MR. RICHEY:

12 Q Mr. Holt, were you in the courtroom? Could you hear the
13 911 tape?

14 A Could you step a little closer? I'm hard of hearing.

15 Q Could -- could you hear the 911 tape that was played?

16 A No.

17 Q Okay. Well, before we play it, let me ask you a series
18 of questions.

19 On the morning that this happened, do you recall
20 calling 911?

21 A Yes.

22 Q And do you recall telling 911 that you didn't know who
23 did the burglary? Do you recall that?

24 A No.

25 Q Okay. Did -- do you -- well, do you recall telling them

1 who did the burglary?

2 A No.

3 Q Okay. Let me rephrase this.

4 When you called 911, did you tell the operator that,

5 "I know who burglarized our house"?

6 A No.

7 Q Okay. So you didn't know at that time?

8 A I didn't tell them.

9 Q You knew but you didn't tell the 911 operator?

10 A I believe I did.

11 Q Okay. We've got a tape here, and -- and I'll play it,

12 but I -- would it surprise you on the 911 tape that you

13 just -- you do not identify Mr. Rios? Would that

14 surprise you?

15 A No, sir.

16 Q It wouldn't surprise you that you did not identify him?

17 A No, sir.

18 Q Okay. So at the time that this happened and you got home

19 with your wife, you didn't know who did what, correct?

20 A That is not correct.

21 Q Okay. When you got home, you knew who did the burglary?

22 A Before I got home.

23 Q Before you got home, you knew? How did you know before

24 you got home?

25 A Because on that morning, when my wife called me, the

1 first thing she could get out of her mouth was, "Gabe
2 just nearly killed me."

3 Q Okay. And -- and so before you called 911, then you had
4 the information from your wife, correct?

5 A I did.

6 Q Okay. And so, having that information from your wife, do
7 you think it was important to tell the police that when
8 you were on the phone with 911?

9 A Not before confirming.

10 Q Confirming it. What do you mean by "confirming it"?
11 Confirming it with your wife? Confirming --

12 A Confirm that I heard it correctly; confirm that she said
13 what she meant. She was pretty upset; her words were
14 pretty garbled, but they were heard.

15 Q Okay.

16 A I just didn't want to pass that along until I saw her.

17 Q Okay. So when you got home and you saw her, is that when
18 she told you all this?

19 A Say it again, please, sir?

20 Q When you got home -- and I'm gonna move a little closer,
21 okay? When we -- when you got home and you confirmed
22 that by talking to her, right?

23 A (Nods head up and down.)

24 Q Because she's -- you've gotta answer so she can take it
25 down, yes or no? You've got to say it out loud.

1 A Yes.

2 Q Okay. So you're on the phone with her, she says, "Oh,
3 Gabe robbed me," that -- is that what you're saying?

4 A No.

5 Q Okay.

6 A She said, "Gabe just nearly killed me."

7 Q Okay. When you were on the phone coming back home,
8 correct?

9 A I was 30 feet in the air working on a roof when
10 she --

11 Q Okay.

12 A -- said it.

13 Q And so you got off the roof and you came home, correct?

14 A (Nods head up and down.)

15 Q You got to answer.

16 A Yes.

17 Q Okay. And when you got home, that's where you called
18 911; is that correct?

19 A No. I called 911 on the way home.

20 Q Okay. And -- and so, on the way home you wasn't quite
21 sure who did this because you didn't -- you wanted to
22 make sure, right?

23 A I knew who I had been told that did it or what I thought
24 I heard, and I wanted to get home and confirm that before
25 passing it forward.

1 Q Okay.

2 A I don't like to pass things forward that are not true.

3 Q Would -- would it surprise you, at all, that your wife is
4 in the background on that 911 tape? Would that surprise
5 you?

6 A Not necessarily.

7 Q Okay. Okay. Okay. So did you talk to any of the police
8 officers about who did it? Did you talk to any of the
9 police officers about who had just robbed your house,
10 almost killed your wife? Did you talk to anybody? Any
11 law enforcement?

12 A Sir, it's been 13 years since he did that. I've talked
13 to a lot of people about what he did.

14 Q Well, at the -- at the time you got home, when this
15 happened, did you call the -- did the police come? Did
16 the police come to your house after this incident?

17 A That day, yes.

18 Q Yes, sir. And do you recall talking to them?

19 A I do.

20 Q And -- and do you know who you talked with?

21 A That becomes such a blur. I think I talked to that man
22 in the second pew back there (indicates), but I'm not
23 sure.

24 Q Okay.

25 A I think I talked to the man in front of him, but it's

1 been 13 years ago.

2 Q Okay.

3 A I don't know --

4 Q Okay.

5 A -- that I could pick out who they were today.

6 Q But you did talk to somebody from law enforcement and

7 tell them what happened, correct?

8 A I told them, yes.

9 Q And your wife did, too, correct?

10 A I believe she did, yes.

11 Q Okay. And -- and y'all -- did y'all give a -- okay --

12 and they asked y'all about a description of who it was

13 and all that stuff, correct?

14 A When I got home, I was there a few minutes before the

15 police arrived --

16 Q Yes, sir.

17 A -- I think. When the police arrived, my wife was so

18 hysterical -- and I had spent some time with her -- that

19 I, too, was about to lose my composure.

20 Q Yes, sir.

21 A And I got them to her, and I went outside to reach for

22 composure.

23 Q Yes, sir.

24 A And she talked with them for quite some time before I

25 ever went back in the house.

1 Q Well, I just have a couple more questions, sir. Just a
2 couple more questions. Do you know who that is? Do you
3 know him (indicates)? Mr. Rios?
4 A Well, it looks like you're pointing to that lady --
5 Q No, no. The guy --
6 A -- cop right there.
7 Q -- sitting in the orange.
8 A But I know who that man in the orange is.
9 Q Yeah. Who is that?
10 A That is Gabriel Rios.
11 Q And -- and what kind of relationship did you have with
12 him prior to all this happening?
13 A At the time this happened --
14 Q Before --
15 A -- or prior to it?
16 Q -- before -- before it happened.
17 A Several years before, he worked with me.
18 Q Okay. And -- and was that in the construction?
19 A Yes.
20 Q Okay. And did you ever give him a ride to work, take him
21 home, or any of that stuff?
22 A I did.
23 Q Okay. And so, would you say you were very familiar with
24 who he is?
25 A Oh, yes.

1 Q Right. So -- so walking in here today, if you looked at
2 him, you would say, "That's Gabe," right?

3 A Or from across the street, yes.

4 Q So -- okay. Thank you, sir.

5 MR. RICHEY: (To the witness) Answer any questions
6 the Attorney General will have for you.

7 THE COURT: All right. Madam AG, your witness. You
8 may have to come closer so he can hear you.

9 MS. MARTO: Yes, Your Honor.

10 **CROSS-EXAMINATION OF PHILLIP HOLT**

11 BY MS. MARTO:

12 Q Good morning, sir.

13 A Good morning.

14 Q So you weren't present at the time of the home invasion,
15 right?

16 A (Made a gesture that he couldn't hear.)

17 Q You weren't present at the time of the home invasion?

18 A (No response.)

19 Q Were you present at the time of the burglary?

20 A No.

21 Q Okay. And you did not tell the police that you
22 recognized Mr. Rios, because you were not present and you
23 wanted to confirm first, right?

24 A Correct.

25 Q Okay. Now, you don't recall any police officer talking

1 to you about changing your story or telling you who to
2 identify as being the perpetrator, right?

3 A Say that again, please.

4 Q Was there any police officer that talked to you and asked
5 you to identify Mr. Rios, or did you come to the
6 conclusion it was Mr. Rios on your own?

7 THE COURT: (To the State) That's a very difficult
8 question to answer the way you asked it.

9 MS. MARTO: Okay.

10 Q Did any police officer tell you to identify Mr. Rios?

11 A No.

12 Q Okay.

13 MS. MARTO: (To the Court) Nothing further.

14 THE COURT: All right. Thank you.

15 (To Mr. Richey) Any redirect?

16 MR. RICHEY: No. Call Ms. Holt.

17 THE COURT: (To the witness) Thank you, sir. You
18 can step down.

19 (WHEREUPON, the witness was excused.)

20 MR. RICHEY: Ms. Holt.

21 THE COURT REPORTER: I'm sorry. Who?

22 THE COURT: Ms. Holt.

23 THE COURT REPORTER: Ms. Holt. Okay.

24 THE COURT: H-o-l-t.

25 THE COURT REPORTER: Okay.

1 THE COURT: Ma'am -- is Ms. Holt here?

2 MR. RICHEY: Yes. Yes, sir. They're going to get
3 her.

4 THE COURT: Okay. Good. Good. Good. Thank you.

5 Ms. Holt, come on up here, ma'am. Just have a
6 seat there. Thank you very much.

7 (WHEREUPON, the witness was sworn.)

8 THE COURT: Thank you. And, ma'am, if you're
9 comfortable, you can lower your mask to testify.
10 Thank you. All right. Thank you. Just speak
11 loudly into that microphone.

12 Mr. Richey, your witness.

13 MR. RICHEY: Thank you, Your Honor.

14 **DIRECT EXAMINATION OF GAIL HOLT**

15 BY MR. RICHEY:

16 Q Ma'am, your -- I'm gonna ask you about this burglary that
17 you were involved in. And on the date that it happened -
18 - that this burglary happened -- well, let me go back.

19 Do you know who that is right there (indicates)?

20 A Yes.

21 Q And how do you know -- what's -- do you know his name?

22 A Yes.

23 Q And what is his name?

24 A I knew him as "Gabe."

25 Q Okay. And -- and how long have you known him prior to

1 this date -- prior to the incident at your home?

2 A I can't say. I saw him a few times; he worked for my
3 husband.

4 Q Would you be able to recognize him if you saw him prior
5 to that? I mean, prior to that, if he came by the house
6 with your husband, and they were going to work, would you
7 say, "Oh, yeah. That's him and Gabe"?

8 A Yes.

9 Q Okay. And so, on the date that this happened, you called
10 your husband -- he was out working; is that correct?

11 A That's correct.

12 Q And he came to your home -- he came back home, right?

13 A Yes.

14 Q And -- and y'all talked about what had happened, right?

15 A Yes. I told him what happened.

16 Q Right. And at the time, when he got back, y'all called
17 911, correct?

18 A Correct.

19 Q And were you in the home with him when he was on the
20 phone with 911?

21 A I -- I can't recall. I don't remember.

22 Q Okay. But -- but you -- do you -- you recall calling
23 911, correct?

24 A Yes. Uh-huh.

25 Q And -- and at the time this happened, it's your testimony

1 -- your testimony was that you knew instantly who did
2 this, correct?

3 A That's correct.

4 Q And when you called your husband, you told him who did
5 it, right?

6 A Yes.

7 Q So as you're driving -- as he's driving back, you tell
8 him Gabe did all this stuff, right?

9 A Yes.

10 Q Would it surprise you that he told the 911 operator he
11 didn't know who it was? Would that surprise you?

12 A Yes.

13 THE COURT REPORTER: (To the witness) I can't hear
14 her.

15 Q You've got -- you've got to answer, so she can take it
16 down. She's taking everything down, so you've got to
17 answer verbally.

18 A I'm -- I'm sorry. Ask -- ask --

19 THE COURT: (To the witness) Would that surprise
20 you that he said he didn't know who it was on the
21 911 tape?

22 THE WITNESS: Yes.

23 THE COURT: (To the court reporter) She said,
24 "Yes."

25 Q And, ma'am -- and you talked to the police officers that

1 day, correct?

2 A Yes.

3 Q And did they talk to you about who did this crime

4 supposedly? Did -- you talked to them about that,

5 correct?

6 A Yes.

7 Q Okay. And -- and did the officers ask you to identify

8 the person?

9 A They brought pictures -- a book of pictures and asked me

10 to go through it and if I could identify.

11 Q And really you didn't -- from your testimony, you didn't

12 need those pictures, correct, because you knew who it

13 was, right?

14 A Yes.

15 Q I mean, you didn't need them to go say, "Here's five

16 people, which one it is," right? You -- I mean, because

17 you already knew, correct?

18 A Yes.

19 Q And so -- so them putting those pictures down there and

20 telling you to circle one, that was something you really

21 didn't need, right?

22 A I don't -- I don't know the -- the procedure for that.

23 Q Yes, ma'am.

24 A I don't --

25 Q Yes, ma'am.

1 A -- they just brought pictures and asked me to look at
2 them.

3 Q Yes, ma'am. But you -- okay.

4 MR. RICHEY: (To the Court) No other questions.

5 **CROSS-EXAMINATION OF GAIL HOLT**

6 BY MS. MARTO:

7 Q Ma'am, how long did it take for you recognize Mr. Gabe?

8 A A split second. I came face-to-face with him, and I came
9 within a second of saying his name, but I had a guardian
10 angel with me that said, "Do not call him by name;
11 address him as 'Sir.'"

12 Q Did you tell the --

13 A Which I did.

14 Q Did you tell the police you recognized him?

15 A Yes.

16 Q And no police officer told you to say, "Gabe did it,"
17 right?

18 A No.

19 THE COURT REPORTER: I'm sorry. Can you speak up?

20 THE COURT: You've got to answer --

21 THE WITNESS: No. No.

22 MS. MARTO: (To the Court) Nothing further.

23 THE COURT: All right. Thank you, ma'am.

24 MR. RICHEY: Wait, don't --

25 THE COURT: You can step down.

1 MR. RICHEY: -- don't -- one -- one moment, please.

2 THE COURT: Okay. Sorry.

3 MR. RICHEY: One moment.

4 THE COURT: One more question.

5 MR. RICHEY: One moment.

6 **REDIRECT EXAMINATION OF GAIL HOLT**

7 BY MR. RICHEY:

8 Q Ma'am, do you recall telling the police officer that a
9 black guy with a baseball cap did this?

10 A I don't -- I don't recall.

11 Q Do you recall whether the guy was wearing a baseball cap?
12 Do you remember any of that?

13 A I think they asked, maybe, what he was wearing. I can't
14 remember.

15 Q Thank you, ma'am.

16 THE COURT: Thank you, ma'am. You can step down.

17 (WHEREUPON, the witness was excused.)

18 THE COURT: (To Mr. Richey) Call your next witness.

19 MR. RICHEY: That's -- no other witnesses.

20 THE COURT: All right. Thank you. Hang on. I want
21 to hear the 911 tape, again.

22 THE COURT: (To the court reporter) You got a
23 microphone over there? Put it close to that.

24 THE COURT REPORTER: Oh, that's not going to amplify
25 the sound; that's just a recorder.

1 THE COURT: You got something that could amplify the
2 sound?
3 THE COURT REPORTER: No. That's just for recording.
4 MR. RICHEY: Won't you bring --
5 THE COURT: Yeah. Put it put it up there.
6 MR. RICHEY: -- won't you bring it -- can you play
7 it --
8 MS. MARTO: Okay.
9 MR. RICHEY: -- from here?
10 THE COURT: Yeah. Just unplug it first before you
11 pull everything out.
12 MR. RICHEY: Okay. Okay.
13 THE COURT: This is a non-working mic, also,
14 so . . .
15 MR. RICHEY: This works.
16 THE COURT: I can plug it in if you want me to.
17 MR. RICHEY: Back it up.
18 THE COURT: I'm loud anyways.
19 (WHEREUPON, the 911 tape was played for the
20 Court.)
21 THE COURT: All right. Thank you. Anything further
22 from the Applicant?
23 MR. RICHEY: No, sir, Your Honor.
24 THE COURT: And anything further from the State?
25 MS. MARTO: Your Honor, we would call Mr. Matthew

1 Shealy.

2 THE COURT: You going to call who to what?

3 MS. MARTO: Mr. Matthew Shealy to the stand.

4 THE COURT: Okay. Mr. Shealy.

5 (WHEREUPON, the witness was sworn.)

6 THE COURT: Thank you, sir. Have a seat there.

7 THE WITNESS: Thank you, Judge.

8 **DIRECT EXAMINATION OF MATTHEW SHEALY, ESQ.**

9 BY MS. MARTO:

10 Q Good morning, sir.

11 A Morning.

12 Q So you represented Mr. Rios at his trial, correct?

13 A I did.

14 Q And in preparation for that trial, did you review any of
15 the evidence and discovery in the case?

16 A I did.

17 Q Did you see any evidence of fraud on the part of Mr.
18 Lorin Williams?

19 A Well, I mean, I -- that's kind of a -- I don't -- I
20 didn't, but I also didn't know that Investigator Williams
21 would lie to a judge, so . . . I mean --

22 Q Did you see any issues with the identification by the
23 Holts of Mr. Rios?

24 A Yes. I mean -- and that's why we had a "Neil v. Biggers"
25 hearing. That's why we had the Officer Welch (phonetic),

1 who was the initial officer there, testify that
2 initially, when he got there, she didn't tell him who did
3 it. So, you know, that was the -- the narrative that we
4 were going with.

5 Q So that was effectively your defense at trial, correct?

6 A I mean, among other things. We had a partial alibi, as
7 well, and the -- there was a fingerprint found, but,
8 obviously, he had worked there, so our position was he
9 had helped replace that pane of glass that Mr. Holt
10 testified he had broken previously.

11 Q The Holts testified at trial that they identified Mr.
12 Gabriel Rios as the perpetrator, correct?

13 A Well, Ms. Holt did. I mean, I kept Mr. Holt's pseudo-
14 identification out, my object, I believe, is to hearsay,
15 and so it didn't come in.

16 Q Okay.

17 MS. MARTO: (To the Court) Nothing further.

18 THE COURT: Mr. Richey?

19 **CROSS-EXAMINATION OF MATTHEW SHEALY, ESQ.**

20 BY MR. RICHEY:

21 Q At trial, did -- did you play the 911 tape?

22 A I did not.

23 Q And why not? Do you --

24 A Because I had already gotten that information in through
25 -- or I was going to get that information in through

1 Officer Welch without all the baggage that a 911 tape
2 carries, the -- the emotional --

3 Q Okay. And --

4 A -- putting jurors in it and all that.

5 Q Okay. Thank you.

6 MR. RICHEY: (To the Court) No other questions.

7 THE WITNESS: Sure.

8 THE COURT: Thank you, sir.

9 THE WITNESS: Thank you.

10 THE COURT: You can step down.

11 (WHEREUPON, the witness was excused.)

12 THE COURT: Anything further from the State?

13 MS. MARTO: No witnesses, Your Honor.

14 THE COURT: All right. Let me hear arguments from
15 both sides. First, Mr. Richey.

16 **CLOSING ARGUMENTS**

17 MR. RICHEY: Your Honor, may it please the Court.

18 Your Honor, in this particular case, I played
19 the 911 tape. It shows and Counsel's testimony
20 shows that Mr. Rios is not identified by these folks
21 at the time this happened. And I think that Mr.
22 Holt's testimony was that -- that he didn't know who
23 done it, and that he was trying to confirm it, but
24 there's nothing on this tape to say Mr. Rios was the
25 perpetrator initially, nothing.

1 And -- and although Mr. Rios's position that
2 something happened with these officers out there to
3 have them go from, "We don't know," until, "It was
4 Mr. Rios." And -- and it's his position that --
5 that these -- these people unfortunately were given
6 this lineup with him in it to say it was him. And
7 it is his position, going off the tape, that -- that
8 it was not him. That they did not initially
9 identify him. You know, that's his position in the
10 case.

11 THE COURT: All right. Thank you, Mr. Richey. Yes,
12 ma'am.

13	CLOSING ARGUMENTS
----	--------------------------

14 MS. MARTO: Yes, Your Honor. It's the State's
15 position that this argument was effectively raised,
16 not just at the trial but at the first PCR hearing,
17 and the only new thing differentiating the argument
18 today from this is Lorin Williams. Of course, Lorin
19 Williams didn't testify. No evidence of fraud on
20 his part has been presented --

21 THE COURT: Did Lorin Williams testify in the trial
22 of the case?

23 MR. SHEALY: He did.

24 MS. MARTO: I believe he did.

25 THE COURT: Mr. Shealy says he did.

1 MR. RICHEY: Yes.

2 MS. MARTO: Yes.

3 THE COURT: Was he questioned about who identified
4 Mr. Rios as the alleged perpetrator?

5 MS. MARTO: One moment, Your Honor. Yes. He was
6 asked, and he said that, "Ms. Holt said that the
7 name was Gabe, and then she picked him out of a
8 photo lineup."

9 THE COURT: Okay. And did Mr. Shealy as Mr. Rios's
10 attorney try to attack -- I'm not saying he did it
11 convictively, but if he tried to attack his
12 credibility, that's really the Court's main concern.
13 Did he try to attack -- attack his credibility in --
14 in cross-examination?

15 MS. MARTO: He -- from my notes, Your Honor, it says
16 that, "The man was the first person to say it was
17 the Applicant and that he wrote a report. He got
18 Applicant's ID from the man, and then they found the
19 car later on." So, from my understanding, it was
20 attacked on early at the trial. I don't know if it
21 was necessarily attacked fully during cross-
22 examination.

23 THE COURT: What is the standard of review that the
24 Court must use in determining a motion for new trial
25 based upon after-discovered evidence under Rule 29?

1 MS. MARTO: Yes, Your Honor. There are five
2 factors. It's that -- it would change the result if
3 a new trial was granted, it's been discovered since
4 the trial, it could not have been discovered but for
5 the exercise of due diligence, it is material, and
6 it is not merely cumulative impeaching.

7 THE COURT: All right. So what's the first factor?

8 MS. MARTO: The first factor is that it would
9 probably change the result if a new trial was
10 granted.

11 THE COURT: Okay. What's the State's position on
12 that?

13 MS. MARTO: The State's position on that argument,
14 Your Honor, is that this is effectively the same
15 argument that was raised at the trial. It was not
16 successful, and any tie-in with Lorin Williams is
17 very tangential at best, and so it would be our
18 stance that it wouldn't have changed the result.

19 THE COURT: All right. The second factor?

20 MS. MARTO: It -- it has been discovered since the
21 trial. The fraud of Mr. Williams was discovered
22 since the trial, but there's no evidence that Mr.
23 Williams committed fraud in this case.

24 THE COURT: Well, then that -- that's why we had
25 this evidentiary hearing.

1 MS. MARTO: Right.

2 THE COURT: I mean, that's why the previous judge
3 ordered that a hearing be held for this Court to
4 flesh --

5 MS. MARTO: Right.

6 THE COURT: -- out these five --

7 MS. MARTO: Right.

8 THE COURT: -- factors. So, I mean, I think, the
9 fact that Mr. Williams, whatever happened with him -
10 - whatever happened, that in and of itself is after-
11 discovered evidence.

12 MS. MARTO: Right.

13 THE COURT: The question is: Whether or not it
14 entitles Mr. Rios to a new trial?

15 MS. MARTO: Right.

16 THE COURT: So that's -- that's the argument on
17 Number 2. So Number 3?

18 MS. MARTO: It's (as spoken) could not have been
19 exercised through the course of due diligence.
20 Again, Your Honor --

21 THE COURT: That's admitted because nobody knew
22 about it at the time?

23 MS. MARTO: Right.

24 THE COURT: Right. So this happened afterward. So,
25 clearly, after-discovered evidence. All right.

1 Number 4?

2 MS. MARTO: Is material, Your Honor. We would argue
3 that what has been represented today isn't material,
4 because it's speculative at best.

5 THE COURT: And I'm going to come back to you on all
6 this stuff. All right.

7 MR. RICHEY: Okay.

8 THE COURT: Watch it.

9 MS. MARTO: And then Number --

10 THE COURT: -- Number 5.

11 MS. MARTO: -- 5 is that it's not merely cumulative
12 in impeaching, and the State would argue that it is
13 in that, again, they're effectively raising the same
14 argument they've raised at every other stage of this
15 proceeding. The only difference is that they now
16 have somebody to kind of hinge the hat on and blame
17 for what they've effectively been arguing for a
18 decade.

19 THE COURT: At the trial -- of course, I've got the
20 transcript, and I'm going to review everything since
21 I'm taking it under advisement -- but did Ms. Holt
22 identify Gabe at the trial?

23 MS. MARTO: Yes, Your Honor.

24 THE COURT: And did she point to him and say,
25 "That's him right there"?

1 MS. MARTO: Yes, Your Honor.

2 THE COURT: Okay. And she was the eyewitness?

3 MS. MARTO: Yes, Your Honor.

4 THE COURT: And she was the victim?

5 MS. MARTO: Yes, Your Honor.

6 THE COURT: So regardless of what Mr. Williams did
7 or didn't do, she -- even -- and I understand there
8 was a "Neil vs. Biggers" hearing, but she pointed
9 him out. There -- there was a before trial
10 identification made, before even a lineup; is that
11 correct?

12 MS. MARTO: Yes.

13 THE COURT: Did she testify before the lineup that
14 Gabe was the person?

15 MS. MARTO: Yes, Your Honor.

16 THE COURT: And then at the lineup, she testified,
17 "That's -- yeah, that's him"?

18 MS. MARTO: Yeah.

19 THE COURT: Then at the trial, she said, "That's
20 him"?

21 MS. MARTO: Yes, Your Honor.

22 THE COURT: All right. Mr. Shealy, I -- I want to
23 make sure I understand that; is that your
24 recollection?

25 MR. SHEALY: Judge, my understanding is that Officer

1 Williams got --

2 THE COURT: Come on up so --

3 MR. SHEALY: I apologize --

4 THE COURT: -- we can hear you.

5 MR. SHEALY: -- to you.

6 THE COURT: Go ahead.

7 MR. SHEALY: -- is that --

8 THE COURT: Officer Williams what?

9 MR. SHEALY: Officer Williams got the information

10 that created that lineup from Mr. Holt, Judge. And

11 I'll call your attention to 183 --

12 THE COURT: All right. (To the law clerk) Write

13 that down.

14 MR. SHEALY: -- it's the cross-examination, that --

15 from what she testified to, it's my understanding

16 that Mr. Holt is the first one to tell you Gabriel

17 Jon Rios, says -- I guess that would be correct.

18 So, Judge, I mean, I'm not --

19 THE COURT: That's Mr. Holt in consultation with

20 this wife?

21 MR. SHEALY: Well -- and I could just tell you that

22 that's what he testified -- that's what Officer

23 Williams testified to at trial was that --

24 THE COURT: Got it.

25 MR. SHEALY: -- he got that information from Mr.

1 Holt. I don't know that he said what

2 he -- what else --

3 THE COURT: What did she testify to? Ms. Holt?

4 MR. SHEALY: Judge, again, I don't have that one
5 with -- I've got it back here.

6 THE COURT: All right. Well, you can go back there
7 and look.

8 Ms. Marto, what do you believe Ms. Holt
9 testified to? I know what she said today --

10 MS. MARTO: Yes, Your Honor.

11 THE COURT: -- but I want to know what she said at
12 trial. Did she say, "Yes. It was Gabe. I
13 recognized him"?

14 MS. MARTO: She testified at the trial that she
15 recognized him immediately. My notes say, "107 to
16 108."

17 THE COURT: All right. (To the law clerk) Write
18 that down.

19 MS. MARTO: She testified at trial starting with
20 Line 4, "Okay. Did you recognize that man?"

21 "Yes. I did."

22 "Who was that man?"

23 It was objected to, then overruled.

24 And then she said, "I know him as 'Gabe.'"

25 THE COURT: Okay. All right. That kind of answers

1 the question I had. So the State's position is that
2 even though Mr. Williams's testimony can be shown as
3 not being credible, it's simply cumulative to all
4 the other evidence, primarily the eyewitness direct
5 testimony of the victim?

6 MS. MARTO: Your Honor, everything flows through
7 Mrs. Holt --

8 THE COURT: Okay.

9 MS. MARTO: -- and so if Your Honor is going to
10 extend Mr. Williams's, from my understanding, an
11 isolated incident to cover every single one of his
12 cases, we would still argue that Mrs. Holt's
13 identification was really just regurgitated by Mr.
14 Williams.

15 THE COURT: Well, exactly. That's what I'm asking.
16 All right. Anything else from the State?

17 MS. MARTO: Nothing further, Your Honor.

18 THE COURT: All right. I'm trying to make a good
19 record.

20 All right. Mr. Richey, let me hear your reply
21 --

22 MR. RICHEY: Okay.

23 THE COURT: -- to those factors.

24 MR. RICHEY: Well, going -- there's three of them
25 that it -- that he couldn't discover at trial --

1 there's two or three of them we've all agreed to.

2 THE COURT: Correct.

3 MR. RICHEY: But the thing is, is it material? Yes.

4 It's material. And the reason why it's material,

5 because it's the ID, and I think the testimony was

6 that there was limited evidence that pointed him to

7 this crime. So the ID, that's the whole case. If

8 he's not identified, the case is over.

9 THE COURT: All right. One -- I heard testimony --

10 sorry to interrupt -- I heard testimony about

11 fingerprints. Was there fingerprint evidence of

12 him?

13 MR. RICHEY: There -- there was -- there was a --

14 one fingerprint there on some broken glass in the

15 house.

16 THE COURT: Okay.

17 MR. RICHEY: It's Mr. Rios's position that he had

18 done work in the house, and he had worked for these

19 people --

20 THE COURT: Right.

21 MR. RICHEY: -- and I think Mr. Holt and both of the

22 Holts pretty much said, "We know him."

23 THE COURT: Okay.

24 MR. RICHEY: "He did construction." So outside of

25 that, there's no evidence -- like, if they had

1 described it being somebody else, then he wouldn't
2 be here.

3 THE COURT: All right. Was there a car stolen?

4 MR. RICHEY: There was a car stolen, but I don't
5 think any of that evidence came back to Mr. Rios --

6 THE COURT: Okay.

7 MR. RICHEY: -- so . . .

8 THE COURT: All right. Was anything recovered in
9 his possession?

10 MR. RICHEY: No, sir.

11 THE COURT: All right. I've got it. All right.
12 What else? Any -- any other argument?

13 MR. RICHEY: And as to the last factor -- (to the
14 State) say that again. I can't remember. My
15 brain.

16 THE COURT: Cumulative.

17 MS. MARTO: Cumulative in impeaching.

18 MR. RICHEY: Cumulative. Your Honor, it is not
19 cumulative, and the reason why it's not cumulative
20 is because we didn't know anything about this
21 gentleman all during the process. See, is -- when
22 they say "cumulative," they won't say cumulative to
23 arguments we'll make, but this argument is not
24 cumulative, because this is the first time we've had
25 a hearing that's related to this officer.

1 THE COURT: Well, the issue is cumulative, but you
2 hadn't been able to argue Mr. Williams's taint of
3 this --

4 MR. RICHEY: Right.

5 THE COURT: -- evidence first, which is why we had
6 this.

7 MR. RICHEY: Right. So --

8 THE COURT: Right. I get it.

9 MR. RICHEY: -- it's not -- it's not cumulative.
10 And I think the testimony -- when we listened to Mr.
11 Shealy, that night -- and I think -- and I'm gonna
12 try to not be too confusing, Mr. Holt testified that
13 he -- his testimony from the 911 tape, he didn't
14 know who it was, and he was trying to verify. He
15 said, "I'm just going to make sure; I'm going to
16 verify." Well, at the time, the testimony from Mr.
17 Williams is he got to the house and they had a
18 discussion and all of sudden it's Mr. Rios. And see
19 that's -- that's the -- that's the chain in this
20 thing that Mr. Rios is saying, "Hey" -- the tape
21 was, "I don't know who it is. Unknown black man."

22 Did Lorin Williams testify at trial, did he get
23 together with Mr. Holt, who's not the victim, who
24 was not at the house, who had no direct knowledge of
25 who it was, how it happened. Based on the

1 conversations with him, they then go present a
2 lineup of Mr. Rios.

3 THE COURT: And, of course, they're gonna pick him,
4 because they know him?

5 MR. RICHEY: Right. And -- and the -- and see the
6 officer didn't go to the house and go to Ms. Holt
7 first, because she was the victim, she was the one
8 in the house, so it would be reasonable from our
9 position that Mr. Holt wasn't there, that he would
10 go to her first and say, "What happened? I need to
11 get your story straight." But in this case, Mr.
12 Williams went to somebody who was not even at that
13 house when the incident occurred.

14 THE COURT: Got it. Who had made the 911 call while
15 he was en route --

16 MR. RICHEY: Yes, sir.

17 THE COURT: -- from wherever?

18 MR. RICHEY: Yes, sir.

19 THE COURT: Okay. (To the State) Anything in reply
20 to that?

21 MS. MARTO: We would rest on the record and our
22 prior arguments, Your Honor.

23 THE COURT: Okay. Well, obviously, y'all can tell
24 from the questions I had, I -- I've got a lot more
25 reading to do --

1 THE APPLICANT: Yes, sir.

2 THE COURT: -- a lot more deliberations to make.
3 I'm gonna do that. I'm gonna think about it, and
4 I'll let -- I'll have -- my law clerk will email the
5 attorneys with my decision just as soon as I make
6 it. I'm gonna try to do it as soon as I can, okay.

7 THE APPLICANT: Okay.

8 THE COURT: But I've got -- I've gotta read
9 everything. I've gotta think about it, okay.

10 THE APPLICANT: Take all the time you gotta take.

11 THE COURT: And I want y'all to understand that, as
12 well. I've gotta read through everything and make
13 sure I'm making what I believe to be the correct
14 decision, and I'm gonna do that. We'll go from
15 there, okay.

16 Thank you very much. This hearing is
17 concluded.

18 MR. RICHEY: Thank you, Your Honor.

19 MS. MARTO: Thank you, Your Honor.

20 THE COURT: All right.

21 (Whereupon, the within hearing was
22 concluded at 11:56 a.m.)

23 (*This transcript may contain quoted material.
24 Such material is reproduced as read or quoted by the
25 speaker.)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)

CERTIFICATE

I, Amber Payne, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina on October 18th, 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party herein.



Amber J. Payne, CVR

Date: May 2, 2023

Notary public for South Carolina

My commission expires August 12, 2029

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

FILED

2023 JAN -6 AM 11:09

Gabriel Rios, #344751,)
Applicant,)

Case No.: 2019-CP-42-02536

CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

v.)

**ORDER GRANTING
POST-CONVICTION RELIEF**

State of South Carolina,)
Respondent.)

This matter comes before this Court by way of Applicant's post-conviction relief application filed July 17, 2019. Respondent made its return and motion to dismiss for untimeliness, successiveness, and failure to establish a *prima facie* case of newly discovered evidence on February 5, 2021. A hearing on the State's motion to dismiss was held on April 5, 2021. The motion was denied and a full evidentiary hearing requested. An evidentiary hearing was held on October 18, 2022, at Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Trial counsel Matthew Shealy testified. Alleged victims Phil and Gail Holt also testified. After reviewing all records and evidence before this Court, this Court finds Applicant has met his requisite burden of proof of establishing he is entitled to post-conviction relief and grants his application for post-conviction relief. Findings of fact and conclusions of law are set forth below.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In November 2010, the Spartanburg County Grand Jury indicted Applicant for first degree burglary (2010-GS-42-

06830), armed robbery (count one) and possession of weapon during commission of a violent crime (count two) (2010-GS-42-07831), grand larceny (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and first degree assault and battery (2010-GS-42-6834). Matthew Shealy, Esquire represented Applicant. Assistant Solicitors Timi Poulos and Russell Ghent, Esquires prosecuted the case. On February 26-28, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh, circuit court judge, and a jury. The jury found him guilty as indicted. Judge McIntosh sentenced Applicant to forty years' imprisonment for first degree burglary, thirty years' imprisonment for armed robbery, thirty years' imprisonment for kidnapping, ten years' imprisonment for first degree assault and battery, and five years' imprisonment for the weapons possession charge, with the weapons sentence running consecutively to the remaining charges, which ran concurrently.

Applicant filed a notice of appeal on March 11, 2013, which was perfected by appellate counsel Katherine Hudgins, Esquire filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. Respondent made its return on April 4, 2014. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. On March 11, 2015, by written order the South Carolina Court of Appeals affirmed the conviction. *State v. Rios*, 2015-UP-135 (Ct. App. Mar. 11, 2015). The remittitur was issued on April 10, 2015.

Applicant filed his first PCR application on June 3, 2015. Relief was denied by the Honorable Edward Miller, circuit court judge, through written order on March 21, 2017. Applicant filed a timely notice of appeal on July 19, 2017. The South Carolina Court of Appeals denied the petition for writ of certiorari on April 10, 2019. The remittitur was issued on April 26,

¹ This charge was dismissed by the State prior to trial.

CLERK OF COURT
SPARTANBURG COUNTY

2023 JAN -6 AM 11:10

FILED

APP'X 757

2019.

Applicant filed a federal habeas petition under 28 United States Code Section 2254 on August 15, 2019. On July 13, 2020, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. A motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure was entered by Petitioner and denied by the Honorable Sherri A. Lydon, United States District Judge, on October 5, 2020.

II. Statement of Facts

On August 14, 2010, the alleged victim, Gale Holt, came face to face with an individual when he broke into her home. (Tr. 107-08). Holt claims to have recognized the Applicant because he previously worked for her husband at both his business and the home. (Tr. 108-09). The individual held a knife to her throat, forced her down the hall, and demanded she open the safe. (Tr. 109-11). When she could not open the safe, he tied her arms behind her back and pulled his gun. (Tr. 111-12). The individual demanded money in her purse, rummaged through the purse, and stole her jewelry. (Tr. 112-13). The individual told her not to move or he would kill her. (Tr. 113). The individual took money, the cell phone, and stole the car. (Tr. 113). Holt allegedly identified Applicant to the police when she called the police and identified him in a phot line-up. (Tr. 131-33). Holt testified at trial concerning the events surrounding the incident and allegedly identified Applicant as the perpetrator. (Tr. 131-34).

Investigator Williams testified that he responded to the scene, that Holt described the invader and identified him by name, that he arranged the photo line -up, and stated around what time Applicant was apprehended that night. (Tr. 175-82).

AMERICAN
SPARTANBURG COUNTY
CLERK OF COURT

2023 JAN -6 AM 11:10

FILED

APP'X 758

III. Current Action before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Actual & Factual Innocence § 17-27-45(c), Newly Discovered."
 - a. Investigator Lorin Williams was fired for fraud and Applicant, who was innocent of the charges, was only convicted because of fraudulent misrepresentation by Mr. Williams.
2. "Investigative & Prosecutorial Misconduct."
3. "Due Diligence; Due Process."

Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections records, the trial transcript, the current PCR application, and prior appeal, PCR, PCR appeals, federal habeas records.

IV. Summary of the Testimony

Applicant testified that he was not guilty of the charges. He stated that identification of him was false. He stated that the investigative officer, Lorin Williams falsely had the victims identify him as the person who committed the robbery. Applicant relied on the 911 call which occurred shortly after the robbery. Applicant in his case played the 911 call. Applicant showed through the 911 call that the Holts did not identify him to the 911 operator. The Holts' described the robbery as an unknown black man. Applicant's testimony was the 911 tape supported his allegation that officer, Lorin Williams falsely had the Holts to identify him as the robber.

Phil Holt testified that he was not present at the time of the robbery. He stated that he talked with his wife about what happened. He stated that he called the 911 operator in the presence of his wife. During this call, he testified that he did not identify Applicant. He says that later after talking with his wife and the investigator he identified Applicant.

Gail Holt, the victim, testified at the hearing. She stated that she had been robbed in her home. She says that she identified the robber as Applicant. She testified that she was in her home

FILED
2023 JAN -6 AM 11:10
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

with her husband when the police were called. She says that her husband was on the phone with the 911 operator in her presence. She also testified that police officers came to her home and talked with her after the robbery.

Matthew Shealy testified that he was unaware of any fraudulent activity committed by Lorin Williams at the time, but thought that this information could have impacted the trial proceedings if discovered before trial.

V. Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to grant the application based upon the following findings:

This Court finds Applicant's claim of newly discovered evidence must be granted because Applicant has made a *prima facie* showing he is entitled to relief for his claim. A person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). To prevail, Applicant must show the newly discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

FILED
2023 JAN -6 AM 11:10
CLERK OF COURT
Spartanburg County
AMY M. COX



State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant discovered that investigator Lorin Williams had been fired because of dishonesty. He discovered the information after his trial and initial post-conviction relief case. This information was not discoverable at the time of his trial, nor could he have discovered it with due diligence. This information is material and not simply cumulative or impeaching. Further, the Court finds that the newly discovered evidence as to the investigator, Lorin Williams credibility is of the nature that it could have affected the outcome of the case. The investigator could have been impeached in a way that could have changed the outcome. Thus, the Court finds that Applicant's claim of newly discovered evidence must be granted.

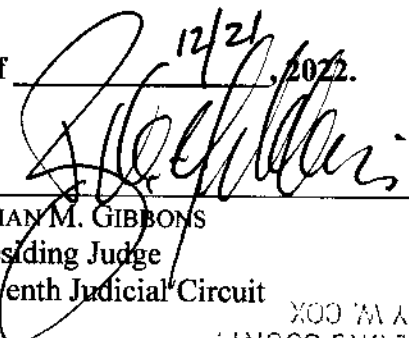
VI. Conclusion

Based on the foregoing, the Court finds and concludes Applicant has established a constitutional violation that would require this Court to grant his application. Therefore, this application for post-conviction relief must be granted. The State has thirty days in which to file an appeal from this order.

IT IS THEREFORE ORDERED THAT:

1. The application for post-conviction relief is granted; and
2. Applicant must be remanded to the county of Spartanburg for a new trial.

AND IT IS SO ORDERED this _____ day of _____, 2022.


BRIAN M. GIBBONS
Presiding Judge
Seventh Judicial Circuit

, South Carolina

CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

2023 JAN -6 AM 11:10

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	IN THE SEVENTH JUDICIAL CIRCUIT
	)	
Gabriel Rios, #344751,	)	Case No.: 2019-CP-42-02536
Applicant,	)	
	)	
v.	)	RESPONDENT'S MOTION
	)	TO RECONSIDER, ALTER, OR AMEND
	)	PURSUANT TO RULE 59(e), SCRCP
State of South Carolina,	)	
Respondent.	)	
_____	)	

This matter comes before the Court by way of Applicant's post-conviction relief application filed July 17, 2019. Respondent made its return and motion to dismiss for untimeliness, successiveness, and failure to establish a *prima facie* case of newly discovered evidence on February 5, 2021. A hearing on the State's motion to dismiss was held on April 5, 2021. The motion was denied, and a full evidentiary hearing ordered. An evidentiary hearing was held on October 18, 2022, at Spartanburg County Courthouse. Rodney W. Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto, Esquire, represented Respondent. The Court granted relief by written order filed January 6, 2023, finding Applicant established newly discovered evidence concerning the alleged fraudulent activity by Lorin Williams, which led to his firing. Respondent, by and through undersigned counsel, making its Motion to Reconsider, Alter, or Amend, pursuant to Rule 59(e), SCRCP, would respectfully show the Court:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In November 2020, the Spartanburg County Grand Jury indicted Applicant for first-degree burglary (2019-GS-42-

2023 JAN 17 AM 8:30
 FILED
 CLERK OF COURT
 SPARTANBURG COUNTY
 ARTHUR W. COX

06830), armed robbery (count one), possession of weapon during commission of a violent crime (count two) (2010-GS-42-07831), grand larceny (2010-GS-42-6832),¹ kidnapping (2010-GS-42-6833), and first-degree assault and battery (2010-GS-42-6834). Matthew Shealy, Esquire, represented Applicant. Assistant Solicitors Timi Poulos and Russell Ghent of the Seventh Circuit Solicitor's Office prosecuted the case. On February 26-28, 2013, Applicant proceeded to trial before the Honorable R. Lawton McIntosh, circuit court judge, and a jury. The jury found him guilty as indicted. Judge McIntosh sentenced Applicant to forty years' imprisonment for first-degree burglary, thirty years' imprisonment for armed robbery, thirty years' imprisonment for kidnapping, ten years' imprisonment for first-degree assault and battery, and five years' imprisonment for the weapons possession charge, with the weapons sentence running consecutively to the remaining charges, which ran concurrently.

Applicant filed a notice of appeal on March 11, 2013. Appellate counsel Katherine Hudgins, Esquire, filed a brief in the South Carolina Court of Appeals on behalf of Applicant on June 3, 2014. Respondent made its return on April 4, 2014. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. On March 11, 2015, by written order, the South Carolina Court of Appeals affirmed the conviction. *State v. Rios*, 2015-UP-135 (Ct. App. Mar. 11, 2015). The remittitur was issued on April 10, 2015.

First PCR Action: (2015-CP-42-2541)

Applicant subsequently filed his first PCR application on June 3, 2015, alleging:

1. Ineffective assistance of counsel
 - a. "prior and during trial involution [sic] of his rights pursuant to the Sixth and Fourteenth Amendment to the United States Constitution, as well as Article I section 14 of the South Carolina Constitution";
 - b. Counsel "failed to object to Solicitor shifting the burden";
 - c. Counsel "failed applicant by conceding his guilt."

¹ This charge was dismissed by the State prior to trial.

FILED
JAN 17 AM 8:30
CLERK OF COURT
STANDING COUNTY
ANY W. COV

Respondent served its return to the application on February 11, 2016. An evidentiary hearing into the matter was convened on January 30, 2017, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Susannah Ross, Esquire. Caitlin B. Hastings, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On March 21, 2017, the Honorable Edward W. Miller issued the order of dismissal denying Applicant's PCR application. An amended order of dismissal was issued on June 21, 2017. Applicant filed a motion to alter or amend, which was dismissed.

Applicant filed a timely notice of appeal on July 19, 2017, that was perfected by David Alexander, Esquire, through filing a petition for writ of certiorari, raising the following issues:

1. Whether trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment?
2. Whether trial counsel's failure to impeach the victim's claim that she recognized appellant as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment?
3. Whether trial counsel's failure to object to the solicitor's burden-shifting closing argument that appellant had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment?

The South Carolina Court of Appeals denied the petition for writ of certiorari on April 10, 2019. The remittitur was issued on April 26, 2019.

First Habeas Corpus Action: (1:19-cv-02329-SAL)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 15, 2019. Applicant set forth the following grounds for relief:

1. "The Applicant is actually and factually innocent due to investigative and

FILED
2023 JUN 17 AM 8:30
CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA

- prosecutorial misconduct and it is pending in PCR court at the time under newly discovered evidence pursuant to S.C. Code Ann. § 17-2745(c) / 2019-CP-42-02536.”
2. “The trial court and subsequent reviewing courts erred in ruling the trial judge did not err[] in refusing to charge the jury with the law on alibi when Petitioner presented alibi evidence at trial.”
 3. “The PCR Court and subsequently reviewing courts erred in failing to find counsel rendered ineffective assistance of counsel when counsel conceded Petitioner’s guilt during closing summation to the jury, that was a fact to be determined by the jury.”
 4. “The PCR Court and subsequent reviewing courts erred in failing to find counsel rendered ineffective assistance of counsel, in failing to object to the prosecution improper comments during closing summation that shifted the burden of proof in violation of the Due Process Clause.”
 5. “The PCR Court and subsequently reviewing courts erred in failing to impeach the State’s star witness that contradicted her trial testimony in regards to the identity of the perpetrator?”
 6. “The PCR Court and subsequent reviewing court erred in failing to find trial counsel rendered ineffective assistance of counsel, prior and during trial (in violation of his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as Article 1, Section 14 of the South Carolina Constitution.”

Respondent filed its return and motion for summary judgment on or around December 9, 2019. On May 19, 2020, Magistrate Judge Shiva V. Hodges issued the report and recommendation that Respondent’s motion for summary judgment be granted, and Applicant’s petition be denied. *Rios v. Warden Williams*, 1:19-2329-SAL-SVH (D.S.C. filed May 19, 2020). Applicant’s objection to the report and recommendation was received on June 22, 2020.

On July 13, 2020, the Court Judge adopted the Magistrate’s report and recommendation granting Respondent’s motion for summary judgment and dismissed Applicant’s petition. *Rios v. Warden Williams*, 1:19-cv-02329-SAL (D.S.C. filed July 13, 2020). A motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure was entered by Petitioner and denied by the Honorable Sherri A. Lydon, United States District Judge, on October 5, 2020.

II. Current Action Before this Court

In his second PCR application, filed July 17, 2019, Applicant alleged:

1. "Actual & Factual Innocence § 17-27-45(c), Newly Discovered."
 - a. Investigator Lorin Williams was fired for fraud and Applicant, who was innocent of the charges, was only convicted because of fraudulent misrepresentation by Mr. Williams.
2. "Investigative & Prosecutorial Misconduct."
3. "Due Diligence; Due Process."²

The amended PCR application was filed August 29, 2019, alleging he is entitled to appointment of counsel and an evidentiary hearing be convened because Investigator Williams was fired based upon fraud related to his work on cases. Applicant claims this firing calls into question every single case the person worked on, including his. This Court granted relief based upon the Williams issue alone.

III. Argument

Respondent respectfully submits to this Court that Applicant did not meet his burden of proof in establishing newly discovered evidence. A person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). To prevail, Applicant must show the newly discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and

² Respondent interprets all of these allegations as derivatives of the main allegation of newly discovered evidence that Investigator Williams was fired for fraud.

2023 JAN 17 AM 8:30
CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA
FILED

(5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Beyond stating that newly discovered evidence exists, Applicant has not shown that fraud occurred in this case. Past investigatory misconduct unrelated to the case at hand does not, by itself, establish a case of newly discovered evidence warranting a new trial. Beyond making unsubstantiated blanket allegations concerning the veracity of William's investigations in this case, Applicant has presented no evidence, through affidavits or otherwise, to confirm or otherwise substantiate the claims of fraud upon the court, as it relates to his case. Thus, Respondent contends that the lack of evidence presented indicates that Applicant's claim cannot be corroborated. Further, given that the victims knew Applicant personally and testified concerning the incident themselves both at trial and at the PCR hearing, and because Williams' testimony at trial was limited in scope, it is unlikely a finding of fraud, in this case, would impact the jury's finding of guilt. For the same reasons, it is not material. Instead, evidence of potential fraud in the unrelated matter is, at best, merely impeaching. Consequently, Respondent urges this court to find that Applicant has not met his burden of proof, and requests the Court grant this motion pursuant to Rule 59(e), SCRPC.

FILED
2023 JAN 17 AM 8:30
CLERK OF COURT
SPARTANBURG COUNTY
AMY M. COX

IV. Conclusion

Based on all the foregoing, Respondent respectfully requests this Court reconsider its prior ruling and deny relief to Applicant based on the erroneous finding of newly discovered evidence. Respondent requests a hearing to fully argue this 59(e), SCRPC, motion and address each of the raised issues before this Court.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

CHELSEY F. MARTO
Assistant Attorney General

By: /s Chelsey F. Marto
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-0386

January 14, 2023

FILED
2023 JAN 17 AM 8:30
CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA
APP'X 768

STATE OF SOUTH CAROLINA

COUNTY OF SPARTANBURG

GABRIEL RIOS, #344751,

Applicant,

vs

STATE OF SOUTH CAROLINA,

Respondent,

IN THE COURT OF COMMON PLEAS

2019-CP-42-02536

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Rule 59(c) Motion to Alter or Amend** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Rodney Wade Richey, Esquire
Richey & Richey, PA
PO Box 10916
Greenville, SC 29603-0916
richeyandrichey@yahoo.com

DATED this the 14th day of January 2023.

/s Chelsey F. Marto
Chelsey F. Marto
Attorney for Respondent

FILED
2023 JAN 17 AM 8:30
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COY

APP'X 769

1 STATE OF SOUTH CAROLINA)
) IN THE COURT OF
 2) GENERAL SESSIONS
) OF THE SEVENTH
 3 COUNTY OF SPARTANBURG)
) JUDICIAL CIRCUIT
)
 4))
))
 5 GABRIEL J. RIOS,)
))
 6 Applicant,) TRANSCRIPT OF RECORD
) 2019-CP-42-02536
 7 vs.)
))
 8 THE STATE OF SOUTH CAROLINA,)
))
))
 9 Respondent.)
))
 10 -----
 11
 12 February 13, 2023
 Spartanburg, South Carolina
 13 B E F O R E:
 14 HONORABLE GRACE G. KNIE, Judge.
 15
 16 A P P E A R A N C E S
 17 RODNEY W. RICHEY, ESQUIRE
 For The Applicant
 18
 19 CHELSEY F. MARTO, ASSISTANT ATTORNEY GENERAL
 For Respondent
 20
 21 ALSO PRESENT: Ashley Searcy, AA
 Brittany Biggs, Law Clerk
 22
 23
 24 Julie A. Cendroski,
 Circuit Court Reporter III
 Seventh Judicial Circuit
 25

I N D E X

<u>WITNESS</u>	<u>PAGE</u>
ANNOUNCEMENT OF CASE By The Court	4
MOTION TO AMEND JUDGMENT By Ms. Marto	9
REPLY TO MOTION TO AMEND JUDGMENT By Mr. Richey	10
REBUTTAL By Ms. Marto	13
ORDER OF THE COURT	13
CERTIFICATE OF COURT REPORTER	15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

EXHIBITS

MARKED

ENTERED

NO EXHIBITS PROFFERED

APP'X 772

1 GABRIEL J. RIOS VS. THE STATE OF SOUTH CAROLINA

2 THE COURT: All right. Madam Attorney General,
3 if you'll introduce the case.

4 MS. MARTO: All right. Yes, Your Honor. May it
5 please the Court? We are here today in the case of
6 Gabriel Rios, docket number 2019-CP-42-2536. Presently
7 residing in the South Carolina Department of Corrections
8 and was indicted for first degree burglary, armed
9 robbery, and possession of a weapon, as well as grand
10 larceny, kidnapping, and first degree assault and
11 battery.

12 He was represented by Matt Shealy and proceeded
13 to trial February 26th, 2018 -- or February 26th through
14 the 28th, 2013. And that was before Judge McIntosh. He
15 was found guilty as indicted and sentenced to 40 years
16 for the burglary, 30 for armed robbery, 30 for
17 kidnapping, 10 for first degree assault and battery, and
18 5 for the weapons possession.

19 He filed a notice of appeal, and then also
20 pursued his first PCR action. His appeal was denied.
21 He filed that application June the 3rd, 2015. It was
22 denied and the matter was dismissed. He timely filed a
23 notice of appeal from them. And that was also denied.
24 He also pursued a petition for habeas corpus, which was
25 summarily dismissed.

1 This application was filed July 17, 2019. The
2 State moved to dismiss February 5th, 2021. He made an
3 amended application March 22nd, 2021. The Motion to
4 Dismiss hearing was held on April 5th, 2021. The
5 State's Motion to Dismiss was denied.

6 Of course, an evidentiary hearing was held before
7 Your Honor on October 18th, 2022. Mr. Richey
8 represented him at that hearing, and Ms. Chelsey Marto
9 prosecuted the case. The Court granted relief, and a
10 written order was filed January 6th, 2023. The
11 allegation being newly discovered evidence concerning
12 the allegedly fraudulent activity of Warren Williams.

13 The State made its motion pursuant to 59(e) to
14 alter or amend the judgment, January 14th, 2013.

15 And so, the State's argument for a motion to
16 alter or amend judgment is namely the five factors set
17 forth when newly discovered evidence haven't been met.

18 The five factors are that it would have changed
19 the result of a new trial; that it's been discovered
20 since the trial.

21 THE COURT: Well, probably, not would have
22 changed.

23 MS. MARTO: Yes.

24 THE COURT: It probably would change the result.

25 MS. MARTO: Yes, Your Honor.

1 THE COURT: Correct.

2 MS. MARTO: That it probably would have changed
3 the result of a new trial. That it has been discovered
4 since the trial. That it could not have been allowed
5 discovered. Exercising due diligence is material and is
6 not merely cumulative in impeachment. And it's the
7 State's position that these factors have not been fully
8 met for two primary reasons.

9 Number one, there's been no establishment or
10 connection between the fraud committed in another case
11 years after this trial, and any investigatory misconduct
12 that was a crime in this case. There has been no
13 showing whatsoever that Warren Williams committed fraud
14 in this case. That anything he did changed or altered
15 the evidence from the State's case in that case. And,
16 in fact, his firing was set to occur years after this
17 trial even happened.

18 So, really the only thing that this thing could
19 have been used for, if it existed at the time of the
20 trial, which it's our position that it did not, because
21 it was five years thereafter, but is it would have been
22 used as impeachment material, which is one of the five
23 factors on the newly discovered evidence test. And
24 even ---

25 THE COURT: All right. And I understand what

1 you're saying. And then, Mr. Richey, of course you'll
2 follow up in your reply argument, but isn't that the
3 very basis of newly discovered evidence, So if this case
4 were granted, Mr. Rios gets a new trial. The matter was
5 teed up for a new trial, assuming it goes to trial. And
6 if Mr. Williams comes to the stand and that is a factual
7 determination for the jury to consider, I mean, do you
8 concede, you know, the fact that he was fired or
9 terminated for fraud or whatever it is, do you concede
10 that that would potentially score points with a jury,
11 such that, you know, there could -- the result could be
12 changed?

13 Perhaps even a mistrial. Not necessarily an
14 acquittal, but perhaps it would be very difficult for
15 the State to convict Mr. Rios with a unanimous jury
16 based upon, you know, Mr. Williams' testimony
17 potentially being tainted or impeached.

18 MS. MARTO: No, Your Honor. Because it does fall
19 underneath. It's still impeachment material, and that's
20 still one of the five factors that need to be met on the
21 newly discovered evidence found. And also, I think the
22 evidence against Mr. Rios was quite strong in the sense
23 that the victim already knew him. In fact, he worked
24 for the victim's husband. She saw him. She knew
25 without a doubt, she said. Both in the trial in a PCR

1 hearing, that it was Mr. Rios.

2 THE COURT: Right. But the 911 call, as I
3 recall, didn't reference any of that. It didn't say,
4 yeah, Mr. Rios just broke in my house and, you know,
5 kidnapped me and did this and did that. And she said a
6 black male did that. And then the gentleman, I think,
7 said the same thing, as I recall. And I can't recall
8 whether -- I know I have the transcript right here, but
9 I can't recall right now as I'm speaking, trying to make
10 a good record, I can't recall whether counsel
11 cross-examined the victims on that, on that mistaken
12 identity -- on that identity issue or not. Did they?

13 MS. MARTO: That ---

14 THE COURT: Did the lawyer cross-examine the
15 victims on the identity issue on that 911 call?

16 MS. MARTO: Not to the best of my knowledge, Your
17 Honor, but to that I do have two primary responses.

18 THE COURT: Okay.

19 MS. MARTO: Number one, the only victim that was
20 in the house was Mrs. Holt. And the only person on the
21 911 call was Mr. Holt, from my understanding. So, Mr.
22 Holt stated it was a black man, but he testified at a
23 PCR hearing that she stated it was Gabe, and he
24 seemingly was reluctant to believe that given their
25 primary -- their prior relationship. And so his

1 testimony at the PCR hearing was that he wanted to go
2 home first and talk to his wife to ensure it was Mr.
3 Rios before they stated that -- before they blamed
4 somebody that they've already had an existing
5 relationship with.

6 And then also, concerning the matter of the 911
7 call, I understand this Court's reservation concerning
8 the failure to bring that 911 call up, but that was
9 exhausted in the first application. And not only was it
10 exhausted at the evidentiary hearing, but it was one of
11 the issues raised on appeal. And so the Court of
12 Appeals has already dismissed that finding and issue as
13 being not deserving of relief.

14 And so, though I understand the Court does have
15 reservations rooted in the 911 call, Mr. Williams'
16 action has little bearing on his existence in
17 participation in this case. He has very little, if any,
18 bearing on that issue itself. That would be an
19 independent issue that, again, has been exhausted.

20 And so, concerning Mr. Williams in particular,
21 there has been no indication that any fraud occurred
22 during this case. Any subsequent trial where that was
23 brought out would show that it doesn't have a bearing on
24 this case, but it would also be impeachment. And,
25 again, that is one of the five factors that must be met

1 in order for relief to be granted for newly discovered
2 evidence. And this ---

3 THE COURT: Okay. I'm sorry, anything further?

4 MS. MARTO: No. I was just gonna pass it off to
5 Mr. Richey.

6 THE COURT: Thank you very much.

7 Yes, sir, Mr. Richey?

8 MR. RICHEY: Thank you, Your Honor, may it please
9 the Court? Your Honor, this conduct by the officer in
10 itself brings into question this conviction. Because
11 the way we have to look at this is, it's disinformation
12 was evolved at the time of trial. This officer is in
13 the middle of this case.

14 Then I would think there would be an issue of
15 whether the State would even try the case.

16 THE COURT: Well, what about the -- jump to that
17 in your argument then, because I'm glad you brought that
18 up first in your rebuttal because Ms. Marto makes a big
19 distinction. She's like, look, this thing was tried
20 back in 2010. And the investigator wasn't fired until
21 when, 2016 or 2017?

22 MS. MARTO: I think 2018.

23 THE COURT: 2018. Some eight years later. How
24 could they even know about it?

25 MR. RICHEY: Well, the conduct -- see, the

1 problem is that he got fired that day, but the conduct
2 goes back a couple years. So, I just say the reason why
3 I think this is critical, because the 911 tape that the
4 Court heard, the lawyer in the initial trial did not use
5 that tape. I mean, it was not presented. And I think
6 when the State filed their motion to dismiss in the
7 court original order, it puts all of it back in play,
8 because the order, the original order said any other
9 issues that the applicant would have.

10 So I think what the courts did to get him back in
11 the court, the circuit court, Judge Hayes, I think he
12 put it all on the table, because he had the foresight to
13 say, hey, because of this conduct, it could lead to da
14 da da da da da.

15 And I think if the lawyer had had this type of
16 information at the trial to say, hey, this whole
17 investigation could be contaminated, I believe now, when
18 it comes to identification, because on that 911 tape, I
19 think it was pretty clear to these folks that not
20 initially ID'd Mr. Rejos that ---

21 THE COURT: Let me ask you this on the 911 tape.
22 I know his lawyer testified at the P.C. hearing, help
23 refresh my memory, did -- when you questioned him about
24 the 911 tape, what was his -- what, if anything, can you
25 remember was his testimony as to why he didn't introduce

1 that or whatnot?

2 MR. RICHEY: He referenced it. He covered that
3 in other aspects of the trial. He said, I went through
4 and I felt like I covered that.

5 THE COURT: I don't remember any of that reading
6 the transcript.

7 MR. RICHEY: That's what his testimony was when
8 he came to him the second time. He said, he felt he did
9 a good enough job that he covered that. And I'm just
10 saying, this officer was saying there was some issue
11 with it, I mean, that's the kind of stuff, Your Honor, I
12 believe that the case should be granted for Mr. Rios.

13 THE COURT: Do you believe that you've met and
14 Mr. Rios has met the five factors that the Attorney
15 General referenced in her argument?

16 MR. RICHEY: Yes, sir.

17 THE COURT: I mean, you reference them in the
18 order, which it's my order, I ordered that you prepared
19 the order.

20 MR. RICHEY: Yes, sir.

21 THE COURT: But you referenced it and you believe
22 that each one of those grounds was met?

23 MR. RICHEY: Yes, sir. Thank you, Your Honor.

24 THE COURT: All right. Coming back to you for
25 reply, if any.

1 MS. MARTO: Just to reiterate, Your Honor. It's
2 our understanding that the 911 issue isn't linked -- it
3 hasn't been linked to any alleged misconduct on Mr.
4 Williams part. And that -- the linkage is extrapolation
5 from people that are unrelated to the case. Again, it
6 was fully exhausted in the first PCR action. And,
7 again, Mr. Williams's conduct is impeaching material,
8 but there's no indication that it was -- that there was
9 any fraud in this case. And so, because of that, we
10 would request you reconsider Your Honor's findings.

11 THE COURT: All right, thank you. I'm going to
12 respectfully deny the State's motion for me to
13 reconsider, or alter, or amend. You know, the
14 testimony, as I recall, and the law which I read,
15 supports Mr. Rios' request to get what he believes is a
16 fair and just trial, and that's the whole purpose of
17 this criminal justice system is to have justice.

18 It's fundamentally fair. And I want the record
19 to reflect this in my decision. It would be
20 fundamentally fair to Mr. Rios, as well as the State, to
21 try this matter where the jury gets to hear all of the
22 relevant evidence, and that includes evidence that may
23 have been tainted from a government witness. Not saying
24 it was, but that wasn't allowed to happen in the first
25 trial because the lawyer didn't do it, and the lawyer

1 didn't introduce the 911 tape, didn't do any of that.
2 And that prejudiced under the *Strickland* factors Mr.
3 Rios. So, Mr. Rios is entitled to a new trial. That's
4 the order of the Court.

5 MR. RICHEY: Thank you, Your Honor.

6 THE COURT: Thank you.

7 (Court concluded at 12:14 p.m.)

8

9 --- THIS ENDS REQUESTED TRANSCRIPT ---

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 COURT REPORTER CERTIFICATE

2
3 I, the undersigned Julie A. Cendroski, Court
4 Reporter for the Seventh Judicial Circuit Court of the
5 State of South Carolina, do hereby certify that to the
6 best of my ability the foregoing is a true, accurate,
7 and complete transcript of record of all the proceedings
8 and evidence introduced in the hearing and/or trial of
9 the captioned case, relative to appeal, in the Court of
10 General Sessions for Spartanburg County, South Carolina,
11 on the 13th day of February, 2023.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.

14
15
16
17
18 s/Julie A. Cendroski
19 Julie A. Cendroski
20 Circuit Court Reporter III
21 Seventh Judicial Circuit
22
23
24
25

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)
)
Gabriel Rios, #344751,)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

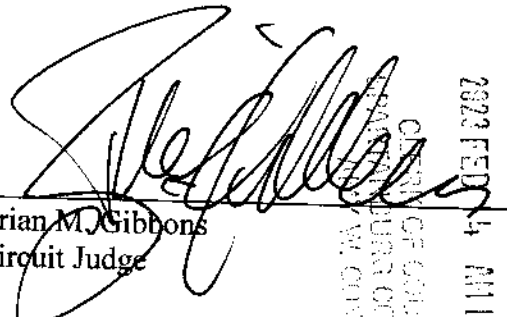
Case No.: 2019-CP-42-02536

**ORDER DENYING RESPONDENT'S
MOTION TO RECONSIDER GRANTING
POST-CONVICTION RELIEF**

This matter comes before the Court by way of Respondent's motion to reconsider the granting of post-conviction relief pursuant to SCRCP 59(e). The Applicant filed his application for post-conviction relief July 17, 2019, on the grounds of newly discovered evidence and an evidentiary hearing was held October 18, 2022, at the Spartanburg County Courthouse. Following the evidentiary hearing, this court granted relief finding Applicant established newly discovered evidence concerning the alleged fraudulent activity by investigator Lorin Williams, which led to his firing, is of the nature that it could have affected the outcome of the case. Subsequently, the Respondent brought this motion for reconsideration, and the matter was heard February 13, 2023, at the Spartanburg County Courthouse. Following oral argument of counsel as well as review of the trial transcripts and the motion itself, the court respectfully denies the Respondents motion.

IT IS SO ORDERED.

February 13, 2023



Brian M. Gibbons
Circuit Judge

2023 FEB 14 AM 11:49
CLERK OF COURT
SPARTANBURG COUNTY
SOUTH CAROLINA
FILED
APP'X 785