

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**ORIGINAL**

CERTIORARI TO RICHLAND COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable J. Michelle Childs, Circuit Court Judge

Case No. 2006-CP-40-0402

Francis O. Campbell,..... Petitioner,

v.

State of South Carolina,..... Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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**PETITIONER'S STATEMENT OF ISSUES ON APPEAL**

WHETHER THE SECOND PCR JUDGE ERRED IN DENYING PETITIONER'S REQUEST FOR RELIEF PER HIS NEWLY DISCOVERED EVIDENCE CLAIM, WHICH WAS SUPPORTED VIA THE TESTIMONY OF JOHN JEFFREY MCDONALD, WHO WAS NOT PRESENT AT THE PRIOR PCR ACTION, BUT NONETHELESS APPEARED AT THE SECOND PCR HEARING AND PROVIDED THE SUFFICIENT CORROBORATION NEEDED TO ESTABLISH PROOF OF THE "DINKY DID IT" MURDER THEORY OF THE CASE

WHETHER THE SECOND JUDGE ERRED IN DENYING PETITIONER'S REQUEST FOR A NEW TRIAL DUE TO A BRADY VIOLATION THAT OCCURRED IN THE CASE BECAUSE THE SOLICITOR WAS PRIVY TO INFORMATION IN THE FORM OF COMMUNICATIONS WITH MCDONALD THAT CORROBORATED THE "DINKY DID IT" MURDER THEORY, BUT FAILED TO DISCLOSE THIS INFORMATION TO DEFENSE COUNSEL PRIOR TO TRIAL

## STATEMENT OF THE CASE

The Respondent agrees with Petitioner's statement of the case for purposes of this Return:

Petitioner Francis Owens Campbell was convicted of murder per jury trial held during the March 1982 term of the Richland County General Sessions Court before Judge Howard Ballenger. Petitioner was sentenced to life imprisonment. App. 1-671. Petitioner was represented at trial by Venable Vermont, and Assistant Attorney Generals Bufort Mabry and Scott Elliot prosecuted the case. Petitioner appealed, but his conviction and sentence were affirmed. App. 673-693. See State v. Campbell, Memo Op. No. 83-MO-283 (S.C. Nov. 8, 1983). App. 694. Petitioner was represented on appeal by Tara D. Shurling.

On November 20, 1985, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App.695-701. The State filed a return on February 24, 1986. App.705-711. Evidentiary hearings were held on February 25, 1987, and July 27, 1987, at the Richland County Courthouse before Judge Owens T. Cobb, Junior. App. 699-869. On October 10, 1987, Judge Cobb issued an Order of Dismissal in the case. App. 870-877. Petitioner was represented at the first PCR hearing Michael J. Thompson. Petitioner appealed, but his petition for writ of certiorari was denied.

On January 18, 2006, petitioner filed a PCR application with the Richland County Office of the Clerk of Court. App. 879-885. A hearing was

convened on April 12, 2010, at the Richland County Courthouse before Judge J. Michelle Childs. App. 925-994. On June 17, 2010, Judge Childs issued an order granting petitioner a new trial. App. 995-1012. On July 1, 2010, the respondent filed a Rule 59(e) motion. App.1013-1022. On August 19, 2010, Judge Childs issued an order rescinding the prior order and denying PCR to petitioner. App. 1023-1039. Petitioner was represented at his second PCR hearing by Tricia Blanchette. The Petitioner filed a Petition for Writ of Certiorari on April 20, 2011. This return follows.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State,

300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Even with respect to guilty plea counsel, the applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

## ARGUMENT

### THE SECOND PCR COURT PROPERLY DENIED PETITIONER'S REQUEST FOR RELIEF PER HIS NEWLY DISCOVERED EVIDENCE AND BRADY VIOLATION CLAIMS BECAUSE THE JOHN JEFFREY MCDONALD TESTIMONY IS NOT NEWLY DISCOVERED EVIDENCE

Sufficient evidence of probative value exists to support the PCR court's dismissal. As the PCR court explained in the Amended Order, the Petitioner's claim of newly discovered evidence with respect to Jeffrey McDonald, and any potential Brady violation, has now lapsed due to Petitioner's failure to timely bring forth McDonald as a witness. (App. p. 1033). At the prior PCR hearing, the case investigator testified that he interviewed Jeffrey McDonald. (Prior PCR Appeal App. p. 809 L. 7). That hearing was in 1987, the Petitioner could have called Mr. McDonald as a witness then. The Petitioner instead waited over twenty (20) years and after the investigator's death, to now claim that the investigator was lying and present a stale pseudo Brady claim. The Petitioner obtained the Johnny Bradwell affidavit in the early 1980s. The affidavit is specifically mentioned at the pretrial conference. (April 15, 1982 pretrial transcript App. p. 6 L. 20 – 22). The very first sentence of that statement is the mention of "Jeff McDonald" (not just the first name "Jeff"). App. p. 1014. Accordingly, there is no good-faith reason for the Petitioner waiting over twenty (20) years to call a witness **whose full name he knew** to rebut testimony that occurred in 1987. The McDonald testimony is not newly discovered evidence. The PCR statute itself is clear,

that even purported *newly discovered evidence* must be presented within one year of when it was discovered. S.C. Code § 17-27-45(c). That section was not enacted until 1995 so the Petitioner is required to make his newly discovered evidence claim, at the absolute latest, within one year of that date. Peloquin v. State, 469 S.E.2d 606 (1996). The Petitioner could have called Jeffrey McDonald to testify at any time as he knew of Jeffrey McDonald prior to the actual trial. If the Petitioner called McDonald as a witness, at or immediately after the first PCR hearing, the case investigator could have been questioned and the alleged written statement by McDonald could have been discovered. The claim of newly discovered evidence, as it relates to McDonald lapsed in 1996.<sup>1</sup> In order to warrant the granting of a new trial on the ground of after-discovered evidence, the movant must show the evidence (1) is such as will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999). For whatever reason, the Petitioner called McDonald to testify at the 2<sup>nd</sup> PCR, there is nothing to explain why that same reasoning was not used to call McDonald during the first PCR to explain his 1980 affidavit statement; accordingly, testimony that was available all along cannot be newly discovered.

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<sup>1</sup> Even absent S.C. Code § 17-27-45(c), the temporal limitation to claims of newly discovered evidence would also fall under a general laches analysis. In addition, Rule 59(b), SCRCP was available to timely present the McDonald claim following the prior PCR.

The PCR court properly denied Petitioner's request for relief per his newly discovered evidence and Brady violation claims because the John Jeffrey McDonald testimony is not newly discovered; accordingly, evidence of probative value exists to sustain the post-conviction relief judge's findings. There is nothing to substantiate the Petitioner's claims that this was a Brady violation because it appears that defense counsel knew of the issue. App. p. 838 – 839. Defense counsel explained at the first PCR that he was aware of the Dinky did it issue as it related to Johnny Bradwell – and that he pursued it with the investigator – but that they were not successful in coming up with anything solid enough to warrant calling Bradwell or Taylor to testify at trial. App. p. 839.<sup>2</sup>

The Petitioner claims “Bradwell was and is the most elusive witness ever and who still cannot be found.” Rhetoric alone cannot absolve the Petitioner's burden of proof to substantiate his claims. Without Johnny Bradwell, the Petitioner's claims are little more than layered hearsay and shadowy third-party guilt that should not be afforded much weight. Bradwell's full name is Johnny Allen Bradwell. App. p. 1040. After he was convicted and sentenced, Petitioner was released to parole for this crime and was a fugitive in Florida sometime around the turn of the century when he claims to have been in contact with Johnny Allen Bradwell. App. p. 952. The Respondent submits that this Court can take judicial notice that the

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<sup>2</sup> Trial counsel summed it up as “it was crossed with all kinds of innuendo and speculation and hearsay, and it was real difficult to come up with anything solid...we ultimately weren't able to get anything out of it.” App. p. 844 – 845, 856 L. 8 - 9.

supposedly elusive Johnny Allen Bradwell was present in the courtroom here in Richland County on April 24, 2003 and testified for the defense in The State v. Jimmy Causey (2003GS4010075-10079).<sup>3</sup> Sufficient evidence of probative value exists to support the denial of the Petitioner's PCR claims, both at his first PCR in the 1980's and the later successive one. As explained by the first PCR court the Petitioner's Dinky arguments failed in 1987 and sufficient evidence of probative value exists to support denial again after this successive PCR. App. p. 875 – 877).

Apart from Johnny Allen Bradwell, we have the Petitioner's own words to thwart the supposedly new claims that the real killer was allegedly Dinky Taylor. The Petitioner himself claims that he knew Dinky by sight and claimed that the real killer was someone else. The jury heard the Petitioner testify at trial how he was at the scene but did not actually kill anyone. App. p. 515 – 525, 608. It was the jury who heard the Petitioner explain that he saw the real killer that night and then saw the real killer again a few months later at Ms. Wilson's house. App. p. 557. The Petitioner would have recognized the real killer as Dinky Taylor because the Petitioner testified and told the jury that he knew Dinky Taylor by sight from time spent together at Dinky's sister, the victim's wife, Ann Wilson's house – the Petitioner spent

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<sup>3</sup> The Jimmy Causey trial transcript and appeal brief are currently on file with this Court as part of Jimmy Causey's pending PCR appeal (2005CP4006585). Johnny Allen Bradwell testified at that trial; in fact he is specifically mentioned in the appeal brief (p. 6) filed by Mr. Causey's then appellate attorney, Ms. Wanda P. Hagler. *Causey Appendix*, p. 849 and p. 1608. While the nature of Bradwell's testimony during the Causey trial is not directly relevant to this case, his presence and availability for the Causey trial is relevant to rebut the Petitioner's proposition that Johnny Allen Bradwell "is the most elusive witness ever and who still cannot be found."

the night at Dinky's sister's house regularly and Dinky was often present on those visits. App. p. 533 – 534. The Petitioner's "Dinky did it" theory is completely refuted by the Petitioner's own trial testimony.

**CONCLUSION**

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By:

  
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ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina  
June 17, 2011

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal From Richland County  
Honorable J. Michelle Childs, Circuit Court Judge

Francis O. Campbell, 111197,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

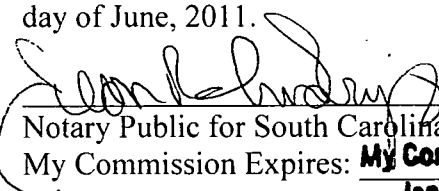
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon opposing counsel, Wanda H. Carter by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 20<sup>th</sup> day of June, 2011.

  
BRIAN T. PETRANO  
ATTORNEY FOR RESPONDENT

SWORN to before me this 20<sup>th</sup>  
day of June, 2011.

 (L.S.)  
Notary Public for South Carolina.

My Commission Expires: **My Commission Expires**  
**January 30, 2013**