

THE STATE OF SOUTH CAROLINA  
SUPREME COURT

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APPEAL FROM YORK COUNTY

NOV 07 2014

John C. Hayes, Circuit Court Judge

**S.C. SUPREME COURT**

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Case No. 2014-001163  
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Robert Hooker #00347354, Petitioner,

v.

State of South Carolina, Respondent.

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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

Bobby G. Frederick  
P.O. Box 8219  
Myrtle Beach, SC 29578  
(843) 444-6122  
Attorney for Petitioner

J. Rutledge Johnson  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
(803) 734-3737  
Attorney for Respondent

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## QUESTIONS PRESENTED

1. Whether the Court should grant a Writ of Certiorari to review the circuit court's decision denying Appellant post-conviction relief, based on trial counsel's failure to investigate and present testimony from four witnesses whose testimony would have been that Appellant lived in the alleged victim's home, when Appellant was charged with Burglary first degree of the alleged victim's home.

## STATEMENT OF THE FACTS

Robert Hooker (Appellant) was convicted at trial of burglary in the first degree, stalking, and malicious injury to property on August 10, 2011. (App. 19-24). A Post Conviction Relief hearing was held on April 16, 2014. Following the hearing, Appellant amended his petition to request relief solely on the burglary first degree charge. The Circuit Court subsequently denied relief on all grounds.

Prior to trial, Appellant's trial attorney Melissa Inzerillo was notified of four witnesses who would have testified that, based on their personal observations, Appellant lived with the alleged victim (Graham), at the residence that was the subject of the burglary first degree charge. The witnesses were Eric Howsare, Wayne Wix, Keith Williams, and Chase Hooker. Inzerillo failed to call any of these witnesses at trial and failed to speak to three of the witnesses prior to the trial.

Eric Howsare testified at the PCR hearing that he hooked up Appellant's washing machine and dryer at Graham's house for Appellant. (App. 124, lines 5-13). He further testified that Appellant was living in Graham's house when he hooked up the washing machine and dryer. (App. 124, lines 12-13). In Inzerillo's notes, she had written the name Eric Howsare with a star beside his name (App. 73, lines 8-14), and Inzerillo received a letter from Howsare before the trial that stated, "Their relationship was a hard one, but he did live with her. It started when she lived near me off 901 and then when she moved to Brookview Court." (App. 71, lines, 14-25; p. 72, lines 1-3). Inzerillo acknowledged at the PCR hearing that she did not contact Howsare and did not call him as a witness at Appellant's trial. (App. 125, lines 2-4).

Wayne Wix testified at the PCR hearing that he had called Inzerillo three times before trial and left messages with the receptionist, but his calls were never returned. (App. 114, lines 1-4). Wix testified that he hung out with Graham and Appellant “all the time” at Graham’s house. (App. 112, lines 11-12). Wix testified that:

They seemed to be nice and having fun all the time, but sometimes they would fight and he would come to my house. But as soon as he would get to my house she would call him back to back to back until he would answer the phone and come back over. That was how it would happen every time. That’s how it happened the whole time I knew him until this - that happened to him that night.

(App. 112, lines 14-20).

Wix went on to say that, from his observations, Appellant lived in Graham’s house during the month Appellant was charged with the burglary and that “his clothes were always there.” (App. 113, lines 7-17). Inzerillo had also put a star by the name Wayne Wix in her notes (App. 74, lines 20-23); however, she did not contact Wix and did not call him as a witness at Appellant’s trial. (App. 113, lines 23-25).

In addition, Inzerillo received an email from Keith Williams (App. 80, lines 4-6), in which Williams notified Inzerillo that he knew Graham tried to use Appellant for money, and he had dropped Appellant off at Graham’s house on several occasions. (App. 81, lines 6-14). Williams testified at the PCR hearing that when Appellant called him for a ride from “the house,” Williams picked him up at Graham’s house. (App. 116, lines 1-11). When Appellant asked for rides home, Williams would take Appellant to Graham’s

house. (App. 116, lines 4-11). Inzerillo did not contact Williams and did not call him as a witness at Appellant's trial. (App. 81, lines 18-19).

Before trial, Inzerillo did speak to Chase Hooker, Appellant's brother. (App. 77, lines 7-8). Chase Hooker told her that Appellant would go over to Shanna's house to see her and her son and then they would get mad and tell him to leave. (App. 78, lines 8-13). Chase Hooker testified at the PCR hearing that the relationship between Graham and Appellant was "off and on off and on." (App. 119, line 17). He said Graham would get mad at Appellant, tell him to leave, and then call him to come back the same day or the next morning. (App. 119, lines 17-20). He said that he knew Appellant lived at Graham's house because him and his wife were invited there to hang out with Appellant and Graham. (App. 120, lines 1-8). He said that he knew that Appellant lived there at the time of the burglary charge because he took Appellant home to Graham's house during that time period. (App. 120, lines 12-22). Chase Hooker went on to say that Appellant owned the washer, dryer, and television at Graham's house. (App. 121, lines 3-4). Inzerillo failed to call Chase Hooker as a witness at Appellant's trial. (App. 79, lines 6-9).

Inzerillo testified at the PCR hearing that three out of four law enforcement witnesses at a pre-trial hearing in the case had testified that Appellant had told them that he lived at the house or had a right to be there. One officer, Officer Dougan, had stated at the pre-trial hearing that Appellant had told him that he did in fact live at Graham's house. (App. 61, lines 7-14). Officers Wells, Felmet, and Slozin testified at the same pre-trial hearing that Appellant had told them that he did live at the house and/or that he had a right to be there. (App. 61, lines 15-25; p. 62, lines 1-4; p. 62, lines 13-20).

At the jury trial, officers Felmet and Slozin again testified that Appellant had told them that he lived at Graham's house and had a right to be there. (App. 63, lines 16-19; p. 65, lines 2-17). There was no other testimony presented at the trial on the issue of consent. At the PCR hearing, Inzerillo testified, on direct examination and cross examination, that Appellant had told her that "he was not supposed to be there," (App. 145, lines 13-18), that Graham "did not want him to live there," (App. 69, lines 8-10; p. 133, lines 10-13), and that "he never indicated to me that he lived there." (App. 69, lines 10-11).

## STANDARD OF REVIEW

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must show: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687 (1984).

This Court has held that it gives great deference to the PCR court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Thus, on review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If no probative evidence exists to support the findings, this Court will reverse. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

## ARGUMENT

Inzerillo's failure to investigate or to call witnesses at trial who would have contradicted an essential element of the burglary charge constituted ineffective assistance of counsel, and had the testimony been presented at trial, it is likely to have affected the outcome. Lack of consent to enter a dwelling is a necessary element of burglary first degree, and evidence tending to show that Appellant lived at the address in question would have gone directly to the issue of consent.

In Walker v. State, No. 27368 (S.C. March 19, 2014), trial counsel failed to investigate and call an alibi witness at Walker's trial. In Walker, the victim was trying to fix her broken down car when a man helped purchase a car part that she needed. Id. at \*2. Since the victim did not have enough money, she told the man to follow her home in order for her to pay him. Id. She alleged that the man went into her house, blindfolded her, drove her to his house, and raped her throughout the night. Id. The next day, he blindfolded her again and drove her back to her house. Id. The victim identified the man from a surveillance videotape from the gas station. Id. The manager of the store said the man in the tape that the victim identified was Joseph Walker. Id. Walker was charged and convicted for the alleged crime. Id.

At Walker's PCR hearing, he alleged ineffective assistance of counsel due to his attorney's failure to investigate a potential alibi witness. Id. Walker referred to Robina Reed, his girlfriend at the time of the incident, as a witness during his initial interview with the police. Id. His attorney admitted having notes containing the name Robina Reed as someone to interview but said she did not interview Reed nor follow up with the investigation as to the alibi witness. Id. Reed testified at Walker's PCR hearing that

Walker was her boyfriend during the relevant time frame and that he spent most weekend nights with her. Id. at \*3. The Circuit Court granted PCR, the Court of Appeals subsequently reversed, and the South Carolina Supreme Court then reversed the Court of Appeals' decision, reinstating the Circuit Court's judgment granting PCR to Walker. The Court of Appeals agreed with the PCR court on the first prong of the Strickland test, in that trial counsel's failure to investigate Reed as a witness was deficient. Walker v. State, 723 S.E.2d 610, 615 (Ct. App. 2012). "Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Id. quoting Edwards v. State, 392 S.C. 449, 456 (2011). While the State argued that this was a strategic decision, the court held that the attorney could not have made an informed choice on strategy when the attorney failed to conduct an adequate investigation. Id.

The South Carolina Supreme Court agreed with the Court of Appeals' finding as to the first prong of the Strickland analysis but went on to reverse the Court of Appeals, finding that "the court of appeals erred in finding Walker was not prejudiced by his trial counsel's failure to interview Reed as a potential alibi witness." Walker, No. 27368, at \*5. The Court of Appeals based its decision of the prejudice element on Glover v. State, 318 S.C. 496 (1995). In Glover, the court said "since an alibi derives its potency as a defense from the fact that it involved the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Id. at \*4 quoting Glover, 318 S.C. at 498. The Court of Appeals in reversing the PCR hearing found that Reed's testimony did "not account for Walker's whereabouts on

March 2, 2002, such that it was physically impossible that he committed the crimes.” Id. at \*5.

In reversing, the South Carolina Supreme Court said that the Court of Appeals misunderstood Glover. They said while Reed could not give exact dates as to when Walker stayed with her, she did conclude in her testimony that the two spent every weekend together during the time of the incident. Id. Therefore, this made it impossible for Walker to have committed the crimes. Id. “In other words, unlike Glover where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed’s testimony to be true and for Walker to have committed the crime.” Id.

Here, as in Walker, Appellant meets both prongs of the Strickland test. Inzerillo was aware of four potential witnesses that would have testified as to their personal knowledge and observations that Appellant did live with Graham during the time of the alleged burglary, which makes it impossible for him to have committed the burglary, as lack of consent is an essential element of the crime. Inzerillo was aware of the witnesses and the nature of their potential testimony. Eric Howsare and Wayne Wix’s names were handwritten in Inzerillo’s notes, with stars next to their names. (App. 73, lines 8-12; p. 74, lines 20-23). Eric Howsare sent a letter to Inzerillo stating that he had personal knowledge that Appellant lived with Graham, not only at the address in question but also at a previous address. (App. 71, lines 14-25; p. 72, lines 1-10) Wayne Wix called Inzerillo and left messages with her receptionist on three different occasions and did not receive a return call. (App. 114, lines 1-4). Inzerillo received an email from Keith Williams stating that he had dropped Appellant off at Graham’s house on different

occasions. (App. 81, lines 6-14). Inzerillo did speak to Chase Hooker but neglected to call him as a witness at trial. (App. 77, lines 7-8).

Inzerillo testified at the PCR hearing that Appellant had told her he was not supposed to be at Graham's house. (App. 145, lines 17-18). When pressed by the assistant attorney general, Inzerillo would not say that Appellant had told her that he did not live in the house, but instead she qualified her answer and reiterated the specific language "that he was not supposed to be there." Id. Throughout her testimony, Inzerillo appears to carefully avoid stating that Appellant told her he did not live at the home; instead, even when pressed by the assistant attorney general, she phrases her responses to state that Appellant had told her that "he was not supposed to be there," (App. 145, lines 13-18), that Graham "did not want him to live there," (App. 69, lines 8-10; p. 133, lines 10-13), and that "he never indicated to me that he lived there." (App. 69, lines 10-11).

At least three police officers, Wells, Felmet, and Slozin, had given contradictory testimony that Appellant had told them that he lived at Graham's house and had a right to be there, (App. 61, lines 15-25; p. 62, lines 1-4; p. 62, lines 13-20; p. 63, lines 16-19; p. 65, lines 2-17), and Inzerillo was aware of four additional witnesses who were prepared to testify from their own personal observations that Appellant lived at the house.

Had Inzerillo interviewed and called these four witnesses at Appellant's trial, the weight of the evidence would have been overwhelming regarding whether Appellant lived at Graham's house, and it is likely that the outcome regarding the critical issue of consent would have been different. All together, the testimony of these witnesses at the PCR hearing show that Appellant and Graham had an on-going tumultuous relationship, but, despite that fact, he did live with Graham and had access to the home on a regular

basis. Therefore, Appellant did not enter the home on the night of the incident without consent.

The testimony of these four witnesses was critical not only because the testimony negates an essential element of the burglary charge, but it also casts considerable doubt on the state's main witness's credibility. In Thomas v. State, the petitioner was found guilty of first degree burglary and first degree criminal sexual conduct. Thomas v. State, 417 S.E.2d 531, 532 (S.C. 1992). The victim testified at trial that she was attacked and identified her neighbor, the petitioner, as her assailant. Id. Since the victim was the only witness to the attack, the Court noted that her credibility was extremely important in proving the State's case. Id. In that case, there were a member of emergency medical personnel who would have testified that right after the attack, the victim said she did not know her assailant. Id. The court found "counsel's performance was deficient in failing to call the medical personnel who would have cast doubt on the sole witness' identification of the petitioner." Id.

Here, Graham testified at trial that she had not invited him over since they had broken up before this incident (App. 131, lines 17-23) and that she did not allow him to come and stay at her house (App. 89, lines 21-22). The testimony of the four witnesses who testified at the PCR hearing, in addition to the two officers who did testify at trial that Appellant had stated he lived in Graham's home, would have clearly damaged her credibility in this case. Inzerillo acknowledges this in the PCR hearing. (App. 90, lines 3-6). If Inzerillo had interviewed these four witnesses and called them to testify at Appellant's trial, it would have cast doubt on Graham's credibility, and it would have

tended to prove that Appellant did live in the house, making it impossible for him to have committed the crime of burglary.

## CONCLUSION

Inzerillo failed to conduct an independent investigation by failing to interview four key witnesses and call them as witnesses in Appellant's trial. As a result, Appellant did not receive a fair trial. The testimony of these four witnesses would have proven that Appellant did in fact live at Graham's house, and therefore, he could not be guilty of burglary in the first degree. Furthermore, the witnesses' testimony would have cast doubt on the credibility of the state's main witness. For the foregoing reasons, Appellant Robert Hooker respectfully asks this Court to grant his Petition for Writ of Certiorari and to ultimately grant a new trial based on ineffective assistance of counsel.

THE STATE OF SOUTH CAROLINA  
SUPREME COURT

APPEAL FROM YORK COUNTY

John C. Hayes, Circuit Court Judge

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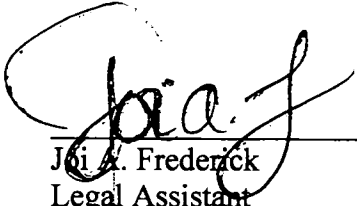
CERTIFICATE OF SERVICE

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I certify that I have served the Petition for Writ of Certiorari to the following recipient by depositing a copy of it in the United States Mail, postage prepaid, on November 6, 2014, addressed to:

J. Rutledge Johnson  
Assistant Attorney General  
P.O. Box 11549  
Columbia, SC 29211  
803-734-3737  
Attorney for Respondent

November 6, 2014



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Jai A. Frederick  
Legal Assistant  
Frederick Law Office  
P.O. Box 8219  
Myrtle Beach, SC 29577  
843-444-6122