



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

APR 9 2012

SC Supreme Court

April 9, 2012

VIA HAND DELIVERY

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

RE **Clarence Gibbs v. State of South Carolina**
PCR Appeal - Georgetown County

Dear Mr. Shearouse

Enclosed please find the original and fifteen (15) copies of the State's **Brief of Respondent**, along with **Proof of Service** in the above-referenced case, which I am today serving upon opposing counsel.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,


Christina J. Catoe
Assistant Attorney General

CJC/

Enclosures

cc Kathrine H. Hudgins, Esquire
The Honorable J. Gregory Hembree, 15th Circuit Solicitor
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

ORDER

The request for an extension until April 9, 2012 to serve and file the Brief of Respondent is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY *Kendra I. Hudgins*
Clerk

Columbia, South Carolina

March 9, 2012

cc Appellate Defender Kathrine H Hudgins
Assistant Attorney General Christina J Catoe



ALAN WILSON
ATTORNEY GENERAL

March 8, 2012

RECEIVED

MAR 8 2012

SC Supreme Court

VIA HAND DELIVERY

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

RE Clarence Gibbs, #289369 v State of South Carolina
2009-CP-22-0546

Dear Mr Shearouse

The Brief of Respondent in the above appeal is due to be served and filed today. However, this is to respectfully request a 30-day extension to serve and file this Brief of Respondent.

This extension request is not intended for the purpose of delay. Rather, this extension request is necessitated by a heavy workload and is for good cause.

Sincerely,

Christina J Catoe
Assistant Attorney General

cc Katherine H Hudgins, Esquire

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

ORDER

Petitioner seeks an extension until February 8, 2012 to serve and file the Petition for Writ of Certiorari and Appendix, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extensions will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED



For the Court CJ

Columbia, South Carolina

January 11, 2012

cc Appellate Defender Kathrine H. Hudgins
Assistant Attorney General Christina I. Catoe

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Georgetown County
Larry B Hyman, Jr , Circuit Court Judge

RECEIVED

JAN - 9 2012

S C Supreme Court

CLARENCE GIBBS,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

(4)

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER

Counsel for Clarence Gibbs petitions the Court for a **final thirty day extension, until February 8, 2012** in which to file the brief of petitioner in this case. In support of this petition, counsel shows

1 The brief of petitioner is due to be filed with the Court today

2 Counsel for Mr Gibbs respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.

3 Counsel filed the petition for rehearing in Lorenzo R. Nicholson v. State on January 5, 2011. Counsel filed the petition for rehearing in State v. Tawanda Williams on December 22, 2011. The initial brief of appellant and designation of matter in State v. Jeffrey Herrmann was filed on December 21, 2011. The petition for writ of certiorari and accompanying appendix in Troy Goffe v. State were filed on December 16, 2011. Counsel filed the initial brief of appellant and designation of matter in State v. Travis Teasley on December 15, 2011. Counsel had two oral arguments in the Court of Appeals on the week of December 5, 2011. On December 6, 2011, had an oral argument in the case of State v. Daniel Jenkins. On December 7, 2011, counsel argued the case of State v. Robert Phipps.

Counsel was in Dorchester County on November 30, 2011 to testify in a Post-Conviction Relief hearing Counsel filed the petitions for writ of certiorari and accompanying appendices to the Court of Appeals in State v Eric Dantzler and State v Bobby Lee Burdine and filed the initial brief of appellant and designation of matter in State v Michael Watson on November 22, 2011 Counsel filed the petition for rehearing in Kareen D Lee v State on November 17, 2011

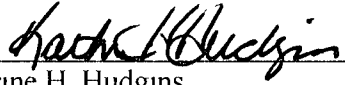
4 Counsel has not had time to complete the brief of petitioner in this case As a result, counsel respectfully asks this Court for a **final thirty day extension, until February 8, 2012** in which to file the brief of petitioner Counsel is striving to limit the number of extensions requested Counsel is attempting to complete the cases with the most number of extensions first

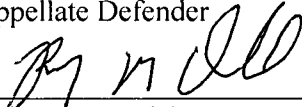
5 As indicated by signature below, Christina J Catoe, of the South Carolina Attorney General's Office, does not oppose this request

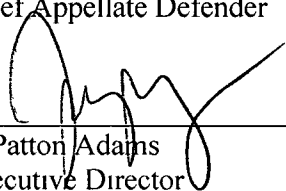
6 Counsel makes this request in good faith and not for purposes of delay

Counsel respectfully requests a **final thirty day extension, until February 8, 2012** in which to file the initial brief of appellant and designation of matter in this case based upon the above circumstances

Respectfully submitted,


Kathrine H Hudgins
Appellate Defender


Robert M Dudek
Chief Appellate Defender


T Patton Adams
Executive Director
J Hugh Ryan, III
General Counsel

January 9, 2012

I do not oppose


Christina J Catoe

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

ORDER

For good cause shown, the request for an extension until January 9, 2012 to serve and file the Brief of Petitioner in this matter is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

December 12, 2011

cc Appellate Defender Kathrine H Hudgins
Assistant Attorney General Christina J Catoe

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Georgetown County

Larry B Hyman, Jr , Circuit Court Judge

RECEIVED

DEC - 9 2011

CLARENCE GIBBS,

PE TITIONER, S.C Supreme Court

V

STATE OF SOUTH CAROLINA,

RESPONDENT

(3)

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER

Counsel for Clarence Gibbs petitions the Court for a thirty day extension in which to file the brief of petitioner in this case In support of this petition, counsel shows

1 The brief of petitioner is due to be filed with the Court today

2 Counsel for Mr Gibbs respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required

3 Counsel had two oral arguments in the Court of Appeals on the week of December 5, 2011 On December 6, 2011 had an oral argument in the case of State v Daniel Jenkins On December 7, 2011, counsel argued the case of State v Robert Phipps Counsel was in Dorchester County on November 30, 2011 to testify in a Post-Conviction Relief hearing Counsel filed the petitions for

writ of certiorari and accompanying appendices to the Court of Appeals in State v Eric Dantzler and State v Bobby Lee Burdine and filed the initial brief of appellant and designation of matter in State v Michael Watson on November 22, 2011 Counsel filed the petition for rehearing in Kareen D Lee v State on November 17, 2011 Counsel had oral argument in this Court in the case of State v John Jabar Greene on November 1, 2011

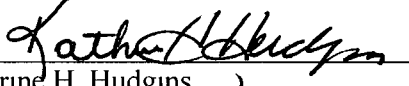
4 Counsel has not had time to complete the brief of petitioner in this case As a result, counsel respectfully asks this Court for a thirty day extension in which to initial brief of appellant and designation of matter Counsel is striving to limit the number of extensions requested Counsel is attempting to complete the cases with the most number of extensions first

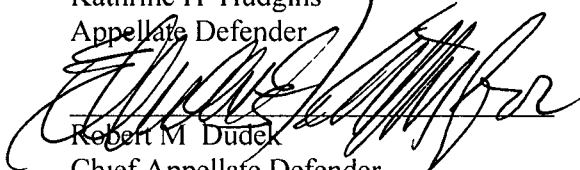
5 As indicated by signature below, Christina J Catoe, of the South Carolina Attorney General's Office, does not oppose this request

6 Counsel makes this request in good faith and not for purposes of delay

Counsel respectfully requests a thirty day extension in which to file the initial brief of appellant and designation of matter in this case based upon the above circumstances

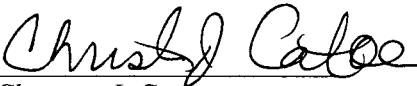
Respectfully submitted,


Kathrine H Hudgins
Appellate Defender


Robert M Dudek
Chief Appellate Defender

December 9, 2011

I do not oppose


Christina J Catoe

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

ORDER

For good cause shown, the request for an extension until December 9, 2011 to serve and file the Brief of Petitioner is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

November 10, 2011

cc Appellate Defender Kathrine H Hudgins
Assistant Attorney General Christina J Catoe

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Larry B Hyman, Jr , Circuit Court Judge

CLARENCE GIBBS,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE BRIEF OF PETITIONER

ORIGINAL

RECEIVED

NOV -9 2011

S C Supreme Court

(2)

Counsel for Clarence Gibbs petitions the Court for a thirty day extension in which to file the brief of petitioner in this case In support of this petition, counsel shows

1 The brief of petitioner is due to be filed with the Court today

2 Counsel for Mr Gibbs respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required

3 Counsel filed the initial brief of appellant and designation of matter in State v Bert Foster on September 7, 2011 On September 12, 2011, counsel filed the petition for writ of certiorari and accompanying appendix in Travis Richardson v State Counsel filed the return to petition for writ of certiorari in Dorian Cain v State on September 20, 2011 Counsel filed the petition for writ of

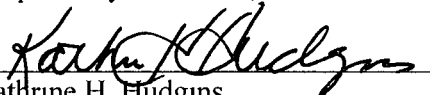
certiorari and accompanying appendix in Cody Waters v State on September 23, 2011 On September 30, 2011, counsel filed the petition for writ of certiorari and accompanying appendix in Terry Smalley v State Counsel had three oral arguments scheduled with the South Carolina Supreme Court and South Carolina Court of Appeals during the week of October 3, 2011 Counsel argued In the interest of Justin B , a minor under the age seventeen in the South Carolina Supreme Court on October 4, 2011 On October 5, 2011, counsel argued Kareen Lee v State and Joseph Walker v State in the South Carolina Court of Appeals Counsel filed the initial brief of appellant and designation of matter in State v Danny Ryant on October 18, 2011 On October 21, 2011, counsel filed the petition for writ of certiorari and accompanying appendix in Troy Zeigler v State Counsel filed the petition for writ of certiorari and accompanying appendix in William Wood v State on October 24, 2011 Counsel file the brief of petitioner in Dana Rikard v State on October 31, 2011 Counsel also had oral argument in this Court in the case of State v John Jabar Greene on November 1, 2011

4 Counsel has not had time to complete the brief of petitioner in this case As a result, counsel respectfully asks this Court for a thirty day extension in which to initial brief of appellant and designation of matter Counsel is striving to limit the number of extensions requested Counsel is attempting to complete the cases with the most number of extensions first

5 Counsel makes this request in good faith and not for purposes of delay

Counsel respectfully requests a thirty day extension in which to file the initial brief of appellant and designation of matter in this case based upon the above circumstances

Respectfully submitted,


Kathrine H Hudgins
Appellate Defender

November 9, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Georgetown County
Larry B Hyman, Jr , Circuit Court Judge

CLARENCE GIBBS,

PETITIONER,

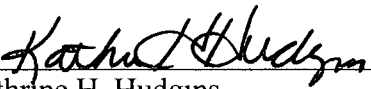
V

STATE OF SOUTH CAROLINA,

RESPONDENT

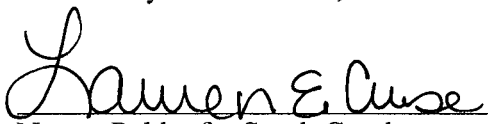
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the brief of petitioner in the above referenced case has been served upon Christina J Catoe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 9th day of November, 2011


Kathrine H Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 9th day of November, 2011

 (L S)
Notary Public for South Carolina
My Commission Expires August 23, 2014

~ 1

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

ORDER

The request for an extension until November 9, 2011 to serve and file the Brief of Petitioner (appendices have been delivered) is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

October 11, 2011

cc Appellate Defender Kathrine H Hudgins
Assistant Attorney General Christina J Catoe



SCCID

SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

 ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender

October 10, 2011

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OCT 10 2011

S C Supreme Court

The Honorable Daniel E Shearouse
Clerk, S C Supreme Court
P O Box 11330
Columbia, SC 29211

Re Clarence Gibbs v The State

Dear Mr Shearouse

The Brief of Petitioner is due to be served and filed with the Court today However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition

By copy of this letter, I am informing Christina J Catoe, Esquire, of the Attorney General's Office, of my request

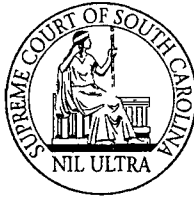
Sincerely,



Kathrine H Hudgins
Appellate Defender

KHH/lec

cc Christina J Catoe, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

September 8, 2011

Appellate Defender Kathrine H. Hudgins
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Gibbs, Clarence v. The State

Dear Counsel,

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) **bound** copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before October 10, 2011. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Very truly yours,



CLERK

DES/JJ

cc: Assistant Attorney General Christina J. Catoe

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

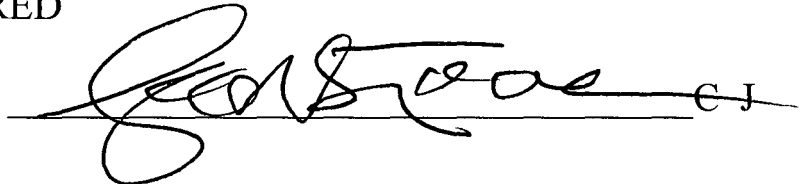
ORDER

Petitioner's first application for post-conviction relief was denied by the Honorable J Michael Baxley. No petition for a writ of certiorari was filed. Petitioner now seeks a writ of certiorari from an order of the Honorable Larry B Hyman granting petitioner a belated review of Judge Baxley's order pursuant to Austin v State, 305 S C 453, 409 S E 2d 395 (1991).

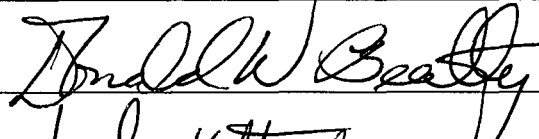
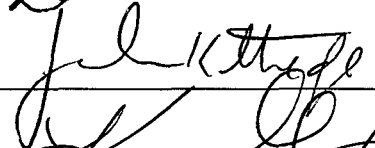
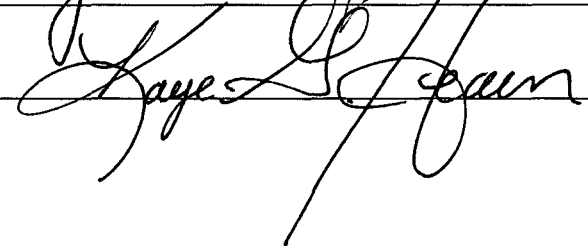
We grant the petition for a writ of certiorari from Judge Hyman's order, dispense with further briefing, and proceed with a belated review of Judge Baxley's order.

We grant the petition for a writ of certiorari from Judge Baxley's order. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(i), SCACR.

IT IS SO ORDERED.



CJ


J

J

J

J

Columbia, South Carolina

September 8, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Paula H Thomas, Circuit Court Judge

 ORIGINAL

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APR 21 2010

SC SUPREME COURT

CLARENCE GIBBS,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI PURSUANT
TO AUSTIN V STATE

KATHRINE H HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

1 Did the PCR judge err in refusing to find counsel ineffective by not requesting a charge to the jury on alibi when Gibbs presented an alibi defense and the State's only evidence consisted of two out of three eye witnesses identifying Gibbs, the third eye-witness testifying that Gibbs was not the person who committed the robbery and three of the witnesses testifying that a jacket found at Gibbs house matched the jacket worn by the robber?

2 Did the PCR judge err in refusing to find counsel ineffective by not contemporaneously objecting to the introduction of the line-up, the show-up and in-court identifications?

STATEMENT

In June 2005, the Georgetown County Grand Jury indicted Gibbs for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime, indictments #05-GS-22-601-603. On September 6, 2005, Gibbs proceeded to jury trial with the Honorable Paula H Thomas presiding. On September 8, 2005, the jury returned verdicts of guilty on all three indictments. Judge Thomas sentenced Gibbs to 20 years for armed robbery, 20 years concurrent for the kidnapping and 5 years consecutive for the possession of a weapon during the commission of a violent crime. A timely notice of intent to appeal was filed on September 13, 2006. An amended notice of intent to appeal was filed on September 21, 2005. The appeal was perfected and on June 27, 2007, the South Carolina Court of Appeals affirmed the sentence and conviction. State v Gibbs, 2007-UP-333 (S C Ct App filed June 27, 2007).

On October 4, 2007, Gibbs filed an application for post conviction relief (2007-CP-22-1332). On November 8, 2007, Gibbs filed another post conviction relief application (2007-CP-22-1515), identical to the first one. The two cases were merged as 2007-CP-22-1332. The State filed a return on December 7, 2007. On June 13, 2008, an evidentiary hearing was held before the Honorable J Michael Baxley. In a written order filed on July 18, 2008, Judge Baxley denied relief and dismissed the application. PCR counsel for Gibbs failed to file a notice of intent to appeal.

On April 13, 2009, Gibbs filed a second application for post conviction relief. The State filed a return and motion to dismiss on May 9, 2009. On May 18, 2009, Gibbs filed a reply to the State's motion to dismiss and alleged that counsel failed to file the notice of intent to appeal from the denial of the first PCR. The State filed an amended return requesting a hearing pursuant to Austin v State, 305 S C 453, 409 S E 2d 395 (1991). On July 29, 2009, an evidentiary hearing

was held before the Honorable Larry B. Hyman. In a written order signed August 13, 2009, Judge Hyman granted a belated appeal pursuant to Austin. This Austin petition and a separately filed petition for writ of certiorari supporting the grant of the belated appeal follow.

ARGUMENTS

1 The PCR judge erred in refusing to find counsel ineffective in failing to request a charge to the jury on alibi when Gibbs presented an alibi defense and the State's only evidence consisted of two out of three eye witnesses identifying Gibbs, the third eye-witness testifying that Gibbs was not the person who committed the robbery and three of the witnesses testifying that a jacket found at Gibbs house matched the jacket worn by the robber

On April 10, 2005, at approximately 9 30 PM the Piggly Wiggly on Highmarket Street in Georgetown was robbed John Fowlkes, the store manager, Eric Sessions, the cashier, and Greg Morton, the bagger, were all working at the Piggly Wiggly the night of the robbery All three employees testified that a man entered the store, approached two of the employees, Fowlkes and Sessions, pulled a gun and stated that this was a robbery The robber took all three employees to the office and demanded money Fowlkes filled a bag with money and gave it to the robber The robber left the store The incident was captured on store surveillance tape that was admitted in evidence at trial, over objection by defense counsel (App pp 141-143)

The night of the incident, Fowlkes described the robber as, “ a middle aged, 50's, 60's age looking older black male He had a scruffy beard with distinct gray colorings in it He had a black hat ” (App p 194, lines 23 – 25) In his statement, Fowlkes said the robber was wearing a blue jacket (App p 214, lines 1-3) Sessions described the robber as, “ a black male, I'd say he was about I'd say my height is about 5'10" He was six foot, 6'1", a little bit, a little slightly taller than I am, and he kind of had like a smaller frame to him, not you know, not a big frame but like, you know, a average small, skinny man frame He had, you know, a gray and black beard He had a black hat on He had a blue jacket with a gray inside liner and some blue jeans, some dark pants, whatever, and some shoes ” (App p 153, lines 14-22) Morton described the robber as “

mid fifties, early sixties, and he was taller – he was about Mr David’s height, a little taller ” (App p 249, lines 2-4) Morton also described the robber’s beard as, “He had a rough beard, gray black beard His hair was gray and black, rough, too, like it hadn’t been brushed or anything ” (App p 249, lines 10-12) Morton testified that the robber was wearing a blue or black jacket (App p 248, line 16) Morton also testified that the robber was wearing a black fishing hat (App p 248, lines 7-11)

After viewing the surveillance tape, officers with the Georgetown Police Department compiled a photo line-up (App p 26, lines 4-6) The photo line-up consisted of two sheets of paper each containing six photos (App p 27, lines 11-17, p 28 lines 12 – p 29, lines 1-14, p 37, lines 23 – p 38, lines 1-15)) One half of the line-up contained a photo of Gibbs (App p 27, lines 18-25) The other half of the line-up was shown to all three witnesses but lost before trial (App p 28, lines 14-16)

On April 20, 2005, the manager, Fowlkes, viewed both photo line-ups and identified photo # 1 as the person who robbed the store (App p 192 lines 23 – p 193 lines 1-17, State’s Exhibit #6) The bagger, Morton, also viewed the photo-lineups on April 20, 2005, and he also identified photo # 1 as the person who robbed the store (App p 245 , lines 19 – p 246, lines 1-8, States Exhibit #7) The cashier, Sessions, was unable to identify anyone from the photo line-ups (App p 155, lines 12-15, p 32, lines 17-23, p 38, lines 16-24) Sessions testified that the robber was not in the line-ups (App p 155, lines 12-15)

On the same day, April 20, 2005, the police executed a search warrant at Gibbs’ house (App p 265, lines 15 – p 234, lines 1-2) Pursuant to the search warrant, police seized a black, not blue, jacket (App p 266 , lines 21 – p 266, lines 1-11, p 268, lines 16 -20) The police did not

find a gun, money, a black fishing hat or any other evidence linking Gibbs to the Piggly Wiggly robbery. Later, the police showed the seized black jacket to the three witnesses. All three testified that they recognized the jacket.

Approximately a week later, the police brought Gibbs in for questioning. All three witnesses were brought to the police station to view Gibbs. Fowlkes testified that, “Officer Powers took me to the –to a door, a small door and he directed me that he wanted me to go inside and look at the person through a two-way mirror and to look at that person and to tell him if it had—if that was someone that had anything to do with the robbery at the Piggly Wiggly.” (App. p. 196, lines 23 – p. 197, lines 1-3). Fowlkes testified that he saw a white male and Gibbs behind the glass. He identified Gibbs as the person who robbed the Piggly Wiggly. Morton testified that, “Before I went into the room one of them [police officer] said just go in there and see if you recognize this person that’s in there.” (App. p. 250, lines 14-15). Morton testified that he recognized the defendant from the robbery at the Piggly Wiggly. (App. p. 251, lines 1-2). When Sessions, however, viewed Gibbs behind the glass, he told police officers that he was sure Gibbs was not the person who robbed the Piggly Wiggly. (App. p. 158, lines 12-15).

During the viewing of Gibbs at the police station, all three witnesses were able to hear Gibbs’ voice. Fowlkes and Morton testified that they recognized Gibbs’ voice from the robbery. (App. p. 198, lines 7-19, p. 251, lines 14-25). Sessions did not recognize Gibbs’ voice. (App. p. 158, lines 16-19).

Karen Dozier, Gibbs’ girlfriend, testified that in April of 2005, she was staying with Gibbs. (App. p. 296, lines 7-10). Dozier testified that on the evening of the robbery she and Gibbs were home watching television with Gibbs’ mother. (App. p. 301, lines 4-23). Rosa Jenkins, Gibbs’

elderly mother, testified that Gibbs was home with her on Sunday evening April 10th, the evening of the robbery (App p 330, lines 14 – p 331, lines 1-25) Gibbs testified that he was at home dozing in front of the television on Sunday night April 10, 2005 (App pp 362-363) Gibbs denied any involvement with the robbery of the Piggly Wiggly (App p 372, lines 21-25)

Gibbs raised two issues during the PCR hearing Gibbs alleged that counsel was ineffective for failing to request an alibi charge and for failing to contemporaneously object to the introduction of identifications The PCR judge found that trial counsel was ineffective in failing to contemporaneously object to the introduction of the line-up, the show-up and the in- court identifications (App p 573) The PCR judge found, however, that there was not a reasonable probability that the outcome of the trial would not have been different had counsel properly objected to the identification and therefore Gibbs failed to establish prejudice on this allegation of ineffectiveness The PCR judge erred and this issue is addressed below in issue two

As to the first issue involving the alibi charge, trial counsel admitted during the PCR hearing that he failed to request a charge on alibi and admitted that the charge should have been given (App p 533, lines 15- p 534, lines 1-15) The PCR judge found that counsel was ineffective for failing to ensure that an alibi instruction was given to the jury (App p 574) The PCR judge found, however, that there was not a reasonable probability that the outcome of the trial would not have been different had an alibi charge been given The PCR judge erred

“The failure to give an alibi charge, where the defendant claims to be at another place, is reversible error State v Robbins, 275 S C 373, 271 S E 2d 319 (1980) Counsel’s rejection of the charge at trial constitutes inadequate legal representation” State v Riddle, 308 S C 361, 363, 418 S E 2d 308, 309 (1992) The PCR judge correctly found that trial counsel was ineffective for

failing to request an alibi charge. The PCR judge erred in finding that Gibbs did not prove prejudice.

The present case is easily distinguished from Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), where the Court found no prejudice from counsel's failure to ensure that an alibi charge was given. In Ford there was overwhelming evidence of guilt including DNA evidence, evidence that the defendant and the driver of the car in which the victim was riding were overheard planning the assault and evidence that the defendant was in possession of the victim's wallet immediately following the assault.

The evidence against Gibbs was not overwhelming. One of the eye witnesses testified that Gibbs was not the robber. While all three witnesses identified a jacket found in Gibbs' home, there was confusion as to whether the jacket was blue or black. Additionally, the police did not find a gun, money, a black fishing hat or any other evidence linking Gibbs to the Piggly Wiggly robbery. The alibi charge was particularly critical under the facts of this case.

In Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), the Court found prejudice in counsel's failure to request an alibi charge because the State's evidence was wholly circumstantial. Under the facts of Roseboro, the Court found the alibi charge particularly critical. In the present case, the alibi charge was particularly critical because the jury was asked to decide whether to believe the identification witnesses presented by the State or the alibi witnesses presented by the defense. Counsel was ineffective in failing to request an alibi charge.

2 The PCR judge erred in refusing to find counsel ineffective by not contemporaneously objecting to the introduction of the line-up, the show-up and in-court identifications

The PCR judge found that trial counsel was ineffective in failing to contemporaneously object to the introduction of the line-up, the show-up and the in- court identifications (App p 573) The PCR judge found, however, that there was not a reasonable probability that the outcome of the trial would not have been different had counsel properly objected to the identification and therefore Gibbs failed to establish prejudice on this allegation of ineffectiveness The PCR judge erred

In State v Mansfield, 343 S C 66, 538 S E 2d 257 (Ct App , 2000), the South Carolina Court of Appeals, quoting 22A C J S *Criminal Law* § 803 (1989), wrote, “ ‘ While a showup in which a witness views a single suspect is generally suggestive, and hence suspect or disfavored, and less preferable than a line-up, even if requested by accused, a showup may be proper in some circumstances [A] showup may be proper where it occurs shortly after the alleged crime, near the scene of the crime, as the witness’ memory is still fresh, and the suspect has not had time to alter his looks or dispose of evidence, and the showup may expedite the release of innocent suspects, and enable the police to determine whether to continue searching ’” Mansfield at 263 None of the factors discussed in Mansfield are present in the current case

The show-up identification procedure in the present case took place a week after the robbery The show-up identification procedure took place at the police station not near the scene of the crime There were no extenuating circumstances to warrant the “show-up” As the Court in Mansfield noted, “ ‘ While show-ups have been upheld by the Court, these situations usually

involve either extenuating circumstances or are very close in time to the crime ”” Mansfield at 263, quoting State v Hoyt, 306 S C 561, 562-63, 413 S E 2d 806, 807 (1992)

In Neil v Biggers, 409 U S 188, 93 S Ct 375, 34 L Ed 2d 401 (1972) the Court developed the two-prong inquiry to determine the admissibility of an out of court identification Pursuant to Neil v Biggers, a court must determine if the identification procedure is unduly suggestive If the procedure is suggestive, the court must determine, under the totality of the circumstances, whether there was a substantial likelihood of misidentification The factors to be considered are 1) the witness’s opportunity to view the perpetrator at the time of the crime, 2) the witness’s degree of attention, 3) the accuracy of the witness’s prior description of the perpetrator, 4) the level of certainty demonstrated by the witness at the confrontation, and 5) the length of time between the crime and the confrontation Neil v Biggers, 409 U S at 199

The trial court held a *Neil v Biggers* hearing (App pp 23-116) Trial counsel moved to suppress the show-up identification as well as the photo line-up and objected to any in-court identification (App 109, lines 19-24) The trial court did not specifically find the show-up identification procedure was unduly suggestive Instead, the court found the previous photo-lineup procedure removed any possible taint of the show-up procedure (App p 115, lines 7- p 116, lines 1-4) The court found that there was not a substantial likelihood of misidentification

The trial court erred in failing to specifically find the show-up identification procedure unduly suggestive State v Moore, 343 S C 282, 540 S E 2d 445 (2000) The court failed to specifically consider the five *Neil v Biggers* factors to determine if the unduly suggestive show-up identification procedure was reliable There were no extenuating circumstances present to justify

the show-up procedure. The trial court erred in admitting evidence of the show-up identification procedure.

Additionally, the trial court erred in failing to find the photo line-up procedure unduly suggestive. Morton, one of the witnesses, described the individuals in the missing six photographs as being a lot younger than the individuals in the other set of six photographs. (App. p. 90, lines 4-13, p. 105, lines 14-25). The missing photographs make it impossible for the court to determine the degree of suggestiveness that may have been present when all twelve photos were presented to the witnesses.

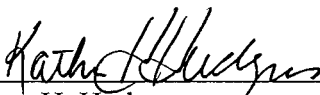
This case is distinguished from State v. Gibbs, 267 S.C. 365, 228 S.E.2d 104 (1976), because in that Gibbs case the whole photo line-up was lost and therefore not admitted in evidence. In the present case, Gibbs challenged the introduction of half of the photo line-up when the other half is missing, an issue not addressed in the other case. Another crucial distinction is that in the present case, Gibbs denied being at the Piggly Wiggly on the night of the robbery. In the other Gibbs case, the defendant admitted being present at the scene of the crime. The trial court erred in admitting the photo line-up identification.

Trial counsel was ineffective for not contemporaneously objecting to the introduction of the line-up, the show-up and the in-court identifications. There is a reasonable probability that the outcome of the trial would not have been different had counsel properly objected to the identifications. The PCR judge erred.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing in the issue

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Paula H Thomas, Circuit Court Judge

CLARENCE GIBBS,

PETITIONER,

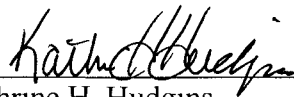
V

STATE OF SOUTH CAROLINA,

RESPONDENT

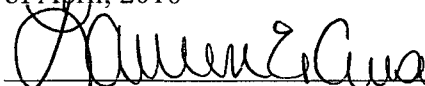
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari pursuant to Austin and a copy of the appendix in this case have been served on Christina J Catoe, Esquire this 21st day of April, 2010


Kathrine H Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of April, 2010

 (L S)

Notary Public for South Carolina

My Commission Expires August 23, 2014

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable J Michael Baxley
2007-CP-22-1332

RECEIVED

JUN - 4 2010

S C SUPREME COURT

ORIGINAL

CLARENCE GIBBS,

PETITIONER,

v

STATE OF SOUTH CAROLINA,

RESPONDENT

**RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO AUSTIN V STATE**

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ISSUES PRESENTED

- I The PCR judge properly found that Petitioner was not prejudiced by counsel's failure to renew his objections to the identification testimony, where the identifications were properly admitted at trial**
- II The PCR judge properly concluded that although counsel should have requested an alibi instruction, the absence of an alibi instruction did not prejudice Petitioner under the circumstances of this case**

STATEMENT OF THE CASE

Petitioner was indicted in Georgetown County in June 2005 for kidnapping, armed robbery, and possession of a weapon during commission of a violent crime (App p 496-504) On September 6-8, 2006, Petitioner proceeded to trial before the Honorable Paula H Thomas (App p 1-494) The jury found him guilty, and Judge Thomas sentenced him to twenty years for armed robbery, twenty years, concurrent, for kidnapping, and five years, consecutive, for the weapon charge (App p 493, line 22 – p 494, line 1) A notice of appeal was timely filed, and an appeal was perfected The South Carolina Court of Appeals affirmed the convictions on June 27, 2007 (2007-UP-333), and the case was remitted to the circuit court on July 13, 2007

Petitioner subsequently filed two identical Applications for post-conviction relief, one on October 4, 2007, and one on November 8, 2007 (App p 505-511) The State made a Return on December 7, 2007, and the two Applications were merged under case number 2007-CP-22-1332 (App p 512-17) An evidentiary hearing was held on June 13, 2008 before the Honorable J Michael Baxley (App p 518-563) Judge Baxley denied post-conviction relief in an Order dated July 8, 2008 (App p 566-77) No appeal was filed

On April 13 2009, Petitioner filed another Application for post-conviction relief (App p 579-95) The State made a Return and Motion to Dismiss on May 9, 2009 (App p 596-600) Petitioner then filed a Reply and requested a belated PCR appeal (App p 601-11) The State made an Amended Return requesting an evidentiary hearing regarding the belated PCR appeal issue (App p 612-13) Counsel was thereafter appointed to represent Petitioner, and a hearing was held before the Honorable Larry B Hyman, Jr , on July 29, 2009 (App p 614-25) By Order dated August 13, 2009, Judge Hyman granted the request for belated review of the denial of the first PCR application A notice of appeal was timely served and filed, and the Petition for Writ of Certiorari and Petition for Writ of Certiorari pursuant to Austin v State were served on April 21, 2010

ARGUMENT

I The PCR judge properly found that Petitioner was not prejudiced by counsel's failure to renew his objections to the identification testimony, where the identifications were properly admitted at trial

Petitioner was charged with the armed robbery of a Piggly Wiggly store near his home in Georgetown County (App p 24, p 537) There were three victims involved, all employees of the store, and two ultimately identified Petitioner as the robber while the other did not (See App p 29-38) Detective Sparkman testified that he spoke with all three victims after the robbery and received descriptions of the robber (R p 25) The victims all described the robber as a middle-aged black male, wearing dark clothes and a hat, with black-and-gray hair and black-and-gray facial hair (App p 28, lines 19-25, p 2-17) All three stated that the robber held a gun inside his jacket, which had a noticeable gray lining (App p 177, p 199-201, p 232, p 253-54) A jacket positively identified by all three victims was found in Petitioner's bedroom and introduced at trial (App p 172-79, p 201, p 253, p 266-67)

Two separate photo lineups were presented to each of the victims approximately ten days after the crime (App p 25-28) The first contained a picture of Petitioner, but the second did not (App p 27-29) At the time of trial, the second lineup, which had also been used in an unrelated case, had been lost (App p 43, lines 5-23) However, the photos in the second lineup were similar to the photos in the first lineup, and all of the photos were of black males generally matching the description given by the victims (App p 28, p 36-37, p 43, lines 5-23, p 46, lines 11-18, p 69-70, p 89-91), p 263-65) Victims Morton and Fowlkes identified Petitioner from the first lineup, both indicating that they were absolutely sure of the identification (App p 29-32, p 69-74, p 79, p 87-

89) After making their identifications from the lineup, the victims were subsequently asked to come to the police station (App p 70-71, p 92-93) After viewing Petitioner behind a one-way mirror and hearing his voice, they both confirmed that Petitioner was indeed the robber (App p 33-34, p 39-41, p 72-73, p 92-93, p 198, p 251)

After conducting a pre-trial Neil v Biggers hearing pursuant to defense counsel's suppression motion, the trial judge admitted the identifications of Victims Morton and Fowlkes and ruled that they could make in-court identifications (See App p 22-117) Later in the trial, counsel did not contemporaneously object to admission of the identification evidence, and this issue was found to be unpreserved for appellate review (See App p 530-31) Nevertheless, the PCR court properly concluded that Petitioner was not prejudiced by counsel's failure to contemporaneously object, because the trial court's admission of the identifications was proper and would have been upheld under the deferential standard of review on appeal

Under Neil v Biggers, 409 U S 188 (1972), there is a two-prong inquiry used to determine the admissibility of out-of-court identifications State v Brown, 356 S C 496, 503, 589 S E 2d 781, 784 (2003) First, the court must determine if the identification process was unduly suggestive Id (citing State v Moore, 343 S C 282, 540 S E 2d 445 (2000)) Second, even where a suggestive procedure has in fact been used, an identification may nonetheless be reliable, and therefore admissible in evidence, under the totality of the circumstances Id (citations omitted) The following factors should be considered to determine the reliability of the identification "(1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4)

the level of certainty demonstrated by the witness at the confrontation, and (5) the amount of time between the crime and the confrontation ” Id (citing State v Mansfield, 343 S C 66, 538 S E 2d 257 (Ct App 2000)) The damaging effect of a suggestive identification should be weighed against these factors, and if the trial court finds that the witness’ identification is reliable, the witness should be permitted to testify before the jury Id (citing Mansfield, supra) “The admission of eyewitness identification is in the trial court’s discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error ” State v Rice, 375 S C 302, 326, 652 S E 2d 409, 421 (Ct App 2007) (citations omitted)

In this case, after listening to extensive testimony in the pre-trial hearing, the trial court found that the identification process was not unduly suggestive, where two non-suggestive photo lineups were viewed first, and the subsequent show-up was merely confirmatory (See App p 113-15) The judge stated that she was not concerned about the loss of one of the two lineups, because the testimony she heard was sufficient to establish that the second photo lineup was sufficiently similar and was not unduly suggestive (App p 113-15) The judge further pointed out that, in any event, Petitioner was not identified from the lost lineup (See App p 113-16)

Even though she did not find the identification procedure unduly suggestive, out of an abundance of caution, the judge carefully reviewed all of the Neil v Biggers reliability factors She concluded that the witnesses had a good opportunity to view the robber, that the witnesses’ degree of attention was “acute,” that the prior descriptions were generally accurate, that both identifying witnesses were absolutely certain of their identifications, and that only a short period of time - ten days - had passed since the

robbery (See App p 113-114) See State v Mansfield, 343 S C 66, 80, 538 S E 2d 257, 264 (Ct App 2000) (discussing when a description is “on the whole” accurate), State v Patterson, 337 S C 215, 230, 522 S E 2d 845, 853 (Ct App 1999) (upholding an identification made two weeks after the crime where, although the prior description was not very detailed, it was consistent with the defendant’s appearance)

The judge’s conclusions regarding these reliability factors are supported by the testimony of the witnesses (See App p 24-106, p 184-260) The judge specifically found that “the image was still in the minds of these individuals ” (App p 114, lines 13-14) The judge also properly pointed out that the lack of an identification from one of the three eyewitnesses did not render the two identifications inadmissible, instead it created an issue to be resolved by the jury (App p 116) The court specifically concluded that due process had indeed been satisfied, and that there was no substantial likelihood of misidentification (App p 116, line 23 – p 117, line 2) Notably, in its opinion affirming Petitioner’s convictions, the South Carolina Court of Appeals commented on the thoroughness of the trial court’s Neil v Biggers analysis as to both types of identifications (See App p 574) Accordingly, Respondent submits that, where the trial court’s admission of the identification testimony would have been affirmed on appeal, Petitioner suffered no prejudice from counsel’s failure to contemporaneously object

II The PCR judge properly concluded that although counsel should have requested an alibi instruction, the absence of an alibi instruction did not prejudice Petitioner under the circumstances of this case

Defense counsel’s primary strategy at trial was to focus the jury’s attention on the one eyewitness, Sessions, who claimed that Petitioner was not the robber (App p 545, line 23 – p 546, line 5) In doing so, he pointed out inconsistencies in the testimony of

the two identifying witnesses and argued that the non-identifying witness provided reasonable doubt (App p 433-47, p 546) Counsel called this witness as a part of the defense case (See App p 143, line 18 – p 180, line 10) However, although he felt it was a secondary issue, counsel also decided to present Petitioner's alibi witnesses, including Petitioner's girlfriend, Petitioner's mother, and Petitioner himself (See App p 294-413) All three testified that Petitioner was at home watching television around the time of the crime, although he went out briefly to a gas station sometime in the evening (See App p 296-302, p 326-32, p 358-364) In closing arguments, both defense counsel and the solicitor presented argument regarding the issue of alibi (See App p 441-47, p 451, lines 8-10, p 457, lines 2-21, p 465-68) Petitioner's counsel argued that the alibi witnesses were credible and should be believed, but even if not, the State failed to prove its case due to erroneous identifications and scant evidence linking Petitioner to the crime (See App p 433-47) Meanwhile, the solicitor argued that the witnesses identifying Petitioner as the robber were credible and accurate, and that the alibi witnesses were not credible (See App p 448-68)

Counsel admitted at the PCR hearing that a jury instruction on alibi was "called for" but was not given at trial (App p 533-34) Although the trial court did not specifically charge the jury regarding alibi, the court did charge the jury that Petitioner was presumed innocent and that he did not have the burden to prove himself innocent (App p 469-70) The jury was charged that the State had to prove every element of each crime beyond a reasonable doubt (App p 470-71) The jury was also instructed that the State had the burden of proving, beyond a reasonable doubt, the identification of Petitioner as the person who committed the crimes (See App p 474-75) The judge

further charged that the State had to prove beyond a reasonable doubt the accuracy of the identification before Petitioner could be convicted (App p 474, lines 16-18) The judge then reiterated that the burden of proof, which was upon the State, specifically included the burden of proving beyond a reasonable doubt the identity of Petitioner as the person who committed the crimes (App p 475, lines 4-8) The judge admonished the jurors that if, after examining the testimony, they had a reasonable doubt as to the accuracy of the identifications, they were required to find Petitioner not guilty (App p 475, lines 8-11)

In this case, the jurors were provided with three alibi witnesses as well as argument from both sides regarding the issue of alibi The jurors were fully aware of Petitioner's claim that he was elsewhere at the time of the crime, and they knew that alibi was an issue for their consideration The judge's instructions regarding the State's burden of proof, combined with her instructions regarding identification testimony, were more than sufficient to inform the jury that the State had to prove, beyond a reasonable doubt, that Petitioner was indeed the person at the Piggly Wiggly who committed the crimes It was also clear to the jurors that if they had any reasonable doubt regarding the identification witnesses, Petitioner had to be found not guilty

Under the circumstances of this case, the critical issues were identification and witness credibility, not technical issues regarding the sufficiency of Petitioner's alibi (See App p 575) The trial court fully charged the jury on both of these issues (See App p 473-75) See Speaks v State, 377 S C 396, 660 S E 2d 512 (2008) (where the critical issue at trial was witness credibility, rather than the delivery of a particular jury charge, the grant of PCR was improper), see also Ford v State, 314 S C 245, 442 S E 2d

604 (1994) (even where counsel is ineffective for failing to ensure an alibi charge is given, there is a lack of the required prejudice if there is not a reasonable probability that the outcome of trial would have been different had an alibi charge been given) An alibi charge was not necessary to ensure the jury's proper consideration of the issues (See App p 556-61)

Further, the PCR court correctly distinguished the cases of Roseboro v State, 317 S C 292, 454 S E 2d 312 (1995), and Riddle v State, 308 S C 361, 418 S E 2d 308 (1992), where, in those cases, comments made by the solicitor conveyed to jurors that either the defendant had the burden to prove his alibi or that alibi was not a proper defense that could be considered In Petitioner's case, the solicitor made no such statements, and the jurors knew that it was permissible to consider Petitioner's alibi defense In fact, the solicitor specifically stated to the jury in closing argument that Petitioner had no burden to put up any evidence (App p 457, lines 2-7) He also reminded the jurors that the State had to prove beyond a reasonable doubt that the two identifications were, in fact, accurate (App p 449, lines 5-12) In conclusion, the jurors in this case were well aware that, even if they discredited Petitioner's alibi witnesses, Petitioner was still not guilty unless the State proved beyond a reasonable doubt that Petitioner was present and participated in the crimes Therefore, under the particular circumstances of this case, the PCR court properly ruled that the absence of a specific alibi charge did not prejudice Petitioner

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari Pursuant to Austin v State, 305 S C 453, 409 S E 2d 395 (1991)

Respectfully submitted,

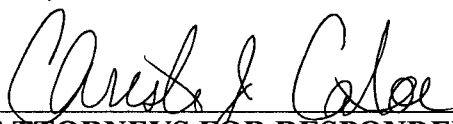
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ATTORNEYS FOR RESPONDENT

June 4, 2010

STATE OF SOUTH CAROLINA
In the Supreme Court
APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable J Michael Baxley
2007-CP-22-1332

RECEIVED

JUN - 4 2010

SC SUPREME COURT

CLARENCE GIBBS,

PETITIONER,

v

STATE OF SOUTH CAROLINA,

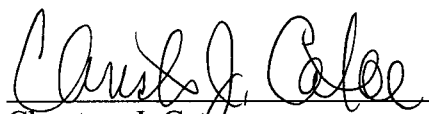
RESPONDENT

PROOF OF SERVICE

I hereby certify that I have served the **Return to Petition for Writ of Certiorari Pursuant to Austin v State** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to

**Kathrine H Hudgins, Esquire
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589**

This 4th day of June, 2010



Christina J Catoe
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 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Larry B Hyman, Jr , Circuit Court Judge

RECEIVED

APR 21 2010

S.C SUPREME COURT

CLARENCE GIBBS,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Did PCR judge correctly grant belated review of the first PCR judge's order of dismissal finding that the right to appellate review had not been knowingly and intelligently waived?

STATEMENT

In June 2005, the Georgetown County Grand Jury indicted Gibbs for kidnapping, armed robbery, and possession of a weapon during the commission of a violent crime, indictments #05-GS-22-601-603. On September 6, 2005, Gibbs proceeded to jury trial with the Honorable Paula H. Thomas presiding. On September 8, 2005, the jury returned verdicts of guilty on all three indictments. Judge Thomas sentenced Gibbs to 20 years for armed robbery, 20 years concurrent for the kidnapping and 5 years consecutive for the possession of a weapon during the commission of a violent crime. A timely notice of intent to appeal was filed on September 13, 2006. An amended notice of intent to appeal was filed on September 21, 2006. The appeal was perfected and on June 27, 2007, the South Carolina Court of Appeals affirmed the sentence and conviction. State v. Gibbs, 2007-UP-333 (S.C. Ct. App. filed June 27, 2007).

On October 4, 2007, Gibbs filed an application for post conviction relief (2007-CP-22-1332). On November 8, 2007, Gibbs filed another post conviction relief application (2007-CP-22-1515), identical to the first one. The two cases were merged as 2007-CP-22-1332. The State filed a return on December 7, 2007. On June 13, 2008, an evidentiary hearing was held before the Honorable J. Michael Baxley. In a written order filed on July 18, 2008, Judge Baxley denied relief and dismissed the application. PCR counsel for Gibbs failed to file a notice of intent to appeal.

On April 13, 2009, Gibbs filed a second application for post conviction relief. The State filed a return and motion to dismiss on May 9, 2009. On May 18, 2009, Gibbs filed a reply to the State's motion to dismiss and alleged that PCR counsel failed to file the notice of intent to appeal. The State filed an amended return requesting a hearing pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). On July 29, 2009, an evidentiary hearing was held before the Honorable Larry

B Hyman In a written order signed August 13, 2009, Judge Hyman granted a belated appeal pursuant to Austin This petition and a separately filed Austin petition follow

ARGUMENT

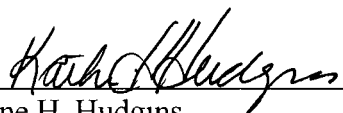
The PCR judge correctly granted belated review of the first PCR judge's order of dismissal finding that the right to appellate review had not been knowingly and intelligently waived

During the second PCR hearing where Gibbs requested a belated appeal, the first PCR attorney admitted that Gibbs asked her to file an appeal and she failed to do so (App p 623, lines 13 – p 624, lines 1-17) The first PCR attorney testified that this case was her first PCR case and she was not familiar with the appeal process (App p 623, lines 20-22) Gibbs testified that he asked his first PCR attorney to file an appeal and she did not (App p 622, lines 8-12) The second PCR judge correctly granted belated review pursuant to Austin v State, 305 S C 453, 409 S E 2d 395 (1991) finding that Gibbs did not knowingly and intelligently waive his right to appeal the denial of his first PCR action This probative evidence in the record supports the judge's decision granting Austin relief See Cherry v State, 300 S C 115, 386 S E 2d 624 (1989)

CONCLUSION

Based on the above argument, petitioner should be allowed to file an Austin petition for writ of certiorari

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 21st day of April, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Georgetown County

Larry B Hyman, Jr , Circuit Court Judge

CLARENCE GIBBS,

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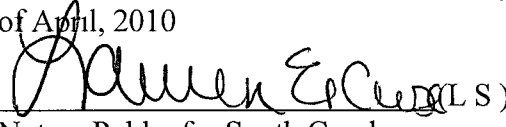
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Christina J Catoe, Esquire this 21st day of April, 2010


Kathrine H Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of April, 2010


Notary Public for South Carolina
My Commission Expires August 23, 2014

ORIGINAL

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Larry B Hyman, Jr
2009-CP-22-546

RECEIVED

JUN - 4 2010

S C SUPREME COURT

CLARENCE GIBBS,

PETITIONER,

v

STATE OF SOUTH CAROLINA,

RESPONDENT

RETURN TO PETITION FOR WRIT OF CERTIORARI

HENRY DARGAN MCMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J CATOE
Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

INDEX

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ISSUE PRESENTED

The PCR judge properly granted Petitioner's request to petition this Court for belated review of the denial of his first PCR application pursuant to Austin v State

STATEMENT OF THE CASE

Petitioner was indicted in Georgetown County in June 2005 for kidnapping, armed robbery, and possession of a weapon during commission of a violent crime (App p 496-504) On September 6-8, 2006, Petitioner proceeded to trial before the Honorable Paula H Thomas (App p 1-494) The jury found him guilty, and Judge Thomas sentenced him to twenty years for armed robbery, twenty years, concurrent, for kidnapping, and five years, consecutive, for the weapon charge (App p 493, line 22 – p 494, line 1) A notice of appeal was timely filed, and an appeal was perfected The South Carolina Court of Appeals affirmed the convictions on June 27, 2007 (2007-UP-333), and the case was remitted to the circuit court on July 13, 2007

Petitioner subsequently filed two identical Applications for post-conviction relief, one on October 4, 2007, and one on November 8, 2007 (App p 505-511) The State made a Return on December 7, 2007, and the two Applications were merged under case number 2007-CP-22-1332 (App p 512-17) An evidentiary hearing was held on June 13, 2008 before the Honorable J Michael Baxley (App p 518-563) Judge Baxley denied post-conviction relief in an Order dated July 8, 2008 (App p 566-77) No appeal was filed

On April 13, 2009, Petitioner filed another Application for post-conviction relief (App p 579-95) The State made a Return and Motion to Dismiss on May 9, 2009 (App p 596-600) Petitioner then filed a Reply and requested a belated PCR appeal (App p 601-11) The State made an Amended Return requesting an evidentiary hearing regarding the belated PCR appeal issue (App p 612-13) Counsel was thereafter appointed to represent Petitioner, and a hearing was held before the Honorable Larry B Hyman, Jr , on July 29, 2009 (App p 614-25) By Order dated August 13, 2009, Judge Hyman granted the request for belated review of the denial of the first PCR application A notice of appeal was timely served and filed, and the Petition for Writ of Certiorari and Petition for Writ of Certiorari pursuant to Austin v State were served on April 21, 2010

ARGUMENT

The PCR judge properly granted Petitioner's request to petition this Court for belated review of the denial of his first PCR application pursuant to Austin v State

Petitioner's first PCR counsel admitted that she failed to file an appeal from the denial of the first PCR application, even though Petitioner timely requested that she file an appeal (App p 624-25) The State agrees that Petitioner should be allowed to petition this Court for belated review of his first PCR application, since he did not knowingly and voluntarily waive his right to an appeal (See App p 619-25)

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari to allow belated review pursuant to Austin v State, 305 S C 453, 409 S E 2d 395 (1991)

Respectfully submitted,

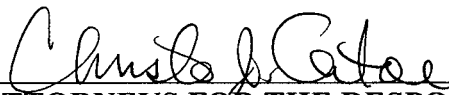
HENRY DARGAN MCMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J CATOE
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737


ATTORNEYS FOR THE RESPONDENT

June 4, 2010

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Larry B Hyman, Jr
2009-CP-22-546

RECEIVED

JUN - 4 2010

S.C. SUPREME COURT

CLARENCE GIBBS,

PETITIONER,

v

STATE OF SOUTH CAROLINA,

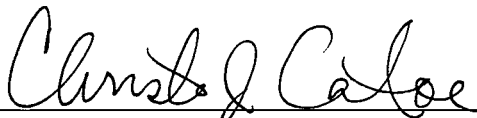
RESPONDENT

PROOF OF SERVICE

I hereby certify that I have served the **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to

Kathrine H Hudgins, Esquire
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

This 4th day of June, 2010



Christina J Catoe
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737



HENRY McMASTER
ATTORNEY GENERAL

June 4, 2010

VIA HAND DELIVERY

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

RECEIVED

JUN - 4 2010

SC SUPREME COURT

RE **Clarence Gibbs v. State of South Carolina**
PCR Appeal Georgetown County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the State's **Return to Petition Writ of Certiorari**, and the original and (6) copies of the State's **Return to Petition Writ of Certiorari Pursuant to Austin v. State**, along with **Proof of Service**, in the above-referenced case, which I am today serving upon opposing counsel.

Thank you for your attention to this matter, and please do not hesitate to contact me at (803) 734-3713 should there be any questions or concerns.

Sincerely,

Christina J. Catoe
Assistant Attorney General

Enclosures

cc Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

ORDER

For good cause shown, the request for an extension until April 21, 2010 to serve and file the Petition for Writ of Certiorari and Appendix in this matter is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what measures are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

March 23, 2010

cc Appellate Defender Kathrine H Hudgins
Assistant Attorney General Christina J Catoe

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Larry B Hyman, Jr , Circuit Court Judge

RECEIVED

MAR 22 2010

SC SUPREME COURT

CLARENCE GIBBS,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

Counsel for Clarence Gibbs petitions the Court for an additional 30 days in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows

1 The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today. The Court has granted counsel two previous extensions.

2 Counsel for Mr. Gibbs respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.

3 Counsel filed the petition for writ of certiorari and accompanying appendix in State v. Marcus McKenzie and Rossie Hicklin v. State and the initial brief of appellant and designation of matter in State v. Aljaquan Drake on February 11, 2010. On February 17, 2010, counsel filed the petition for writ of certiorari and accompanying appendix in Dana Rikard v. State and the initial brief and designation in State v. Michael McFadden. Counsel filed the brief of petitioner in Nicholas Boan v. State on February 22, 2010. On March 1, 2010, counsel filed the petitions for writ

of certiorari and accompanying appendices in Darrell Sturkey v State and Blake Harris v State Counsel filed the petition for writ of certiorari and accompanying appendix in Regginal Crooks v State on March 5, 2010 Counsel filed the petition for rehearing in State v Eugene Boggans on March 8, 2010 Counsel filed the initial brief of appellant and designation of matter in State v Carius Lomax on March 15, 2010 Counsel is filing the initial brief of appellant and designation of matter in State v Jason Phillips on March 19, 2010

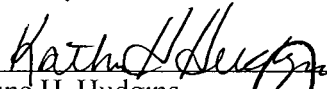
4 Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case As a result, counsel respectfully asks this Court for an additional 30 day extension of time to file the petition for writ of certiorari and accompanying appendix Counsel understands that the Court has granted two previous extensions in this case Counsel is striving to limit the number of extensions requested Counsel is attempting to complete the cases with the most number of extensions first

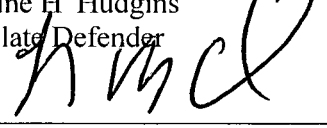
5 As indicated by signature below, Christina J Catoe, of the South Carolina Attorney General's Office, does not oppose this request

6 Counsel makes this request in good faith and not for purposes of delay

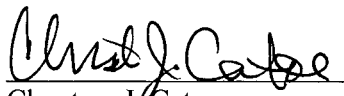
Counsel respectfully requests a 30 day extension, in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender


Robert M. Dudek
Chief Appellate Defender

March 22, 2010
I do not oppose


Christina J. Catoe

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

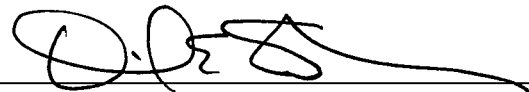
ORDER

For good cause shown, the request for an extension until March 22, 2010 to serve and file the Petition for Writ of Certiorari and Appendix is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY


Clerk

Columbia, South Carolina

February 19, 2010

cc Appellate Defender Kathrine H Hudgins
Assistant Attorney General Christina J Catoe

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Georgetown County

Larry B Hyman, Jr , Circuit Court Judge

CRIMINAL

RECEIVED

FEB 18 2010

CLARENCE GIBBS,

S C SUPREME COURT

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

(2)

PETITION FOR EXTENSION OF TIME
IN WHICH TO FILE THE PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX

Counsel for Clarence Gibbs petitions the Court for an additional 30 days in which to file the petition for writ of certiorari and accompanying appendix in this case. In support of this petition, counsel shows

1 The petition for writ of certiorari and accompanying appendix are due to be filed with the Court today. The Court has granted counsel one previous extension.

2 Counsel for Mr. Gibbs respectfully submits that extraordinary circumstances exist which warrant the granting of an additional extension of time. Given the number of extensions previously granted and the order in which counsel attempts to manage her caseload, counsel hopes that no further extension requests will be required.

3 On January 8, 2010, counsel filed the petitions for writ of certiorari and accompanying appendices in Nicholas Brundage v. State and Anthony Smith v. State as well as the initial brief and designation in State v. Johnny Wilkins. On January 13, 2009, counsel filed the petition for writ of certiorari and accompanying appendix in Richard Carlos v. State. On January 15, 2010, counsel filed the petition for writ of certiorari and accompanying appendix in Billy Robinson v. State and

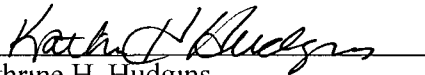
the initial brief of respondent and designation of matter in State v Joseph Zoller On January 19, 2010, counsel filed the petitions for writ of certiorari and accompanying appendices in Jeffrey Youngren v State and State v Terry Pendergrass Counsel filed the initial brief of appellant and designation of matter in State v Bobby Burdine on January 25, 2010 Counsel filed the initial brief of appellant and designation of matter in State v Eric Dantzler on January 28, 2009 Counsel filed the petition for writ of certiorari and accompanying appendix in Terrence Cox v State and the initial brief of appellant and designation of matter in State v Robert Phipps on January 29, 2009 Counsel filed the petition for writ of certiorari and accompanying appendix in Daryl Spain v State on February 3, 2010 Counsel filed the initial brief of appellant and designation of matter in State v Jerry Ward on February 5, 2010 Counsel filed the petition for writ of certiorari and accompanying appendix in State v Marcus McKenzie and Rossie Hicklin v State and the initial brief of appellant and designation of matter in State v Aliquon Drake on February 11, 2010 Counsel filed the petition for writ of certiorari and accompanying appendix in Dana Rikard v State and the initial brief of appellant and designation of matter in State v Michael McFadden on February 17, 2010

4 Counsel has not had time to complete the petition for writ of certiorari and accompanying appendix in this case As a result, counsel respectfully asks this Court for an additional 30 day extension of time to file the petition for writ of certiorari and accompanying appendix Counsel understands that the Court has granted one previous extension in this case Counsel is striving to limit the number of extensions requested Counsel is attempting to complete the cases with the most number of extensions first

5 Counsel makes this request in good faith and not for purposes of delay

Counsel respectfully requests a 30 day extension in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above circumstances

Respectfully submitted,


Kathrine H Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

February 18, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Larry B Hyman, Jr , Circuit Court Judge

CLARENCE GIBBS,

PETITIONER,

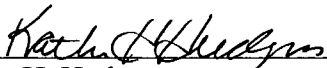
V

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

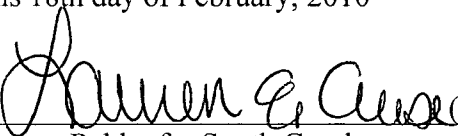
The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the petition for writ of certiorari and accompanying appendix in the above referenced case has been served upon Christina J Catoe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 18th day of February, 2010



Kathrine H Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 18th day of February, 2010

 (L S)

Notary Public for South Carolina
My Commission Expires August 23, 2014

The Supreme Court of South Carolina

Clarence Gibbs,

Petitioner,

v

State of South Carolina,

Respondent

The Honorable Larry B Hyman, Jr
Georgetown County
Trial Court Case No 2009-CP-22-00546

ORDER

The request for an extension until February 18, 2010 to serve and file the Petition for Writ of Certiorari and Appendix is granted Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause

IT IS SO ORDERED

JEAN H TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

January 19, 2010

cc Appellate Defender Kathrine H Hudgins
Assistant Attorney General Christina J Catoe



ORIGINAL

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332
Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1330
Facsimile (803) 734 1397

Robert M Dudek Acting Chief Appellate Defender
Wanda H Carter Deputy Chief Appellate Defender
Joseph L Savitz III Senior Appellate Defender

January 19, 2010

RECEIVED

JAN 19 2010

The Honorable Daniel E Shearouse
Clerk, S C Supreme Court
P O Box 11330
Columbia, SC 29211

(1)

S C SUPREME COURT

Re Clarence Gibbs v The State

Dear Mr Shearouse

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Christina J Catoe, Esquire, of the Attorney General's Office, of my request.

Sincerely,


Kathrine H Hudgins
Appellate Defender

KHH/lec

cc Christina J Catoe, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDEPENDENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Robert M. Dudek Acting Chief Appellate Defender
Wanda H. Carter Deputy Chief Appellate Defender
Joseph L. Savitz III Senior Appellate Defender

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NOV 23 2009

S.C. SUPREME COURT

November 23, 2009

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side:

Clarence Gibbs v. State of South Carolina

11/20/2009

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Lorie French
Legal Services Coordinator



HENRY McMASTER
ATTORNEY GENERAL

October 5, 2009

The Honorable Alma Y White
Georgetown County Clerk of Court
Common Pleas Division (PCR)
Post Office Drawer 479
Georgetown, SC 29442

RE Clarence Gibbs v State of South Carolina
2009 CP 22 0546
(Post Conviction Relief – Now on Appeal)

Dear Ms White

Enclosed please find, for filing in your office, an **Order Dismissing *Pro Se* Motion for Relief from Judgment** signed by the Honorable Larry B Hyman, Jr, in the above referenced PCR matter

Thank you for your assistance in this matter, and please do not hesitate to contact me should you have any questions or concerns

Sincerely,

Christina J Catoe
Assistant Attorney General

CJC/

Enclosures

cc Paul Archer, Esquire
Office of Appellate Defense
Clerk, South Carolina Supreme Court

RECEIVED

OCT 06 2009

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)

COUNTY OF GEORGETOWN)

IN THE COURT OF COMMON PLEAS

Clarence Gibbs, # 289369,)

Applicant,)

v)

State of South Carolina,)

Respondent)

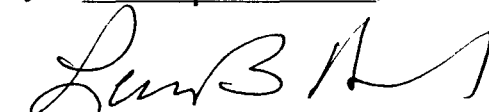
2009-CP-22-0546

**ORDER DISMISSING *PRO SE*
MOTION FOR RELIEF FROM JUDGMENT**

This post-conviction relief matter came before the Court for a hearing on July 29, 2009. Thereafter, this Court issued an Order Granting Belated PCR Appeal, which was served by mail upon the Applicant's counsel of record, Paul Archer, Esquire, on August 17, 2009. Attorney Archer timely served a Notice of Belated PCR Review on August 19, 2009, and filed the same with the South Carolina Supreme Court, pursuant to Rule 243, SCACR. Thereafter, on September 2, 2009, the Applicant filed a *pro se* document captioned "Applicant's Objection to Judge's Order dated August 13, 2009 and Notice of Motion for Relief from Judgment or Order."

The Applicant's *pro se* Motion was not timely submitted within ten days of service upon counsel of record, pursuant to Rule 5(b)(1) and Rule 59(e), SCRCP, nor is the Motion proper under Rule 11(a), SCRCP ("[e]very pleading, motion or other paper of a party represented by an attorney shall be signed by [the] attorney of record").¹ Furthermore, when the Notice of Appeal was filed, jurisdiction was transferred exclusively to the South Carolina Supreme Court pursuant to Rule 205, SCACR. The South Carolina Supreme Court has not granted leave for the Circuit Court to proceed upon the Applicant's Motion. For all of these reasons, this Court may not properly entertain the Motion, and the same must be **DISMISSED**.

AND, IT IS SO ORDERED this 29 day of Sept, 2009



Larry B. Hyman, Jr.
Presiding Judge, Fifteenth Judicial Circuit

Conway, South Carolina

¹ See also Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989) (no right to hybrid representation). The Applicant is now represented by the Office of Appellate Defense.



SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 14, 2009

Ms. Brenda R. Babb
Circuit Court Reporter
4668 River Road
Little River, SC 29566-7927

Dear Ms. Babb

RECEIVED

SEP 14 2009

SC SUPREME COURT

Our office has been requested to perfect the appeal arising out of

Clarence Gibbs v. State of South Carolina Indictment # 09-CP 22-00546

County Horry Date of Trial June 13, 2008

Presiding Judge Larry B. Hyman, Jr.

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Brenda R Babb
September 14, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Katharine M. Stafford', with a large, stylized loop at the end.

Katharine M. Stafford
Legal Assistant

xc S C Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDICENT DEFENSE

Division of Appellate Defense
1330 Lady Street Suite 401
Columbia South Carolina 29201 3332

Post Office Box 11589
Columbia South Carolina 29211 1589
Telephone (803) 734 1343
Facsimile (803) 734 1397

Joseph L. Savitz III Chief Attorney
Wanda H. Carter Deputy Chief Attorney

September 14, 2009

RECEIVED

SEP 14 2009

SC SUPREME COURT

Ms. Linda McCall
Circuit Court Reporter
PO Box 187
North Myrtle Beach SC 29597-0187

Dear Ms. McCall

Our office has been requested to perfect the appeal arising out of

Clarence Gibbs v. State of South Carolina Indictment # 09-CP 22 00546

County Horry Date of Trial July 29, 09

Presiding Judge Larry B. Hyman, Jr.

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI 4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25 and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms Linda McCall
September 14, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions or problems please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Katharine M. Stafford', with a long horizontal flourish extending to the right.

Katharine M. Stafford
Legal Assistant

xc S C Supreme Court
Attorney General's Office

PAUL ARCHER, Esq.
8231 OCEAN HWY
PAWLEYS ISLAND, SC 29585

Re. Gibbs, Clarence V The State,
2009-CP-22-0546

Dear Mr Archer

I Am writing you because you did not do as I asked you to do, which was to do what you said you were appointed which was to represent me in my PCR. So why didn't you do that? I told you that the evidence was newly discovered to me because my trial attorney never told about a robber with a limp. He never went over any discover material with me so how could I help in my defense. Now I want these issues, and motions that I filed in court to be heard and ruled on in my PCR application and the amended issue My original PCR attorney could have brought these issue up in an amended PCR application, because she told me so she should informed the court of these defenses. She violated my due process right to hear all my issues.

I wanted you to get Leave as the court instructed you to do in letter dated September 23, 2009, from The Supreme Court of South Carolina. So the motion for relief from Judgment under Rule 60(b) can be heard if the Judge denies my entire PCR. So be it. Now do it please

Sworn before me this
14th day of September 2009
Susan J. Johnson
notary for South Carolina
My Commission expires March 5, 2018

Sincerely,

Clarence Gibbs
Clarence Gibbs 289349
BRCK MT 272
4460 Broad River Rd
Columbia, SC 29210

CC The Supreme Court of South Carolina
Assistant Attorney General Christina J. Calkins
~~Christina J. Calkins~~
~~Christina J. Calkins~~

RECEIVED

SEP 17 2009

SC SUPREME COURT



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

September 3, 2009

Paul Archer, Esquire
8231 Ocean Hwy
Pawleys Island, SC 29585

Re Gibbs, Clarence v The State, 2009-CP-22-0546

Dear Mr. Archer

Enclosed is a copy of a copy of a Rule 60(b), SCRCF, motion that your client has filed with the lower court. I remind you that a motion for relief from a judgment under Rule 60(b) may not be made during the pendency of an appeal without leave of this Court.

Very truly yours,

CLERK

Enclosure

cc Appellate Defense
Assistant Attorney General Christina J. Catoe
Mr. Clarence Gibbs, #28949

Georgetown Clerk's office
P O DRAWER 421270
Georgetown SC 29442

Re Clarence Gibbs V State of South Carolina
2009-CP-22-0546

Dear clerk

Please find for filing the following

- (1) Applicant's object to Judges order and notice ~~of~~ and motion for relief from Judgment on order (order dated August 13, 2009)
- (2) Clarence Gibbs Affidavit in support of same
- (3) and certificate of service by mail
- (4) Please return extra copy of certificate of service by mailing it back to Applicant in the SASE enclosed

RECEIVED

AUG 31 2009

SC SUPREME COURT

Sincerely

Clarence Gibbs

Clarence Gibbs 289349

BRLE MA 272

4460 Broad River Rd

Columbia SC 29210

Sworn before me this

27th day of August 2009

[Signature]

Notary for South Carolina

My Commission expires _____

My Commission Expires

August 25, 2015

State of South Carolina
County of Georgetown

Clarence Gibbs #289369
Applicant

State of South Carolina
Respondent

}
} In The Court of common Pleas
} 2009-CP-22-0546
} Applicant's objection to Judge's order
} dated (August 13, 2009) And Notice of And
} Motion for Relief from Judgment or order
}

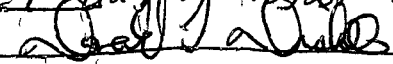
Gibbs is objecting to the Judge's order that only Grants Belated PCR APPEAL for the following reasons

In the order on page 2 under Allegations, the judge indicates that Mr Gibbs knowingly and willing withdrew all claims other than his belated PCR APPEAL. Now Mr Gibbs is illiterate and did not understand fully what the Judge was asking him to do. Mr Gibbs relied on yet another court appointed attorney to protect his rights. This attorney allowed this withdrawal without any objections even after Gibbs had wrote his attorney a letter specifically asking or telling him to argue all of his issues including the amended one. It is clear that the Judge and his attorney took advantage of Mr. Gibbs ignorant about his rights and in stead of protecting Mr Gibbs' due process rights they in effect denied him equal protection and due process.

The Judge had knowledge of Mr Gibbs' being illiterate so did his attorney. Gibbs contend that his claim or issue all of them should have been argued as he wanted, And the Judge should have made his Judgment or order on all of Mr Gibbs' motion and on all his issues not only the belated APPEAL.

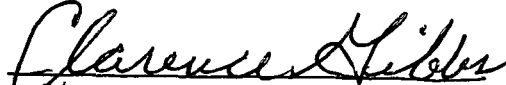
Please withdraw and rehear this order ~~OR~~ grant relief from Judgment or order pursuant to Rule 60 (b) (3) SC RCP And also based on this motion and Clarence Gibbs' Affidavit in support of the same.

Sworn before me this
27TH day of August 2009



Notary for South Carolina
My Commission Expires

My Commission Expires
August 25, 2015


Clarence Gibbs 289369
BRCE MA 272
4400 Broad River Rd
Columbia SC 29210

State of South Carolina
County of Georgetown
Clarence Gibbs #289369
Applicant
V
State of South Carolina
Respondent

} In The Court of Common Pleas
} 2009 CP-2-0546
} Clarence Gibbs' Affidavit in support
} of his objection to Judge's order and
} motion for relief from judgment or order
} pursuant to SCRPC Rule 60(b)(3)

UPON PENALTY OF PERJURY I Clarence Gibbs 289369 having first been duly sworn depose and say

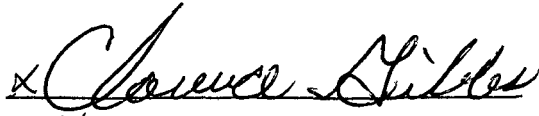
- (1) I Am A resident of Broad River Correctional Institution, MA 272 4460 Broad River Rd Columbia SC 29210
- (2) I have personal knowledge of the facts in this Affidavit and I am competent to swear to the matter herein and do so of my own free will.
- (3) On June 5, 2009 my court appointed Attorney wrote me a letter asking if I wanted him to only get me a belated appeal (see) Exhibit (1)
- (4) On June 14, 2009 I wrote him back and specifically told him that I wanted him to Argue all my issues including the amended issue which would have been the belated appeal I also told him that I wanted all motions I made in court to be ruled on (see) Exhibit (2)
- (5) This Attorney and Judge knew I was illiterate and did not fully understand my right as indicated in my motions and affidavits,
- (6) I was taken advantage of and my due process right violated I did not knowingly and willingly withdraw my right to have all my issues heard.
- (7) And had it not been for my attorney's act or nonaction to protect my rights to have my issues heard I would have had them heard at the hearing
- (8) I relied on court appointed Attorney to protect my rights he violated my due process right He never even came to see before the hearing.
- (9) I got this order from my Attorney on August 20, 2009 And I responded as soon as possible I did not understand I could object because I don't have legal assistance,

Sworn before me this
27th day of August 2009



Notary for South Carolina
my commission expires

My Commission Expires
August 25, 2015


Clarence Gibbs 289369
Pro se

PAUL ARCHER

Attorney at law

Phone/FAX (843) 979-4000

Email archerlawfirm@gmail.com

Certified as Lead Counsel for Death Penalty Defense

Exhibit (1)
Clarence Gibbs

Member NY Bar since 1966

Member SC Bar 1994

Federal Bar since 1967

United States Supreme Court 1976

8231 Ocean Highway

Pawleys Island, South Carolina 29585

Mr Clarence Gibbs # 289369
Broad River Correctional
4460 Broad River Rd
Columbia, SC 29211

June 5, 2009

Dear Mr Gibbs

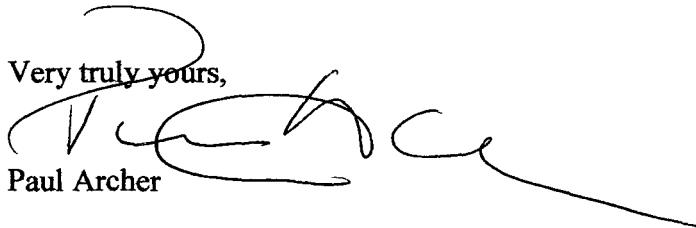
I was appointed to represent you in your PCR

You already had a PCR and this one would be successive and barred by the Statute Of Limitations You can not have more than one PCR unless on newly discovered evidence

However, if you only want me to get you a belated appeal I am sure the Attorney General will agree to that I file a Notice of appeal for you and then your case will be appealed and my file sent to Indigent Appellate Defense in Columbia which would handle the appeal for you

Let me know if all you want is an appeal

Very truly yours,



Paul Archer

PAUL ARCHER
Attorney at Law
8213 Ocean Highway
Pawleys Island, SC 29585

Exhibit (2)
Clarence Gibbs

Re. Clarence Gibbs #289369 v State of South Carolina

Dear Mr. Archer:

I received your letter dated June 5, 2009 on June 9, 2009. It says you are appointed to represent me in my PCR then that is what I want you to do. Please I did not do what they said I did. I want you to argue all my issues including the amended ones. In accordance with § 17-27-45 I filed this PCR within a year that I actually discovered the fact or my right in my PCR application. And because I've been totally denied any trained legal assistance, and I am illiterate I could not have ascertained these arguments any sooner.

I also want you to claim or amend or motion the court that my South Carolina Constitutional rights have also been violated. Articles 2, 3, and 9. And because my first PCR attorney could have brought up these issues in a properly amended PCR application the first time my due process rights of law were violated. I am not making an ineffective claim against her.

I want all the motions I made in court to be ruled on before court by a judge. Please see that this is done.

I also want declaration in opposition to the state's claim that my other claim should be barred as successive and or by the statute of limitations. You will be getting everything I have filed in this case look for it.

Sworn before me this
10th day of June 2009
Susan D. Jones
Notary for South Carolina
My Commission Expires

My Commission Expires
March 5, 2018

Clarence Gibbs
Clarence Gibbs 289369
BRCE MA 272
4460 Broad River Rd
Columbia, SC 29210

State of South Carolina
County of Georgetown
Clarence Gibbs 289369
Applicant

V

State of South Carolina
Respondent

In the Court of Common Pleas
2009-C-22-0546

Certificate of Service
by mail

I Clarence Gibbs do hereby certify that I have this 27
day of August 2009 served the following

(1) Applicant's Objection to Judge's order and notice of and
motion for relief from judgment or order dated August
13, 2009

(2) Clarence Gibbs' Affidavit in support of same and Exhibits (1), and (2)

(3) and letter to clerk

and by depositing a copy of the same in the U.S. post
office addressed as follows

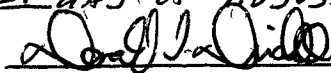
South Carolina Supreme Court
P.O. Box 11330
Columbia SC 29211

Georgetown Clerk's Office
P.O. Drawer 421270
Georgetown SC 29442

Christina Catoe Esq
Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

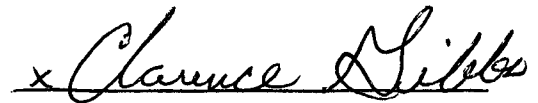
PAUL ARCHER
attorney at law
8231 Ocean Highway
Pawleys Island SC 29585

Sworn before me this
27th day of August 2009



Notary for South Carolina
My Commission Expires

My Commission Expires
August 25, 2015

x 
Clarence Gibbs

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2007 CP 22 1332

Clarence Gibbs # 289569
(aka Clarence Gibbs)

Applicant

**ORDER DENYING
POST CONVICTION RELIEF**
(Evidentiary Hearing Held)

State of South Carolina

Respondent

FILED
CLERK OF COURT
JAN 11 2008
GEORGETOWN

PROCEDURAL HISTORY

Just
This matter came before the Court pursuant to an application for post conviction relief (PCR) filed October 4, 2007, by Clarence Gibbs, also known as Clarence Gibbs. Mr. Gibbs filed an identical PCR application on November 8, 2007 (2007 CP-22 1515). The State made a Return to both applications on December 7, 2007. Thereafter, by Order dated December 19, 2007, the two PCR applications were merged into one action under the 2007 CP-22 1332 civil action number. On June 13, 2008, an evidentiary hearing was convened at the Georgetown County Courthouse. Applicant was present in court and represented by Vanessa Ann Richardson, Esquire. Respondent was represented by Christina J. Catoe, Assistant Attorney General.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment from Georgetown County. Applicant was indicted at the June 2005 term of the Georgetown County Grand Jury for kidnapping (2005 GS 22 0601), armed robbery (2005-GS 22 0602) and possession of a weapon during the commission of a violent crime (2005 GS 22 0603).

On September 6, 2005, Applicant represented by J. Eric Fox Esquire proceeded to trial before the Honorable Paula H. Thomas. The jury found him guilty on September 8, 2005, and he was sentenced to twenty years for kidnapping, twenty years concurrent for armed robbery, and five years consecutive for the weapon charge. A timely appeal was filed on Applicant's behalf and the convictions were affirmed on June 27, 2007 (2007 UP 335). The matter was remitted to the circuit court on July 13, 2007.

In his application for PCR, Applicant alleged that his attorney was ineffective for failing to ensure that the jury was charged on alibi. He also alleged that his due process rights were violated with respect to eyewitness identification procedures. Prior to ruling on this matter, this Court had the opportunity to review Applicant's PCR file, the records of the Georgetown County Clerk of Court regarding the convictions, Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the pertinent appellate records. At the PCR hearing, this Court heard the testimony of Applicant and that of his former trial attorney and listened to the arguments presented. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

STANDARD OF REVIEW

In a post conviction relief proceeding, the Applicant bears the burden of proving his or her allegations by a preponderance of the evidence. Caprood v. State, 338 S.C. 103, 109-110, 525 S.E.2d 514-517 (2000). Rule 71-1(c). Where ineffective assistance of counsel is alleged is a ground for relief, the Applicant must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 60 L.Ed.2d 674, 692 (1984). Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The correct measure of performance is whether the

attorney provided representation within the range of competence required in criminal cases. Butler supra. There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case. Caprio supra at 109-125 S.E.2d at 517 (citations omitted). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its 'reasonableness under professional norms'. Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. When a defendant challenges his or her convictions after a trial, the proper consideration is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt. Smith v. State, 375 S.C. 507, 515, 654 S.E.2d 523, 527-28 (2007) (citations omitted). **In order to receive relief, an Applicant must prove both ineffective assistance and resulting prejudice.** See Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

DISCUSSION OF THE FACTS

Applicant's Testimony

Applicant testified that he filed this PCR claim alleging that his trial attorney, Eric Fox, was ineffective. He stated that he was unable to read or write and therefore he had assistance with his PCR Application. He indicated that his attorney should have objected when the Court permitted introduction of two show-up identifications that occurred at the police station shortly after the

robbery of the Piggly Wiggly. He stated his attorney should have also objected when two of the witnesses testified regarding their out of court voice identifications and should have objected to the Court admitting a photo lineup when half of the lineup was missing at the time of trial. His attorney also failed to object when the witnesses made in court identifications.

Applicant stated that he did testify at his trial. In his testimony, he told the jury that he did not commit the armed robbery at Piggly Wiggly and further told the jury that he was in fact at home at the time this crime occurred. Applicant stated that his mother, Rosa, and his girlfriend, Karen, also testified on his behalf at trial. They both also told the jury that Applicant was at home at the time of the robbery. Applicant stated that the jury was not charged with respect to alibi. He stated that his attorney should have requested a jury instruction on alibi or at least objected when the judge did not charge it. He further testified that he was not aware of the significance of any of these issues at the time of his trial since he had no knowledge of the law and he was relying on his attorney. He stated that he later became aware that, because his attorney did not object to these issues, they were not preserved for his appeal to the Court of Appeals. Applicant indicated that he was seeking a new trial based upon the ineffective assistance of his attorney.

JWS
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Trial Counsel's Testimony Incorporating the Trial Record

J. Eric Fox, Esquire, testified that he has been practicing law since 1990 and has been a public defender for Georgetown County since 1994. His practice has focused almost exclusively in the area of criminal law. He stated that he was appointed as Applicant's public defender after Applicant was arrested following a show up identification at the police station. Counsel and Applicant met to discuss the charges and the facts. The charges arose out of the robbery of the Georgetown Piggly Wiggly on the night of April 10, 2005. The Piggly Wiggly was within about five or ten minutes' walking distance of where Applicant lived at the time. There were three witnesses to

the robbery - two Piggly Wiggly employees Eric Sessions and Greg Morton - and also the manager of the store John David Fowlkes. The discovery materials that Counsel received included statements taken from these witnesses that contained descriptions of the robber given to police on the night of the robbery. The descriptions were all similar but there were variations of which counsel took note. Generally the robber was described as being a black male wearing a blue jacket and a dark hat with black and gray hair and a rough beard. All three witnesses also described the robber as having a gun, which he held inside his jacket. Morton initially indicated that the robber may have walked with a limp. He also stated initially that the robber was wearing shades but later he stated that it only looked like the robber was wearing shades because of a hat that covered his eyes.

JB
5 All three witnesses identified each with a high level of certainty a black jacket with a gray lining that was found in Applicant's bedroom. All three of the witnesses seemed to focus particularly on the gray lining of the jacket because this was where the robber held the firearm used in commission of the robbery. Counsel stated that, in the days following the robbery, each witness was shown a twelve photo line-up, and then a one man show up later. Counsel was advised that one-half of the line-up photographs had been misplaced or lost at some point after Applicant's arrest. There was some indication that the lost photos had been used in another case. Counsel also became aware of a video from the Piggly Wiggly security system that documented the time and opportunity each witness had to observe the robber. This tape was played for the jury at trial.

Counsel stated that two of the witnesses Morton and Fowlkes identified Applicant from the photo line up and later in the show up. They also identified his voice as being that of the robber. The other witness Sessions did not pick Applicant out of the line up and told police at the show up that Applicant was not the robber. Sessions was ultimately called as a witness for the defense. During a pre trial Neily v. Biggers hearing Counsel challenged the identifications of Morton and

Fowlkes objected to the photo line up and show up procedures and argued that the loss of one-half of the photographs used in the line up should prevent the introduction of the witnesses identifications. The Court made an *in limine* ruling that the two identifications were admissible because the procedures used were not unduly suggestive and did not violate due process. Counsel acknowledged that later during trial he did not make sufficient contemporaneous objections to the admission of the identifications during the State's case, although at one point he voiced an objection to the lineup and also to the video of the robbery. He noted that the Court of Appeals found that the identification issues were not preserved for review.

Jus 6
Counsel also testified that, at trial, he presented evidence of Applicant's alibi. Specifically, Applicant's girlfriend Karen Dozier, testified that Applicant was at home with her and his mother all night on the date of the robbery, with the exception of a brief period of time that they went to the gas station to get cigarettes and soda. Rosa Jenkins, Applicant's mother, also testified that Applicant was at home on that night, watching television, and that he and Karen went to the store briefly. Finally, Applicant testified that he was at home that night, that he watched television, ate dinner, and went to the store with his girlfriend. He stated that he returned home while it was still light outside and did not leave again. All three witnesses also testified that they were watching the television program JAG at some point that night, but the State challenged the testimony as to whether their television actually received the channel on which JAG was aired. In rebuttal, the State called witnesses from a Charleston television station to establish that the program would not have aired as claimed by the alibi witnesses.

Counsel noted that the testimony did not firmly establish a time frame for that evening. He also noted that Karen Dozier's testimony was somewhat confusing and did not come across as credible testimony. He stated that Applicant's mother seemed to be a credible witness, but she

admitted that she got confused about dates and times. In addition, on cross examination, the solicitor pointed out that the witnesses had discussed the details of their testimony with one another previously, including that they were watching TAO that night and that Gladys Knight made a cameo appearance on the program.

JWS
7 Counsel stated that he did recall having a charge conference with Judge Thomas, but he could not recall what was discussed. He indicated that he apparently did not submit a request for a jury instruction on alibi, even though alibi witnesses were in fact called and the issue was argued to the jury in both his closing and the State's closing. He stated that alibi should have been charged; however, he did not feel that the alibi testimony was very strong, especially since the time frame was not solidly established. The issue of identification was much more important to him at the time. He stated that his primary strategy for trial was to attempt to exclude the two identifications by Morton and Fowlkes. After the Court denied his pre-trial motion, he then focused upon creating reasonable doubt in the minds of the jurors by emphasizing Sessions' testimony that Applicant was not the perpetrator. He attempted to point out in the security video that Sessions had a good opportunity to view the robber, and he cross-examined the two other witnesses regarding the discrepancies and variations in their descriptions of the robber.

Counsel noted that in response to his emphasis on Sessions, the solicitor attempted to imply that Applicant and Sessions had some prior acquaintance or complicity with one another. In fact, during Applicant's cross examination, the solicitor challenged Applicant as to why Applicant allowed Eric Sessions to remain behind him during the robbery, as depicted on the video. Counsel was not sure of the impact his testimony had upon the jury, but the jury did request that this testimony be replayed during deliberations. The solicitor also very thoroughly impeached Applicant's general credibility at trial, bringing out his prior record for burglary, grand larceny, petit

larceny, criminal domestic violence, shoplifting, possession of cocaine, and assault and battery of a high and aggravated nature. In addition, the solicitor pointed out to the jury that Applicant was on trespass notice at the Piggly Wiggly and argued that this constituted motivation to rob that particular store.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At the PCR hearing, this Court carefully listened to the testimony of Applicant, which consisted primarily of background information and a re-statement of his allegations of ineffectiveness. This Court also listened to the testimony of Applicant's former counsel and found that his testimony was candid and highly credible on all factual issues. Based upon this evaluation of credibility, in conjunction with the entire record, this Court finds that Applicant failed to meet his burden of proof under Strickland v. Washington and therefore this Court must deny and dismiss his application for post-conviction relief.

Identification Issues

First, this Court finds that Applicant did prove that counsel was ineffective for failing to properly and contemporaneously during trial object to the introduction of the line-up, the show-up, and the in-court identifications. Because counsel did not contemporaneously object at the appropriate times, issues related to Morton's and Fowlkes' identifications were not preserved for review on appeal. However, this Court finds that Applicant did not meet his burden to show prejudice from counsel's errors, because this Court is convinced that the trial Court's admission of the identifications would have been upheld on appeal. The admission of eyewitness identification is in the trial court's discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Rice, 375 S.C. 102, 326, 652 S.E.2d 409, 421 (S.C. App. 2007).

Here, counsel made a pre-trial motion to suppress the identifications, and an extensive Neil v. Biggers hearing was held. Thereafter, even though the trial Court did not find the identification process unduly suggestive, it nonetheless reviewed all of the pertinent factors, including the opportunity to view, the degree of attention, the prior descriptions given, the level of certainty, and the length of time that had passed. See Rice, supra, at 327-652 S.E.2d at 421. (See Trial Transcript pages 113-114). The trial Court also noted that it did not find the process to be tainted where the photo line-up came first and the show-up second. The trial Court further found that testimony sufficiently established the relevant details regarding the lost half of the photo line-up, and noted that the defendant was not identified out of that photo spread. The trial Court stated that the fact that one of the witnesses did not make an identification was an issue for the jury. The trial Court specifically found that due process had been satisfied and there was no substantial likelihood of misidentification. This Court would also point out that the South Carolina Court of Appeals stated in its unpublished opinion in this case that, after the Neil v. Biggers hearing, 'the Court made a *thorough ruling* denying Gibbs's motion to suppress both types of identification' (emphasis added). Based upon all of the above, this Court finds no reasonable probability that the outcome would have been different had counsel contemporaneously objected and preserved these issues for appeal. Therefore, Applicant has failed to establish prejudice on this allegation of ineffectiveness.

Alibi Issue

This Court finds that Applicant has also proven that trial counsel was ineffective for failing to ensure that an alibi instruction was given to the jury. This Court finds that had a jury instruction on alibi been requested, the trial Court would have been required to deliver such a charge because it was supported by evidence presented at trial. See State v. Burris, 234 S.C. 256, 262, 513 S.E.2d 104 (1999) (trial court must give requested charge if it is supported by evidence). However, this

Court finds that Applicant has not proven that he suffered prejudice from the lack of an alibi charge. Alibi testimony was presented to the jury and both attorneys discussed the issue in their closing arguments. The solicitor specifically pointed out to the jury in his closing argument that the defendant had no burden to put up evidence. The trial Court charged the jury that the State had the burden of proof to prove each and every element of each offense beyond a reasonable doubt and that a defendant is presumed innocent of each and every offense. Importantly, the trial Court also specifically charged the jury that

Once again, I instruct you the burden of proof is on the State and extends to every element of the crime and this specifically includes the burden of proving beyond a reasonable doubt the identity of the Defendant as the person who committed the crimes. If after examining the testimony you have a reasonable doubt as to the accuracy of the identification you must find the defendant not guilty. (Trial Transcript page 475, lines 3-11)

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This Court finds that this charge was sufficient to inform the jury that the State had to prove beyond a reasonable doubt that Applicant was not at home at the time of the crime, and that he was in fact, at the scene of the crime and committed the crime. In addition, in this particular case because the jurors could believe either the State's identification witnesses or they could believe the alibi witnesses but not both, this Court finds that the crucial issue in this case was credibility. Witness credibility was argued by both sides and was thoroughly charged to the jury.

This Court finds that the case of Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) supports the position that even where counsel is ineffective for failing to ensure an alibi charge is given, there is no lack of the required prejudice if there is not a reasonable probability that the outcome of trial would have been different had an alibi charge been given. In the Ford case, the Supreme Court noted that the evidence was both direct and circumstantial as it was in Applicant's case. This Court further finds that the case of Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995), is

distinguishable because the evidence in that case was wholly circumstantial and because the solicitor implied in closing argument that the defense bore some burden of proof on the issue of alibi. The Supreme Court found that an alibi charge was particularly critical in that case for those reasons. Roseboro, supra, at 295-454 S.E.2d at 313-14. Finally, this Court finds the case of Riddle v. State to be distinguishable because in that case the sole theory of defense was alibi and, in addition, the State commented in closing argument that the judge would charge the jury on the only legal defenses available. The Supreme Court found prejudice when the trial court failed to charge alibi, finding that the jurors may have concluded because of the solicitor's comment, that they could not consider alibi as a defense.

In conclusion, under the particular facts of this case, although counsel was ineffective in the two respects discussed above, this Court does not find that Applicant has proven prejudice from either of counsel's errors. Therefore, Applicant failed to prove that he was denied a fair trial under the Sixth Amendment.

CONCLUSION

For all of the reasons discussed above, this Court finds and concludes that Applicant's post-conviction relief application must be denied and dismissed with prejudice for failure to meet his burden of proof under Strickland v. Washington, 466 U.S. 668 (1984), and Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

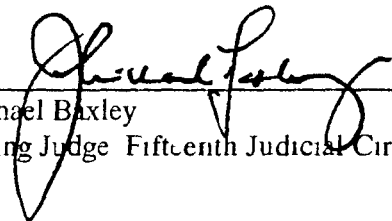
Counsel's attention is directed to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), and Rule 59(c) SCRPC regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S.C. Code Ann. § 17-27-50 (2003). This Court further advises that if Applicant desires to secure appellate review, a notice of appeal must be filed with the South Carolina Supreme Court and served within thirty (30) days of the

Service of this Order Pursuant to Rule 71 (g), SCRPC PCR counsel must file a notice of appeal on Applicant's behalf if Applicant wishes to pursue appellate review Applicant and Counsel are directed to Rules 203 206 and 227 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed

IT IS THEREFORE ORDERED

- 1 Clarence Gibbs application for post-conviction relief is **DENIED** and **DISMISSED with PREJUDICE**
- 2 Applicant must remain in the custody of the State for the completion of his sentence

IT IS SO ORDERED this 8th day of July 2008



J. Michael Baxley
Presiding Judge Fifteenth Judicial Circuit

Georgetown South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

2007 CP 22 1332

Clarence Gibbs

Applicant

v

State of South Carolina,

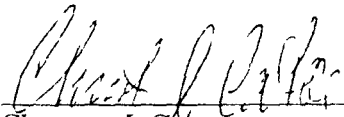
Respondent

CERTIFICATE OF SERVICE BY MAIL

- 1 I am an employee of the Respondent in the above captioned action
- 2 Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail
- 3 I have this day served a copy of the **ORDER OF DISMISSAL** in the above-captioned matter on the following person(s) by depositing in the United States mail, postage prepaid

Vanessa A Richardson, Esquire
Bell Legal Group
Post Office Box 2590
Georgetown, SC 29442

DATED this 17th day of July, 2008


Christina J. Catoe
Office of the Attorney General
Post Office Box 11549
Columbia South Carolina 29211
(803) 734 3737

PAUL ARCHER

Attorney at law

Phone/FAX (843) 979-4000

Email archerlawfirm@gmail.com

Certified as Lead Counsel for Death Penalty Defense

Member NY Bar since 1966

Member SC Bar 1994

Federal Bar since 1967

United States Supreme Court 1976

*8231 Ocean Highway
Pawleys Island, South Carolina 29585*

RECEIVED

AUG 20 2009

SC SUPREME COURT

Honorable Daniel E Shearouse
Clerk Of Court
SC Supreme Court
P O Box 11330
Columbia, SC 29211

August 19, 2009

Re Clarence Gibbs Notice Belated
Appeal Austin v State 2009-CP-22-0546

Dear Mr Shearouse

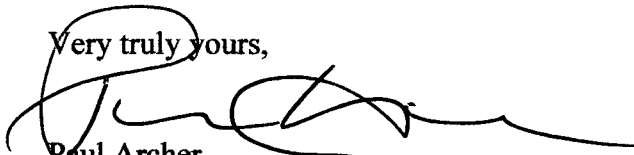
Enclosed is a Notice Of Belated Appeal pursuant to Austin V State

I have served the necessary parties

I was appointed in the 15th Judicial Circuit

Thank you

Very truly yours,



Paul Archer

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

BELATED REVIEW PURSUANT TO AUSTIN V STATE

RECEIVED

Case # 2009-CP-22-0546

AUG 20 2009

CLARENCE GIBBS

APPLICANT

SC SUPREME COURT

STATE OF SOUTH CAROLINA

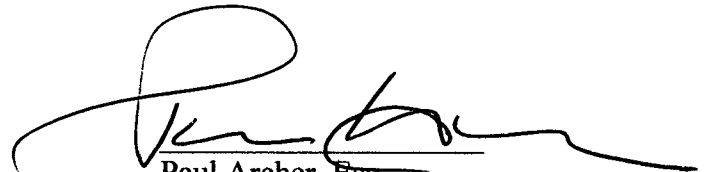
RESPONDENT

BELATED REVIEW PURSUANT
TO AUSTIN V STATE

Clarence Gibbs requests a belated review, pursuant to Austin V State, of the PCR Order of the Honorable J Michael Baxley, dated July 8, 2008, denying and dismissing his Application for relief

Other Counsel of record

Christina J Catoe, Esq
Attorney for Respondent
Attorney General's Office
P O Box 11549
Columbia, SC 29211
(803) 734-3970



Paul Archer, Esq
Attorney for Petitioner
8231 Ocean Highway
Pawleys Island, SC 29585
(843) 979-4000

Dated August 19, 2009

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

NOTICE OF REVIEW PURSUANT TO AUSTIN V STATE

RECEIVED

AUG 20 2009

Case # 2009-CP-22-0546

SC SUPREME COURT

CLARENCE GIBBS

APPLICANT

STATE OF SOUTH CAROLINA

RESPONDENT

PROOF OF SERVICE

The undersigned, Attorney for the Applicant, hereby certifies that a true copy of the Notice Of Belated Review pursuant to Austin V State, in the above case has been served upon the following by mailing a copy to each in a properly addressed envelope on August 19, 2009

South Carolina Supreme Court
P O Box 11330
Columbia, SC 29211

Clarence Gibbs 289369
Broad River Correctional
4460 Broad River Rd
Columbia, SC 29211

Christina Catoe, Esq
Assistant Attorney General
P O Box 11549
Columbia, SC 29211-1549

Office Of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

Georgetown Clerk's Office
P O drawer 421270
Georgetown SC 29442



PAUL ARCHER, EQS

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Clarence Gibbs,

Applicant,

v

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS

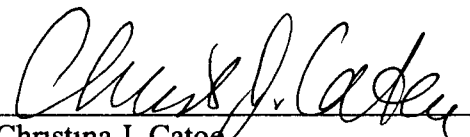
2009-CP-22-0546

CERTIFICATE OF SERVICE BY MAIL

- 1 I am an employee of the Respondent in the above-captioned action
- 2 Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail
- 3 I have this day served a copy of the **ORDER GRANTING BELATED PCR APPEAL** in the above-captioned matter on the following person by depositing in the United States mail, postage prepaid

**Paul Archer, Esquire
8231 Ocean Highway
Pawleys Island, SC 29585**

DATED this 17th day of August, 2009


Christina J. Catoe
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

Clarence Gibbs, # 289369,

Applicant,

v

State of South Carolina,

Respondent

IN THE COURT OF COMMON PLEAS

2009-CP-22-0546

**ORDER GRANTING BELATED PCR APPEAL
PURSUANT TO *AUSTIN V STATE***

This matter came before the Court pursuant to an Application for post-conviction relief filed April 13, 2009, by Clarence Gibbs, seeking a belated appeal from the denial of his first PCR Application. Respondent made a Return and Motion to Dismiss on May 9, 2009. After the Applicant submitted a Reply on May 18, 2009, requesting a belated PCR appeal, the State submitted an Amended Return on May 29, 2009, requesting an evidentiary hearing on this claim only. An evidentiary hearing was convened at the Horry County Courthouse on July 29, 2009. The Applicant was present in court and represented by Paul Archer, Esquire. The Respondent was represented by Christina J. Catoe, Assistant Attorney General.

PROCEDURAL HISTORY

Clarence Gibbs is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. The Applicant was indicted at the June 2005 term of the Georgetown County Grand Jury for kidnapping (2005-GS-22-0601), armed robbery (2005-GS-22-0602), and possession of a weapon during the commission of a violent crime (2005-GS-22-0603). On September 6, 2005, the Applicant proceeded to trial, represented by J. Eric Fox, Esquire. The jury convicted him on September 8, 2005, and he was sentenced by the Honorable

Paula H Thomas to twenty years for kidnapping, twenty years, concurrent, for armed robbery, and a consecutive five years for the weapon charge. A timely appeal was filed on the Applicant's behalf, and the South Carolina Court of Appeals affirmed the convictions on June 27, 2007 (2007-UP-333). The case was remitted to the circuit court on July 13, 2007.

The Applicant filed his first Application for PCR on October 4, 2007 (2007-CP-22-1332), alleging ineffective assistance of counsel and due process violations. (In this action, the Applicant spelled his last name "Gibbes.") He then filed an identical PCR Application on November 8, 2007 (2007-CP-22-1515), and the two actions were thereafter merged, under the 2007-CP-22-1332 civil action number. The Respondent filed a Return on December 7, 2007. On June 13, 2008, an evidentiary hearing was held before the Honorable J. Michael Baxley, at which the Applicant was present and represented by Vanessa Ann Richardson, Esquire. By Order dated July 8, 2008, and filed July 18, 2008, Judge Baxley denied and dismissed Application. No appeal was filed.

Allegations

In his current Application, Mr. Gibbs alleged numerous grounds for relief, including that he was denied the right to appeal the denial of his previous post-conviction relief Application. At the outset of the hearing, however, the Applicant withdrew all claims other than his belated PCR appeal claim. Therefore, this Court will address only the belated PCR appeal claim.

Set forth below are the relevant findings of fact and conclusions of law, as required by S.C. Code Ann. § 17-27-80 (2003).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In considering the Applicant's case, this Court had before it the records of the Georgetown County Clerk of Court regarding the convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the direct appeal records, and the prior post-conviction

relief file. In addition, the prior PCR hearing transcript (from June 13, 2008) has been made a part of the record. Both the Applicant and his former PCR counsel, Vanessa Ann Richardson, Esquire, testified at the hearing.

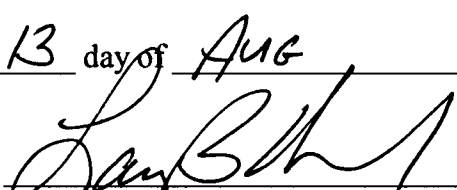
The Applicant testified that he had a PCR hearing in June of 2008 before Judge Baxley. He was represented by Vanessa Richardson at the hearing. After his PCR was denied, he requested that Ms. Richardson file an appeal. However, he later learned that no appeal had been filed. Ms. Richardson corroborated the Applicant's testimony. She stated that the Applicant did request that she file an appeal, but she was unfamiliar with the appeals process and no appeal was ever filed. She testified that at the time her office received a clocked copy of the Order of Dismissal on July 22, 2008, Mr. Gibbs had already requested that an appeal be filed.

CONCLUSION

Based upon the above testimony, this Court finds that the Applicant requested an appeal but was denied the opportunity for an appeal due to his PCR counsel's deficient conduct. Therefore, Mr. Gibbs is entitled to petition for belated review of the denial of his first PCR, pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

This Court advises that in order to secure belated review, the Applicant's counsel must file and serve a Notice of Appeal **within thirty (30) days** of the date of service of this Order. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND, IT IS SO ORDERED this 13 day of Aug, 2009


Larry B. Hyman, Jr.
Presiding Judge
Fifteenth Judicial Circuit

Conway, South Carolina

Attorney at Law

Pawleys Island, South Carolina 29585

Honorable Daniel E Shearouse
Clerk Of Court
SC Supreme Court
P O Box 11330
Columbia, SC 29211



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