

STATE OF SOUTH CAROLINA

SUPREME COURT OF
SOUTH CAROLINA

RECEIVED
OCT 18 2024

Nathaniel Antron Hunter #372378.

Petitioner,

v.

State of South Carolina,

Respondent.

APPELLATE CASE NO:

2023-001611

PETITIONER'S PRO SE RESPONSE

TO JOHNSON PETITION

This matter comes before the Supreme Court of South Carolina by way of Petitioner's Pro Se Response to Ashley A. McMahan's, Esquire, Johnson Petition for Writ of Certiorari due to the PCR Court's Order of Dismissal of Petitioner's Post-Conviction-Relief application on October 11th, 2023. Petitioner was present at the hearing and was represented by Ashley A. McMahan, Esquire, Zachary W. Jones represented Respondent. The Honorable Kristi F. Curtis presided. Petitioner will first explain the procedural irregularities that took place in his PCR proceedings, secondly Petitioner will present the meritorious issues that Ms. McMahan should have raised that are more meritorious than the issue she raised in her Johnson Petition.

Now comes the Petitioner, to submit his Pro Se Response to Ashley McMahan's, Esquire, Johnson Petition to the Supreme Court of South Carolina. In Petitioner's Post-Conviction-Relief proceedings, the following took place before, during, and after Petitioner's PCR evidentiary hearings. First and foremost, I respectfully requested Counsel McMahan to hire a Touch-DNA expert to explain to the PCR court that Touch-DNA evidence is not conclusive evidence of guilt when there is a reasonable explanation for its presence. Also, the Touch-DNA expert could have explained that Touch-DNA evidence is not DNA evidence demonstrating guilt such as blood, saliva, or semen. However, Counsel McMahan did not hire a Touch-DNA expert to testify at the evidentiary hearing which severely prejudiced Petitioner based upon the fact that Petitioner's Touch-DNA on a cap was the "key" piece of evidence the State used to arrest, indict, and convict Petitioner.

The District Court has repeatedly held that a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Petitioner will possibly be submitting an affidavit from Dr. Robert Bennett, who is a Touch-DNA expert, if this Court will grant Petitioner's Motion for Discovery and Funding, who will explain in his affidavit what he would have testified to had he been hired. Secondly, I requested Counsel McMahan to allow me to listen to the victim's recorded interview with Investigator Thomas Griffith at the hospital to determine if there was exculpatory evidence in favor of Petitioner on the recording. However, Counsel McMahan refused to let me hear the recording. Had Counsel McMahan done so, there is a reasonable probability the victim would have described the suspect as a light-skinned man which was the initial description of the suspect that was relayed to Investigator Thomas Griffith by Sgt. Libertini who was the first investigator on the scene. Counsel McMahan's inadequate and incompetent representation of Petitioner violated the Rules of Professional Conduct Rule 1.1 (Lawyer shall provide competent representation to client) Rule 1.3 (Lawyer shall act with reasonable diligence and promptness in representing client). Counsel McMahan's inadequate representation of Petitioner falls below the standards set forth in Strickland v. Washington 466 U.S. 668, 686 (1984). In the Defense Function General Standards, Standard 4-5.1 Advising the Accused (a) After informing himself or herself fully on the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome. Counsel McMahan's failure to do a brief and proposed order to support Petitioner's arguments severely prejudiced Petitioner because Petitioner could not show the PCR court the facts of the case that supported Petitioner's claims as well as the witnesses, exhibits, and any additional testimony that would have supported Petitioner's claims.

The meritorious claims that Counsel McMahan should have raised that were requested by Petitioner for her to raise were not. Petitioner attached a letter that he wrote to Counsel McMahan dated February 22, 2023 to his Motion to Relieve Counsel that was filed with the Supreme Court of South Carolina on February 26th, 2024. Petitioner requested Counsel McMahan to raise the following meritorious issues in his amended PCR application:

- 1.) Applicant's 5th Amendment Right to a Fair Trial and his 14th Amendment Right to Due Process was violated when the trial court instructed both counsel's to withhold the victim's identification of Applicant at the Jackson v. Denno hearing from the jury.
- 2.) Applicant's 5th and 14th Amendment rights were violated when the State failed to correct false testimony at Applicant's trial when the victim testified.
- 3.) Trial counsel was ineffective for failing to request the photo-lineup of Applicant to be included in Applicant's discovery.

- 4.) Applicant's 5th and 14th Amendment Rights were violated when the State failed to disclose to Applicant the photo-lineup and the victim's inability to identify Applicant in the photo-lineup which was exculpatory evidence.
- 5.) Trial counsel was ineffective for failing to call a Touch-DNA expert at trial to explain the complicated concepts of Touch-DNA.

The following issues were reworded by Counsel McMahan in Petitioner's amended PCR application, please see Petitioner's amended PCR application page 1, section i ("While the applicant was warned about the dangers of testifying, he has never warned that his voice would be used against him during a pre-trial hearing"). Petitioner was never warned about the dangers of testifying in the presence of the victim at Petitioner's Jackson v. Denno hearing, which resulted in the victim's irreparable misidentification of Petitioner by his eyes and voice. "The victim identified the Applicant by his eyes and voice; counsel failed to object when the prosecutor asked her if she actually identified him while he was sitting at the table with trial counsel." This issue is also reworded because trial counsel Jason Chehoski asked the victim did she identify me while I was sitting at the table with trial counsel, not the prosecutor. See trial transcript page 363, lines 16-23 and page 364, lines 1-2. On page 3 section (h) of Petitioner's amended PCR application Counsel McMahan amended the following issue, Trial counsel were ineffective for failing to inform Applicant of his 5th Amendment right against self-incrimination and the consequences of exercising or waiving those rights. Please see Petitioner's Motion to Relieve Counsel that was filed in the Supreme Court on February 26, 2024, and the letter attached in which Petitioner requested Counsel McMahan to raise the following issue: Trial counsel was ineffective for failing to inform Applicant of his 5th Amendment right and the consequences of exercising and waiver of those rights, depriving Applicant of his Fifth Amendment right to counsel and his Fourteenth Amendment right to due process.

The following claims were frivolous claims that Counsel McMahan raised at the PCR hearing. (See amended PCR application.)

Page 1(a) - Failure to object to the jury pool not being an adequate cross-section of the residents of Lexington County. A jury pool must represent a cross-section of the Applicant's peers.

(b) - Failure to request sequestration of the victim during the Jackson v. Denno hearing. (Counsel McMahan failed to acknowledge or research S.C. Code Ann. § 16-3-1550 (B) which clearly states "a person must not be sequestered from a proceeding adjudicating an offense of which he was a victim.")

(d) - Trial counsel did not adequately move to quash Applicant's statement. (Counsel McMahan did not properly investigate this issue. Had she done so she would have discovered that Petitioner's trial counsel did adequately move to quash the statement by requesting a Jackson v. Denno hearing as well as presenting to the trial court the fact that Petitioner's alleged second statement was given after Petitioner had requested the public defender represent him.)

Page 2(f) - Trial counsel's failure to conduct sufficient pre-trial research and investigation to adequately evaluate and challenge the State's in-court identification of the Applicant. State v. Collier 421 S.C. 436 (2017). The PCR court ruled that the Collier case was published after Petitioner's trial and that Petitioner's trial counsel could not have relied on Collier to challenge the State's pre-trial in-court identification of Applicant. Counsel McMahan did not research the Collier case to determine if that case would have supported Petitioner's claim.

Page 3(k) - Trial counsel did not object to admitting the State's DNA witness as an expert. There was no reason for this issue to be raised whereas Counsel McMahan never explained why the qualification of the State's DNA expert was erroneous.

(n) - Failed to argue at closing that it was unbelievable that the victim could identify the Applicant after more than three years. Petitioner's trial counsel argued this in closing. See trial transcript page 1032, lines 2-4, page 1032, line 22, page 1033, line 4, and page 1033, lines 16-18. Once again, Counsel McMahan failed to read Petitioner's trial transcript, which resulted in Petitioner being denied on this claim as well.

(o) - Failed to argue in closing that there could be multiple guns that could match, not just the ones in evidence. This issue was also frivolous based upon the fact that Petitioner's trial counsel did argue, at closing, that multiple guns could match. See trial transcript page 1051, lines 11-17, however, Counsel McMahan failed to research and read Petitioner's trial transcript.

(p) - Failure to object to the trial court's instructions that stated "inferred malice may also arise when the deed is done with a deadly weapon." The case law that Counsel McMahan relied on was State v. Belcher 385 S.C. 597 (2009) and State v. Burdette 427 S.C. 490 (2019) for this issue; however, the holdings in both of these cases clearly state that inferred malice cannot be challenged in Post-Conviction-Relief proceedings.

Petitioner did not receive his amended PCR application until the morning of the PCR hearing when he arrived at the courthouse. The fact that Petitioner received his amended PCR application so late was highly prejudicial because Petitioner did not have time to go over his amended PCR application with Counsel McMahan to ensure that the case law was

supportive, the issues were non-frivolous, and that the issues were not refuted by the record. If Petitioner would have had time to go over his amended PCR application with Counsel McMahan, Petitioner would have been afforded the opportunity to correct or not raise the amended claims, and in all reasonable probability, Petitioner would have been granted relief in his Post-Conviction-Relief proceedings.

On the morning of the PCR hearing, Petitioner gave Counsel McMahan his Memorandum of Law in Support of his amended Post-Conviction-Relief Application to submit to the PCR Court and to be filed with the Lexington County Clerk of Court. However, Counsel McMahan filed Petitioner's Memorandum of Law as an exhibit. All of the problems aforementioned in this Pro, Se Response forced me to request a continuance from the PCR court which was denied, and I was forced to go forward with the PCR hearing which was a direct violation of my Fifth Amendment Right to a Fair Trial and my Fourteenth Amendment Right to Due Process. For the record to be clear, Petitioner nor Petitioner's PCR counsel have never requested a continuance in Petitioner's Post-Conviction-Relief proceedings prior to Petitioner's PCR hearing. After Petitioner's request for a continuance was denied, Petitioner requested that Counsel McMahan be relieved as his counsel due to numerous amounts of conflict between Petitioner and Counsel McMahan before Petitioner's PCR hearing proceeded. The PCR court denied Petitioner's request for a continuance and deprived Petitioner of having a fair bite at the apple in his Post-Conviction-Relief proceedings. Ms. McMahan did not present any documentation in support of any of Petitioner's meritorious issues . After all of the testimony at the PCR hearing the PCR court gave the Attorney General's Office thirty days to review Petitioner's Memorandum of Law In Support of his amended PCR application. When the hearing concluded I wrote Ms. McMahan letters respectfully requesting her to do a Rule 59(e) Motion to Amend and a proposed order if the issues that were raised were not ruled upon or if the PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80. Ms. McMahan wrote me back stating "I'm not going to make the judge angry by preparing a proposed order if she doesn't ask me to do one. That letter was filed as an attachment to Petitioner's Motion to Relieve Counsel that was filed with the Supreme Court of South Carolina as an attachment on February 26th 2024. If Ms. McMahan would have submitted a proposed order and filed a Rule 59 (e) Motion to Amend there is a reasonable probability Petitioner would have been granted relief in his PCR proceedings. Petitioner is now respectfully requesting this Court to make a ruling on four issues that were not ruled upon in Petitioner's Memorandum of Law pursuant to Fishburne v. State 427 S.C. 505. (2019), (holding, the Supreme Court held that remand was required for trial court to make Findings of Fact and Conclusions of Law on duly raised PCR claim of ineffective assistance of

counsel, even though defendant did not file a motion for ruling on claim). The four issues that were not ruled upon at all are as follows:

Issue#3: Applicant's Fifth Amendment Right to a Fair Trial and his Fourteenth Amendment Right to Due Process was violated when the trial court instructed both counsels to withhold the victim's identification of Applicant at the Jackson v Denno hearing from the jury.

Issue#4: Applicant's Fifth and Fourteenth Amendment Rights were violated when the State failed to correct false testimony at Applicant's trial when the victim testified.

Issue#6: The solicitor engaged in prosecutorial misconduct when the State referenced to the jury items that were not in evidence during closing arguments, thus misleading the jury.

Issue #7: Section (2) Prosecutor withheld exculpatory.

Ms. McMahan was inadequate when she failed to do a Rule 59(e) Motion to Amend and a proposed order on my behalf, also, the PCR Court was in error when the PCR court failed to make Findings of Fact and Conclusions of Law in its dismissal of my application for post-conviction-relief pursuant to Pruitt v. State 423 S.E.2d 127, 128 (1992), holding, (vacating and remanding the PCR court's order, despite lack of Rule 59(e) motion to address the failure of many PCR orders to address all the issues raised) and McCray v. State 408, S.E.2d 241 (1991), holding, (reversing order denying applicant relief and remanding for a new PCR hearing where the PCR'S court order failed to make specific findings of fact and conclusions of law sufficient for appellate review.

The following issues are the meritorious issues that Pro Se Petitioner is raising to this Court in his Response to Counsel McMahan's Johnson Petition:

M: Ownership of the nylon cap:

The PCR Court erred and did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann 17-27-80. At trial, Investigator Thomas Griffin testified that, when he initially interviewed Petitioner, Petitioner stated he had recently given away some of his clothes to a thrift store and some drug users and that the clothes included hoodies, (trial transcript page 551, lines 17-22). The PCR court ruled in it's Order of Dismissal that "the only evidence at trial that would have supported this argument was Applicant's self-serving statement to law enforcement, made after he had been confronted with the DNA evidence against him." That was error. Petitioner's trial counsel was ineffective for failing to hire a Touch-DNA expert to testify on Petitioner's behalf in reference to the Touch DNA evidence. If Petitioner's trial counsel would have hired a Touch-DNA expert Petitioner could have showed the jury that Petitioner's Touch-DNA on the cap does not prove that Petitioner was the last person to wear the cap. The Touch-DNA on the cap was a mixture of at least two individuals with Petitioner being the major contributor and the minor contributor was not enough for a reliable interpretation (trial transcript page 935, lines 11-19). Petitioner's trial counsel 's ineffectiveness prejudiced Petitioner because the jury was misled and not given the true facts about Petitioner's touch DNA being on the cap at the time of the incident. The jury was under the impression that because Petitioner's Touch-DNA was on the cap he must have been the last person to wear it and the person who left it at the crime scene. A Touch-DNA expert could have explained to the jury that no credible physical evidence indicated that Petitioner was wearing the cap at the time of the incident. The cap was the "key" piece of evidence in Petitioner's case and the only piece of evidence linking Petitioner to the incident at the time of the crime. The Supreme Court has repeatedly held a PCR Applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial. Petitioner was not afforded the opportunity for the Touch DNA expert to testify on his behalf at the PCR hearing due to Ms. McMahan's inadequate representation of him in his PCR proceedings. In U.S. v. Bonner 2011 648 F.3d 209 (4th Circuit), the DNA expert testified that he could not conclude who last wore the hat based on the DNA despite the government's emphasis on the word "predominant". Any assumption that Bonner was the last wearer is an impermissible inference by the jury. Also, In U.S. v. Bonner the United States Court of Appeals for the Fourth Circuit stated "the government relied on the insufficient scientific theory that, because the defendant's DNA was the "predominant" profile on the hat, he must have

been the last one to wear it. We concluded that this “scientific theory as to identify lacked any evidentiary support in the record. When the district court considered acquitting the defendant it relied on missing, flawed, or contradictory facts”. Here, we found that the government failed to produce sufficient identity evidence placing Bonner at the scene of a robbery and relied on unsubstantiated, unscientific evidence to bolster minimal evidence. For the foregoing reasons, we find that the district court correctly concluded that no reasonable trier of fact could conclude that Bonner was guilty beyond a reasonable doubt. Therefore, we affirm the district court’s conclusion that there was insufficient evidence to convict Bonner in this matter. In Petitioner’s case the State failed to produce sufficient identity evidence placing Petitioner at the scene of the incident and relied on unsubstantiated, unscientific evidence to bolster minimal evidence. In the PCR Court’s Order of Dismissal the PCR Court stated that “Mary Ann Boehm testified that cleaning an item of clothing would remove the DNA, (trial transcript page 927, lines 21-23. Therefore, for Applicant’s DNA to still be on the cap by the time it was found at the crime scene, it would have to have not been cleaned since the last time Applicant had worn it. It strains credulity to suggest that the cap would still have had Applicant’s DNA on it weeks after he gave it away to someone else. That was error. There is no evidence in the record to support that Petitioner washed the clothes before giving the clothes away or that anyone who received the clothes washed them before the cap was found at the scene of the incident. Also, in reference to the PCR Court’s ruling that “no evidence at trial would have supported Petitioner’s self-serving statement to law enforcement that he gave some clothes away”, Petitioner’s Mother testified at the PCR hearing that she witnessed Petitioner putting clothes into bags to take to the thrift store, (PCR Transcript page 21, lines, 11-25), Petitioner’s Mother also testified that she witnessed Petitioner putting two or three trash bags into his car a couple of weeks before the incident (PCR Transcript page 22, lines 1-20). Had trial counsel’s hired a Touch-DNA expert to testify on Petitioner’s behalf and called Petitioner’s Mother to testify at trial to corroborate Petitioner’s statement to Investigator Griffin that Petitioner had given some clothes away, there is a reasonable probability, but for trial Counsel’s unprofessional errors the results of the proceeding would have been different. Pauling v. State 331 S.C. 606, 503 S.E.2d 468 (1998) (failure to call defense witness triage nurse was ineffective); Martinez v. State 304 S.C. 39, 403 S.E.2d 113(1991)(where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance). Therefore, this Court should grant the application for post-conviction-relief and order a new trial.

CONCLUSION

Based on the foregoing reasons, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this back to the Court of general sessions for a new trial.

Ineffective Assistance of Appellate Counsel---Failed to argue on

appeal the issue regarding the continuance request made before the Schmerber Hearing.

The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in its Order of Dismissal, ruling “applicant has again failed to explain how this issue was clearly stronger than the four issues Appellate Counsel chose to raise instead”. A defendant is constitutionally entitled to the effective assistance of appellate counsel Evitts v Lucey, 469 U.S. 387, 105 S.C. 830, 83 L.Ed 2d 821 (1985) (to be effective appellate counsel must give assistance of such quality to make appellate proceedings fair); Thrift v State, 302 S.C. 535, 397 S.E. 2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record). In deciding a claim of ineffective assistance of counsel the focus is on “the fundamental fairness of the proceeding whose result is being challenged. Strickland v Washington, 466 U.S. 668 (1984). Defendant who contends appellate counsel rendered ineffective assistance by failing to argue issue was objectively unreasonable and that, but for this failure, defendant’s conviction or sentence would have reversed. Simpkins v. State, 303 S.C. 364, 368, 401 S.E. 2d 142,144 (1991) stating, (“failing to raise a meritorious issue clearly establishes ineffective assistance. The PCR Court’s ruling was in error based on the following facts. On December 2nd, 2014 Petitioner proceeded in a Schmerber Hearing to determine if there was probable cause that Petitioner committed the crime. Petitioner was represented by Dayne Phillips at the Schmerber Hearing with Judge Thomas A. Russo presiding. Counsel Phillips motioned the court for a continuance to ensure Petitioner’s Constitutional Rights were not violated under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 3 and 14 of the South Carolina Constitution, see Schmerber Hearing transcript (page 3, line 17 thru page 6, line 5,) (page 8, line 23 thru page 11, line 6) (page 11, line 20 thru page 12, line 11) (page 13, line 2 thru page 14, line 23). Also, see Schmerber Hearing (transcript page 55, lines 22-25 and page 56, lines 1-16). The trial court denied Petitioner’s motion for continuance stating “I am going to respectfully deny that. I think Mr. Hunter’s Constitutional Rights— You’re an outstanding attorney, Mr. Phillips, and I believe you’re doing a great job of protecting his rights. I don’t think continuing this is going to affect the purposes of this hearing as to whether or not there is probable cause to order the buccal swab so I’m going to—we are just going to proceed and let the State proceed with their presentation”. This was error based upon the fact that Petitioner’s case rests solely on Petitioner’s Touch-DNA on a cap which was corroborated by Judge Thomas W. Cooper at Petitioner’s trial when Judge Cooper stated, “ this case is about DNA”, (trial transcript page 776, lines 16-17). The trial court failed to address Petitioner’s motion for continuance in whole. The failure of the trial court to address Petitioner’s need for all of the DNA evidence in the case as well as Petitioner’s

need for a Touch-DNA expert on Petitioner's behalf to determine if there was probable cause that Petitioner committed the crime was error pursuant to Rule 702 South Carolina Rules of Evidence, stating, " If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise" and Rule 705 South Carolina Rules of Evidence, stating " The expert may in any event be required to disclose the underlying facts or data on cross-examination ". The trial court also failed to address the fact that Theresa Hines was not present at Petitioner's Schmerber Hearing, Hines was a critical witness from SLED who did all the reliability steps to determine whether the CODIS hit was actually proper and Petitioner did not have the proper, full discovery to attack that witness's credibility and the veracity of the DNA evidence as well. If Petitioner was afforded the opportunity to present a touch DNA expert to testify at the Schmerber Hearing, Petitioner could have shown the Court that Touch DNA evidence is not DNA evidence demonstrating guilt such as blood, saliva, or semen. Also, Petitioner's Touch DNA on the cap does not prove that Petitioner was the last person to wear the cap, not does it prove that Petitioner was the person who left it at the scene of the incident, that testimony was never relayed to the jury in Petitioner's case. The trial court's denial of Petitioner's motion for a continuance was fundamentally unfair considering the fact that the Schmerber Hearing was a one-sided argument in favor of the State when Petitioner was not afforded to present an expert witness to discredit the State's theory that because Petitioner's Touch DNA was on the cap, Petitioner must have been the last person to wear it. Therefore, the trial court violated Petitioner's Fifth, Sixth, and Fourteenth Amendment Rights of the United States Constitution and Article 1, Section 3 and 14 of the South Carolina Constitution when the trial court denied Petitioner's motion for a continuance. The trial court erred in determining that probable cause was established without giving Petitioner an opportunity to present a full and complete defense as well as giving the Petitioner an opportunity to put the State's theory to adversarial testing. Furthermore, the trial court's denial of Petitioner's motion for a continuance violated the South Carolina Rules of Criminal Procedure Rule 7 Continuances (b)(2) Continuance Because of Absence of Witness. No motion for continuance of trial shall be granted on account of the absence of a witness without the oath of the party, his counsel, or agent to the following effect: the testimony of the witness is material to the support of the action or defense of the party moving; the motion is not intended for delay, but is made solely because one cannot go safely to trial without such testimony; and has made use of due diligence to procure the testimony of the witness or of such other circumstances as will satisfy the court that his motion is not intended for delay.(2) A party applying for such postponement on account of the absence of a witness shall set forth under oath in addition to the foregoing matter what fact or facts he believes

the witness if present would testify to and the grounds for such belief. See State v. Tanner 299 S.C. 459, 385 S.E.2d 832(1989), whereas, the Supreme Court of South Carolina ruled, “ it was reversible error to deny a defendant a continuance so that he could adequately ascertain evidentiary value of blood, skin, and hair samples taken from vehicle after accident and held in police custody until ten minutes before pre-trial hearing”. “We hold that the trial court erred in failing to consider the potential exculpatory value of the samples. We further hold that the defendant has satisfied the Squires criteria of demonstrating other evidence that could have been produced, and other points on his behalf that could have been raised”. No real harm would have befallen the State from this continuance, and indeed, the samples may be supportive of the State’s case in Tanner’s new trial. Hence, we hold that the trial court abused it’s discretion in not granting Tanner a continuance “. In Petitioner’s case, Petitioner’s Touch DNA on the cap was critical and the “key” piece of evidence used to arrest, indict, and convict Petitioner which makes Petitioner’s case easily distinguishable from the State v. Hardin case 425 S.C. 1, 819 S.E.2d 177 (2018). If Petitioner would have been granted a continuance Petitioner would have been able to offer the testimony of a Touch DNA expert on Petitioner’s behalf, see, U.S. v. Bonner 2011 648 F.3d 209 (4th Circuit), in which the DNA expert testified he could not conclude who last wore the hat based on the DNA despite the government’s emphasis on the word “predominant”. In Bonner, the United States Court of Appeals for the Fourth Circuit held “The government relied on the insufficient scientific theory that, because the defendant’s DNA was the “predominant” profile on the hat, he must have been the last one to wear it. We concluded that this scientific theory as to identity lacked any evidentiary support in the record. When the district court considered acquitting the defendant it relied on missing, flawed, or contradictory facts. Here we found that the government failed to produce sufficient identity evidence placing Bonner at the scene of a robbery and relied on unsubstantiated, unscientific evidence to bolster minimal evidence”. Please note that Petitioner’s Schmerber Hearing was rendered fundamentally unfair when the State was afforded the opportunity to present an expert witness to testify when Petitioner was not, which was crucial considering the fact that Petitioner’s Touch-DNA was the “key” piece of evidence used to convict Petitioner. The fact that the cap with Petitioner’s Touch DNA on it had a mixture of at least two individuals on it with Petitioner’s Touch DNA being the major contributor and the minor contributor being not enough for reliable interpretation was even more of a reason for Petitioner to be granted a continuance because Petitioner could not show the Court that the State failed to produce sufficient identity evidence placing Petitioner at the scene of the crime without the testimony of a Touch-DNA expert on Petitioner’s behalf. If Petitioner was afforded the opportunity to present a Touch DNA expert Petitioner could have discredited the State’s theory that because Petitioner’s Touch-DNA on the cap was the major contributor, he must have been the last one to wear it, see U.S. v.

Bonner 2011 648 F.3d 209 (4th Circuit). The trial court's denial of Petitioner's motion for a continuance violated Petitioner's Fifth, Sixth, and Fourteenth Amendment Rights of the United States Constitution and Article 1, Sections 3 and 14 of the South Carolina Constitution. Petitioner's appellate counsel Katherine Hudgins was ineffective for failing to raise this meritorious issue in Petitioner's direct appeal proceedings. The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in its Order denying Petitioner's application for post-conviction-relief based upon the fact that this issue was clearly stronger than some of the issues that Petitioner's appellate counsel chose to raise and there is a reasonable probability, but for the PCR Court's error Petitioner would have been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the Court of general sessions for a new trial.

Ineffective Assistance of Appellate Counsel---Directed Verdict Issue

The PCR Court erred and did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in its Order of Dismissal finding Petitioner's appellate counsel was not ineffective for failing to raise the denial of Petitioner's Motion for a Directed Verdict on appeal. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed. 2d 821 (1985) (to be effective, appellate counsel must give assistance of quality to make appellate proceedings fair); Thrift v State, 302 S.C. 535, 397 S.E. 2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record). In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged. Strickland v Washington, 466 U.S. 668 (1984). Defendant who contends appellate counsel rendered ineffective assistance by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed. Simpkins v State 303 S.C.364, 368, 401 S.E. 2d 142, 144 (1991) stating ("failing to raise a meritorious issue clearly establishes ineffective assistance"). The trial court ruled the State introduced considerable evidence of Applicant's guilt based upon the following reasons:

1. Applicant's Touch DNA was found on the cap recovered from the crime scene.
The cap with Petitioner's Touch DNA recovered from the crime scene was the "key" piece of evidence in Petitioner's case and was the reason Petitioner was arrested. However, Petitioner's trial counsel failed to hire a Touch-DNA expert to explain to the jury that just because Petitioner's Touch DNA was on the cap does not mean Petitioner committed the crime. Petitioner's Touch DNA on the cap was the major contributor and there was also a minor contributor that was not enough for a reliable interpretation which was testified to by the State's DNA expert Mary Ann Boehm (trial transcript page 922, lines 7-13). When Petitioner was arrested and interviewed and questioned as to why his DNA was at the scene of the incident, Petitioner told law enforcement that he gave away jeans, hoodies, and shirts and that was testified to by Investigator Griffin, (trial transcript page 551, lines 17-25). Touch DNA evidence is not DNA evidence demonstrating guilt such as blood, saliva, or semen. Also, Touch DNA evidence is not DNA evidence demonstrating guilt when there's a reasonable explanation for its presence. Petitioner's mother also testified at the PCR hearing that she witnessed Petitioner gathering clothes into two or three trash bags to give away to the thrift store and putting the clothes into his car a few weeks before the incident (PCR transcript page 21, lines 17-25 and page 22, lines 1-20). Pauling v State 331 S.C. 606, 503 S.E.2d 468 (1998) (failure to call defense

witness triage nurse was ineffective); *Martinez v State* 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance). Also, in Petitioner's case there was no other physical evidence linking Petitioner to the incident. Petitioner does not deny that he once possessed the cap, but Petitioner did not possess the cap at the time of the crime. At Petitioner's PCR hearing Petitioner relied on *State v Bostick* 392 S.C. 134, 708 S.E.2d 774 (2011) in support of this issue whereas in *State v Bostick* the Supreme Court of South Carolina ruled ("the evidence presented by the State raised, at most, a mere suspicion that *Bostick* committed the crime. Under settled principles, the trial court should grant a directed verdict motion when the evidence presented merely raises a suspicion of guilt. *State v Cherry* 361 S.C. 588, 594, 606 S.E.2d 475, 478 (2004). (Therefore, we find the circuit court erred in failing to direct a verdict in favor of *Bostick*). At the close of the State's case in Petitioner's trial, Petitioner's trial counsel motioned the court for a directed verdict in favor of Petitioner, (trial transcript page 1004, lines 4-5), the trial court denied Petitioner's motion for a directed verdict, (trial transcript page 1004, lines 17-22), that was error. Petitioner's trial counsel failed to utilize the right to offer evidence after the close of the State's case pursuant to the South Carolina Rules of Criminal Procedure Rule 19(b) Defendant's Right to Present Evidence (If a defendant's motion for directed verdict at the close of the evidence offered by the State is not granted, the defendant may offer evidence without having reserved the right). Petitioner's trial counsel's failure to offer evidence was highly prejudicial to Petitioner because there is a reasonable probability the trial court would have granted Petitioner's motion for a directed verdict based on the offering of the following evidence to the trial court.

(1-Touch DNA expert to explain to the jury that Touch-DNA evidence is not DNA evidence demonstrating guilt such as blood, saliva, or semen, also, that Touch DNA evidence is not DNA evidence demonstrating guilt when there's a reasonable explanation for it's presence, Touch DNA is not conclusive DNA evidence and Petitioner's Touch DNA on the cap does not prove Petitioner was the last person to wear the cap). (2- Petitioner's trial counsel could have subpoenaed Petitioner's Mother to testify on Petitioner's behalf to relay to the jury that Petitioner did in fact donate clothes to the thrift store which would have corroborated Investigator Thomas Griffin's testimony that Petitioner informed Investigator Griffin during his initial interview with him that he had given clothes away. Trial counsel knew prior to trial that Petitioner's mother witnessed Petitioner gathering the clothes and putting the clothes in his car. Petitioner's trial counsel's private investigator discovered this information after conducting an interview with Petitioner's mother months before

trial). (3- Considering the fact that the cap was the “key” piece of evidence in Petitioner’s case and there was a mixture of at least two individuals DNA on the cap with Petitioner’s Touch DNA being the major contributor, Petitioner’s trial counsel could have disputed the State’s presentation of unsubstantiated, unscientific evidence to bolster minimal evidence, see U.S. v Bonner 2011 648 F.3d 209 (4th Circuit). In U.S. v Bonner the United States Court of Appeals for the Fourth Circuit held “the government relied on the insufficient scientific theory that, because the defendant’s DNA was the “predominant” profile on the hat, he must have been the last one to wear it. We concluded that this “scientific theory as to identity lacked any evidentiary support in the record. When the district court considered acquitting the defendant it relied on missing, flawed, or contradictory facts “. Here, we found the government failed to produce sufficient identity evidence placing Bonner at the scene of a robbery and relied on unsubstantiated, unscientific evidence to bolster minimal evidence. In Petitioner’s case the State’s DNA expert testified that she cannot indicate when the sample got on the surface of the evidence, she can’t determine when the Touch DNA got on the sample, she can’t determine how long it has been there, and cannot say under what circumstances it got there, (trial transcript page 941, lines 7-16). The State’s DNA expert’s testimony further substantiates Petitioner’s argument that at the time of the crime Petitioner did not have possession of the cap and that Touch DNA is not conclusive DNA evidence. If Petitioner’s trial counsel would have hired a Touch-DNA expert to testify on Petitioner’s behalf he could have shown the jury that Touch-DNA is not conclusive DNA which could have put a reasonable doubt in the jury’s mind and the jury may have found Petitioner not guilty. Also, in U.S.v Bonner, the Fourth Circuit Court of Appeals held that circumstantial evidence was insufficient to support defendant’s conviction. The trial court erred in it’s denial of Petitioner’s motion for a directed verdict, (see trial transcript page 1004, lines 17-22) when the trial court allowed the State to submit insufficient identity evidence placing Petitioner at the scene of the crime and relied on unsubstantiated, unscientific evidence to bolster minimal evidence. The trial court also erred by allowing the State to submit to the jury an unreliable identification of Petitioner by the victim when the trial court denied Petitioner’s motion for a Neil v. Biggers hearing in which the victim would not have been able to overcome three of the five factors in determining the reliability of her identification of Petitioner according to the evidence and facts in the record. Petitioner’s trial counsel’s failure to offer evidence pursuant to South Carolina Rules of Criminal Procedure Rule 19 (b) Defendant’s Right to Present Evidence prejudiced Petitioner because there is a reasonable probability that Petitioner’s motion for a directed verdict would have been granted. Petitioner’s appellate counsel Katherine

Hudgins was ineffective for not raising the preserved directed verdict motion on appeal, if she would have there is a reasonable probability that Petitioner would have succeeded on direct appeal. Lastly, the PCR Court erred and did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 when the PCR Court ruled “there was substantial direct and circumstantial evidence, viewed in the light most favorable to the State, from which Applicant’s guilt could fairly be deduced. Therefore, a challenge to the trial court’s directed verdict ruling was unlikely to succeed on appeal, and the Court finds Appellate Counsel acted reasonably in focusing her efforts on other issues “. That was error. The PCR Court’s ruling was highly prejudicial based upon the aforementioned facts and if the PCR Court would have ruled correctly there is a reasonable probability that Petitioner would have been granted relief in his Post-Conviction-Relief application.

Please note: For more emphasis on the victim’s unreliable identification of Petitioner, see Section F: Neil v. Biggers Hearing Issue In Petitioner’s Pro Se Response to Ashley McMahan’s Johnson Petition to see Petitioner’s full explanation of this issue.

Petitioner’s challenge to the circumstantial evidence is as follows:

- 1) Petitioner’s cousin Tanisha Taylor testified that it’s not uncommon for Petitioner to wash clothes late at night and that she never saw Petitioner washing clothes the night the crime occurred, (trial transcript page 861, lines 1-2 and page 863, lines 12-13). Petitioner’s cousin did actually scratch Petitioner which was why an abrasion was on Petitioner’s head, Taylor was angry with Petitioner because Petitioner told law enforcement that Taylor scratched him in which that information to law enforcement got Taylor involved when she had to take off work to be interviewed by investigators. Also, there is no evidence in the record to support that the victim scratched the suspect in any way and this was testified to by Investigator Griffin (trial transcript page 564, lines 5-16).
- 2) There is no evidence in the record to support that Petitioner possessed a .40 caliber Glock. Taylor testified that she wasn’t quite sure if it was a Glock, Taylor also testified that she didn’t know what caliber the gun was, (trial transcript page 868, lines 11-20). No gun was ever found in Petitioner’s case.
- 3) Petitioner told investigators and his trial counsel that he took a class, not that he was actually in college at the time of the incident. In that class they spoke on DNA and DNA databases. Petitioner believed his DNA was in the database illegally because he was not convicted of a violent felony. Petitioner’s trial

counsel was under the impression that Petitioner had just took a class near the time the crime happened because Petitioner stated he just took a class.

- 4) Law enforcement only checked for Petitioner's phone activity during the time of the crime, if they would have reviewed Petitioner's phone activity even a month before the incident they would have discovered that Petitioner always looked at news stories in all categories including different kinds of crimes. Law enforcement failed to look at Petitioner's phone activity outside of the timeframe of the incident, if they would have done so they would have discovered that it was common for Petitioner to look at news stories concerning burglaries and other kinds of crimes as well.
- 5) There is no substantial or direct evidence that Petitioner's car was used in the crime, Petitioner's cousin Tanisha Taylor even testified that Petitioner drove her car more than his own car, (trial transcript page 856, lines 20-25 and page 857, lines 1-4).

Petitioner did not flee from law enforcement because he was guilty of a crime, Petitioner did not want to stop on the interstate when law enforcement activated their blue lights, Petitioner was simply looking for a safe place to stop in the presence of pedestrians so he would feel safe.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the court of general sessions for a new trial.

F: Ineffective Assistance of Appellate Counsel—Neil v. Biggers Hearing

The PCR Court erred and did not make Findings of Fact and Conclusions of Law pursuant to S.C. Ann 17-27-80 in the PCR Court's Order of Dismissal when the PCR Court found that Appellate Counsel Katherine Hudgins was not ineffective for failing to raise the trial courts denial of Petitioner's Neil v. Biggers hearing request on appeal. A defendant is constitutionally entitled to the effective assistance of appellate counsel Evitts v Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (to be effective appellate counsel must give assistance of such quality to make appellate proceedings fair); Thrift v State, 302 S.C. 535, 397 S.E.2d 523 (1990) (appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record). In deciding a claim of ineffective assistance of counsel, the focus is on "the fundamental fairness of the proceeding whose result is being challenged. Strickland v Washington, 466 U.S. 668 (1984). Defendant who contends appellate counsel rendered ineffective assistance by failing to argue issue, must show that failure to raise issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have reversed. Simpkins v State, 303 S.C. 364, 368, 401 S.E. 2d 142, 144 (1991) stating , ("failing to raise a meritorious issue clearly establishes ineffective assistance ").Petitioner testified at the PCR hearing that the trial court erred in denying his motion for a Neil v. Biggers hearing when the trial court admitted the victims' unreliable identification of Petitioner as evidence against him at trial, (PCR transcript page 33, lines 15-25, page 34, lines 1-25, page 35, lines 1-23, page 36, lines 24-25, page 37, lines 1-25, page 38, lines 1-25). Petitioner's Appellate Counsel Katherine Hudgins testified at the PCR hearing that State v. Lewis was the controlling precedent by the time of Applicant's trial , and Lewis held that a Neil v Biggers hearing is unnecessary when a witness identifies a criminal defendant for the first time in court. State v. Lewis 363 S.C. 37, 42, 609 S.E.2d 515, 518 (2005). In Neil v Biggers, the United States Supreme Court found that a court must review the totality of the circumstances to determine whether an identification is reliable. In Petitioner's case, Petitioner was identified by the victim at his pre-trial Jackson v Denno hearing, (see trial transcript page 224, lines 7-14) in which she confided in the victim's advocate that she recognized Petitioner by his eyes and voice three years after the crime occurred. Please be advised that the victim testified I'm trial, "it was dark and the suspect must have cut the lights off when he entered the home". This weighs heavily against the victim's reliability in her testimony that she recognized the suspect's eyes in court three years after the crime occurred and does not overcome the first factor in the Neil v Biggers analysis, which is The Opportunity To View The Criminal At Time of The Crime. The lightning conditions in this factor is critical in determining a witness's ability to view a criminal and according to the victims testimony at trial, all the lights in the home

we're off. On the night of the incident the victim stated to Investigator's that the voice of the suspect sounded familiar, the victim also testified at trial that the suspect's voice sounded familiar. Ultimately, after law enforcement's investigation it was discovered that Petitioner and the victim never met and did not know each other, which also weighs heavily against the victim's alleged identification of Petitioner's voice during the Jackson v Denno hearing. The trial court's ruling denying Petitioner's Neil v Biggers hearing request was in error based upon the fact that the first time the victim identified Petitioner was at his pre-trial Jackson v Denno hearing, not at Hunter's trial whereas the victim falsely testified that the first time she identified Petitioner was in Petitioner's actual trial at the table surrounded by defense counsel (trial transcript page 363, lines 17-25 and page 364, lines 1-2). According to the South Carolina Court of Appeals Petitioner should have been warranted a Neil v Biggers hearing based upon the fact that the victim's identification of Petitioner at his pre-trial Jackson v Denno hearing should have been clarified as a pre-trial identification by the trial court. In the Lewis case, the South Carolina Court of Appeals decision represents the majority view that the Neil v Biggers analysis should not be extended to protect criminal defendants against identifications that occur for the first time in court without a pre-trial identification. Petitioner's identification at his Jackson v Denno hearing was in fact a pre-trial identification, although, the identification was in court, the identification was established during a pre-trial proceeding prior to Petitioner's trial proceeding. Lewis clearly holds that a Neil v Biggers analysis should not be extended to protect criminal defendants against identifications that occur for the first time in court without a pre-trial identification. Petitioner met this criteria and the trial court erred when the court failed to grant Petitioner a Neil v Biggers hearing. Also, the trial court in Petitioner's case failed to review the totality of the circumstances in Petitioner's case such as the three factors in the Neil v Biggers analysis in which the victim would not have been able to overcome. At the evidentiary hearing Petitioner explained to the PCR Court that the victim would not have been able to overcome three of the five factors in determining the reliability of her first time in-court identification of Petitioner. After Petitioner explained this, Petitioner's Appellate Counsel Katherine Hudgins on cross examination agreed with Petitioner that Petitioner was right and admitted that she should have raised this issue on direct appeal, (PCR transcript page 145, lines 1-23). Smith v. State 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010), holding, (When reviewing a claim for ineffective assistance of counsel, the "court proceeds from the rebuttable presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment") (quoting Strickland v Washington 466 U.S. 668, 690(1984). To rebut this presumption and succeed on an ineffective assistance claim, a PCR Applicant must show (1) trial counsel's performance was deficient, and (2) trial counsel's deficient performance prejudiced the outcome of the trial. Strickland, 466 U.S. at 687. To distinguish Petitioner's case from State

v. Lewis, the Court of Appeals ruled in Lewis that “Armstrong’s in-court identification of Lewis was strong, detailed, and clear, and would have survived an in-camera hearing,” however, in Petitioner’s case we don’t have that and the victim would not have been able to overcome three of the five factors considered in evaluating the likelihood of misidentification. Appellate Counsel Katherine Hudgins testified at the PCR hearing and admitted that she should have raised the Neil v. Biggers hearing issue on direct appeal and had she done so there is a reasonable probability Petitioner would have been granted relief in his direct appeal proceedings and granted a new trial. Furthermore, if the PCR Court would not have erred in it’s ruling denying Petitioner relief on this claim there is a reasonable probability Petitioner would have been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the court of general sessions for a new trial.

S.C. SUPREME COURT

4/17/14

[Redacted]

Theresa Wolfe

1010

Nathaniel Hunter - Suspect 2/03/83 256-4892
319-9217

- ✓ Hospital if victim knows him - Neg [Redacted]
- ✓ Warrants: 2 kidnapping - Burg First, Alt CSS & Dist by Meac
- ✓ Poss Firearm, Att Murder^{x2}, Pass by person unlawful
- ✓ Photo line up - Request sent
- ✓ Search warrant for phone
- ✓ Suspects vehicle
- ✓ Customer at same residence
- ✓ Search warrant for residence
- ✓ Richland County Probation

Mike Robertson

[Redacted]

1725

2548 N. Main St Apt 100 by SLED Mike Robertson

EKP285 New York

Nathaniel Hunter Driving Vehicle

Rich County Case # 1404039817 Walmley

576-3131 - RCSD records report will

be ready by Wed 4/23

C: Unnecessary Jackson v Denno Hearing

The PCR Court erred and did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann 17-27-80 in its Order of Dismissal when the PCR Court found Petitioner's trial counsel was not deficient for requesting a Jackson v. Denno hearing. The Sixth Amendment of the United States Constitution guarantees effective assistance of counsel for criminal defendant's in all criminal proceedings, regardless of whether the trial is federal or state, or whether the counsel is retained or appointed. The Supreme Court has also recognized that certain judicial acts amount to a denial of a right to counsel and require declaration of a mistrial or reversal of a conviction. At trial, Petitioner's trial counsel should not have motioned the Court for a Jackson v Denno hearing when Petitioner never confessed to the crime and there is no evidence in the record to support Petitioner gave law enforcement any statements, there is no evidence of any written or recorded statements from Petitioner. There is no evidence in the record to suggest Petitioner gave Investigators any statements other than the Investigator's self-serving statement that Petitioner gave them to Investigator's. However, Investigator's alleges that the statements that were given to them were not confessions and Petitioner never admitted to being involved in the crime. Petitioner's alleged statements were deemed voluntary and admissible and admitted as evidence by the trial court. One of the State's "key" witnesses Investigator Griffin testified that Petitioner never confessed to the crime, (trial transcript page 575, lines 16-24, page 577, lines 9-24, page 579, lines 1-5). At the Jackson v Denno hearing Petitioner denied making any statements to law enforcement, (trial transcript page 184, lines 24-25, page 185, lines 1-25, page 186, lines 1-2). After Petitioner testified at the Jackson v Denno hearing Petitioner was allegedly identified by his eyes and voice by the victim three years after the crime took place (trial transcript page 224, lines 7-14). In Investigator Griffin's notes, which is enclosed in this Pro Se Response, the notes state Investigator Griffin went to the hospital to see if the victim knew Petitioner four days after the crime on April 17, 2014 in which the victim said no. If the victim could not identify Petitioner by his eyes four days after the crime it was highly unlikely that the victim could identify him by his eyes three years after the crime while sitting from a distance of at least 15 feet from Petitioner at the Jackson v Denno hearing. This is where trial counsel's deficient performance prejudiced Petitioner when the victim's identification of Petitioner was used against him as evidence at trial. If trial counsel would not have motioned the court for a Jackson v Denno hearing Petitioner would not have been mistakenly identified being that it was highly suggestive and the jury may have been influenced to vote not guilty. Petitioner's trial

counsel testified at the PCR hearing that he requested a Jackson v Denno hearing to ensure that the defense was made aware of any statements from Petitioner that the State would attempt to introduce at trial to avoid an ambush by the State. However, all of the statements that were introduced by the State were already in Petitioner's Discovery and was known by trial counsel prior to trial (trial transcript page 199, lines 19-25, and page 200, lines 1-4). Not only did the State send additional information from all witnesses in Petitioner's case, the State is also obligated to comply with discovery requests and if counsel did not want to be ambushed by the State, trial counsel could have filed a motion pursuant to the South Carolina Rules of Criminal Procedure Rule 5 Brady v Maryland to prevent an ambush by the State. Therefore, trial counsel's reasoning for motioning the court for a Jackson v Denno hearing was invalid. The probative value of the Jackson v Denno hearing was substantially outweighed by the danger of unfair prejudice when the victim was in the courtroom when Petitioner testified at the Jackson v Denno hearing and there was a probability the victim could mistakenly identify Petitioner. Trial counsel was obligated to prevent an irreparable misidentification from taking place and the prejudice from the possibility of an identification of a defendant by a witness far outweighs the probative value of alleged statements Petitioner made to Investigators. Identification evidence is far more damaging than alleged statements that don't consist of a confession from Petitioner nor any statement from Petitioner admitting any involvement in the crime. The PCR Court's Order of Dismissal held "at the time, it was far from obvious that a Jackson v Denno hearing would expose Applicant to any prejudice" (PCR Court's Order of Dismissal page 14). The PCR Court agrees with Petitioner that he was prejudiced but failed to find that trial counsel's performance was deficient, this was error. The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann 17-27-80 and McCray v. State 408 S.E. 2d 241 (1991) (reversing order denying Applicant relief and remanding for a new PCR hearing where PCR Court's Order failed to make specific findings of fact and conclusions of law sufficient for appellate review). If trial counsel would not have motioned the court for a Jackson v Denno hearing Petitioner would not have been identified by the victim when trial counsel knew Petitioner was not taking the stand during trial, whereas trial counsel did not put up a defense to have the last argument in closing arguments. Petitioner's prejudice was enhanced when trial counsel failed to warn Petitioner of the dangers of testifying in the presence of the victim at the Jackson v Denno hearing, had counsel done so Petitioner would not have testified just to prevent an unreliable or irreparable misidentification from the victim, The only thing Petitioner's trial counsel Dayne Phillips told Petitioner before Petitioner testified at the Jackson v Denno hearing was that "anything that you say or do cannot be used against you because it's an in-camera hearing out of the presence out the jury". See, Sexton v. French 163, F.3d 874 (4th Circuit 1998), holding, (trial counsel, not the court, has the primary responsibility for advising the

defendant of his right to testify and for explaining the tactical implications of doing so or not". Trial counsel did not explain the pros and cons of taking the stand and Petitioner was not fully aware of the consequences of taking the stand to testify at his Jackson v Denno hearing. Petitioner's Fifth, Sixth, and Fourteenth Amendment Rights of the Constitution of the United States were violated when Petitioner's trial counsel motioned the Court for a Jackson v Denno hearing. The PCR Court's ruling was in error based on the aforementioned facts, had the PCR Court not erred there is a reasonable probability that Petitioner would have been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the Court of general sessions for a new trial.

D: Failure to quash Applicant's statements

The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 when the PCR Court failed to uphold the ruling in State v Anderson 357 S.C. 514, 593 S.E.2d 820 (2004) which was the case law that Applicant relied on in support of his claim to quash Applicant's statements. At the PCR hearing, Petitioner argued that his initial bond hearing and arraignment was on April 18, 2014, a day after Petitioner was arrested and requested the services of a public defender (PCR transcript page 36, lines 1-23. When Petitioner requested the services of a public defender by signing the paperwork for a public defender his Sixth Amendment Right to Counsel attached at that point. In State v Anderson the Supreme Court of South Carolina ruled when the Sixth Amendment right to counsel has attached, if police initiate interrogation after a defendant's assertion, at an arraignment or other similar proceedings, of his right to counsel, any waiver of the defendant's right to counsel for that police initiated interrogation is invalid unless the defendant initiates the contact himself". In Petitioner's case, Petitioner did not initiate contact with police. At Petitioner's trial (trial transcript page 196, lines 8-12), the trial court ruled that Petitioner " was properly mirandized, that he was given his rights and he waived those rights. That was error and the PCR Court failed to make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 when the PCR Court ruled that "applicant has not alleged any other grounds that would have supported trial counsel's motion" (PCR Court's Order of Dismissal page 15), Section D. Also, see (trial transcript page 196, lines 12-19 and page 196, lines 20-25 and page 197, line 1), in which the trial court ruled that "I do not find that the State has an obligation four days after the initial investigation in which they asked if he had an attorney and he said no and the second interview on the 21st, even though four days later, that the State was under an obligation to go beyond the warnings on the Miranda form to inquire of anyone else other than Mr. Hunter himself about his involvement with counsel". The trial court erred. The initial interview Petitioner had with law enforcement was on April 17, 2017 when Petitioner was arrested. Petitioner was arraigned at his bond hearing the next day on April 18, 2017 and requested the services of a public defender. The trial court's ruling was in error based upon the fact that the ruling in State v. Anderson 357 S.C. 514 (2004), specifically states " the police (one state actor) may not claim to be ignorant of Appellant's request for Counsel at his arraignment before the Court (another state actor)". Also , in State v Anderson the Supreme Court of South Carolina ruled "Sixth Amendment principles require that we impute the State's knowledge from one state actor to another ". Also, see Fellers v. U.S. 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed.2d 1016 (2004), whereas the Supreme Court of the United States stated "Sixth Amendment Right to Counsel is triggered at or after the time that judicial proceedings have been initiated, whether by way of formal charge, preliminary

hearing, indictment, information or arraignment. The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 because the PCR Court's ruling denying Petitioner's request to suppress Petitioner's statements completely contradicts the Supreme Court of South Carolina's ruling in State v Anderson 357 S.C. 514 (2004) and the Supreme Court of the United States holding in Fellers v United States 540 U.S. 519, 124 S.Ct. 1019, 157 L.Ed2d 1016 (2004). Petitioner's statements were admitted as evidence against Petitioner in violation of Petitioner's Fifth, Sixth and Fourteenth Amendment Rights of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution. The PCR Court erred in it's ruling denying Petitioner relief on this issue and if not for the PCR Court's error, there is a reasonable probability that Petitioner's application for post-conviction-relief would have been successful and Petitioner would have been granted relief.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the Court of general sessions for a new trial.

G: Failure to Seek Rehearing and a Writ of Certiorari

The PCR Court erred and did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 when the PCR Court found that “Applicant has failed to point out any error in the decision of the Court of Appeals, such that he likely would have prevailed on rehearing or on further review by the Supreme Court” (PCR Court’s Order of Dismissal page 33). That was error. Petitioner had a meritorious issue that should have been reheard by the Court of Appeals or raised to the Supreme Court of South Carolina for Writ of Certiorari. The PCR Court applied Douglas v State 369 S.C. 213, 216, 631 S.E. 2d 542, 543-544 (2006) in it’s Order of Dismissal of Petitioner’s Post-Conviction-Relief application, holding, “we find that the decision whether to pursue certiorari is a matter left solely to the appellant attorney’s professional discretion”. However, Petitioner is entitled to the Constitutional Right to effective assistance of counsel in his direct appeal proceedings pursuant to Strickland v Washington 466 U.S. 668 (1984). Petitioner is also entitled to seek appellate review of the denial of his direct appeal by the Court of Appeals pursuant to Sanders v State 412 S.C. 611, 773 S.E.2d 580 (2015), holding, “Consequently, we hold that although a defendant may waive his right to collateral review, he is nevertheless still entitled to challenge whether the advice he received in agreeing to that waiver was Constitutionally defective”. In Rogers v State 261 S.C. 288, 199 S.E. 2d 761. (1973), the Supreme Court of South Carolina held, “where the application of the appellate for PCR was based entirely upon his claim that he did not have the effective assistance of counsel because of their incompetency, this allegation set forth a Prima Facie violation of the appellants Constitutional Rights and raised a question of fact which could only be determined in the lower court by an evidentiary hearing”. The Supreme Court of the United States in Hill v Lockhart 474 U.S. 52, 106 S.Ct. 366 (1985), held that” defendant represented by counsel and rely on advice of counsel, prejudice depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases”. The issue that Petitioner raised at the PCR hearing in reference to appellate counsel’s failure to Seek Rehearing or Writ of Certiorari was : Hunter argues the trial court erred in refusing to grant a mistrial because the State mentioned a photograph of him holding a gun during opening arguments and that photograph was never admitted into evidence. The Court of Appeals ruled because competent evidence was shown that Hunter owned a .40 caliber Glock Hunter’s appeal shall be denied in this issue. That was error. Petitioner’s cousin Tanisha Taylor was the witness the State used to show Petitioner allegedly owned a .40 caliber Glock. At Petitioner’s trial, on cross-examination Taylor testified that she wasn’t quite sure if the gun was a Glock, Taylor also testified that she doesn’t know what caliber the gun was (trial transcript page 868, lines 11-20). Taylor’s testimony completely contradicts the Court of Appeals ruling which is not supported by facts in the record. No gun was ever found in

Petitioner's case, therefore no competent evidence was admitted that showed Hunter owned a .40 caliber Glock. Petitioner raised this issue at the PCR hearing that Appellate Counsel Katherine Hudgins should have raised this issue for a Rehearing or a Petition for Writ of Certiorari when the appellate court denied Petitioner's direct appeal, (PCR transcript page 61, lines 1-25 and page 62, lines 1-5). The trial court erred when the court denied Hunter's motion for a mistrial based on the solicitor's improper comments during opening statements. In State v Huggins 325 S.C. 103, 481 S.E.2d 114 (1997), the Supreme Court ruled that "the trial judge erred in refusing to grant a mistrial on this basis". Here, the alleged statement of Appellant's brother was not in evidence, nor did he testify regarding any such statement. We find the State's questioning of Appellant about the statement does not amount to putting this in evidence, particularly when Appellant denied having told her brother what was in the statement. Furthermore, we find the reference to it during closing argument fundamentally unfair under the circumstances of this case". The photograph of Petitioner holding a .40 caliber Glock was never admitted into evidence and the courts have held under U.S. v Maddox, 156 F.3d 1280 and U.S. v Smalls, 74 F.3d 1280, stating, "we have held many times before and we hold again that in closing arguments, counsel may not refer to or rely upon evidence unless the trial court admitted it". In State v Webb 389 S.C. 174, 697 S.E.2d 622 (2010), the Supreme Court of South Carolina states that "a solicitor may not rely on statements not in evidence during closing arguments". Therefore, Petitioner's Appellate Counsel was ineffective for failing to seek Rehearing and Writ of Certiorari considering the fact that the State's improper comment was highly prejudicial because it inferred to the jury that Petitioner was guilty beyond a reasonable doubt and misled the jury. The State's comments convicted Petitioner before the jury even heard the evidence against Petitioner. The State's comments violated Petitioner's Fifth Amendment Right to a Fair Trial as well as his Fourteenth Amendment Right to Due Process, see Fortune v State 428 S.C. 545, 837 S.E. 2d 37 (2019), holding, ("the assistant solicitor's improper statements to the jury during closing argument infected Fortune's trial with such a degree of unfairness has to make his conviction a denial of due process. We reverse the order of the PCR Court denying Fortune relief and remand to the Court of general sessions for a new trial. The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in it's Order denying Petitioner relief and if the PCR Court would have done so there is a reasonable probability that Petitioner would have succeeded and been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the Court of general sessions for a new trial.

L: Improper Comments During Closing Argument

The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 when the trial court ruled Petitioner's trial counsel was not ineffective for failing to object to the improper comments made by the solicitor during closing arguments to the jury. The PCR Court stated, "it is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." United States v Francisco, 35 F.3d 116, 120 (4th Circuit 1994). The PCR Court ruled "Applicant has failed to prove that any of these comments by the solicitor were improper (PCR Court's Order of Dismissal pages 23-25 That was error. At the PCR hearing, Petitioner testified that the solicitor's comments during closing argument referencing Petitioner's dreads, Petitioner wearing gloves and Petitioner trying to sell his car was prejudicial to Petitioner when none of the said items were admitted into evidence (PCR transcript page 56, lines 19-25, page 57, lines 1-25, page 58, lines 1-25, page 59, lines 1-25). Petitioner relied on established Supreme Court of South Carolina case law as well as the Supreme Court of the United States case law in support of his argument for this issue at Petitioner's PCR hearing. To further substantiate Petitioner's argument for this issue Petitioner's PCR Counsel Jael Gilreath testified at the PCR hearing that" the solicitor kept talking about gloves. He was wearing gloves. You didn't hear any testimony from anyone that the suspect was seen wearing gloves"(PCR transcript page 123, lines 17-21).There is no evidence in the record to support the solicitor's comments that the suspect had dreads. The comment pertaining to Petitioner wearing gloves was also improper because there is no evidence in the record to prove the suspect wwsas wearing gloves. The PCR Court ruled "the comment regarding gloves was offered as a possible explanation for why the perpetrator's fingerprints were not found at the crime scene (PCR Court's Order of Dismissal page 24). That was error based upon the fact there were fingerprints found at the crime scene but the fingerprints did not match Petitioner nor the victim or the victim's daughter. This information was testified to by Investigator Griffin at trial (trial transcript page 791, lines 9-25 and page 792, lines 1-5), which means the fingerprints found at the crime scene could match the actual suspect who committed the crime since there is no evidence in the record to support

the State's theory that the suspect had on gloves. Not only was there not any gloves in evidence, there were fingerprints found at the crime scene in the bathroom where the struggle between the suspect and the victim took place and a partial palm print found on the sliding glass door, the fingerprints found at the crime scene did not match Petitioner or the victim. The PCR Court also ruled "it was permissible to infer that the car was somehow used in connection with the crime and that Applicant was attempting to cover his tracks by getting rid of it." That was error, there is no evidence in the record to support that Petitioner's car was used in the crime. Petitioner's cousin even testified that Petitioner drove her car more than his own car (trial transcript page 856, lines 20-25 and page 857, lines 1-4). At Petitioner's PCR hearing, Petitioner's trial counsel Jael Gilreath even testified to further substantiate Petitioner's argument that the State relayed improper comments to the jury when Ms. Gilreath testified in reference to Petitioner's car being used in the crime "they searched it, they didn't find any bloody, you know, blood or evidence that it had been cleaned. They didn't find anything in it related to the crime, and that when they arrested him he was in a totally different kind of car" (PCR transcript page 124, lines 1-4). At the PCR hearing, Petitioner relied on clearly established state and federal law in support of his argument for this issue such as Smalls v State 422 S.C. 174, 810 S.E.2d 836 (2018), holding, (the result of the trial would have been different had trial counsel objected to portions of the solicitor's closing argument. None of the mentioned items were admitted into evidence as the rules governing the admission of evidence require. The Court's have held under U.S. v Maddox, 156 F.3d 1280 and U.S. v Smalls, 74 F.3d 1280, stating " we have held many times before and we hold again that in closing arguments, counsel may not refer to or rely upon evidence unless the trial court admitted it. Petitioner was prejudiced by trial counsel's failure to object to the solicitor's improper comments during closing arguments in which solicitor presented no evidence of said items into evidence, relayed inadmissible evidence and offers of proof in the hearing of the jury which violated the South Carolina Rules of Evidence Rule 103(c), see State v Hornsby, 326 S.C. 121, 484 S.E.2d 869-873 (1997), holding, a denial of due process occurs when a defendant in a criminal trial is denied the fundamental fairness essential to the concept of justice. State v Webb 389 S.C. 174, 697 S.E.2d 622 (2010), stating, a solicitor

may not rely on statements not in evidence during closing arguments (quoting) State v Huggins, 325 S.C. 103, 481, S.E.2d 144 (1997), arguments must be confined to evidence in the record and reasonable inference therefrom. State v Gaines 271 S.C. 65, 244 S.E.2d 539, a new trial will not be granted unless the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. State v Coleman 301 S.C. 57 S.E.2d 659 (1990) citing, Donnelly v. Dechristoforo 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). Also, see Fortune v State 428 S.C. 545, 837 S.E.2d 37 (2019), holding, ("the assistant solicitor's improper comments to the jury during closing argument infected Fortune's trial with such a degree of unfairness as to make his conviction a denial of due process. We reverse the order of the PCR Court denying Fortune relief and remand to the court of general sessions for a new trial"). Petitioner was prejudiced by the repetitious statements by the prosecutor of the items, dreads, car and gloves that was not entered into evidence as the rules required. Without any objections from trial counsel there's a strong possibility that Petitioner was found guilty based upon the solicitor's misleading of the jury which influenced the jury's guilty verdict of Petitioner. The failure of Petitioner's Counsel to object to the solicitor's improper comments was a viral error on trial counsel's behalf that weighed against Petitioner's innocence. The prosecutor's improper comments unfairly prejudiced Petitioner, depriving him of a fair trial and depriving Petitioner of his Fourteenth Amendment Right to Due Process. The PCR Court's failure to make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 was in error and there is a reasonable probability, but for the PCR Court's error Petitioner would have been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the Court of general sessions for a new trial.

Prosecutorial Misconduct

The PCR Court erred and did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in its Order of Dismissal of Petitioner's application for post-conviction-relief when the PCR Court failed to address Section (2) of Petitioner's argument for Issue #7 of Petitioner's Memorandum of Law In Support of his application for post-conviction-relief that he submitted to Ashley McMahan so she could submit it to PCR, see Petitioner's Memorandum of Law pages (37, 38, and 39). Petitioner's argument is that the prosecutor engaged in prosecutorial misconduct and violated the Rules of Professional Conduct, Section (2) The Prosecutor Withheld Exculpatory Evidence. The PCR Court's failure to make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 was in error pursuant to McCray v. State, 408 S.E.2d 241 (1991), holding, (reversing order denying Applicant relief and remanding for a new PCR hearing where PCR Court's order failed to make specific findings of fact and conclusions of law sufficient for appellate review. The PCR Court did not address the prosecutor's withholding of exculpatory evidence section of this issue pertaining to the description of the suspect being a light-skinned man by the victim and the victim's daughter while the crime was fresh in both of the victim's minds, State v. Johnson, 318 S.C. 372, 458 S.E.2d 49, 50 holding, ("a person in fear for his life presumably has a more accurate degree of attention to his surroundings than a mere passerby"). Investigator Griffin testified at trial that the first investigator at the crime scene, Sgt. Libertini informed him that the initial description of the suspect was that of a light-skinned male (trial transcript page 562, lines 4-25 and page 563, lines 1-3). The description of the suspect being a light-skinned man was never in an original incident report that Petitioner received, Petitioner never received an incident report that says the suspect was a light-skinned male. The prosecution knowingly withheld this information violating the South Carolina Code of Regulations which specifically states under 73-30 Uniform Crime Reporting (A) Every law enforcement agency must send SLED a copy of each report made by ANY officer during the performance of his duties in responding to reported criminal violations within the jurisdiction of that agency. Reports must be sent to SLED regardless of the degree of seriousness of the reported criminal activity. (B) The reports must be recorded on standard forms approved by SLED, commonly referred to as incident reports. (C) Reports must include to the maximum extent possible, details of all offenses investigated by officers, whether actual or unfounded, to include follow up investigations, reports of property recovered, changes in the status of any case and similar comments. The State's failure to disclose information warrants a reversal as a Brady violation only if the omission deprived the defendant of a fair trial. Under Rule 407 South Carolina Rules of Professional Conduct Rule 8.4, it is professional misconduct for a lawyer to: (A) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or

induce another to do so, or do so through the acts of another; (B) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; (C) commit a criminal act involving moral turpitude; (D) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

The West Columbia Police Department violated the S.C. Code of Regulations 73-30 Sections (A,B and C) when the department failed to produce or include the victim's initial description of the suspect as a light-skinned male in the incident report and the prosecution's knowingly withholding of this information prejudiced Petitioner because it weighed heavily against Petitioner's innocence. Petitioner was further prejudiced when he was not afforded the opportunity to submit the incident report with the victim's initial description of the suspect being that of a light-skinned male into evidence so that the jury could deliberate on it considering the fact that Petitioner is a very dark-skinned male. Evidence that is submitted for a jury to deliberate on far outweighs testimony about evidence that the jury may not even consider. There is a reasonable probability if Petitioner would have submitted the incident report containing the victims initial description of the suspect as a light-skinned male into evidence Petitioner could have established a reasonable doubt in the jury's minds and the jury may have voted not guilty. The prosecutor's knowingly withholding of exculpatory evidence violated Petitioner's Fifth, Sixth, and Fourteenth Amendment Rights of the United States Constitution and Article 1, Section 3 of the Constitution of the State of South Carolina. In Brady v. Maryland 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) the Maryland Court of Appeals declared, "The suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process without citing the United States Constitution or the Maryland Constitution which also has a due process clause". The prosecutor violated the South Carolina Rules of Criminal Procedure Rule 5 Disclosure in Criminal Cases (a) Disclosure of Evidence by the Prosecution (1) Information Subject to Disclosure (C) Documents and Tangible Objects. Upon request of the defendant the prosecution shall permit the defendant to inspect and copy books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, which are within the possession, custody or control of the prosecution, and which are material to the preparation of his defense or are intended for use by the prosecution as evidence in chief at the trial, or were obtained from or belong to the defendant.

Also, see Gibson v State 334 S.C.515 (1999), the Supreme Court of South Carolina stated, In "specific request" and "general or no-request" situations "favorable evidence is material and Constitutional error results from it's suppression by the government, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, see Kyle v. Whitley 514 U.S. 419, 15 S.C. 1555,

131 L.Ed.2d 490, 63 USLW 4303 (1995) in which the Supreme Court of the United States ruled favorable evidence State failed to disclose to defendant would have made a different result “reasonably probable” in capital murder prosecution , and thus, nondisclosure of evidence was Brady violation and defendant’s failure to request favorable evidence does not leave government free of all obligation to disclose such evidence to defendant, under Brady. Although the jury in Petitioner’s case heard testimony about the suspect being a light-skinned male in trial and during closing arguments, the probative value of submitting the incident report with both victims description of a light-skinned male into evidence for the jury to deliberate on far outweighs mere testimony that the jury may not even consider.

Therefore, the PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in it’s Order denying Petitioner’s application for post-conviction-relief, if the PCR Court would have done so, there is a reasonable probability Petitioner would have been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the Court of general sessions for a new trial.

1407629

4/13/14 0345 Call out showing #1 1035 Comanche Trl
Vic - Lorenda Simon - At Pelletts, Richland

0410. Dwi at Richland ER.

Sat says light skin blk male w/ mark breaks in house
Att. to repr vic she time of month he tells 6 yr
old to disclose to have sex w/ her. Vic starts yelling
Susp Shook her 5-6 times then runs out of house

0420 = ER nurse state to observe approx 10 holes in vic
chest. She is Alert & Conscious. Currently in CT scan
- In ER room ~~762~~ Pod 6 Rm 262

0430: Vic wheeled down to room 262

800 Calls: 9322 Family Mobile. Blue Back T-Mobile Concord
12 actual wounds one slug wound stuck

-recenter

Swg 504-502, 150 Small Black Ski mask
covering nose & mouth - dark blue. Dark blue
or black Hoodie. Dark Blue Jeans. Boots - Navy ²⁴⁻³²

[Redacted] Cousin to Luke Cantor, 25 years old
Covington, La. - Believes in Columbian

Belmont Simon [Redacted]

Pink phone at apartment [Redacted]

Simon medication given out the whole time

Trance Pencil ~~140335~~ 140135

0515 Vic taken to Operating Room 12

G: Cross-Examination of the Victim

The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in its order that Petitioner's trial counsel was not deficient for failing to adequately cross-examine the victim (PCR Court's Order of Dismissal pages 17 and 18). If Petitioner's trial counsel would have adequately cross-examined the victim about the initial description of the suspect which was corroborated by the victim's daughter that the suspect was a light-skinned male, there is a reasonable probability that Petitioner could have raised a reasonable doubt in the jury's minds towards Petitioner's innocence. The record reflects that the initial description of the suspect was a light-skinned male based upon Investigator Griffin's notes who was one of the State's "key" witnesses, (Trial transcript page 562, lines 10-23). Investigator Griffin testified that information was relayed to him by Sgt. Libertini who was the first investigator on the crime scene. The State nor Petitioner's trial counsel subpoenaed Sgt. Libertini to come to court to testify to determine where Sgt. Libertini got this information from that the suspect was a light-skinned male. This was highly prejudicial to Petitioner because not one, but two victims described the suspect as a light-skinned male while the crime was fresh in both of the victim's minds and without Sgt. Libertini at trial to testify violates Petitioner's Sixth Amendment Right to Confront Witnesses against him stating, "the Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him. This right includes the ability to cross-examine witnesses, challenge statements made by witnesses in court and ask questions that may discredit a witness. If Petitioner would have had an opportunity to cross-examine Sgt. Libertini there is a reasonable probability Sgt. Libertini would have testified that the information in reference to the light-skinned suspect did in fact come from one or both victims of the incident. In the PCR Court's Order of Dismissal of Petitioner's PCR application the PCR Court ruled "Applicant has failed to prove that the victim ever said the perpetrator was light-skinned". This was error based upon the fact that this assertion by the PCR Court was in fact due to the procedural irregularities that took place at Petitioner's PCR hearing (PCR hearing transcript page 5, lines 6-8 and page 6, lines 1-13). Investigator Griffin testified that he went to the hospital and conducted a tape recorded interview with the victim in which Investigator Griffin testified that the victim may have told him in that recorded interview that the suspect was a light-skinned male, (Trial transcript page 561, lines 11-25 and page 562, line 1). At Petitioner's trial the redacted version of the victim's recorded interview with Investigator Griffin was played instead of the unredacted version to prevent the jury from hearing the background noise from hospital staff. However, Petitioner never heard the unredacted version in which that version could have the victim's description of the light skinned male to corroborate Investigator Griffin's testimony that the victim may have told him the

suspect was light skinned. Prior to Petitioner's PCR hearing proceeding Petitioner sent numerous letters requesting Ms. McMahan to let him hear the unredacted version of the victim's recorded interview with Investigator Griffin in which she refused. This was also highly prejudicial to Petitioner because he was not afforded the opportunity to investigate and review all exculpatory evidence in his favor. At Petitioner's PCR hearing Petitioner motioned the Court for a continuance to be afforded the opportunity to hear the unredacted version of the victim's recorded interview to determine if there was exculpatory evidence in his favor in support of his issues for his Post-Conviction-Relief application, however, Petitioner's motion for a continuance was denied. (PCR hearing transcript page 5, lines 6-8 and page 6, lines 1-13). This was error pursuant to State v Tanner 299 S.C. 459, 385 S.E.2d 832 (1989) whereas, the Supreme Court of South Carolina ruled, ("it was reversible error to deny a defendant a continuance so that he could adequately ascertain evidentiary value of blood, skin, and hair samples taken from vehicle after accident and held in police custody until ten minutes before pre-trial hearing." "We hold that the trial court erred in failing to consider the potential exculpatory value of the samples. We further hold that the defendant has satisfied the Squires criteria of demonstrating other evidence that could have been produced and other points in his behalf that could have been raised." No real harm would have befallen the State from this continuance and indeed, the samples may be supportive of the State's case in Tanner's new trial. Hence, we hold that the trial court abused its discretion in not granting Tanner a continuance. The PCR Court's error rendered Petitioner's PCR hearing fundamentally unfair for the following reasons, first, the PCR Court denied Petitioner's motion for a continuance denying Petitioner his substantial right to determine if the victim said the suspect was light skinned as the PCR Court stated in its order denying Petitioner's PCR application, the PCR Court now claims that Petitioner can't prove if the description of the light skinned suspect came from the victim when the PCR Court is the sole reason as to why Petitioner wasn't afforded the opportunity to determine if that information pertaining to the light skinned suspect came from the victim, when the PCR Court denied Petitioner's motion for a continuance. This was fundamentally unfair to Petitioner and goes against the fundamental fairness essential to the concept of justice. If Petitioner's trial counsel would have impeached and adequately cross-examined the victim about the complexion of the suspect there is a reasonable probability the victim would have admitted that she told Sgt. Libertini and Investigator Griffin that the suspect was a light-skinned male. If the the victim would have admitted that she told Sgt. Libertini or Investigator Griffin the suspect was a light-skinned male, that testimony could have been sent back to the jury for deliberations which would have been very critical in determining Petitioner's innocence or guilt. Although Petitioner's trial counsel did argue to the jury in closing that Petitioner did not fit the initial description of the suspect, a thorough cross-examination of the victim that may have produced a description of a light-skinned suspect

from the victim in reference to Investigator Griffin's notes pertaining to the light skinned suspect would have been vital to support Petitioner's defense and closing arguments.

In Rogers v United States 2014 WL 12819294, the United States District Court, D. South Carolina held, ("ultimately, these passing, non-evidential references by the prosecutor and the trial judge were not nearly an adequate substitute for the vigorous cross-examination that should have taken place. An effective cross-examination would have at least drawn out the basic details of the arrangement between the government and Clayvon and the manner and extent to which Clayvon stood to benefit provided that he testified in a manner consistent with the Government's expectations. Had such a cross-examination taken place, the jury would have been appropriately equipped to assess the credibility of this critical witness. In Petitioner's case, the passing, non-evidential references by Petitioner's trial counsel's referencing to the jury that the suspect was light-skinned was not nearly an adequate substitute for the vigorous cross-examination that should have taken place.

Lastly, in the PCR Court's Order of Dismissal the PCR Court stated, "under these circumstances, it would not be surprising for a witness to mistake a dark-skinned black male for a light skinned black male . The PCR Court's allegation was not based upon Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 and was based on pure speculation. Therefore, there is a reasonable probability that, but for the PCR Court's error Petitioner would have been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the court of general sessions for a new trial.

I: Touch-DNA Expert

The PCR Court did not make Findings of Fact and Conclusions of Law pursuant to S.C. Code Ann. 17-27-80 in its Order denying Petitioner relief in his Post-Conviction-Relief application. The PCR Court ruled "at the evidentiary hearing, Applicant did not introduce any testimony from a Touch-Dna expert to substantiate this **allegation**, nor did he call the State's DNA expert to demonstrate how a more thorough cross-examination might have resulted in a different outcome at trial." (PCR Court's Order of Dismissal pages 19 and 20) That was error. Several months prior to Petitioner's PCR hearing Petitioner's family spoke with Touch DNA expert Dr. Robert Bennett in which Dr. Bennett agreed to testify on Petitioner's behalf after reviewing. Dr. Bennett is the same expert that Ms. McMahan was granted funding for, for the services of Dr. Bennett, however Ms. McMahan claimed she consulted with Dr. Bennett and he was to no availability, in which Petitioner discovered Ms. McMahan was dishonest with him about her consultation with Dr. Bennett after Petitioner spoke with Dr. Bennett himself. At Petitioner's PCR hearing Petitioner motioned the Court for a continuance to obtain the services of Touch DNA expert Dr. Robert Bennett as well as other reasons also. (PCR transcript page 7, lines 17-25 and page 8, lines 1-24). Please be advised that Petitioner never moved the court for a continuance prior to Petitioner's request at his PCR hearing. The State was the only party that requested a continuance in Petitioner's post-conviction-relief proceedings. When the PCR Court denied Petitioner's request for a continuance to obtain the services of Touch DNA expert Dr. Bennett, that rendered Petitioner's PCR hearing fundamentally unfair to Petitioner depriving Petitioner of having a full last bite at the apple. The PCR Court stated that Petitioner failed to introduce any testimony from a Touch-Dna expert. Petitioner was not afforded the opportunity to present testimony from a Touch-Dna expert due to the inadequate representation of Petitioner by Ms. McMahan in his Post-Conviction-Relief proceedings and the PCR Court's error denying Petitioner's request for a continuance so he could obtain a Touch DNA expert to testify on his behalf especially considering the fact that Petitioner's Touch DNA was the "key" piece of evidence used to arrest, indict and convict Petitioner, see State v. Tanner 299 S.C. 459 ,385 S.E.2d 832 (1989) whereas the Supreme Court of South Carolina ruled, " it was reversible error to deny a defendant a continuance so that he could adequately ascertain evidentiary value of blood, skin, and hair samples taken from vehicle after accident and held in police custody until ten minutes before pre-trial hearing." "We hold that the trial court erred in failing to consider the potential exculpatory value of the samples. We further hold that the defendant has satisfied the Squires criteria of demonstrating other evidence that could have been produced and other points in his behalf that could have been raised." "No real harm would have befallen the State from this continuance, and indeed, the samples may be supportive of the State's case in Tanner's

new trial. Hence, we hold that the trial court abused its discretion in not granting Tanner a continuance. In Petitioner's case, Petitioner suffered the same prejudice as Tanner when the PCR Court denied Petitioner's request for a continuance and Petitioner was prevented from investigating and presenting exculpatory evidence in his favor at the PCR hearing. If Petitioner was afforded the opportunity to present the exculpatory evidence at his PCR hearing Petitioner could have shown the PCR Court that a Touch DNA expert would have testified on his behalf and there is a reasonable probability Petitioner would have been granted relief in his PCR application. The fact that the jury nor the PCR Court in Petitioner's case never heard testimony from a Touch-Dna expert weighed heavily against Petitioner's innocence. Neither Court heard the testimony from an expert that Touch DNA evidence is not conclusive DNA evidence of guilt, Touch DNA evidence is not DNA evidence demonstrating guilt such as blood, saliva or semen, Petitioner's Touch DNA on the cap does not prove that Petitioner was the last person to wear the cap based upon the fact that the cap had a mixture of at least two individuals and the State's expert testified that she cannot determine how long Touch DNA stays on an object, (Trial transcript page 941, lines 10-14). The trial court at Petitioner's trial even stated "this case is about DNA", (Trial transcript page 776, lines 16-17. Petitioner was initially prejudiced at his trial when his trial counsel's failed to hire a Touch-DNA expert to testify on his behalf to challenge the State's DNA evidence pursuant to Reeves v. State 415 S.C. 366, 782 S.E.2d 747 (2015), holding, ("defendant's trial counsel was deficient for failing to call a medical expert to challenge the State's medical evidence and defendant was prejudiced by his trial counsel's deficiency in failing to call medical experts.") Petitioner's trial counsel's ineffectiveness deprived Petitioner of his Constitutional Right to present a defense pursuant to the South Carolina Rules of Evidence Rule 702 Testimony by Experts, stating "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Petitioner also relies on Ard v Catoe 372, S.C. 318. 642 S.E.2d 590 (2007) whereas, the Supreme Court held that defense counsel's decisions regarding the investigation of, and failure to challenge, the gunshot residue evidence were unreasonable and clearly deficient. Also, in Ard v Catoe the Supreme Court of South Carolina found "the PCR Court properly focused on the evidence that counsel failed to appropriately examine the State's forensic evidence and failed to obtain the assistance of an appropriate expert. In Petitioner's case, he doesn't have that in which the PCR Court properly focused on the evidence that Petitioner's trial counsel failed to appropriately examine the State's forensic evidence and failed to obtain the assistance of an appropriate expert. Petitioner's PCR counsel Jason Chehoski even testified at the PCR hearing that he was not experienced or familiar with how to represent a defendant with DNA evidence against them, Mr. Chehoski handled the DNA part of

Petitioner's trial (PCR transcript page 128, lines 19-24). The PCR Court in Petitioner's case failed to properly focus on the evidence that Petitioner's trial counsel failed to appropriately examine the State's forensic evidence and failed to obtain the assistance of an appropriate expert, which was an error on the PCR Court's behalf. There is a reasonable probability that, but for counsel's deficient performance the results of the proceeding would have been different. Petitioner's PCR Counsel McMahan's inadequate representation of Petitioner fell below the standard set forth in Strickland v Washington 466 U.S. 668 (1984) when she failed to obtain a Touch DNA expert on behalf of Petitioner pursuant to Bannister v State 333 S.C. 298, 509 S.E.2d 807 (1998) stating, "Post-Conviction-Relief applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness's failure to testify at trial." Petitioner's PCR Counsel deprived Petitioner of that right when she failed to hire a Touch-DNA expert on Petitioner's behalf. If Counsel McMahan would have offered the testimony of a Touch-DNA expert on Petitioner's behalf at the PCR hearing Petitioner could have shown the State failed to produce sufficient identity evidence placing Petitioner at the scene of the crime as in U. S. v. Bonner 2011 648 F.3d 209 (4th Circuit) whereas, the United States Court of Appeals held, ("The government relied on the insufficient scientific theory that, because the defendant's DNA was the "predominant" profile on the hat, he must have been the last one to wear it. We concluded that this "scientific theory as to identity lacked any evidentiary support in the record. When the district court considered acquitting the defendant it relied on "missing, flawed, or contradictory facts." Here, we found that the government failed to produce sufficient identity evidence placing Bonner at the scene of a robbery and relied on unsubstantiated, unscientific evidence to bolster minimal evidence. Petitioner's case is identical to Bonner's considering the fact that the cap with Petitioner's Touch DNA on it had a mixture of at least two individuals with Petitioner being the major contributor. Please be advised that at the time of the crime Petitioner's Touch DNA on the cap was the only evidence linking Petitioner to the incident. Petitioner's Touch DNA on the cap does not prove that Petitioner was the last person to wear it. Petitioner informed Investigator Griffin when he was arrested that Petitioner had given away some clothes to the thrift store and some drug users when confronted about why his DNA was at a crime scene in which Investigator Griffin testified to this at Petitioner's trial (Trial transcript page 551, lines 17-22. Petitioner's Mother testified at the PCR hearing that she witnessed Petitioner putting clothes into two or three trash bags to donate to charity, she also stated that she saw Petitioner putting the bag of clothes in his car (PCR transcript page 21, lines 11-25 and page 22, lines 1-20). All of these factors render a valid explanation as to why Petitioner's Touch DNA was on the cap that was at the scene of the crime. The only evidence linking Petitioner to the crime was Petitioner's Touch DNA on the cap. Petitioner

filed a Motion for Discovery and Funding with this Court on August 16, 2024 respectfully requesting funding for the services of Touch DNA expert Dr. Robert Bennett. If this Court grants Petitioner's Motion for Discovery and Funding Petitioner will submit to this Court an affidavit from Dr. Bennett in support of Petitioner's meritorious issues that he is raising to this Court in reference to Counsel McMahan's Johnson Petition. Dr. Bennett's testimony is critical in Petitioner's case. Petitioner's trial counsel and his PCR counsel failed to exercise due diligence and challenge the State's forensic evidence and obtain the services of an appropriate Touch-Dna expert. If both Counsel's would have done so Petitioner could have shown either Court that the State failed to produce sufficient identity evidence placing Petitioner at the scene of the crime and that the State relied on unsubstantiated unscientific evidence to bolster minimal evidence. There is a reasonable probability that, but for the PCR Court's error, Petitioner would have been granted relief in his Post-Conviction-Relief application.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the court of general sessions for a new trial.

The PCR Court erred in finding that trial counsel was not ineffective when counsel failed to call Pauline Jones to show that the Petitioner did not have ownership of the nylon cap at the time of the incident.

When reviewing a claim for ineffective assistance of counsel, the “court proceeds from the rebuttable presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Smith v. State 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (quoting Strickland v Washington 466 U.S. 668, 690 (1984)). To rebut this presumption and succeed on an ineffective assistance claim, a PCR Applicant must show (1) trial counsel’s performance was deficient, and (2) trial counsel’s deficient performance prejudiced the outcome of the trial. Strickland, 466 U.S. at 687. To prove trial counsel’s performance was deficient, a PCR Applicant must show trial counsel’s representation fell below an objective standard of reasonableness.” Smalls 422 S.C. at 181, 810 S.E.2d at 840 (quoting Williams v State 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)).

Investigator Griffin testified that when he initially interviewed the Petitioner he stated he had recently given away some of his clothes to a thrift store, and that the clothes included some hoodies. (Trial transcript page 551, lines 17-22). Petitioner’s Mother Pauline Jones testified at the PCR hearing that she witnessed Petitioner putting clothes into two or three trash bags (PCR transcript page 21, lines 11-25). Ms. Jones testified that she saw the Petitioner take the bags of clothes out of the house and put them in the car two or three weeks before the incident, (PCR transcript page 22, lines 1-20).

Had trial counsel’s called Ms. Jones to testify as a witness in trial it would have supplemented the Petitioner’s statement about the donation of the clothes and possibly swayed the jury to return a verdict of not guilty. See Pauling v State 331 S.C. 606, 503 S.E.2d 468 (1998) (failure to call defense witness triage nurse was ineffective); Martinez v State 304 S.C. 39, 403 S.E.2d 113 (1991) (where trial counsel admits the testimony of a certain witness may have made the difference in obtaining an acquittal, the Court may find ineffective assistance). Therefore, this Court should grant the application for post-conviction-relief and order a new trial.

CONCLUSION

Based on all the foregoing, Petitioner respectfully requests this Court to grant the previous denial of Post-Conviction-Relief and remand this case back to the Court of general sessions for a new trial.