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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**

Appellate Case No. 2023-000968

MARTIN D. FLOYD,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

STATEMENT OF QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 4

ARGUMENT 5

 I. The PCR court correctly found trial counsel was not ineffective for failing to call witnesses to testify to Petitioner’s residency because counsel articulated a reasonable strategic decision for not calling witnesses whose testimonies were cumulative to testimony already presented, inconsistent with the timeframe for the burglary, and if true, would not have changed the result of the trial 6

 II. The PCR court correctly found trial counsel was not ineffective for not investigating circumstances surrounding Petitioner’s residence in the mobile home because counsel’s decision was reasonable under prevailing professional norms, and Petitioner failed to present evidence that information from such investigations would have established Petitioner’s residency at the time of burglary, and thus, would have changed the result of the trial 12

CONCLUSION 20

QUESTIONS PRESENTED

PETITIONER'S STATEMENT OF QUESTIONS

- I. 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 the petitioner's residency in the mobile home and his close relationship with the deceased owner which would have made conviction for burglary an impossibility?
- II. 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?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS

- I. Did the PCR court correctly find counsel was not ineffective for not calling witnesses whose testimonies were inconsistent with the State's timeframe for the burglary and cumulative to testimony already presented because counsel articulated a reasonable strategic decision, and the witnesses' testimonies, if true, would not have changed the result of the trial?
- II. Did the PCR court correctly find counsel was not ineffective for not investigating circumstances surrounding Petitioner's residence in the mobile home where Petitioner failed to present evidence that information from such investigations would have established Petitioner's residency at the time of the burglary, and thus, would have changed the result of the trial?

STATEMENT OF THE CASE

In November 2013, the Dorchester County Grand Jury indicted Petitioner for burglary in the first degree (2013-GS-18-0364). The State served Petitioner with notice of its intent to seek a sentence of life without parole as a recidivist offender based on his prior convictions. On December 17, 2013, Petitioner proceeded to a jury trial before the Honorable Maite Murphy. Assistant Solicitors Glenn P. Justis and Mandy W. Kimmons prosecuted the case. Petitioner was represented by Mary P. LeMatty, Esq., (“Counsel” or “trial counsel”) and Michelle R. Suggs, Esq. Petitioner was convicted as indicted, and Judge Murphy sentenced Petitioner to life without parole.

On June 21, 2022, Petitioner timely filed notice of appeal. On appeal, Petitioner was represented by Appellate Defender Laura R. Baer, and raised the following issues:

- I. [Petitioner] is entitled to a directed verdict on the charge of first-degree burglary where the State did not present any evidence that [Petitioner] had any intent to commit a crime within the trailer when he entered the trailer.
- II. [Petitioner] is entitled to a directed verdict on the charge of first-degree burglary because the State did not prove that the property entered qualified as a dwelling where the sole owner of the property was deceased at the time of entry.

Following briefing and without oral argument, the South Carolina Court of Appeals affirmed Petitioner’s conviction and sentence in an unpublished opinion.¹ Petitioner filed a petition for rehearing, which was denied. Petitioner filed a petition for Writ of Certiorari with the South Carolina Supreme Court, which denied certiorari. The Remittitur was issued on August 1, 2016.

Petitioner timely filed a PCR on July 25, 2017. On May 21, 2021, an evidentiary hearing convened before the Honorable Kristi F. Curtis. Assistant Attorney General Samantha J. Weidauer represented the State, and Leslie T. Sarji, Esq., represented Petitioner. On June 7, 2023, the PCR court denied relief, finding Petitioner failed to meet his burden of proof on his allegations.

¹ *State v. Floyd*, Op. No. 2015-UP-362 (Ct. App. filed July 15, 2015).

STATEMENT OF THE FACTS

On the morning of January 17, 2013, Charles Rearick (“Rearick”) passed away. (App. 183). Rearick’s only child, Jennifer Rearick Felkel (“Jennifer”) and her husband collected sentimental items from Rearick’s mobile home and locked the mobile home, intending to return in the immediate future. (App. 186; 205). Jennifer testified that no one had permission to enter Rearick’s home that night, including Petitioner and his friends. (App. 205). Jennifer testified that Petitioner had previously lived with Rearick for a time but had been kicked out months prior. (App. 197-98).

Angela Fleeman (“Fleeman”), Petitioner’s girlfriend, testified that once Petitioner heard the news, he expressed concern about his property located at Rearick’s home but did not specify what property. (App. 106-07). A group composed of Petitioner, Fleeman, Rusty Norris (“Norris”), and Candace Mauldin (“Mauldin”) went to Rearick’s home, wherein they found the lights off and front door locked. (App. 108). Mauldin climbed through a rear window and unlocked the front door for the others. (App. 108; 131). Once inside, Petitioner proceeded to Rearick’s bedroom first. (App. 108). Fleeman testified Petitioner seemed upset that he could not find Rearick’s gun collection. (App. 113-14). Fleeman testified that only after searching Rearick’s bedroom and bathroom did Petitioner go to the bedroom where he had previously lived and located his belongings. (App. 108-09; 114).

Norris testified that he and Petitioner went to a locked shed located behind the home, and Norris used bolt cutters to remove the lock. (App. 133-34). Norris took various tools from the shed. (App. 143-44). Moments later, law enforcement arrived at the home and caught the group. (App. 134; 152-53). Law enforcement obtained a search warrant for Mauldin’s truck, and the subsequent search revealed several items belonging to Rearick. (App. 170-71). When arrested, law enforcement found on Norris various items that belonged to Rearick. (App. 143-48).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

ARGUMENT

Petitioner asserts the PCR court erred in finding trial counsel was effective for not calling witnesses to testify at Petitioner's trial and not investigating Petitioner's residence in the mobile home. However, the PCR court correctly found Petitioner failed to meet his burden of proving trial counsel's performance fell below the objective standard of reasonableness under prevailing professional norms.

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms [i.e. deficient performance], and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). A PCR applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and a fair assessment requires that "every effort be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689). Judicial scrutiny of counsel's performance and range of legitimate decisions regarding how

best to represent a defendant must be highly deferential to counsel. *Strickland*, 466 U.S. at 688-89.

- I. **The PCR court correctly found trial counsel was not ineffective for failing to call witnesses to testify to Petitioner’s residency because counsel articulated a reasonable strategic decision for not calling witnesses whose testimonies were cumulative to testimony already presented, inconsistent with the timeframe for the burglary, and if true, would not have changed the result of the trial.**

Petitioner asserts counsel was ineffective for failing to call witnesses who would have testified to Petitioner’s residency in the mobile home and his close relationship with Rearick. However, the PCR court correctly found that Petitioner failed to meet his burden of proving counsel was ineffective for failing to call Brian Cole and Jason Tony to testify at trial because counsel articulated a reasonable strategic decision for not calling the witnesses.

A criminal defense attorney has a duty to conduct reasonable investigations to discover all reasonably available evidence tending to rebut any aggravating evidence introduced by the state. *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). The scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and make independent investigations of the facts and circumstances of the case. *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). However, counsel’s duty to interview potential witnesses is limited to when it is reasonable to do so. *Edwards v. State*, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). Counsel is not required to call every potential witness where counsel makes a reasonable decision and can articulate reasonable grounds for not calling the witness. *Id.* To prevail on a claim that counsel failed to interview or call witnesses, an applicant must prove counsel’s inaction resulted in prejudice by producing witnesses at the PCR hearing to show a reasonable probability the result

of the trial would have been different based on the witness's testimony. *C.f. Glove v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995).

At the PCR hearing, Brian Cole ("Cole") testified that he knew Petitioner was living with Rearick because he helped Petitioner move some tools (a skill saw, jigsaw, and hand tools) and clothes to Rearick's home. (App. 369). Cole testified that he did not know when the move-in occurred. (App. 372). Cole would have testified at trial that Cole purchased the tools Petitioner owned and kept at Rearick's home. (App. 371).

Jason Tony ("Tony") testified that he knew Petitioner lived at Rearick's home because Petitioner told Tony that he lived there, and Tony would go visit Petitioner there. (App. 380). Tony testified that Petitioner would be at Rearick's house, sometimes working, but was not there all of the time. (App. 381). Tony testified that he saw Petitioner there several times, and Petitioner had baby toys in Rearick's house. Tony also testified that he brought Petitioner some meat to store in a freezer at Rearick's home two (2) months before Rearick passed away. (App. 381). Neither Cole nor Tony testified about whether Petitioner still lived with Rearick at the time of Rearick's death.

A. Counsel articulated a reasonable strategic decision for failing to call witnesses, Brian Cole and Jason Tony, because their testimonies were cumulative to testimony given by Petitioner's mother and inconsistent with the State's timeframe for the burglary.

Petitioner asserts Counsel was ineffective for failing to call Brian Cole ("Cole") and Jason Tony ("Tony"), who would have testified to Petitioner's residency and close relationship with Rearick. Counsel's performance was not deficient under prevailing professional norms because Counsel articulated a reasonable strategic decision for not calling Cole and Tony to testify. Counsel testified that Cole and Tony's testimonies would have been cumulative to another witness' testimony and did not match the State's timeline for the burglary. (App. 395).

Petitioner cites *Weldon v. State*, 436 S.C. 69, 870 S.E.2d 183 (Ct. App. 2021). However, Petitioner's case is distinguishable from *Weldon*. In *Weldon*, the Court of Appeals determined that

an attorney was ineffective for failing to call alibi witnesses where an attorney admitted he did not know why he did not call the witnesses. *Id.* at 83, 870 S.E.2d at 190. The alibi witnesses would have testified that the defendant was with them the morning of the crime. *Id.* at 76, 870 S.E.2d at 186-87. The only evidence that tied the defendant to the crime was DNA on a single piece of duct tape recovered from the victim's head. *Id.* at 74, 870 S.E.2d at 185. The defendant worked with the victim in a woodshop. *Id.* The defendant denied knowing anyone involved, and none of the people interviewed by law enforcement implicated the defendant in the crime. *Id.* The defendant's attorney testified that his trial strategy was to attack the credibility of the DNA evidence. *Id.* at 77-78, 870 S.E.2d at 187. Although the attorney had spoken to the alibi witnesses about the defendant's whereabouts, the attorney did not call the witnesses to testify and *admitted that he did not know why* he chose not to call the witnesses. *Id.* at 77-83, 870 S.E.2d at 187-90 (emphasis added). The court determined the attorney was ineffective for failing to call the alibi witnesses because the attorney could not articulate a valid trial strategy for not doing so. *Id.* at 82-82, 870 S.E.2d at 190.

Here, however, Counsel identified two (2) valid strategic reasons why she did not call Cole and Tony to testify. At the PCR hearing, Counsel testified that she subpoenaed Cole and Tony to testify but did not call them because their testimonies were cumulative to the trial testimony of Rita Smith ("Smith"), who had already testified that Petitioner previously lived with Rearick, kept property there, and was working on the mobile home. (App. 395; 222). Counsel testified she believed Cole and Tony's testimonies would have been duplicative of Smith's testimony and would not have presented a real issue because it was undisputed that that Petitioner and Rearick were friends, had previously lived together, and Petitioner was in the process of remodeling the mobile home. (App. 395; 402; 412-13). Counsel testified she thought Smith did a wonderful job

setting those facts out clearly. (App. 395). Counsel testified that her trial strategy was to argue Petitioner was not at the mobile home to commit a crime but to retrieve his property, and the mobile home was not a dwelling since Rearick had passed. (App. 415-16). Smith's trial testimony alone was sufficient to support Counsel's trial strategy. Although Counsel testified at the PCR hearing that she now disagreed with her decision not to call Cole and Tony to testify (App. 402), Counsel's conduct is not to be judged by hindsight but by the decision made at trial in congruence with the strategic reason articulated. *See Strickland*, 466 U.S. at 689 ("a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight").

Counsel further testified that the timelines in Cole and Tony's testimonies did not match the State's timeline for the burglary. (App. 395). The State's case was that the burglary occurred on January 17, 2013. Cole could not identify when he helped Petitioner move into the mobile home. (App. 372). Tony's testimony that he brought Petitioner meat while Petitioner lived at the mobile home occurred months before Rearick's passing. (App. 381). Cole and Tony's testimonies regarding their knowledge of Petitioner residing at the mobile home involved facts that occurred weeks to months prior to the burglary. Counsel identified this as one of the reasons for not calling Cole and Tony to testify. Thus, Counsel's performance was not deficient because she articulated valid strategic decisions for not calling Cole and Tony to testify at trial.

B. Petitioner failed to prove he was prejudiced by Counsel's decision not to call Brian Cole and Jason Tony because, if true, their testimonies regarding Petitioner's residency in the mobile home would not have changed the result of the trial.

Petitioner asserts that Cole and Tony's testimonies regarding Petitioner's residency in the mobile home and close relationship with Rearick would have made the burglary a legal impossibility. However, assuming Cole and Tony's testimonies regarding these facts are true, the testimonies would not have changed the result of the trial.

Petitioner cites *Martin v. State*, 427 S.C. 450, 832 S.E.2d 277 (2019). However, Petitioner's case is distinguishable from *Martin*. In *Martin*, the Supreme Court determined an attorney's failure to call an alibi witness resulted in prejudice when the alibi witness would have testified to the defendant's whereabouts at specific time that would have made the crime an impossibility. *Id.* at 457, 832 S.E.2d at 280. The defendant's mother informed the attorney that she dropped her son off at a bus stop in Atlanta, GA around 11:15 am or 11:30 am on the day of the robbery. *Id.* at 453, 832 S.E.2d at 279. The robbery occurred at 12:20 pm in North Augusta, SC. *Id.* There was no evidence linking the defendant to the robbery other than the testimony of the co-defendants who admitted their guilt, two of whom admitted to lying to law enforcement in an effort to exonerate themselves. *Id.* at 453, 457, 832 S.E.2d at 279, 280. The defendant's mother gave the attorney *specific and critical information* regarding the defendant's whereabouts, which the attorney failed to elicit from the mother at trial. *Id.* at 453-54, 832 S.E. at 279 (emphasis added). The Court found Counsel's performance prejudiced the defendant because without the specific timeline testimony, the defendant failed to establish a legal alibi that would have made the defendant's participation a legal impossibility. *Id.* at 456, 832 S.E.2d at 280. The Court determined there was a reasonable likelihood the trial would have been different with the *specific timeline testimony*. *Id.* (emphasis added).

Here, unlike the alibi witness in *Martin*, neither Cole nor Tony's testimonies establish Petitioner's residence in the mobile home *at the time of the burglary*. Jennifer testified at Petitioner's trial that although Petitioner previously lived with Rearick, Rearick kicked Petitioner out of the house approximately six months prior to the burglary. (App. 197-98). Cole testified that he does not know when he helped Petitioner move into the mobile home. (App. 372). Tony testified that he brought Petitioner meat while Petitioner resided at the mobile home but acknowledged that

instance occurred a couple months prior to Rearick's death. (App. 381). Both Cole and Tony's testimonies that Petitioner previously lived with Rearick was a fact already known, but neither could establish Petitioner's residence in the mobile home with specificity to the burglary's timeline. Further, there was overwhelming evidence of Petitioner's guilt, unlike the defendant in *Martin*, because law enforcement caught Petitioner committing the burglary.

Petitioner also cites *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008). However, Petitioner's case is also distinguishable from *Lounds*. In *Lounds*, the Court determined an attorney was ineffective for failing to call witnesses who would have testified to the friendship of the defendant and the victim, which would have added significantly to the credibility of the defendant's case. *Id.* The defendant was charged with armed robbery and kidnapping. *Id.* at 457, 670 S.E.2d at 647. The victim testified that the defendant and another held him at gun and knife point and demanded money. *Id.* The defendant testified in his own defense and related a "much different account[,]" in which the defendant stated the victim bought drugs from him in the past. *Id.* at 458, 670 S.E.2d 648. The defendant denied having a weapon, threatening the victim, and stated the victim owed him money. *Id.* When recalled, the victim denied ever buying or using drugs. *Id.* The defendant's attorney failed to call the defendant's brother as a witness, who would have testified that the defendant and the victim bought and used drugs together. *Id.* at 461-62, 670 S.E.2d at 650. The Court determined this testimony would have added *significantly* to the defendant's credibility because it would have directly refuted the victim's testimony. *See Id.* at 462, 670 S.E. at 650 (emphasis added).

Here, unlike the defendant's brother's testimony in *Lounds*, neither Cole nor Tony's testimonies would have added *significant* credibility to Petitioner's case. Cole and Tony would have testified to facts already known by Petitioner, the State, and the jury. Counsel testified to this

point at the PCR hearing, stating that it was no real issue that Petitioner was on the property frequently, lived there previously, was working on the house, had property there, and was friends with Rearick. (App. 412-13).

Further, Petitioner's argument regarding a "close relationship" between Petitioner and Rearick is immaterial to the elements of burglary. Cole and Tony's testimony that Petitioner and Rearick were friends was an undisputed fact that would not have changed the result of the trial because two parties having a close relationship does not negate any element of burglary or add significantly to Petitioner's defense. Thus, Petitioner failed to show a reasonable probability that the result of the trial would have been different but for Counsel's failure to call Cole and Tony to testify to his residence and close relationship with Rearick. Accordingly, the PCR court correctly found Counsel was not ineffective.

II. The PCR court correctly found trial counsel was not ineffective for not investigating the circumstances surrounding Petitioner's residence in the mobile home because counsel's conduct was reasonable under prevailing professional norms, and Petitioner failed to present evidence that information from such investigations would have established Petitioner's residency at the time of burglary, and thus, would have changed the result of the trial.

Petitioner asserts Counsel was ineffective for not investigating circumstances surrounding Petitioner's residence. However, the PCR court correctly found that Petitioner failed to meet his burden of proving trial counsel was ineffective for failing to investigate Petitioner's residency in the mobile home. Further, Petitioner failed to present evidence of information from investigations of Petitioner's residency in the mobile home that would have changed the result of the trial.

Counsel's duty to make an independent investigation of the facts and circumstances of the case is "limited to a *reasonable* investigation." *Ard v. Catoe*, 372 S.C. at 331, 642 S.E.2d at 597 (emphasis added). In applying the *Strickland* standard to a claim for failure

to investigate, a court must give heavy deference to counsel's decision not to undertake a particular investigation. *Bagwell v. State*, 410 S.C. 259, 265, 763 S.E.2d 630, 633 (Ct. App. 2014). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result. *Moorehead v. State*, 329 S.C. 329, 496 S.E.2d 415 (1998). To prevail on a claim that counsel did not adequately investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). The applicant must present evidence demonstrating how the discoverable matters or defenses would have resulted in a different outcome. *Harris v. State*, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008), abrogated on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

A person is guilty of burglary in the first degree if the person (1) enters a dwelling; (2) without consent, (3) with intent to commit a crime in the dwelling, and (4) the entering or remaining occurs at nighttime. S.C. Code Ann. § 16-11-311(A)(3). Consent is defined as without the consent of "the person in lawful possession." *Id.* Burglary is a crime against possession and habitation; the victim need not be the owner of the dwelling burglarized, it is sufficient that the alleged victim was the occupant or possessor of the dwelling. *State v. Singley*, 392 S.C. 270, 274, 709 S.E.2d 603, 605 (2011). One cannot commit the crime of burglary by breaking into his own home. *Id.* at 276, 709 S.E.2d at 606. The proper test [for residency] is whether, under the totality of the circumstances, a burglary defendant had custody of, and the right and expectation to be safe and secure in, the dwelling burglarized. *Id.* at 277, 709 S.E.2d at 606.

A. Counsel’s decision not to investigate circumstances surrounding Petitioner’s residency was reasonable under prevailing professional norms because the information from such investigations would not have established that Petitioner had custody of, and the right and expectation to be safe and secure in the mobile home.

Petitioner asserts Counsel’s performance was deficient for failing to investigate circumstances surrounding Petitioner’s residency. However, Counsel’s decision not to undertake the investigations was reasonable as the information discovered would not have established the mobile home as Petitioner’s residence.

Petitioner cites *Singley*, 392 S.C. 270, 709 S.E.2d 603 (2011). The facts of Petitioner’s case are comparable to *Singley*. In *Singley*, the Supreme Court determined a reasonable jury could conclude that the property burglarized was not the defendant’s residence, despite his ownership interest, where the defendant was put out of the house and did not have permission to return. *Id.* at 277, 709 S.E.2d at 607. The defendant inherited an ownership interest in his childhood home (burglarized property) which was shared with his brother and mother, who had the majority interest. *Id.* at 272, 709 S.E.2d at 604. The defendant resided in the home for three weeks until his mother “put him out” of the house. *Id.* The Defendant took up residence elsewhere and did not have permission to return to the house. *Id.* at 272, 277-78, 709 S.E.2d at 604, 607. On the night of the burglary, the defendant entered the house through a back window after climbing a step ladder. *Id.* The Court found that although the defendant had an ownership interest in the home, this was insufficient to establish the home as his residence because he had been put out of the home, took up residence elsewhere, and did not have permission to return. *Id.* at 277-78, 709 S.E.2d at 607. In its analysis, the Court analogized the facts of *Singley* to *State v. Coffin*, 331 S.C. 129, 502 S.E.2d 98 (1998) (holding a burglary defendant, who had previously lived with his girlfriend, did not have the right to possess the property burglarized where the defendant’s girlfriend “threw him out of the house” and refused to let him return). *Singley*, 392 S.C. at 275, 709 S.E.2d at 605-06. The

Court held the defendant did not have an expectation of peace and security in the dwelling at issue nor did he have custody or control of it, despite his ownership interest in the home. *Id.* at 277-78, 709 S.E.2d at 607.

Here, Petitioner failed to present evidence that he had a possessory interest in the mobile home at the time of burglary. Upon Rearick's passing, Jennifer became the possessor of the mobile home and held the possessory interest. Jennifer testified that Petitioner had previously lived with Rearick for a time but was kicked out months prior. (App. 197-98; 222; 226). Petitioner testified at the PCR hearing that during that time he was staying with Fleeman. (App. 364). Petitioner alleges Counsel should have investigated a tenancy Petitioner had with Rearick. However, any tenancy that might have existed was terminated by Rearick and was non-existent at the time of the burglary as evidenced by Jennifer's testimony that Rearick put Petitioner out. (App. 197-98).

Here, the evidence showed Petitioner did not have permission to be in the mobile home at nighttime. Rearick allowed Petitioner to return to the mobile home to work on renovations but not to reside. Petitioner's permission to be at the mobile home was limited to the daytime while working on renovations with others. Smith testified at trial that she took Petitioner to Rearick's house to work on renovations two (2) to four (4) times a week. (App. 231). Petitioner testified at the PCR hearing that he worked on renovations on the mobile home two (2) to three (3) times a week. (App. 344). Once the work was completed on a given day, Petitioner returned to live with Fleeman. (App. 364). Regardless of Petitioner's relationship with Rearick, once Rearick passed, the evidence showed Jennifer had possession of the mobile home and did not grant Petitioner permission to be there on the night of the burglary. (App. 205).

Here, Petitioner did not have custody or control of the mobile or an expectation of peace and security in the mobile home. Petitioner entered the mobile home after Maudlin climbed

through a back window and unlocked the front door. (App. 108; 131). Petitioner gained entry into the mobile home through a back window, similar to the defendant in *Singley*.

Petitioner alleges Counsel should have investigated his property in the mobile home, which would have revealed he was residing there. However, investigations into Petitioner's property would have only revealed that he had an interest in the *property* located in the mobile home, as opposed to a *possessory interest* in the mobile home itself. Further, Petitioner's claim that he entered the mobile home to retrieve his property is refuted by Fleeman's testimony at trial that Petitioner seemed more concerned about Rearick's guns than his own personal property. (App. 108; 113-14; 131-32). Petitioner's claim that tools located at the mobile home belonged to him is also refuted by Norris' testimony that the tools were locked in a shed that was padlocked and nailed shut. (App. 133; 142; 155). Counsel's decision not to investigate Petitioner's personal items at the residence was reasonable under prevailing professional norms because such investigation would not have established that Petitioner had a possessory interest in the mobile home.

Petitioner alleges Counsel should have interviewed Jessica Koons ("Koons"), who would have testified that Petitioner was staying with Rearick and performing renovations on the mobile home. However, at the PCR hearing, Counsel testified that she did not see anything in her file about Koons. (App. 395). The absence of notes about Koons suggests Petitioner did not mention her to Counsel. Thus, Counsel's conduct cannot be deemed as falling below prevailing professional norms where Petitioner failed to mention Koons to Counsel as a potential witness.

However, even if Counsel had interviewed Koons, the information obtained would not have benefited Petitioner as Koons was not present at the mobile home often and was uncertain about Petitioner's residency. Koons testified at the PCR hearing that she lived next door to Rearick and remembered seeing Petitioner and others working on remodeling at Rearick's home. (App.

374). Koon testified that Rearick told her *weeks before he passed* that Petitioner was living at the mobile home, but Koons testified that the length of Petitioner's residence never came up in that conversation. (App. 376; 378). Koons also testified that she was not present all the time and could not see what was happening at the mobile home. (App. 378). Koons did not have personal knowledge of the length of any living arrangement Petitioner may have had with Rearick. Thus, the information Koons would have provided would not have conclusively established Petitioner's residency in the mobile home at the time of the burglary.

Petitioner alleges Counsel was deficient for not investigating the mobile home itself, which would have revealed the back window was a common entry point into the mobile home due to renovations. However, this allegation is directly refuted by Jennifer's testimony at trial that she entered the home through the front door by using a key. (App. 185). The existence of a key to the front door suggests the back window was not a common entry point. Further, Jennifer's husband testified that renovations were being done to the kitchen, but the rest of the mobile home was "normal." (App. 185). Renovations to the kitchen of an otherwise "normal" mobile home would not have obstructed the front door as an entry point. Thus, Counsel's decision not to investigate other entry points in the mobile home was reasonable under prevailing professional norms because of the existence of a key and the front door as an accessible entry point.

None of the circumstances Petitioner avers Counsel should have investigated would have established that Petitioner was in possession of, had a reasonable expectation of privacy and security in, or custody and control of the mobile home. Instead, investigation into the circumstances Petitioner alleges would have led to the discovery of facts that were either immaterial, inconclusive, or moot. Thus, Counsel's performance was not deficient for not undertaking the investigations.

B. Petitioner failed to prove he was prejudiced by Counsel's decision not to investigate because Petitioner failed to present evidence of information that would have established a defense to burglary or negated any of the elements, and thus, would have changed the result of the trial.

Petitioner asserts an investigation into the circumstances of Petitioner's residency in the mobile home would have made the burglary a legal impossibility. However, Petitioner failed to present evidence of information from such investigations that would have either established a defense to burglary or negated any of the elements.

Petitioner cites *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014). However, Petitioner's case is distinguishable from *Walker*. In *Walker*, the Court determined a defendant was prejudiced by an attorney's failure to contact an alibi witness who would have testified that the defendant spent every weekend with the witness and, if true, would have made the defendant's involvement in the kidnapping and sexual assault crime impossible. *Id.* at 406, 756 S.E.2d at 147. The defendant denied knowledge of the crime and victim. *Id.* at 403-04, 756 S.E.2d at 145-46. The defendant told law enforcement that on the day of the crime, he spent the afternoon at a friend's house then returned to his girlfriend's home at night. *Id.* The defendant's attorney, at the PCR hearing, admitted that the girlfriend's name was contained in her notes, but the attorney did not follow up with the girlfriend after a failed attempt to contact her. *Id.* The PCR court found credible the girlfriend's testified that she and the defendant spent every weekend together while dating, and she would have testified to that fact at trial. *Id.* In its analysis, the Court analogized the facts of *Walker* to *Glover v. State*, 318 S.C. 496, 458 S.E.2d 538 (1995) (holding trial counsel was deficient for failing to contact an alibi witness who would have testified that the defendant was out of state at the time of the crime, making the crime a legal impossibility). *Walker*, 407 S.C. at 406, 756 S.E.2d at 147. The Court determined there was a reasonable probability that the result of the

defendant's trial would have been different with the girlfriend's alibi testimony. *Id.* at 406-07, 756 S.E.2d at 147.

Here, the investigations Petitioner avers Counsel should have taken would not have conclusively established Petitioner had possession of, a reasonable expectation of privacy, and custody and control of the mobile home *at the time of burglary*. Further, law enforcement caught Petitioner in the act of committing the burglary at the mobile home. (App. 152-68). Petitioner failed to show a reasonable probability that the result of the trial would have been different if Counsel had interviewed Koons, taken pictures of the mobile home, offered testimony from Cole and Tony, or investigated an alleged tenancy agreement because Petitioner did not introduce evidence showing the information would have provided a defense to burglary or negated any element. Accordingly, the PCR court correctly found Counsel was not ineffective.

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CONCLUSION

Based on the foregoing argument, the PCR court correctly found trial counsel was not ineffective for not calling witnesses to testify to Petitioner's residency and for not undertaking investigations that would not have changed the result of the trial. Accordingly, this Court should deny Petitioner's petition for a writ of certiorari.

Respectfully submitted,



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