

VOLUME II OF II

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Georgetown County

Larry B Hyman, Jr , Circuit Court Judge

RECEIVED

APR 21 2010

SC SUPREME COURT

CLARENCE GIBBS,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

KATHRINE H HUDGINS
Appellate Defender

South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, S C 29211-1589

ATTORNEY FOR PETITIONER

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

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA)

IN THE COURT OF GENERAL SESSIONS

COUNTY OF Georgetown)
 STATE VS)
Clarence B. bbs)
 AKA)
 Race Sex M Age 52)
 DOB)
 Address)
 City State Zip Georgetown)
 DL# SID# SC 00117570)

INDICTMENT/CASE#
05 -GS- 22 - 602
 A/W# 14-943299
 Date of Offense 4-10-05
 S C Code § 16-11-0330(A)
 CDR Code # 0111319
☐ CASE RESTORED
SENTENCE
☐ PLEA ☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADSTO Armed Robberyin violation of 16-11-330(A) of the S C Code of Laws bearing CDR Code # 0111319
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ 17-25 45
The charge is ☐ As Indicted ☐ Lesser Included Offense ☐ Defendant Waives Presentment to Grand JuryThe plea is ☐ Without Negotiations or Recommendation ☐ Negotiated Sentence ☐ Recommendation by the State

ATTEST

[Signature]
 Solicitor

Defendant

[Signature]
 Attorney for Defendant

WHEREFORE the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center,
 for a determinate term of 20 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
 and/or to pay a fine of \$_____ provided that upon the service of _____ days/months/years and/or payment
 of \$_____ plus costs and assessments as applicable* the balance is suspended with probation for _____
 months/years and subject to South Carolina Department of Probation Parole and Pardon Services standard conditions of probation
 which are incorporated by reference

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on _____☐ The Defendant is to be given credit for time served pursuant to S C Code §24-13-40 to be calculated and applied by the State Department of Corrections

SPECIAL CONDITIONS

☐ RESTITUTION ☐ Heard ☐ Waived ☐ Ordered

Total \$_____ plus 20% fee \$_____

Payment Terms _____

☐ set by SCDPPPS _____

Recipient _____

*Fine \$_____

§14-1-206 (Assessments 107 5%) \$_____

§14-1-211(A)(1) (Conv Surcharge) \$100 \$100.00

§14-1-211(A)(2) (DUI Surcharge) \$100 \$_____

§56-5-2995 (DUI Assessment) \$12 \$_____

§ 35 13 (Public Def/Prob) \$500 \$_____

§73 3 1B TP (Law Enforce Funding) \$25 \$25.00

§33 7 1B TP (Drug Court Surcharge) \$100 \$_____

§50-21 114(BUI Breath Test Fee) \$50 \$_____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$_____

3% to County (if paid in installments) \$3.75TOTAL \$128.75

[Signature]
 Clerk of Court/ Deputy Clerk

[Signature]
 Court Reporter

PTUP _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc Rehab or Job Corp _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol Testing _____

Fine may be pd in equal consecutive weekly/monthly _____

pmts of \$ 10.00 beginning in after release

\$_____ paid to Public Defender Fund

Other _____

☐ Appointed PD or appointed other counsel §35 13 TP
 Requires \$500 be paid to Clerk during probation

PRESIDING JUDGE

Judge Code

Sentence Date

[Signature]
0111019
Sept 8, 2005

WITNESSES
GEORGETOWN POLICE
DEPARTMENT

ARREST WARRANT/TICKET NUMBER

DIRECT INDICTMENT

0549 16-23-490

SID SC00117570

DOI 4-10-05

D/L

ACTION OF GRAND JURY

True Bill

6-22-05

Date

Harry L. Parker
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury

DOCKET NO 05-GS22-0603 ✓

The State of South
Carolina,

County of Georgetown

20803 001 MJM
COURT OF GENERAL
SESSIONS

June TERM 2005

THE STATE

VS

CLARENCE GIBBS
410 N Hazard Street
Georgetown, SC 29440
DOB 6-23-54
SS# 085-50-3560

J GREGORY HEMBREE,
SOLICITOR

INDICTMENT FOR

POSSESSION OF A WEAPON
DURING THE COMMISSION
OF A VIOLENT CRIME

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GEORGETOWN)

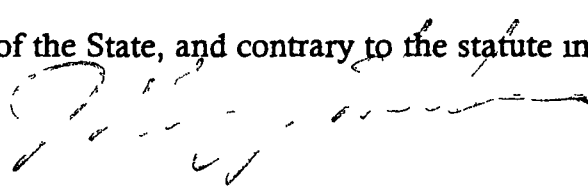
INDICTMENT FOR

Possession of a Weapon During the
 Commission of a Violent Crime

At a Court of General Sessions, convened on June 22, 2005, the Grand Jurors of Georgetown County present upon their oath

That Clarence Gibbs did in Georgetown County on or about April 10, 2005, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime, to wit Armed Robbery and/or ABWIK, in violation of Section 16-23-490, South Carolina Code of Laws, 1976, as amended

Against the peace and dignity of the State, and contrary to the statute in such case made and provided



SOLICITOR

STATE OF SOUTH CAROLINA

COUNTY OF Georgetown

STATE VS

Clarence Gibbs

AKA

Race A Sex M Age 52

DOB

Address

City State Zip

DL# SID# SC0017570

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#

05 -GS- 22 - 603AW# Direct IndictmentDate of Offense 4-10-05S C Code § 16-23-030(e)CDR Code # 2131614☐ CASE RESTORED

SENTENCE

☐ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☐ PLEADSTO possession of weapon during commission of a violent crimein violation of § 16-23-490 of the S C Code of Laws bearing CDR Code # 2131614☐ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☐ MOST SERIOUS ☐ 17-25-45The charge is ☐ As Indicted ☐ Lesser Included Offense ☐ Defendant Waives Presentment to Grand JuryThe plea is ☐ Without Negotiations or Recommendation ☐ Negotiated Sentence ☐ Recommendation by the State

ATTEST

Solicitor

Defendant

Attorney for Defendant

WHEREFORE the Defendant is committed to the ☒ State Department of Corrections ☐ County Detention Center, for a determinate term of 5 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years

and/or to pay a fine of \$ _____ provided that upon the service of _____ days/months/years and/or payment

of \$ _____ plus costs and assessments as applicable* the balance is suspended with probation for _____

months/years and subject to South Carolina Department of Probation Parole and Pardon Services standard conditions of probation which are incorporated by reference

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on Armed Robbery - Kidnapping☒ The Defendant is to be given credit for time served pursuant to S C Code §24-13-40 to be calculated and applied by the State Department of Corrections

SPECIAL CONDITIONS

☐ RESTITUTION ☐ Heard ☐ Waived ☐ Ordered

Total \$ _____ plus 20% fee \$ _____

Payment Terms

☐ set by SCDPPPS

Recipient

*Fine \$ _____

§14-1-206 (Assessments 107 5%) \$ _____

§14-1-211(A)(1) (Conv Surcharge) \$100 \$ 100.00

§14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35 13 (Public Def/Prob) \$500 \$ _____

§73 3 1B TP (Law Enforce Funding) \$25 \$ 25.00

§33 7 1B TP (Drug Court Surcharge) \$100 \$ _____

§50-21-114(BUI Breath Test Fee) \$50 \$ _____

§56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 3.75TOTAL \$ 128.75

PTUP

_____ days/hours Public Service Employment

Obtain GED

Attend Voc Rehab or Job Corp

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd in equal consecutive weekly/monthly

pmts of \$ 10.00 beginning two after release

\$ _____ paid to Public Defender Fund

Other

☐ Appointed PD or appointed other counsel §35 13 TP Requires \$500 be paid to Clerk during probation/

PRESIDING JUDGE

Judge Code

Sentence Date

0111019
Sept 8, 2005

Court Reporter

Clerk of Court/Deputy Clerk

505
RECEIVED

OCT 09 2007

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Georgetown)

Referred to PCR

Answered _____

CLARENCE Gibbs, 289369)

Full name and prison number if any of applicant.)

v)

Robert M. Stevenson)

Name of Respondent)

State of South Carolina)

2007 CP22 1332

APPLICATION FOR
POST-CONVICTION RELIEF

2007 OCT -1, AM 9:34
CLERK OF COURT

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

- 1 Place of detention Broad River Correctional Institution, 4460
Broad River Rd, Columbia, S.C. 29210
- 2 Name and location of Court which imposed sentence Court of General Sessions,
for the County of Georgetown
- 3 The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed
 - (a) #05-GS22-0601
 - (b) #05-GS22-0602
 - (c) #05-GS22-0603
- 4 The date upon which sentence was imposed and the terms of the sentence
 - (a) September 8, 2005, 20 Years CONCURRENT for Kidnapping
 - (b) 20 Years for Armed Robbery
 - (c) 5 Years Consecutive for Possession of A Weapon

5 Check whether a finding of guilty was made

- (a) after a plea of guilty _____
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere _____

6 Did you appeal from the judgment of conviction or the imposition of sentence? yes

7 If you answered "yes" to (6), list

(a) the name of each Court to which you appealed

- i The State of South Carolina IN the Court of Appeals / Appeal from Georgetown County
- ii _____
- iii _____

(b) the result in each such Court to which you appealed

- i AFFIRMED
- ii N/A
- iii _____

(c) the date of each such result

- i Submitted June 1, 2007 - Filed June 27 2007
- ii N/A
- iii _____

(d) if known, citations of any written opinion or orders entered pursuant to such results

- i NOT KNOWN
- ii N/A
- iii _____

8 If you answered "no" to (6), state your reasons for not so appealing

- (a) _____
- (b) _____
- (c) N/A

9 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully

- (a) INEffective Assistance of Counsel (ONE)
- (b) Constitutional Violation of Due Process of Law
- (c) Constitutional violation of Due process of Law

State of South Carolina
County of Georgetown

Clarence Gibbs

Vs

Robert M. Stevenson
State of South Carolina

IN The Court of common pleas

Application For
Post-Conviction Relief

Additional page

Continued Answer for the following question

Page (2), # 9

- (b) TRIAL Court Admitting evidence of An out of court "Show-up" Identification
- (c) TRIAL Court Admitting evidence of An out of court Voice Identification
- (d) Constitution violation of Due process of Law, And / Ineffective Assistance of Counsel (# Two)

Page (3), # 10

- (d) Procedure by which police secured identification of defendant in Photo-Line up procedure unduly suggestive, because ~~witness~~ witness, described the individuals in photo line up as being alot younger (in the photographs that were making), / And Trial counsels FAILURE to object to the half of the photo line up identification at time the evidence was being offered and final ruling procured

10 State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) Court failure to give Alibi charge to jury, Trial Counsel failed to object, AND Failure To request An Alibi charge under the facts constituted Ineffective Assistance of Counsel
- (b) Procedure by which police secured identification of defendant voice without opportunity for witnesses to compare defendant's voice with others violated Due process
- (c) Procedure by which Police secured identification of defendant in "show-up" identification without the opportunity of witnesses be able to compare defendant with any others violated Due process

11 Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law?

The Stat of South Carolina / In the Court of Appeals / Georgetown County

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

12 If you answered "yes" to any part of (11), list with respect to each petition, motion or application

(a) the specific nature thereof

I Appeal

II N/A

III N/A

IV N/A

(b) the name and location of the Court in which each was filed

I Appeal with the Court / In the Court of Appeals

II N/A

III N/A

IV N/A

(c) the disposition thereof

I AFFIRMED

II N/A

III N/A

IV N/A

(d) the date of each such disposition

I Submitted June 1, 2007 - Filed June 27, 2007
 II N/A
 III N/A
 IV N/A

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition

I NOT KNOWN
 II N/A
 III N/A
 IV N/A

13 Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal in any petition, motion or application which you have filed? yes

14 If you answered "yes" to (13) identify

(a) which grounds have been presented

I INEFFECTIVE ASSISTANCE OF COUNSEL FOR NOT OBJECTING, AND FAILURE TO REQUEST ALIBI charge
 II TRIAL COURT ADMITTED EVIDENCE OF "SHOW-UP" IDENTIFICATION
 III TR. & COURT ADMITTED HALF OF PHOTO LINE-UP INTO EVIDENCE

(b) the proceedings in which each ground was raised

I APPEAL
 II _____
 III _____

15 If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented

(a) holding unless objection is made then issue is not properly preserved to review on appeal
 (b) COUNSEL'S FAILURE TO OBJECT
 (c) COUNSEL'S FAILURE TO OBJECT

16 Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? N/A
 (b) your trial, if any? yes
 (c) your sentencing? yes
 (d) your appeal if any, from the judgment of conviction or the imposition of sentence?
yes

(e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? yes

17 If you answered "yes" to one or more parts of (16), list

(a) the name and address of each attorney who represented you

i J. Eric Fox, 210 ELM Street, Suite 5, Conway, SC 29526
 ii KATHARINE H. HUDGINS, P O Box 11589, Columbia, SC 29211
 iii N/A

(b) the proceedings at which each such attorney represented you

i TRIAL, And sentencing, And (E) of 16
 ii Appeal
 iii N/A

18 State clearly the relief you seek in filing this application

VACATED Sentence with prejudice (OR)
Reverse with prejudice

19 Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)

VERIFICATION

2007 CF22 1332

I CLARENCE Gibbs, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application, that I know the contents thereof, that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application, and that the matters and allegations therein set forth are true

X Clarence Gibbs

Sworn to and subscribed before me

This 01ST day of OCTOBER 2007

Sherry Hall L S
Notary Public for South Carolina
My Commission Expires August 16th, 2014

2007 OCT -1, AM 9 54
CLERK OF COURT

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, CLARENCE Gibbs, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true

- (1) I am the applicant in this action and I believe I am entitled to redress
- (2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor

X Clarence Gibbs
Applicant

Sworn to and subscribed before me

This 01ST day of OCTOBER 2007

Sherry Hall L S
Notary Public for South Carolina
My Commission Expires August 16th, 2014

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
	)	
	)	2007-CP-22-1332
	)	2007-CP-22-1515
Clarence Gibbs, # 289369,	)	
(a k a Clarence Gibbs),	)	
Applicant,	)	
	)	
v	)	RETURN AND MOTION FOR MERGER
	)	WITH 2007-CP-22-1515
	)	
State of South Carolina,	)	
	)	
Respondent	)	

The Respondent, making its Return, and Motion for Merger, to the Application for post conviction relief (PCR) filed October 4, 2007, by Clarence Gibbs, also known as Clarence Gibbs,¹ would respectfully show this Court

I

The Applicant 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. The issues raised on direct appeal were as follows: (1) whether

¹ The Applicant was indicted and tried as Clarence Gibbs and is currently listed in SCDC as Clarence Gibbs however his PCR Application lists his last name as Gibbs.

the trial court erred in admitting an out-of-court show-up identification, (2) whether the trial court erred in admitting only one-half of the photo lineup, and (3) whether the trial court erred in failing to give the jury an instruction on alibi. The Court of Appeals, in a per curiam unpublished opinion, affirmed the convictions, finding that issues (1) and (2) had not been properly preserved for appellate review, and that issue (3) was waived because there was no specific objection to the jury charge as given. See 2007-UP-333 (S C Ct App filed June 27, 2007). The matter was remitted to the circuit court on July 13, 2007.

Incorporated herein by reference are the records of the Georgetown County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the direct appeal file. Any of the above not attached to this Return will be forwarded upon receipt. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II

In his Application, Mr. Gibbs alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that counsel did not request an alibi charge and failed to object to the jury charge as given,
2. Due process violations regarding the show-up identification being admitted, a voice identification being admitted, and one half of the photo lineup being admitted.

The Applicant seeks vacation of his sentences with prejudice, or reversal with prejudice.

III – Ineffective Assistance of Counsel

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in his or her application. Butler v State, 286 S C 441, 334 S E 2d 813 (1985). Where the application alleges ineffective assistance of counsel as 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, 80 L Ed 2d 674, 692 (1984), Butler, 334 S E 2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U S 668. The Applicant must overcome this presumption in order to receive relief. Cherry v State, 300 S C 115, 386 S E 2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S C at 117, 386 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.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record may not conclusively refute. Accordingly, the Respondent requests

an evidentiary hearing to fully resolve this issue See Sharper v State, 279 S C 264, 305 S E 2d 247 (1983)

IV – Due Process Violations

The Applicant has also claimed that his due process rights were violated because of the trial court's admission of certain evidence, including a show-up identification, half of a photo lineup, and a voice identification. "A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification." State v Traylor, 360 S C 74, 81, 600 S E 2d 523, 526-27 (2004) (cert denied Jan 10, 2005) (citation omitted). "An in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification." Id (citation omitted). The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. Id (citing to Neil v Biggers, 409 U S 188 (1972)). "First, a court must ascertain whether the identification process was unduly suggestive." Id. "The court must next decide whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed." Id (citation omitted). "The central question is whether under the totality of the circumstances the identification was reliable even though the confrontation procedure was suggestive." Id (citation omitted).

In this case, the Respondent submits that the record will reflect that the trial court held a hearing pursuant to Neil v Biggers, followed the appropriate guidelines set forth therein, and properly admitted the challenged evidence. (See Trial Transcript dated September 6-8, 2005, pages 23-117, see particularly pages 113-117). Accordingly, Respondent submits that there is no merit whatsoever to the allegation regarding violations of due process. However, the allegation may raise

questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper, supra

V

The State therefore requests that this Court convene an evidentiary hearing on the issue of ineffective assistance of counsel, including the issue of due process violations

VI

Each and every allegation contained within the Application which is not expressly admitted, qualified, or explained is hereby denied

VII - MOTION FOR MERGER WITH 2007-CP-22-1515

The Applicant has filed two Applications for post conviction relief, the first filed on October 4, 2007 (2007-CP-22-1332), and the second filed November 8, 2007 (2007-CP-22-1515). The Application is exactly the same document in both cases, both signed and notarized on October 1, 2007. Because an applicant is not generally allowed to have two post-conviction relief proceedings in regard to the same convictions, see Aice v. State, 305 S. C. 448, 409 S. E. 2d 392 (1991), Foxworth v. State, 275 S. C. 615, 274 S. E. 2d 415 (1981), S. C. Code Ann. § 17-27-90, the Respondent hereby moves to have the two proceedings merged and that the later-filed Application (2007-CP-22-1515) be considered an amendment to the initial Application filed October 4, 2007 (2007-CP-22-1332).

VIII

WHEREFORE, having made its Return and Motion for Merger, the State requests that

- (1) This action be merged with 2007-CP-22-1515, with this action (2007-CP-22-1332) being the surviving action, and
- (2) That counsel be appointed and a hearing be held, as discussed above

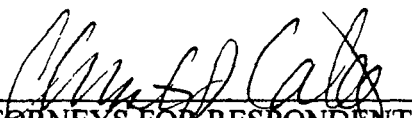
Respectfully submitted,

HENRY D McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J CATOE
Assistant Attorney General

By 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P O Box 11549
Columbia, SC 29211
Telephone (803) 734-3737

December 7, 2007

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GEORGETOWN	)	TWELFTH JUDICIAL CIRCUIT
	)	
CLARENCE GIBBS	)	
	)	POST CONVICTION RELIEF
	)	
PLAINTIFF	)	2007-CP-22-1332
	)	
VERSUS	)	
	)	
THE STATE OF SOUTH CAROLINA	)	
	)	June 13, 2008
DEFENDANT	)	
	)	

BEFORE

THE HONORABLE J MICHAEL BAXLEY

Venessa Ann Richardson, Esquire
Attorney for the Appellate

Christina J Catoe, Esquire
Attorneys for The State

Pamela Ozment-Cartee
Circuit Court Reporter

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WITNESSES

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>
Clarence Gibbs	06		
Jonathan Eric Fox	10	18	33
Statement of Ms Richardson			Page 37 Page 42
Statement of Ms Catoe			Page 39
Decision of The Court			Page 42
Certificate of Reporter			Page 47

EXHIBITS

No Exhibits Offered

THE STATE V CLARENCE GIBBS

3

1 (Whereupon, The Court comes to order at 9 55 on,
2 Friday, June 13, 2009)

3 **THE COURT** All right, ladies and gentlemen, good
4 morning Please be seated I understand that the case of
5 Gibbs is going to be first, am I correct?

6 **MS CATOE** Yes, Your Honor

7 **THE COURT** All right And if we're ready, please bring
8 him in

9 Have you had ample time to talk to with Mr Gibbs?

10 **MS RICHARDSON** Yes, Honor, I have

11 **THE COURT** All right Very good And this matter is
12 for hearing?

13 **MS CATOE** Yes, Your Honor

14 **THE COURT** Counsel, so our record will be clear, tell
15 your full name, please

16 **MS RICHARDSON** Vanessa Ann Richardson

17 **THE COURT** All right, Ms Richardson, welcome to the
18 courtroom

19 **MS RICHARDSON** Thank you

20 **THE COURT** All right, good morning Are you Mr
21 Clarence Gibbs?

22 **MR GIBBS** Yes, sir

23 **THE COURT** All right Mr Gibbs, I am Judge Baxley
24 The reason we're here today is because you filed a Post
25 Conviction Relief Claim, and we're here today for a hearing on

THE STATE V CLARENCE GIBBS

4

1 that claim, sir Are you ready to go forward?

2 **MR GIBBS** Yes, sir

3 **THE COURT** All right Have you had ample time with Ms
4 Richardson to discuss this matter and prepare for today's
5 hearing?

6 **MR GIBBS** Yes, sir

7 **THE COURT** All right Let me just talk with you a
8 moment about Post Conviction Relief so that we'll have an
9 understanding, about how this works, because you are the
10 Applicant, you are the Petitioner You have the burden of
11 proof and you have got to prove two things

12 Number one, you've got to prove that your lawyer's
13 performance below, when your lawyer represented you during
14 criminal charges, that's his performance was deficient That
15 was it fell below the standard required by lawyer's practicing
16 criminal law in South Carolina So, in other words, Mr Fox's
17 performance was deficient, below the standard

18 And, number two, you've got to prove that you were
19 prejudice by that Those are the two things that you must
20 prove

21 Now, where we are going to start is, we're going to let
22 Ms Catoe from the Attorney General's Office, gives us the
23 procedural history of your case Then you will begin by
24 calling your witness counsel, and we will go into the
25 Petitioner's case, all right

THE STATE V CLARENCE GIBBS

5

1 Go ahead, Ms Catoe

2 PROCEDURAL HISTORY

3 **MS CATOE** Thank you, Your Honor This is, the matter
4 of Clarence Gibbs verses The State, Docket Number 2007-CP-22-
5 1332 It was previously merged with 2007-CP-22-1515

6 The Applicant was indicted by the Georgetown County Grand
7 Jury in June of 2005 for kidnaping, armed robbery, and
8 possession of a weapon during the commission of a violent
9 crime He was represented by Mr Eric Fox He did proceed to
10 trial on September 6 through 8, 2005, and was convicted of all
11 charges

12 Judge Thomas sentenced him to twenty-years on each of the
13 kidnaping and armed robbery concurrent, and five years
14 consecutive for the weapon's charge

15 A direct appeal was filed in this matter, but the
16 convictions were affirmed on June 27, 2007

17 This PCR was then filed October 4, 2007 and The State
18 made its return December 7, 2007 And the two cases that I
19 mentioned earlier were merged by Order dated December 19,
20 2007 And we are prepared today for a hearing on the merits,
21 Your Honor

22 **THE COURT** All right Now, Ms Richardson, is there
23 any objection to the history, or the procedural status of this
24 case?

25 **MS RICHARDSON** No, Your Honor, there is none

CLARENCE GIBBS - DIRECT BY MS RICHARDSON

6

1 **THE COURT** Very good, then please call your first
2 witness

3 **MS RICHARDSON** Okay, Your Honor, I would like to call
4 Clarence Gibbs to the stand

5 **THE COURT** All right, Mr Gibbs, please come forward
6 and take the oath of a witness

7 **CLARENCE GIBBS**

8 **BEING DULY SWORN TESTIFIES AS FOLLOWS**

9 **CLERK** Please be seated Please speak your full name,
10 spelling your last

11 **MR GIBBS** Clarence Gibbs G-I-B-B-S

12 **DIRECT EXAMINATION BY MS RICHARDSON**

13 Q Hi, Mr Gibbs

14 A Hi, how are you doing

15 Q You filed an application for Post Conviction Relief,
16 correct?

17 A Right

18 Q And basically your application was made to believe that
19 Mr Eric Fox, your trial counsel, did not provide you
20 with effective assistance of counsel, correct?

21 A Correct

22 **MS RICHARDSON** Your Honor, may I approach the witness?

23 **THE COURT** You may

24 Q Mr Gibbs, does that appear to be your Application for
25 Post Conviction Relief?

1 A Yes, ma'am

2 Q And is this your signature?

3 A Yes, it is

4 Q And is this your writing?

5 A No, it's not

6 Q Mr Gibbs, isn't it true that you are unable to read and

7 write?

8 A Yes

9 Q Okay So you did have assistance in helping with the

10 application?

11 A Yes, I did

12 Q And in your Application, you allege that Mr Fox was

13 deficient in your representation, because he failed to

14 object to the admission of a shell identification, s that

15 correct?

16 A Correct

17 Q And he is also deficient in objection to a out of Court

18 identification?

19 A Correct

20 Q And, also because he did not object to this admission of

21 the photo array, in fact, there were two photo arrays,

22 but only one was admitted at trial

23 A Correct

24 Q Right?

25 A Right

CLARENCE GIBBS - DIRECT BY MS RICHARDSON

8

1 Q And also in your Application, you allege that he was
2 deficient because he failed to object at trial for
3 failure to have an alibi charge?

4 A Correct

5 Q Correct And at that trial, you gave testimony, correct?

6 A Correct

7 Q And that trial, because you testified that you were some
8 place other than the Piggly Wiggly at the time of this
9 event?

10 A Yes, ma'am

11 Q Okay And at the trial, were other witnesses called to
12 support your alibi?

13 A I didn't hear you

14 Q Were other witnesses called to support your alibi?

15 A Yes, they was

16 Q And who were those witnesses?

17 A My mother and girlfriend

18 Q Okay And what were their names?

19 A Rosie Jenkins and Karen Dozier

20 Q And at the time of the trial when the photo was submitted
21 into evidence, did you recall your attorney objecting to
22 that?

23 A No

24 Q And did you make any comment to your attorney at the time
25 about not objecting to that?

1 A No, I didn't

2 Q And what about the show-up identification information
3 Did you question your attorney when he did not object to
4 that?

5 A No, I didn't

6 Q Okay And also, did you question your attorney as to why
7 he did not object to the alibi charge?

8 A No, I didn't

9 Q And can you tell The Court why you did not make a comment
10 to your attorney about those issues at the time?

11 A Because I didn't know at the time

12 Q Okay In fact, you did not know about the significance
13 of this information, until you had submitted an appeal?

14 A Right

15 Q Okay And what is based in that appeal, is that this
16 Court found that those issues were not preserved, is that
17 correct?

18 A Correct

19 MS RICHARDSON I have nothing further --- questions
20 for this witness, Your Honor

21 THE COURT All right, very good Cross examination?

22 MS CATOE No questions, Your Honor

23 THE COURT All right Then sir, you may step down

24 MR GIBBS Yes, sir

25 MS RICHARDSON Your Honor, I will call my next

JONATHAN ERIC FOX - DIRECT EXAMINATION BY MS RICHARDSON

10

1 witness, Mr Fox

2 **THE COURT** Very good Mr Fox, please come forward and
3 take the oath of a witness

4 **JONATHAN ERIC FOX**

5 **BEING DULY SWORN TESTIFIES AS FOLLOWS**

6 **CLERK** Please speak your full name, spelling the last
7 name for the record

8 **MR FOX** Jonathan Eric Fox F-O-X

9 **DIRECT EXAMINATION BY MS RICHARDSON**

10 Q Hi, Mr Fox

11 A Good morning

12 Q You represented Mr Gibbs in his initial trial, correct?

13 A That is correct

14 Q And in the course of that trial you were provided with
15 witness statements from Gregory Ricardo Mortan, and Eric
16 Lamar Sessions, correct?

17 A Yeah, I think we had those as part of our Discovery
18 prior to trial, that is correct

19 Q Okay And -

20 **MS RICHARDSON** May I approach, Your Honor?

21 **THE COURT** You may

22 Q Those are the statements that you got during the course
23 of your trial?

24 A Yes, I think so

25 Q Thanks And for purposes for The Court, could you please

1 read the highlighted portions in Morton's statement

2 A He is describing the armed robbery The man was around
3 five seven to five eight with a slight limp I think
4 that is what he said He wore a brim hat, black shades,
5 jeans, black shirt and blue jacket He was dark brown
6 with a black and gray beard

7 Q And could you just, for the record, can you tell me when
8 that statement was provided?

9 A April 10 2005

10 Q Okay, and this is on the same day of the armed robbery,
11 is that correct?

12 A That is correct

13 Q Okay And then if you will also read the highlighted
14 portions of Mr Sessions' statement

15 A Mr Session describes the black man wearing a blue
16 jacket, black shirt, blue jeans, brown shoes, blue hat,
17 and glasses That was also from the tenth of April 2005

18 Q Thank you At the time that Mr Gibbs' photo was placed
19 in a lineup, had you already been representing the
20 client?

21 A Do you mean during the police investigation?

22 Q Yes

23 A I'll have to see when I was appointed, I'm not sure I
24 could perhaps tell you from the date of my appointment
25 I don't believe so The Order of Appointment I have from

JONATHAN ERIC FOX - DIRECT EXAMINATION BY MS RICHARDSON

12

1 The Clerk's Office is not dated, but I don't believe so
2 Typically, it would be, I think the photo line up was
3 shown about ten days after, and normally it's two or
4 three weeks after arrest that I am appointed, usually,
5 but I don't have a date on that Order of Appointment

6 Q Okay Just a moment

7 **MS RICHARDSON** Your Honor, may I approach?

8 **THE COURT** You may

9 Q Mr Fox?

10 A Yes

11 Q Is that one of the photos that was used in the trial?

12 A I believe it is, yes, it's not marked I believe this
13 came from my file

14 Q Okay

15 A And I believe that is one of the ones, that was used,
16 yes

17 Q And, there was a second photo array, correct?

18 A There was a second photo array, but it turned out that I
19 was unaware of until shortly before trial It turned out
20 that one was lost according to the Solicitor's Office

21 Q Okay And at that time you had not seen that --

22 A -- I never saw that photo

23 Q And at the trial, did you object to having this photo
24 array entered into evidence?

25 A We had a hearing prior to the trial, you know, after the

1 jury was sworn, we had a Neil verses Biggers hearing
2 about law identification issues Once Mr Gibbs was
3 arrested shortly after the robbery occurred and was taken
4 back, the store --- and shown at least two --- presented
5 two at least a couple of the witnesses I'm not sure if
6 all three witnesses were still there So there was that
7 issue out for out of Court identification We also
8 addressed the photo array So I know at that point I
9 object to all of that stuff I knew there was an issue
10 during trial, because the photo array The Judge ruled
11 --- Judge Thomas ruled that all of that would be
12 admissible

13 When that particular photo array was introduced at
14 trial, it actually came in through a witness other than I
15 expected, and I think what I did is, after the fact
16 objected In other words, I stood and renewed by
17 objection I had already objected during the Biggers'
18 Hearing At the point I stood up and objected, I think
19 it had actually been entered into evidence I still
20 realized it had come in through another witness I put
21 on the record that I was wanting to preserve that issue
22 It was not contemporaneous in the since that --- The
23 incident was the Solicitor introduced it, I don't think I
24 objected at that moment

25 Q Right And the objection that you made was *in limine* in

1 Biggers?

2 A That is correct There was definitely an objection

3 Q So, in order for it to have been preserved you had to
4 make it on the record at the time of the admission?

5 A That is correct I think in the Appellant Decision, it
6 was discussed There was an objection made but it did
7 come --

8 Q -- Right And so they --

9 A -- in their point of view too late, yes

10 Q Right And so based on that, would you agree that that
11 particular issue was not preserved, because your
12 objection was not timely?

13 A That is how The Court of Appeals saw it, yes

14 Q Okay And you also objected to the show up, and the
15 voice identification, *in limini*, as well, correct?

16 A Correct

17 Q And did you object to the admission of that evidence in
18 the course of the trial?

19 A I don't recall That would be in the record, I don't
20 recall if I made it or not

21 **MS RICHARDSON** Okay Just a moment Your Honor?

22 **(PAUSE)**

23 **THE COURT** Yes, ma'am

24 Q (By Ms Richardson) Let me, just ask one other
25 question

1 A Yes

2 Q When the photo array was presented to you at trial did

3 you make an additional inquiry about --- I'm sorry Did

4 you make an additional inquiry about why the other one

5 was missing, what happened to it in chain of custody?

6 A An Additional --- I'm not sure that I did, other than

7 during the Motion *in limini*

8 Q Okay

9 A I don't think there is any further discussion, no

10 Q And, now at the trial you presented alibi evidence on

11 behalf of Mr Gibbs, correct?

12 A We served --- Yes

13 Q And those witnesses were Karen, I'm sorry

14 A Karen Dozier?

15 Q Yes Karen Dozier and Rosie Jenkins?

16 A That is correct

17 Q Rosie Jenkins And, in fact, their testimony indicated

18 that he was, in fact, at home at the time of this

19 robbery?

20 A The last --- They testified he was at home with them

21 watching TV earlier in the evening They were able to

22 even state what shows, or at least describe which shows

23 they were watching I think Karen Dozier also stated at

24 some point she and Mr Gibbs had gone to the store and

25 gotten a soda or cigarettes something like a convenient

1 store and come back It was an issue as to whether they
2 could provide an alibi for the time the robbery occurred
3 I mean that was a jury issue that was in question, and
4 that was very unclear There was another man's name that
5 Mr Gibbs gave me as a potential alibi witness, a
6 neighbor I was unable to located him until literally
7 the day of trial, I went by Mr Gibbs' house or his mom's
8 house, that morning and was able to locate this
9 gentlemen, who did not say at least to me what Mr Gibbs
10 expected, so there was always an issue of whether --- He
11 had an explanation of where he was part of the evening,
12 and then it was a factual issue as to whether it covered
13 --- It was very unclear, whether it covered that part
14 But we did present the witnesses, yes

15 Q Okay And in the course of issuing the jury charges
16 though, did you submit an Alibi Charge on Mr Gibbs'
17 behalf?

18 A No

19 Q And did you recall why you did not?

20 A I don't, but I certainly had a Charge Conference with
21 Judge Thomas, I honestly don't recall the discussion
22 The alibi in preparing for Mr Gibbs' case, and I think
23 if you look at both the testimony and the arguments made
24 at the end, my argument as well as the solicitor's, I
25 felt the identification issues were much more in his

1 favor

2 There was a real question in my mind --- Number one,
3 we had a witness who was there, Eric Sessions, who said,
4 that's not him They had two witnesses that it was We
5 had the video tape that I felt where Mr Morton the
6 manager --- they were arguing he was constantly looking
7 back and forth, he identified --- but he was, very
8 scared He was getting glances at the robber I felt the
9 identification were much stronger and emphasize that much
10 more, I do know that

11 I don't recall the Charge Conference and don't have
12 specific notes about that with Judge Thomas But we did
13 present the witnesses, and I did argue it in my closing
14 So, it certainly should have been charged to the jury, I
15 think

16 Q Okay As counsel for Mr Gibbs, and coupled with the
17 the initial identification provided by the witnesses, and
18 after the incidence, which describes a black man wearing
19 a blue jacket, a blue hat and glasses, and a slight limp,
20 and also in conjunction with the alibi statement of him
21 being home with his mother and girlfriend, do you believe
22 that an alibi charge would have been appropriate at that
23 time?

24 A Well, I think it was --- certainly was called for

25 Q Okay

JONATHAN ERIC FOX - CROSS EXAMINATION BY MS CATOE

18

1 A What effect it would have with the jury I don't know, but
2 I think certainly with the evidence we presented should
3 have been charged to they jury

4 Q Okay And do you also agree that your *in limini*
5 objections to the line up in the show up should have been
6 made at the time during the trial--

7 A Yes

8 Q -- for purposes of preserving those issues, correct?

9 A Yes

10 MS RICHARDSON I have no further questions, Your
11 Honor

12 THE COURT All right, thank you And cross examination?

13 MS CATOE Thank you, Your Honor

14 **CROSS EXAMINATION BY MS CATOE**

15 Q Good morning, Mr Fox

16 A Good morning

17 Q Just for background, how long have you been practicing
18 law?

19 A I was admitted to the Bar in 1990, February of 1990

20 Q All right What area of practice are you focused in?

21 A Almost exclusively criminal

22 Q All right Did you and Mr Gibbs, meet to discuss the
23 charges?

24 A Yes

25 Q Do you recall how many times you meet with him?

1 A A number of times We met fairly often, because he was
2 able to provide me with, again, names of witnesses on his
3 behalf, some of whom we subpoenaed, and he was very
4 familiar with them We discussed things like clothing
5 descriptions and things, and whether he even had a blue
6 jacket, things of that nature

7 Q Okay

8 A' So we were able to go through the evidence pretty
9 thoroughly Run down witnesses that he had request

10 Q All right Did he have any background with that
11 particular store, that is the Piggly Wiggly that was
12 robbed?

13 A There was at least one store in the area, and it may have
14 been that one, where he had been requested not to return
15 because of problems

16 Q Okay Did the Solicitor point that out in --

17 A I don't think so I don't think so, because that would
18 be a defense But, I don't think that was --- I mean,
19 they were aware of that fact, but I'm not sure if that
20 came out in trial

21 Q Okay But if it did the record would so reflect?

22 A The record would show it

23 Q All right Would that have been relevant to motive if it
24 had been?

25 A It may have been Again, I --- Again, I believe that

1 with regard to the witnesses identifying, at least Mr
2 Gibbs lived fairly closed to the grocery store, within a
3 couple of blocks, and I think there was at least
4 testimony that they recognized him from being there
5 before

6 Q Okay And you said he lived a couple of blocks from
7 there Did he tell you how long it would take him to
8 walk?

9 A It was no more than a five minute walk He wasn't far

10 Q All right Did that effect alibi at all, the fact that
11 he was so close, as far as the time frame?

12 A It did But was unclear, and we certainly had witnesses
13 that testified themselves what he was doing earlier in
14 the evening I did not think we precluded him from still
15 being able or any person from still being able to get
16 from where he was over to the Food Lion at the time the
17 robbery occurred and that was not absolute

18 Q Okay Did you develop an impression of how he came
19 across as a witness?

20 A I think he did, just like he did today I think he was a
21 good witness

22 Q Okay How about the other two witnesses, I believe it
23 was Rosie Jenkins, and Karen Dozier?

24 A Ms Dozier, not as strong I thought that his mother, Ms
25 Jenkins was good, but the problem with all of this was

1 they were trying to remember events a year or so before,
2 you know, down to the details and that was the problem
3 I thought Ms Jenkins was a good witness Ms Dozier was
4 a little more uncertain

5 Q Okay Did they have --- Do you recall any reply testimony
6 in this case?

7 A I believe that was, when we had the program director come
8 in from Charleston from the TV station, I think that was
9 the reply testimony

10 Q Do you recall what the substance of that testimony ---
11 what the effect of it would have been, or the import of
12 it?

13 A I do Mr Gibbs and his witnesses testified they were
14 watching a certain a show at a certain time They had a
15 specific show like --

16 Q -- JAG?

17 A JAG And then there was something else they showed, some
18 kind of variety show where Gladys Knight was in So,
19 this Program Director came up and said, I think there was
20 more than one, it could have had two stations, said we
21 don't show those shows I would know what is on our
22 station I have to be familiar with what is on other
23 stations I don't know what effect it had I questioned
24 them about whether they had any idea what channels Mr
25 Gibbs and his family received

JONATHAN ERIC FOX - CROSS EXAMINATION BY MS CATOE

22

1 Q Do you recall what the witnesses testified, or what
2 channels they said that they have in the home? I know
3 you don't recall the numbers but --- In other words why
4 didn't --

5 A -- There was some confusion about that, you know, whether
6 it came on one channel or another Whether it was a show
7 being shown from a network, or being syndicated like with
8 JAG

9 Q Or whether they have the channel that carried the show

10 A Right, exactly And then there is the question that no
11 one could answer for sure, whether they were getting it
12 from a Charleston station or maybe out of Florence/
13 Myrtle Beach

14 Q Okay Do you recall Mr Gibbs' cross examination by, I
15 believe it was Mr Modica? Is it Modica or Modica?

16 A Modica

17 Q Modica All right Do you recall anything significant
18 about this cross examination of your client?

19 A No, I don't recall anything particular, but you may refer
20 me to something

21 Q There is a question he asked about where was Eric
22 Sessions during the robbery Do you recall the effect of
23 that testimony?

24 A I don't recall, but Mr Gibbs --- But, I remember the
25 point that Mr Modica attempted to make, which was the

1 --- There are three people, employees in the grocery
2 store There was Mr Sessions, there was the manager, I
3 think was Mr Morton, and then the third employer, whose
4 name I don't recall, a young man But with regard to
5 Eric Sessions, and Eric Sessions is the one that we
6 called as a witness who came in and said, I saw the guy
7 who robbed us, and it was not Clarence Gibbs We
8 subpoenaed him and he came In fact, he was taken out of
9 order because he was going into the military But, on
10 the tape you could see, and Mr Modica tried to point
11 that Mr Sessions --

12 Q -- Let me direct you to --

13 A -- Stepped behind --

14 Q -- I'm sorry --

15 A -- That maybe he was involved That was the words

16 Q Okay

17 A That maybe he stepped behind Mr Gibbs, and somehow he
18 was involved in the whole thing I didn't think that was
19 very believable

20 Q Okay Let me direct you to page 390 of the Transcript

21 A Okay

22 Q And I will give you a minute to review that When I say
23 390, I am talking about the actual transcript, not the
24 record on appeal numbers I'm not sure, which version
25 you have

JONATHAN ERIC FOX - CROSS EXAMINATION BY MS CATOE

24

1 A This says transcript

2 Q Okay

3 A And this is the cross examination of Mr Gibbs, so it
4 should be it

5 Q Okay Is that refreshing your memory?

6 A Yeah, you are referring to the discussion about Eric
7 Sessions, specifically?

8 Q Right Cross examination by the Solicitor

9 A Yeah

10 Q Do you recall what he was attempting to do?

11 A He was trying to make it sound like Eric Sessions was
12 involved with Mr Gibbs in the robbery But, you know,
13 even though he was there as an employee, because he kind
14 of supposedly lingered back and, you know, was out of the
15 way of the man with the gun etcetera, and that somehow he
16 was a part of it

17 Q Okay

18 A And it's also the part --- And, you were asking also
19 about the statements Mr Gibbs gave to police

20 Q Well, I am wondering more about, the effect of how that
21 testimony came across, because that testimony --- Do you
22 recall the jury asking to rehear some testimony later on?

23 A Yes

24 Q Okay Do you recall it being that testimony there?

25 A Yes

1 Q Was the Solicitor trying to trip up your client?

2 A In part, I mean, you know, he asked the question --- The
3 way he poses the question, assumes that Mr Gibbs is the
4 robber In other words he says, isn't it interesting
5 that when the robbery occurs, he's behind you, as if Mr
6 Gibbs was definitely there

7 Q Do you recall how that came across?

8 A I don't know To me, you know, it was just a lawyer's,
9 you know, trick which is legitimate, it's fine I saw it
10 for what I thought it was I have no idea how the jury
11 saw it

12 Q Okay But they did ask to rehear that testimony?

13 A They did ask to hear that portion of the testimony, that
14 is true

15 Q All right Do you recall in the Neil v Biggers Hearing
16 on the identification, do you recall whether The Court
17 properly reviewed the factors under Neil v Biggers and
18 under the case law in our State?

19 A I'm sure that she did We had a pretty thorough hearing
20 on that

21 Q On --

22 A She gave us the opportunity to thoroughly --- me the
23 opportunity to thoroughly cross examine their witnesses,
24 and to make an argument on the law So I felt like we
25 got a thorough hearing

JONATHAN ERIC FOX - CROSS EXAMINATION BY MS CATOE

26

1 Q All right I will just point you to page 113 and 114 on
2 that transcript

3 A Okay

4 Q Did The Court go over its concern, or lack of concern
5 over one half of the photos that were missing?

6 A Yes That did not seem to troubled the Judge, that part
7 of the line up was not there

8 Q All right Did The Court find that due process was
9 satisfied?

10 A Let me just refresh my memory from the Transcript

11 Q Was the I D 's admitted?

12 A Yes, they were

13 Q Okay

14 A She felt with the combined --- We had the one set of
15 pictures, and then you have the testimony from the
16 officers about the whole process, and she felt in
17 combination that was sufficient

18 Q All right Were there any plea offers in this case?

19 A Yeah Mr Gibbs was charged with armed robbery,
20 kidnaping, and possession of a weapon during a commission
21 of a violent crime So, the armed robbery and kidnaping,
22 of course, would be most serious, no parole offenses,
23 85% Ten to thirty on the armed robbery I always
24 forget, twenty or thirty on the kidnaping, and then five
25 on the weapon He was offered --- The offer was to

1 dismiss the kidnaping Dismiss the possession of a
2 weapon charge, and allow Mr Gibbs to plea to strong-
3 armed robbery, which would be zero to fifteen Would not
4 be a most serious or no parole offense There would be
5 no recommendation on time So he would be looking at an
6 exposure of fifteen-years He has some records I felt
7 he was going to get some, you know, would certainly get
8 some kind of active prison sentence if he plead, but that
9 was his offer

10 Q Okay And what did your client say about that?

11 A He declined

12 Q Did he say why?

13 A He maintained he was innocent

14 Q Okay And you just mentioned prior record Did that
15 come up, or did you discuss his right to testify and not
16 testify?

17 A Oh, yeah, absolutely

18 Q Did you discuss how the prior record might play in with
19 that?

20 A Yes

21 Q Do you have any recollection of what the prior record
22 consisted of?

23 A I can look real quick at my --- hold on, I've got it
24 somewhere I don't off the top of my head He had a few
25 things Some that would not have been He had some

JONATHAN ERIC FOX - CROSS EXAMINATION BY MS CATOE

28

1 magistrate level offenses that would not have come into
2 play

3 Q Okay How about burglary third?

4 A Right

5 Q Grand larceny, criminal domestic violence, shoplifting
6 two counts

7 A Right

8 Q -- Possession of cocaine, ABHAN and burglary 1996?

9 A I think that's correct

10 Q Okay And do you recall whether those were, in fact,
11 brought out on cross examination?

12 A I don't recall without looking at the Transcript, but I
13 would be surprised if Mr Modica missed a chance, to
14 bring that up

15 Q Okay So you say, you did discuss testifying and not
16 testifying And did he always want to testify?

17 A I believe so --- Yeah, I don't recall I know that we
18 had that --- that is an on going discussion Of course,
19 The Court questioned him about his right to testify or
20 not, and the consequences, his right absolute right not
21 to So, I don't recall if he changed --- but he
22 definitely chose to, in the end

23 Q All right Did you have an overall trial strategy in
24 this case?

25 A Overall, I felt his best defense was on the

1 identification issues Obviously, I would have,
2 preferred if the photo lineup and the show ups would have
3 been suppressed, but I still --- the issue you had One
4 of the witnesses who was right there, looking him in the
5 face, point-blank, said, that's not him There were
6 discrepancies in the description of the size of the
7 robber, and his clothing, description and all Mr Gibbs
8 matched the description mainly in the fact that he was a
9 black man with some gray in his hair But, you know,
10 there were many discrepancies from the witnesses, that
11 did claim to identify him I felt that was his strongest
12 defense The alibi, I was concerned that the witnesses
13 were going to be girlfriend and mother, relatives, you
14 know, with may be a motive to help him It wasn't real
15 strong on the time and what they were watching, etcetera
16 He, Mr Gibbs, in his original statement to the police
17 and his testimony was somewhat inconsistent on when he
18 was home, when he left to go to the store, did different
19 things and so --

20 Q -- Did the Solicitor, utilized any opportunities to bring
21 out those inconsistencies?

22 A He absolutely did I felt that was bad And, so if you
23 look at the Transcript of my Closing Argument, although I
24 mention the alibi witnesses, probably 80% plus focusing
25 on identification issues

JONATHAN ERIC FOX - CROSS EXAMINATION BY MS CATOE

30

1 Q All right Did you see any difficulties with --- Did you
2 want Eric Sessions' testimony in?

3 A Oh, yes

4 Q Did you see any problem with objecting to two of them and
5 not the other one? In other words in the *Motion in*
6 *limini* you objected to how many?

7 A I believe I objected to the other two, not Mr Sessions,
8 the other two

9 Q Okay Or maybe all three?

10 A You know, I don't recall

11 Q Okay

12 A But it was a weird situation I want one of them to be
13 able to, you know, I want his, you know, not just his
14 testimony, his identification, or lack of identification
15 but not these others, so --

16 Q Okay

17 A I don't think Mr Sessions, because he didn't identify, I
18 don't believe they offered, you know, his identification
19 into evidence, so I am not sure that came up actually

20 Q All right Is that something you thought about as a
21 reason not to object to the two you didn't want, you
22 know, and because you did want the other one?

23 A You know, I honestly don't recall I honestly don't
24 recall

25 Q All right

1 A I do remember thinking that ideally it would have been
2 great if they would have been excluded I felt pretty
3 sure from my own research that they were going to be
4 admitted, and, in fact that is what Judge Thomas ruled,
5 and I felt I had enough to discredit those
6 identifications But, again, it would have been best if
7 I could have kept them out, but I was more concerned with
8 rebutting them then keeping them out

9 Q All right Do you recall whether The Court gave a charge
10 on the identification issue?

11 A I do not recall I did not read the entire transcript
12 so --

13 Q All right I'll just direct you to page 474

14 A Thank you

15 Q Would you have noticed if The Court did not give a charge
16 on reasonable doubt, burden of proof, presumption of
17 innocence?

18 A I would hope so

19 Q Okay

20 A I learned never to say --

21 Q I don't want to have to look for it, but I wanted to ask

22 A And she did --- Judge Thomas did charge identification
23 issues

24 Q Okay Did she tell the jurors that The State had the
25 burden of proof to prove identification beyond a

JONATHAN ERIC FOX - CROSS EXAMINATION BY MS CATOE

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1 reasonable doubt?

2 A Yes

3 Q All right Do you recall how many of the three witnesses
4 positively with certainty identified the jacket that was
5 found in your client's bedroom?

6 A Excuse me

7 Q Even though there were only two positive certain
8 identifications --

9 A -- I think just one, and I think the store manager --

10 Q -- Possibly all three?

11 A It could be I honestly don't remember I know there
12 was a black jacket instead of a blue jacket, but then
13 when it came into Court they said, yeah, that's the
14 jacket the guy had

15 Q Do you recall what they focused on with that particular
16 jacket even though the outside color was different, do
17 you recall the gray lining?

18 A Yeah, that's exactly right There was an issue with the
19 lining I don't think there was any kind of Logo or
20 anything on it, but right, there was a gray lining that
21 was somewhat distinctive or at least contrasted that
22 would be visible

23 Q Do you recall why they were focused on that area?

24 A Because that is where he the --- what was reported to be
25 a gun That he had his hand inside the jacket, and so

JONATHAN ERIC FOX - REDIRECT EXAMINATION BY MS RICHARDSON 33

1 their attention was drawn to the inside

2 **MS CATOE** All right I don't believe I have any
3 further questions for you Thank you, Mr Fox

4 **MR FOX** Thank you

5 **THE COURT** Is there redirect on new issues brought up
6 in cross?

7 **MS RICHARDSON** Yes, Your Honor Court's indulgence

8 **(PAUSE)**

9 **REDIRECT EXAMINATION BY MR RICHARDSON**

10 Q I just have, a few more questions

11 A Sure

12 Q You testified that you felt the best strategy was to
13 focus on the improper identification issues, correct?

14 A Well not specifically improper issues, but rather the
15 quality of the identification that was made

16 Q And given that that was your best strategy, do you
17 believe that it would have been prudent for you to object
18 to the admission to any of that identification exhibits?

19 A No question I said the best outcome would have been to
20 have that evidence excluded, and preserve that issue
21 But my feeling that it was going to come in, I do focus
22 more on rebutting it

23 Q Okay And you thought that to be reasonable given the
24 other evidence that was put forth?

25 A I did

JONATHAN ERIC FOX - REDIRECT EXAMINATION BY MS RICHARDSON³⁴

1 Q And isn't it true with respect to the jacket, the police
2 did not find a blue jacket in their search of the
3 Defendant's home, correct?

4 A That is absolutely correct

5 Q Okay And there are a lot of jackets that have a gray
6 lining, correct?

7 A I'm sure

8 Q Okay

9 A I believe we argued that point in closing Just the
10 discrepancy between the description of the jacket and the
11 actual jacket that was brought to Court

12 Q Okay And going along with the identification, the
13 police also did not find the brimmed hat?

14 A No

15 Q Or the black shades?

16 A No

17 Q Or a weapon?

18 A No They didn't even arrest Mr Gibbs for quite a while
19 after --- I am not sure it was long as three weeks, but
20 it was a good --- it was a long time after the robbery
21 before he was arrested

22 Q And, you also testified that Mr Gibbs actually lived
23 within five minutes walking distance from the Piggly
24 Wiggly, correct?

25 A It was close, I am not sure it was as close as five, but

1 it was a short walk, five or ten minutes It was in
2 close distance

3 Q So if he wasn't attempting to elude police, they didn't
4 have far to go?

5 A No

6 Q If, he was, in fact, the perpetrator, correct?

7 A That is true

8 Q And you mentioned that in the Biggers Hearing, you did
9 challenge the identifications, the photo identification
10 and the lineup identification, correct?

11 A I believe so, yes

12 Q Okay In the Biggers Case there are certain standards
13 that would determine if a show up or a lineup is properly
14 or should be admitted or may be admitted, correct?

15 A Yes

16 Q And, of those, The Court is required to look at the
17 totality of the circumstances to make sure that there
18 isn't any misidentification and so forth, correct?

19 A That is correct

20 Q Okay And in this case do you believe that there
21 exhibited any criteria --- Let me rephrase that In the
22 Biggers standard, one of the factors that is to be
23 considered is the accuracy of the witnesses' prior
24 description of the predator, correct?

25 A Yes

JONATHAN ERIC FOX - REDIRECT EXAMINATION BY MS RICHARDSON 36

1 Q Okay And earlier in your testimony, I had presented you
2 with two witness statements that contradicts greatly what
3 was immediately observed after the robbery, and then what
4 was later pointed out in the show up and in the lineup,
5 and the courtroom identification, correct?

6 A Yes

7 Q And also at the time of those identifications in
8 correlation of when the witnesses gave their initial
9 description of the perpetrator, it was ten days after
10 that the show up was done as well as the lineup, correct?

11 A Yes

12 Q And then even further down the line when they did the
13 courtroom identification?

14 A Yes

15 Q All right

16 **THE COURT** Anything further, ma'am?

17 **MS RICHARDSON** No, Your Honor, I have no further
18 questions

19 **THE COURT** Very good Thank you, ma'am You may step
20 down, Mr Fox

21 **MR FOX** Thank you

22 **THE COURT** And are there further witnesses for the
23 Applicant, Ms Richardson?

24 **MS RICHARDSON** No, Your Honor

25 **THE COURT** Applicant, rests

1 All right, are there witnesses for The State?

2 MS CATOE No, Your Honor, The State would rest as
3 well

4 THE COURT Very good Testimony is closed

5 Ms Richardson, tell me, ma'am, what is the prejudice
6 shown here?

7 MS RICHARDSON Your Honor, the prejudice is that in
8 conjunction --- when you look at --

9 THE COURT Pull that microphone to you, please, so we
10 can hear you a little bit better

11 MS RICHARDSON When you look at the total allegations
12 of ineffective assistance of counsel, we have a --- Can you
13 hear me?

14 THE COURT Yes, speak up a little bit, I can't hear you
15 very well but go ahead

16 MS RICHARDSON Okay There is on the record, alibi
17 testimony corroborating Mr Gibbs' testimony that he was at
18 home with his mother and his girlfriend at the time of the
19 robbery That alone is sufficient evidence for the trial
20 court to give an Alibi Charge But now when you look at in
21 conjunction with the show up and the lineup being admitted
22 without objection, clearly there is evidence to support that
23 there was a misidentification The witnesses who provided a
24 statement immediately after the incident gave a totally
25 different description, in such that they indicated that the

THE STATE V CLARENCE GIBBS

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1 perpetrator had on a brimmed hat, and also black glasses,
2 which means anyone who was observing this perpetrator could
3 really only identify him from his nose brim down But, in the
4 show up and in the lineup they were provided with Mr Gibbs'
5 identification by the police officer, and I believe it is in
6 the transcript that they said we do have a suspect, okay But
7 in the photo array of that one single photo array, there are
8 several men who do have a black and gray beard, because that
9 is what the witnesses indicated that they observed at the time
10 of the incident

11 Second, there wasn't option to look at the second photo
12 array because it had been lost, and while trial counsel did
13 indicate that he made an issue of it, it still prejudiced him
14 because now the jury couldn't see if there were other people
15 in that photo array who could have looked like Mr Gibbs
16 Okay, and the police identification's would have been tainted
17 based on the fact that that in the show up he was the only
18 individual seated there, and they had already told him that
19 they had a suspect in place

20 So, when you look at the alibi witness, the potential for
21 misidentification, and also the witnesses testified to the man
22 with a limp, Mr Gibbs does not limp He does not have a limp
23 in his walk So, that in itself was also evidence that there
24 could have been potential misidentification

25 So, when you look at the totality of all of these points

1 Mr Fox was deficient in his representation

2 THE COURT All right

3 MS RICHARDSON And it did prejudice him because if you
4 took it as a whole, a jury could have said okay, the
5 identifications could have been wrong, and his alibi could
6 have been credible, but there were not allowed to even
7 consider it because there was no charge

8 THE COURT All right, I will come back to you on that
9 Let me hear from The State on those issues, issues of
10 prejudice, please, Ms Catoe

11 MS CATOE Yes, Your Honor The State would, I think we
12 have to concede that had the Alibi Charge been requested there
13 is at least a chance it would have been given perhaps even
14 with its time frame problems But, The State would point out
15 that it was specifically mentioned and argued in both closing
16 arguments The testimony was there The State in their
17 Closing Argument pointed out that the Defense had no burden of
18 proof to prove alibi, and then The Court gave a specific
19 charge that The State had to prove the identification beyond a
20 reasonable doubt

21 In this case we've got identification verses alibi If
22 the jury believes the identification witnesses then they
23 necessarily believe that he was there and that they don't
24 believe the alibi witnesses So the issue is more one of
25 credibility which was also charged to the jury

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1 There are some cases on the alibi issue and The State
2 would submit that this case is more akin to, Ford verses The
3 State of South Carolina, 314 S C 245 (1994) case The Court
4 found that there was not prejudice even though counsel, I
5 believe, actually rejected in alibi charge in that case in
6 light of the evidence against the Defendant there In that
7 case there was direct and circumstantial evidence

8 There are some other cases whether there were
9 circumstantial evidence, Roseboro v State, 317 S C 292 (1995)
10 case Counsel testified, that he did not --- intentionally he
11 did request alibi He wanted to focus the jury on failure to
12 meet the burden of proof In the case, The Court noted that
13 the evidence was entirely circumstantial There was no I D
14 in that case And plus in that case the Solicitor implied in
15 the Closing Argument that the Defendant bore some burden of
16 proof

17 I submit that it is different in this case, because we do
18 have two identifications, and the Solicitor specifically said,
19 that the Defense has no burden of proof on the alibi issue

20 As far as the identification, the Applicant would have to
21 prove that on appeal, he would win the issue And The State
22 would submit that where The Court went over all of the factors
23 required by Neil v Biggers on pages 113, 114, good opportunity
24 to view acute attention, generally accurate descriptions
25 previously and descriptions that were not in conflict, the

1 Court noted the certainty of the identifications and noted
2 that ten days was not to long And believe there is other
3 case law upholding two weeks and things of that nature The
4 Court noted that it was not concerned that there was a witness
5 who did not I D because that was jury issue The Court also
6 specifically noted that the one-half that was missing was not
7 a concern because there was testimony establishing what the
8 pictures looked like, and The Court found that that was
9 sufficient

10 Therefore, The State would submit that since The Court
11 went over all the factors, found that there was no taint from
12 the photo lineup because the photo lineup was done first, and
13 the show up was more like a confirmation of it, The Court
14 found due process was satisfied And on appeal the Appellant
15 Court would be constrained to --- I'm sorry, Your Honor, I
16 can't find the quote I am looking for --- But, trial court's
17 discretion and will not be disturbed upon appeal, absent an
18 abuse of discretion or commission of prejudicial legal error
19 The State would submit that because the Applicant would not
20 win on appeal on that issue there would be no prejudice

21 Thank you, Your Honor

22 THE COURT Just one moment, please, ladies and
23 gentlemen

24 (PAUSE)

25 THE COURT One last question for you, Ms Richardson

THE STATE V CLARENCE GIBBS

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1 How can you show prejudice, I know you argued on the totality
2 of circumstances, but on the alibi issue? There was not a
3 charge, but the issue was taken directly to the jury The
4 jury would have clearly understood if the Defendant was not
5 there, whether you call it an alibi and charge it or not, if
6 the Defendant was not there, he could not be convicted of the
7 charge How can you prove prejudice on that specific point?

8 MS RICHARDSON Your Honor, in State v Hill, cited 315
9 S C 260 (1993) case, The Court held that a charge must be
10 given if there is any evidence, to support it, and if The
11 Court commits reversible error, if it fails to give such
12 charge

13 THE COURT All right, now is that a PCR case you are
14 quoting from?

15 MS RICHARDSON It is -

16 THE COURT That is the underlying criminal case is it
17 not?

18 MS RICHARDSON It is, Your Honor

19 THE COURT All right

20 MS RICHARDSON And then also in State v Bealin,
21 B-E-A-L-I-N, cite 201 S C 490 also from 1943, an alibi charge
22 is considered especially crucial when the evidence is
23 extremely circumstantial as it is in this case as well, and
24 that was the actually case Roseboro for citing that case

25 THE COURT All right

1 **MS RICHARDSON** But that is the prejudice, Your Honor
2 This case was all circumstantial as evidence and therefore it
3 was crucial to have that charge

4 **THE COURT** Very good Thank you, ma'am Just a moment,
5 ladies and gentlemen, and I will be prepared to rule

6 **MS RICHARDSON** Thank you, Your Honor

7 **(PAUSE)**

8 **DECISION OF THE COURT**

9 **THE COURT** All right Mr Gibbs, as I said when we
10 began this Hearing at Post Conviction Relief, you have to
11 prove two things, and the burden is on the Applicant

12 The first thing is that your lawyer's performance below
13 was deficient, and I find that you have proven that portion of
14 your case The Appellant Court has said that the objection
15 should have been in a timely and contemporaneous fashion, not
16 just in *limini* fashion So, I note that you have met that
17 prong of *Strickland*

18 The second prong is that you must show prejudice I
19 find, that you failed to show prejudice in this case, and you
20 have not met the second prong of proof

21 And I make the findings for the following reasons First
22 of all, with regard to the identifications I note that The
23 Court of Appeals in their opinion, and this is on page three
24 of the opinion, in discussing this issue they comment that
25 after the hearing, and this was after the *Neil verses Biggers*

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1 hearing it says, The Court made a thorough ruling denying
2 Gibbs' Motion to Suppress both types of identification What
3 The Court is saying there is that and having read what Judge
4 Thomas said in the transcript, she clearly looked at those
5 issues She reviewed those issues and she made a ruling
6 against you at the trial I have no proof today that that
7 would have been reversed had it been appropriately preserved
8 for review In fact, the evidence is fairly strong to the
9 contrary based on this Court's reading of the Appellant
10 decision, as well as the review of what Judge Thomas said
11 when she took up the matter

12 And then finally on the issue of alibi I don't find
13 there is any showing of prejudice there either This is a case
14 where that fact was argued directly to the jury The jury
15 would have understood whether there was a charge or not on
16 alibi, but if you weren't there then you weren't guilty, and
17 they decided against you

18 I agree with Ms Catoe that says this case rose or failed
19 on questions credibility The jury made those determinations
20 against you and your witnesses, and I find no reason at Post
21 Conviction Relief now to grant your request that the
22 conviction be vacated

23 For these reasons I am going to deny your request for
24 Post Conviction Relief

25 Now please understand, you can appeal this decision and

1 this is how it works I am asking our Attorney General to
2 prepare an Order within thirty days of the date a Formal
3 Order, which gives the reasons that I just gave on the record
4 for denying your Post Conviction Relief Your right to appeal
5 begins to run the day we serve that formal written and signed
6 Order on your lawyer So not today, but some future day when
7 we serve that on her, and thirty days from that date is the
8 time frame you will have to appeal Do you understand that,
9 Mr Gibbs?

10 **MR GIBBS** No

11 **THE COURT** Then I will explain it to you one more time
12 on the record

13 You have thirty days to appeal this decision and that
14 thirty days begins to run on the day that I sign a formal
15 written Order which denies your Post Conviction Relief, not
16 from today but from that future day So your attorney has the
17 responsibility to notify you when she is served, and for you
18 all to make a decision as to whether or not an appeal will be
19 filed And you will have thirty days from the date the Order
20 is served on your lawyer to make that decision and file your
21 appeal

22 All right, I am going to enter a Temporary Order in the
23 record showing what the decision is, and I have asked the
24 Attorney General to prepare an Order within thirty days

25 Good luck to you, Mr Gibbs That is the decision of The

THE STATE V CLARENCE GIBBS

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1 Court

2 I am going to remand you now back to the Detention
3 Center

4 MS CATOE Thank you, Your Honor

5 -- END OF TRANSCRIPT --

6 (Whereupon, This hearing was concluded at 10 55 a m
7 on Friday, June 13, 2008)

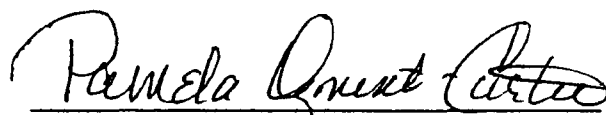
Certificate of Reporter

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I, the undersigned, Pamela Ozment-Cartee, official court reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in of Common Pleas, Georgetown County, South Carolina, on the 13th day of June 2008

I do further certify that am neither, of kin, counsel, nor interest to any party hereto

July 8, 2009

A handwritten signature in cursive script that reads "Pamela Ozment-Cartee". The signature is written in dark ink and is positioned above the printed name and title.

Pamela Ozment-Cartee
Circuit Court Reporter

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STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2007-CP-22-1332

Clarence Gibbs, # 289369,
(a k a Clarence Gibbs),

Applicant,

v

State of South Carolina,

Respondent

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

2008 JUL 18 PM 4 12
CLERK OF COURT

PROCEDURAL HISTORY

jud
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 orders 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-333). 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(e). Where ineffective assistance of counsel is alleged as 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, 80 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" Caprood, supra, at 109, 525 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 had not committed 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.

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4

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 .

Sub 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 Neil 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.

JWB
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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 'JAG' that night and that Gladys Knight made a cameo appearance on the program.

Counsel stated that he did recall having a charge conference with Judge Thomas, but 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 this testimony had upon the jury, but the jury did request that this testimony be re-played during deliberations. The solicitor also very thoroughly impeached Applicant's general credibility at trial, bringing out his prior record for burglary, grand larceny, petit

Jus
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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. 302, 326, 652 S.E.2d 409, 421 (Ct. 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 Burniss, 334 S C 256, 262, 513 S E 2d 104, 108 (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)

JLB
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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 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. 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.

John
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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).

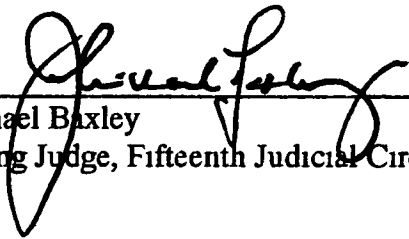
Counsel's attention is directed to Marlar v. State, 375 S C 407, 653 S E 2d 266 (2007), and Rule 59(e), SCRCP, regarding the filing of a Motion to Alter or Amend should counsel believe this Order fails to adequately address all issues raised as required by S C Code Ann § 17-27-80 (2003). This Court further 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 1(g), SCRCR, 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)
)
)
)
Clarence Gibbes,)
)
)
Applicant,)
)
v)
)
State of South Carolina,)
)
Respondent)
_____)

IN THE COURT OF COMMON PLEAS

2007-CP-22-1332

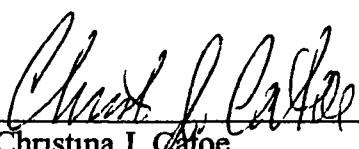
CERTIFICATE OF SERVICE BY MAIL

2008 JUL 18 PM 4:12
CLERK OF COURT

- 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

STATE OF SOUTH CAROLINA

County of Georgetown

In the Court of Common Pleas

CLARENCE Gibbs, 289369

Full name and prison number (if any) of Applicant

vs

Robert M Stevenson

Name of Respondent

State of South CarolinaAPPLICATION FOR
POST-CONVICTION RELIEFFILED
GEORGETOWN COUNTY, SC
2009 APR 13 PM 3:13
ALMA Y. WHITE
CLERK OF COURTINSTRUCTIONS — READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

- 1 Place of detention Broad River Correctional Institution, 4460
Broad River Rd Columbia, SC 29210
- 2 Name and location of Court which imposed sentence Court of General Sessions
for the County of Georgetown
- 3 The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed
 - (a) # 05-6522-0601
 - (b) # 05-6522-0602
 - (c) # 05-6522-0603
- 4 The date upon which sentence was imposed and the terms of the sentence
 - (a) September 8, 2005, 20 years CONCURRENT for Kidnapping
 - (b) 20 years for Armed Robbery
 - (c) 5 years Consecutive for Possession of A Weapon

5 Check whether a finding of guilty was made

- (a) after a plea of guilty N/A
- (b) after a plea of not guilty N/A
- (c) after a plea of nolo contendere N/A

6 Did you appeal from the judgment of conviction or the imposition of sentence?

yes

7 If you answered "yes" to (6), list

(a) the name of each Court to which you appealed

- i The State of South Carolina in the court of Appeals
- ii _____
- iii _____

(b) the result in each such Court to which you appealed

- i Affirmed
- ii _____
- iii _____

(c) the date of each such result

- i submitted June 1, 2007 - Filed June 27, 2007
- ii _____
- iii _____

(d) if known, citations of any written opinion or orders entered pursuant to such results

- i not known
- ii _____
- iii _____

8 If you answered "no" to (6), state your reasons for not so appealing

- (a) N/A
- (b) N/A
- (c) N/A

9 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully

- (a) In effective Assistance of counsel (TRIAL Counsel I)
- (b) In effective Assistance of counsel (TRIAL Counsel II)
- (c) _____

10 State concisely and in the same order the facts which support each of the grounds set out in (9)

- (a) TRIAL Counsel was ineffective for not bring up the defense that the
- (b) TRIAL Counsel was ineffective for not bring up the defense that
- (c) _____

11 Prior to this application have you filed with respect to this conviction

(a) any petition in a State Court under South Carolina Law? yes

(b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? No N/A

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? No N/A

(d) any other petitions, motions or applications in this or any other Court?

yes

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application

(a) the specific nature thereof

I PCR

II

III

IV

(b) the name and location of the Court in which each was filed

I State of South Carolina / county of Georgetown / in the court of common pleas

II

III

IV

(c) the disposition thereof

I denied and dismissed with Pre Judice

II

III

IV

(d) the date of each such disposition

I Submitted July 8th 2008 - Filed July 18, 2008

II

III

IV

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition

I Pursuant to Rule 71.1(9) SCRPC, PCR Counsel must file a Notice of Appeal on Applicant's behalf if Applicant wishes to pursue Appellate Review

II

III

IV

13 Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

14 If you answered "yes" to (13), identify

(a) which grounds have been presented

- I N/A
- II N/A
- III N/A

(b) the proceedings in which each ground was raised

- I N/A
- II N/A
- III N/A

15 If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented

- (a) In effective assistance of counsel (TRIAL counsel) I
- (b) In effective assistance of counsel (TRIAL counsel) II
- (c) _____

16 Were you represented by an attorney at any time during the course of

- (a) your arraignment and plea? N/A
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Appeal (yes) / as for Initial PCR Applications (no)

17 If you answered "yes" to one or more parts of (16), list

(a) the name and address of each attorney who represented you

- I J. ERIC FOX, 210 ELM Street, suit 5, Conway SC 29526
- II Kathrine H. Hodgins P.O. Box 11589, Columbia SC 29211
- III Bell Legal Group, Vanessa A. Richardson, P.O. Box 2590, Georgetown SC 29442

(b) the proceedings at which each such attorney represented you

- I TRIAL, and Sentencing
- II Appeal
- III PCR hearing / not Initial PCR Application

18 State clearly the relief you seek in filing this application

Vacated Sentence with Prejudice
(OR) Reverse with Prejudice

19 Are you now under sentence from any other court that you have not challenged?

NO
See attached sheet

State of South Carolina
County of Georgetown

Clarence Gibbs

- Vs -

Robert M. Stevenson
State of South Carolina

In: The Court of Common Pleas

Application for

Post-Conviction relief

Additional Pages

Continued Answer for the following question Page (2), #10

(a) defendant could not have been the robber because the Robber in the video Tape had a limp and Mr. Gibbs the defendant has no limp nor did he

(b) The one piece of evidence the State had was not even Mr. Gibbs property. The coat belonged to his girl friend. Mr. Gibbs contend had it not been for his trial counsel ineffectiveness in not getting him to try on the coat during the trial he would tried it on and it would not have fit, and he would have been acquitted

Page 4 #15

(d) Mr Gibbs contends that he had not seen the video tape because his trial Attorney did not show it to him, so Mr Gibbs did not know the Robber had a limp. This information was revealed to him by his PCR Attorney, Vanessa A. Richardson, during her initial visit to see him at Broad River Correctional Institution (approx three week before his PCR hearing which was June 13, 2008).

Continued Answer for the following question Page (4) #15

(b) Mr Gibbs contends that ~~he~~ is not an attorney and he is not educated. He simple did not understand the important of having him try on the coat during the trial, so it could have been compared to the Robber in the video tape. Thus he believe would have changed the out come of the whole trial.

Mr Gibbs contends that if it was not for inmates trying to extort money from him to do legal work he would have gotten the legal assistance he needed to find out all his issues. South Carolina Department of Correction is aware of this problem because there are already in federal court because of inmates charging money to do legal work.

Also Gibbs contends had ~~it~~ not been for his TRIAL council's ineffectiveness he would have ~~tried~~ on the coat during the trial.

STATE OF SOUTH CAROLINA

VERIFICATION

County of Richland

I, CLARENCE Gibbs, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application, that I know the contents thereof, that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application, and that the matters and allegations therein set forth are true

X CLARENCE Gibbs
CLARENCE Gibbs

FILED
GEORGETOWN COUNTY, S.C.
2009 APR 13 PM 3:13
ALMA Y WHITE
CLERK OF COURT

SWORN to and subscribed before me this 9

day of April, 2009

Carolyn G. King (L.S.)
Notary Public

My Commission Expires Oct 1, 2018

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, CLARENCE Gibbs, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true

- (1) I am the applicant in this action and I believe I am entitled to redress
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor

X CLARENCE Gibbs
Applicant
CLARENCE Gibbs

SWORN or affirmed to and subscribed before me this

9 day of April, 2009
Carolyn G. King
Notary Public

My Commission Expires Oct. 1, 2018 7

Clerk of court

P.O. BRawer 421270

Georgetown, SC 29442

Re, Gibbs V State 2009 CP 220546

Dear clerk:

Enclosed for filing Please find the following.

(1). One original copy of Petitioner's Motion for new TRIAL

(2). Certificate of service

(3). Motion for appointment of counsel

(4). And An extra copy of the certificate of service to be returned to petitioner in enclosed S.A S E

(5). Gibbs' Affidavit in support of his motion for new trial

(6). Clarence Gibbs Affidavit to correct when he found out about the Robber with the limp on PCR Application

(7). Applicant's notice for motion and motion to expedite proceeding

Columbia, South Carolina

April 23, 2009

Sincerely yours

Clarence Gibbs

State of South Carolina

County of Georgetown

Clarence Gibbs 289369

Petitioner

VS

State of South Carolina

Respondent

IN The Court of Common Pleas

Judicial Circuit

Case No: 2009 CP 220546

Motion For Appointment of Counsel

pursuant to Rule 71 (d)

SCRPC

To The Honorable Court

IN Application for Post-Conviction relief, filed April 13, 2009

The petitioner would show this court

(1). That, there exist genuine issue of material fact and controversy which requires a hearing for the court to make a determination of finding of facts and conclusions of law there on;

(2). That, pursuant to South Carolina Rules of court Rule 711, (d), Appointment of counsel to assist in this matter is germane to Res Judicate as the claim of ineffective assistance of counsel, and Constitutional violation was direct and proximate cause of applicants Rights abridgement

WHEREFORE, the petitioner Prays the court order counsel be appointed in this matter, and what other relief the court deems just and proper.

Columbia, South Carolina

April 23, 2009

Respectfully submitted

X

Clarence Gibbs

Clarence Gibbs 289369
Petitioner,

V

State of South Carolina
Respondent,

Case No. 2009 CP 220546

Petitioner's Notice of Motion and Motion
for a New TRIAL

Pursuant to Rule of Court 29(b)

SCRP

The Petitioner is moving before the court to ask for a new trial based on the following reason.

Argument I

Gibbs contends that his trial counsel never informed him about the fact that the real robber had a limp. Nor did he show Gibbs the video tape. Gibbs was also unable to see the video. At trial Gibbs contends that this was a missed opportunity to present this as a defense and to bring about the question of reasonable doubt in the minds of the jurors. If this was a strategy of trial attorney, not to inform Mr. Gibbs of a real defense that would have helped to exonerate his name, it was a poor strategy.

Mr. Gibbs was informed of the new facts or evidence that the real robber had a limp by his PCR counsel, Vanessa A. Richardson on the day of his evidentiary hearing, June 13, 2008. When she saw Mr. Gibbs she asked him to walk for her and Gibbs had no limp. She went on to point out to Gibbs that the man in the video had a limp. So why wasn't this very important point ever brought out by his trial attorney, Mr. Fox?

Mr. Gibbs was prejudiced by his trial attorney because his attorney erred in a manner that a reasonably proficient attorney would not, and the error was prejudicial (see) Al-Shabazz v. State 338 SC 354, 572 SE2d 742 (2000)

And contrary to the comment that Judge, J. Michael Bailey made in his order denying Mr. Gibbs' PCR filed July 18, 2008 P. 5 P. 1 "Morton initially indicated that the robber may have walked with a limp." This is not true. Nor does the Judge give a page number in the record of the trial to find this information. In fact, the fact that the would be robber had a limp was not even

brought up by any witnesses during the trial or before. Nor was this fact brought up by the solicitor, nor Gibbs own attorney at any time during the trial nor was it mentioned in any pretrial statement. Gibbs has proven that his trial attorney was ineffective and that he was prejudiced by his action or the action.

Argument II

Then Gibbs contends that his trial counsel failed ^{to} provide a defense that one piece of evidence that the state relied on was not Mr. Gibbs coat, and it would not have fit him. Mr. Gibbs contend that he is not an attorney and is not trained in law, and he is poorly educated. Therefore he relied on counsel to represent him in a professional manner. His attorney error was in a manner that a reasonably proficient attorney would not, and the error was prejudicial. See *Alshabazz v. State* 338 SC 354, 572 SE2d 747 (2000).

The only physical evidence the state had was and is a coat of which the witnesses could not even agree on the color of the coat. But more importantly is the fact that the coat that the police took from Mr. Gibbs' mother house is not even his coat. So why didn't his trial attorney have Gibbs to try it on during the trial to compare with how it fit him to the real robber coat and how it fitted him in the video tape. The coat is a woman's coat his girl friend's coat, and it would not have fit Mr. Gibbs correctly. Remember OJ TRIAL if the coat does not fit you must acquit, Gibbs was deprived of this defense which would have given reasonable doubt in the minds of the jurors and which would have given a different end to the trial.

Gibbs contends had it not been for his trial attorney's poorly strategy or like of strategy Gibbs would have tried on that coat during the trial. Also Gibbs does not have any legal assistance from trained inmate clerks because Gibbs has no money to pay them so he is at the mercy of someone who will help without paid. But with exercise of reasonable diligence he has come up with this defense that should have been brought up at trial.

Conclusion

Gibbs pray that this court will grant his per relief. Mr. Gibbs is not guilty of the crime that he has been in prison for.

For all of the foregoing reason, it is respectfully submitted that the conviction be reversed, and the petitioner be granted the relief that he asked for in his PCR Application

Respectfully Submitted,

Columbia, South Carolina

April 23, 2009

Clarence Gibbs 289369

BRCE M4 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
Fifteenth JUDICIAL CIRCUIT

CAVno 2009 CP 220546

CLARENCE Gibbs' Affidavit in support of
Motion for New Trial

591⁽⁶⁾

Personally APPEARED before me, Clarence Gibbs, 289369, who being duly
Sworn depose and state

(1) I Am CURRENTLY being housed here at Broad River Correctional Institution
MA 272, 4460 Broad River Rd, Columbia SC 29210

(2) I have Personal Knowledge of facts in this affidavit and I am
competent to swear to the Matter herein and do so of my own free will.

(3) I was KIDNAPPED by Georgetown Police and wrongfully charged
and arrested on APRIL 20 2005 for a crime that I did not do

(4) MY trial Attorney did not include me in the Planning of my defense
because he never told me about the fact that the real robber had a
Limp

(5) MY trial Attorney never showed me the video of the robbery, nor
did I see it during the trial

(6) So the fact that the robber had a Limp was never brought up at
trial denied me of a defense that could have given rise to reasonable
doubt in the Juror's minds

(7) Which I believe would have given a different outcome in that
trial

(8) I depended on counsel's ability to bring about all possible defenses
however I was never asked about the robber's Limp in the video

(9) Had it not been for the ineffectiveness of my trial counsel
I would have wanted the fact that the robber had a limp to be
brought up at trial Because this is a case of mistaken identification

(10) Also the coat that was taken by police as evidence was not my
coat this was — brought out by the solicitor during the trial

(11) And had it not been for the ineffectiveness of my counsel I
would have wanted to try the coat on

(1)

(12) And because I have been solicited by inmates for money I have not been able to get effective legal assistance here to bring my issue to the court's attention

(13) I did not Rob the PIGGLY WIGGLY on APRIL 10, 2005 nor did I rob it on any other day.

(14) I did not kidnap anyone nor did I have a gun

(15) I have been falsely accused and falsely identified by the witnesses

(16) And because of the fact that I am uneducated, and I am not an Attorney and I am not trained in law I could not have come up with these issues before now

(17) And as I pointed out my PCR attorney is the one who told me about the Robber's limp.

(18) I also believe I was set up by the police officer because I would not turn informant for him

Further Affiant says not

Sworn before me this

23rd day of April 2005

Donald J. Dido

Notary for South Carolina My Commission Expires
my commission expires August 25, 2015

Clarence Gibbs
Clarence Gibbs

(5 original copies)

STATE of South Carolina
County of Georgetown

In The Court of Common Pleas
Fifteenth Judicial Circuit

Clarence Gibbs 289369
Applicant

CA/no 2009 CP 220546

V

STATE of South Carolina
Respondent

Clarence Gibbs' Affidavit to correct
when he found out about the Robber
With the Lump on PCR Application

PERSONALLY APPEARED before me, Clarence Gibbs, 289369, who
being duly Sworn depose and state:

- (1) I Am Currently being housed here at Broad River Correctional Institution
MA 272, 4460 Broad River Rd, Columbia SC 29210.
- (2) I have personal knowledge of facts in this Affidavit and I Am
Competent to swear to the matter herein and do so of my own free will.
- (3) In PCR Application filed April 13, 2009 there was a mistake that needs
to be corrected See P. 5 under Page 4 # 15.
- (4) It states that "This information was revealed to him by his PCR Attorney,
Vanessa A. Richardson, during her initial visit to see him at Broad River
Correctional Institution (approx) three week before his PCR hearing which was
June 13, 2008."
- (5) That was incorrect, it was suppose to be changed before it was mailed, however
the inmate that prepared it forgot to change it.
- (6) It should have stated "This information was revealed to him by his PCR Attorney,
Vanessa A. Richardson on the day of my evidentiary hearing which was June
13, 2008."
- (7) There was no deception on my part. It was a miss understanding that would
not prejudice the state in anyway.
- (8) After all I am relying A inmate that is not trained in Law to help me.
- (9) However the fact remains that I was told this information about
the robber's who had a lump by my PCR Attorney. That fact has not
changed.
- (10) She can verify this information.

Further Affiant sayeth not

Sworn before me this
23rd day of April 2009

Clarence Gibbs

Notary for South Carolina My Commission Expires
my Commission expires August 24, 2015

(5 original copies)

STATE OF South Carolina
County of Georgetown

Clarence Gibbs 289369
Applicant

State OF South Carolina
Respondent

IN THE COURT OF COMMON PLEAS
Fifteenth Judicial Circuit
CA/no 2009 CP 220 546

Applicant's Notice For Motion And Motion
to expedite Proceeding

MOTION to EXPedite The Proceeding

APPLICANT is moving before this Court to ASK this Court to Please expedite these proceeding for the following reasons:

- (1) I AM HIV POSITIVE And my health IS NOT the best. This disease IS UP AND DOWN. I AM NOT DOING WELL MENTALLY EITHER. I TRY TO STAY WORKING TO KEEP MY MIND OFF THIS WRONGFUL INCARCERATION WHICH HAS TAKEN ME FROM MY ELDERLY MOM, WHO JUST RECENTLY GOT SICK ONCE MORE FROM HIGH BLOOD PRESSURE. THIS WRONGFUL ARREST AND INCARCERATION HAS TAKEN A TOTAL ON MYSELF AND MY MOM. WE ARE ALL EACH OTHER HAS. WHEN I DON'T HEAR FROM HER I TRY TO GET SOMEONE TO CALL OR GO BY TO SEE IF SHE IS OK
- (2) I DID NOT DO THIS CRIME AND I WOULD LIKE TO GET BACK TO MY MOTHER BEFORE SHE OR I DIES. I DID PASS THE POLYGRAPH TEST.
- (3) THE RECORD WILL SUBSTANTIATE MY CLAIMS, AND SHOW THAT I WAS IRREVERSIBLY PREJUDICED BY MY ATTORNEY'S INEFFECTIVENESS.
- (4) I DO NOT WANT THE SOLICITOR, WHO ALSO KNEW ABOUT THE ROBBERY HIMP BUT SAID NOTHING TO HELP. PLEASE DO NOT LET HIM DRAG THIS PROCESS OUT MAKING THIS SITUATION EVEN WORSE THEN IT ALREADY IS

I Pray this Court will speed up this process out of fairness And all that is Good. Please grant my motion so my mother And myself May have a few year together and end this Suffering

Sworn before me this
23rd day of April 2009

Notary Public
Notary for South Carolina
My Commission expires

My Commission Expires
August 25, 2015

Respectfully Submitted

Clarence Gibbs

CLARENCE Gibbs 289369

BRCT MA 272

4460 Broad River

Columbia, SC 29210

(5 original copies)

Certificate of Service

I HEREBY certify that a true copy of petitioner's motion for new TRIAL, and Gibbs' Affidavit in support of his motion for new TRIAL, and motion for appointment of counsel has been served by MAIL Postage prepaid by depositing same with the appropriate SCDC official addressed to the following

(1) Clerk of Court

P.O. Drawer 421270

Georgetown SC 29442

(2) Attorney General

State of South Carolina

Post office Box 11549

Columbia, SC 29211-1549

SC Attorney General

RECEIVED

APR 28 2009

Referred to

Catell

Answered

Suven before me this
27th day of April 2009

Susan Z. Johnson

Notary for South Carolina

My Commission Expires

My Commission Expires
March 5, 2018

Clarence Gibbs

CLARENCE Gibbs 289369

BRCI Mt 272

4460 Broad River Rd

Columbia, SC 29210

* Additional motions, and Affidavit also served

(1) CLARENCE Gibbs' Affidavit to correct when he found out about the Robber with the Lump on PCR Application.

(2) Applicant's Notice For motion and motion to expedite proceeding. Also has been served

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

2009-CP-22-0546

Clarence Gibbs, # 289369,

Applicant,

v

**RETURN AND MOTION FOR
SUMMARY DISMISSAL**

State of South Carolina,

Respondent

The Respondent, making its Return, and Motion for Summary Dismissal, to the Application for post-conviction relief filed on April 13, 2009, by Clarence Gibbs, would respectfully show this Court

I

The Applicant 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

II

In his current Application, Mr Gibbs alleges that he is being held in custody unlawfully for the following reasons

- 1 "Trial counsel was ineffective for not bringing up the defense that the defendant could not have been the robber because the robber in the videotape had a limp and Mr Gibbs the defendant has no limp nor did he", and
- 2 "Trial counsel was ineffective for not bringing up the defense that the one piece of evidence the State had was not even Mr Gibbs' property The coat belonged to his girl friend Mr Gibbs contends had it not been for his trial counsel's ineffectiveness in not getting him to try on the coat during the trial he would have tried it on and it would not have fit, and he would have been acquitted "

On page 5 of his Application (attachment) the Applicant states that he was made aware that the robber had a limp at the time of his last PCR hearing He states that he is seeking vacation of his sentence with prejudice, or reversal with prejudice

On or about April 23, 2009, the Applicant submitted further documents in support of his post-conviction relief Application, including a Motion for New Trial, Motion for Appointment of Counsel, Affidavits (2), and a Motion to Expedite Proceeding These materials were filed on April 29, 2009

Incorporated herein by reference are the records of the Georgetown County Clerk of Court regarding the convictions, and the Applicant's previous post-conviction relief file, which is in the custody of the Georgetown County Clerk of Court. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III – The Application is Impermissibly Successive

The Respondent first submits that the current Application must be summarily dismissed because it is impermissibly successive to the previous Applications for post-conviction relief. The Uniform Post Conviction Procedure Act provides that

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (2003). Successive applications are disfavored and the burden is on Applicant to establish that he *could not have raised* any ground raised in a subsequent application in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991), Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (emphasis added).

In the Applicant's case, the Order Denying Post-Conviction Relief from the first PCR action reflects trial counsel's PCR hearing testimony that "Morton (eyewitness to the robbery) initially indicated that the robber may have walked with a limp." (See page 5, Order Denying Post-Conviction Relief, action 2007-CP-22-1332, filed July 18, 2008). In addition, the videotape of the robbery was played at trial, and the coat to which the Applicant refers was entered into evidence at trial. (See id., page 5). Therefore, since all of this information existed prior to the Applicant's trial and at the time of trial, it is not "newly-discovered" evidence such that the Applicant can bring a successive PCR action.

See Clark v. State, 315 S C 385, 434 S E 2d 266 (1993), Hayden v. State, 278 S C 610, 299 S E 2d 854 (1983)

Further, the Applicant acknowledges that he and his PCR attorney were aware of the information at the time of his last PCR hearing. Accordingly, because the Applicant could have raised these allegations at his first PCR hearing, the Applicant cannot raise them now in a successive Application. Land v. State, 274 S C 243, 262 S E 2d 735 (1980), Aice v. State, *supra*, see also Graham v. State, 378 S C 1, 3, 661 S E 2d 337, 338 (2008) ("successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings," burden is on the applicant to establish that his application is not successive). Therefore, the Application must be summarily dismissed.

IV – The Application is Barred by the Statute of Limitations

The Respondent also submits that the current Application must be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act, S C Code Ann. §17-27-10 to -160 (Supp. 2003). S C Code Ann. §17-27-45(A) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The statute of limitations applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S C 468, 469 S E 2d 606 (1996). The Applicant in this case was convicted on September 8, 2005, and the appeal was remitted to the circuit court on July 13, 2007. This Application, which was not filed until April 13, 2009, is clearly barred by the statute of limitations.

A motion for summary judgment may properly be used to raise a statute of limitations defense. See RWE Nukem Corp. v. ENSR Corp., 73 S C 190, 194, 644 S E 2d 730, 732 (2007). In addition, S C Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for

summary disposition of [an] application when it appears from the pleadings that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law " Therefore, Respondent submits that this Application for post-conviction relief must be summarily dismissed

V

Each and every allegation, statement, or claim contained within the Application not expressly admitted, qualified, or explained is hereby denied

VI

WHEREFORE, having made its Return and Motion for Summary Dismissal, the Respondent requests that the Application be summarily dismissed

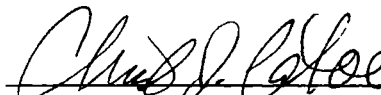
Respectfully submitted,

HENRY D McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J CATOE
Assistant Attorney General



ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P O Box 11549
Columbia, SC 29211
(803) 734-3737

May 9, 2009

State of South Carolina
County of Georgetown

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

Clarence Gibbs #289369
V Applicant

State of South Carolina
Respondent

} Applicant's Reply To Respondent's motion
for Summary Dismissal And Applicant's
notice for motion and motion to Amend
his PCR Application.

In Response to Respondent's motion for Summary dismissal and Applicant's motion to Amend his PCR Application. for the follow reason

I - This Application is not Successive

In response to the Respondent's Allegation of Successive Application Under the Uniform Post Conviction Procedure Act. First "All grounds of Relief Available to an Applicant under this chapter must be raised in his original, Supplemental or Amended Application." The Applicant contends that he was appointed Attorney during his first PCR, because he was indigent and illiterate, by the court so he was relying on that court appointed Attorney to Amend the Application once she found issues, And because she did not bring forth these issue that the State is now saying was present then Applicant contends that his due process of Law Right was violated by the Court Appointed Attorney's conduct by not amending the application. And her shortcomings has Prejudiced him. Because these issues could have been brought forth by the Attorney, And had it not been for her violation of his due process of Law right he would have brought forth both issue before the court. Now her conduct caused Gibbs his due process of Law right and irrevocable harm, because he relied on this court appointed attorney to bring all available issues.

So Gibbs contends that because the issues were not raised, by his court appointed Attorney he did not knowingly, voluntarily, and intelligently waive his relief or rights to these defenses now before the court of mistaken identity. The Applicant has no lump as the Robber did not is the Court in evidence his coat. Gibbs should have been allowed to try it on. This denied Gibbs his chance to raise reasonable doubt in the Juries minds. Gibbs has established that he could not have raised any of his issues because he is not a trained Attorney. Gibbs was relying on both of his court appointed in the original trial and in the PCR, the first PCR process

Thus Court can find that grounds for relief has been asserted which is sufficient reason - as why these issues in his first PCR was not asserted or amended. Mr Gibbs is not trained in Law nor has he had any help from inmates Law clerks who are trained in Law, because he was not willing to ~~submit~~ be extorted by them for money. And his Court appointed Attorney's conduct fell below the Reasonable standard of due process of Law - Right

As for his trial Counsel's PCR hearing testimony that "Morton (eye witness to the robbery) initially indicated that the robber may have walked with a limp." (See Page 5, order Denying Post-Conviction relief - Action 2007-CP-22-1332, filed July 18, 2008) This Statement has not been verified by the State from the trial transcript Morton's testimony is found on p. 84-106 and 237-241 of the original trial transcript. Please have the State to point out where Morton made that statement. And even if he did which Gibbs has not found it. The fact that the trial Counsel knew about this limp and yet did not use it to place doubt in the Juries mind, All Gibbs needed was reasonable doubt, About the true identity of the robber shows his ineffectiveness. And had it not been for trial Counsel's ineffectiveness Gibbs would have used that defense and the out come of the trial may have been different.

Also Gibbs has already stated in his Affidavit in support of his motion for new trial. That he never saw the videotape before the trial or during the trial, Gibbs knows nothing about the robber's limp. As for the coat, Gibbs contends that the fact that it came out during trial proves that trial counsel was ineffective for not using it as a defense by having Gibbs try the coat on because Gibbs states that it would not have fit. This would have also placed reasonable doubt in the minds of the Jury. Gibbs contends that but for his trial counsel's ineffectiveness he would have tried on the coat during the trial, and the trial could have had a different out come

And even if the information existed prior to the applicant's trial or at the time of trial it is newly-discovered evidence to him because he is only now after diligent research has found his right that were violated. And Gibbs contends

due to past trial counsel's ineffectiveness and that the PCR Counsel violated Gibbs' due process of law right by her conduct of not amending the first PCR application, so Gibbs has been harmed irrevocably by both court appointed Attorneys.

And further even if Applicant and his PCR Attorney had this information at the time of his PCR hearing, the Attorney was still wrong for not amending his PCR application, because it would have been her duty as a court appointed Attorney. And since Gibbs is not trained in law, and he is indigent, and illiterate he did not knowingly, voluntarily and intelligently waive his right to all possible defenses. therefore the application should not be summarily dismissed.

II The application is not barred by statute of limitation

In response to IV, Gibbs contends that his application should not be dismissed because he has complied with the Uniform Post-Conviction Procedure Act, SC Code Ann § 17-27-10-160 (Supp. 2003) SC Code Ann § 17-27-14(A) Gibbs contend that ~~his~~ his due process of law right ^{had} not been violated by his court appointed attorney during the first PCR application process, when she did not amend his PCR application it would have been filed in the one year time frame, the issue that are now before the court.

Gibbs filed his first PCR application on October 4, 2007. When he wrote the clerk she stated that he had not filed a PCR application so Gibbs filed another, therefore the two were merged under 2007-Cr-22-1332. Gibbs asked for and got appointment of Attorney. The evidentiary hearing was ~~heard~~ on June 13, 2008, The court appointed Attorney then had ample time to make any amendments to Gibbs' PCR application. And because she did not amend the PCR application to include the two defenses that are now before this court violated Gibbs' due process of law right the 14th Amendment of the United States Constitution Gibbs contends that he relied on the court appointed Attorney to bring all issues to the PCR application in an amended PCR application.

Gibbs would like to state for the record that he is not

bring an ineffective assistance of counsel claim against his PCR Counsel. as this would not work, however because the court had appointed Gibbs Counsel because it found Mr Gibbs to be illiterate and indigent his due process of law was violated by the counsel's conduct in the case she fell well below the due process of law reasonable standard. The first PCR was filed in October 4, 2007 and the evidentiary hearing was held on June 13, 2008 and the order denying post-conviction relief filed on July 18, 2008. The Applicant filed this PCR on April 13, 2009 within a year of his finding out his rights that had been violated, and the new evidence.

Gibbs contend that he has proven that his trial "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 80 L Ed 2d 674, 692 (1984). Gibbs was denied two defenses that could have changed the outcome of the trial. Gibbs contends that had it not been for the trial counsel's ineffectiveness he would have been those two defenses, and he would not have been here now. This is clearly a case of mistaken identity. This was a court appointed attorney.

Also the appeal attorney was ineffective for not bring to light those two defenses since the State is claiming that the evidence was or information existed prior to trial. Yet she make no reference to either of the two defense that are before the court now. Had these defenses been pointed out to Gibbs even at this stage Gibbs would have used it in his first PCR application.

But Gibbs is making no such claim of ineffectiveness against his first PCR court appointed attorney. Gibbs is stating that her conduct fell below the due process of law right reasonable standard. And had it not been for her poor conduct Gibbs would have use those two defenses then during his first PCR if she would have amended it. Because the State claim that the information was all in place. Gibbs contends that he should not be barred by an statute of limitations, because he is only now find out his right and defenses. She was a court appointed attorney. Gibbs did not knowingly, voluntarily and intelligently give up or waive his right. But it was because of PCR counsel's violation of his due process right. Therefore Applicant's

Application for Post-Conviction relief must not be summarily dismissed because there ARE genuine issue of material fact and Gibbs is entitled to Judgment as matter of Law.

III

In response to respondent's denial of Applicant's Allegations, Statement or claims contained within the Application, and affidavit Gibbs contends that the State can not simply deny the Allegation. They need to produce written statements or declarations by by an attorney of record... See Rule 11(C) SCRPC

IV

Please Amend the PCR Application to include the following. The PCR counsel that was appointed by the court did by, her misconduct violate Gibbs' due process of Law right, by not amending his first PCR Application to include the current issues, She also violated Gibbs due process of Law right by not Appealing his first PCR Judgement as he ask her to do. She did not answer this letter directly (see Exhibit A and Also see Exhibit B) The letter she wrote did not tell if she was filing the appeal or if she wanted him to. However Gibbs had no reason to believe she did not file the appeal. Her Actions fell below a reasonable standard of due process of Law Rights. This was required by Law (see) order denying Post-conviction relief 2007-CP-22-1332 P. 12 which states "Pursuant to Rule 71.1(g) SCRPC, PCR counsel must file a notice of appeal on Applicant's behalf if Applicant wishes to pursue appellate review. And Gibbs is stating for the record that he asked her to appeal that order denying Post-conviction relief. And but for counsel's misconduct Gibbs would have filed an appeal.

Also the court appointed Attorney during the appeal was ineffective for not RAISING these issues that are now before the court. She had some information that the State is trying now say was there all the time. Gibbs contends that had it not been for her ineffectiveness he would have brought these issues before now to the courts attention.

V

Gibbs being a prose inmate states that because he has been solicited by inmates for money he has not been able to get effective legal assistance here at Broad River Correction Inst. So he has been denied total legal assistance from trained legal inmates assistance. Had it not been for the inmates'

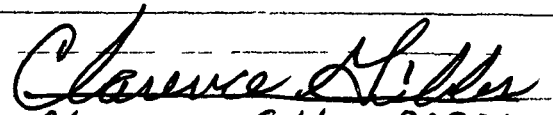
demand for money which Gibbs did not have he would
 had been able to bring his issue to the court's attention
 sooner. Pleadings filed by individuals representing
 themselves are held to a less stringent standard than
 those prepared by attorneys. BOAG V. MacDOUGALL 454
 U.S. 364, 70 LEd 2d 551, 102 S.Ct 700 (1982) and MAINES V
KERNER 404 U.S. 519, 30 LEd 2d 652, 92 S.Ct 594 (1972)

VI

Therefore, having made his Reply to Respondents' motion
 for summary dismissal, and given the reasons above, and
 Gibbs' Affidavit in support Applicant's Reply to Respondents'
 motion for summary dismissal and applicant's notice for
 motion and motion to Amend his PCR Application Applicant
 request that his Application not be summarily dismissed

Respectfully Submitted

Columbia, South Carolina
 May 18, 2009


 CLARENCE Gibbs 289369
 BRCE m4 272
 4460 Broad River Rd
 Columbia, SC 29210
 Pro Se

STATE of South Carolina	}	IN The Court of Common Pleas
County of Georgetown		Fifteenth Judicial Circuit
		CA/NO 2009 - CP - 220546
CLARENCE Gibbs 289369	}	CLARENCE Gibbs' Affidavit in support of
Applicant,		Applicant's Reply Respondent's motion for Summary
V		Dismissal and Applicant's notice for motion
State of South Carolina	}	and motion to Amend his PCR Application
Respondent.		

Personally Appeared before me, Clarence Gibbs, 289369, who being duly sworn depose and state:

- (1). I am currently being housed here at Broad River Correction Institution Mt 272 4460 Broad River Rd, Columbia, SC 29210
- (2). I have personal knowledge of facts in this Affidavit and I am competent to swear to the Matter herein and do so of my own free will
- (3). The Court appointed me An Attorney, Mr. J. ERIC Fox for trial
- (4). During my original trial, I was not aware that the Robber had A Limp
- (5) Mr Fox did not use the defense of the true Robber had a Limp and I did not have a Limp, which would have created a reasonable doubt in Jurors mind.
- (6) Nor did Mr. Fox show me the videotape of the crime At any time before, during or after the trial.
- (7) Mr. Fox did not ask me to try on the coat which was not my coat, which also would have place reasonable doubt in the jurors mind And was a defense.
- (8) Court also appointed me an attorney. Ms. Vanessa A. Richardson as attorney in my First PCR.
- (9) During the process Ms. Richardson after seeing the tape and reading the trial transcript never Amended my PCR Application
- (10) Even though she told me at the Pretrial hearing that person in the tape had a Limp, She did Amend the Application
- (12) The fact that the coat was not my coat was in the transcript too, but she did not bring this fact up or ask why I did try it on as a defense.
- (13) After the hearing I asked Ms Richardson to put in the Appeal from the PCR.
- (14) I wrote at least two letter Asking About my appeal See Exhibits A, And B
- (15) She also never mentioned either of these as a defense that I have now before the court. Yet the State is saying All the evidence was there

- (16) I've been unable to get trained legal assistance, because inmate law clerk and other inmates are charging money to get help. SCDC is aware of this illegal practice yet have done nothing which has totally denied me of trained legal assistance
- (17) Had either or any of these Court Appointed Attorneys given me these defenses, I would have use them.

Forster Affiant sayeth not

Clarence Gibbs
Clarence Gibbs

Pro se

Sworn before me this
18th day of May 2009
Quail L. White
Notary for South Carolina
My Commission expires

My Commission Expires
August 25, 2015

(3 original copies)



Attorney At Law

Mr. James Bell

P.O. Box 2590

Georgetown, S.C. 29442

7/14/08 609

Exhibit A
Clarence Gibbs

Dear Mr. Bell,

I am writing you to find out what happen
in court, has the Judge made a decision in Clarence's
case. Has the Judge given a final order yet. If
not could you please find out how much longer will it
be before that order comes down. Is there anything
I can do here. If they denied Clarence, will
you be appealing for him or will he need to do
that himself. (CA/NO 2007-CP2201332)

Yours Truly

Sworn before me this

15 day of July 2008

x Eugene Bell

Notary Public South Carolina

My Commission Expires 2 My Commission Expires April 4, 2010

x Clarence Gibbs

Clarence Gibbs 289369

BRCI MA 212

4440 Broad River Rd

Columbia, SC 29210

Exhibit B

Katherine H. Hudgins
 Appellate Defender
 SC Commission of Indigent Defense
 Division of Appellate Defense
 Post Office Box 11589
 Columbia SC 29211-1589

Clarence Gibbs

RE Gibbs V State 2007-CP-22-1332

Dear Ms Hudgins

I Am writing you to find out what is the status of my Appeal of my PCR evidentiary hearing that was filed July 18, 2008? Have you submitted A Brief on my behalf.

The following is what Gibbs feels is the bases of ~~WR~~ for new trial But because of ineffective of his trial Attorney this may have had a chance in Gibbs' trial had these thing been brought out during the first trial.

(1) Gibbs was never shown the vido of the crime, so he never knew about the fact that the robber had A Limp This information, about the limp, was given to him by his PCR Attorney When she saw Gibbs she asked to walk for her And Gibbs has no limp She went on to tell him why she had him to walk. She point out to Gibbs the man in the vido had a limp. So why did the trial point this fact out during the trial. And have Gibbs to walk

(2) Then the only physical evidence they had was and is a coat of which the witnesses could not agree on the color of the coat. But more important is the fact that the coat that Police took from Gibbs home was not his coat. So why ~~didn't~~ his Attorney (trial) have Gibbs to try it on during the trial to compare how it fit him him (Gibbs) with how the coat fit the robber on the video Because the coat is A woman's coat. And we know that women's clothing dose not fit men the same way, Remembe OJ Trial if the coat dose not fit you must Acquit. Gibbs was deprived this defense of how the coat fit

Please let Gibbs Know what feels about the Above

Sworn before me this
30 day of Jan 2009
[Signature]
 Notary for South Carolina
 My Commission expires Oct 1, 2018

cc VANESA A Richardson

Your truly
 X Clarence Gibbs
 CLARENCE GIBBS #289369
 ORCI MA 272
 4440 Broad River Rd
 Columbia, SC 29210

State of South Carolina
County of Georgetown

IN The Court of Common Pleas

Clarence Gibbs # 289369,
Applicant,

2009-CP-22-0546

V.

Certificate of Service
By MAIL

State of South Carolina,
Respondent.

- (1). I Am Clarence Gibbs, the Applicant in the above-captioned Action
- (2) Regular Communication by mail exist 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 Applicant's Reply to Respondent's motion for Summary dismissal And Applicant's Notice for Motion And motion to Amend his PCR Application,
- (4) And Gibbs' Affidavit in support of same.

Dated this 18TH day of May 2009

Christina J. Catoe
Assistant Attorney General
P.O. Box 11549
Columbia, SC, 29211

Sworn before me this
18TH day of May, 2009

Notary for South Carolina
My Commission expires _____

My Commission Expires
August 25, 2015

(4 original copies)

Clarence Gibbs 289369
BACE MA 272
4460 Broad River Rd
Columbia, SC. 29210
Pro Se

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	FIFTEENTH JUDICIAL CIRCUIT
	)	
	)	2009-CP-22-0546
Clarence Gibbs, # 289369,	)	
	)	
Applicant,	)	
	)	
v	)	AMENDED RETURN
	)	(Hearing for <u>Austin v State</u> Claim)
	)	
State of South Carolina,	)	
	)	
Respondent	)	
_____	)	

The Respondent, hereby amending its original Return dated May 9, 2009, would respectfully show this Court

The Applicant submitted a Reply to the State’s original Return and Motion to Dismiss on May 18, 2009 In this Reply, he appears to make a claim for a belated appeal from his June 2008 PCR hearing, pursuant to Austin v State, 305 S C 453, 409 S E 2d 395 (1991) The Applicant claims that, after his PCR was denied, he wanted to appeal and asked his attorney to appeal, but that an appeal was never filed Accordingly, the State believes that the Applicant is entitled to a hearing on his Austin claim

WHEREFORE, having made its Amended Return, the State hereby requests that counsel be appointed so that a hearing can be held on the belated PCR appeal claim The State maintains that all other claims are barred as successive and/or by the statute of limitations

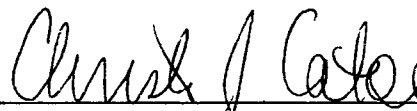
Respectfully submitted,

HENRY D McMASTER
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

SALLEY W ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J CATOE
Assistant Attorney General

A handwritten signature in cursive script, appearing to read "Christina J. Catoe", written over a horizontal line.

ATTORNEYS FOR RESPONDENT

Office of the Attorney General

P O Box 11549

Columbia, SC 29211

(803) 734-3737

May 29, 2009

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN) CASE NO 09-CP-22-546

CLARENCE GIBBS,
APPLICANT,
-VS-
STATE OF SOUTH CAROLINA,
RESPONDENT

)
)
)
)
)
)
)
)
)

TRANSCRIPT OF RECORD

WEDNESDAY
JULY 29, 2009
CONWAY, S C

B E F O R E

HONORABLE LARRY B HYMAN, JUDGE

A P P E A R A N C E S

PAUL ARCHER, ESQUIRE
ATTORNEY FOR THE APPLICANT

AND

CHRISTINA CATOE, ESQUIRE
ASSISTANT ATTORNEY GENERAL
ATTORNEY FOR THE RESPONDENT

LINDA W MCCALL
OFFICIAL REPORTER

INDEXWEDNESDAY, JULY 29, 2009POST-CONVICTION RELIEF HEARING(APPLICANT'S WITNESS) CLARENCE GIBBS

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(APPLICANT'S WITNESS) VANESSA ANN RICHARDSON

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1

EXHIBITS

2

NONE

MR GIBBS - DIRECT EXAMINATION BY MR ARCHER

4

WEDNESDAY, JULY 29, 2009

POST-CONVICTION RELIEF HEARING

THE COURT Thank you Thank you Thank you

Good morning, everybody Please be seated

What do we have here this morning, three?

MS CATOE Your Honor - - yes, Your Honor I believe
we were going to take up Clarence Gibbs first

THE COURT Okay Mr Gibbs

MS CATOE Mr Archer was here two seconds ago, and he
must have just stepped out but he will be right back

THE COURT This is a belated appeal?

MS CATOE Yes, Your Honor, a belated PCR appeal

THE COURT A belated PCR appeal Okay

MS CATOE Yes, Your Honor

(Applicant takes the witness stand)

CLARENCE GIBBS, BEING DULY SWORN,
TESTIFIES AS FOLLOWS

CLERK OF COURT State your name for the Court, please

MR GIBBS Clarence Gibbs

DIRECT EXAMINATION BY MR ARCHER

Q Good morning, Mr Gibbs

A Good morning

MR ARCHER Your Honor, I'd like to just give you a
little background on this case

The, ah, - - -

MR GIBBS - DIRECT EXAMINATION BY MR ARCHER

5

1 THE COURT Oh, I'm sorry Okay

2 MR ARCHER The background is that the applicant had a
3 trial He was found guilty He appealed the verdict to the
4 Court of Appeals, and then he had a PCR which was denied

5 THE COURT Okay

6 MR ARCHER He's now filed another PCR requesting
7 certain issues but he also wants a belated appeal on his PCR

8 THE COURT I - - I was looking at the documents here,
9 his application on it It would appear that he is addressing
10 ineffective assistance of counsel at the - - at the trial level
11 again, is he not?

12 MR ARCHER Well, I'm going to question him I'm going
13 to ask him to withdraw that

14 THE COURT Okay

15 MR ARCHER I think the only issue that he would have
16 would be a belated appeal

17 THE COURT I - - I think you're correct He's already
18 had an appeal that was denied by Judge Baxley

19 MR ARCHER Exactly, and that's the one we would like a
20 belated appeal but I'm going to ask him if he would withdraw

21 THE COURT All right

22 Q Sir, you've already had a PCR Is that correct?

23 A Yes, sir

24 Q And it was denied, correct?

25 A Correct

MR GIBBS - DIRECT EXAMINATION BY MR ARCHER

6

1 Q Okay

2 And when it was denied you asked your attorney to appeal
3 that PCR Is that correct?

4 A Correct

5 Q And she did not appeal it

6 A No, she didn't

7 Q Okay

8 In South Carolina law you can only have one PCR, um, and
9 you had that PCR This one would be successive on all the
10 issues except the appeal issue

11 In other words, I'm going to ask the Court to grant you a
12 belated appeal because she should have appealed it but you can't
13 raise any other issues in this PCR application because you've
14 already had a PCR

15 You understand that?

16 A Yes, sir

17 Q Would you like to withdraw all those other issues?

18 A I - - I wasn't aware of all of this

19 THE COURT Let me explain it to you, Mr Gibbs

20 You had a trial and you were convicted

21 You understand that?

22 MR GIBBS Yes, sir

23 THE COURT Okay

24 And you had a PCR, Post-Conviction Relief Application,
25 where you alleged ineffective assistance of counsel It was

MR GIBBS - DIRECT EXAMINATION BY MR ARCHER

7

1 heard by Judge Baxley, and that PCR alleged the ineffective
2 assistance of your trial attorney at your trial

3 You understand that?

4 MR GIBBS Yes

5 THE COURT Okay

6 Well, you're limited to one PCR That issue has already
7 heard by Judge Baxley I cannot revisit that The only thing
8 that would be properly before me would be the issue of whether
9 or not your - - your PCR attorney improperly failed to appeal
10 Judge Baxley's order

11 You understand that?

12 MR GIBBS Yes, sir

13 THE COURT Now, if I were to grant you an appeal and
14 the Supreme Court were to reverse Judge Baxley, you would still
15 be back in court but at this hearing the only issue as I see it
16 would be whether or not your attorney did or did not properly
17 file you - - file an appeal for you

18 You understand that?

19 MR GIBBS Yes, sir

20 THE COURT Okay

21 We can't go back into what Judge Baxley had before him
22 That's already been ruled upon

23 The Supreme Court, if I granted an appeal, or the Court of
24 Appeals could review what Judge Baxley did I can't review what
25 Judge Baxley did I can only determine whether you get an

MR GIBBS - DIRECT EXAMINATION BY MR ARCHER

8

1 appeal from Judge Baxley

2 You understand that?

3 MR GIBBS Yes, sir

4 THE COURT Okay

5 Now do you understand what we're talking about?

6 MR GIBBS Yes, sir

7 THE COURT Okay

8 MS CATOE And just for the record, Your Honor, the
9 State does have a pending motion to dismiss on the grounds of
10 statute of limitations and successiveness

11 THE COURT All right All right

12 Q So, what I'm asking you is that you do have a valid claim
13 for what we call a belated appeal - -

14 A Right

15 Q - - on your first PCR

16 A Right

17 Q And I'm asking you at this time since the judge won't hear
18 it or can't hear it since it's successive, would you like to
19 withdraw that part of the PCR application to all these other
20 issues except the fact that you would like the belated appeal?

21 Would you like to withdraw these other allegations?

22 A Yes, I do

23 Q Okay

24 And nobody forced you to do this? You're doing this
25 voluntarily?

MR GIBBS - DIRECT EXAMINATION BY MR ARCHER

9

1 A Yes, sir

2 Q All right

3 Let's just talk about the appeal, your belated appeal

4 After your PCR was denied did you ask your attorney - - who
5 was your attorney anyway?

6 A Vanessa

7 Q All right

8 Did you ask Vanessa to file an appeal on Judge Baxley's
9 order of denying your PCR?

10 A Yes, I did

11 Q And to your knowledge did she file that appeal?

12 A No, she didn't

13 Q All right

14 MR ARCHER I have no other questions

15 THE COURT All right, Ms Catoe

16 MS CATOE I have no questions, Your Honor

17 THE COURT All right Step down

18 MR ARCHER I'd like to just call Vanessa

19 THE COURT Okay

20 You can step down, Mr Gibbs

21 (The witness leaves the witness stand

22 Next witness takes the witness stand)

23 THE COURT Is it Vanessa Ann Richardson?

24 MS RICHARDSON Yes, Your Honor

25 THE COURT All right, Ms Richardson, I don't think

MS RICHARDSON - DIRECT EXAMINATION BY MR ARCHER

10

1 we've met

2 Good to see you

3 MS RICHARDSON Thank you

4 VANESSA ANN RICHARDSON, BEING DULY SWORN,

5 TESTIFIES AS FOLLOWS

6 CLERK OF COURT State your name for the record

7 MS RICHARDSON Vanessa Ann Richardson

8 DIRECT EXAMINATION BY MR ARCHER

9 Q How are you today, Vanessa?

10 A I'm fine, thanks

11 Q I haven't seen you in a while

12 A I know

13 Q Vanessa, let me ask you a couple of quick questions

14 On page 44 of the PCR transcript Judge Baxley mentioned
15 that the applicant would have thirty days to appeal his order of
16 denial, and as his attorney did you file a Notice of Appeal on
17 his behalf?

18 A No, I did not

19 Q And what were the reasons that you did not file the appeal?

20 A Um, as I had represented to the Attorney General on the day
21 of the hearing, um, I had never done a PCR hearing before, and
22 I did not understand an appeal process

23 When my client did ask me to file an appeal, I had informed
24 him my office does not handle the appeals and that I would
25 forward his file on to the Appellate Division which I did but I

1 did not know that I had to file the Notice of Appeal from my
2 office

3 Q All right

4 So, you never filed a Notice of Appeal and sent it to
5 Indigent - - I assume you weren't retained, correct? He was
6 indigent

7 A Right

8 Actually, my boss was appointed as his court appointed
9 attorney but I took over the case on his behalf

10 Q Okay

11 So, the process is is that after it was denied you prepare
12 a Notice of Appeal You attach a copy of the Order of Denial
13 You serve it on the Clerk of Court You serve it on the
14 Attorney General You serve it on the applicant, and you serve
15 it on the Supreme Court

16 Did you do any of those things?

17 A No, I did not

18 Q All right Thank you

19 THE COURT Ms Catoe

20 CROSS EXAMINATION BY MS CATOE

21 Q Um, just for the record, um, Ms Richardson, um, the order
22 signed by Judge Baxley, that was signed on July 8, 2008 Is
23 that right?

24 A Yes, it was and my office had received the clocked copy on
25 July 22nd

RULING OF THE COURT

12

1 Q All right, and had Mr Gibbs already asked you to file an
2 appeal?

3 A Yes, he did

4 Q Okay No further questions

5 Thank you

6 THE COURT Thank you You may step down, Ms
7 Richardson

8 (The witness leaves the witness stand)

9 THE COURT Is that your showing, Mr Archer?

10 MR ARCHER Yes, sir

11 I'm just asking the Court to grant the belated appeal which
12 I will do for the applicant I prepare a Notice of Appeal I
13 attach your order and I'll serve it on the proper parties

14 THE COURT Let's hear from Ms Catoe

15 MS CATOE I think the evidence speaks for itself, Your
16 Honor

17 RULING OF THE COURT

18 THE COURT All right I'm going to grant a belated
19 appeal

20 MR ARCHER Thank you, sir

21 (The Court adjourns the hearing of this proceeding)

22 - - - END OF TRANSCRIPT - - -

CERTIFICATE OF COURT REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

I, the undersigned Linda W McCall, Official Court Reporter for South Carolina Court Administration, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the within referenced proceeding relative to the captioned cases, relative to appeal, in the Court of Common Pleas, Georgetown County, South Carolina

I do further certify that I am neither of kin, counsel, nor interest to any party hereto

November 17, 2009

Linda W. McCall

Linda W McCall
Official Reporter

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GEORGETOWN	)	
	)	
	)	2009-CP-22-0546
Clarence Gibbs, # 289369,	)	
	)	
Applicant,	)	
	)	
v	)	ORDER GRANTING BELATED PCR APPEAL
	)	PURSUANT TO <i>AUSTIN V STATE</i>
	)	
State of South Carolina,	)	
	)	
Respondent	)	

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.

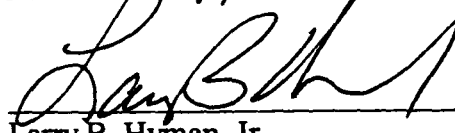
The Applicant testified that he had a PCR hearing in June of 2008 before Judge Baxley. He was represented by Vanessa Richardson at the hearing. After his PCR was denied, he requested that Ms. Richardson file an appeal. However, he later learned that no appeal had been filed. Ms. Richardson corroborated 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

STATE OF SOUTH CAROLINA

COUNTY OF GEORGETOWN

IN THE COURT OF COMMON PLEAS

2009-CP-22-0546

Clarence Gibbs,

Applicant,

v

State of South Carolina,

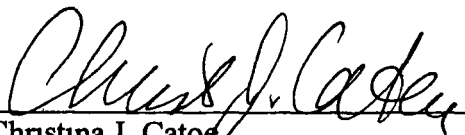
Respondent

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 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
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