STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

RECEIVED
OCT 22 2013
S.C. Supreme Court

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2012-CP-30-0741

Davoris Smiley,.....Respondent,

v.

State of South Carolina,.....Petitioner.

NOTICE OF APPEAL

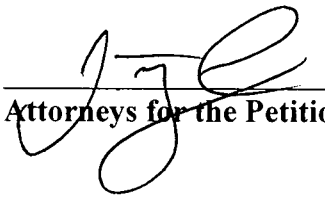
The State of South Carolina appeals the Honorable Eugene C. Griffith, Jr.'s order dated and filed on August 9, 2013 granting post-conviction relief to the Respondent. The State received notice of entry of the order on September 27, 2013. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General
S.C. Bar # 78871

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: 

Attorneys for the Petitioner

Columbia, South Carolina

October 22, 2013

Other counsel of record:

Joshua S. Nasrollahi, Esquire
209 Waller Avenue
Greenwood, South Carolina 29646

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PROOF OF SERVICE

I, J. Rutledge Johnson, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Joshua S. Nasrollahi, Esquire
209 Waller Avenue
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served this 22nd day of October, 2013.

J. RUTLEDGE JOHNSON
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-30-00741

Davoris Smiley

PLAINTIFF(S)

State of South Carolina

DEFENDANT(S)

Submitted by: Joshua S. Nasrollahi

Attorney for : ☒ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

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

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

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

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

2154
Judge Code

8-9-13
Date

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

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

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

STATE OF SOUTH CAROLINA **COUNTY OF LAURENS**	)	**COURT OF COMMON PLEAS** **EIGHTH JUDICIAL CIRCUIT**
Davoris Smiley, Applicant, -v- State of South Carolina, Respondent.	)	2:50 Case No. 2012-CP-30-00741 ORDER

A TRUE COPY OF ORIGINAL
Lynn W. Lancaster
Lynn W. Lancaster
Laurens County CCCP & GS

Griffith, J.

A jury convicted the Applicant Davoris Smiley of armed robbery and possession of a deadly weapon during a violent crime and the Honorable Roger Couch sentenced him to fifteen years in prison. The conviction stems from a robbery that occurred on the evening of April 24, 2011, at the Guatemex Store in Clinton, South Carolina. That night, two masked men wearing "dark tops" entered the Guatemex and, while one of the robbers held the clerk at gunpoint, the other robber took cash out of the register. The robbers then fled on foot.

Surveillance footage from the store showed that, prior to the robbery, three men walked back and forth in front of the Guatemex. One of the men wore a gray tank top and dark jeans while the other two men wore "dark colored tops and jeans." Then, minutes before the robbery took place, the individual wearing the gray tank top entered the Guatemex, purchased a soda, and left. At trial, the store's clerk, Anna Sebastian, identified that individual as the co-defendant Jakeivan Pulley. Sebastian also identified Pulley as the robber who took money out of the register, this time wearing a dark sweater.

After the robbery, law enforcement stopped a vehicle near Watts Street with two females, Pulley, and Lakasion Robinson inside. Based on information received from officers processing the Guatemex crime scene, Pulley and Robinson were arrested and charged with the robbery. Once in custody, Detective Leann Riggott interviewed Robinson and learned that Robinson had discarded a black sweater near Watts Street. The sweater was retrieved from where Robinson indicated and was placed in evidence.

While Detective Riggot was interviewing Robinson, law enforcement received an "anonymous tip," where they learned that Smiley was now at Laurens Terrance Apartments, four miles away from the Guatemex. Once at 905 Laurens Terrace Apartments, Lieutenant Robbie Haupfear approached the apartment's tenant, Porsha Miller. As they spoke, Smiley appeared and was immediately placed in "investigative detention," where he was handcuffed and placed in the back of a patrol car. It was just after one o'clock in the morning, more than four hours after the robbery took place. Haupfear then obtained consent from Miller to search her apartment, where he found, among other things, $705 in cash and a cell phone. Smiley was processed into the Laurens County Detention Center, where his clothing was bagged and collected as evidence by Detective Riggott.

After Smiley's arrest, Detective Riggott obtained a search warrant for the cell phone taken from Laurens Terrace Apartments. The search warrant describes the property sought from the cell phone as "all information on cell phone [sic] not limited to all calls (incoming and outgoing), text messages (incoming and outgoing), contacts, and photos." The affidavit in support of the search warrant states that "all three suspects had cell phones on their person at the time of arrest and it is believed that the three may have had

conversations on their cell phones before and or [sic] after the robbery between themselves and or [sic] others." Nothing in the surveillance footage—which Detective Riggott personally viewed—shows any of the suspects using a cell phone. As a further matter, nothing in the statement taken from Robinson indicates that any cell phones were used in the commission of the robbery. Smiley's phone was searched pursuant to the search warrant and its contents were seized. Among the photos taken from Smiley's phone was a picture of Smiley posing in front of a mirror with a handgun. The handgun actually used in the Guatemex robbery was never recovered.

Trial counsel was later appointed to Smiley's case. Over the course of the several months leading up to trial, counsel met with Smiley at the jail "two or three times." Records from the Laurens County Detention Center indicate that counsel visited with Smiley on only two occasions, the last being the day before trial. According to Smiley's testimony at the PCR hearing, counsel did not discuss the case with him to any real extent. Nonetheless, Smiley's case proceeded to trial, where he was tried together with Pulley. Robinson had earlier struck a deal with the State and had pled guilty to misprision of a felon, where he received a probationary sentence.

At trial, the State used the clothing seized from Smiley to tie him to the Guatemex robbery. The State also used the pictures taken from Smiley's cell phone to paint him as the gunman. Throughout the trial, the only individual who positively identified Smiley as the gunman was Detective Riggott, who claimed that she could recognize Smiley by his forehead—the only part of gunman's face exposed on the video, which Detective Rigott viewed on a 17-inch monitor. Another source of critical testimony was that of Lakasion Robinson, who pinned the entire robbery squarely on Smiley and Pulley. Prior to trial,

defense counsel never requested a copy of Robinson's plea colloquy nor did he investigate whether Robinson had exchanged a probationary sentence in return for his testimony. All the same, during the defense's case in chief, trial counsel called a single witness, whose testimony further implicated Smiley as the gunman. At the PCR hearing, trial counsel admitted that he never interviewed the witness beforehand and was unaware of what her testimony would be.

In his application, Smiley claims that trial counsel was ineffective for several reasons: (1) trial counsel was ineffective for failing to object to the introduction of Smiley's clothing at trial; (2) trial counsel was ineffective for failing to object to the introduction of the pictures from Smiley's cell phone; (3) trial counsel was ineffective for failing to investigate his co-defendant Lakashian Robinson; (4) trial counsel was ineffective for failing to investigate Diana Melendez before calling her as a witness; and (5) trial counsel was ineffective for failing to meet with the Applicant in order to investigate and prepare for the case.

STANDARD OF LAW

In an action for post-conviction relief, the burden of proof is on the Applicant to prove his allegations by a preponderance of the evidence. Frasier v. State, 351 S.C. 385, 570 S.E.2d 172 (2002) (citing Rule 71.1(e), SCRCP); Butler v. State, 286 S.C. 441, 442 (1985). "To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Johnson v. State, 480 S.E.2d 733, 735 (1997)(citing Underwood v. State, 309 S.C. 560 (1992); Simmons v. State, 308 S.C. 481 (1992)). In

this way, an ineffective assistance of counsel claim involves a two prong analysis: (1) that counsel's performance was deficient and (2) that counsel's performance prejudiced the Applicant. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Demonstrating error requires a showing that counsel's performance fell below the "reasonableness under professional norms." Id. at 117. In order to show prejudice, the Applicant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson, 480 S.E.2d at 735(citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984)).

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF THE CLOTHING SEIZED FROM THE APPLICANT AS A RESULT OF HIS ILLEGAL ARREST.

Smiley first argues that several articles of clothing introduced at trial should have been suppressed as the fruits of an illegal arrest. The first step in determining whether Smiley's argument has any merit is whether the "investigative detention" in question constituted an arrest. "The test for determining if a particular encounter constitutes a seizure within the meaning of the Fourth Amendment is whether in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." State v. Brannon, 379 S.C. 487, 499, 666 S.E.2d 272, 278 (Ct. App. 2008) aff'd, 388 S.C. 498, 697 S.E.2d 593 (2010)(citing Michigan v. Chesternut, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed.2d 565 (1988); United States v. Analla, 975 F.2d 119 (4th Cir.1992); United States v. Sullivan, 138 F.3d 126, 132 (4th Cir.1998)). There is no question that when Smiley was handcuffed and placed in the back of a patrol car, he

was under arrest. It would be absurd to think that a reasonable person in handcuffs and in the back of a police patrol car would believe he was free to leave.

The next factor in analyzing Smiley's argument is whether Smiley was arrested pursuant to a valid arrest warrant or, without a warrant, upon suspicion of a "freshly committed crime." S.C. Code Ann. § 23-13-60; State v. Martin, 274 S.C. 141, 145, 268 S.E.2d 105, 107 (1980). There is no evidence that the arrest in question was made pursuant to a valid arrest warrant. According to the incident report and trial testimony, Smiley was immediately arrested when he was observed by law enforcement at Laurens Terrace Apartment. The incident report further reveals that not until *after* Smiley was arrested and Miller's apartment was searched was Smiley charged with the commission of a crime.

This Court must then resolve whether law enforcement arrested Smiley upon suspicion of a freshly committed crime. Here, officers arrested Smiley hours after the robbery—according to the testimony of Detective Riggott, more than four hours later. The four-hour lapse in time between the incident and the arrest cannot be construed by this Court as law enforcement acting on suspicion of a freshly committed crime. Cf. Martin, 274 S.C. at 147-47 (reversing suppression of evidence under S.C. Code Ann. 17-13-30 where there was evidence of an accident, the defendant appeared highly intoxicated and admitted to driving, and a group of fifteen to twenty people had congregated around the scene of the accident); State v. Mims, 263 S.C. 45, 47-48 (1974)(approving warrantless arrest for breach of peace where the officer arrived minutes after being summoned, hear scuffling inside the home, and an argument in a high voice); Simmons v. Smith, 2012 WL 2935369 (D.S.C. July 2, 2013)(finding evidence of freshly

committed crime where officers responded to a 911 call and discovered signs of a struggle and injury to the victim and arrested the plaintiff minutes later); Koon v. County of Newberry, S.C., 2010 WL 3781798 (D.S.C. Sept. 21, 2010)(finding no violation of § 23-13-60 where officers responded to 911 all and found evidence of domestic violence); Fradella v. Town of Mount Pleasant, 325 S.C. 469, 475-76 (Ct. App. 1997)(concluding that there was evidence of a freshly committed crime where Fradella admitted to dispatch that he was involved in a car accident, was identified by another individual as a driver, and was found 27 minutes later intoxicated at his home); State v. Retford, 276 S.C. 657 (1981)(finding evidence of a freshly committed crime where there was evidence of an automobile break in, a witness observed the defendant's criminal behavior and officers placed the defendant under arrest within moments of arriving on the scene). The clothes obtain from Smiley, likewise, were taken from him after he had been transported to and booked into the detention center and, thus, were the fruits of an illegal arrest. In this regard, trial counsel's failure to object to the admission of the clothing was error.

By the same token, it is questionable whether Smiley's arrest was supported by probable cause. "Probable cause for a warrantless arrest exists when the circumstances within the arresting officer's knowledge are sufficient to lead a reasonable person to believe that a crime has been committed by the person being arrested." State v. Baccus, 367 S.C. 41, 49, 625 S.E.2d 216, 220 (2006)(citing State v. George, 323 S.C. 496, 509, 476 S.E.2d 903, 911 (1996)). The question of probable cause must be resolved looking "the totality of the circumstances surrounding the information at the officer's disposal. Baccus, 367 S.C. at 49(citing George, 323 S.C. at 496; Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). In determining the existence of probable cause,

the Court must consider "whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." Beck, 379 U.S. at 91 (citing Brinegar v. United States, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1310-11, 93 L.Ed. 1879 (1949); Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134 (1959)).

According to the incident report and trial testimony, law enforcement, using a tracking dog, followed a scent to 104 Watts Street, which was the direction the robbers fled. There, no subjects were found. The incident report goes on to state that "[o]fficers received information of the other two subjects names, Davoris Smiley and Lakasion Robinson." The source of this "information" is unknown. At trial, Detective Riggott testified:

Q. Later on did you receive any information about Smiley's whereabouts?

A. Oh, yes, sir, we did.

Q. Okay. Now, I'm not gonna ask you—well, how did that come into your possession? How did that information come to you?

A. At the time Captain Cofield had gotten an anonymous tip of his location.

Q. And in response to that tip, what did y'all do?

A. She forwarded the information to Chief Morris, and I believe at that time they went to that location.

Q. All right. And what was that location?

A. 905 Laurens Terrace.

SCA

Again, there is nothing in the record confirming the source of the information received by law enforcement regarding Smiley's involvement in the robbery. Clearly, nothing in the incident report or trial testimony reveals that the co-defendants were the source of this information. See Beck, 379 U.S. at 94("There is nowhere in the record any indication of what 'information' or 'reports' the officer had received, or, beyond what has been set out above, from what source the 'information' and 'reports' had come."). Moreoever, Captain Cofield never testified as to any "anonymous tip" she received regarding Smiley's whereabouts or involvement in the robbery.

Additionally, there was no evidence that Smiley behaving in any suspicious manner; on the contrary, the evidence indicates that Smiley walked calmly into the hands of law enforcement. Lieutenant Haupfear testified as to Smiley's demeanor at the time of arrest:

Q. All right. When you came to the house, did you call for Mr. Smiley to come down or did you call out for him?

A. No, sir.

Q. Did he come down on his own volition?

A. Yes, sir.

Q. Did you have to go—you didn't have to go look for him then?

A. No, sir, we were talking to Ms. Miller and he walked from downstairs, from upstairs.

Q. Just casually walked down the steps? He wasn't trying to be evasive?

A. No, sir.

See Beck, 379 U.S. at 94("And the record does not show that the officers saw . . . saw, heard, smelled, or otherwise perceived anything else to give them ground for belief that the petitioner had acted or was then acting unlawfully."). Based on the record before the Court, there is a strong question as to whether probable cause existed for law enforcement to conduct a warrantless arrest. Again, as the clothing seized from Smiley was the result of an illegal arrest, trial counsel's failure to object to their introduction was error.

Smiley, by the same note, was prejudiced by trial counsel's failure to object to the introduction of the clothing at trial. At trial, the State used Smiley's clothing to tie him to the robbery:

Q. What did you observe in the [Guatemex surveillance] video?

A. [Detective Riggott:] I observed the clothing to be the same clothing in the video.

Q. Okay.

A. It appeared to be the same clothing.

Q. Specifically, what, what did you observe?

A. You mean the description of the clothing?

Q. The, the various items of clothing you saw in the video and, and the clothing you see here.

. . .

A. Okay. The gray shorts were, were worn by the shorter male in the video. Appeared to be the same shorts.

Q. Okay. Appeared to be the same shorts as State's exhibit 9?

A. Yes, sir.

Q. All right.

A. And the belt and also the boots. The individual with the gray shorts is also wearing boots that look exactly like those.

Q. State's Exhibit No. 17?

A. Yes, sir.

At the PCR hearing, trial counsel admitted that the clothing in question was "critical" to the State's case. Trial counsel further stated that he was unaware that the seized clothing was subject to challenge because of the legality of Smiley's arrest. Moreover, trial counsel stated that he was under the impression that law enforcement could have detained Smiley for several hours of questioning without constituting an arrest. In this way, trial counsel's failure to object to the admission of this evidence constituted error and prejudice.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PICTURES SEIZED FROM SMILEY'S PHONE.

Smiley next contends that counsel was ineffective for failing to move to suppress the pictures seized from his cell phone. He supports this contention on the grounds that the pictures were seized in violation of the Fourth Amendment of the United States Constitution. "The Fourth Amendment's guarantee against unreasonable searches and seizures is, of course, in part implemented by the constitutional requirement that 'no Warrants shall issue, but upon probable cause, and particularly describing the things to be seized.'" United States v. Jacob, 657 F.2d 49, 51 (4th Cir. 1981)(emphasis omitted). The

SCDf.

search warrant in this case violates both the probable cause and particularity requirements of the Fourth Amendment.

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Marron v. United States, 275 U.S. 192, 196, 48 S.Ct. 74, 76 (1927). The particularity requirement of a search warrant prohibits law enforcement from engaging in "a general, exploratory rummaging in a person's belongings." Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); see also Maryland v. Garrison, 480 U.S. 79, 84, 107 S.Ct. 1013, 94 L.Ed.2d 72 (1987) ("By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit."). "General warrants of course, are prohibited by the Fourth Amendment." Andresen v. Maryland, 427 U.S. 463, 480, 96 S. Ct. 2737, 2748, 49 L. Ed. 2d 627 (1976). "[W]arrants will frequently lack particularity where they include a general, catch-all paragraph or provision, often one authorizing the seizure of 'any or all records' of a particular type." United States v. Vilar, S305CR621KMK, 2007 WL 1075041 (S.D.N.Y. Apr. 4, 2007)(citing United States v. Bianco, 998 F.2d 1112, 1116 (2d Cir.1993); United States v. Hickey, 16 F.Supp.2d 223, 238 (E.D.N.Y.1998); United States v. Gigante, 979 F.Supp. 959, 966-67 (S.D.N.Y.1997)). See also U.S. v. Wecht, 619 F.Supp. 2d 213 (E.D.Pa. 2009)(finding that search warrant affidavit did not provide sufficient information to justify seizure of all

information on a laptop); U.S. v. Abrams, 615 F.2d 541 (1st Cir. 1980)(finding a search warrant that permitted seizure of all Medicare and Medicaid records invalid for lack of particularity); United States v. Ford, 184 F.3d 566, 576 (6th Cir. 1999)("Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad.").

The search warrant in this case is a clear violation of the prohibition set forth in cases like Coolidge. The search warrant allowed the seizure of all "information" on the phone. The common sense import of this language is clear—anything and everything on the phone was fair game for law enforcement. In this way, the search warrant authorized law enforcement to essentially rummage through the contents of Smiley's phone for any evidence deemed of interest. There were no limitations placed on what law enforcement was authorized to seize. The warrant, instead, extended to each and every call, text, photo—every item of information on the phone—regardless of its probative value to the crime in question.

The affidavit in support of the search warrant, furthermore, does not establish probable cause as to how *all* of the contents of the phone were related to the crimes charged. No doubt some if not much of the contents of the cell phone predate the alleged offense. The pictures at issue are just such a case, their being taken hours before the robbery. Nothing in the warrant and supporting affidavit articulate a justification for seizing them. In re Application of Lafayette Academy, 610 F.2d 1, 6 (1st Cir.1979)(rejecting justification for the seizure of records predating offense as being unsupported in affidavit). Additionally, it is unsettled as to how several of the categories listed in the warrant were relevant at all to the robbery. Nothing in the record, for

example, indicates that a single picture was taken with a cell phone at any time before, during, or after the robbery. The justification for seizing *all* pictures on the phone is a mystery. The link, moreover, between the pictures and the conversations between the conspirators, as alleged in the supporting affidavit, is a bigger enigma.

At the PCR hearing, trial counsel stated that he was unfamiliar with Fourth Amendment jurisprudence. He stated that his knowledge of search warrants was what he had learned in law school. While counsel did object to the admission of the pictures on Rule 803, SCRE, grounds, his failure to object to their admission on Fourth Amendment grounds was error, unsupported by any discernable trial strategy. It is also doubtless that Smiley was prejudiced by counsel's deficient performance. The gun used in the robbery was never recovered. Instead, the state used the pictures of Smiley posing with the gun—pointing out the similarities between the one in the picture and the one in the Guatemex surveillance footage—to link him to the robbery. For this reason, it was both error and prejudice when trial counsel failed to raise a Fourth Amendment objection to the admission of the pictures in question.

III. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE SEVERAL CRITICAL WITNESSES

Smiley also argues that trial counsel's failure to investigate the plea colloquy of co-defendant Robinson, defense witness Diana Melendez, and to meet with Smiley himself and prepare for trial constitutes a violation of the Strickland test. "While a lawyer's failure to investigate a witness who has been identified as crucial may indicate an inadequate investigation, the failure to investigate everyone whose name happens to be mentioned by the defendant does not suggest ineffective assistance." Jones v. United

States, 2:03-3861-18, 2006 WL 2038305 (D.S.C. July 19, 2006) (citing Huffington v. Nuth, 140 F.3d 572, 580 (4th Cir.1998)(internal quotations omitted). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690-91. "Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'" Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007)(citing Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir.1986); Strickland, 466 U.S. at 691, 104 S.Ct. 2052).

A. Trial Counsel Was Ineffective for Failing to Investigate Robinson's Plea.

Also linking Smiley to the robbery was Robinson's testimony. By the time Smiley stood for trial, Robinson had plead guilty to misprision of felon and had received a probationary sentence. Evidence was adduced that there may have been a deal between Robinson and the State with regard to Robinson's testimony. At trial, counsel objected to the introduction of Robinson's testimony on the grounds that the transcript of Robinson's plea had not been provided in discovery.

It is not speculative to consider that there some evidence of impeachment value in Robinson's plea. Prior to Robinson's taking the stand, and outside the presence of the jury, Robinson's public defender was called to testify as to her understanding of Robinson's plea negotiation and subsequent plea:

Q. To your knowledge, were, were there any, any promises, rewards, inducements made to a codefendant in this case whether or not they will testify at trial?

A. The best thing to look at would be the guilty plea transcript. As far as a

written agreement or an oral agreement of you get to plea because you testified, no. I do believe, during the guilty plea, I mentioned that he would cooperate and I told him that he may be called as a witness in this trial.

. . .

A. But I do believe I said there would be cooperation during the guilty plea, and the best thing to look at would be the transcript word-for-word. It's been sometime.

Evidence in this case indicates that Robinson was involved with the robbery, the degree of which is uncertain. Robinson either gave Pulley his sweater and then discarded the sweater afterwards or it was Robinson himself who was the gunman. His involvement, nevertheless, was somewhat greater than the waiver indictment of misprision of a felon to which he pled. Cf. U.S. v. Dung Vu, 215 Fed.Appx. 9 (1st Cir. 2007)(finding no ineffective assistance where trial counsel failed to obtain co-defendant's plea transcript for sentencing purposes but evidence amply demonstrated defendant's leadership role in the crime).

Trial counsel's belief that the transcript in question was subject to Rule 5, SCCrimP, and Brady v. Maryland, 373 U.S. 83 (1983), was contrary to established law. His failure to request a copy of the transcript is thus error. See Anderson v. Leeke, 271 S.C. 435, 248 S.E.2d 120 (1978)(finding the State has no obligation under Brady to furnish evidence equally available to the accused); State v. Cox, 274 S.C. 624, 266 S.E.2d 784 (1980)(same). The fact that Smiley was deprived of potentially valuable impeachment material thus constitutes prejudice.

B. **Trial Counsel Was Ineffective for Failing to Investigate the Testimony of Diana Melendez Prior to Calling Her as a Witness.**

Smiley also claims that it was ineffective assistance of counsel for failing to interview Diana Melendez prior to calling her as a witness at trial. At the PCR, trial counsel testified that he did not interview Melendez, an eye-witness to the crime, before subpoenaing her for trial. At trial, Melendez testified on cross-examination:

Q. Did the guy on the right-hand side say anything?

A. I, I don't know.

Q. Don't know. Okay. That's fair. When they were getting ready to leave the store, did they say anything?

A. Only I head the part of let's go, let's go, D I think.

Q. Say it again please.

A. Let's go, D.

Q. Let's go, D. And did the one that was on my right [the gunman] or on my left [Pulley] say that?

A. On the left.

Q. The left?

A. Yes.

Trial counsel further testified at the PCR hearing that he was completely unaware as to what Melendez's testimony would be. Prior to trial, he never interviewed her as to what her testimony would be. Instead, he called her as a witness in order to bring out inconsistencies in her statement to law enforcement. It is clear from the incident report—the source of the inconsistencies that trial counsel sought to bring out—that Melendez

was an eye-witness to the crime in question. In this way, trial counsel's failure to investigate Melendez and her possible testimony was unreasonable. The end result, however, was that Smiley's own witness testified against him. Counsel's failure to investigate an eyewitness to the crime before calling her as a witness constitutes both error and prejudice under Strickland.

IV. Trial Counsel Was Ineffective for Failing to Prepare the Case.

According to trial counsel's testimony at the PCR hearing, he met with his client at least three times prior to trial. The testimony of Private Crawford at the Laurens County Detention Center and the visitation logs she introduced into evidence indicated that counsel only met with Smiley twice. Trial counsel averred that one of the visits could have been erroneously logged by the detention center where counsel met with several clients on the same day. In reply, Private Crawford testified that this was likely impossible, given the protocols the detention center followed when logging attorney-client visits.

Trial counsel also testified that while he conducted some research into the laws applicable to the case, he relied mostly on his consultation with other attorneys in preparation for this case. As addressed above, trial counsel never researched or investigated the laws governing searches and seizures here in question. With regard to the issue of the search warrant specifically, trial counsel conducted no independent research at all. Smiley testified that he and trial counsel hardly discussed the facts of the case prior to trial. In this regard, for example, trial counsel never inquired into the nature of the contents of the cell phone, which would have been probative to the issue of probable cause underlying their subsequent seizure. Trial counsel, additionally, never inquired into

the specific facts surrounding Smiley's illegal arrest. In conjunction with the fact that counsel admitted that he did not research any of the Fourth Amendment issues, trial counsel's failure to interview constitutes both error and prejudice.

CONCLUSION

This Court finds the Applicant has satisfied the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant presented specific and compelling evidence that counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has satisfied the second prong of the Strickland test – that he was prejudiced by counsels' performance. This Court concludes the Applicant has met his burden of proving counsel failed to render reasonably effective assistance.

Based on the testimony of the witnesses, a careful review of the record and all of the foregoing, the Court finds and concludes that the Applicant has met his burden in establishing that the Applicant is entitled to post-conviction relief. For the foregoing reasons, this application for post-conviction relief is granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Applicant has met his burden in establishing that he is entitled to post-conviction relief and the same is hereby granted. Applicant is ordered remanded to the custody of the Laurens County Detention Center pending further proceedings on this case.

IT IS SO ORDERED.

Hon. Eugene Griffith
Presiding Circuit Court Judge
Eighth Judicial Circuit

This 9th day of August, 2013
At Laurens, South Carolina

ALAN WILSON
ATTORNEY GENERAL

October 22, 2013

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Davoris Smiley, 349965 v. State of South Carolina**
2012-CP-30-0741

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the Notice of Appeal on the Respondent.
2. A copy of the order which is to be challenged on appeal.

Sincerely,

J. Rutledge Johnson
Assistant Attorney General

JRJ:cey
Enclosures

cc: Joshua S. Nasrollahi, Esquire
Trisha Allen, Victim Services
SC Office of Indigent Defense
David Stumbo, Solicitor