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S.C. Supreme Court

Volume II of II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Beaufort County

Perry M. Buckner, Circuit Court Judge

RICHARD SIMMONS,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-001253

APPENDIX

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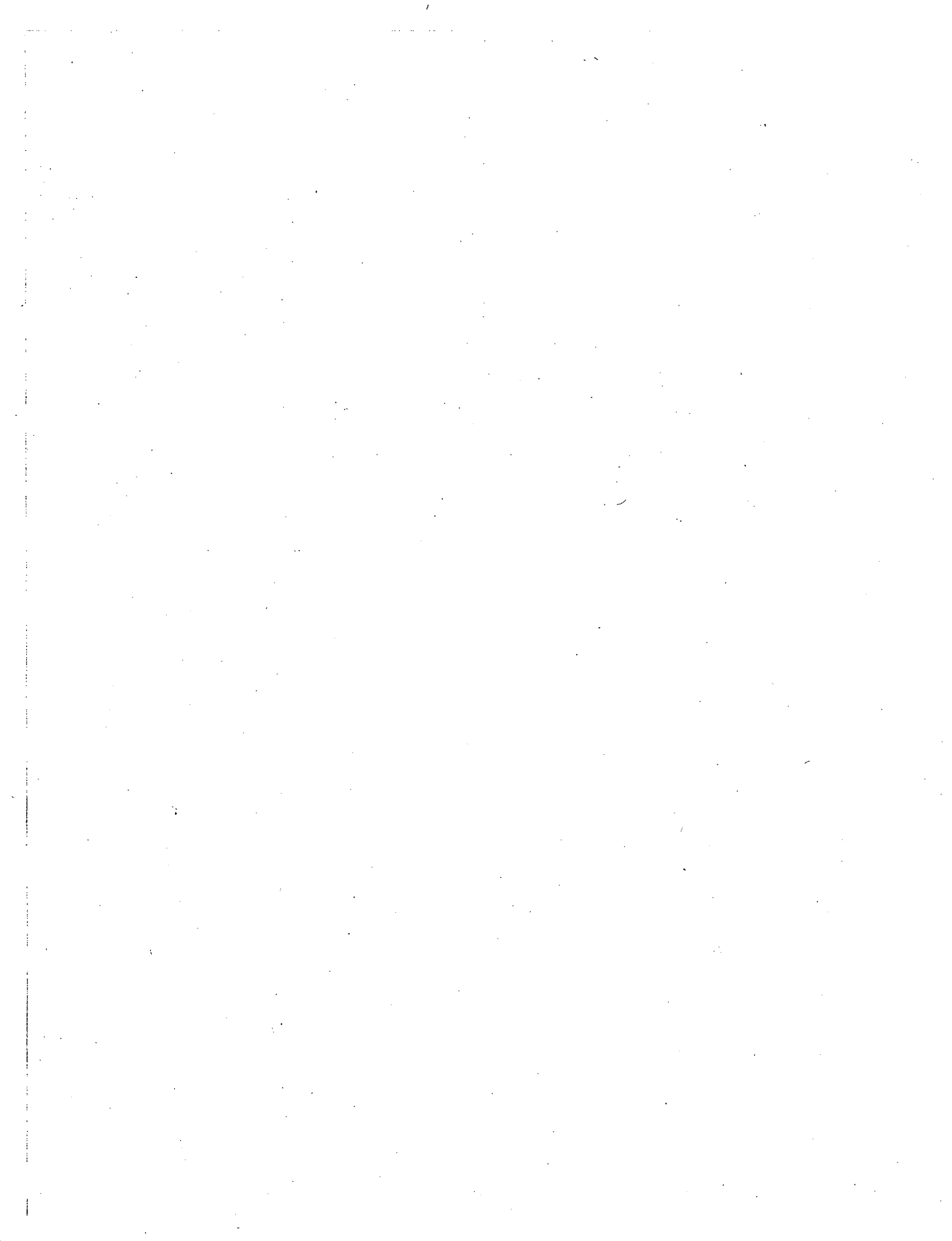
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1 we knew that this guy was a big-time boozier. So
2 therefore, you know, put all that together; and the
3 fact that he was depressed; his mother had just died;
4 he was having to move out of his house; and his sister
5 and he were having to sell the house because he was
6 going to have to move. He lived in the house with his
7 mother all of his life, so.

8 MR. JOHNSON: I have no other questions, your
9 Honor.

10 THE COURT: Very well. Cross-examination.

11 MS. WILSON: Thank you, your Honor.

12 HON. GENE T. HOOD

13 CROSS-EXAMINATION, MS. WILSON:

14 Q. Mr. Hood, how long have you been practicing law?

15 A. Forty years.

16 Q. And you were appointed to represent Mr. Simmons?

17 A. Correct.

18 Q. How many times do you recall meeting with him
19 before you went to trial?

20 A. Well, Richard -- I met with my clients at least
21 twice a month. I spend a lot of time with them. And
22 just to say hello, you know. If I got nothing to say,
23 I just wander by to see how they're going, basically,
24 yeah.

25 Q. And did you file Brady or Rule 5 motions --

1 A. Yes.

2 Q. -- to get discovery from the State?

3 A. Yes.

4 Q. And did you review your materials with Mr.
5 Simmons?

6 A. He and I talked about it, yes.

7 Q. And did you discuss the elements of the charges
8 against Mr. Simmons or what the State was required to
9 prove?

10 COURT REPORTER: I'm sorry. Your answer?

11 A. Yes. I'm sorry.

12 Q. Did you discuss with him or did he discuss with
13 you his version of the facts?

14 A. Well, we talked about the case an awful lot. I
15 mean, you know. And Richard -- the biggest problem we
16 had, again, was the statements involving the undercover
17 SLED agent. And -- and we spent a lot of time talking
18 about that and about what was happening in his life
19 during that period of time. There was, you know, a
20 variety of things that we discussed. But yes, we
21 discussed it.

22 Q. Do you recall trying to suppress at trial the
23 statements from the undercover SLED agent?

24 A. Yes, we did. Matter of fact, we had a mistrial
25 the first time around. And I've forgotten why there

1 was a mistrial. I don't remember.

2 Q. And did you discuss possible defenses with Mr.
3 Simmons.

4 A. Yes.

5 Q. And what did you decide you were going to present
6 at trial? What was your strategy in Mr. Simmons' case?

7 A. Well, number one, there was -- there was no real
8 defense to the, you know, crime of murder, other than
9 it wasn't me. The -- the alibi, again, as I said,
10 didn't pan out. And even if it had panned out, again,
11 that was just one period of time that could be
12 excluded, you know, from -- from that particular period
13 of time. So. Yeah. It didn't mean he couldn't do it,
14 but it was certainly -- it just showed that the -- the
15 investigation was done in a very haphazard manner.

16 Q. And did you highlight to the jury what you thought
17 was the poor investigation?

18 A. Yes. Yes. The fingerprints, the hair. There was
19 no DNA. Nothing. They didn't do anything.

20 Q. And you testified that, even if it had panned out,
21 it just -- the time, Mr. Simmons' alibi just covered --
22 included a short period of the time during which the
23 crime could have been committed. At that time, did you
24 have anybody to present that could show even that time,
25 that small time, could have been excluded? Any witness

1 to --

2 A. I had nothing.

3 Q. But Mr. Simmons told you about his alibi. That's
4 correct?

5 A. Yes. Richard and I talked about everything.

6 Q. And did it give you other potential witnesses
7 outside of the witnesses he gave you for his alibi?

8 A. No. Huh-uh.

9 Q. And what kind of investigation did you do in the
10 case?

11 A. Well, that was basically it.

12 Q. Okay. You know, 13 years later, it's kind of hard
13 to get any information. And just like the crime scene,
14 they had turned the crime scene over to the family
15 prematurely as a result of thinking it was a suicide.
16 And they went in the house and cleaned it up. So,
17 finding anything any time later, and 13 years later,
18 was probably going to be impossible. So I had to rely
19 totally upon the memory of Richard, and also, the
20 police reports and the information that I could gather
21 from reading old newspaper clippings and anything else
22 that I could find that could help me.

23 Q. Did you think you had enough time to prepare for
24 trial?

25 A. Yes.

1 Q. When you were being questioned by Mr. Johnson, you
2 talked about how the police, a couple hours after the
3 incident, might have taken -- or a couple hours before
4 they thought the incident had taken place, they had
5 spoken to a Donald Mitchell? Do you recall that?

6 A. Correct.

7 Q. Do you recall bringing up Mr. Mitchell's testimony
8 during trial?

9 A. Yes.

10 Q. Okay. And do you also recall bringing before the
11 jury evidence about the defendant's statements to SLED
12 agents and how he was under the influence and may have
13 been, you know, taking some illegal substance and been
14 drinking, during trial? Did you bring that up?

15 A. Correct, the intoxication and the involuntariness
16 of the statement. Yes, we litigated that issue at
17 least twice, if I recall correctly, in two different
18 courts.

19 Q. Do you recall at trial talking to Officer Steven
20 Davis, and Officer Davis saying that he checked out the
21 alibi, and he couldn't find the people -- find any
22 people who said they were with the defendant? Do you
23 recall that?

24 A. I do. Yes.

25 MS. WILSON: That's all I have, your Honor.

1 A. See, Davis had actually left and had been -- was
2 living in, I want to say Washington, D.C. or Baltimore,
3 somewhere like that. And they had to bring him back
4 for that particular trial. But he was the one that
5 indicated that he had actually, you know, looked into
6 it, but couldn't find anybody to cooperate. But you
7 know, again, I say that, you know, there wasn't --
8 there wasn't any physical evidence that could tie
9 anybody to this crime that was actually examined so
10 that we could match and be able to say positively
11 that's his stuff, you know.

12 MS. WILSON: Okay. Thank you.

13 THE COURT: Re-direct.

14 MR. JOHNSON: Yes, your Honor.

15 HON. GENE T. HOOD

16 RE-DIRECT EXAMINATION, MR. JOHNSON:

17 Q. Mr. Hood, I want to call your attention that
18 during closing, you actually did give some information
19 to the jury about his alibi. You remember that?

20 A. I'm pretty sure.

21 THE COURT: Read him page and line number, Mr.
22 Johnson.

23 Q. I have it. I have it.

24 A. Just tell me what it is. I -- I know I discussed
25 it. I know I mentioned something about him being --

1 Q. Well, I can settle that for you. Your Honor, if I
2 could approach. I have the page and line.

3 THE COURT: You may.

4 Q. Page 426, Lines 6 through 14. Tell me after
5 you've had a chance to review.

6 THE COURT: I'm there with you, Counsel. I'm on
7 426, Lines 6 through 14. Is that correct?

8 MR. JOHNSON: That's correct, your Honor.

9 THE COURT: Give me a moment to read it, as well.

10 BY MR. JOHNSON:

11 A. Okay.

12 Q. Now, I have to refresh your memory. In that part
13 of your closing argument, you argued to the jury that
14 -- that also was aware of his alibi, he gave them the
15 information about where he was located, correct?

16 A. Correct.

17 Q. Now, you mentioned earlier, during cross-
18 examination that the time line was a problem; that it
19 didn't cover the whole time line. Is that correct?

20 A. That is correct, yes.

21 Q. But on Line 14, if you'll go to Line 14, will you
22 please read out what you said to the jury during that
23 time.

24 A. Line 14?

25 Q. Um-hmm.

1 A. She can tell you exactly where I was. She woke me
2 up.

3 Q. Right.

4 She can tell you exactly where I was. She
5 woke me up.

6 So there was evidence that he slept there.

7 A. Well, at least that was -- that was what I
8 gathered from what --

9 Q. From the evidence that you had.

10 A. -- from the police, what they had, yes.

11 Q. So there was some evidence to indicate that there
12 was time to show there. So there was some alibi
13 evidence available to you.

14 A. I agree. I mean, I'm not saying I disagree. I
15 agree, yes.

16 MR. JOHNSON: I understand. I was just trying to
17 clear up what the State had brought up. I have no
18 other questions, your Honor.

19 THE COURT: Re-cross limited to re-direct.

20 HON. GENE T. HOOD

21 RE-CROSS-EXAMINATION, MS. WILSON:

22 Q. Mr. Hood, with this alibi testimony that you're
23 saying is available, you did not prove an alibi
24 defense. Is that correct?

25 A. That is correct.

1 Q. And it was your decision to do that prior to
2 trial.

3 A. Yes, because I couldn't -- couldn't gather the
4 people necessary to be able to do that.

5 MS. WILSON: Nothing further, your Honor.

6 THE COURT: You may step down. Call your next
7 witness, Mr. Johnson.

8 MR. JOHNSON: Your Honor, we have no other further
9 witnesses. I would like to address the Court
10 concerning the issue at the appropriate time.

11 THE COURT: At the appropriate time. I'm going to
12 move to the respondent's case in this matter, Mr.
13 Johnson, but I'll give you a chance at the close to
14 address the Court.

15 You may call your first witness, Ms. Wilson.

16 MS. WILSON: No witnesses for the State, your
17 Honor.

18 THE COURT: Very well. Mr. Johnson, I'll be happy
19 to hear from you at this time.

20 ARGUMENT ON BEHALF OF

21 APPLICANT, MR. JOHNSON:

22 MR. JOHNSON: Your Honor, at issue was the alibi
23 defense. It was actually brought up, your Honor, in
24 the *Anderson* brief that was filed in this case.

25 THE COURT: I've looked at it. It's in the

1 packet.

2 MR. JOHNSON: And basically, your Honor, that's
3 our whole synopsis of the case. I have two cases that
4 I'd like to present to the Court. The State already
5 has copies. Make sure I've got the right file here.
6 It is *Ford v. State* and *Riddle v. State* that's
7 mentioned in the Anderson brief.

8 THE COURT: Let the record reflect, Wanda, I'm
9 being handed 442 S.E.2nd 604 and 418 S.E.2nd 308. The
10 latter being *Riddle versus State of South Carolina*, and
11 the former being *Ford versus State of South Carolina*.

12 Yes, sir, Mr. Johnson.

13 MR. JOHNSON: And your Honor, I'm just going to
14 repeat what's in the argument of the Anderson brief.
15 It is our belief that it is well settled that counsel's
16 rejection of a alibi charge when the defendant claims
17 that he was at another place at the time of the
18 commission of the crime, criminal act, constitutes
19 deficiency, deficient representation under an objective
20 standard of reasonableness. It is our position that it
21 was not my client's position to have to prove his
22 alibi, but it was the State's position to disprove his
23 alibi.

24 He gave an alibi defense. Alibi defense was
25 actually placed into the record. There was testimony

1 by the investigating officer of the time. And it's
2 understood, your Honor, eleven-year period between a
3 case happening and coming to trial, one of the reasons
4 that speedy trials are requested, your Honor, because
5 proving things eleven years later is a lot harder than
6 proving it a month later. So, it's understandable that
7 some of these witnesses could not be found. And that's
8 not against the defense, your Honor, they was able to
9 find it. But there was evidence of an alibi defense
10 that either officers investigated it, didn't
11 investigate. Who knows.

12 But once that became part of the record, it's
13 incumbent upon the defense to make that part of his
14 defense. There was no other significant evidence
15 connecting my client to the crime before there was
16 evidence of DNA. That's why the Court ruled against
17 the plaintiff in that -- I mean, the petitioner in that
18 case, your Honor.

19 In this case, there's no DNA. There's no blood.
20 There's no fingerprints. There's a statement given by
21 my client to an undercover officer some ten years
22 later, at a time which everybody agreed that my client
23 was, basically, for short of a better word, was a crack
24 head. He was on drugs. He was homeless. He could
25 have been easily led, but that's a question for the

1 jury. But the jury was not given the opportunity to
2 question the alibi or even consider the alibi. As a
3 result of that, your Honor, I believe that was
4 ineffective assistance of counsel, and it's clear
5 evidence that that is reversible error. So therefore,
6 if not for the defense counsel not bringing that up as
7 or even requesting of the judge that, that the judge
8 did not have an opportunity to consider an alibi
9 defense. If he had objected to it, it could have been
10 brought up on appeal, but because he never raised an
11 objection to it, it couldn't even be brought up on
12 appeal. As a result, I believe the outcome of the
13 trial would have been different.

14 THE COURT: Thank you, Mr. Johnson. Ms. Wilson,
15 happy to hear from you in response.

16 ARGUMENT ON BEHALF OF

17 THE STATE, MS. WILSON:

18 MS. WILSON: Thank you, your Honor. May it please
19 the Court. Your Honor, for post-conviction relief, Mr.
20 Simmons has the burden of proving both deficiency and
21 prejudice. And in this case, it's the State's position
22 that Mr. Hood was not deficient, for not, I guess,
23 requesting an alibi jury charge in this case.
24 Specifically, it was Mr. Hood --

25 THE COURT: What's your position, Ms. Wilson, on

1 the fact that Mr. Hood's testimony was -- and I'll ask
2 Mr. -- I'll give Mr. Johnson a reply to this question,
3 too, after you argue it. Mr. Hood says that, even if
4 he could have produced a witness, which he couldn't,
5 that it was not a complete alibi defense.

6 Alibi, as a defense, in order to make a difference
7 in the outcome of a trial, which is the test under
8 *Strickland*, would have to be a complete alibi defense.
9 A partial alibi defense would not, in and of itself,
10 necessarily have produced a different outcome. Would
11 it, Counsel, or would it not?

12 MS. WILSON: It would not have produced a
13 different outcome, your Honor, because, for an alibi,
14 you have to prove that it's impossible, basically, for
15 the defendant to be there. And Mr. Hood gave testimony
16 that Mr. Simmons, the time that he said -- that he
17 stated he had an alibi, for which Mr. Hood said he
18 couldn't find anybody, it didn't pan out, was only for
19 -- excluded a small portion of when the crime could
20 have been committed.

21 And also, your Honor, he didn't have -- even if he
22 just presented the alibi witness and said, hey, he was
23 here, we have an officer who said that he investigated
24 the alibi during trial, and he said he didn't find
25 anything. And that was in Mr. -- that was in Mr.

1 Hood's cross-examination. Mr. Hood told us what his
2 strategy was at trial. He was just -- Mr. Simmons
3 didn't do it. He poked at the holes in, talking about
4 the poor investigation by the State. And he said that
5 he chose not to present the alibi defense to the jury.

6 And your Honor, with regard to case law presented
7 by Mr. Johnson, *Ford v. State* was about the rejection
8 of an alibi charge where the defendant claimed he was
9 in another place at another time. And in that case,
10 the State -- in that case, Mr. Ford, he actually
11 testified that he wasn't there; that he was in a
12 different place. And the State offered -- I mean, the
13 judge offered to charge alibi to the jury, and trial
14 counsel rejected it, which is a different situation
15 than what we have here.

16 Also, in *Riddle*, also presented by trial counsel,
17 the sole theory of the case was alibi, and we don't
18 have that here either, your Honor. So, in both of
19 those cases where counsel was found ineffective for
20 rejecting the court's offer of an alibi, there was
21 actually -- that was offered before the jury. It
22 wasn't just a comment here, a comment there. That was
23 the sole theory of the case.

24 So, it's the State's position that Mr. Hood was
25 not deficient. He spent ample time on the case. Said

1 he had time to prepare. He had frequent talks with Mr.
2 Simmons before trial. And he decided not to present
3 that evidence, because it didn't pan out when he looked
4 into it. So, we would just request that you deny the
5 application for post-conviction relief.

6 THE COURT: Very well. Mr. Johnson, you know the
7 Court has great respect for you, so, I'll ask you the
8 same question. And that is, Mr. Hood's testified,
9 number one, he could not produce the alibi witnesses.
10 I realize that Mr. Simmons told him Betty in the
11 laundromat just in part. Mr. Hood also tells you that,
12 even if he could have produced Betty, and even if she
13 could have testified that he woke her up, apparently,
14 there was a time line established by the pathologist,
15 which nobody bothered to elicit during this hearing as
16 to cause of death, although there was a theory to when,
17 according to Mr. Hood, and as a result of which, it
18 would be as Mr. Hood described it in his testimony an
19 incomplete alibi. So, even if there were a deficiency
20 in failing to present an alibi defense, as you allege
21 in your application, amended today to proceed on that
22 sole ground, if you don't have a complete alibi, how
23 can the outcome of the trial be different?

24 RESPONSE TO STATE ON BEHALF

25 OF APPLICANT, MR. JOHNSON:

1 MR. JOHNSON: Your Honor, I believe that it was a
2 complete alibi. I believe -- one of the reasons I
3 brought up Page 426 --

4 THE COURT: Which is exactly Betty and the
5 laundromat and waking me up.

6 MR. JOHNSON: Waking you up. That he would have
7 to be there all night to be woke up.

8 THE COURT: Now, Mr. Johnson, I understand that's
9 your interpretation, but somebody can get woke up at a
10 laundromat doesn't mean they were there all night. But
11 I understand that's your argument.

12 MR. JOHNSON: Well, and once again, a part of my
13 argument, your Honor, is that he brought up from the
14 officer on statement that also investigated or didn't
15 investigate it, really. The officer didn't investigate
16 the alibi. So.

17 THE COURT: I understand that very clearly, Mr.
18 Johnson.

19 MR. JOHNSON: So he did not even go and
20 investigate.

21 THE COURT: I won't ask Ms. Wilson to comment on
22 that, but I believe you, me, and Mr. Hood probably
23 agree on the a quality of the investigation in this
24 case.

25 MR. JOHNSON: So, at the time, ten years earlier,

1 any evidence that could have been used to either prove
2 or disprove was not done. My client --

3 THE COURT: But that doesn't go to ineffective
4 assistance of counsel and you know it. There were no
5 charges under your client's testimony for at least
6 seven years, Mr. Johnson, before there was any
7 opportunity to move for a speedy trial.

8 MR. JOHNSON: I totally agree, your Honor. But
9 during the actual trial itself, the alibi defense was
10 brought up -- was brought up by defense counsel, as
11 well as questioning the officer as to his
12 investigation, and alibi was brought up that my client
13 give statement to the alibi. The defense counsel even
14 brought it up in closing. It is our contention that
15 any evidence, however light, that, brought up during
16 trial, is subject to have a charge on it.

17 Now, we question about the totality of the
18 defense, your Honor, but that's a question for the
19 jury. It's our contention the jury did not even have
20 this opportunity to consider that, because they were
21 not given the charge. And that's our main contention,
22 your Honor. Not that --

23 THE COURT: I understand it very well.

24 MR. JOHNSON: Thank you, your Honor.

25 THE COURT:

1 THE COURT:

2 THE COURT: Thank you. Well argued, well
3 prepared, and I appreciate that from both sides. All
4 right, Mr. Johnson. Pull out your pen. Both sides
5 submit a proposed order to me. I, obviously, have some
6 reading to do on a transcript, too. I'll expect your
7 orders within ten days of today. Please submit them to
8 me at P.O.D. 470, Walterboro, 29488. That's P.O.
9 Drawer 470, Walterboro, 29488. Please copy opposing
10 counsel on any transmittal to the court.

11 Please include a self-addressed, stamped envelop,
12 with sufficient postage affixed thereto for a return of
13 your proposed order. Please send my law clerk, Camden
14 Hodge, a working copy of your proposed order so I have
15 one and he has one, also, so that we both have to share
16 off of one proposed order.

17 If you want to comply with the time deadline,
18 since Mr. Johnson is in Orangeburg, you can email me
19 your proposed order, and also email my law clerk. My
20 email address is pbucknerj@sccourts.org. My law
21 clerk's address is pbucknerlc@sccourts.org. However,
22 you will still have to United States mail me a self-
23 addressed, stamped envelop, with sufficient postage
24 affixed thereto for the return of your proposed order.

25 Obviously, any communication to the Court, whether

1 by email or by United States mail, you have to copy
2 opposing counsel. If you're going to use email, send
3 my law clerk a copy. If you're going to use United
4 States mail, send my law clerk a copy.

5 I will expect your proposed orders on my desk
6 within ten days of today's date. Any questions about
7 the proposed order procedure from counsel for
8 Applicant?

9 MR. JOHNSON: I have none, your Honor.

10 THE COURT: Any questions about the proposed order
11 procedure from counsel for the State of South Carolina?

12 MS. WILSON: No, your Honor.

13 THE COURT: This concludes the hearing. I'm
14 taking the packet with me, including the two cases that
15 you handed to me, Mr. Johnson, during the hearing. I
16 look forward to getting your proposed orders. Thank
17 you for being well prepared.

18 MR. JOHNSON: Thank you, your Honor.

19 THE COURT: Thank you.

HEARING ENDS 3:03 P.M.

CERTIFICATE OF REPORTER
APRIL 1, 2013 TRANSCRIPT OF
POST-CONVICTION RELIEF HEARING

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

I, Wanda H. Rowe, CVR-M, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing April 1, 2013 Transcript of Post-conviction Relief Hearing is a true, accurate, and complete record of the proceedings had in the case of State of South Carolina versus Richard Simmons, Beaufort County Court of General Sessions, Case Number 2011-GS-07-03968; that no exhibits were admitted.

I further certify that I am of neither kin, counsel, or interest to any party hereto.

The original of this transcript, nor any copy of same, is not certified, nor authorized for use by me, to be true, accurate, and complete without my original signature and stamp affixed hereto.

Witness my signature August 19, 2013.


WANDA H. ROWE, CVR-
OFFICIAL COURT REPORTER

ORIGINAL

4-1-13 RICHARD SIMMONS V STATE

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF BEAUFORT)
)
 Richard Simmons, #232156,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2011-CP-07-3808

13 MAY 15 PM 3:18
 BEAUFORT COUNTY S.C.
 CLERK OF COURT

ORDER OF DISMISSAL

#1
 PmB
 This matter comes before the Court by way of an application for post-conviction relief (PCR) dated September 7, 2011. The Respondent made its return on February 10, 2012. An evidentiary hearing on the matter was convened on April 1, 2013 at the Beaufort County Courthouse. The Applicant was present at the hearing and represented by Charlie J. Johnson, Jr., Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

Also present and testifying was Gene Hood, Esquire. The Court had before it the trial transcript, the Beaufort County Clerk of Court records, the Applicant's records from the South Carolina Department of Corrections, the Applicant's application, the Respondent's Return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Beaufort County Clerk of Court. The Applicant was indicted at the October 2004 term of the Beaufort County Grand Jury for murder (2004-GS-07-

1654) and burglary- first degree (2004-GS-07-1667). He was represented by Gene Hood, Esquire.

The Applicant proceeded to trial and was found guilty. On November 17, 2006, the Applicant was sentenced by the Honorable Roger M. Young, Sr. to confinement for life without parole.

A Notice of Appeal was filed on the Applicant's behalf at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals reviewed the entire record and affirmed the Applicant's convictions and sentences. State v. Simmons, Op. No. 2011-UP-279.

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ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. "Numerous deficiencies"
 - b. Failure to file "Massiah motion"
 - c. Failure to object to jury instruction on malice.

At the hearing, Applicant proceeding solely on the allegation of ineffective assistance of counsel for failure to investigate the Applicant's alibi and request an alibi jury instruction.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly.

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

Summary of the Testimony

The Applicant, Richard Simmons, was present and testified he was represented by Gene Hood, Esquire. He testified counsel met with him several times prior to trial and reviewed the facts of the case with him. The Applicant recalled reviewing discovery with his attorney and recalls discussing possible defenses with his attorney.

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The Applicant testified he was interviewed by police in 1995 who were investigating the murder. The Applicant testified he never admitted killing the victim and told police that at the time of the incident he was waiting at the Island Plaza to meet someone who was supposed to give him a job. The Applicant provided the police with the names of several people who saw him there that night and they were unable to find any alibi witnesses. The Applicant testified he told counsel about his alibi and where he was the night of the murder. He testified he gave counsel the names of his alibi witnesses, but did not give him the witnesses' phone numbers or contact information.

The Applicant testified further that in 2002 he met and befriended an undercover SLED agent. He testified the officer would give him money for alcohol and drugs. The Applicant testified ultimately the SLED officer arrested him for murder. Lastly, the Applicant testified counsel discussed with him his right to testify at trial and advised him not to testify at trial because of his prior convictions. The Applicant testified he agreed not to testify at trial.

Trial counsel, Gene Hood, was present and testified he has been practicing law for 40 years. Counsel testified he filed Brady and Rule 5 motions on the Applicant's behalf and met with the Applicant at least twice monthly before trial. Counsel testified he reviewed the

discovery material he received with the Applicant. Counsel testified further he discussed with the Applicant the elements of the charges and what the State was required to prove. Counsel testified he also discussed possible defenses with the Applicant.

Counsel testified he knew about and investigated the Applicant's alibi. He testified he was aware of the alibi, because police reports indicated the Applicant had given an alibi and the names of witnesses. Counsel testified since the murder occurred thirteen years prior, it was not much he could investigate. Counsel testified his investigation was based on the Applicant's memory, police reports, and old newspaper articles.

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Counsel testified further he was unable to find any witnesses to support the Applicant's alibi and even had he found the witnesses, their testimony, as he understood it, would not have been a complete alibi since it did not establish the Applicant's ^{Abducing} whereabouts the entire timeline created by the facts. Counsel testified the death was found to have occurred after 2:00 AM. He testified further he could not confirm the Applicant's alibi. Counsel testified that in hindsight, maybe he should have requested an alibi jury instruction, but he did not because prior to trial he only had an allegation and did not have any witness who could testify to support the alibi.

Counsel testified that other than the Applicant's statement, there was no physical evidence connecting the Applicant to the crime. He testified he highlighted to the jury, the police's poor investigation of both the Applicant's alibi and the crime. Counsel testified that at trial he also highlighted for the jury the Applicant's drug use during the time the statement was made to the undercover SLED officer. Lastly, counsel testified he made a motion to suppress the Applicant's statement which was denied.

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "the burden of proof is on the applicant to prove his allegation by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002).

For the Applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

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This Court finds the Applicant's testimony is not credible, while also finding trial counsel's testimony is credible. This Court further finds counsel has extensive experience in the practice of criminal law and has been practicing law for 40 years. This Court finds counsel met with the Applicant numerous times prior to trial and fully investigated the Applicant's case. This Court finds counsel filed Brady and Rule 5 motions on the Applicant's behalf and reviewed the received discovery with the Applicant. This Court finds counsel discussed with the Applicant the elements of the charges against him and what the State was required to prove. This Court finds counsel discussed the Applicant's version of the facts and possible defenses with the Applicant.

This Court finds that the Applicant failed to meet his burden of proving trial counsel should have investigated the Applicant's alibi witnesses and requested an alibi jury charge at trial. An alibi is "a defense that places the defendant at the relevant time of crime in a different place than the scene involved and so removed therefrom as to render it impossible for him to be the guilty party." United States v. Smoot, 172 F. App'x 496, 498 (4th Cir. 2006) (citing *Black's Law Dictionary* 71 (6th ed. 1990)). In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). The applicant's mere speculation as to what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Id.

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This Court finds counsel fully investigated the Applicant's alleged alibi witnesses. Counsel gave credible testimony that he tried to locate the Applicant's alibi witnesses, but he was unable to locate the witnesses due to the large time gap between the murder and the Applicant's arrest. This Court also finds credible, counsel's testimony that he may not have presented any alibi witnesses at trial as the alleged alibi as reported to him by the Applicant would not have been a complete alibi. This Court finds further that since the Applicant has failed to produce the alleged alibi witnesses at the evidentiary hearing, the Applicant has failed to carry his burden of proving prejudice resulted from counsel's performance.

This Court finds counsel was not ineffective for failing to request an alibi jury instruction. Counsel's testimony reflects he did not have any witnesses or testimony to support the request for an alibi charge. This Court also finds the issue of whether the "trial court erred by failing to instruct the jury on the law of alibi" and the entire trial record were reviewed during the

Applicant's appeal pursuant to Anders v. California, 386 U.S. 738 (1967). The Court of Appeals dismissed the Applicant's appeal after review of this issue. State v. Simmons, Op. No. 2011-UP-279.

In support of the granting of post-conviction relief, the Applicant argued Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992) and Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994) are analogous to the facts of this case. In Riddle, counsel was held ineffective for failing to request an alibi instruction where both the defendant and his wife testified at trial about the defendant's alibi. In Ford, counsel's performance was held deficient because counsel rejected the Court's offer of an alibi charge where the defendant and two witnesses testified at trial about the defendant's alibi. This Court finds both cases can be distinguished from the facts of this case. In the present case, trial counsel was unable to locate any alibi witnesses to support the Applicant's testimony and testified that he had nothing to support an argument for an alibi jury instruction. Also, unlike in Ford and Riddle, the Applicant did not take the stand to testify or present any witnesses who would support his alleged alibi at trial. This Court finds the Court's rulings in Riddle and Ford are not applicable to the facts of this case.

Accordingly, this Court finds the Applicant failed to prove the first prong of the Strickland test- that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial counsel committed either errors or omissions in their representation of the Applicant. This Court also finds the Applicant has failed to prove the second prong of Strickland- that he was prejudiced by trial counsel's performance. This Court concludes the Applicant has not met his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application at the hearing in this matter and not specifically addressed in this Order, this Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds the Applicant waived such allegations and failed to meet his burden of proof regarding them. Therefore they are hereby denied and dismissed.

CONCLUSION

Based on all the forgoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

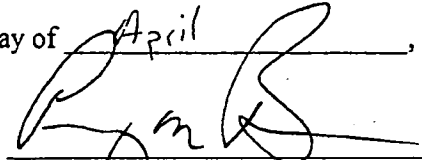
#8
PMB
This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

[Signature on the following page.]

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice;
and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 30 day of April, 20 13



Perry M. Buckner
Presiding Judge
14th Judicial Circuit

Walters

_____, South Carolina.

WITNESSES

LT BOB BROMAGE

DOCKET NO.

2004-GS-07-01654

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III., Solicitor

COURT OF GENERAL SESSIONS

10/28/2004

TERM

THE STATE
VS.

SIMMONS, RICHARD JR

G590453

ARREST WARRANT NUMBER

09/27/2004

ACTION OF GRAND JURY

True Bill

Patricia Culbertson

Foreperson of Grand Jury
Date JAN 14 2005

VERDICT

Guilty

Bill Roper

11/17/05

Foreperson of Petit Jury
Date:

Indictment for

MURDER

SC Code : 16-3-0010,20
CDR Code : 0116
Class:

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2004-GS-07-01654

At a Court of General Sessions, convened on 10/28/2004 the
Grand Jurors of BEAUFORT COUNTY present upon their oath:

MURDER
=====
16-3-0010,20

Between 01-13-1995 and 01-15-1995, Richard Simmons Jr unlawfully entered the residence of Charles Godley ([REDACTED] St. Helena, South Carolina/Beaufort County), while Godley was sleeping. While searching for property to steal, the Defendant came upon the Godley in his bedroom. The Defendant picked up a hammer from the residence and delivered one or more blows to Godley with that hammer, causing blunt head trauma (skull fractures and subdural hematoma), then death. The Defendant committed this act with malice aforethought.

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

Randolph M. ...
SOLICITOR

WITNESSES

LT BOB BROMAGE

DOCKET NO.

2004-GS-07-01667

THE STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

RANDOLPH MURDAUGH III, Solicitor

COURT OF GENERAL SESSIONS

10/28/2004

TERM

THE STATE
VS.

SIMMONS, RICHARD JR

G590454

ARREST WARRANT NUMBER

09/27/2004

ACTION OF GRAND JURY

True Bill

Patricia C. Williams

Foreperson of Grand Jury

Date: JAN 14 2005

VERDICT

Guilty

Patricia C. Williams

11/17/06

Foreperson of Petit Jury

Date:

Indictment for

BURGLARY 1ST DEGREE

SC Code : 16-11-0311

CDR Code : 0079

Class:

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

INDICTMENT
2004-GS-07-01667

At a Court of General Sessions, convened on 10/28/2004 the
Grand Jurors of BEAUFORT COUNTY present upon their oath:

BURGLARY 1ST DEGREE
=====

16-11-0311

Between 01-13-1995 and 01-15-1995, Richard Simmons did unlawfully enter the residence of Charles Godley located at [REDACTED] St. Helena, South Carolina, Beaufort County, while Godley was sleeping. The Defendant bludgeoned Godley with a hammer he found in the residence, causing Godley's death, as result. The Defendant went on to steal property including Godley's wallet, which contained United States currency, believed less than 1000.00 cash.

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

Randolph M. ...
SOLICITOR