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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Honorable Kristi F. Curtis, Circuit Court Judge

MARTIN D. FLOYD,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-000968

PETITION FOR WRIT OF CERTIORARI

GARY H JOHNSON
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ISSUE PRESENTED

1. Did the PCR Court err in finding counsel was effective during petitioner's trial for first degree burglary of a mobile home when she failed to present witnesses who would have provided details on both petitioner's residency in the mobile home and his close relationship with the deceased owner which would have made conviction for burglary an impossibility?

2. Did the PCR court err in finding counsel was effective when she failed to conduct a reasonable investigation of petitioner's residency in the mobile home which would have made conviction for burglary an impossibility?

STATEMENT

Petitioner was convicted of first-degree burglary and sentenced to life in prison without the possibility of parole in connection with entering a mobile home in which he maintained a residence and close relationship with the deceased owner.[1] App. 257, ll. 14 – 21; 292; 344, l. 3 – 13; 376, ll. 2 -10.

During his original trial, evidence of petitioner's status as a resident in the mobile home with the consent of decedent Charles Rearick was limited by trial counsel Mary LeMatty's decision to call a single witness, petitioner's mother Rita Smith.[2] App. 219 - 236. Despite having two witnesses available, Brian Cole and Jason Tony, who would have provided testimony concerning both petitioner's residency in the mobile home and storage of his personal property there, trial counsel LeMatty elected not to call them since petitioner's mother "did a wonderful job" and trial counsel believed the testimony would be "duplicative."[3] App. 395, ll. 16 – 20.

Petitioner was represented by Leslie Sarji in connection with his PCR hearing before the Honorable Kristi Curtis on May 21, 2021. App. 326. Samantha Weidauer appeared on behalf of the State. Sarji, eight years after petitioner's original trial, presented the testimony of both Cole and Tony at the PCR hearing concerning petitioner living at the mobile home and maintaining

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[1] The mobile home was owned by Charles Rearick, who died in a car accident earlier in the day of petitioner's alleged burglary. App. 183, ll. 1 – 17.

[2] Petitioner was represented at trial by Mary LeMatty and Michelle Suggs with Glenn Justis and Mandy Kimmons representing the state. App. 1. Following a guilty verdict, Judge Maite Murphy sentenced petitioner to life in prison without the possibility of parole. App. 288; 292.

[3] Both Cole and Tony were at the courthouse under subpoena during petitioner's three-day trial waiting to be called as witnesses. App. 370, ll. 1-24; 380, l. 15 – 381, l. 16.

property there around the time of the alleged burglary. App. 369, l. 22 – 370, l. 24; 369, ll. 4 – 18; 372, l. 6 – 373, l. 3.

At the PCR hearing, trial counsel LeMatty admitted to never visiting the mobile home or making an investigation to support petitioner's residency status.[4] App. 403, ll. 3 – 13. Jessica Koon was a neighbor who lived in close proximity to the mobile home at the time of the alleged burglary. App. 374, ll. 15 – 22. Sarji, despite the long passage of time, located and presented Koon's testimony at the PCR hearing that Koon was able to visually confirm petitioner's continued presence at the mobile home close in time to the owner's passing and that petitioner did in fact reside at the mobile home with the owner's consent and permission. App. 376, ll. 2 – 22.

At trial, the solicitor hammered petitioner on the lack of evidence and witnesses regarding his residence in the mobile home and ownership of tools and other items in the mobile home and outbuilding. App. 235, ll. 2 – 23; 266, ll. 11 – 24. The solicitor also impeached the testimony of petitioner's mother on her desire to protect her son and with the idea that her testimony about his residence and maintaining property at the mobile home were recent fabrications since she did not tell anyone until providing testimony at trial. App. 235, ll. 2 – 23.

While petitioner admitted to spending most nights with his new girlfriend away from the mobile home leading up to his arrest, he testified at his PCR hearing that he maintained his property at the mobile home and was a tenant of the decedent. App. 364, l. 20 – 365, l. 10. Trial counsel admitted that petitioner never told her that he had abandoned the mobile home as his residence but that his spending most nights away from the mobile home complicated his residency status. App. 404, ll. 3 – 17; 408, ll. 8 – 17.

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[4] While both LeMatty and Suggs appeared on behalf of petitioner at trial, LeMatty served as lead counsel and provided testimony at the PCR hearing and is hereinafter referred to as trial counsel.

Petitioner was tried before Judge Murphy and a jury from December 17 – 19, 2013. App. 1. Following a guilty verdict, the Court of Appeals upheld petitioner's conviction on direct appeal in an unpublished opinion ruling that the mobile home could still qualify as a dwelling despite the death of Rearick and that the state presented sufficient evidence on intent to commit a crime to submit the issue to the jury. State v. Floyd, No. 2015-UP-362, 2015 WL 4275318 (S.C. Ct. App. July 15, 2015). Petitioner filed for post-conviction relief and an evidentiary hearing was held on May 21, 2021. App. 328. Judge Curtis denied post-conviction relief by order dated June 7, 2023. App. 427 – 463.

This petition for certiorari follows.

ARGUMENT

"A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution." Taylor v. State, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). To establish a claim for ineffective assistance of counsel, a PCR applicant must show (1) counsel's performance was deficient because it fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "[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).

1. The PCR Court erred in finding counsel was effective during petitioner's trial for first degree burglary of a mobile home when she failed to present witnesses who would have provided details on both petitioner's residency in the mobile home and his close relationship with the deceased owner which would have made conviction for burglary an impossibility.

A. The evidence of petitioner's residency in the mobile home at trial.

At the time of his arrest, petitioner was with three companions who were also charged with burglary. App. 80, ll. 12 – 20. The state called two of these individuals as witnesses, Angela Fleeman and Rusty Norris. App. 2. Fleeman testified that petitioner was emotional and upset on hearing of Mr. Rearick's passing and took the group to the mobile home to retrieve petitioner's

personal property. App. 105, l. 10 – 110, l. 3. Norris similarly testified that petitioner wanted to retrieve his property from the mobile home. App. 129, l. 23 – 130, l. 11.

The state also presented the testimony of the decedent's daughter, Jennifer Felkel. From Felkel, the state was able to present testimony that petitioner had resided with the decedent but that he had been "kicked out" the summer before the burglary. App. 198, ll. 7 – 9. The solicitor explained the purpose of this testimony to the trial judge in response to a motion for a mistrial:

> Obviously, Ms Lematty has no problem with other people testifying that he lived there. They don't have personal knowledge of that. *It's all coming from their client telling them he lived there.* So she's okay with all of that coming in, but we can't have a person who does have personal knowledge, who talked to her father every day, that can -- *I mean, she's corroborating that, yes, he did live there, but at some point he left. And that's all we're trying to establish is that he left back in the summer.* He wasn't a resident there when this burglary took place. And we'd be happy to -- you know, that's essentially what I wanted to get out of this witness was that at the time of this burglary he was no longer living there.[5]

App. 200, ll. 9 -22 (emphasis added).

Defense counsel called a single witness, petitioner's mother Rita Smith. App. 220, ll. 2 – 15. Smith's testimony about petitioner living in the mobile home and keeping property there were effectively cast in doubt on cross-examination.

> Q. *And according to your testimony today you know [Petitioner] had property there.*
>
> A. Yes, sir.
>
> Q. That's what you said.
>
> A. Yes.
>
> Q. *So that seems to corroborate what he was saying,* wouldn't that be correct?

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[5] Counsel for petitioner ultimately abandoned the motion for a mistrial. App. 201, l. 16 – 202, l. 9.

A. Yes.

Q. *Don't you think that would help him, that police would like to hear that?*

A. Well, it's the truth.

Q. *The truth is you'd do anything for your son, wouldn't you?*

A. Not anything, no, sir. He's made me angry lot of times and sometimes I wouldn't do anything for him, no, sir, but I don't want to see him go to jail, to prison for the rest of his life for something that he did not do -- you know, he did not do, that's all.

Q. *But you're okay with him sitting in jail for a year when you have information that might help him?*

A. I really didn't know that that option was available to me. I did not know that.

App. 235, ll. 2 – 23 (emphasis added). This line of questioning implied a recent fabrication by his mother of petitioner both living in the mobile home and keeping his property there since she did not want to see petitioner sent to prison for the rest of his life.[6]

During closing argument, the solicitor focused on the sole source of the alleged relationship between petitioner and the decedent and the mobile home were the petitioner's own statements made to Fleeman and Norris. "*The only person that said Marty Floyd had permission to be there was Marty Floyd.* That's what he told Angela Fleeman and that's what he told Rusty Norris." App. 256, ll. 5 – 8 (emphasis added).

The solicitor also emphasized that the sole witness offered to support the claims petitioner made to Fleeman and Norris about living in the mobile home and maintaining property there was his mother, who the solicitor claimed likely fabricated testimony to protect her son.

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[6] Trial counsel was apparently prepared for the bias allegation by bringing the independent witnesses Cole and Toney to trial under subpoena but failed to call them to present testimony.

> And finally, as far as witnesses, Marty's mom. *It's his mom.* She testifies *that the first time she told her story was last Friday.* Her son's locked up for a year, over a year. You don't come forward if you've got information that you think will help him? Is that reasonable? As I said, they're there two, three, four times a week. Couldn't he get his stuff then? You know, when you look at the witnesses on cross-examination of the State's witnesses, you really didn't learn anything new. They just reiterated what they said in direct. He told me he had permission, this happened, that happened. Nothing new. You know, Ms. Smith, Marty's mom, on cross-examination *we found out a few things that she didn't tell us on direct like, oh, this is the first time I'm telling this story.*

App. 266, ll. 11 – 24 (emphasis added).

The solicitor also made extensive use of the lack of evidence that petitioner maintained his personal property at the mobile home.

> Same thing with the shop vac. You saw in one of the pictures the shop vac. *There's no testimony that that was Marty's. The only testimony related to an item that was Marty's, according to his mom, was this picture that he cared a lot about.* He cared a lot about his art, according to Ms. Lematty. He cared so much he left it there for seven months because he couldn't fit -- too much stuff to take.

App. 264, l. 24 – 265, l. 6 (emphasis added).

B. How residency was addressed at PCR hearing.

At trial, it was undisputed that petitioner spoke to Fleeman and Norris about his desire to retrieve his property from the mobile home on the evening of their arrest. App. 105, l. 10 – 110, l. 3; 129, l. 23 – 130, l. 11. After entering the mobile home, they made no effort at stealth, turning on all the lights and staying for a good amount of time before police arrived. App. 108, l. 19 – 109, l. 9; 114, l. 22 – 115, l. 12. Petitioner had a discussion with Fleeman about the need to stay at the mobile home to be sure no one tried to break in and rob it. App. 116, ll. 9 – 16. When

police did finally drive up to the mobile home, petitioner told Fleeman "Angela, don't freak out. He said, it's the law. We're not doing anything wrong. We're fine." App. 116, ll. 22 - 24.

The basis for petitioner's statements that night are simple: he lived there and was only at the mobile home to retrieve his own property. At his PCR hearing, petitioner testified he had lived at the mobile home with the decedent for almost a year before he was arrested on this burglary allegation. App. 344, l. 3 – 13. While he admitted to staying most nights with his girlfriend close in time to his arrest, he maintained a residency status in the mobile home and his possessions remained there since he was still in the "getting to know each other" phase of the relationship with his girlfriend. App. 365, ll. 1 – 7. Petitioner explained that he resided in the mobile home and had the consent of the deceased owner to be there, and shared witness names with trial counsel to support those assertions. App. 345, l. 13 – 346, l. 19; 347, ll. 1 – 19. Petitioner also tried to get trial counsel to review the law surrounding his status as a tenant under South Carolina law and his legal right to be on the property.

> Q. Did you and Ms. LeMatty ever discuss South Carolina landlord/tenant law?
>
> A. I had shown her -- I had written many letters to her about it. I had shown her some paperwork that my father had sent me about it, landlord/tenant law stating that I'm a tenant-at-will, or a tenant for a term, when you have an oral or written agreement. And she told me that she didn't want to pursue that issue, that defense strategy.

App. 345, ll. 6 – 14.

Brian Cole testified at the PCR hearing. He was at petitioner's trial under subpoena and expected to testify but was never called by trial counsel. App. 369, l. 22 – 370, l. 24. He provided testimony of moving petitioner's belongings into the mobile home and visiting several times,

including on occasions when the deceased owner was also present. App. 369, ll. 4 – 18; 372, l. 6 – 373, l. 3.

Jason Tony grew up with petitioner and knew the decedent owner of the mobile home very well. App. 380, l. 2 – 18. Tony testified at the PCR hearing that he visited the mobile home quite often, even bring a quantity of meat for petitioner to store in a freezer *a few weeks* before the owner's death. App. 381, ll. 5 – 18. Tony was at petitioner's trial under subpoena but was never called to testify by trial counsel. App. 382, ll. 15 – 25.

Jessica Koon was a neighbor who lived in close proximity to the mobile home. App. 374, ll. 15 – 22. She resided there with her boyfriend and was back and forth to another residence in Dorchester.[7] She testified at the PCR hearing that she was able to visually confirm petitioner's continued presence at the mobile home close in time to the owner's passing and that petitioner did in fact reside at the mobile home with the owner's consent and permission. App. 376, ll. 2 – 22. Trial counsel admitted to never visiting the mobile home or making an inquiry of neighbors, like Koon, to confirm petitioner's residency at the mobile home. App. 403, ll. 3 – 13.

Despite the legal importance of petitioner's status as a resident of the mobile home, trial counsel elected not to interview neighbors like Koon, discussed *infra*, or call two available witnesses to establish petitioner's residency and property in the mobile home. Trial counsel acknowledged understanding the importance of this legal issue leading up to trial and the potential probelm created by petitioner spending nights with his girlfriend leading up to trial:

> Well, he had the residency issue. Nobody really contested that he and Mr. Rearick were friends, he had lived with Mr. Rearick for a

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[7] This testimony of part-time residential status and moving back and forth between places of residence would have been particularly informative for the jury as it mirrored petitioner's own residency status.

> period of time.[8] It became a bit fuzzy towards in the month prior to Mr. Rearick's passing because Mr. Floyd had a girlfriend, and I believe he had a young child, or a child on the way, or something like that, so he wasn't at Mr. Rearick's as consistently as he would have been if I just say that I'm living at this place.
>
> He would go back and forth, but he was still working on the property. He did still have items of his own at that property. So he was continuing with that relationship, although *it didn't seem from what we were able to gather that he spent every night there in the weeks and months proceeding Mr. Rearick's passing.*

App. 393, ll. 2 – 16 (emphasis added).

Instead of calling Cole and Tony concerning residency, trial counsel relied solely on the testimony of petitioner's mother. Trial counsel explained her reasoning for this decision.

> Q. Okay. And you did subpoena the two gentlemen that did testify today?
>
> A. Yes.
>
> Q. And why did you not call them at trial?
>
> A. To the best of my recollection, I think I just thought it would be cumulative after his mother. *I thought his mother did a wonderful job in setting things out very clearly, and I just thought it would be duplicative.*
>
> Q. Okay. And was there any strategy involved in not calling them?
>
> A. The second gentleman who testified said something, he testified something about the timeframe not matching up or something. And I believe -- and this all sort of happened at the courthouse as things were happening, but I believe I may have backed off on calling him for that. And the other gentleman, I just thought would be duplicative of Mr. Floyd's mother's testimony.

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[8] The idea that "nobody" contested the friendship is inaccurate. Decedent's daughter, Jennifer Felkel testified that decedent kicked petitioner out of the mobile home. App. 198, ll. 7-9. The solicitor emphasized the lack of witnesses about this supposed friendship. App. 256, ll. 5–8. The witnesses available to trial counsel would have established the friendship between petitioner and decedent so that they were "not really contested" but trial counsel elected to not present this evidence.

App. 394, l. 12 – 395, 5 (emphasis added).

It is important to note trial counsel denied any independent memory of the conversations or actions she took surrounding trial that were not reflected in her physical file or the record. App. 399, l. 16 – 400, l. 4. In contrast, petitioner recalled the issue surrounding the two witnesses very well. He testified as follows:

> Q. And what is it that you believed that they would offer at your trial?
>
> A. A good faith relationship between me and Mr. Charlie, that I had belonged there, that I had a right to be there.
>
> Q. Okay.
>
> A. That I had a bona fide interest in that home.
>
> Q. Did Ms. LeMatty ever discuss with you why she did not call those two witnesses to trial?
>
> A. The only thing Ms. LeMatty told me is after the State called their witnesses, which were two of my co-defendants, both my co-defendants consistently testified that there was no intention to commit a crime, that they had permission to be there, and she told me that she believed those star witnesses for the prosecution had actually gave testimony that would have acquitted me because there was nothing incriminating in their testimony, that she believed that there's nobody left that needed to be called, and she believed I didn't need to get on the stand because they already proved my innocence.

App. 348, l. 15 – 349, l. 10.

Trial counsel admitted the error in not calling these witnesses during the PCR hearing.

> Q. [W]ould you agree with me that Mr. Justis [the solicitor] worked hard to impeach Marty's mother's testimony because she's his mother?
>
> A. He did. He did focus on that in closing.

> Q. And actually while he was questioning her, he cross-examined her about the fact that she would do anything she could to help Mr. Floyd because she's his mother. Do you recall that?
>
> A. Not specifically. But if it's in the record then that would be the exchange.
>
> Q. And so despite the fact that the other two gentlemen that you had under subpoena were not relatives of Mr. Floyd's, you testify that you believe that their testimony would be cumulative?
>
> A. At the time, yes.
>
> *Q. Okay. In retrospect, do you disagree with what your judgment was at the time?*
>
> *A. Yes.*

App. 402, l. 10 – 403, l. 2 (emphasis added).

C. The PCR Court's ruling.

The PCR court determined that the testimony of both Tony and Cole was not material since it did not specifically involve the day of the alleged burglary. App. 455. The PCR court also found this testimony would have been "cumulative testimony to that of Applicant's mother, who also testified that Applicant had previously lived at the home but was now living with his girlfriend." App. 455. The PCR court also noted the petitioner's staying most evenings with his then girlfriend as an admission that he was no longer a resident of the mobile home. App. 455.

D. The PCR Court erred in discounting the impact of trial counsel's failure to call supporting witnesses on an issue that would have made the crime charged a legal impossibility.

"We have maintained consistently for well over one hundred years that burglary is a crime against possession and habitation, not a crime against ownership." State v. Singley, 392

S.C. 270, 274, 709 S.E.2d 603, 605 (2011). "It is axiomatic that 'one cannot commit the offence of burglary by breaking into his own home.'" Id., 392 S.C. at 276, 709 S.E.2d at 606 (quoting State v. Trapp, 17 S.C. 467, 471 (1882)). "[T]he proper test is whether, under the totality of the circumstances, a burglary defendant had custody and control of, and the right and expectation to be safe and secure in, the dwelling burglarized." Singley, 392 S.C. at 277, 709 S.E.2d at 606. In the present case, trial counsel elected not to present witnesses that would have supported petitioner's assertion that he had such status in the mobile home.

Had trial counsel put the witnesses who were at the courthouse and available on the stand, the jury would have heard about the close relationship between the decedent and petitioner from Tony who knew both men very well. App. 380, ll. 2 - 22. The jury would have heard how petitioner moved out of Cole's home and into the decedent's mobile home before the burglary charges. App. 369, ll. 7 – 25. The jury would have heard about Toney bringing meat to the mobile home for petitioner to store within a couple of months of the arrest. App. 381, ll. 9 – 22. The jury would have heard from neighbors about petitioner's continued presence at the mobile home and his close relationship with the decedent within a few weeks of the arrest. App. 376, ll. 2 – 22.

These witnesses would also have been able to provide confirmation of petitioner's property in the mobile home, an issue also emphasized by the solicitor as lacking any confirmation from a reliable witness. Petitioner was performing remodeling work on behalf of the decedent around the mobile home on an ongoing basis before the night of his arrest. App. 231, ll. 7 – 24. The mobile home had areas of active construction and numerous tools were located about the property. App. 193, ll. 21 – 23; 368, l. 21 – 369, l. 10. At the PCR hearing,

Cole indicated petitioner's tools were present at the mobile home and provided important details as he sold some of the tools to petitioner. App. 371, l. 21 – 372, l. 23.

This issue is guided by other cases dealing with witnesses whose testimony would have been central to a defense, such as alibi witnesses, when available and not called by trial counsel. *See* Weldon v. State, 436 S.C. 69, 82, 870 S.E.2d 183, 190 (Ct. App. 2021) (finding "no evidence supports the PCR court's findings that trial counsel provided effective assistance or implemented—much less articulated—any valid trial strategy with respect to the alibi witnesses."); Martin v. State, 427 S.C. 450, 456, 832 S.E.2d 277, 280 (2019) (finding as a matter of law that Martin's trial attorneys were deficient for not eliciting specific alibi timeline testimony from available witnesses); Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding counsel deficient in failing to call witnesses "that would have added significantly to the credibility of petitioner's case."). The PCR court's ruling ignores the clear benefits to petitioner of presenting evidence, other than his own mother's testimony and what he allegedly told his co-defendants, regarding both his right to be in the mobile home and the presence of his own property inside the mobile home with the consent of the owner. Instead of presenting this evidence, trial counsel allowed the state to impeach with clear bias and recent fabrication the only witness who supported this critical aspect of petitioner's defense, his mother.

Here, petitioner was convicted on December 17, 2023, while the witness' memories were fresh regarding the events surrounding his living in the mobile home and maintaining substantial property there. Despite two of the witnesses being present for trial, and other witnesses easily reached and available with minimal effort as discussed *infra*, trial counsel decided to rely solely on the testimony of petitioner's mother. Almost eight years later during the PCR hearing, these witnesses were still able to relate information concerning petitioner's living in the mobile home

around the time of the crime. The PCR court's focus on the lack of direct testimony that petitioner resided at the mobile home on the specific day of the alleged burglary eight years after the fact ignores the importance of how significant the confirming testimony would have been on the critical issue of petitioner's residence and maintaining property in the mobile home. Counsel admitted the mistake in not calling the witnesses, and a new trial is the only remedy.

Petitioner's interest in the mobile home as a tenant did not expire simply because he slept most nights away from the mobile home leading up to Rearick's death. Petitioner would have been a tenant on a "month to month" basis absent some other agreement. *See* S.C. Code Ann. § 27-35-30 (1976 as amended). While the state did produce some evidence petitioner had moved out of the mobile home, both Tony and Cole were available at trial to contest that testimony and, had counsel conducted a minimal investigation, neighbors like Cook were also available, as discussed *infra*. Petitioner denied abandoning his property or residency status in the mobile home. App. 345, ll. 2 – 19; *See* S.C. Code Ann. § 27-35-150 (1976 as amended) ("Absence from the property for fifteen days after default in the payment of rent shall be construed as abandonment."). There was a clear legal basis, supported by available witnesses, that petitioner resided in the mobile home on the day of his alleged burglary.

The facts of this case closely mirror those in Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008). In Lounds, the petitioner sought PCR relief due to trial counsel's inadequate investigation and failure to call witnesses to confirm a prior relationship with the alleged victim. This Court noted if "witnesses other than petitioner were willing to testify" to a central element of the defense of the case, "certainly that would have added significantly to the credibility of petitioner's case." Id. at 463, 670 S.E.2d at 650. Trial counsel in Lounds, despite the notice of the state's intent to seek LWOP, failed to secure the favorable witness testimony and his

performance fell below an objective standard of reasonableness. In the present case, trial counsel knew the state was seeking life without parole, and failed to put two witnesses on the stand who would have provided testimony that added significant credibility and evidence to petitioner's claims of residency and being at the property solely to secure his own property.

Trial counsel was ineffective in failing to call the witnesses she had under subpoena who would have supported petitioner's status as a resident of the mobile home. The PCR court erred in concluding this testimony was immaterial and cumulative. There is a reasonable probability that this error impacted the outcome of the trial and a new trial is the remedy under Strickland.

2. The PCR court erred in finding counsel was effective when she failed to conduct a reasonable investigation of petitioner's residency in the mobile home which would have made conviction for burglary an impossibility.

"[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).

As noted *supra*, Jessica Koon was a neighbor who lived in close proximity to the mobile home. App. 374, ll. 15 – 22. She testified at the PCR hearing that she was able to visually confirm petitioner's continued presence at the mobile home close in time to the owner's passing and that petitioner did in fact reside at the mobile home with the owner's consent and permission. App. 376, ll. 2 – 22. As Koon's living arrangements mirrored petitioner's in terms of maintaining more than one residence, her testimony would have been particularly relevant. Trial counsel admitted to never making an inquiry of neighbors, like Koon, to confirm petitioner's residency status or visiting the mobile home to investigate it as an active construction site with a unique point of entry at the rear of the mobile home (the rear window). App. 403, ll. 3 – 13.

The state made much of the method of entry into the mobile home at trial. Petitioner and his companions entered through a rear window. App. 349, l. 19 – 350, l. 23. Had trial counsel made a visit to the mobile home, she would have seen the evidence of ongoing construction and the fact that the rear door to the mobile home was boarded over as part of that construction. App. 350, ll. 11 - 23. Petitioner explained the use of the window to gain access was common since the rear door to the mobile home was boarded over and no longer accessible *due to the remodeling work petitioner* himself was performing.

> That's how we got in because it was adjacent to the tool shop, the shop, you know, remodeling the house, things inside the shop, and that's where [the window] we're passing lumber through to work on the house. *We had boarded up the back door and tore off the siding and boarded that up* because he wanted to build an extension right there.

App. 350, ll. 18 – 23 (emphasis added).

In its order, the PCR court found that petitioner "did not present any documentary evidence to establish that any additional investigation would have yielded beneficial information that would have resulted in a different outcome at trial." App. 452. While this may be an accurate description of the issue surrounding the ongoing construction at the mobile home, which was limited to petitioner's own testimony at the PCR hearing, it is not supported by the presence at the PCR hearing of Koon. Koon's testimony about petitioner's residence and relationship with the decedent was competent evidence of what an adequate investigation by counsel would have disclosed.[9]

After eight years, PCR counsel was able to secure the attendance of a neighbor who testified that petitioner resided in the mobile home and was actively working there within a couple of weeks of petitioner's arrest. Had counsel made any effort at investigating the issues surrounding petitioner's residence or the construction access through the window, the jury would have been presented with a substantially different picture than the one portrayed by the state during trial. The PCR court was in error in deciding petitioner presented no evidence to support the assertion that counsel was ineffective for failing to investigate.

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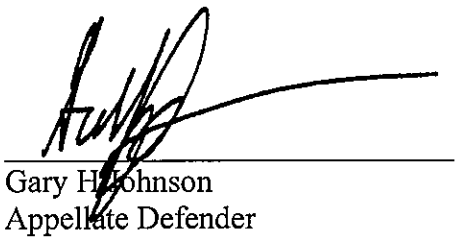
[9] The PCR judge noted that Koon "testified on cross-examination that she was not staying at her then-boyfriend's house every day so, it is possible someone could have come by to speak to her when she was not present." App. 443. As trial counsel admitted to conducting no investigation of the scene or seeking out neighbors, this finding is not relevant. App. 403, ll. 3 – 13.

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), trial counsel was found ineffective following PCR when counsel failed to investigate the potential alibi witness identified by Walker, his girlfriend Robina Reed. This Court noted that while Reed's testimony "was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. As was the case in Walker, the potential impact on the petitioner's guilt had trial counsel interviewed Koon would have made conviction for burglary an impossibility as one may not burglar one's own residence. Koon, and other neighbors and evidence such as the entry point, should have been investigated in light of trial counsel's known concerns over petitioner's residence in the mobile home.

Counsel was ineffective for failing to investigate the scene of the alleged burglary and in failing to interview neighbors who would have confirmed petitioner's residency in the mobile home. As this testimony would have made conviction for the crime charged an impossibility, a new trial is warranted. *See* Strickland v. Washington, 466 U.S. 668 (1984); Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011).

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that this Court grant the writ of certiorari to allow full briefing on these issues.



Gary H. Johnson
Appellate Defender

ATTORNEY FOR PETITIONER

This 9th day of November, 2023.