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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Greenville County Court of Common Pleas
The Honorable G.D. Morgan, Jr., Circuit Court Judge

JAMES MICHAEL JOHNSON, #340206,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

Appellate Case No. 2023-001191

RETURN IN OPPOSITION TO MOTION FOR APPEAL BOND

The State's petition challenging the lower court's grant of post-conviction relief is currently pending in this Court. The PCR court granted a new trial on Johnson's two charges of murder and two accompanying counts of possession of a weapon during the commission of a violent crime. The new trial relief granted is stayed as a result of the timely notice of appeal. *See* Rule 241(a), SCACR. Respondent, James Michael Johnson, through his counsel, has now filed a motion for an appeal bond pursuant to Rule 243(k), SCACR. The State opposes the motion and would initially note that the petition and return have been filed and the matter is currently being considered. Further, and critically, the State has outlined the basis for the appeal in its petition with specific legal support which supports not only a high probability that the petition may be granted, but also that ultimately, relief may be reversed. The State also submits that while Respondent generally contends that the question presented is not meritorious (which the State maintains is not the case), he has further failed to convincingly argue the remaining factors in Rule 243(k), SCACR

to support the granting of his motion. Notably, without question, the crimes are serious – Respondent's jury convicted him of two counts of murder. The State has a substantial concern over bail in such circumstances. Yet, Johnson's motion fails to address the seriousness of the offenses and the dangers of release. When the factors are properly considered in the circumstances present here, the motion should be denied.

In specific support of its position, the State would respectfully show the Court:

FACTORS TO CONSIDER

An appellate court should consider the following factors in evaluating a motion for bail pending PCR appeal: (1) the probability of success on appeal; (2) the nature of the relief the PCR applicant will receive if successful; (3) the seriousness of the criminal offense committed; (4) the danger the applicant may pose to the community if he or she is released; (5) the likelihood the applicant may flee if released; and (6) the character and circumstances of the applicant. Rule 243(k), SCACR.

RESPONDENT'S MOTION

In his motion, Respondent argues that the State's issue is not strong because it depends upon a reversal of a credibility ruling; that he has been incarcerated without incident for 8 years; has taken numerous educational courses while incarcerated in order to better himself; has significant ties to Greenville County; and will reside with his mother in Greenville if released.

ARGUMENT IN OPPOSITION

"The authority to grant bail will be exercised with caution and only in exceptional cases." Rule 243(k), SCACR. This Court has long recognized "[a]fter conviction … the matter of granting bail is not mandatory, but discretionary." *Nichols v. Patterson*, 202 S.C. 352, 25 S.E.2d 155, 155 (1943). Further, consideration of bail post-conviction should be approached with "extreme

caution." *Id.* (citing *State v. Satterwhite*, 20 S.C. 536 (1884)). Much different from a pre-trial status request for bail, "after conviction the law presumes" the movant "to be guilty." *Nichols,* at 155. Here, the presumption must be that Respondent is guilty of the two counts of murder as the jury found along with the weapon charges. Further, Respondent's argument that he has an alibi based on his post-conviction evidence is flawed as a matter of law. Further still, the evidence presented at trial, which has not been set aside or found insufficient, solidly supports the jury's verdict.

Factual Summary of the Trial Evidence

On April 3, 2011, around 10:00 am, fire department personnel responded to victim Christopher Porcoro's home. Smoke was coming from the kitchen area of the small duplex. A propane canister had been placed in the oven and other evidence showed an intent to have the fire spread. (App., 740-745).[1] Firemen saw Chris's body on a couch in the living area. While attempting to get to Chris for possible aid, they discovered the second victim, Amber Daniel. (App., at 746-747). What became apparent was that Chris and Amber had been brutally murdered. Chris sustained three gunshot wounds – one to the back of head, one behind his right ear, and one to the cheek. (App., at 800-801). Ms. Daniel suffered a severe beating to the head, resulting in a "caved in" portion of the skull, and 7 gunshot wounds to her body, including a close range shot just under her nose. (App., at 805-810). From the wounds, the pathologist was able to determine that there were 2 different weapons of different calibers used. (App., at 817-819).

Respondent Johnson's co-conspirators, Nick Granados and Scott Lowe, were charged with murder, but pled guilty to manslaughter. Lowe testified against Johnson at trial. Johnson lived a few miles from Chris and Amber. All three conspirators knew Chris from buying or selling drugs,

[1] These references are to the PCR Appendix on file with the Court.

and Lowe and Johnson had dated Amber. (App., at 863-865 and 870-872). Johnson lived just a few minutes from Chris. (App., at 860). Lowe had lost his jeep and personal possessions in the jeep when the jeep was seized as a mobile meth lab. (App., at 867). In need of money, Lowe agreed to join with Johnson to rob Chris, a dealer known to have drugs and money at his home. (App., at 867-869 and 876). They selected a time, Sunday morning, when they thought Chris would be asleep. Granados was to be "the inside man" to help with entry to Chris's home. (App., at 879 and 882). Lowe testified that he gave Johnson a .380 to use. (App., at 885). Lowe admitted to shooting Chris and Amber. (App., at 873-874). He had a .38. (App., at 884). Lowe testified that Johnson beat and shot Amber. (App., at 890). Lowe testified they wanted to make it look like a meth lab explosion in the home. (App. 892). Lowe testified that he, Johnson, and Grandados divided the drugs and money (approximately $3,000) that they took from Chris's home. (App., at 892 and 895). He testified that he gave his gun to Granados to take to North Carolina because it was the murder weapon. (App., at 895-896; *see also* 874 and 901). Granados was arrested in North Carolina after firing a weapon in a home. Officers located a .38 and a .22., the .38 being Lowe's weapon. (App., at 844 and 854). Lowe testified that Johnson threw his gun in a pond. (App., at 884).

After the murder, according to Lowe, Johnson "said that he had somebody for his alibi" and that "he was going to get his girlfriend to vouch for him." (App., at 898). However, officers interviewed Johnson's girlfriend, Jordan Gary, but she stated she was not with Johnson at the time of the murders, though she recalled that Lowe was with him when Jordan left, several hours before the murder. (App., at 1041-1045). Other evidence also connected Johnson to Lowe. Shortly after the murder, Amber's father received a call from a number associated with Johnson, but received a text indicating it was "Scott," a call Lowe admitted to making. (App., at 984-988 and 965).

Further, Johnson had been incarcerated with Billy Purham who testified that Johnson admitted: (1) that he was involved with the murders and that "it was a robbery went bad and that after the robbery they tried to burn the house," (2) that "he had a girl that was supposed to lie" to provide him with alibi; (3) that Scott Lowe and "Nick somebody" were involved; (4) "that Scott was the shooter and he had some guy inside the house that was supposed to let him in and stuff"; (5) that they "[t]hrew one gun in a pond by an apartment complex on Wade Hampton and some guy took them to North Carolina and get rid of them but he ended up getting arrested with them." (App., at 1069-1070).

As asserted above, the jury convicted after hearing the evidence.

Summary of Procedural History

A Greenville County grand jury indicted Johnson in March 2014 for two counts of murder and he was also charged with two counts of possession of a weapon during the commission of a violent crime. (App., at 1136, 2014-GS-23-2201 and 2203).[2] Johnson was tried by a jury on July 13-16, 2015. Zachary D. Ellis, Esq., represented him on the charges. The Honorable J. Derham Cole presided. The jury convicted as charged. Judge Cole sentenced Johnson to 30 years imprisonment for each murder, and 5 years on each weapons charge, all concurrent. (App., at 1140). Though he timely appealed, Johnson, through counsel, moved to dismiss the direct appeal prior to briefing. (App., at 1133). The Court of Appeals dismissed the appeal on February 23, 2017, and issued the remittitur on March 13, 2017. (App., at 1134).

Johnson, again through counsel, filed an application for post-conviction relief on December 4, 2017, and raised multiple issues, one that alleged counsel should have investigated

[2] At trial, the solicitor advised that in Indictment 2203, the possession of a weapon charge was by direct presentment. (App., at 643).

and obtained cell phone records for favorable evidence to use at trial. (*See* App., at 3). Robert C. Childs, III, Esq., and J. Falkner Wilkes, Esq., represented him in the action. An evidentiary hearing on the allegations was held in Greenville County January 31, 2023, through February 2, 2023, before the Honorable G.D. Morgan, Jr. (App., at 27). At the conclusion of the hearing, Judge Morgan took the matter under advisement and granted the parties' joint request that they be allowed to submit post-hearing briefs, which the parties did. (*See* App., at 601; 573 and 588). By order filed on June 27, 2023, Judge Morgan denied relief on all grounds apart from one: "Applicant's claim that trial counsel was constitutionally ineffective for failing to present evidence in support of the defense of alibi." (*See* App., at 602-607). The State has appealed and presented the following question to this Court:

> Did the PCR court err in finding defense counsel was deficient in representation, and that his deficiency prejudiced Johnson, based upon finding "exculpatory" value in Johnson's cell phone records such as would support the legal requirements of alibi when those records do not show any actual use of the phone, much less use by Johnson, in a different location from the murder?

Analysis of Motion Argument and General Factors

Respondent argues that the petition is not likely meritorious as the question presented demonstrates mere disagreement in fact-finding. He is wrong. This Court's precedent provides that there must be probative evidence to support the findings, consequently, it "will not uphold the findings of a PCR court if no probative evidence supports those findings." *Rutland v. State*, 415 S.C. 570, 576, 785 S.E.2d 350, 353 (2016) (citing *Holland v. State,* 322 S.C. 111, 113, 470 S.E.2d 378, 379 (1996)). Essentially, the State submits that the PCR judge committed reversible error in two ways. First, the factual findings that the phone records offered during the PCR hearing are exculpatory as they support an alibi defense is not supported by the testimony and is controlled by an error of law – the PCR judge critically failed to consider the facts presented on cell phone

location data in context of the legal requirements of alibi. Second, the PCR judge failed to give deference to counsel's strategic reasons both for not utilizing the phone records, and in stopping investigation into Johnson's phone records. Specifically, counsel expressed sound and reasonable strategic reasons to avoid offering the cell phone records including the fact that records linked Respondent to the co-defendant in the case. When the facts are not construed beyond the fair weight of their worth as demonstrated by the evidence, and when the facts are considered in light of the proper controlling law, there could be no basis to support a grant of relief. Thus, the State seeks reversal of the factually and legally erroneous decision granting relief.

As to alibi, this Court has explained:

> The literal significance of the word "alibi" is "elsewhere"; as used in criminal law, it indicates that line of proof by which an accused undertakes to show that because he was not at the scene of the time at the time of its commission, having been at another place at the time, he could not have committed the crime. In order 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. It is not enough for the accused to say that he was not at the scene and must therefore have been elsewhere. The latter statement does not constitute an alibi. And since an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.

State v. Baker, 411 S.C. 583, 591, 769 S.E.2d 860, 864-65 (2015) (quoting *State v. Robbins*, 275 S.C. 373, 271 S.E.2d 319 (1980)).

In his PCR action, Respondent Johnson claimed that counsel failed to investigate and present exculpatory evidence contained in his phone records, specifically that "Applicant's phone was sending and receiving texts throughout the day of the murders including texts at 8:52, 9:03, 9:14, 9:33, 9:56, 10:07, and 10:46 a.m." (*See* App., at 603). Attempting to carry his burden of proof, he presented Ben Levitan who was qualified to testify as an expert as follows:

> …the witness is qualified as an expert due to his education, his work experience and his professional experience in the area of cell phone technology to include the interpretation of data relating to *location of the cell phone used*.

(App., at 69, lines 8-13 and 74) (emphasis added). The expert testified, consistent with the reason he was offered, *on the location of the cell phone*. He candidly testified "I cannot say he was in this area" around his home, only that "[h]is phone records are consistent with him in this area." (App., at 84, lines 8-10; *see also* App., at 93, line 23- 94, line 2, agreeing that "Mr. Johnson's phone on the day of the murder" was near "his local tower" and not the tower near the murder). Yet, the murder scene was only 3 miles from the home – an estimated travel time, by car, of six minutes. (*See* App., at 104).

Johnson also presented his mother and father at the PCR hearing. The mother testified that she saw Johnson asleep on the couch (which was, incidentally, contrary to Johnson's own statement and attempted alibi) and said she "never saw" Johnson "leave the house that day." (App., at 118-119; *see also* App., at 605). The father testified that he saw Respondent asleep on the couch (again contrary to Respondent's own statement) around 9:30 to 9:45. (App., 129). Both testified that they were prepared to testify at trial, but were, not called. (App., at 124-126 and 133).

Respondent, when asked at the PCR hearing if he was aware that he had been using his cell phone at approximately 9:56 a.m. on April 3, 2011, responded, somewhat curiously, "I am now." (App., at 146, lines 9-14). He admitted being arrested for obstruction of justice because his original alibi provided in his statement to investigators that he had been with girlfriend Jordan Gary at the time of the murders was false. (App., at 150-151). He also, and again somewhat curiously, testified that he "wouldn't think" that he would be able to participate in the murder, the burning of the home and be back at his house in approximately 23 minutes. (App., at 155). He testified that he could not recall the "details" of his discussions with counsel about phone records, but asserted

that he "would have pressed the issue *regardless of the phone records* because I didn't have anything to do" with the murders. (App., at 158). However, he did not testify at trial, but affirmatively waived the opportunity. (App., at 1077).

It is undisputed that counsel knew what Johnson's parents would say, and counsel did not call the parents. (App., at 167 and 173-174). Counsel testified that Johnson asserted "that Jordan Gary would vouch for where he was as well" and "[p]ossibly Georgia Bowers." (App., at 174 lines 4-8). Counsel also testified that "in speaking to both of his parents on numerous occasions and also … my client … if I recall correctly there was concern that the times when the murder could have occurred that they were not able to positively place him where he would not have been at the murder scene." (App., at 245). Counsel maintained that due to his discussions with Johnson and his parents both before and during trial, "the decision was made not to" call the parents as witnesses. (App., at 293). Counsel testified, though inconsistent, Johnson generally maintained he was at his house. (App., at 294-295).

Counsel also testified that he had copies of Johnson's cell phone records. (App., at 174 and 178). He testified that he and his staff did look at the records but he was not confident that he could show cell location away from the crime scene. (App., at 180-181, 208 and 210). The State did not attempt to use the records in their case, (App., at 108); however, counsel's "concern was that … the records did show that he had had – he'd had numerous communications with Scott Lowe surrounding the incident," (App., at 209, lines 20-22). Counsel testified that his "hope was that we could minimize any use of the cell phone records with any importance the jury would attach to the cell phone records to not expose, you know, James anymore than necessary to … show then that he was in cahoots with Scott Lowe." (App., at 209 line 24 – p. 210, line 3). Counsel did not fully agree that the information could be useful (only that it "possibly" could be so), and

testified to his "understanding" that many "factors … play into" location mapping, and readily admitted he did not retain an expert. (App., at 229). Counsel sagely testified, "Just because his cell phone is somewhere doesn't mean that he is." (App., at 246, lines 3-4). Further, in his testimony during cross-examination by the State, counsel testified that his understanding was the tower closest to the phone "may not be the tower it was pinging off of." (App., at 266, lines 1-5).

Counsel later testified again that he was "primarily concerned with whether it showed collusion, or corroboration, communication, et cetera between" Johnson and Lowe. (App., at 229). He added there were "other factors" surrounding retaining an expert, and asserted he had "no ability to afford one given the parameters I had for the case." (App., at 229). He explained that during many conversations with Johnson and his parents that he "tried to explore possible alibis." (App., at 251). Counsel testified that Johnson had provided "contradictory statements … in the past about his location that morning," and that he ultimately did not believe there was credible evidence of alibi. (App., at 252-258). Counsel testified that his argument that was supported by the evidence was "there was no evidence to tie Mr. Johnson to this incident in any way outside of only Scott's Lowe's statement," nor forensic evidence or witnesses other than Lowe, tied him to the crime. (App., at 282). He recalled that the phone records would have shown "the two of them talked something like 16 times in a 24 hour or so period surrounding the murder…." (App., at 284, line 24 – 285, line 1).

Senior Special Agent Anthony Gentile of the South Carolina Law Enforcement Division State Surveillance and Intelligence Unit, testified "as an expert in cell record analysis and interpretation and cell site location analysis…." (App., at 321-325). The agent went over accepted concepts in the field of cell phone information analysis, including that data information should not be relied upon for location analysis, (App., at 331 and 339); and, that phones do "not always" use

"the closest tower" but may connect based upon signal strength, (App., at 335). He opined that Johnson's records support connection with the tower closest to his home, but that was "[n]ot necessarily … the closest tower, but it was the tower that provided the best strength for the transactions." (App., at 340). It was not possible to determine just on the records. (App., at 341). Notably, the agent testified that nothing in the records showed whether a text message was opened or read, and also that the text messages round the relevant time, from 9:14 a.m. to 10:46 a.m. showed *incoming* text messages only, and no *outgoing* text to even support someone actively using the phone or that the phone was on. (*See* App., at 343-344). During that time frame, there was also a series of calls that were not answered; the agent agreed that "after 3:45 am the first call that is answered on the phone is one at 2:19 pm." (App. pp. 347-348). In critical part, the agent testified he could not make any "conclusions about whether anyone was using the phone between 5:37 am and 2:19 pm," though he could opine that "the fact that it's all incoming does suggest that there were no transactions *initiated by this device.*" (App., at 353) (emphasis added). Further, location question aside, as to data, there were no exchanges between 6:05 am and 4:59 pm. (App., at 354).

Mr. Levitan was recalled after the agent's testimony. Though there was some disagreement on what financial records may show as usage, Mr. Levitan conceded that the messages could have been received as indicated, but the phone could have been in an empty house near the cell tower. (App., at 370).

The PCR court found counsel was ineffective in failing to obtain an expert to interpret and explain the cell phone location data. (App., at 606). The PCR court found because he was "unaware of its exculpatory value," counsel could not have made a reasonable strategic decision on possible use of the data, and this established deficient performance under *Strickland*. Multiple errors control the PCR court's ruling, but one error dominates – nothing shows an impossibility for

Johnson to have been involved in the murder. In short, the judge erred in finding "exculpatory value" or any support for an actual alibi. *Baker, supra* ("a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all"). The law of alibi is crucial in determining whether the PCR decision should stand. As to deficient performance, it goes to whether counsel exercised reasonable judgment in his assessment. Further, to find the required prejudice, the evidence must qualify as supportive of alibi to earn the "exculpatory" label placed upon it. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) ("The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision."). And other more narrow findings are also unsupported, as set out in the petition, but this point certainly supports the granting of the petition and narrows the possibility that the grant of relief can be upheld.

Further, the PCR court's finding that counsel did not understand the records, (*see* App., at 606), is not supported. Counsel testified that he did not think he could use the records for an alibi/exculpatory purpose. Further, that testimony must be consider in light of the totality of the representation. Counsel interviewed the parents but made a strategic decision that they should not be called. That decision was informed and reasonable. Moreover, counsel was not incorrect that the records did not show exculpatory evidence. By the end of the hearing, both Johnson's expert and the State's expert agreed that the phone could have been receiving messages in an empty house. And, for purposes of determining whether counsel was reasonable in his representation, as demonstrated above, the State's expert supported counsel's understanding and belief that the tower location may not be dispositive. That Johnson could find another expert to disagree does not show ineffective assistance of counsel. Simply, nothing in the record indicates Johnson was actively using his phone away from the murder scene. The records are not exculpatory evidence – they in

fact could tie Respondent to Lowe even further. Based on the evidence presented in the PCR hearing, counsel reasonably decided not to investigate further or use the evidence.

To the extent the offered evidence could be considered mildly (and speculatively) supportive of alibi, Johnson, for mostly the same reasons, cannot show deficient performance, failed to show a reasonable probability of a different result. *Strickland*, at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). The PCR judge's ruling on prejudice is inexplicably summary. (*See* App., at 607). Nothing in the ruling shows a detailed analysis of what is challenged in the trial evidence such that the absence of the phone records could "undermine confidence in the outcome." *Strickland*, at 694. However, to the extent the prejudice analysis depends solely on the finding of "exculpatory nature," as demonstrated above, that finding is without probative evidence in support. Critically, the phone records do not prove that any person was actively operating the phone during the relevant time frame – Johnson included. The phone records cannot show that it was physically impossible for him to have committed the crimes. Thus, they do show alibi. Johnson failed in his *Strickland* burden.

For all the foregoing reasons, the collective circumstances of the case and basis for the appeal—when properly considered—do not warrant the extraordinary relief of a grant of an appeal bond.

Further, and notably, the jury – representative of the community in which Johnson seeks to be released into – found the evidence supported that he was guilty not just of one but two murders. Any new trial would again have this solid evidence. And, as noted above, these convictions give rise to a presumption of guilt that carries into consideration of the motion. *Nichols, supra.* Furthermore, while the educational achievements listed in his motion are good for what they are, they do not reflect on dangerousness and flight risk, and his SCDC record belies the

worth of those courses taken in this context. That record shows 3 weapon charges, an escape-related charge, and drug use. (Attachment 1). Further, as noted above, the trial evidence shows that Respondent gave false information in the investigation to evade capture. Again, Respondent fails to persuasively argue for the extraordinary grant of bail at this level. This Court should exercise the extreme caution warranted by the circumstances and deny the motion.

As a last point, although the State firmly believes this Court should deny the motion, should the Court disagree, this Court should impose reasonable, but firm, bond conditions to protect the community. *See generally* Rule 243(k), SCACR ("If bail is granted, the court may require the posting of a bond and impose other conditions."). Home detention and strict monitoring, at Respondent's expense, would be reasonable requirements in these circumstances.

CONCLUSION

For all the foregoing reasons, the motion should be denied.

Respectfully submitted,

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