

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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FEB 27 2026

**APPEAL FORM ANDERSON COUNTY
COURT OF COMMON PLEAS**

S.C. SUPREME COURT

R. Lawton McIntosh, Circuit Court Judge

Case No: 2025-002377

**Anthony Marlar,
Appellan**

V.

**State Of South Carolina
Respondent**

Exhibit A

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FORM ANDERSON COUNTY
COURT OF COMMON PLEAS**

R. Lawton McIntosh, Circuit Court Judge

Case No: 2025-002377

**Anthony Marlar,
Appellan**

V.

**State Of South Carolina
Respondent**

Exhibit B

2025 FEB 23 10:00 AM

FEB 23 2025

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STATE OF SOUTH CAROLINA

In the Court of Common Pleas

County of Anderson

TRUE COPY

Anthony Leroy Marlar #242361

Full name and prison number, if any, of applicant.

AUG 18 2000

APPLICATION FOR

v.

Lucy J. DeShields
CLERK OF COURT

POST-CONVICTION RELIEF

State of South Carolina,

Name of Respondent

Charles M. Condon, Atty. Gen.

2000-CP-04-2026

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. Applicants 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 Perry
2. Name and location of Court which imposed sentence Anderson County
Court
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) Burglary 1st. Degree #96-GS-04-2027
 - (b) Criminal Sexual Conduct 1st. Degree #96-GS-04-2026
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) July 10, 1997, 30yrs. Burglary, 12yrs. consecutive CSC
 - (b) _____
 - (c) _____

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5. Check whether a finding of guilty was made
(a) after a plea of guilty N/A
(b) after a plea of not guilty YES
(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. Appellate Court
ii. _____
iii. _____
(b) the result in each such Court to which you appealed:
i. Affirmed Conviction
ii. _____
iii. _____
(c) the date of each such result:
i. May 15, 2000
ii. _____
iii. _____
(d) if known, citations of any written opinion or orders entered pursuant to such results:
i. Unknown
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) See attached 14 pages
(b) See Attached 14 pages
(c) See attached 15 pages

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

(a) See attached 14 pages

(b) See attached 14 pages

(c) See attached 14 pages

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

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

No, except direct appeal

(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. N/A

ii. _____

iii. _____

iv. _____

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

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. N/A
- 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. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. N/A
- 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) All issues revolve around constitutional violations and may only be challenged in a collateral attack

(b) _____

(c) _____

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

(a) your arraignment and plea? Robert Gambrell

(b) your trial, if any? Bruce Bryholdt

(c) your sentencing? Bruce Bryholdt

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Robert Pachak

(e) preparation, presentation or consideration of any petitions, motions, or applications with respect to this conviction, which you filed? N/A

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. Robert Gambrell-Public Defender; Anderson County
- ii. Bruce Bryholdt-117 West Benson St.; Anderson, SC 29622
- iii. Robert Pachak-1122 Lady St., Suite 940; Columbia, SC 29201

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

- i. Robert Gambrell- Preliminary hearing
- ii. Bruce Bryholdt- Trial & Sentencing
- iii. Robert Pachak- Direct appeal

18. State clearly the relief you seek in filing this application.

Vacate sentences and convictions and remand for a new trial.

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

NO

STATE OF SOUTH CAROLINA

COUNTY OF Anderson

VERIFICATION

I, Anthony L. MARLAR, 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.

Anthony L. Marlar

Sworn to and subscribed before me 2009
This 2 day of August, 192009.

[Signature] L.S.
Notary Public for South Carolina

My Commission Expires December 7, 2009

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

I, Anthony L. MARLAR, 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 proceeding or give security therefor.

Anthony L. Marlar
Applicant

Sworn to and subscribed before me
This 2 day of August, 192009.

[Signature] L.S.
Notary Public for South Carolina

My Commission Expires December 7, 2009

FILED
AUG 11 10 54 AM '09

ISSUE I

Applicant was denied Due Process of Law and deprived of a fair trial in as much as the state failed to disclose an oral statement alligedly given by applicant pursuant to applicants Brady Motion.

Prior to trial, the applicant was questioned by Detective Sutton (Tr. Trans. pg.208, Lines 728). Ms. Sutton asked applicant if he had been with Mr. Fields on 2-27-93. (Tr. Trans. pg.211, Lines 14-19) Applicant told Ms. Sutton that it had been over three years and he could not recall wether or not he was with Mr. Fields on that date. Ms. Sutton took down what applicant said in hand written notes, later to arrange his statement in a type written statement in such a way as to implicate himself in a crime. Ms. Sutton never allowed applicant to read her written or typed notes and never allowed applicant to sign them. (Tr. Trans. pg.216, Line 12-21) Prior to trial applicants counsel filed a rule 5 Motion for Discovery and requested a copy of any alliged oral statements given by applicant which would be relied upon at trial. The State never provided the defense with the alliged hand written notes of the oral statement.

At trial Ms. Sutton testified that applicant had informed her that he was with Mr. Fields on the night in question (Tr. Trans. pg.211, Line 19) and that she was basing her testimony upon her type written notes of the conversation. (Tr. Trans. pg.213, Line 24).

The States failure to disclose the contents of the hand written notes deprived applicant of a fair trial and the ability to prepare a defense.

The testimony of Ms. Sutton came as a complete surprise to the applicant as applicant only expected her to testify that applicant could not remember where he was on that evening, not that he had admitted to being with Mr. Fields. Additionally, the hand written notes contradict Ms. Sutton's in court testimony and were different than the type written notes.

In connection, this evidence is extremely important in this case as the State relied almost entirely upon the theory that applicant had admitted being with Mr. Fields on the night in question. Furthermore, the Jury gave great weight to this theory that applicant admitted being with Mr. Fields for they returned to the courtroom requesting to review the testimony where the applicant admitted being with Mr. Fields. (Tr. Trans. pg. 333, Line 18 - pg. 338, Line 25) Therefore applicant was convicted more likely than not, based upon the theory that he had admitted being with the co-defendant. The non-disclosed hand written notes would have benefited the defense greatly. Specifically it would have placed applicant on notice that Ms. Sutton was going to testify that applicant admitted being with Mr. Fields and would have allowed applicant the ability to form a proper defense or consider testifying himself to dispute the claim. Secondly, it would have allowed the defense to demonstrate that the hand written notes were different than her in court testimony and the type written notes, thereby impeaching her testimony with her own hand written notes.

ARGUMENT IN LAW

Suppression of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963), State v. Freeman, 459 S.E. 2d 867 (1995) The State has a continuing duty to disclose any exculpatory evidence that it uncovers after its initial disclosure. Mooney v. Holohan, 294 U.S. 103, 108 (1935) The State has the duty regardless of whether or not the defendant specifically request the favorable evidence. U.S. v. Agurs, 427 U.S. 97, 107 (1976). Favorable evidence includes that which is either directly exculpatory or items which can be used for impeachment purposes. Giglio v. U.S., 405 U.S. 150 (1972).

The good or bad faith of the prosecution is irrelevant. Brady, at 87. It is equally irrelevant if the undisclosed evidence was in the hands of the police. Rather than the prosecution. Barbee v. Warden, 331 F. 2d 842 846 (4th Cir. 1964); Boone v. Paderick, 541 F. 2d 447, 450-51 (4th Cir. 1976).

The State withholding of the hand written notes of Ms. Sutton and Ms. Sutton's attempt to rewrite the notes in a typewritten form. And rearrange the statements in an unfavorable light to indicate that applicant admitted being with the co-defendant. Where applicant did not admit this fact, Raises the specter that the State knowingly presented a false position, which created a materially false impression of the evidence and mislead the jury. Such conduct violates due-process. Giglio, at 153; Mooney, at 103; and Napue v. Illinois, 360 U.S. 264 (1959)..

Under these circumstances, the burden of proof is different. If the State creates a false impression of the evidence, then it must show beyond a reasonable doubt that the error could not have affected the outcome. Agurs, at 103; Brown v. Mainwright, 785 F. 2d 1457 (11 Cir. 1986); McDowell v. Dixon, 858 F. 2d 945 (4th Cir. 1988).

Thus, the State must prove that even if the State had disclosed the hand written notes which would have impeached their own State witnesses testimony that the defendant would have nevertheless been found guilty. This will be hard to accomplish, as the juries main concern was whether or not applicant had admitted being with the co-defendant, and returned to the courtroom to review this testimony. Therefore applicant was denied due-process of law and a fair trial.

ISSUE II

Applicant was denied effective assistance of counsel, inasmuch as counsel failed to question the co-defendant (Jerry Fields) concerning his redacted plea agreement and past bias which would have been reason to falsely implicate the applicant in the crime.

The applicant and his co-defendant was charged with Burglary 1st and Criminal Sexual Conduct 1st degree. The co-defendant Jerry Fields testified at trial against the applicant, implicating the applicant in the crimes. Mr. Fields testified that he entered a plea agreement with the State to testify against the applicant. (Tr. Trans. pg. 143, lines 23). Prior to the trial and on two occasions the applicant and Mr. Fields were involved in fist fights with each other. The applicant sought a warrant on one occasion for malicious damage to property against Mr. Fields. Applicants girlfriend Jerriann Williamson was scheduled to testify against Mr. Fields and his brother in an unrelated burglary charge. When the Fields brothers learned of this potential witness they plead guilty and Jerry Fields received a forty five year sentence and his brother received life. Likewise, Mr. Fields gave a prior inconsistent statement exonerating himself from the crimes, and only after entering a redacted plea agreement, changed his story. Counsel for the applicant never questioned Mr. Fields concerning his prior inconsistent statement, the new redacted plea agreement, or his prior run-ins with the applicant and his girlfriend. It is clear that the Jury could have found that Mr. Fields implicated the applicant in the crime in retaliation for applicants run-ins with him in the past so he could get a deal with the State and to keep his brother from becoming a suspect, which applicant believes was the real second rapist in the crime as will be demonstrated else where herein. Therefore, Applicant was denied effective assistance of counsel.

ISSUE III

Applicant was denied effective assistance of counsel inasmuch as counsel failed to call Detective Lindley to testify to the statements given by Jerry Fields.

Detective Lindley was the person who took Jerry Fields' statement. In that statement Mr. Fields never states that the name "Tony" was ever used during the criminal acts. The victim testified that while in her house one of the defendants stated, "Tony get the little girl out of here". (Tr. Trans. pg.40, Lines 3&4). The applicant denies that he was ever in the victim's home and again believes that it was Jerry Fields' brother Terry Fields who was involved in the crime. First, the DNA test excluded applicant from being one of the rapist, but the DNA was very similar to Jerry Fields, which might be possible if it came from his brother, which will be discussed elsewhere herein. Secondly, Mr. Fields' brother Terry Fields has a long record of committing burglaries with his brother. Thirdly, the name "Terry" is similar enough to "Tony" that the victim may have misunderstood the name or the name "Tony" may have been accidentally injected into the victim's memory by detectives discussing the applicant with the victim. Applicant was denied effective assistance of counsel by not bringing this information to the jury's attention through the testimony of Detective Lindley.

ISSUE IV

Applicant was denied effective assistance of counsel inasmuch as counsel failed to object or move to suppress the testimony of Detective Sutton, where the testimony concerning a statement given by the applicant was never read or signed by the applicant and where the original notes were lost and were not similar to what the detective testified to at trial.

Detective Sutton testified at trial concerning an alleged oral statement given by the applicant. Ms. Sutton testified that she wrote out applicant's statement as he gave it to her. Ms. Sutton took the handwritten notes and typed them up. (Tr. Trans. pg.214, lines 3-20). The handwritten notes were never given to the applicant or his counsel pursuant to their Brady Motion.

Ms. Sutton then used the typed written notes during her testimony. (Tr. Trans. pg. 213, Line 24) even though she admitted that the applicant never read or signed what she wrote down or the typed version. (Tr. Trans. pg. 216, Lines 12-21) Ms. Sutton used those notes and testified that the applicant admitted being with Mr. Fields on the night of the crimes. (Tr. Trans. pg. 211, Line 19) When in fact what applicant said was that it had been three years and he could not remember where he was that night but that he could have been with Mr. Fields, but that he couldn't remember. The Applicant did state that he does remember that he didn't do any crime with Mr. Fields. Ms. Sutton used what the applicant said and rearranged his statement in a fashion so as to implicate himself in a crime. Counsel should have objected since the notes were not read or signed by the applicant and should have moved to suppress the notes and testimony for failure to provide the evidence to the defence pursuant to their Brady Motion. Counsel's failure to do so constitutes ineffective assistance of counsel.

ISSUE V:

Applicant was denied effective assistance of counsel inasmuch as counsel failed to bring up the victims selective memory, where victim originally contended that both rapists ejaculated inside her and where DNA evidence excludes applicant from being one of the two rapists.

Prior to trial the victim gave a statement contending that two perpetrators broke into her home and raped her. She contended that both rapist ejaculated inside her (Tr. Trans. pg. 204, Lines 18-25). At trial the victim testified she had slept with three people, her boyfriend Jim Rushton (Tr. Trans. pg 55, Lines 5-10) and the two rapist. If this is true, there could only be four possible DNA evidence. (1) DNA from the victim (2) DNA from the victims boyfriend (3) DNA from Jerry Fields, and (4) DNA from the 2nd person involved in the rape.

Suspect DNA kits were taken from the victim, the victims boyfriend, Jerry Fields and the applicant. (Tr. Trans. pg. 242, Lines 3-12) There was DNA evidence taken from the scene which belonged to the victim, the victims boyfriend, and Jerry Fields. No DNA evidence linked applicant to the crime. (Tr. Trans. pg. 253, Lines 7-11) This fact alone does not mean that applicant was not the 2nd rapist, for such DNA evidence belonging to the applicant could have been washed away or lost. However a public hair sample was taken which did not belong to anyone for which a DNA suspect kit was taken. This fact alone demonstrates that someone else was the second rapists. While applicants DNA could have been washed away or lost it is impossible for DNA to have been retrieved that belonged to a 5th person if the victim only had intercourse with three people, her boyfriend and the two rapist. Counsel never even brought up the fact that a public hair sample existed which belonged to an unknown suspect. If the victims testimony is correct and she only had intercourse with three people, the fact that DNA evidence was found which belonged to someone else, also exonerates applicant from being the 2nd rapist. Therefore the unmatched public hair sample must have belonged to the 2nd rapist. Interestingly, the DNA semen samples were very similar to Jerry Fields DNA but not an exact match (Tr. Trans. pg. 249, Lines 13-22, and pg. 254, Lines 9-19) Such evidence may have come from Jerry Fields brother Terry Fields. Their DNA would be very similar but not an exact match. This evidence supports applicants contentions that Terry Fields was the 2nd rapist. Jerry and Terry Fields have a long history of burglaries together. Likewise, it is possible that the victim heard the name Terry instead of Tony since there similar and the victim was hysterical at the time. (Tr. Trans. pg. 57, Lines 19- pg. 58, Lines 1, and pg. 90 Line 7) Obviously had counsel raised this evidence it would have likely affected the outcome. If there are only three people the victim had intercourse with and none of the

DNA belongs to the applicant but some of the evidence belongs to an unknown person, the jury would likely infer that the pubic hair sample belonged to the real 2nd rapist and applicant was not involved.

ISSUE VI

Applicant was denied effective assistance of counsel, inasmuch as counsel failed to subpoena DNA expert John Barron or object to the States failure to subpoena Mr. Barron in an attempt to gain an unfair tactical advantage where his testimony would have established that applicants DNA did not match any of the DNA samples collected from the crime scene which would have arguable exonerated applicant as being the second rapist.

The victim contended that she had been raped by two perpetrators. The victim maintained that she had only had intercourse with three people, her boyfriend Jim Ruston and the two perpetrators. Therefore other than the victims own DNA, there should only be three separate DNA evidence. The State contended that Jerry Fields and the applicant were the two rapists. DNA suspect kits were taken from the victim, the victims boyfriend, Jerry Fields and the applicant. Some DNA evidence came back belonging to the victim, some belonging to the victims boyfriend, and some belonging to Jerry Fields but none belonged to the applicant. This fact alone means little for applicants DNA could have been washed off or lost. However, two pubic hair samples as well as other DNA evidence came back as belonging to an unknown suspect. It is only possible that the pubic hair DNA belonged to the second rapist, for remember the victim contends she only had sexual intercourse with three people. However this evidence was never introduced at trial.

(8.)

Prior to trial the State made an agreement with defense to subpoena the SLED agents, Lorri Johnson, Nancy Green and John Barron. As a result, counsel never subpoenaed either witness but relied upon his ability to present evidence on cross-examination. John Barron was the only witness who could have testified concerning the two pubic hair samples which excluded applicant. At trial and for an unfair tactical advantage, the State failed to subpoena John Barron. As a result, applicants counsel was prevented from introducing the pubic hair DNA evidence which excluded applicant. Counsel failed however to object to the States breach of the agreement to subpoena Mr. Barron as a State witness.

At trial, counsel attempted to bring up the pubic hair DNA evidence on cross-examination of the states witness Lorri Johnson. However when asked, Ms. Johnson committed perjury and stated that SLED did not test any hair because they (SLED) did not have the equipment (Tr. Trans. pg. 251, line 11 - pg. 252. line 2) The State allowed this perjury to go unchecked as they knew DNA pubic hair samples did exist and was tested at SLED, which excluded applicant. IN the eyes of the jury, Ms. Johnsons testimony shot down any attempts to demonstrate that someone else was the second rapist. Likewise Ms. Johnsons denial of such evidence must have looked to the jury as if counsel was attempting to fabricate evidence or argue that someone else was involved when no evidence existed to establish that fact. But in fact evidence proving that fact did exist, but was not presented to the jury because counsel failed to subpoena the only witness who's expert DNA testimony would have arguable exonerated applicant. In connection, counsel failed to object to the states breach of their promise to subpoena Mr. Barron and their failure to do so to gain an unfair tactical advantage by convincing applicants counsel that Mr. Barron would be present to testify.

but then not having him present to prevent the exculpatory evidence from being presented to the jury. (Tr. Trans. pg. 80, Lines 8 - pg. 81, line 18, pg. 293, Lines 8-25)

Had the evidence been presented to the jury it would have shown that because only 4 DNA samples are possible, if the victim only had sex with 3 people, and 4 DNA samples exist and none belong to applicant that applicant could not have been the 2nd rapist.

The two DNA pubic hair sample that matched no one tested, must belong to the second rapist. This evidence would have created a reasonable doubt in the minds of the jury and most probably affected the outcome of the trial.

ISSUE VII

Applicant was denied effective assistance of counsel inasmuch as counsel failed to object to Solicitors' misstatement of facts in closing arguments.

During closing arguments, the solicitor mistated the facts of the case, arguing to the jury that applicant must have been involved in the crime because the investigator obtained Mr. Fields' name from the applicant and the investigator would not have known to question Mr. Fields if the applicant hadn't gave them his name and Mr. Fields has admitted that he was one of the rapists. (Tr. Trans. pg. 289, Line 23 - pg. 290, Line 11). In fact, the evidence demonstrates that Detective Brown talked to Mr. Fields on 3-27-96, (Tr. Trans. pg. 170, Line 16 - pg. 171, Line 1) two months prior to talking to the applicant on 5-9-96, (Tr. Trans. pg. 173, Line 25 - pg. 174, Line 2). This misstatement of fact in the eyes of the jury must have seemed as if the applicant was involved in the crime and would have likely affected their decision.

at the close of the case, the jury returned a question to the court to play the testimony that applicant admitted he was with Mr. Fields on the night in question. The fact that the jury returned to replay the testimony demonstrates that they gave great weight to the states claim that applicant admitted he was with Mr. Fields. In fact applicant never made such a statement and the only evidence introduced to that effect was Detective Suttons testimony that applicant admitted that, but such statements were not read or signed by the applicant and was not provided to the defense pursuant to their Brady Motion. Counsel was ineffective for failing to object to the misstatement of fact.

ISSUE VIII

Applicant was denied effective assistance of counsel, inasmuch as counsel failed to discuss the case with applicant and in failing to prepare a defense.

Prior to applicants trial, applicants trial counsel had a heart attack and died. Counsel was miraculously revived by medical technicians. Counsel was released from the hospital only three weeks prior to applicants trial. Counsel had not yet recovered from his heart attack and as a result was not able to discuss the case with applicant, was not able to investigate the case and evidence and was not able to prepare a defense. Counsel only met with the applicant one time and this was after counsels heart attack. The meeting lasted less than 15 minutes and counsel never discussed or asked any questions about the the evidence or who applicant might believe should be called as a witness. As a result counsel was not prepared for trial. During the trial, the state introduced a type written notes of an allged statement given by the applicant.

They also introduced the hand written notes of the statement. Counsel was never provided with the hand written notes through discovery, which was substantially different than the type written notes and could have been used to impeach the states witness and demonstrate that her in court testimony was not accurate. Had counsel met with applicant and informed applicant of the contents of the type written notes, applicant could have informed counsel of the hand written notes and he should obtain them as they were substantially different. As a result, applicant was caught by complete surprise when the witness testified that applicant had stated that he was with Jerry Fields on the date of the crime. Applicant thought the witness would simply state that applicant could not remember where he was on that date because it had been over three years, not that he was with Mr. Fields. The testimony was not accurate and contradicted the applicants statement to investigators and the original hand written notes. Additionally, counsels health prevented him from interviewing expert DNA witness John Barron who conducted test on all hair samples and found that the pubic hair samples excluded applicant from being the second rapist. Counsel failed to subpoena Mr. Barron, because the prosecution informed counsel erroneously that Mr. Barron would testify in court. This false impression of the witness caused counsel not to contact Mr. Barron. This failure to discuss the case with applicant, failure to investigate the case and obtain witnesses for a defense constituted ineffective assistance of counsel.

ARGUMENT IN LAW

A Defendant is entitled under the sixth amendment of the United States Constitution to receive effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, S.Ct., L.E. 2d. (1984). In determining ineffective assistance of counsel claims, court must indulge "strong presumption" that counsels assistance was not deficient. Middleton v. Evatt, 855 F.Supp. 837, aff. 77 F.3d 469 (4th Cir. 1994) Smith v. State, 309 S.C. 413, 424 S.E.2d 480 (1992). To prove a claim of ineffective assistance of counsel, defendant must show that counsels representation fell below objective standard of reasonableness, and that, but for counsels error there is a reasonable probability that result would have been different. Strickland Supra. at 688 and 694; Brown v. State, 307 S.C. 465, 415 S.E.2d 811 (1992). For purpose of establishing ineffective assistance of counsel claims "reasonable probability" that result of trial would have been different is probability sufficeint to undermine confidence in outcome of trial. Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992).

In the case sub-judice, the evidence presented by applicant will rebutt the "strong presumption" that counsels assistance was effective and will in fact demonstrate by a preponderance of the evidence that counsel was not effective.

Applicant claims that counsel failed to question the co-defendant Jerry Fields; Call detective Lindley; Subpoena DNA experts, or discuss case with applicant or otherwise investigate the case and prepare a defense constitutes ineffective assistance of counsel, Grier v. State, S.C.- 384 S.E.2d 722 (1989); Thomas v. State, S.C.- 417 S.E. 2d 521 (1992), Hicks v. State, S.C.- 443 S.E.2d 907 (1994). Likewise counsels failure to object to the states breach of their promise to have

Mr. Barron present to testify and failure to object or move to suppress Detective Suttons testimony and failure to bring up the victims selective memory and prior inconsistent statements also denied effective assistance of counsel. Gallman v. State, S.C., 414 S.E.2d 780 (1992); Simmons v. State, S.C.- 419 S.E.2d 225 (1992).

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

ANTHONY LEROY MARLAR, #242361)

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

IN THE COURT OF COMMON PLEAS

SEP 25 2002

SECOND

AMENDMENT TO APPLICATION FOR

POST-CONVICTION RELIEF

CLERK OF COURT

2000-CP-04-2026

The Plaintiff would amend his Application For Post-Conviction Relief to add the following grounds:

ISSUE IX

The Applicant was denied effective assistance of counsel because counsel failed to obtain and/or elicit appropriate information for and to make a motion to exclude or suppress statements allegedly made by the Applicant to the investigators based upon the failure of Michelle Brown to properly Mirandize the Applicant at the initial interview when he was a suspect in the case. All information obtained thereafter from the Applicant was as a result of the information provided by him in the initial interview and would therefore be excludable pursuant to the "fruit of the poisonous tree" doctrine of the law.

ISSUE X

The Applicant was denied effective assistance of counsel because counsel failed to subpoena and present the witnesses needed to counter testimony and other evidence presented by the State, specifically Anderson County Deputy Clark Brasier, the initial investigator on the case who obtained statements from the victim, and SLED Agent John C. Barron, the trace evidence forensics expert who examined the pubic hairs found in the bed materials of the victim. Presentation of evidence through these witnesses would have shown that the victim did not know or have reason to know that the Applicant was one of her rapists as she later testified to, and that the pubic hairs found at the scene was physical evidence that conclusively excluded the Applicant and would therefore show that another person reasonably could be the second perpetrator and would constitute reasonable doubt as to the guilt of the Applicant.

ISSUE XI

The Applicant was denied effective assistance of counsel because counsel failed to contact and consult with SLED Agent John C. Barron concerning the results of the tests performed by him on the evidence submitted to him to determine how best to use and present that evidence to the jury. Further, counsel failed to take the necessary steps to have the microscopically inconsistent pubic hairs tested for DNA evidence, either by the State or by an appropriate qualified agency, to obtain further evidence excluding the Applicant as one of the perpetrators in this case.

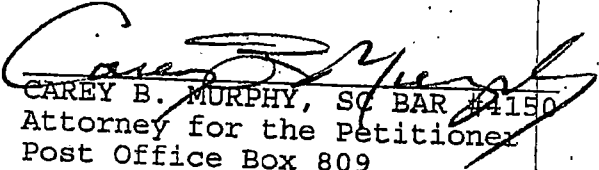
ISSUE XII

Applicant was denied effective assistance of counsel because counsel failed to obtain the extensive criminal record of the witness Jerry Fields, and cross-examine him thereon and have same introduced into evidence for the purpose of putting that witness's credibility into evidence for consideration by the jury in their deliberations.

ISSUE XIII

Applicant was denied effective assistance of counsel because counsel failed to allow the Applicant to testify on his own behalf at trial even though Applicant wanted to testify at trial and informed his counsel of same. Applicant was not aware that he would not be testifying at trial until the trial itself. Applicant had evidence to present by way of his own testimony which Applicant believes would have benefitted him at trial and should have been considered by the jury.

Based upon the contents of the original Application For Post-Conviction Relief, and upon the above amendments thereto, the Applicant prays that this Court vacate his conviction and sentence and grant him a new trial on all charges against him, and for such other and further relief as to this Court seems just and proper.


CAREY B. MURPHY, SC BAR #4150
Attorney for the Petitioner
Post Office Box 809
Anderson, SC 29622
(864) 224-1569

September 23, 2002
Anderson, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS



ANTHONY LEROY MARLAR, #242361)
Plaintiff,)
vs.)
STATE OF SOUTH CAROLINA)
Defendant.)

AMENDMENT TO APPLICATION FOR
POST-CONVICTION RELIEF
2000-04-04-2026

A TRUE COPY

The Plaintiff would amend his Application For Post-Conviction Relief to add the following grounds:

ISSUE IX

The Applicant was denied effective assistance of counsel because counsel failed to obtain and/or elicit appropriate information for and to make a motion to exclude or suppress statements allegedly made by the Applicant to the investigators based upon the failure of Michelle Brown to properly Mirandize the Applicant at the initial interview when he was a suspect in the case. All information obtained thereafter from the Applicant was as a result of the information provided by him in the initial interview and would therefore be excludable pursuant to the "fruit of the poisonous tree" doctrine of the law.

ISSUE X

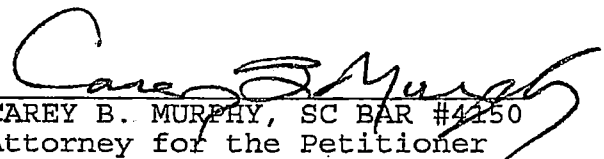
The Applicant was denied effective assistance of counsel because counsel failed to subpoena and present the witnesses needed to counter testimony and other evidence presented by the State, specifically Anderson County Deputy Clark Brasier, the initial investigator on the case who obtained statements from the victim, and SLED Agent John C. Barron, the trace evidence forensics expert who examined the pubic hairs found in the bed materials of the victim. Presentation of evidence through these witnesses would have shown that the victim did not know or have reason to know that the Applicant was one of her rapists as she later testified to, and that the pubic hairs found at the scene was physical evidence that conclusively excluded the Applicant and would therefore show that another person reasonably could be the second perpetrator and would

constitute reasonable doubt as to the guilt of the Applicant.

ISSUE XI

The Applicant was denied effective assistance of counsel because counsel failed to contact and consult with SLED Agent John C. Barron concerning the results of the tests performed by him on the evidence submitted to him to determine how best to use and present that evidence to the jury. Further, counsel failed to take the necessary steps to have the microscopically inconsistent pubic hairs tested for DNA evidence, either by the State or by an appropriate qualified agency, to obtain further evidence excluding the Applicant as one of the perpetrators in this case.

Based upon the contents of the original Application For Post-Conviction Relief, and upon the above amendments thereto, the Applicant prays that this Court vacate his conviction and sentence and grant him a new trial on all charges against him, and for such other and further relief as to this Court seems just and proper.


CAREY B. MURPHY, SC BAR #44150
Attorney for the Petitioner
Post Office Box 809
Anderson, SC 29622
(864) 224-1569

September 23, 2002
Anderson, South Carolina

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**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FORM ANDERSON COUNTY
COURT OF COMMON PLEAS**

R. Lawton McIntosh, Circuit Court Judge

Case No: 2025-002377

**Anthony Marlar,
Appellan**

V.

**State Of South Carolina
Respondent**

Exhibit B

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Anthony Marlar,

Petitioner

v.

State of South Carolina,

Respondent

Appeal from Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 4225
Heard September 14, 2006 – Filed March 26, 2007

VACATED AND REMANDED

Assistant Appellate Defender Robert M. Dudek, of Columbia, for
Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy Attorney
General Salley W. Elliott, Assistant Attorney General
Christopher L. Newton, all of Columbia, for Respondent.

BEATTY, J.: Anthony Marlar was convicted of first-degree burglary
and first-degree criminal sexual conduct. His petition for post-conviction

relief (PCR) was denied. This court granted certiorari to review the PCR court's denial of relief. We vacate and remand.

FACTS

In the early morning hours of February 23, 1993, two men with stockings covering their faces broke into the victim's home. The victim's [REDACTED]-year-old daughter was sleeping in the bed with her at the time. The victim heard the short, stocky male tell the tall, slim male, "Tony, get the girl out of here." The tall, slim male replied, "Oh, sh--," when the name "Tony" was used. "Tony" took the child out of the room and returned. The short, stocky male asked "Tony," "Is this her?" After "Tony" nodded his head in assent, the two men held a knife to victim and took turns raping her. When they finished, they cleaned the victim and threatened her before leaving.

The victim went to the hospital, and a rape kit was performed. The victim told hospital personnel and police that both males ejaculated during the crime. She told police that she believed the two males were brothers Bobby Marlar and Anthony "Tony" Marlar, because of their build. The Marlar brothers were in her house the prior week to help her roommate, whom Bobby Marlar was dating, move out of the house. The victim did not recognize the voices of the perpetrators. Although both Bobby and Tony Marlar were briefly interviewed, the criminal investigation did not progress for several years.

In 1996, the investigation was reopened. In March 1996, police questioned Jerry Fields, who denied participating in the crime and indicated that he was with Tony Marlar ("Marlar") that evening. After DNA collected from the victim matched Fields, he eventually confessed and implicated Marlar as the second suspect. Fields agreed to plead guilty and to testify at Marlar's trial in exchange for a twenty-year sentence. There was no DNA evidence linking Marlar to the crime, and two pubic hairs found in the bed did not match Fields, the victim, the victim's boyfriend, or Marlar. Prior to the DNA results linking Fields, Marlar was questioned by police and he stated he could not recall where he was three years earlier on the night of the crime. Marlar also denied any involvement in the crime and indicated that he probably was with Fields that night.

stated counsel told him not to testify, despite Marlar's desire to do so, because he would lose the last argument.

After a hearing, the PCR court denied relief and dismissed the petition. The court found counsel rendered "reasonably effective assistance under the prevailing professional norms and demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law." As to the specific issues raised in the PCR application, the court held: "As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them." This petition for certiorari followed.

STANDARD OF REVIEW

"This Court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Id. The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

LAW/ANALYSIS

Marlar argues the PCR court's order was inadequate and should be remanded for specific findings of fact. We agree.

A PCR court "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. § 17-27-80 (2003). PCR courts have been repeatedly admonished regarding the failure to specifically rule on the issues presented in a PCR application. See Bryson v. State, 328 S.C. 236, 236-37, 493 S.E.2d 500, 500 (1997) (vacating a PCR order and remanding the matter for specific findings of fact and conclusions of law); McCullough v. State, 320 S.C. 270, 272, 464 S.E.2d 340, 341 (1995); Pruitt v. State, 310 S.C. 254, 255, 423 S.E.2d 127, 128

court's order specifically acknowledged that some issues were not addressed. The court made the finding that, as to those issues, no evidence was presented. When, as here, the PCR court's order specifically addresses its failure to delineate each issue and gives reasons for the ruling, the issue has been finally ruled upon by the lower court and is preserved for appeal.

As to the merits of the PCR court's ruling, Marlar presented evidence to support his claims. Accordingly, there is no evidence to support the PCR court's finding that he failed to present any evidence. We must vacate the order and remand the matter for a new PCR hearing. We caution the PCR court on remand to make specific findings of fact and conclusions of law as to each issue raised in Marlar's PCR application.

CONCLUSION

For the reasons outlined above, the PCR court's decision denying relief is

VACATED and REMANDED for a new hearing.

HEARN, C.J., and SHORT, J., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Anthony Marlar,

Respondent,

v.

State of South Carolina,

Petitioner.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Anderson County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 26391
Submitted November 1, 2007 – Filed November 5, 2007

REVERSED

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Daniel E. Grigg, all of Columbia, for Petitioner.

Deputy Chief Attorney for Capital Appeals Robert M. Dudek, South Carolina Commission on Indigent Defense, Division of Appellate Defense, of Columbia, for Respondent.

allegations contained in the application and/or mentioned at the PCR hearing about which absolutely no evidence is presented.

The Court of Appeals rejected the State's argument that none of respondent's allegations were preserved for appellate review because respondent failed to make a Rule 59(e), SCRCP, motion to alter or amend the judgment to include specific findings of fact and conclusions of law. *See Humbert v. State*, 345 S.C. 332, 548 S.E.2d 862 (2001); *Pruitt v. State*, *supra*. In discussing this argument, the Court of Appeals noted this Court has remanded PCR actions to the PCR judge for specific rulings, despite the fact there were no Rule 59(e) motions. The court then pointed to the more recent case of *Humbert v. State*, *supra*, in which this Court held an issue was not preserved for appellate review because it was not addressed in the PCR order and no Rule 59(e) motion was filed. The Court of Appeals' opinion then states, "It does not appear that *Humbert* overruled the prior cases, and it is not clear whether, in light of *Humbert*, an appellate court may still take the extraordinary action of overlooking the failure to file a Rule 59(e) motion and remanding matters so that specific orders may be issued by the PCR court."

The cases this Court remanded for specific findings were unique cases in which the Court attempted to remind circuit court judges and parties that: (1) specific findings of fact and conclusions of law were required; and (2) a Rule 59(e) motion must be filed if issues are not adequately addressed in order to preserve the issues for appellate review. Although the cases apparently have not accomplished the Court's goal, they do not change the general rule that issues which are not properly preserved will not be addressed on appeal. In fact, in *Pruitt*, this Court stated in a footnote, "In vacating and remanding in this case, we are not abandoning the general rule that issues must be raised to, and ruled on by, the post-conviction judge to be preserved for appellate review. The extraordinary action we take today is necessary only because our opinion in *McCray* [*v. State*, 305 S.C. 329, 408 S.E.2d 241 (1991)] is not being followed." *Pruitt v. State*, 310 S.C. at 255, 423 S.E.2d at 128.

Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review, and the Court

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS**

R. Lawton McIntosh, Circuit Court Judge

Case No: 2025-002377

**Anthony Marlar,
Appellan**

V.

**State Of South Carolina
Respondent**

Exhibit C

AO 241 (Rev. 5/85)

HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District <u>South Carolina</u>
Name <u>Mr. Anthony L. Marlar</u>	Prisoner No. <u>#242361</u>	Case No. <u>2009-CP-04-2026</u>
Place of Confinement <u>Tyger River Correctional Inst.</u> <u>200 Prison Rd.</u> <u>Enoree, S.C. 29335</u>		
Name of Petitioner (include name under which convicted) <u>Mr. Anthony L. Marlar</u>		Name of Respondent (authorized person having custody of petitioner) <u>South Carolina Dept. of Corrections</u> <u>DISTRICT COURT</u> <u>DISTRICT OF SOUTH CAROLINA</u> <u>CHARLESTON, SC</u>
The Attorney General of the State of <u>Mr. Henry McMaster, P.O. BOX 11549, Columbia, S.C 29211</u>		
PETITION		
1. Name and location of court which entered the judgment of conviction under attack <u>Anderson Co Court of</u> <u>General Sessions, P.O. BOX 8002, Anderson, S.C 29622</u> <u>#96-GS-04-2027..#96-GS-04-2026</u>		
2. Date of judgment of conviction <u>July 10, 1997</u>		
3. Length of sentence <u>30 years, Burglary, 12 years</u> <u>CSC "CONSECUTIVE"</u>		
4. Nature of offense involved (all counts) <u>Burglary</u> <u>Criminal Sexual Conduct</u>		
5. What was your plea? (Check one) (a) Not guilty ☒ (b) Guilty ☐ (c) Nolo contendere ☐ If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:		
6. If you pleaded not guilty, what kind of trial did you have? (Check one) (a) Jury ☒ (b) Judge only ☐		
7. Did you testify at the trial? Yes ☐ No ☒		
8. Did you appeal from the judgment of conviction? Yes ☒ No ☐		

AO 241 (Rev. 5/85)

9. If you did appeal, answer the following:

(a) Name of court South Carolina Appellate Court, 1015 Sumter St, Columbia, S.C. 29211

(b) Result AFFIRMED CONVICTION

(c) Date of result and citation, if known May 15, 2000

(d) Grounds raised The failure to present at Trial the analysis of microscopic pubic hair Evidence

(e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

(1) Name of court NONE

(2) Result N/A

(3) Date of result and citation, if known NONE

(4) Grounds raised N/A

(f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

(1) Name of court NONE

(2) Result N/A

(3) Date of result and citation, if known NONE

(4) Grounds raised N/A

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court Anderson County Court of Common Pleas

(2) Nature of proceeding Post Conviction relief Application

(3) Grounds raised INEFFECTIVE ASSISTANCE OF COUNSEL / Counsel failed to present Exculpatory Hair Evidence and failed to cross-examine co-Defendants motivation to Implicate applicant in this Crime.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☒ No ☐

(5) Result Denied Relief

(6) Date of result September 30th, 2003

(b) As to any second petition, application or motion give the same information:

(1) Name of court THE SOUTH CAROLINA COURT OF APPEALS

(2) Nature of proceeding WRIT OF CERTIORARI

(3) Grounds raised COUNSEL FAILED TO PRESENT EXCULPATORY HAIR EVIDENCE AND AND FAILED TO CROSS-EXAMINE CO-DEFENDANT REGARDING A WARRANT THAT THE APPLICANT SWORE OUT FOR HIS ARREST BACK IN 1994..

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result "VACATED AND REMANDED TO THE LOWER COURT"

(6) Date of result MARCH 26, 2003

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☐ No ☒

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Once the Court of Appeals Vacated and Remanded this case, the State
Successfully appealed to the S.C. Supreme Court, Petitioner then filed a
"Motion For Reconsideration and was Unsuccessful.."

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (h) Denial of right of appeal.

A. Ground one: DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL

Supporting FACTS (state *briefly* without citing cases or law) Defense Counsel was Ineffective
 for failing to call available SLED Agent John Barron to testify that two public Hairs Found
 on the Victim's Bed "DID NOT" match Petitioner. Similarly, counsel was Ineffective for failing
 to cross-examine co-defendant Fields about his bias since petitioner had sworn out a warrant
 for his arrest for damaging his property, and Petitioner testified at PCR this was Field's
 Motivation for placing him at the crime scene.

B. Ground two: CONVICTION OBTAINED BY UNCONSTITUTIONAL DNA PROCEDURES
AND COURT OF APPEALS FAILED TO MAKE A PROPER RULING...

Supporting FACTS (state *briefly* without citing cases or law) The Court Of Appeals Properly Did NOT
 rule on the Issue OF WHETHER TRIAL COUNSEL WAS Ineffective for Failing to call SLED Agent
 John Barron to testify about Pubic Hairs found on the Victim, since there were NO findings
 of fact and Conclusions of Law made by the PCR court on this Issue....

C. Ground three: THE SUPREME COURT PROPERLY FOUND THAT THE PCR JUDGE IN THIS MATTER FAILS TO SPECIFICALLY ADDRESS ANY OF THE ALLEGATIONS RAISED BY RESPONDENT....

" PCR JUDGE FAILED TO UPHOLD THE INTEGRITY OF THE JUDICIARY"
Supporting FACTS (state *briefly* without citing cases or law) _____

An Independent Judiciary is Indispensable to Justice in Our Society.
A Judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the Integrity and Independence of the Judiciary will be preserved. The Judge shall shall Respect and Comply with the Law and shall act at all times in the manner that promotes public confidence in the Integrity and Impartiality of the Judiciary. The PCR JUDGE ~~JAUD~~ FAILED TO DO SO, THEREFORE, CAUSING A MISCARRIAGE OF JUSTICE IN THIS CASE.

D. Ground four: TRIAL COURT EXHIBITED "CALLOUS AND DELIBERATE DISREGARD FOR THE PETITIONERS FUNDAMENTAL AND FAIRNESS, DUE PROCESS RIGHTS OF PETITIONER..."

Supporting FACTS (state *briefly* without citing cases or law) Trial Court Violated the Confrontation Clause by preventing defense Counsel from cross-Examining...
Trial Court violated 6th Amendment by curtailing defense cross-Examination of state's Expert and by Impeding defense from presenting expert of its own. Trial Court failed to use proper DNA techniques and failed to investigate psychological evidence of the victims story, whereas claims of sexual abuse by the Petitioner was fabricated, or whether the perpetrator was someone other than the petitioner.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: _____

NO

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing Mr. Robert Gambrell-Anderson Co. Public Defenders Office

(b) At arraignment and plea Mr. Robert Gambrell

(c) At trial Bruce Bryholdt-117 West Benson St. Anderson, S.C. 29622

(d) At sentencing Bruce Bryholdt

(e) On appeal Mr. Robert Pachak-South Carolina Appellate Defense. P.O. BOX 11589
Columbia, S.C. 29211

(f) In any post-conviction proceeding Carey Murphy, P.O. Box 809, Anderson,
S.C. 29622

(g) On appeal from any adverse ruling in a post-conviction proceeding Robert Dudek
South Carolina Appellate Defense, P.O. Box 11589, Cola, S.C. 29211

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Anthony L. Marlar

Signature of Attorney (if any)

(Petitioner Pro-Se)

Mr. Anthony Marlar

I declare under penalty of perjury that the foregoing is true and correct. Executed on

5-12-08

(date)

Anthony L. Marlar

Signature of Petitioner

Mr. Anthony Marlar #242361 (Pro-Se)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

SEP 11 AM 37

RECEIVED
U.S. DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA

ANTHONY L. MARLAR, SCDC #242361

PETITIONER

VS.

WARDEN, TYGER RIVER CORR. INST.

RESPONDENT

C/A NO. 02:08-1874-RBH-RSC

RESPONSE IN OPPOSITION
TO RETURN AND MOTION
FOR SUMMARY JUDGMENT

- 1) DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL AVAILABLE S.L.E.D. AGENT JOHN BARRON TO TESTIFY THAT TWO (2) PUBIC HAIRS FOUND IN THE VICTIMS BED DID NOT MATCH THE PETITIONER.

PETITIONER IS REQUIRED TO PRESENT EVIDENCE THAT COUNSEL WAS INEFFECTIVE, AND THAT THAT INEFFECTIVENESS PREJUDICED THE OUTCOME OF HIS TRIAL. STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. CT. 2052 (1984); COBS, S.C. 299, 408 S.E.2d 223 (1991). THERE WAS AVAILABLE EVIDENCE FROM S.L.E.D. AGENT JOHN BARRON THAT THERE WERE TWO (2) PUBIC HAIRS TESTED AND IF HE WERE CALLED TO TESTIFY HE WOULD HAVE STATED THAT THE PUBIC HAIR WERE INCONSISTENT WITH PETITIONER, CO-DEFENDANT, VICTIM, AND JIM RUSHTON AND WOULD HAD TO HAVE BEEN FROM SOMEBODY ELSE. (P.C.R. APP. PG. 424 - 425) THE FACT THERE WAS NO DNA IMPLICATING PETITIONER WAS VERY SIGNIFICANT, AND THE FAILURE TO CALL AGENT BARRON WAS OF GREAT MOMENT. THE HAIR NOT MATCHING EVIDENCE LED TO A CLEAR INFERENCE THAT THE PUBIC HAIRS MAY HAVE COME FROM THE OTHER RAPIST.

AT PCR, TRIAL COUNSEL BYRHOLDT TESTIFIED THAT HE CROSS EXAMINED OTHER AGENTS CONCERNING THE CONTENTS OF MR. BARRON'S TEST RESULTS. MR. BYRHOLDT WENT ON TO EXPLAIN HOW THIS EVIDENCE ALLOWED HIM TO ARGUE REASONABLE DOUBT, THAT THEY HAD PUBIC HAIRS THAT COULD NOT BE EXPLAINED AND HOW IT ALLOWED HIM TO POINT A FINGER AT SOMEBODY ELSE, "SOME UNKNOWN ENTITY OUT THERE RATHER THAN PETITIONER" (PCR APP. PG. 398, L. 10 - PG. 399, L.18) THE TESTIMONY ABOVE BY TRIAL COUNSEL IS CLEARLY EVIDENT THAT HE BELIEVED THIS EVIDENCE WAS VIABLE AND IMPORTANT FOR HIM TO INCLUDE IN HIS DEFENSE.

UNFORTUNATELY, ONLY AFTER FURTHER INTENSE QUESTIONING DID TRIAL COUNSEL CHANGE HIS TESTIMONY AND TESTIFIED THAT HE THOUGHT HE HAD ARGUED IT BUT ADMITTED THAT HE DID NOT. (PCR APP. PG. 399, L. 19 - PG. 401, L. 9). PETITIONER SUBMITS THE RECORD WILL REFLECT THAT MR. BYRHOLDT NEVER PRODUCED THIS EVIDENCE TO THE TRIAL COURT IN ANY WAY, TESTIMONY OR IN ANY ARGUMENT. TESTIMONY AND ADMISSION ON MR. BYRHOLDT'S BEHALF CLEARLY SHOWS HE "DID NOT" DEMONSTRATE REASONABLE SOUND TRIAL STRATEGY AND COUNSEL'S DEFENSE WAS INEFFECTIVE.

2) DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CROSS EXAMINE CO-DEFENDANT FIELDS ABOUT HIS BIAS SINCE PETITIONER HAD SWORN OUT A WARRANT FOR HIS ARREST FOR DAMAGING HIS PROPERTY, AND PETITIONER TESTIFIED AT PCR THIS WAS FIELDS MOTIVATION FOR PLACING HIM AT THE CRIME SCENE.

PETITIONER WAS REQUIRED TO PRESENT EVIDENCE THAT COUNSEL WAS INEFFECTIVE AND THAT INEFFECTIVENESS PREJUDICED THE OUTCOME OF HIS TRIAL. STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S.CT. 2052 (1984); COBS, 305 S.C. 299, 408 S.E.2d 223 (1991). THERE WAS EVIDENCE COUNSEL FAILED TO ELICIT, IN THE PRESENCE OF THE JURY, THAT FIELDS HAD DAMAGED PETITIONER'S TRUCK AND THAT PETITIONER SWORE OUT A WARRANT FOR HIS ARREST. PETITIONER TOLD MR. BYRHOLDT ABOUT THE EXISTENCE OF THIS WARRANT. (PCR APP. 436, L. 2 - 22) PETITIONER DOESN'T KNOW OF ANY REASON WHY DEFENSE COUNSEL DID NOT USE THE ARREST WARRANT TO SHOW FIELD'S BIAS DURING THE TRIAL. (PCR APP. 436, L. 20 - 437, L. 16).

AT PCR, TRIAL COUNSEL TESTIFIED HE ASKED PETITIONER "WHY WOULD FIELDS BE POINTING HIS FINGER AT PETITIONER RATHER THAN SOMEONE ELSE?" (PCR APP. 408, L. 14-17) BUT THEN TRIAL COUNSEL TESTIFIED HE DID NOT HAVE ANY INDEPENDANT RECOLLECTION OF WHAT HE WAS TOLD BY PETITIONER A NUMBER OF YEARS AGO. (PCR APP. 408 L. 19-23)

PETITIONER SUBMITS THIS LINE OF CROSS EXAMINATION ABOUT A CO-DEFENDANT'S BIAS WAS NOT ONLY PERMISSIBLE, BUT MANDATED IF COUNSEL IS TO BE DEEMED EFFECTIVE. THIS CROSS-EXAMINATION WENT DIRECTLY TO FIELDS BIAS OR MOTIVE TO TESTIFY AGAINST PETITIONER, AND IT WAS NOT A COLLATERAL ISSUE.

FIELDS WAS THE STATES KEY WITNESS SINCE THE VICTIM GAVE INCONSISTENT STATEMENTS. THEREFORE, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO IMPEACH FIELDS WITH THIS AVAILABLE EVIDENCE. SEE, STRICKLAND V. WASHINGTON, SUPRA.

PETITIONER WOULD CITE THE FOLLOWING IN SUPPORT OF HIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AND HEREBY MOVES THIS HONORABLE COURT TO VACATE HIS CONVICTIONS, BOTH BURGLARY AND CRIMINAL SEXUAL CONDUCT.

ADAMS V. BERTRAND, 453 F.3d 428 (7TH Cir. 2006)(COUNSEL FAILED TO FIND AND PRESENT "PIVOTAL WITNESS" BECAUSE COUNSEL "COMMITTED TO A PREDETERMINED STRATEGY WITHOUT A REASONABLE INVESTIGATION.")

NELSON V. WASHINGTON, 172 FED APP. 748, 2006 U.S. APP. LEXIS 5711 (9TH Cir. MARCH 6, 2006) (COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE WHETHER COMPLAINANT'S CLAIM OF SEXUAL ABUSE WAS FABRICATED OR, WHETHER PERPETRATOR WAS SOMEONE OTHER THAN PETITIONER.)

JOSHUA V. DEWITT, 341 F.3d 430 (6TH Cir 2003) (COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE 4TH AMENDMENT ISSUE, WHICH "REASONABLE TRIAL ATTORNEY WOULD HAVE RAISED" BASED ON APPLICABLE LAW AND FACTS OF CASE, GIVEN THAT "THERE IS NOTHING IN THE RECORD TO REFLECT THAT TRIAL COUNSEL CONSIDERED AND DECLINED TO RAISE (ISSUES) FOR STRATEGIC REASONS."

LINDSTADT V. KEANE, 239 F.3d 191 (2ND Cir 2001)(REPRESENTATION WAS RENDERED INEFFECTIVE BY CUMULATIVE EFFECT OF FAILURE TO EXPLOIT IMPORTANT DISCREPANCY IN PROSECUTION WITNESSES' ACCOUNTS; FAILURE TO RAISE AVAILABLE CHALLENGE TO PROSECUTIONS PHYSICAL EVIDENCE; FAILURE TO OFFER ADEQUATE ARGUMENTS FOR RELEVANCE OF IMPORTANT DEFENSE TESTIMONY.)

HOLSOBACK V. WHITE, 133 F.3d 1382 (11TH Cir 1998)(IN PREPARING FOR TRIAL IN SEXUAL OFFENSE CASE IN WHICH THERE WAS NO MEDICAL EVIDENCE TO SUBSTANTIATE VICTIMS ALLEGATIONS, COUNSEL WAS INEFFECTIVE IN FAILING TO SUBPOENA MEDICAL RECORDS AND CONSULT PHYSICIAN TO ASCERTAIN SIGNIFICANT OF ABSENCE OF CORROBORATIVE MEDICAL EVIDENCE; COUNSEL'S CLAIM OF STRATEGIC CHOICE IS REJECTED BECAUSE "INFORMED TACTICAL DECISION" COULD NOT BE MADE WITHOUT ADEQUATE INVESTIGATION.)

BAYLOR V. ESTELLE, 520 U.S. 1151 (1997) (COUNSEL WAS INEFFECTIVE IN FAILING TO PURSUE ADEQUATE INVESTIGATION OF POTENTIAL EXCULPATORY SEROLOGICAL EVIDENCE IN SEXUAL ASSAULT CASE.)

- 3) DUE TO A PROVISION INSIDE AN OTHERWISE GENERIC PCR ORDER AND GIVEN THE 14TH AMENDMENT TO THE U.S. CONSTITUTION TO "DUE PROCESS", PETITIONER'S ISSUES HAVE BEEN PROPERLY RAISED AND PRESERVED TO BE ADJUDICATED ON THE MERITS OF HIS CLAIMS.

PETITIONER ASSERTS IT SHOULD BE CLEAR UPON READING THE PCR ORDER, WHILE NOT KNOWING ANYTHING ABOUT THE CASE, THAT THE ORDER DOES NOT CONTAIN THE REQUISITE FINDINGS OF FACT AND CONCLUSION OF LAW. (APP. PG. 468 - 471) SEE S.C. CODE § 17-27-80 (2003); MARLAR V. STATE, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (2007). THE ORDER DID NOT ADDRESS PETITIONER'S ALLEGATIONS THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL S.L.E.D. AGENT BARRON ABOUT THE INCONSISTENT PUBIC HAIRS FOUND IN THE VICTIMS BED. THE ORDER OF DISMISSAL DID NOT ADDRESS PETITIONERS ALLEGATIONS THAT DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CROSS-EXAMINE FIELDS ABOUT HIS BIAS SINCE PETITIONER HAD TAKEN A WARRANT OUT FOR HIS ARREST. FIELDS WAS THE STATE'S KEY WITNESS AGAINST THE PETITIONER SINCE THE VICTIM GAVE "INCONSISTENT" STATEMENTS. THE ORDER EVEN ERRONEOUSLY REFERRED TO PETITIONER'S ALLEGATIONS BEING AN "INVOLUNTARY PLEA."

PETITIONER ASSERTS THE COURT OF APPEALS ONLY DISCUSSED THE EVIDENCE OFFERED AT THE HEARING AND THEN NOTED THE PCR COURT'S ORDER "DID NOT" COMPLY WITH S.C. CODE § 17-27-80 BECAUSE IT DID NOT MAKE A SPECIFIC FINDINGS OF FACT AND CONCLUSION OF LAW. THE COURT DID NOT AFFIRM THE DENIAL OF RELIEF ON THIS GROUND. SEE. MARLAR V. STATE, 373 S.C. 275, 644 S.E.2d 769 (2007).

THE ABOVE SAID ARGUMENT CLEARLY SHOWS PETITIONER ESTABLISHES A "DUE PROCESS CLAUSE" VIOLATION OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, THEREFORE GIVES THIS HONORABLE COURT JURISDICTION OF SAID CLAIM WHEN CITING A U.S. CONSTITUTIONAL VIOLATION, AND IN ADDITION TO WHEN A "MISCARRIAGE OF JUSTICE" HAS OCCURED.

SECONDLY, THE SOUTH CAROLINA COURT OF APPEALS RULED THAT PETITIONERS ISSUES WERE PRESERVED GIVEN THAT THE PCR ORDER CONTAINED A PROVISION FINDING PETITIONER HAD PRESENTED NO EVIDENCE TO SUPPORT ANY ISSUES NOT ADDRESSED, THEN VACATED AND REMANDED THIS CASE FAR FURTHER FINDS BECAUSE DESPITE THE ORDERS LANGUAGE PETITIONER DID IN FACT PRESENT EVIDENCE IN SUPPORT OF HIS ISSUES AND THERE WAS NO

EVIDENCE TO SUPPORT THE COURTS FINDINGS. (APP. PG. 531-533).

PETITIONER ASSERTS THE SOUTH CAROLINA APPEALS COURT APPLIES THE PROPER STANDARD OF REVIEW; "THIS COURT GIVES GREAT DEFERENCE TO THE POST CONVICTION RELIEF (PCR) COURTS FINDINGS OF FACT AND CONCLUSIONS OF LAW." DEMPSEY V. STATE, 363 S.C. 365, 368 610 S.E.2d 812, 814 (2005). A PCR COURTS FINDING WILL BE UPHELD ON APPEAL IF THERE IS "ANY EVIDENCE OF PROBATIVE VALUE SUFFICIENT TO SUPPORT THEM." Id. THE APPELLATE COURT MUST REVERSE WHERE THERE IS NO PROBATIVE EVIDENCE TO SUPPORT THE FINDINGS. PIERCE V. STATE, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

PETITIONER AND THE SOUTH CAROLINA COURT OF APPEALS ASSERT THAT WHEN A PCR COURT ORDER SPECIFICALLY ADDRESSES IT'S FAILURE TO DELINEATE EACH ISSUE AND ALSO GIVES REASONS IN SUPPORT OF THEIR RULING, THAT THE ISSUES HAS BEEN FINALLY RULED UPON BY THE LOWER COURT AND NO RULE 59(e) IS REQUIRED FOR PRESERVATION.

IN ADDITION, THE PETITIONER POINTS OUT THAT THE SOUTH CAROLINA SUPREME COURT ACKNOWLEDGES IN THEIR ORDER THAT ON OCCASION THEY HAVE CHOSE TO OVERLOOK PCR COUNSEL'S FAILURE TO FILE A RULE 59(e) MOTION. THE COURT REFERS TO THESE AS "UNIQUE" CASES.

HERE, PETITIONER SUBMITS THE FORENSIC EVIDENCE OBTAINED AND TEST BY STATE LAW ENFORCEMENT POINTS DIRECTLY TO PETITIONERS INNOCENCE. THEREFORE, PETITIONER ASSERTS GIVEN THE STATES WEAK CASE AGAINST HIM AND CONSIDERING THE ISSUES OF EVIDENCE NOW PRESENTED TO THIS HONORABLE COURT THAT THERE HAS BEEN A "MISCARRIAGE OF JUSTICE" AND PRAYS THIS CASE IS HANDLED AS A "UNIQUE" CASE AS WELL AND GIVEN A FINAL RULING ON THE MERITS OF THIS CASE.

THE SOUTH CAROLINA SUPREME COURTS DECISION NOT TO GIVE A RULING ON THE MERITS OF PETITIONERS ISSUES IS IN ERROR, SUCH ACTION BY THE COURT PLACES THE JUDICIARY'S INTEGRITY INTO SERIOUS QUESTION AND JEOPARDIES THE MACHINERY OF JUDICIAL DECISION MAKING BY CAUSING IT TO BECOME UNFAIR AND FUNDAMENTALLY FLAWED: SEE. CHEWING V. FORD MOTOR COMPANY, 354 S.C. 72,78, 579 S.E.2d 605, 608, (S.C. 2003).

- 4) PETITIONER WAS DENIED DUE PROCESS OF LAW AND DEPRIVED OF A FAIR TRIAL IN AS MUCH AS THE STATE FAILED TO DISCLOSE AN ORAL STATEMENT ALLEGEDLY GIVEN BY PETITIONER PURSUANT TO BRADY MOTION.
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PETITIONER ASSERTS PRIOR TO TRIAL, THE PETITIONER WAS WAS QUESTIONED BY DETECTIVE SUTTON (TR. PG. 208, L. 7-8). MS. SUTTON ASKED PETITIONER IF HE HAD BEEN WITH FIELDS ON 02-27-1993. (TR. PG. 211, L. 14-19). PETITIONER TOLD MS. SUTTON THAT IT HAD BEEN OVER THREE (3) YEARS AND HE COULD NOT RECALL WHETHER OR NOT HE WAS WITH FIELDS ON THAT DATE. MS. SUTTON TOOK DOWN WHAT PETITIONER SAID IN HAND WRITTEN NOTES, LATER TO REARRANGE HIS STATEMENT IN A TYPED WRITTEN FORM IN SUCH A WAY AS TO IMPLICATE HIMSELF WITH FIELDS ON THE NIGHT IN QUESTION. MS. SUTTON NEVER ALLOWED PETITIONER TO READ HER WRITTEN OR TYPED NOTES AND NEVER ALLOWED PETITIONER TO SIGN THEM. (TR. APP. PG. 216, L. 12-21). PRIOR TO TRIAL PETITIONERS COUNSEL FILED A RULE 5 MOTION FOR DISCOVERY AND REQUESTED A COPY OF ANY ALLEGED ORAL STATEMENT GIVEN BY PETITIONER WHICH WOULD BE RELIED UPON AT TRIAL. THE STATE NEVER PROVIDED THE DEFENSE WITH THE HAND WRITTEN NOTES OF THE ORAL STATEMENT. IN ADDITION, THESE HAND WRITTEN NOTES WERE INTRODUCED AND PRESENTED TO THE TRIAL COURT DURING MS. SUTTON'S TESTIMONY. (TR. APP. PG. 214 L. 3-17).

AT TRIAL MS. SUTTON TESTIFIED THAT HE WAS WITH FIELDS ON THE NIGHT IN QUESTION (TR. APP. PG. 211, L. 19) AND THAT SHE WAS BASING HER TESTIMONY UPON HER TYPED WRITTEN NOTES OF THE CONVERSATION. (TR. APP. PG. 213, L. 24).

THE STATES FAILURE TO DISCLOSE THE CONTENTS OF THE HANDWRITTEN NOTES DEPRIVED PETITIONER OF A FAIR TRIAL AND THE ABILITY TO PREPARE A PROPER DEFENSE.

THE TESTIMONY OF MS. SUTTON CAME AS A COMPLETE SURPRISE TO THE PETITIONER AS PETITIONER ONLY EXPECTED HER TO TESTIFY THAT PETITIONER COULD NOT REMEMBER WHERE HE WAS ON THAT EVENING, NOT THAT HE ADMITTED TO BEING WITH FIELDS. ADDITIONALLY, THE HAND WRITTEN NOTES CONTRADICT MS. SUTTONS IN COURT TESTIMONY AND WERE DIFFERENT THAN THE TYPED WRITTEN NOTES.

IN CONNECTION, THIS EVIDENCE IS EXTREMELY IMPORTANT IN THIS CASE AS THE STATE RELIES ALMOST ENTIRELY UPON THE THEORY THAT PETITIONER HAD ADMITTED TO BEING WITH FIELDS ON THE NIGHT IN QUESTION. FURTHERMORE, THE JURY GAVE GREAT WEIGHT TO THE THEORY THAT THE PETITIONER ADMITTED BEING WITH FIELDS FOR THEY RETURNED TO THE COURT ROOM REQUESTING TO REVIEW THE TESTIMONY WHERE THE PETITIONER ADMITTED TO BEING WITH FIELDS. (TR.APP.PG. 333, L. 18 - PG. 338, L. 25). THEREFORE PETITIONER WAS CONVICTED MORE LIKELY THAN NOT, BASED UPON THE THEORY THAT HE HAD ADMITTED BEING WITH THE CO-DEFENDANT. THE NON-DISCLOSED HAND WRITTEN NOTES WOULD HAVE BENEFITED THE DEFENSE GREATLY. SPECIFICALLY, IT WOULD HAVE PLACED PETITIONER ON NOTICE THAT MS. SUTTON WAS GOING TO TESTIFY THAT PETITIONER ADMITTED TO BEING WITH FIELDS AND WOULD HAVE ALLOWED PETITIONER THE ABILITY TO FORM A PROPER DEFENSE OR CONSIDER TESTIFYING HIMSELF TO DISPUTE THE CLAIM. SECONDLY, IT WOULD HAVE ALLOWED THE DEFENSE TO DEMONSTRATE THAT THE HAND WRITTEN NOTES WERE DIFFERENT THAN HER IN COURT TESTIMONY AND THE TYPED NOTES; THEREBY IMPEACHING HER TESTIMONY WITH HER OWN HAND WRITTEN NOTES. FURTHERMORE, THERE IS AMPLE SUPPORT IN THE RECORD OF A BRADY VIOLATION. PETITIONER FIRST MADE A BRADY VIOLATION CLAIM IN HIS PCR APPLICATION. (APP.PG. 368-370) TRIAL COUNSEL WAS THEN QUESTIONED CONCERNING THIS BRADY VIOLATION DURING THE PCR, WHERE MR. BYRHOLDT STATED HE DID NOT RECEIVE THE HAND WRITTEN NOTES IN ADVANCE OF TRIAL BEFORE AS A RESULT OF HIS RULE (5) FOR DISCOVERY. COUNSEL WENT ON TO SAY THAT UNDER RULE (5) HE IS ENTITLED TO TECHNICAL INFORMATION, EXPERT WITNESS REPORTS, AND STATEMENTS OF THE DEFENDANT. (PCR APP.PG.410-411). PETITIONER SUBMITTS THIS WAS A ORAL STATEMENT GIVEN BY PETITIONER AND HAND WRITTEN BY MS. SUTTON. THESE HAND WRITTEN NOTES WERE USED AT TRIAL (TR. APP.PG.214) AND SHOULD HAVE BEEN INCLUDED IN RULE (5) FOR DISCOVERY.

ADDITIONALLY, IN THE SOUTH CAROLINA COURT OF APPEALS ORDER THEY VACATED AND REMANDED THIS CASE BACK TO THE PCR COURT TO SPECIFICALLY ADDRESS EACH ISSUE RAISED IN PETITIONERS PCR APPLICATION. (APP.PG. 528-533).

THE STATES FAILURE TO DISCLOSE THE CONTENTS OF THE HAND WRITTEN NOTES DEPRIVED THE PETITIONER OF A FAIR TRIAL AND ALSO A VIOLATION OF PETITIONERS U.S. CONSTITUTIONAL RIGHTS, IN ADDITION PETITIONER WILL CITE SAID CASE LAW IN SUPPORT OF HIS ARGUMENT;

BRADY V. MARYLAND, 373 U.S. 83, 10 L.Ed 2215, 83 S.Ct 1194 (1963)
U.S. V. GIL, 297 F.3d 93 (2ND Cir. 2002) (BRADY MATERIAL MUST BE
DISCLOSED IN TIME FOR IT'S EFFECTIVE USE AT TRIAL).

KYLES V. WHITLEY, 514 U.S. 491 (1995) ("BECAUSE THE NET EFFECT OF
THE EVIDENCE WITHHELD BY THE STATE IN THIS CASE RAISES A REASONABLE
PROBABILITY THAT IT'S DISCLOSURE WOULD HAVE PRODUCED A DIFFERENT
RESULT, KYLES IS ENTITLED TO A NEW TRIAL.").

BANKS V. DRETKE, 540 U.S. 668, (2004) ("WHEN POLICE OR PROSECUTORS
CONCEAL SIGNIFICANT EXCULPATORY OR IMPEACHING MATERIAL IN THE STATE'S
POSSESSION, IT'S ORDINARILY INCUMBENT ON THE STATE TO SET THE RECORD
STRAIGHT, THEREFORE A NEW TRIAL IS ENTITLED.")

CASTLEBERRY V. BRIGANO, 349 F.3d 286 (6TH Cir. 2003) ("PROSECUTION
DID NOT DISCLOSE TO DEFENSE COUNSELS THAT VICTIMS DESCRIPTION OF
ASSAILANT DIFFERED FROM PETITIONERS APPEARANCE IN IMPORTANT RESPECTS,
SUCH WITHHOLDING IS GROUNDS FOR A NEW TRIAL.")

SAWYER V. HOLBAUER, 299 F.3d 605 (6TH CIR. 2002)

WHITE V. HELLING, 194 F.3d 937 (8TH CIR. 1999)

5) THE EVIDENCE PRESENTED POINTS DIRECTLY TO PETITIONER'S
"ACTUAL INNOCENCE."

PRIOR TO TRIAL THE VICTIM GAVE A STATEMENT CONTENDING THAT TWO (2) PERPETRATORS BROKE INTO HER HOME AND RAPED HER. SHE THEN CONTENDED THAT BOTH RAPIST EJACULATED INSIDE HER. (TR.APP.PG. 204 L. 18-25). AT TRIAL THE VICTIM TESTIFIED SHE HAD SLEPT WITH THREE (3) PEOPLE, HER BOYFRIEND JIM RUSHTON (TR.APP.PG.55 L.5-10) AND THE TWO (2) RAPIST. IF THIS IS TRUE, THERE COULD ONLY BE FOUR (4) POSSIBLE DNA EVIDENCE. (1) DNA FROM THE VICTIM, (2) DNA FROM THE VICTIMS BOYFRIEND, (3) DNA FROM JERRY FIELDS, AND (4) DNA FROM THE 2ND PERSON INVOLVED IN THE RAPE.

SUSPECT DNA KITS WERE TAKEN FROM THE VICTIM, THE VICTIMS BOYFRIEND, JERRY FIELDS AND THE PETITIONER. (TR.APP.PG.242 L.3-12). THERE WAS DNA EVIDENCE TAKEN FROM THE SCENE WHICH BELONGED TO THE VICTIM, THE VICTIMS BOYFRIEND, AND JERRY FIELDS. NO DNA EVIDENCE LINKED PETITIONER TO THE CRIME. (TR.APP.PG.253 L. 7-11). THIS FACT ALONE DOES NOT MEAN THAT PETITIONER WAS NOT THE SECOND RAPIST, FOR SUCH DNA EVIDENCE BELONGING TO THE PETITIONER COULD HAVE BEEN WASHED AWAY OR LOST. HOWEVER A PUBIC HAIR SAMPLE WAS TAKEN WHICH DID NOT BELONG TO ANYONE FOR WHICH A DNA SUSPECT KIT WAS TAKEN. THIS FACT ALONE DEMONSTRATES THAT SOMEONE ELSE WAS THE SECOND RAPIST. WHILE PETITIONERS DNA COULD HAVE BEEN WASHED AWAY OR LOST IT IS IMPOSSIBLE FOR DNA TO HAVE BEEN RETRIEVED THAT BELONGED TO A 5TH PERSON IF THE VICTIM ONLY HAD INTERCOURSE WITH THREE PEOPLE, HER BOYFRIEND AND THE TWO RAPIST. COUNSEL NEVER EVEN BROUGHT UP THE FACT THAT TWO (2) PUBIC HAIR SAMPLES EXISTED WHICH BELONGED TO AN UNKNOWN SUSPECT. ATTORNEY GENERAL MR. DUKES EVEN REFERRED TO TRIAL COUNSEL'S TACTICS AS MERELY A SMOKE SCREEN. (PCR APP.PG. 465 L. 5-13).

IF THE VICTIMS TESTIMONY IS CORRECT AND SHE HAD INTERCOURSE WITH THREE (3) PEOPLE, THE FACT THAT FORENSIC EVIDENCE WAS FOUND WHICH BELONGED TO SOMEONE ELSE EXONERATES PETITIONER FROM BEING THE SECOND RAPIST. THEREFORE THE UNMATCHED PUBICE HAIRS MUST HAVE BELONGED TO THE 2ND RAPIST. ESPECIALLY, GIVEN THE VICTIM WAS RAPED MULTIPLE TIMES BY THE PERPETRATORS. (TR.APP.PG.44 L. 7).

INDEED, PETITIONER DID PRESENT EVIDENCE IN HIS PCR APPLICATION AS TO WHO THE PUBIC HAIRS BELONGED. (APP.PG.368-381) INTERESTINGLY, SOME OF THE DNA SEMEN SAMPLES WERE VERY SIMILAR TO JERRY FIELDS DNA BUT NOT AN EXACT MATCH. (TR.APP.PG.249 L.13-22, PG. 254 L.9-19) SUCH EVIDENCE MAY HAVE COME FROM JERRY FIELDS BROTHER TERRY FIELDS. THEIR DNA WOULD BE VERY SIMILAR BUT NOT AN EXACT MATCH. JERRY AND TERRY FIELDS HAVE A LONG HISTORY OF COMMITTING BURGLARIES TOGETHER. LIKEWISE, IT IS POSSIBLE THAT THE VICTIM HEARD THE NAME TERRY INSTEAD OF TONY SINCE THEY'RE SIMILAR AND THE VICTIM WAS HYSTERICAL AT THE TIME. (TR.APP.PG.57 L. 19 - PG. 58 L. 1; AND PG. 90 L. 7).

OBVIOUSLY HAD COUNSEL RAISED THIS EVIDENCE NO REASONABLE JUROR WOULD HAVE FOUND PETITIONER GUILTY. FOR IF THE VICTIM ONLY HAD INTERCOURSE WITH THREE (3) PEOPLE AND NONE OF THE DNA BELONGS TO THE PETITIONER BUT SOME OF THE EVIDENCE BELONGS TO AN UNKNOWN PERSON, THE JURY WOULD INFER THAT THE PUBIC HAIR SAMPLES BELONGED TO THE REAL 2ND RAPIST AND PETITIONER WAS NOT INVOLVED.

PETITIONER ASSERTS THAT THIS EVIDENCE PROVES HIS INNOCENCE AND THEREFORE ASKS THIS HONORABLE COURT TO GRANT HIS IMMEDIATE RELEASE.

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- 6) PETITIONER WOULD LIKE TO "POINT OUT" THAT SOME OF THE FACTS RESPONDENT USED IN THEIR RETURN AND MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WAS MISLEADING AND INACCURATE.
-

HERE, RESPONDENT STATES THE VICTIM WAS A "HUNDRED PERCENT SURE" HER ASSAILANT WAS PETITIONER. PETITIONER SUBMITTS THIS TO BE INACCURATE AND MISLEADING. AT TRIAL THE VICTIM TESTIFIED THAT SHE COULD NOT IDENTIFY PETITIONERS VOICE AND DID NOT SEE PETITIONERS FACE (TR. APP. PG. 70 L. 24- PG. 73 L. 1), BUT WENT ON TO TESTIFY THAT SHE WAS ABSOLUTELY SURE THAT THE TALL, SLIM RAPIST WAS PETITIONER BECAUSE: (1) OF HIS BUILD; (2) FIELDS REFERRED TO THE 2ND RAPIST AS "TONY", AND (3) THE 2ND RAPIST WAS FAMILIAR WITH HER HOUSE.

PETITIONER ASSERTS VICTIMS IDENTIFICATION IS MERELY A GUT FEELING WITH LITTLE TO OFFER IN SUPPORT. IN ADDITION, PETITIONER BROUGHT THE VICTIMS IDENTIFICATION INTO QUESTION AT PCR. (PCR APP.PG.447 L. 2-6).

PETITIONER "POINTS OUT" THE VICTIM COULD NOT POSITIVELY IDENTIFY THE TWO RAPIST.

7) TRIAL COUNSEL HAD A SEVER ALLERGIC REACTION AND WAS HOSPITALIZED FOR THREE (3) DAYS JUST WEEKS PRIOR TO TRIAL.

AT PCR TRIAL COUNSEL ADMITTED TO BEING HOSPITALIZED FOR THREE (3) DAYS JUST WEEKS PRIOR TO TRIAL. (PCR APP.PG.411 L.21-23). PETITIONER DID NOT INTEND TO OFFER THIS AS A CLAIM IN SUPPORT OF HIS "MEMORANDUM IN SUPPORT OF § 2254 MOTION" AS AN ISSUE OF MERIT, BUT RATHER STATED AS A FACT. PETITIONER BELIEVES THE ISSUES HE PRESENTS TO THIS HONORABLE COURT ARE SUBSTANTIAL AND PETITIONER BELIEVES THE SUBSTANCE OF HIS MERITS ENTITLES HIM TO RELIEF UNDER HABEAS REVIEW.

CONCLUSION

- 8) BY REASON OF THE FOREGOING ARGUMENTS, PETITIONER SHOULD BE GRANTED RELIEF, AND THE RESPONDENTS RETURN AND MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

RESPECTFULLY SUBMITTED,

s/ Anthony L. Marlur
ANTHONY L. MARLAR
#242361 U-1/A109
TYGER RIVER CORR. INST.
200 PRISON ROAD
ENOREE, SC 29335

Sworn before me
THIS 3rd DAY OF SEPTEMBER, 2008

[Signature]
Notary Public of South Carolina

My Commission Expires: 1-26-2009

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FORM ANDERSON COUNTY
COURT OF COMMON PLEAS**

R. Lawton McIntosh, Circuit Court Judge

Case No: 2025-002377

**Anthony Marlar,
Appellan**

V.

**State Of South Carolina
Respondent**

Exhibit D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO: 2:08-1874 - RBH - RSC

ANTHONY L. MARLAR
PETITIONER

-VS-

WARDEN, TYGER RIVER
CORRECTIONAL INSTITUTION
RESPONDENTS

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT, ANTHONY L. MARLAR. PETITIONER HEREBY APPEALS TO THIS HONORABLE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. WHEREBY THE UNITED STATES DISTRICT COURT, HONORABLE R. BRYAN HARWELL GRANTED SUMMARY JUDGMENT ON THE 4TH DAY OF DECEMBER 2008.

PETITIONER WOULD SHOW UNTO THIS HONORABLE COURT AND ALL PARTIES IN THIS ACTION THE BELOW LISTED GROUNDS FOR APPEAL AND MOVES THIS COURT TO TAKE JURISDICTION OVER THE PETITIONERS APPEAL, SETTING FORTH THE BELOW LISTED FACTS:

- 1) DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL AVAILABLE S.L.E.D. AGENT JOHN BARRON TO TESTIFY THAT TWO (2) PUBIC HAIRS FOUND IN THE VICTIMS BED DID NOT MATCH THE PETITIONER.

PETITIONER IS REQUIRED TO PRESENT EVIDENCE THAT COUNSEL WAS INEFFECTIVE, AND THAT INEFFECTIVENESS PREJUDICED THE OUTCOME OF HIS TRIAL. STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. CT. 2052 (1984); COBS, S.C. 299, 408 S.E.2d 223 (1991). THERE WAS AVAILABLE EVIDENCE FROM S.L.E.D. AGENT JOHN BARRON THAT THERE WERE TWO (2) PUBIC HAIRS TESTED AND IF HE WERE CALLED TO TESTIFY HE WOULD HAVE STATED THAT THE PUBIC HAIR WERE INCONSISTENT WITH PETITIONER, CO-DEFENDANT, VICTIM, AND JIM RUSHTON, WOULD HAD TO HAVE BEEN FROM SOMEBODY ELSE. (P.C.R. APP PG. 424 - 425) THE FACT THERE WAS NO DNA IMPLICATING PETITIONER WAS VERY SIGNIFICANT, AND THE FAILURE TO CALL AGENT BARRON WAS OF GREAT MOMENT. THE HAIR NOT MATCHING EVIDENCE LED TO A CLEAR INFERENCE THAT THE PUBIC HAIRS MAY HAVE COME FROM THE OTHER RAPIST.

AT PCR, TRIAL COUNSEL BYRHOLDT TESTIFIED THAT HE CROSS EXAMINED OTHER AGENTS CONCERNING THE CONTENTS OF MR. BARRON'S TEST RESULTS. MR. BYRHOLDT WENT ON TO EXPLAIN HOW THIS EVIDENCE ALLOWED HIM TO ARGUE REASONABLE DOUBT, THAT THEY HAD PUBIC HAIRS THAT COULD NOT BE EXPLAINED AND HOW IT ALLOWED HIM TO POINT A FINGER AT SOMEBODY ELSE, "SOME UNKNOWN ENTITY OUT THERE RATHER THAN PETITIONER" (PCR APP. PG. 398, L. 10 - PG. 399, L.18) THE TESTIMONY ABOVE BY TRIAL COUNSEL IS CLEARLY EVIDENT THAT HE BELIEVED THIS EVIDENCE WAS VIABLE AND IMPORTANT FOR HIM TO INCLUDE IN HIS DEFENSE.

UNFORTUNATELY, ONLY AFTER FURTHER INTENSE QUESTIONING DID TRIAL COUNSEL CHANGE HIS TESTIMONY AND TESTIFIED THAT HE THOUGHT HE HAD ARGUED IT BUT ADMITTED THAT HE DID NOT. (PCR APP. PG. 399, L. 19 - PG. 401, L. 9). PETITIONER SUBMITS THE RECORD WILL REFLECT THAT MR. BYRHOLDT NEVER PRODUCED THIS EVIDENCE TO THE TRIAL COURT IN ANY WAY, TESTIMONY OR IN ANY ARGUMENT. TESTIMONY AND ADMISSION ON MR. BYRHOLDT'S BEHALF CLEARLY SHOWS HE "DID NOT" DEMONSTRATE REASONABLE SOUND TRIAL STRATEGY AND COUNSEL'S DEFENSE WAS INEFFECTIVE.

ADAMS V. BERTRAND, 453 F.3d 428 (7TH Cir. 2006)(COUNSEL FAILED TO FIND AND PRESENT "PIVOTAL WITNESS" BECAUSE COUNSEL "COMMITTED TO A PREDETERMINED STRATEGY WITHOUT A REASONABLE INVESTIGATION.")

NELSON V. WASHINGTON, 172 FED APP. 748, 2006 U.S. APP. LEXIS 5711 (9TH Cir. MARCH 6, 2006) (COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE WHETHER COMPLAINANT'S CLAIM OF SEXUAL ABUSE WAS FABRICATED OR, WHETHER PERPETRATOR WAS SOMEONE OTHER THAN PETITIONER.)

JOSHUA V. DEWITT, 341 F.3d 430 (6TH Cir 2003) (COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE 4TH AMENDMENT ISSUE, WHICH "REASONABLE TRIAL ATTORNEY WOULD HAVE RAISED" BASED ON APPLICABLE LAW AND FACTS OF CASE, GIVEN THAT "THERE IS NOTHING IN THE RECORD TO REFLECT THAT TRIAL COUNSEL CONSIDERED AND DECLINED TO RAISE (ISSUES) FOR STRATEGIC REASONS."

LINDSTADT V. KEANE, 239 F.3d 191 (2ND Cir 2001)(REPRESENTATION WAS RENDERED INEFFECTIVE BY CUMULATIVE EFFECT OF FAILURE TO EXPLOIT IMPORTANT DISCREPANCY IN PROSECUTION WITNESSES' ACCOUNTS; FAILURE TO RAISE AVAILABLE CHALLENGE TO PROSECUTIONS PHYSICAL EVIDENCE; FAILURE TO OFFER ADEQUATE ARGUMENTS FOR RELEVANCE OF IMPORTANT DEFENSE TESTIMONY.)

HOLSOBACK V. WHITE, 133 F.3d 1382 (11TH Cir 1998)(IN PREPARING FOR TRIAL IN SEXUAL OFFENSE CASE IN WHICH THERE WAS NO MEDICAL EVIDENCE TO SUBSTANTIATE VICTIMS ALLEGATIONS, COUNSEL WAS INEFFECTIVE IN FAILING TO SUBPOENA MEDICAL RECORDS AND CONSULT PHYSICIAN TO ASCERTAIN SIGNIFICANCE OF ABSENCE OF CORROBORATIVE MEDICAL EVIDENCE; COUNSEL'S CLAIM OF STRATEGIC CHOICE IS REJECTED BECAUSE "INFORMED TACTICAL DECISION" COULD NOT BE MADE WITHOUT ADEQUATE INVESTIGATION.)

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- 3) PETITIONER WAS DENIED DUE PROCESS OF LAW AND DEPRIVED OF A FAIR TRIAL IN AS MUCH AS THE STATE FAILED TO DISCLOSE AN ORAL STATEMENT ALLEGEDLY GIVEN BY PETITIONER PURSUANT TO BRADY MOTION.
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PETITIONER ASSERTS PRIOR TO TRIAL, THE PETITIONER WAS WAS QUESTIONED BY DETECTIVE SUTTON (TR. PG. 208, L. 7-8). MS. SUTTON ASKED PETITIONER IF HE HAD BEEN WITH FIELDS ON 02-27-1993. (TR. PG. 211, L. 14-19). PETITIONER TOLD MS. SUTTON THAT IT HAD BEEN OVER THREE (3) YEARS AND HE COULD NOT RECALL WHETHER OR NOT HE WAS WITH FIELDS ON THAT DATE. MS. SUTTON TOOK DOWN WHAT PETITIONER SAID IN HAND WRITTEN NOTES, LATER TO REARRANGE HIS STATEMENT IN A TYPED WRITTEN FORM IN SUCH A WAY AS TO IMPLICATE HIMSELF WITH FIELDS ON THE NIGHT IN QUESTION. MS. SUTTON NEVER ALLOWED PETITIONER TO READ HER WRITTEN OR TYPED NOTES AND NEVER ALLOWED PETITIONER TO SIGN THEM. (TR. APP. PG. 216, L. 12-21). PRIOR TO TRIAL PETITIONERS COUNSEL FILED A RULE 5 MOTION FOR DISCOVERY AND REQUESTED A COPY OF ANY ALLEGED ORAL STATEMENT GIVEN BY PETITIONER WHICH WOULD BE RELIED UPON AT TRIAL. THE STATE NEVER PROVIDED THE DEFENSE WITH THE HAND WRITTEN NOTES OF THE ORAL STATEMENT. IN ADDITION, THESE HAND WRITTEN NOTES WERE INTRODUCED AND PRESENTED TO THE TRIAL COURT DURING MS. SUTTON'S TESTIMONY. (TR. APP. PG. 214 L. 3-17).

AT TRIAL MS. SUTTON TESTIFIED THAT HE WAS WITH FIELDS ON THE NIGHT IN QUESTION (TR. APP. PG. 211, L. 19) AND THAT SHE WAS BASING HER TESTIMONY UPON HER TYPED WRITTEN NOTES OF THE CONVERSATION. (TR. APP. PG. 213, L. 24).

THE STATES FAILURE TO DISCLOSE THE CONTENTS OF THE HANDWRITTEN NOTES DEPRIVED PETITIONER OF A FAIR TRIAL AND THE ABILITY TO PREPARE A PROPER DEFENSE.

THE TESTIMONY OF MS. SUTTON CAME AS A COMPLETE SURPRISE TO THE PETITIONER AS PETITIONER ONLY EXPECTED HER TO TESTIFY THAT PETITIONER COULD NOT REMEMBER WHERE HE WAS ON THAT EVENING, NOT THAT HE ADMITTED TO BEING WITH FIELDS. ADDITIONALLY, THE HAND WRITTEN NOTES CONTRADICT MS. SUTTONS IN COURT TESTIMONY AND WERE DIFFERENT THAN THE TYPED WRITTEN NOTES.

IN CONNECTION, THIS EVIDENCE IS EXTREMELY IMPORTANT IN THIS CASE AS THE STATE RELIES ALMOST ENTIRELY UPON THE THEORY THAT PETITIONER HAD ADMITTED TO BEING WITH FIELDS ON THE NIGHT IN QUESTION. FURTHERMORE, THE JURY GAVE GREAT WEIGHT TO THE THEORY THAT THE PETITIONER ADMITTED BEING WITH FIELDS FOR THEY RETURNED TO THE COURT ROOM REQUESTING TO REVIEW THE TESTIMONY WHERE THE PETITIONER ADMITTED TO BEING WITH FIELDS. (TR.APP.PG. 333, L. 18 - PG. 338, L. 25). THEREFORE PETITIONER WAS CONVICTED MORE LIKELY THAN NOT, BASED UPON THE THEORY THAT HE HAD ADMITTED BEING WITH THE CO-DEFENDANT. THE NON-DISCLOSED HAND WRITTEN NOTES WOULD HAVE BENEFITED THE DEFENSE GREATLY. SPECIFICALLY, IT WOULD HAVE PLACED PETITIONER ON NOTICE THAT MS. SUTTON WAS GOING TO TESTIFY THAT PETITIONER ADMITTED TO BEING WITH FIELDS AND WOULD HAVE ALLOWED PETITIONER THE ABILITY TO FORM A PROPER DEFENSE OR CONSIDER TESTIFYING HIMSELF TO DISPUTE THE CLAIM. SECONDLY, IT WOULD HAVE ALLOWED THE DEFENSE TO DEMONSTRATE THAT THE HAND WRITTEN NOTES WERE DIFFERENT THAN HER IN COURT TESTIMONY AND THE TYPED NOTES; THEREBY IMPEACHING HER TESTIMONY WITH HER OWN HAND WRITTEN NOTES. FURTHERMORE, THERE IS AMPLE SUPPORT IN THE RECORD OF A BRADY VIOLATION. PETITIONER FIRST MADE A BRADY VIOLATION CLAIM IN HIS PCR APPLICATION. (APP.PG. 368-370) TRIAL COUNSEL WAS THEN QUESTIONED CONCERNING THIS BRADY VIOLATION DURING THE PCR, WHERE MR. BYRHOLDT STATED HE DID NOT RECEIVE THE HAND WRITTEN NOTES IN ADVANCE OF TRIAL BEFORE AS A RESULT OF HIS RULE (5) FOR DISCOVERY. COUNSEL WENT ON TO SAY THAT UNDER RULE (5) HE IS ENTITLED TO TECHNICAL INFORMATION, EXPERT WITNESS REPORTS, AND STATEMENTS OF THE DEFENDANT. (PCR APP.PG.410-411). PETITIONER SUBMITTS THIS WAS A ORAL STATEMENT GIVEN BY PETITIONER AND HAND WRITTEN BY MS. SUTTON. THESE HAND WRITTEN NOTES WERE USED AT TRIAL (TR. APP.PG.214) AND SHOULD HAVE BEEN INCLUDED IN RULE (5) FOR DISCOVERY.

ADDITIONALLY, IN THE SOUTH CAROLINA COURT OF APPEALS ORDER THEY VACATED AND REMANDED THIS CASE BACK TO THE PCR COURT TO SPECIFICALLY ADDRESS EACH ISSUE RAISED IN PETITIONERS PCR APPLICATION. (APP.PG. 528-533).

THE STATES FAILURE TO DISCLOSE THE CONTENTS OF THE HAND WRITTEN NOTES DEPRIVED THE PETITIONER OF A FAIR TRIAL AND ALSO A VIOLATION OF PETITIONERS U.S. CONSTITUTIONAL RIGHTS, IN ADDITION PETITIONER WILL CITE SAID CASE LAW IN SUPPORT OF HIS ARGUMENT;

BRADY V. MARYLAND, 373 U.S. 83, 10 L.Ed 2215, 83 S.Ct 1194 (1963)
U.S. V. GIL, 297 F.3d 93 (2ND Cir. 2002) (BRADY MATERIAL MUST BE
DISCLOSED IN TIME FOR IT'S EFFECTIVE USE AT TRIAL).

KYLES V. WHITLEY, 514 U.S. 491 (1995) ("BECAUSE THE NET EFFECT OF
THE EVIDENCE WITHHELD BY THE STATE IN THIS CASE RAISES A REASONABLE
PROBABILITY THAT IT'S DISCLOSURE WOULD HAVE PRODUCED A DIFFERENT
RESULT, KYLES IS ENTITLED TO A NEW TRIAL.").

BANKS V. DRETKE, 540 U.S. 668, (2004) ("WHEN POLICE OR PROSECUTORS
CONCEAL SIGNIFICANT EXCULPATORY OR IMPEACHING MATERIAL IN THE STATE'S
POSSESSION, IT'S ORDINARILY INCUMBENT ON THE STATE TO SET THE RECORD
STRAIGHT, THEREFORE A NEW TRIAL IS ENTITLED.")

CASTLEBERRY V. BRIGANO, 349 F.3d 286 (6TH Cir. 2003) ("PROSECUTION
DID NOT DISCLOSE TO DEFENSE COUNSELS THAT VICTIMS DESCRIPTION OF
ASSAILANT DIFFERED FROM PETITIONERS APPEARANCE IN IMPORTANT RESPECTS,
SUCH WITHHOLDING IS GROUNDS FOR A NEW TRIAL.")

SAWYER V. HOLBAUER, 299 F.3d 605 (6TH CIR. 2002)

WHITE V. HELLING, 194 F.3d 937 (8TH CIR. 1999)

4) THE EVIDENCE PRESENTED POINTS DIRECTLY TO PETITIONER'S
"ACTUAL INNOCENCE."

PRIOR TO TRIAL THE VICTIM GAVE A STATEMENT CONTENDING THAT TWO (2) PERPETRATORS BROKE INTO HER HOME AND RAPED HER. SHE THEN CONTENDED THAT BOTH RAPIST EJACULATED INSIDE HER. (TR.APP.PG. 204 L. 18-25). AT TRIAL THE VICTIM TESTIFIED SHE HAD SLEPT WITH THREE (3) PEOPLE, HER BOYFRIEND JIM RUSHTON (TR.APP.PG.55 L.5-10) AND THE TWO (2) RAPIST. IF THIS IS TRUE, THERE COULD ONLY BE FOUR (4) POSSIBLE DNA EVIDENCE. (1) DNA FROM THE VICTIM, (2) DNA FROM THE VICTIMS BOYFRIEND, (3) DNA FROM JERRY FIELDS, AND (4) DNA FROM THE 2ND PERSON INVOLVED IN THE RAPE.

SUSPECT DNA KITS WERE TAKEN FROM THE VICTIM, THE VICTIMS BOYFRIEND, JERRY FIELDS AND THE PETITIONER. (TR.APP.PG.242 L.3-12). THERE WAS DNA EVIDENCE TAKEN FROM THE SCENE WHICH BELONGED TO THE VICTIM, THE VICTIMS BOYFRIEND, AND JERRY FIELDS. NO DNA EVIDENCE LINKED PETITIONER TO THE CRIME. (TR.APP.PG.253 L. 7-11). THIS FACT ALONE DOES NOT MEAN THAT PETITIONER WAS NOT THE SECOND RAPIST, FOR SUCH DNA EVIDENCE BELONGING TO THE PETITIONER COULD HAVE BEEN WASHED AWAY OR LOST. HOWEVER A PUBIC HAIR SAMPLE WAS TAKEN WHICH DID NOT BELONG TO ANYONE FOR WHICH A DNA SUSPECT KIT WAS TAKEN. THIS FACT ALONE DEMONSTRATES THAT SOMEONE ELSE WAS THE SECOND RAPIST. WHILE PETITIONERS DNA COULD HAVE BEEN WASHED AWAY OR LOST IT IS IMPOSSIBLE FOR DNA TO HAVE BEEN RETRIEVED THAT BELONGED TO A 5TH PERSON IF THE VICTIM ONLY HAD INTERCOURSE WITH THREE PEOPLE, HER BOYFRIEND AND THE TWO RAPIST. COUNSEL NEVER EVEN BROUGHT UP THE FACT THAT TWO (2) PUBIC HAIR SAMPLES EXISTED WHICH BELONGED TO AN UNKNOWN SUSPECT. ATTORNEY GENERAL MR. DUKES EVEN REFERRED TO TRIAL COUNSEL'S TACTICS AS MERELY A SMOKE SCREEN. (PCR APP.PG. 465 L. 5-13).

IF THE VICTIMS TESTIMONY IS CORRECT AND SHE HAD INTERCOURSE WITH THREE (3) PEOPLE, THE FACT THAT FORENSIC EVIDENCE WAS FOUND WHICH BELONGED TO SOMEONE ELSE EXONERATES PETITIONER FROM BEING THE SECOND RAPIST. THEREFORE THE UNMATCHED PUBICE HAIRS MUST HAVE BELONGED TO THE 2ND RAPIST. ESPECIALLY, GIVEN THE VICTIM WAS RAPED MULTIPLE TIMES BY THE PERPETRATORS. (TR.APP.PG.44 L. 7).

INDEED, PETITIONER DID PRESENT EVIDENCE IN HIS PCR APPLICATION AS TO WHO THE PUBIC HAIRS BELONGED. (APP.PG.368-381) INTERESTINGLY, SOME OF THE DNA SEMEN SAMPLES WERE VERY SIMILAR TO JERRY FIELDS DNA BUT NOT AN EXACT MATCH. (TR.APP.PG.249 L.13-22, PG. 254 L.9-19) SUCH EVIDENCE MAY HAVE COME FROM JERRY FIELDS BROTHER TERRY FIELDS. THEIR DNA WOULD BE VERY SIMILAR BUT NOT AN EXACT MATCH. JERRY AND TERRY FIELDS HAVE A LONG HISTORY OF COMMITTING BURGLARIES TOGETHER. LIKEWISE, IT IS POSSIBLE THAT THE VICTIM HEARD THE NAME TERRY INSTEAD OF TONY SINCE THEY'RE SIMILAR AND THE VICTIM WAS HYSTERICAL AT THE TIME. (TR.APP.PG.57 L. 19 - PG. 58 L. 1; AND PG. 90 L. 7).

OBVIOUSLY HAD COUNSEL RAISED THIS EVIDENCE NO REASONABLE JUROR WOULD HAVE FOUND PETITIONER GUILTY. FOR IF THE VICTIM ONLY HAD INTERCOURSE WITH THREE (3) PEOPLE AND NONE OF THE DNA BELONGS TO THE PETITIONER BUT SOME OF THE EVIDENCE BELONGS TO AN UNKNOWN PERSON, THE JURY WOULD INFER THAT THE PUBIC HAIR SAMPLES BELONGED TO THE REAL 2ND RAPIST AND PETITIONER WAS NOT INVOLVED.

PETITIONER ASSERTS THAT THIS EVIDENCE PROVES HIS INNOCENCE AND THEREFORE ASKS THIS HONORABLE COURT TO GRANT HIS IMMEDIATE RELEASE.

5) PETITIONER WOULD LIKE TO "POINT OUT" THAT SOME OF THE FINDS IN THE DISTRICT COURT'S ORDER IS INACCURATE.

HERE, RESPONDENT STATES THE VICTIM WAS A "HUNDRED PERCENT SURE" HER ASSAILANT WAS PETITIONER. PETITIONER SUBMITS THIS TO BE INACCURATE. AT TRIAL THE VICTIM TESTIFIED THAT SHE COULD NOT IDENTIFY PETITIONERS VOICE AND DID NOT SEE PETITIONERS FACE (TR. APP. PG. 70 L. 24 - PG. 73 L. 1), BUT WENT ON TO TESTIFY THAT SHE WAS ABSOLUTELY SURE THAT THE TALL, SLIM RAPIST WAS PETITIONER BECAUSE: (1) OF HIS BUILD, (2) FIELDS REFERRED TO THE 2ND RAPIST AS "TONY", AND (3) THE 2ND RAPIST WAS FAMILIAR WITH HER HOUSE.

PETITIONER ASSERTS VICTIMS IDENTIFICATION IS MERELY A GUT FEELING WITH LITTLE TO OFFER IN SUPPORT. IN ADDITION, PETITIONER BROUGHT THE VICTIMS IDENTIFICATION INTO QUESTION AT P.C.R. (P.C.R. APP. PG. 447 L. 2 - 6).

PETITIONER "POINTS OUT" THE VICTIM COULD NOT POSITIVELY IDENTIFY THE TWO RAPIST.

PETITIONER HERE HAS FILED A DIRECT APPEAL. POST CONVICTION RELIEF APPLICATION, AND A TIMELY PETITION FOR A WRIT OF CERTIORARI BEFORE FILING SAID 28 U.S.C. SECTION 2254. THEREBY MEETING THE REQUIREMENTS OF EXHAUSTING REMEDIES. IN ADDITION, THE PETITIONER HAS RAISED CONSTITUTIONAL CLAIMS AT THE APPROPRIATE TIME IN STATE COURTS. WHEREAS HIS CLAIMS SHOULD NOT BE IN PROCEDURAL DEFAULT. HE HAS FILED HIS DIRECT APPEAL AND PCR IN A TIMELY MANNER, WHEREFORE IN COMPLIANCE WITH MATTHEWS V. EVATT, 105 F.3d 907 (4TH CIR 1997).

PETITIONER ASSERTS HE HAS PRODUCED NEW EVIDENCE THAT WAS NOT AVAILABLE AT TRIAL TO ESTABLISH HIS FACTUAL INNOCENCE: ROYAL V. TAYLOR, 188 F.3d 239 (4TH CIR 1999). THE PETITIONER HAS RAISED ACTUAL INNOCENCE IN SAID HABEAS CORPUS PETITION. WHEREFORE "ACTUAL INNOCENCE IS A EXCUSING DEFAULT METHOD."

PETITIONER HAS ASSERTED CLAIMS THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO CALL A S.L.E.D. AGENT TO TESTIFY THAT TWO (2) PUBIC HAIRS FOUND ON THE VICTIM DID NOT MATCH THE PETITIONER. AND FOR FAILING TO CROSS-EXAMINE THE CO-DEFENDANT ON AN ALLEGED BIAS CLAIM SINCE PETITIONER PREVIOUSLY HAD A SWORN OUT WARRANT AGAINST CO-DEFENDANT FOR PROPERTY DAMAGING.

PETITIONER ALSO ASSERTS THAT HIS DUE PROCESS RIGHTS WERE VIOLATED DUE TO THE PROSECUTIONS FAILURE TO COMPLY WITH A BRADY MOTION.

PETITIONER CLAIMS SHOULD BE AVAILABLE FOR REVIEW IN THIS HONORABLE COURT BASED UPON THE ABOVE SAID GROUNDS AND CASE LAW. IN SAID UNITED STATES DISTRICT COURTS ORDER THE HONORABLE COURT STATES ON PAGE FOUR (4) THAT PETITIONER FAILED TO FILE A 59(e) SCRCR MOTION. WHICH RULE PROVIDES AN AVENUE FOR ANY PARTY TO MOVE TO ALTER OR AMEND A JUDGEMENT. SEEKING SPECIFIC RULINGS FROM THE PCR COURT ON THE ISSUES HE RAISED. (STATE V. MARLAR, OP NO. 26391, 653 SE.2d 266 (S.C. 2007) CITING PRUITT V. STATE, 310 S.C. 254, 423 S.E.2d 127).

PETITIONER ASSERTS THE PCR COURTS ORDER WAS "CONTROVERSIAL" AND PCR COUNSEL DID NOT FILE A RULE 59(e) MOTION BECAUSE HE BELIEVED THE ISSUES WERE PROPERLY PRESERVED FOR REVIEW.

THE PCR COURTS ORDER STATED THAT PETITIONER "PRESENTED NO EVIDENCE TO SUPPORT HIS ISSUES" AND ACCORDINGLY THOSE ISSUES DID NOT HAVE TO BE ADDRESSED. (APP. PAGE 407).

THIS FINDING BY THE PCR COURT IS "CONTROVERSIAL" BECAUSE THE S.C. APPELLATE COURT FOUND THAT PETITIONER DID PRESENT EVIDENCE TO SUPPORT HIS CLAIMS. THE APPELLATE COURT AGREED AGREED WITH PCR COUNSEL THAT THE ISSUES WERE PRESERVED, GIVEN THE PCR COURTS WORDING. AND WENT ON TO STATE THAT ["WHEN A PCR COURT'S ORDER SPECIFICALLY ADDRESSES IT'S FAILURE TO DELINEATE EACH ISSUE AND GIVES

REASONS FOR THE RULING, THE ISSUES HAS BEEN FINALLY RULED UPON BY THE LOWER COURT AND IS PRESERVED FOR APPEAL."] (STATE V. MARLAR, OP. NO. 26391, 653 S.E.2d 266, S.C. 2007)

HENCE, THE PETITIONER ASSERTS PCR COUNSEL WAS "COURT APPOINTED" AND IF PROPER COUNSEL WOULD HAVE BEEN APPOINTED THROUGHOUT APPELLATE PROCESS HIS CASE WOULD BE PREVAILING, WHEREBY THE LOWER COURTS WOULD HAVE VACATED PETITIONERS CONVICTION ON ABOVE SAID GROUNDS ESPECIALLY THE LACK OF DNA EVIDENCE. FURTHERMORE TO INCLUDE SUCH INEFFECTIVE ASSISTANCE OF COUNSEL, WHEREBY PETITIONER HAS DEMONSTRATED CAUSE AND PREJUDICE AND ACTUAL INNOCENCE TO RELIEVE HIM OF SAID DEFAULT AND HE IS ENTITLED TO RELIEF. THE STATE COURT OF APPEALS PROPERLY VACATED AND REMANDED TO THE PCR COURT THE ISSUE OF WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL A S.L.E.D. AGENT JOHN BARRON. THE S.C. SUPREME COURT WAS INCORRECT IN OVERRULING THAT DECISION FINDING AS A PROCEDURAL MATTER THE ISSUES WERE NOT PRESERVED.

PETITIONER MOVES THIS HONORABLE COURT TO EXCUSE ANY PROCEDURAL DEFAULT, WHEREAS PURSUANT TO CRANBERRY V. GREER, 481 U.S. 129, 131, 107 S.Ct. 1671 (1989) A FEDERAL COURT WILL REVIEW A PROCEDURALLY DEFAULTED CLAIM IF THE PETITIONER CAN DEMONSTRATE CAUSE FOR THE DEFAULT AND ACTUAL PREJUDICE THEREFROM, OR HIS ACTUAL INNOCENCE OF THE CRIMES FOR WHICH HE IS BEING HELD (COLEMAN V. THOMPSON, 501 U.S. 722, 750, 111 S. Ct. 2546 (1991)). HERE PETITIONER HAS SHOWED THAT A "CONTROVERSIAL" PCR COURTS ORDER CAUSED "COURT APPOINTED" PCR COUNSEL'S INEFFECTIVENESS FOR NOT FILING A RULE 59(e) MOTION AND SHOULD BE EXCUSABLE TO SATISFY CAUSE FOR THE DEFAULT.

PETITIONER HAS ALSO SHOWED PREJUDICE AND PROVIDED EVIDENCE AND EXHIBITS TO THIS HONORABLE COURT AND ALL PARTIES PROVING HIS ACTUAL INNOCENCE. THEREFORE THIS HONORABLE COURT SHALL UPHOLD THIS MOTION IN ACCORD WITH THE ABOVE SAID CASE CITINGS.

THE TRIAL COURT ERRED IN SO MANY PARTICULARS THAT THE CUMULATIVE EFFECT OF THE ERRORS DESTROYED THE FUNDAMENTAL FAIRNESS OF THE PROCEEDING AND DENIED THE PETITIONER HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

PETITIONER IN ADDITION WOULD CITE (STATE V. WADE, S.C. 79, 409 S.E.2d 780 (1991); (STATE V. WINGO, 304 S.C. 173, 403 S.E.2d 322 (Ct. APP. 1991); STATE V. ADAMS, 277 S.C. 115, 283 S.E. 2d 582, 587 (1981); STATE V. THOMPSON, 305 S.C. 496, 409 S.E.2d 420 (CT. APP. 1991)).

THERE ARE NUMEROUS INCONSISTENCIES THROUGHOUT THE TRIAL WHEREFORE THE PETITIONER CITES STATE V. BALDONADO, 955 P.2d 214, 220 (N.M.Ct.APP. 1998). ACCORDINGLY PETITIONER SUBMITS HIS CONVICTION SHOULD BE OVERTURNED..

CONCLUSION

WHEREFORE, PETITIONER RESPECTFULLY SUBMITS THAT FOR ALL OF THE FOREGOING REASONS, HIS CONVICTIONS MUST BE SET ASIDE AND ALL CHARGES DISMISSED. THERE IS ABSOLUTELY NO SUBSTANTIAL EVIDENCE OF RECORD UPON WHICH A JURY COULD HAVE REASONABLY FOUND PETITIONER GUILTY OF THE CHARGES. PETITIONER WAS PREJUDICED TO A FAIR AND IMPARTIAL TRIAL. WHICH DENIED HIM DUE PROCESS AND FUNDAMENTAL FAIRNESS. WHEREAS PETITIONER PRAYS THIS MOTION BE GRANTED AND GRANT SUCH OTHER RELIEF AS THE COURT DEEMS JUST AND PROPER.

I DECLARE UNDER PENALTY OF PERJURY THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON: 12-15-08

SI Anthony L. Marlar #242361
ANTHONY L. MARLAR, #242361
(PRO-SE)

MR. ANTHONY L. MARLAR #242361
TYGER RIVER C.I. UNIT 1 ROOM 109
200 PRISON ROAD
ENOREE, SC 29335

CERTIFICATE OF SERVICE BY MAIL

I ANTHONY L. MARLAR DO HEREBY CERTIFY THAT I HAVE MAILED THE
ENCLOSED "NOTICE OF APPEAL" AND EXHIBITS TO THE BELOW LISTED ADDRESS
BY PLACING SAID IN AN ENVELOPE WITH POSTAGE PRE-PAID AN AFFIXED FOR
DELIVERY ON THIS 15 DAY OF December, 2008.

TO: U.S. DISTRICT COURT
LARRY W. PROPPS
P.O. BOX 835
CHARLESTON, SC 29402

TO: OFFICE OF ATTORNEY GENERAL
C/O CREIGHTON WATERS
P.O. BOX 11549
COLUMBIA, SC 29211

TO: U.S. COURT OF APPEALS
1100 E. MAIN STREET SUITE 501
RICHMOND, VA 23219-3517

I DECLARE UNDER PENALTY OF PERJURY THE FOREGOING IS TRUE
AND CORRECT. EXECUTED ON: 12-15-08

s/ Anthony L. Marlar #242361
ANTHONY L. MARLAR #242361
TYGER RIVER C.I. UNIT 1 ROOM 109
200 PRISON ROAD
ENOREE, SC 29335
(PRO-SE)

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RECORD NO. 08-8572

In The
United States Court of Appeals
For The Fourth Circuit

ANTHONY L. MARLAR,

Petitioner – Appellant,

v.

WARDEN, TYGER RIVER CORRECTIONAL INSTITUTION,

Respondent – Appellee.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AT CHARLESTON**

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this habeas corpus proceeding pursuant to 28 U.S.C. §§ 1331, 2241 & 2254. The district court granted summary judgment to appellee Tyger River Correctional Institution and dismissed the case with prejudice on December 5, 2008. Joint Appendix ("J.A.") 625. Appellant Anthony L. Marlar submitted a timely notice of appeal on December 15, 2008. J.A. 626.

This court granted a partial certificate of appealability on the issue of whether trial counsel was ineffective for failing to call a state investigator to testify about potentially exculpatory crime scene hair evidence. *See* Order, May 19, 2010 (Docket Entry No. 13). This court therefore has jurisdiction pursuant to 28 U.S.C. §§ 1291 & 2253.

STATEMENT OF THE ISSUE

Whether trial counsel was ineffective for failing to call a state investigator to testify about potentially exculpatory crime scene hair evidence?

STATEMENT OF THE CASE

In 1996, investigators in Anderson County, South Carolina reopened the investigation of a home invasion and rape that had occurred three years previously on February 27, 1993. J.A. 163, 175, 187, 191. For unexplained reasons, the original case investigation had not been pursued, despite complaints from the victim. J.A. 61. As a result of the renewed investigation, Petitioner Anthony "Tony" Marlar and co-defendant Jerry Fields were charged. J.A. 121, 341-345.

Trial occurred on July 7, 1997, over four years after the underlying incident. J.A. 20. The State relied primarily on testimony from the victim, who did not see the face of her masked assailants or recognize their voices, and from Fields, who pleaded guilty and agreed to testify after the only DNA evidence recovered at the scene tied him to the assault. J.A. 56, 121. Investigators found no physical evidence at the scene that conclusively belonged to Marlar – no clothing, no weapons, no fingerprints, no bodily fluids, and no DNA evidence. All other witnesses for the State were the local police investigators, the treating physician, and agents from the South Carolina State Law Enforcement Division ("SLED") crime lab. J.A. 21-22.

One SLED agent the State did not call, however, was John Barron. Agent Barron analyzed pubic hairs found in the crime scene evidence and

reported that they came from an unknown person and did not match Marlar, Fields, the victim, or her boyfriend. J.A. 11-12, 410. Agent Barron's exculpatory report was never introduced into evidence at trial, either through Agent Barron or through other witnesses on cross-examination.

After the State rested, Marlar called no witnesses and presented no evidence. J.A. 259. His counsel did not call Agent Barron or introduce his report. In fact, although Agent Barron's report had apparently been provided by the State, Marlar himself did not know of its existence. J.A. 425-26. Despite the fact that Agent Barron was never called and his report was never entered into evidence, the State argued to the jury at closing that "[e]very report, every SLED report has been provided and you saw it. Every report, every SLED report, everything." J.A. 274.

Marlar was ultimately convicted on all counts and sentenced to thirty years in prison for burglary, to be followed by a twelve year consecutive sentence for criminal sexual conduct. J.A. 337. Only after his conviction and receiving his case file did Marlar learn of Agent Barron's exculpatory report. J.A. 420-26, 434.

After the South Carolina Court of Appeals initially affirmed his direct appeal, Marlar submitted a *pro se* petition for rehearing, highlighting the SLED report from Agent Barron showing the presence of unknown public

hairs in the crime scene evidence. J.A. 539-50. The state appeals court granted Marlar's petition and recalled its prior opinion, but ultimately affirmed, finding that issues concerning Agent Barron's exculpatory hair evidence report were not preserved for direct appeal. J.A. 553-57.

Marlar applied for Post-Conviction Relief ("PCR") in state court and raised a number of issues, including that he was denied effective assistance of counsel from the failure to present the exculpatory evidence from Agent Barron. J.A. 350-70. After hearing testimony from Agent Barron, Marlar, and Marlar's trial counsel, the PCR court rejected Marlar's claims and dismissed his application. J.A. 378, 456-59. Marlar appealed to the state appellate courts. J.A. 460.

The South Carolina Court of Appeals vacated and remanded, having determined that the PCR court's order was inadequate for failing to include specific findings of fact and conclusions of law. *See Marlar v. South Carolina*, 644 S.E.2d 769 (S.C. Ct. App. 2007); *rev'd*, 653 S.E.2d 266 (S.C.). The State argued that Marlar's appeal was foreclosed by his failure to file a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure seeking specific rulings on his arguments. *Id.* at 771. The South Carolina Court of Appeals rejected this argument, explaining that the South Carolina Supreme Court had, in previous cases, "overlooked the failure to

file a Rule 59(e), SCRCP motion in order to attend to the pervasive problem of inadequate orders.” *Id.* Regardless of Rule 59(e), the South Carolina Court of Appeals found that the issue had been preserved based on the way the PCR court had worded its order. *See id.* at 772. On further appeal by the State, however, the South Carolina Supreme Court reversed, finding that Marlar’s issues were not preserved for appeal because of the failure to file a Rule 59(e) motion. *See* 653 S.E.2d at 267. As a result of these state court proceedings, Marlar’s PCR application was denied.

Marlar filed the present petition for habeas relief in the district court, which was entered on the docket on May 14, 2008. J.A. 5. The State moved for summary judgment, and a magistrate judge issued a report recommending that the motion be granted. J.A. 592. The district court adopted the report and recommendation and granted summary judgment to the State, finding Marlar’s claims concerning Agent Barron’s report were procedurally barred due to the failure to file a Rule 59(e) motion in state court. J.A. 622-24. Marlar argued alternatively that, even if there was a procedural default due to the failure to file a Rule 59(e) motion, the district court should have excused it because he was actually innocent. J.A. 622. The district court found that Marlar did not meet this burden for excusing a procedural default and dismissed the petition. J.A. 622-24. Due to the

findings concerning the procedural bar, the district court never reached the merits of Marlar's claims of ineffective assistance of counsel related to Agent Barron's report.

This appeal followed. On May 5, 2009, this court held Marlar's appeal in abeyance pending the outcome of *Bostick v. Stevenson*, No. 08-6331, 589 F.3d 160, 164 (4th Cir. 2009). See Order, Fourth Circuit Docket Entry No. 11. *Bostick* involved the identical procedural issue addressed by the district court below – whether the failure to file a Rule 59(e) motion in South Carolina's PCR proceedings is a procedural bar preventing federal habeas relief. See *Bostick*, 589 F.3d at 163.

This court released its opinion in *Bostick* on December 17, 2009, and ruled that the failure to file a Rule 59(e) motion in the state PCR proceedings was not a procedural bar in a subsequent federal habeas petition because “Rule 59(e) was not consistently applied by the South Carolina courts” at the time of *Bostick*'s PCR proceedings. *Id.* at 164. Notably, the court in *Bostick* expressly referred to the state appellate court decisions in Marlar's PCR proceedings as evidence that Rule 59(e) had not been consistently applied. See *id.* at 164-65 (explaining that in Marlar's PCR proceedings the “state supreme court acknowledged ... that it had previously excused failures to file Rule 59 motions in order to force PCR courts to make specific

findings”). As a result of this inconsistency, this court held that Bostick’s petition was not procedurally barred by a failure to file a Rule 59(e) motion. *See id.* at 165 (“We decline to hold Bostick responsible for failing to comply with a rule when, at the time his case was decided, the state courts did not distinguish, in any principled way, those cases in which it would apply the rule from those in which it would not.”).

As a result, *Bostick* holds that the same procedural default ruling that the district court made below to dismiss Marlar’s petition is no longer valid. *See id.* at 163-64. If Rule 59(e) was not consistently applied in 2004 when Bostick’s PCR application was denied, it could not have been consistently applied in 2003 when Marlar’s PCR application was denied. To that end, and confirming that *Bostick* disposes of the procedural bar issue and that the court wishes to proceed to the merits of Marlar’s petition, this court resumed Marlar’s appeal and issued a certificate of appealability on the single merits issue of “whether trial counsel was ineffective for failing to call [a] state investigator to testify about potentially exculpatory crime scene hair evidence.” *See* Order, May 19, 2010 (Docket Entry No. 13); *see also Bostick*, 589 F.3d at 165 (“Though it is generally preferable for a district court to consider the matter first, we see no need for remand in this case

because no fact-finding is required, the issue has been fully briefed by each side, and the result is obvious.”).

Undersigned counsel was appointed to brief this issue.

STATEMENT OF FACTS

In the early morning of February 27, 1993, two men invaded a woman's home in Anderson County, South Carolina and sexually assaulted her. J.A. 34. Due to the fact that both men wore stockings over their heads, the victim was not able to recognize the men's faces. J.A. 34, 56. Although she heard one man call the other "Tony," she did not recognize either of their voices. J.A. 56, 89. In a "fairly chaotic" interview with police where the victim was drinking beer, she provided names of possible suspects, including petitioner Anthony "Tony" Marlar, who was an acquaintance of her roommate. J.A. 47-48, 56, 69, 92.

At trial, the victim testified that her initial identification to police was based solely on hearing the name "Tony" once and the "shape of his body and his height." J.A. 56. According to the victim, she knew Marlar was "[a]verage – above average in height. About 5'10" to 6'. Slim." J.A. 66.¹ The victim acknowledged, however, that "[n]obody ever asked [her] if [she] could positively identify him" as her assailant. J.A. 66. The victim was treated at a local hospital, where a rape kit examination was performed. J.A. 195-96.

¹ The record suggests that the victim initially told police she was relying on physical characteristics of *Bobby* Marlar, the Petitioner's brother, who had been dating the victim's roommate. J.A. 56, 108-09. Bobby Marlar is not a suspect in this matter.

During the following six months, the victim heard nothing further from the local authorities. J.A. 61. The victim was "very mad" about the lack of investigation and the fact that the investigating officer had done "nothing," to the point that she was calling the police "every week or every two weeks." J.A. 61. The case remained dormant for three years before it was reopened in 1996 by a different investigator. J.A. 78-79, 164.²

The State found no physical evidence at the scene tying Tony Marlar to this incident. Anderson County investigator George Cremer testified that he recovered no fingerprints belonging to Marlar, and SLED investigators Nancy Greene and Lori Johnson testified that they found no bodily fluids or DNA that conclusively belonged to Marlar. J.A. 96-99, 232, 245. At trial, the State offered numerous explanations for why physical evidence may not have been recovered, including that the victim had been cleaned after the attack, that her sheets had been wiped, and other "factors." J.A. 74, 227-28. The State did find, however, DNA evidence belonging to co-defendant Jerry Fields. J.A. 121, 239, 245. Although Fields initially denied any involvement, when the DNA evidence came back he admitted that "they had

² The initial investigator did not testify at trial, as he was apparently "out of town." J.A. 191, 438.

[him].” J.A. 121. Fields then pleaded guilty and agreed to testify against Marlar. J.A. 121-24.³

Critical to this appeal, the jury was never told that the State *did find other evidence* belonging to an *unknown person*. Specifically, State investigators recovered pubic hairs from the crime scene evidence that did not match the victim, Tony Marlar, Fields, or the victim’s boyfriend. J.A. 11-12, 410. SLED Agent John Barron analyzed these pubic hairs and, after trial, testified in Marlar’s PCR hearing that, based upon the technology he had used, “the hair did not belong to any one of those four individuals,” and it “would have had to have been somebody else’s.” J.A. 411, 413.

³ Detective Jean Sutton testified that, prior to the DNA results coming back, Marlar told her he had been with Fields on the night in question. J.A. 207. Marlar claimed in his PCR proceedings that this testimony distorted his actual interview with her. J.A. 361 (claiming he had said “it had been three years and he could not remember where he was that night but that he could have been with Mr. Fields but that he couldn’t remember,” and that the detective “rearranged his statement in a fashion so as to implicate himself in a crime”); J.A. 438. In the PCR proceedings, Marlar also alleged that he had previously sworn out a warrant against Fields for property damage, and that this circumstance would have provided further incentive for Fields to testify against him. J.A. 424.

Despite the presence of these unknown pubic hairs and Agent Barron's conclusions, Agent Barron was never called as a witness and his report was never introduced into evidence at Marlar's trial. In fact, the State even suggested that no such evidence existed and that no hair testing had been performed by SLED. For example, when SLED Agent Greene testified about the DNA results, Marlar's counsel asked "are there other tests that could have been done down there? At SLED." J.A. 231. Agent Greene responded "No, sir." J.A. 231. SLED Agent Johnson was similarly asked whether "there [is] DNA contained in hair samples," and she responded that testing could have been done on hair samples, but "[w]e don't perform that test at SLED" and that "[w]e don't have the equipment to do it." J.A. 246. Most tellingly, the State's closing argument claimed that it had shown the jury "every SLED report," had "provided all the SLED reports to the defense," and was "not hiding anything." J.A. 289-90; J.A. 274 ("Every report, every SLED report has been provided and you saw it. Every report, every SLED report, everything.").

There is no evidence that the State took any further steps to determine the identity of the person who left the unknown pubic hairs at the scene.⁴

⁴ As discussed by the state court of appeals, Marlar insinuated in his PCR submissions that Jerry Fields' brother "Terry" was involved, based on the facts that the name "Terry" could be confused with "Tony," that Terry had the same build as Marlar, and that Terry had been involved in other crimes with his brother in the past. J.A. 360, 505. There is no evidence in the record concerning whether the State investigated this theory or what impact it could have had on the DNA analysis, given the possibility that brothers might have similar genetic profiles. Cf. J.A. 244 (discussing DNA evidence that was statistically uninterpretable). The State also relied on testimony suggesting that the assailants were familiar with the home and that the victim recognized part of a baseball jacket with red sleeves she said belonged to Marlar. J.A. 44, 67. This evidence does not necessarily single out Marlar as an assailant. Co-defendant Fields was also familiar with the house, having been there the day before the incident. J.A. 109. Furthermore, the responding officer testified that the victim told him only that an assailant wore a leather jacket, without any further detail, and the police file appears to refer to only one jacket. J.A. 89, 183-84. Fields himself acknowledged he was wearing a black leather jacket on the night of the crime. J.A. 127. Authorities never conducted a search for a jacket and Fields believes his jacket was later sold; there was never any baseball jacket or jacket with red sleeves introduced at trial. J.A. 127, 131, 184.

SUMMARY OF THE ARGUMENT

The sole issue presented by the certificate of appealability is whether trial counsel was ineffective for failing to call SLED agent John Barron about his report that pubic hairs found at the scene excluded Marlar as a suspect. Had Agent Barron been called, his testimony and his report would have cast considerable doubt on the prosecution's entire case. The State, which waited years after the incident to bring this case, had no physical evidence linking Marlar in any way to the crime – no weapon, no clothing, no fingerprints, no DNA, and no body fluids or other serological evidence. The victim, who was understandably panicked by a home invasion in the dark of night and who may have changed aspects of her story in the following years, did not see the face of her masked assailants, nor was she able to recognize their voices. The only other person who testified that Marlar was present was his co-defendant, who had pleaded guilty in exchange for his testimony after the only DNA evidence collected from the victim left no doubt that he was one of her assailants.

Against this weak evidence, SLED Agent Barron's report and conclusions – which the jury never heard – would have provided Marlar with credible, un rebutted proof from one of the State's own investigators that he may not have been involved at all in this horrible incident. Agent

Barron's report explained that pubic hairs collected from the crime scene were not from the victim, not from her boyfriend, not from the co-defendant, *and not from Marlar*, meaning that they must have come from an unknown person who may have actually been the second rapist. Therefore, while the State had no physical evidence to place Marlar at the scene, it *did have* physical evidence suggesting he was *not* at the scene, evidence the jury never heard. Compounding this error, the State incorrectly told the jury they had seen "every SLED report," J.A. 274, and even suggested that State investigators had not conducted any tests on hair that may have been recovered at the scene. Agent Barron, had he been called, would have prevented this misconception, as his testimony would have been that pubic hairs recovered at the scene *were tested* by SLED and determined not to have come from Marlar.

A criminal defendant is entitled to have the jury consider all relevant, admissible evidence that bears on his innocence. If the defendant's trial counsel fails to ensure that the jury hears this evidence, the defendant has been deprived of his constitutional rights to effective assistance of counsel. Marlar's trial counsel should have ensured that the jury heard the exculpatory evidence from Agent Barron. Because this failure prejudiced

Marlar, this court should reverse and direct the district court to grant Marlar's petition for habeas corpus.

ARGUMENT

A. Standard of Review

This court reviews *de novo* a district court's grant of summary judgment in habeas proceedings. See *Bostick v. Stevenson*, 589 F.3d 160, 163 (4th Cir. 2009). Where the state court initially reviewing the petitioner's claim reaches a decision on the merits, this court should grant relief if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). However, as in *Marlar*'s case, where the state court rules only on procedural grounds and never reaches the merits, this court reviews the claim *de novo*. See *Bostick*, 589 F.3d at 163 (citing *Hudson v. Hunt*, 235 F.3d 892, 895 (4th Cir. 2000)).

B. The Failure to Call Agent Barron or Introduce His Report Constitutes Ineffective Assistance of Counsel

As set forth in *Strickland v. Washington*, 466 U.S. 668, 688-90 (1984), a petitioner is entitled to habeas relief due to ineffective assistance of counsel if (1) counsel's performance was objectively unreasonable under prevailing professional norms and (2) the petitioner was prejudiced by the deficient performance. See *Bostick*, 589 F.3d at 166 (citing *Strickland*). Here, the failure to present the exculpatory evidence in SLED Agent

Barron's report was both objectively unreasonable and prejudiced Marlar.

As a result, the district court should have granted habeas relief.⁵

1. The Failure to Present Agent Barron's Findings Was Objectively Unreasonable

"An attorney's failure to present available exculpatory evidence is ordinarily deficient, 'unless some cogent tactical or other consideration justified it.'" *Griffin v. Warden, Md. Corr. Adjustment Ctr.*, 970 F.2d 1355, 1358 (4th Cir. 1992) (quoting *Washington v. Murray*, 952 F.2d 1472, 1476 (4th Cir. 1991), and citing cases involving objective unreasonableness from failure to present exculpatory evidence). Because exculpatory evidence

⁵ Although the issue in this appeal is couched in terms of ineffective assistance of counsel, Marlar and his appointed counsel do not wish to impugn the general competence or abilities of Marlar's trial counsel, who is by all accounts a well-respected member of the bar. Even Marlar's *pro se* materials in state court note that he "respect[s] and like[s]" his trial counsel. J.A. 528. Marlar has explained, however, that his trial counsel suffered from a medical condition just prior to trial that affected his abilities, and his trial counsel acknowledged that he had been hospitalized for three days shortly before trial occurred. J.A. 528-29; 399-400 (trial counsel testifying, however, that he was ready for trial). In any event, the issue in this appeal is whether the jury needed to hear from Agent Barron or see his report about the unknown pubic hairs to have an accurate picture of all the relevant evidence bearing on Marlar's guilt or innocence, not to attack the general competence of a member of the bar who, on this particular occasion, did not introduce exculpatory evidence that should have been introduced. *Cf. Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995) ("*Strickland* requires us to focus, not upon whether counsel could have done a better job, but upon whether counsel provided the assistance necessary to ensure the fundamental fairness of the proceeding whose result is being challenged.") (citations omitted).

directly contradicts and undermines the government's theory of guilt and could create reasonable doubt, counsel must take all reasonable steps to present it to the jury. *See, e.g., Richards v. Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009) (finding objectively unreasonable counsel's failure to present evidence of statements from victim that supported self-defense theory and undermined government's murder case); *Moore v. Johnson*, 194 F.3d 586, 610-11 (5th Cir. 1999) (determining that counsel was ineffective for failing to present exculpatory language in confession that would have supported plausible defense theory that could have raised a reasonable doubt in the jury's mind); *Sims v. Livesay*, 970 F.2d 1575, 1580 (6th Cir. 1992) (counsel was ineffective for failing to investigate and present to jury key piece of physical evidence that undermined prosecution's murder theory); *cf. Towns v. Smith*, 395 F.3d 251, 259 (6th Cir. 2005) (counsel failed to interview witness who had previously stated petitioner was innocent of felony murder charges).

a. SLED Agent Barron's Testimony and Report Constituted Exculpatory Evidence

SLED Agent Barron's testimony and report were exculpatory evidence that should have been presented to the jury, as they tended to show Marlar was not guilty of sexual assault or even present at the scene of the crime. Given the tenuous nature of the State's case and lack of any physical

evidence tying Marlar to the scene, this exculpatory evidence would have cast doubt on the State's theory and, at a minimum, created reasonable doubt of Marlar's guilt.

Agent Barron analyzed pubic hairs recovered from the crime scene and compared them against known samples from the victim, her boyfriend Jim Rushton, co-defendant Jerry Field, and Tony Marlar. J.A. 410-13. Agent Barron concluded that the pubic hairs belonged to an unknown person, as they were "microscopically inconsistent with the victim, Jim Rushton, Anthony Marlar, and Jerry Field[s]." J.A. 12. As Agent Barron testified at the PCR hearing, "I was not able to microscopically match to anyone, any standard, any hair standard submitted in this case, which included two defendants, a boyfriend, and victim." J.A. 410. In Agent Barron's opinion, based upon the technology he used, "the hair did not belong to any one of those four individuals," and it "would have had to have been somebody else's." J.A. 411, 413.

Had this exculpatory evidence been presented to the jury, it would have easily created a reasonable doubt and undermined the State's theory of guilt. *Cf. Sims*, 970 F.2d at 1580 (explaining that FBI report concerning gunpowder residue on quilt "disclosed facts that suggested that the state's theory was easily refutable" and that victim may have shot herself or that

shooting was accidental; “[s]uch a report cannot be ignored”). The State claimed that Marlar and his co-defendant, Jerry Fields, had committed the attack. Fields’ guilt was never in doubt, as he had pled guilty and there was DNA evidence against him. There was, however, no such physical evidence tying Marlar to the scene – no fingerprints, no DNA, and no other bodily fluids that permitted the State to argue conclusively that Marlar was present. J.A. 96-99, 232, 245. Against this lack of physical evidence, SLED Agent Barron’s report was critical, as it showed that there was at least some physical evidence, the unknown pubic hairs, actually *excluding* Marlar as a possible suspect. Viewed in conjunction with the lack of any physical evidence tying Marlar to the scene, the three year lapse of time since the crimes had occurred, the victim’s inability to see the faces of her attackers or recognize their voices, and the bias of Marlar’s co-defendant who had already pled guilty and been conclusively linked to the scene, Agent Barron’s exculpatory evidence could easily have created reasonable doubt for the jury. *See Montgomery v. Petersen*, 846 F.2d 407, 415 (7th Cir. 1988) (“Because the verdict against the petitioner rested primarily on the testimony of the confessed accomplice, it is more likely to have been affected by errors than one with overwhelming record support.”) (citations omitted).

Even Marlar's trial counsel, who at the PCR hearing mistakenly believed the exculpatory hair evidence had come in at trial, explained that the hair evidence would have "allowed [him] to argue reasonable doubt that [the State] had a hair that could not be explained," which would have allowed him to "point a finger at somebody else, some unknown entity out there rather than Tony Marlar." J.A. 387. When it was shown at the PCR hearing that this evidence was never presented to the jury, trial counsel acknowledged that, "Heck, yes," he wished he had called Agent Barron, J.A. 394, and that it "could have been important" for the "jury to know that there was, in fact, another person." J.A. 393.

b. Agent Barron's Testimony and Report Would Have Undermined the State's Explanations for the Lack of Physical Evidence

The exculpatory hair evidence would not only have cast doubt on the State's theory, it would have also considerably undermined the State's efforts to justify the lack of physical evidence at the scene. The State presented testimony of several scientific witnesses who analyzed the crime scene evidence, but who also acknowledged that there was no physical evidence to conclusively tie Marlar to the scene. *See, e.g.*, J.A. 96-99, 232, 245 (testimony of Lieutenant Cremer on fingerprints, SLED Agent Greene on serology, and SLED Agent Johnson on DNA). Each witness, however,

offered rationalizations for why physical evidence might not have been recovered.⁶

For example, Lieutenant George Cremer of the Anderson County Sheriff's Department testified that no identifiable fingerprints of any suspects were found at the scene, but justified this fact by telling the jury that useable fingerprints are rarely recovered. J.A. 96-99 (explaining that it was "very common in real life" to recover no readable fingerprints at a crime scene). Similarly, SLED serologist Nancy Greene testified about her analysis of the bodily fluids recovered at the scene and taken from the suspects. Her testimony showed that she was unable to conclusively identify Marlar as the contributor of any bodily fluids at the scene and that, based on her analysis, "[a]ny male" could have been the assailant. J.A. 233. At the same time, however, Greene rationalized that it was "not uncommon" to have a rape case and "not be able to pick up serology or DNA from one or the other rapists," and that there were "numerous reasons" why this might theoretically occur in a given case, including very low sperm count,

⁶ It is important to note that all of the investigators, regardless of whether they were looking for serology, DNA, hair, or fingerprints – worked with the same evidence, the same victim's clothing, rape kit, bedding, and known samples. J.A. 99-101, 103-05 (testimony concerning chain of custody for crime scene evidence). Agent Barron was therefore working from the same materials as all the other agents and investigators.

heredity, pathological conditions, or elective surgery. J.A. 228.⁷ Agent Greene further testified that the lack of bodily fluids tying Marlar to the scene could also be explained by the victim going to the bathroom, “[a]ny type of drainage or dilution,” and whether the second assailant had ejaculated, which, according to Agent Greene, did not happen in approximately thirty-three percent of the cases. J.A. 228-29.⁸

SLED Agent Lori Johnson also testified about her analysis of the DNA evidence, including her conclusion that she could only identify DNA belonging to Jerry Fields, and none belonging to Tony Marlar. J.A. 239, 245 (“Do you have any profile that matches the defendant Anthony Marlar? A No, sir.”). As with the other State witnesses, Agent Johnson attempted to explain reasons for the lack of evidence, including that the suspect may not have ejaculated. J.A. 242. The State had also highlighted that the victim was cleaned after the attack and that her attackers wiped off her sheets. *See, e.g.*, J.A. 74. The State further stressed that the lack of physical evidence against Marlar did not necessarily exclude him as a suspect, and alluded to the three-year delay in reopening of the case after an initially sloppy

⁷ The State offered no evidence that any of these “numerous reasons” applied to Marlar.

⁸ The victim initially reported that both assailants had ejaculated. At trial, Marlar attempted to show that the victim had changed her story during the investigation of the case. *See, e.g.*, J.A. 176-77.

investigation as a justification. *See, e.g.*, J.A. 286 ("Sometimes you leave evidence and sometimes you don't."); J.A. 164 (Anderson County investigator explaining that the investigation was reopened three years later by a different detective who used "what [she] had to work with"); J.A. 187, 191 (acknowledging that the state's case would have been easier if the investigation had "been done properly in 1993").⁹

SLED Agent Barron's report and testimony that pubic hairs *were found* at the crime scene and that they *did not come from Marlar* would have seriously undermined the State's efforts to rationalize the lack of physical evidence. For example, Agent Barron's report would have weakened the impact of the State's claim that the victim was cleaned and the bed was

⁹ The serological crime scene evidence appeared to show the presence of several blood group substances, including an "A" factor. J.A. 227. Agent Greene testified that "any male in the world" could have provided samples containing all of the various factors detected, so that she could not exclude anyone. J.A. 234. Agent Johnson's DNA analysis was able to positively identify Fields as a contributor of DNA. J.A. 239. Presumably because Fields could not have also contributed an "A" factor due to his typing, the evidence tended to show that someone other than Fields contributed unidentified male bodily fluids. J.A. 241. However, the contributor of this "A" factor could not be identified, and, according to Agent Johnson, could have come from any "A, B, or AB secreting male" in the world, "[a] lot" of possible people (which could have included the victim's boyfriend). J.A. 239, 250. The State tried to justify the absence of DNA evidence for this second person as well, asking whether it was "common or uncommon sometimes not to be able to get a DNA profile of someone who is picked up in serology." J.A. 240. Agent Johnson again provided explanations to rationalize the lack of physical evidence identifying the other assailant. J.A. 240-41.

wiped after the attack. Likewise, even if the State could claim that rapists may not always leave *DNA* evidence, or that suspects do not always leave fingerprints, the jury should have heard that other evidence, including pubic hairs, was left at the scene and had not been identified with any of the known suspects. The jury was entitled to a complete picture of the physical evidence, not just rationalizations to explain what even the State called "strange results." J.A. 237.

c. Agent Barron's Testimony Would Have Exposed the State's Misleading Presentation of the Evidence

The exculpatory hair evidence would not only have damaged the State's efforts to explain the lack of physical evidence against Marlar, it would have exposed several misleading aspects of the State's case. For example, when SLED Agent Greene testified about the DNA results that matched Fields but not Marlar, Marlar's counsel asked "are there other tests that could have been done down there? At SLED." J.A. 231. Agent Greene responded "No, sir." J.A. 231. Likewise, Agent Johnson was asked about DNA evidence and whether "there [is] DNA contained in hair samples." J.A. 246. Agent Johnson replied that testing could have been done on hair samples by other labs, but "[w]e don't perform that test at SLED" and that "[w]e don't have the equipment to do it." J.A. 246. Although Agents

Greene and Johnson may have been implicitly limiting their responses to other *DNA* or *serology* tests that could have been done, to the jury these responses would be misleading because there were other tests that *had been done* by Agent Barron at *SLED*, including the pubic hair analysis that excluded Marlar as a suspect.

Likewise, while Agent Greene did say that there was a separate department for "trace evidence," she never explained (or was asked) what that meant or how it had anything to do with the "other tests" that she said could not have been done at *SLED*. J.A. 231. This testimony provided an even more confusing and misleading picture of the evidence, because Agent Barron, who worked in that "trace evidence" section at *SLED*, did test the unknown pubic hairs found at the scene and concluded that they did not come from Tony Marlar. In fact, Agent Barron, had he been called, would have explained that the exculpatory results of his hair analysis would have made it *unnecessary* to send out the sample for further DNA analysis by other labs, further demonstrating the misleading nature of the State's claim that "[w]e don't perform that test at *SLED*" and that "[w]e don't have the equipment to do it." J.A. 246; *see also* J.A. 412 (testifying at PCR hearing that, because hair analysis done by Barron showed that hair did not belong to

Marlar or any other persons named in the action, “typically further DNA examinations are not performed.”).¹⁰

Other portions of the State’s case created a misleading view of the evidence that Agent Barron’s report would have rectified. For example, Agent Johnson also explained that “[t]here were no unidentified profiles in any of the evidence” she examined. J.A. 243. The State reiterated this position at closing, claiming “there’s a very important thing to remember – no foreign unidentified DNA was found. There was no DNA that didn’t match Fields or the victim. There was no DNA that they could say, gee, who is this. All of it was identified.” J.A. 286. While that may have been true of the *DNA* evidence recovered from the scene, Agent Barron’s testimony and report concerning the unknown pubic hairs would have shown that there *was foreign, unidentified* physical evidence found at the scene that could not be tied to either defendant, the victim, or her boyfriend.

Perhaps the most misleading examples, however, come from how the State summarized the evidence during closing arguments. The State told the jury: “The defense has been provided obviously with everything. You saw this. *Every report, every SLED report has been provided and you saw it.*

¹⁰ This issue does beg the question of what SLED and the State did to follow up on evidence of unknown pubic hairs at a rape scene and whether another suspect was investigated. *See also supra* n.4.

Every report, every SLED report, everything." J.A. 274 (emphasis added). These statements are misleading because, even though the SLED reports had been provided to the defense, the jury *had not* seen "everything" and *had not* seen "every SLED report" because Agent Barron's report had not been introduced.

Furthermore, in anticipating what the defense might say at closing, the State argued "I expect the defense will say there's no physical evidence. ... no fingerprints... *No hair.*" J.A. 291. Not only did the State say there was "[n]o hair," it claimed that there was not even any hair evidence "of the victim's." J.A. 291. This claim was obviously false, as there was considerable hair evidence recovered from the crime scene and provided to Agent Barron at SLED, who found "[n]umerous Caucasian head and pubic hairs found consistent with the victim," a head hair that could have come from the victim's boyfriend, and two pubic hairs that were "microscopically inconsistent with the victim, [her boyfriend], Anthony Marlar, and Jerry Field." J.A. 12.¹¹ Had Agent Barron been called as a witness, the State could not have made these inaccurate arguments, and Agent Barron would have been able to discuss all of these findings and the exculpatory evidence

¹¹ In fact, if there was "[n]o hair" at the crime scene, as the State claimed, the jury may have been confused as to why the State asked Marlar to provide hair samples. *See, e.g.*, J.A. 105-07.

that could have created reasonable doubt as to Marlar. Because Agent Barron and his report had not come into evidence, however, Marlar's trial counsel could only tell the jury that the State "took all sorts of samples" from Marlar, including "hair samples," but came up with "[n]othing." J.A. 303.

d. There Was No Cogent Tactical or Other Consideration Justifying the Failure to Present Exculpatory Evidence

The failure to present exculpatory evidence is objectively unreasonable unless there is a "cogent tactical or other consideration" that justifies it. *Griffin*, 970 F.2d at 1358. Given the power of exculpatory evidence (especially undisputed evidence from the State's own investigators), the tactical decision must be a legitimate one, not simply a post-hoc justification. *See id.* at 1358-59 (cautioning against post-hoc justifications of trial strategy); *see also Wiggins v. Smith*, 539 U.S. 510, 526-527 (2003) ("When viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing."); *Richards v. Quarterman*, 566 F.3d 553, 566-67 (5th Cir. 2009) (affirming district court's determination that counsel's purported trial

strategy was actually invented after trial, and referring to the “crucial distinction between strategic judgment calls and plain omissions” by counsel) (citation omitted).

The failure to call Agent Barron or otherwise present his exculpatory evidence was not a legitimate “strategic judgment call,” but was a “plain omission” that was objectively unreasonable. *Richards*, 566 F.3d at 566-67. At the PCR hearing, trial counsel initially believed the evidence had come in during cross-examination of the State’s witnesses. J.A. 387-88. Trial counsel then explained, based on this mistaken belief, the hair evidence was important because it “allowed [him] to argue reasonable doubt that [the State] had a hair that could not be explained ...I could point a finger at somebody else, some unknown entity out there rather than Tony Marlar.” J.A. 387.

It was only after trial counsel was shown the trial transcript that he acknowledged that the exculpatory evidence from Mr. Barron’s report was never shown to the jury. J.A. 388-89. At that point, trial counsel admitted that it “could have been important” “for the jury to know that there was, in fact, another person,” and that, “heck, yes,” he wished he had called Agent Barron. J.A. 393-94. Nevertheless, trial counsel then stated that, due to the lack of physical evidence against Marlar, “it wasn’t going to help me point

to some unknown person,” and that he wanted to preserve the last argument. J.A. 394-95.

There is no question, however, that Agent Barron’s testimony and report could have helped Marlar to point to “some unknown person,” precisely *because* of the lack of physical evidence against him, the victim’s inability to see her attackers’ faces or recognize their voices, and the other tenuous portions of the State’s case. If anything, trial counsel’s statement that Agent Barron’s report “allowed [him] to argue reasonable doubt that [the State] had a hair that could not be explained” and to “point a finger at somebody else, some unknown entity out there rather than Tony Marlar,” J.A. 387, cannot be reconciled with the claim that “it wasn’t going to help me point to some unknown person,” J.A. 394.

Furthermore, if trial counsel had made a “strategic judgment call” not to introduce Agent Barron or his report in order to save the last closing argument – as opposed to just making a “plain omission” – it would have been a decision of such magnitude that he would have known whether Agent Barron’s report had come into evidence during the State’s case. However, he could not recall. J.A. 389 (“I’ll take your word if you say it’s not in [the trial transcript].”); *cf. Moore*, 194 F.3d at 610 (discussing counsel’s inability to explain why exculpatory portion of confession was omitted and holding

that, to the extent the prior courts found a "strategic reason," it was "not fairly supported by the record" because trial counsel "testified that he had no idea why the exculpatory language was excluded, or even who had requested that the exculpatory language be excluded"). Furthermore, if the decision was a fully informed strategic decision made at the time of trial, then trial counsel would have discussed the exculpatory evidence with Marlar. Marlar, however, did not even know about Agent Barron's exculpatory report until after the trial. J.A. 425-26 (testifying at the PCR hearing that he "didn't know anything about the pubic hairs" and only learned after trial when he requested and received his case file while in prison); J.A. 434 (Marlar's PCR testimony that he would have given up the right to the last closing argument to present the SLED report).

Nor was it necessary to sacrifice the last closing argument in order to introduce this exculpatory evidence, because Marlar could have introduced the evidence during the State's case. For example, when SLED Agent Greene testified that the DNA results matched Fields but not Marlar, Marlar's trial counsel asked "are there other tests that could have been done down there? At SLED." J.A. 231. Agent Greene responded "No, sir." J.A. 231. Marlar could have impeached Agent Greene's testimony by introducing Agent Barron's report and publishing it to the jury to show that

“other tests” were conducted at SLED. Similarly, when Agent Johnson was asked about DNA evidence and whether “there [is] DNA contained in hair samples,” she replied that testing could have been done on hair samples, but “[w]e don’t perform that test at SLED” and that “[w]e don’t have the equipment to do it.” J.A. 246. This testimony could have permitted cross-examination on hair analysis that was performed by SLED Agent Barron and what his results showed. The trial judge permitted the cross-examination of the State’s investigators on reports prepared by other investigators, demonstrating that he would have permitted cross-examination of the State’s witnesses concerning the Agent Barron’s report. See J.A. 182 (permitting cross-examination of one investigator on comments in another officer’s report concerning discrepancies in victim’s account of facts). In fact, when the state court of appeals explained that issues concerning the exculpatory report were not preserved for direct review, it stated that “nothing prevented Marlar from cross-examining the State’s forensic experts about the existence of this evidence, introducing the report into evidence himself, or calling the SLED analyst who performed the microscopic hair analysis as a witness for the defense,” showing there were ways to introduce the evidence without sacrificing the right to argue last. J.A. 557.

Even if Marlar had to sacrifice the last closing argument, it could not have been more important than ensuring that the jury knew about significant exculpatory evidence from the State's own investigators, especially where this evidence also undermined the State's rationalizations for the lack of physical evidence and exposed the State's misleading and incomplete explanation of the evidence that was found. *See* J.A. 434 (Marlar's PCR testimony that he would have given up the right to the last closing argument to present the SLED report); *see also supra* § B.1; *cf.* J.A. 395 (trial counsel answer that, "at some point in time," he felt the right to the last argument was more important, than, as PCR counsel stated, "a piece of evidence that specifically showed somebody else was in that bed"). This evidence was not a "double-edged sword" that could have also hurt Marlar. Rather, Agent Barron and his report would have provided unimpeachable evidence from the State's own investigative crime lab – the same lab that analyzed the same crime scene materials for DNA and bodily fluids – that there was evidence that was *inconsistent* with Marlar being involved in this crime. *Cf. United States v. Terry*, 366 F.3d 312, 318 (4th Cir. 2004) (distinguishing *Griffin*, 970 F.2d at 1358, as case where witness could have significantly drawn factual guilt in issue); *see also Moore*, 194 F.3d at 610-11 ("Counsel's decision to exclude [exculpatory] language [in confession], which produced

no conceivable benefit to the defense and prejudiced Moore by precluding reliance upon a plausible alternative defensive theory that was supported by other evidence in the record, was professionally unreasonable.”).

Although there is often a valuable benefit in being the last to summarize the evidence for the jury, that benefit may not be worth much if the evidence being summarized is incomplete and lacks critical information the jury needs to know. *Cf. Richards*, 566 F.3d at 567 (“Even if we were to accept Davis’s version of her trial strategy, however, there does not appear to be any legitimate strategic reason for Davis’s failure to present evidence (or more evidence) that [would have undermined the prosecution’s theory].”). Nor is closing argument worth much if it cannot expose the State’s misleading presentation of the evidence. For the foregoing reasons, in the present case there was no “cogent tactical or other consideration” that justified the failure to present this exculpatory evidence. *Griffin*, 970 F.2d at 1358.

2. Marlar Was Prejudiced

There can also be no doubt that Marlar was prejudiced by the decision not to call Agent Barron or otherwise present his exculpatory evidence. In assessing prejudice, this court determines whether the “deficient performance undermine[s] confidence in the outcome.” *Id.* Courts do not

ask merely “whether the outcome would have been different, but also ... whether the result was fundamentally unfair or unreliable.” *Williams v. Washington*, 59 F.3d 673, 679 (7th Cir. 1995) (“*Strickland* requires us to focus, not upon whether counsel could have done a better job, but upon whether counsel provided the assistance necessary to ensure the fundamental fairness of the proceeding whose result is being challenged.”) (citations omitted).

Here, the fact that the jury could not consider a key piece of exculpatory physical evidence undermines confidence in the outcome of Marlar’s conviction. The misleading and prejudicial effect of the failure to present this evidence is perhaps best shown in the way the State concluded its case at closing argument. The State told the jury it had seen “every SLED report” and alluded to the fact that there was a “hair person from SLED,” even though the jury had *never* heard any testimony that such a “hair person” even existed, much less anything about his analysis or his report that there were unknown pubic hairs found in the crime scene evidence. The State argued:

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The defense has been provided obviously with everything. You saw this. *Every report, every SLED report has been provided and you saw it. Every report, every SLED report, everything. ...* [T]he defense will stand up and say ...[the State] didn't call the hair person from SLED Ladies and gentlemen, all of us have subpoena power. There is no indication that any of these people are out of state. ...Who do you think provided all the SLED reports to the defense? We did. We're not hiding anything. ... Everything went to SLED. Witnesses were talked to. Everything was done.

J.A. 274, 287-90.¹² Even if “[e]verything went to SLED” and “[e]verything was done,” J.A. 289-90, the jury was not told what SLED’s reports showed – that unknown pubic hairs in the evidence tended to exclude Marlar. Without the benefit of the exculpatory report from Agent Barron, or even any testimony that Agent Barron or his report existed, the State’s claim that “[e]verything went to SLED” and that “[e]verything was done” created the

¹² Marlar claimed below that his trial counsel had reached an agreement with the State that he did not need to subpoena any SLED witnesses. *See, e.g.*, J.A. 364. In fact, when the victim was cross-examined about DNA evidence, the State objected and told the trial court that the SLED agents “will be testifying.” J.A. 76.

misleading and prejudicial impression that the State had shown the jury "everything." It had not.¹³

Marlar's proceedings in the state appellate courts further demonstrate the prejudice he suffered. For example, the South Carolina Court of Appeals initially dismissed Marlar's direct appeal after receiving an *Anders* brief from his state appellate counsel. J.A. 518, 539. However, after Marlar submitted a petition for rehearing, J.A. 541, the court ordered briefing on two issues, including:

Was it error for the trial court to deny Marlar's motion for a directed verdict when the SLED report showed the hair samples found in the victim's bed were inconsistent with Marlar's hair, but this information was not made known to the

¹³ The distorted presentation of scientific evidence in criminal prosecutions has become a topic of very recent public discussion in this circuit in the wake of an audit commissioned by the North Carolina Attorney General showing that in over 200 cases the North Carolina State Bureau of Investigation was involved in providing improper or misleading scientific reports, including those that "stated that no further tests were conducted when, in fact, one or more confirmatory tests were conducted with negative or inconclusive results." Chris Swecker & Michael Wolf, "An Independent Review of the SBI Forensic Laboratory," at 3 (Aug. 18, 2010), available at the North Carolina Department of Justice website, <http://www.ncdoj.com/getdoc/0a92ee81-0667-4935-b2d3-221d4f586c61/Independent-Review-of-SBI-Forensic-LAB.aspx> (visited Sep. 15, 2010).

jury because the SLED expert¹⁴ testified merely that no DNA tests had been performed on the hair samples and did not mention that the hairs had been microscopically compared to and were inconsistent with Marlar's hair?

J.A. 553. The state court of appeals found this issue significant enough to recall its prior dismissal of the appeal and direct counsel, who had filed a "no merits" *Anders* brief, to brief the issue. The court ultimately found, however, that the issue had not been preserved for appeal, stating that "nothing prevented Marlar from cross-examining the State's forensic experts about the existence of this evidence, introducing the report into evidence himself, or calling the SLED analyst who performed the microscopic hair analysis as a witness for the defense." J.A. 557. Thus, even though the state court of appeals appeared to think this was compelling enough of an issue to recall its original dismissal, it could not rule on the issue because the evidence had not been submitted below. This is the essence of prejudice.

¹⁴ The "SLED expert" apparently refers to Agent Johnson, who testified about DNA analysis and also stated that testing could have been done on hair samples by other labs, but "[w]e don't perform that test at SLED" and that "[w]e don't have the equipment to do it." J.A. 246.

Furthermore, and as discussed above, the evidence would have undermined the State's already weak case, just as it would have exposed the State's misleading efforts to rationalize the lack of evidence. *See supra* § B.1; *see also Sims*, 970 F.2d at 1581 ("This is not a case where the evidence of the petitioner's guilt was so massive or multilayered as to render harmless defense counsel's errors."). The State lacked any physical evidence conclusively tying Marlar to the crime – no weapons, no clothing, no fingerprints, no bodily fluids, and no DNA. Even the State's own witnesses acknowledged that the investigation of the case – which was reopened after three years of inactivity – was mishandled. J.A. 187, 191 (acknowledging that the State's case would have been easier if the investigation had "been done properly in 1993"); *see also* J.A. 69 (testimony from victim that she was drinking alcohol during her initial interviews with police).

The victim herself could not see her assailants' faces, could not recognize their voices, and appears to have changed parts of her story as the investigation proceeded. *See, e.g.,* J.A. 56, 176-77, 385. The only other "witness" to the assault was Marlar's co-defendant, who lacked credibility due to his own criminal activity and his plea deal with the State. *See*

Montgomery v. Petersen, 846 F.2d 407, 415 (7th Cir. 1988) (“Because the verdict against the petitioner rested primarily on the testimony of the confessed accomplice, it is more likely to have been affected by errors than one with overwhelming record support.”) (citations omitted). In fact, the jury returned on two separate occasions with questions about Marlar’s interactions with the co-defendant, demonstrating that this was not a quick and easy decision based on overwhelming evidence of guilt. See J.A. 327-33; see also *supra* § B.1 (explaining how exculpatory report would have undermined State’s rationalization of lack of physical evidence and exposed misleading testimony about testing performed at SLED).

Had the jury been able to hear from one of the State’s own trained investigators that unknown pubic hairs were in the crime scene evidence – hairs that did not match Marlar or anyone else the State said was involved – it is certainly possible that the jury would have returned with a different verdict. Even Marlar’s trial counsel conceded that “Heck, yes,” he wished he had called Agent Barron, and that it “could have been important” for the “jury to know that there was, in fact, another person.” J.A. 393-95. At a

minimum, the failure to present this evidence to the jury “undermine[s] confidence in the outcome” of Marlar’s case. *Griffin* at 1358.¹⁵

CONCLUSION

For the foregoing reasons, Marlar respectfully requests that the court reverse the district court’s decision and remand with instructions to grant his petition for habeas corpus.

¹⁵ In the district court, Marlar sought relief under a number of different theories, including the failure to cross-examine Fields concerning various matters, such as a warrant Marlar had previously sworn out against Fields, and to present the alleged distortion of Marlar’s statement to police as recounted by Detective Sutton. *See, e.g.*, J.A. 350-69. Because the certificate of appealability was confined to the single issue of ineffective assistance of counsel related to Agent Barron, appointed counsel has focused this brief solely on this issue. To the extent this court does not grant habeas relief on this issue, because this court’s decision in *Bostick* disposes of the district court’s ruling on any procedural bar that prevented it from reaching the merits of the other issues, Marlar would alternatively request that his case be remanded to the district court for further consideration, including consideration of the remaining merits issues, or that the certificate of appealability be expanded for further development of these other issues through supplemental briefing. However, if the court determines that habeas relief should be granted due to the issue identified in the certificate of appealability, any other issues would likely be unnecessary in these proceedings.

REQUEST FOR ORAL ARGUMENT

Appellant Anthony L. Marlar respectfully requests that the court hear oral argument in this appeal.

Respectfully submitted,

/s/ Thomas E. Vanderbloemen

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CERTIFICATE OF COMPLIANCE

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Dated: September 17, 2010

/s/ Thomas E. Vanderbloemen
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 17th day of September, 2010, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 17th day of September, 2010, I caused the required number of bound copies of the foregoing Brief of Appellant and Joint Appendix to be hand-filed with the Clerk of this Court and for one copy of the Joint Appendix to be served, via UPS Ground Transportation, to all case participants, at the above listed address.

/s/ Thomas E. Vanderbloemen
Counsel for Appellant

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**APPEAL FORM ANDERSON COUNTY
COURT OF COMMON PLEAS**

R. Lawton McIntosh, Circuit Court Judge

Case No: 2025-002377

**Anthony Marlar,
Appellan**

V.

**State Of South Carolina
Respondent**

Exhibit E

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-8572

ANTHONY L. MARLAR,

Petitioner - Appellant,

v.

WARDEN, TYGER RIVER CORRECTIONAL INSTITUTION,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Charleston. R. Bryan Harwell, District Judge. (2:08-cv-01874-RBH)

Argued: March 23, 2011

Decided: May 25, 2011

Before GREGORY, AGEE, and KEENAN, Circuit Judges.

Affirmed by unpublished opinion. Judge Keenan wrote the opinion, in which Judge Gregory and Judge Agee joined.

ARGUED: Thomas Edward Vanderbloemen, GALLIVAN, WHITE & BOYD, PA, Greenville, South Carolina, for Appellant. Samuel Creighton Waters, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee. **ON BRIEF:** Henry D. McMaster, Attorney General, John W. McIntosh, Chief Deputy Attorney General, Donald J. Zelenka, Assistant Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

KEENAN, Circuit Judge:

Anthony L. Marlar appeals from the district court's award of summary judgment in favor of the Warden of the Tyger River Correctional Institution (the State) on Marlar's petition for a writ of habeas corpus (the petition). The district court did not reach the merits of the petition, in which Marlar alleged that his trial counsel provided ineffective assistance. Instead, the district court concluded that Marlar's claim was not reviewable in a federal habeas corpus petition, because the South Carolina Supreme Court had held that Marlar failed to preserve this argument for appellate review. See Marlar v. Warden, Tyger River Correctional Inst., No. 2:08-cv-1874, 2008 WL 5111878, at *2 (D.S.C. Dec. 4, 2008) (citing Marlar v. South Carolina, 653 S.E.2d 266, 267 (S.C. 2007)). We issued a certificate of appealability to address Marlar's claim of ineffective assistance of counsel.

Based on our holding in Bostick v. Stevenson, 589 F.3d 160 (4th Cir. 2009), issued after the district court dismissed Marlar's petition, we hold that Marlar's petition alleging ineffective assistance of counsel is not procedurally barred, and we therefore consider the merits of Marlar's petition. We affirm the district court's award of summary judgment in favor of the State on a different ground than cited by the district

court, namely, that Marlar did not suffer prejudice as a result of his trial counsel's allegedly deficient performance.

I.

In 1997, Marlar was convicted by a jury in Anderson County, South Carolina, of criminal sexual conduct in the first degree and burglary in the first degree, based on a burglary and a rape that occurred in 1993. Marlar received consecutive sentences of 12 and 30 years, respectively, for those convictions.

The evidence at Marlar's trial established that in February 1993, two male individuals (the assailants) entered the victim's residence around 3:30 a.m. Both the assailants wore stockings over their heads, and the victim was not able to observe the faces of either of the two men during the events that followed.

After the assailants entered the victim's residence, they encountered the victim, who was in her bedroom along with one of her two young children. The victim testified that the shorter assailant stated to his taller companion, "Tony, get her out of here," in reference to the victim's daughter. The taller assailant then exclaimed, "Oh, shit," apparently upon realizing that his first name was spoken by his accomplice.

Once the child was removed from the bedroom, the two men took turns sexually assaulting the victim, with each individual engaging in nonconsensual sexual intercourse with the victim

while holding a large knife against her throat. After the assailants ceased having intercourse with the victim, the taller assailant retrieved a rag from the victim's bathroom, wet the rag, and then "stuck his hand up inside of [the victim's vagina] wiping [her] out and wiping the bed."

At some point during the course of these events, the assailants disconnected the telephone that was located in the victim's kitchen. The assailants did not attempt to disconnect the only other telephone in the residence, which was located in the victim's bedroom but was inoperable for the purpose of placing outgoing calls. Upon leaving the residence, the shorter assailant told the victim that they would kill her children if she informed anyone about the attack.

After a police investigation, a grand jury in Anderson County indicted Marlar and Jerry Fields for their participation in the crimes. Both Marlar and Fields initially denied committing the crimes, and each stated that the two were together in the early morning hours of the events at issue. However, after DNA evidence collected from the victim's person "matched" a sample of Fields' DNA, Fields confessed to his participation in the crimes and entered a plea of guilty to the charges. Fields implicated Marlar as his accomplice, and testified against Marlar at his trial.

The victim provided testimony at Marlar's trial, in which she stated that she was "a hundred percent sure" that Marlar was one of her assailants. The victim stated that she knew Marlar before her attack, and had seen him on several previous occasions because her roommate's boyfriend was Marlar's brother. The victim testified that Marlar knew from his visits to the residence that the telephone in the victim's bedroom could not be used to place outgoing telephone calls.

The victim also testified that one of her assailants wore a baseball jacket with red sleeves, which looked like a jacket that she had seen Marlar wearing on a previous occasion. According to the victim, the assailant wearing the baseball jacket had a tall and slim "build," which the victim stated also was a characteristic of Marlar's "build." These attributes, in addition to the taller assailant being referred to as "Tony" by his accomplice, led the victim to identify Marlar as one of the assailants when she reported the crime to the police.

Additionally, Fields testified that he and Marlar were the victim's assailants, stating that they had planned the attack on the same night that the crimes occurred. Fields further testified that he and Marlar each raped the victim two times, after which Marlar used a washcloth to "clean" the victim after the sexual assault. Fields also corroborated the victim's

statement that Fields referred to Marlar as "Tony" in front of the victim, and that Marlar responded, "Oh, shit."

The prosecution's evidence did not include DNA evidence, such as evidence derived from blood, semen, or hair, linking Marlar to the crime. And, as noted above, because the assailants wore stockings over their heads, the victim did not see the face of either of her assailants. She also was unable to identify either of them by their voices on the night of the attack.

As provided by South Carolina law, Marlar's counsel received the benefit of making the final closing argument to the jury, because he did not present any witnesses or introduce any evidence during the trial.¹ Accordingly, Marlar's counsel did not introduce into evidence a report prepared by Agent John Barron of the South Carolina State Law Enforcement Division Forensic Sciences Laboratory (SLED). This report (the Barron Report) analyzed two pubic hairs found in a box of evidence collected from the crime scene. The box of evidence also contained a bedsheet, pillowcases, a bedspread and pillow sham, a pair of pants, a black cap, and paper towels.

¹ Under South Carolina law, "[i]n a criminal prosecution, where a defendant introduces no testimony, he is entitled to the final closing argument to the jury." South Carolina v. Mouzon, 485 S.E.2d 918, 921 (S.C. 1997).

Agent Barron concluded in the Barron Report that the pubic hairs originated from an unknown person, and were "microscopically inconsistent" with those of Marlar, Fields, the victim, or the victim's boyfriend. Additionally, Agent Barron's report did not state whether those pubic hairs originated from a male or a female.

The jury convicted Marlar of burglary and criminal sexual conduct. Following his sentencing, Marlar sought relief from his convictions in the appellate courts of South Carolina.

The South Carolina Court of Appeals (Court of Appeals) initially affirmed Marlar's conviction on direct appeal. Following this decision, Marlar submitted a pro se petition for rehearing, citing a statement in the Barron Report that there were pubic hairs of unknown origin found in the box of evidence collected by investigators at the crime scene. The Court of Appeals granted Marlar's petition for rehearing and recalled its prior opinion, but ultimately affirmed the convictions. The court held that Marlar had not preserved for direct appeal any issues concerning the conclusions in the Barron Report, because "no argument relating to hair analysis was presented to the [trial] court."

Marlar thereafter applied for Post-Conviction Relief (PCR) in the trial court (the PCR court). Marlar raised several issues in his application, including his contention that he was

denied effective assistance of trial counsel because of his counsel's failure to present the hair evidence discussed in the Barron Report. The PCR court held a hearing during which the court heard testimony from Agent Barron, Marlar, and Marlar's trial counsel.

After the hearing, the PCR court issued an order on October 1, 2003, in which the court denied Marlar's application. In its order, the PCR court summarily concluded that Marlar's counsel did not render ineffective assistance and, in the alternative, that Marlar did not demonstrate any prejudice from his counsel's allegedly deficient performance. The PCR court failed to state specific findings of fact or express conclusions of law relating to each issue presented, as required by S.C. Code § 17-27-80.² Marlar did not ask the PCR court afterwards to make such findings and conclusions, although he was permitted to do so under Rule 59(e) of the South Carolina Rules of Civil Procedure.

A PCR court's failure to make specific findings of fact and conclusions of law, if not raised by a petitioner in that court, ordinarily precludes appellate review of a PCR proceeding by the state courts of South Carolina. See Pruitt v. South Carolina,

² This provision of the South Carolina Code states, in relevant part, that a court adjudicating an application for post-conviction relief "shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented." S.C. Code § 17-27-80.

423 S.E.2d 127, 128 (S.C. 1992) (per curiam).³ Nevertheless, Marlar appealed the denial of his application for PCR relief to the Court of Appeals, which vacated the denial of Marlar's application. The Court of Appeals held that the PCR court's order was inadequate because it did not include specific findings of fact and conclusions of law. See Marlar v. South Carolina, 644 S.E.2d 769, 771 (S.C. Ct. App.), rev'd 653 S.E.2d 266 (S.C. 2007). The Court of Appeals declined to hold that Marlar's appeal was foreclosed by his failure to file a motion pursuant to Rule 59(e), and concluded that Marlar's case should be remanded to the PCR court. Id. at 771-72.

The South Carolina Supreme Court (the Court) granted a petition for writ of certiorari to review the judgment of the Court of Appeals. The Court reversed the Court of Appeals' judgment, thereby reinstating the PCR court's denial of Marlar's application for post-conviction relief. 653 S.E.2d 266 (S.C. 2007.) The Court held that any issues concerning the Barron Report were not preserved for appeal based on Marlar's failure to file a Rule 59(e) motion. Id. at 267. The Court stated that although it had remanded post-conviction applications in certain

³ The Court's opinion in Pruitt explained that "[e]ven after an order [denying post-conviction relief] is filed, counsel has an obligation to review the order and file a Rule 59(e) [] motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by [S.C. Code] § 17-27-80." 423 S.E.2d at 128.

cases to a PCR court to make specific findings of fact and conclusions of law in the absence of a Rule 59(e) motion, those cases presented "unique" circumstances that were not present in Marlar's case. Id.

After his unsuccessful attempts in the South Carolina state courts to vacate his convictions, Marlar filed a habeas corpus petition in the district court under 28 U.S.C. § 2254. In his petition, Marlar alleged that his trial counsel's failure to introduce the Barron Report into evidence constituted ineffective assistance of counsel.⁴

Upon consideration of the State's motion for summary judgment, a magistrate judge issued a report recommending that the district court grant the motion. The district court adopted the magistrate judge's report and recommendation, and awarded judgment in favor of the State, holding that Marlar's claims of ineffective assistance of counsel were procedurally barred due to his failure to file a Rule 59(e) motion asking the PCR court to make specific findings of fact and conclusions of law. 2008 WL 5111878, at *2. The district court explained that because Marlar had not preserved this issue for appellate review in the state courts of South Carolina, the claim was not cognizable in

⁴ Marlar raised several other issues in his petition for habeas corpus, none of which is at issue in this appeal.

a petition for habeas corpus filed in federal court.⁵ Id. at *1 (citing Fisher v. Angelone, 163 F.3d 835, 844 (4th Cir. 1998)). Accordingly, the district court did not reach the merits of Marlar's petition.

The district court issued its order dismissing Marlar's petition before we issued our opinion in Bostick v. Stevenson, 589 F.3d 160 (4th Cir. 2009). In Bostick, we addressed the identical procedural issue presented here, namely, whether the failure to file a Rule 59(e) motion in a South Carolina PCR proceeding precludes any consideration of habeas corpus relief in a federal court.

We answered this question in the negative in Bostick, holding that the failure to file such a motion was not a procedural bar because "Rule 59(e) was not consistently applied by the South Carolina courts" at the time of Bostick's PCR proceedings in 2004. 589 F.3d at 164. Significantly, our decision in Bostick referenced the state appellate proceedings in Marlar's case as an illustration that the South Carolina

⁵ As stated by the district court, "[i]f a petitioner in federal court has failed to raise a claim in state court at the appropriate juncture, and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in state courts and the claim will be considered procedurally defaulted. As a consequence, the petitioner will be barred from raising the issue in his federal habeas petition." 2008 WL 5111878, at *1 (citing Fisher v. Angelone, 163 F.3d 835, 844 (4th Cir. 1998)).

courts "did not distinguish, in any principled way, those cases in which it would apply [Rule 59(e)] from those in which it would not." Id. at 165.

Because Marlar filed his appeal from the district court's judgment while the appeal in Bostick was pending, we held Marlar's appeal in abeyance until after we decided Bostick. Following our decision in Bostick, we issued a certificate of appealability in this case under 28 U.S.C. § 2253(c) to resolve the issue "whether trial counsel was ineffective for failing to call [a] state investigator to testify about potentially exculpatory crime scene hair evidence."

II.

We review de novo a district court's award of summary judgment in a habeas corpus proceeding. Bostick, 589 F.3d at 163; Frye v. Lee, 235 F.3d 897, 902 (4th Cir. 2000). In cases in which a habeas petitioner's claim has been "adjudicated on the merits" by a state court, a federal court may not grant relief unless the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1); see Bostick, 589 F.3d at 163. However, when, as in the present case, the state court did not reach the merits of the petitioner's claim and instead ruled on

procedural grounds, we review the petitioner's claim de novo. Bostick, 589 F.3d at 163; Hudson v. Hunt, 235 F.3d 892, 895 (4th Cir. 2000).

A.

We first address the issue whether Marlar may raise in his federal habeas petition arguments concerning his trial counsel's alleged ineffectiveness, despite Marlar's failure to file a Rule 59(e) motion in the PCR court requesting that the court make specific findings of fact and express conclusions of law. Applying our holding in Bostick, we conclude that Marlar may pursue his ineffective assistance of counsel claim in federal court, even though the South Carolina appellate courts declined to reach the merits of his claim.

As noted above, we held in Bostick that "Rule 59(e) was not consistently applied by the [South Carolina] courts" at the time of Bostick's PCR proceedings in 2004. 589 F.3d at 163-64. This holding is squarely applicable here because Marlar's PCR proceedings occurred in 2003, just a year before Bostick's PCR proceedings, and thus also took place during the time period in which South Carolina courts applied Rule 59(e) in an inconsistent manner. Therefore, under Bostick, Marlar's

ineffective assistance of counsel claim is not procedurally barred from appellate review in the federal courts.⁶

B.

Addressing the merits of his appeal, Marlar argues that his trial counsel was ineffective in failing to introduce into evidence the Barron Report, or testimony referencing the Barron Report's conclusions, concerning the pubic hairs of unknown origin found in the box of evidence collected by investigators at the crime scene. According to Marlar, these pubic hairs may have come from one of the victim's "true" assailants. Marlar contends that if his trial counsel had developed this evidentiary issue, there is a reasonable probability that the jury would not have convicted him of the sexual assault and burglary charges.

In response, the State argues that Marlar's counsel provided effective representation to Marlar, and that the

⁶ In reaching this conclusion, we also reject the State's argument that Marlar is barred from raising his claim because he did not "specifically object on the ground that the Rule 59(e) bar was not consistently applied." We again note that Bostick had not been decided at the time that Marlar could have raised this objection. We decline to hold Marlar, who was proceeding pro se at this time, responsible for failing to predict our Bostick holding years in advance. Moreover, Marlar cited Rule 59(e) in a motion objecting to the magistrate judge's report and recommendation. We construe this pleading in the light most favorable to Marlar because he was proceeding pro se, see Haines v. Kerner, 404 U.S. 519, 520 (1972), and we hold that Marlar adequately preserved this argument for our review.

decision not to introduce the evidence from the Barron Report was a strategic trial decision, which allowed Marlar to preserve the right to present the "last argument" during closing arguments at his trial. The State also contends that even if Marlar's counsel rendered ineffective assistance in not bringing the issue of the unidentified pubic hairs to the jury's attention, Marlar suffered no prejudice because the value of that evidence was minimal and overwhelming evidence supported the jury's verdict.

In deciding this issue, we apply well-established principles of law. A defendant's right to counsel under the Sixth Amendment includes the right to effective assistance of counsel. Yarborough v. Gentry, 540 U.S. 1, 5 (2003); Roe v. Flores-Ortega, 528 U.S. 470, 476-77 (2000); Strickland v. Washington, 466 U.S. 668, 685-86 (1984); Rubin v. Gee, 292 F.3d 396, 401 (4th Cir. 2002). Under this guarantee, a defendant is entitled to counsel who is reasonably competent and who gives advice that is within the range of competence required of attorneys in criminal cases. Wiggins v. Smith, 539 U.S. 510, 521-23, (2003); Kimmelman v. Morrison, 477 U.S. 365, 384, (1986); Strickland, 466 U.S. at 687; Bell v. Evatt, 72 F.3d 421, 427 (4th Cir. 1995).

To prevail on a claim of ineffective assistance of counsel, a petitioner must ordinarily satisfy both parts of the two-part

test set forth in Strickland. Wiggins, 539 U.S. at 521; Williams v. Taylor, 529 U.S. 362, 390 (2000); Strickland, 466 U.S. at 687; Bell, 72 F.3d at 427. The petitioner first must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-88; accord Wiggins, 539 U.S. at 521; Williams, 529 U.S. at 390-91; Bell, 72 F.3d at 427. In making this determination, the court considering the habeas corpus petition "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689; accord Kimmelman, 477 U.S. at 381; Darden v. Wainwright, 477 U.S. 168, 185-86 (1986); Bell, 72 F.3d at 427.

If counsel's performance is found to have been deficient under the first part of the Strickland test, to obtain relief the petitioner must also show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; accord Wiggins, 539 U.S. at 534; Williams, 529 U.S. at 390-91; Gray v. Branker, 529 F.3d 220, 234 (4th Cir. 2008).

A reviewing court, however, is not required to determine whether "counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the

alleged deficiencies." Strickland, 466 U.S. at 697. Therefore, the Supreme Court's decision in Strickland instructs that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Id.; see also Meyer v. Branker, 506 F.3d 358, 369 (4th Cir. 2007) (following Supreme Court's instruction in Strickland to proceed directly to "prejudice" prong if petitioner cannot demonstrate reasonable probability that outcome of trial would be different but for counsel's performance); Buckner v. Polk, 453 F.3d 195, 202 (4th Cir. 2006) (same).

In addressing Marlar's claim, as recommended by the Supreme Court in Strickland, we move directly to consider the "prejudice" prong of the Strickland test. Under this prong, we examine the issue whether there is a "reasonable probability" that trial counsel's decision not to place the Barron Report in evidence, or otherwise address the conclusions drawn in the Barron Report during the trial, "undermine[s] confidence in the outcome" of the jury's verdict of guilty. Strickland, 466 U.S. at 694. As directed by the Supreme Court, we make this determination by considering the totality of the evidence before the trier of fact. See Strickland, 466 U.S. at 695; see also Kimmelman, 477 U.S. at 381.

After reviewing the evidence presented at trial, and the evidence concerning the Barron Report offered by Marlar in the PCR court and in the proceedings that followed, we conclude that Marlar has failed to demonstrate that his defense was prejudiced by trial counsel's failure to present evidence concerning the pubic hairs noted in the Barron Report. We reach this conclusion because there was extensive evidence at trial supporting the jury's verdict, and the probative value of the Barron Report's conclusions regarding the hair evidence is limited.

First, there was very strong evidence of Marlar's guilt presented at his trial. As described above, the victim testified that she was "a hundred percent sure" that Marlar was one of her assailants, even though her assailants used stockings to mask their faces. On several occasions prior to the attack, the victim had met Marlar, becoming familiar with Marlar's tall and slim "build," which the victim testified resembled the "build" of the assailant who was called "Tony" by his accomplice. In addition to confirming Fields' testimony that he referred to his accomplice as "Tony," the victim testified that "Tony" responded, "Oh, shit," upon hearing his name uttered out loud by the other assailant. Further, the victim testified that she was familiar with a baseball jacket with red sleeves that

she previously had observed Marlar wearing, which she identified as being similar to the jacket worn by "Tony" during the attack.

The manner in which the assailants carried out their attack also provided corroborative evidence of Marlar's guilt. Marlar had been at the victim's residence prior to the attack and, as stated by the victim in her testimony, was aware that the telephone in the victim's bedroom could not be used to place outgoing calls. It is thus significant that the assailants disconnected the telephone in the kitchen, but did not attempt to disconnect the telephone in the victim's bedroom where the rape took place.

We also observe that Fields admitted his role in the crimes, identified Marlar as his accomplice, and testified that he and Marlar agreed to use each other to provide an alibi regarding their whereabouts on the morning in question. Fields also acknowledged that he inadvertently called Marlar by his first name, "Tony," in front of the victim during the attack.

Additionally, we observe that Detective Jean Sutton of the Anderson County Sheriff's Office, who interviewed Marlar in connection with the investigation, testified that Marlar told her that he and Fields were together during the time period in which the sexual assault took place. This testimony had the dual impact of supplying Marlar's admission that he was with Fields during the time period that the crimes occurred, and of

corroborating Fields' testimony that he and Marlar had agreed to use each other to provide an alibi.

In contrast to this very strong evidence of Marlar's guilt, the probative value of the evidence concerning the pubic hairs was limited. As stated above, the pubic hairs at issue were found in a box that also contained pillowcases, a bedspread and pillow sham, a bed sheet, a pair of pants, a cap, and paper towels. Although the Barron Report excluded Marlar, as well as Fields, the victim, and the victim's boyfriend, as the source of the pubic hairs, the Barron Report did not offer any other conclusions regarding the identity of the person or persons who deposited the pubic hairs. Notably, the Barron Report was not probative of the issue whether the hairs originated from a male or a female.

There also was no evidence indicating where or when the pubic hairs at issue were deposited on any item or items that ultimately were placed in the crime scene evidence box. Significantly, those hairs could have been deposited on any of the items found in the evidence box. Further, there was no evidence concerning who may have owned or worn some of the items found in the evidence box, such as the pants and black cap. In short, there is no evidence in the record supporting a physical or temporal connection between the sexual assault on the victim and the pubic hair evidence noted in the Barron Report.

Our conclusion is not altered by Marlar's additional argument that the prosecutor misleadingly informed the jury during closing arguments that "[t]he defense has been provided obviously with everything. You saw this. Every report, every SLED report has been provided and obviously you saw it. Every report, every SLED report, everything." Marlar has not contended in his federal habeas proceedings that his counsel's failure to object to these comments constituted ineffective assistance of counsel. Moreover, the prosecutor's misleading remarks do not change the fact that the record fails to connect the hair evidence at issue to a male, to any particular item collected at the crime scene, or to the time period in which the sexual assault occurred.

For these reasons, we conclude that the record does not demonstrate that, but for trial counsel's alleged failures, there is a reasonable probability that the result of Marlar's trial would have been different. In sum, the record before us does not undermine confidence in the outcome of the proceedings. See Strickland, 466 U.S. at 694. Because we reach this conclusion, we need not address whether the performance of Marlar's trial counsel was deficient. See id. at 697. Accordingly, we affirm the district court's judgment dismissing Marlar's petition for a writ of habeas corpus.

AFFIRMED