

STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No. 2014-002026

Gary W. Bennett,Respondent,

v.

State of South Carolina, Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

1. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel was ineffective for failing to prepare an alternative defense strategy if he was not allowed to cross-examine the co-defendant on the details of his prior conviction where the constitutional guarantee of effective counsel does not require trial counsel prepare for every potential contingency at trial?
2. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel was ineffective in failing to meet with Respondent and review discovery where trial counsel corresponded with Respondent prior to trial and where Respondent failed to offer any evidence of how further meetings or review would have changed the outcome of his trial?
3. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel was ineffective for failing to object to the introduction of phone records where he articulated a strategic reason of not objecting to their introduction, where an objection would not be successful, and where even a successful objection would not have changed the outcome of Respondent's trial?
4. Is certiorari warranted to review the post-conviction relief judge's finding trial counsel was ineffective for failing to investigate an alibi witness where Respondent failed to present any alibi witnesses at the evidentiary hearing and where the testimony he alleges an alibi witness would have given does not establish an alibi?

STATEMENT OF THE CASE

On May 23, 2000, the victim in this case was brutally murdered over the combination to a safe at the Surfside Beach Taco Bell. In February 2002, the Horry County Grand Jury indicted Respondent for murder and armed robbery in connection with the victim's death. (App. pp. 334-335; p. 337-338). Johnny Gardner, Esquire ("trial counsel") represented Respondent. (App. p. 1). On August 12, 2002, Respondent proceeded to trial before the Honorable John M. Milling and a jury. (App. p. 1). On August 14, 2002, the jury found Respondent guilty as indicted. (App. p. 317, line 18-p. 318, line 6). Judge Milling sentenced Respondent to life without the possibility of parole for both convictions.¹ (App. pp. 336; p. 339).

Joseph L. Savitz III, Esquire, perfected Respondent's direct appeal to the South Carolina Court of Appeals, arguing Judge Milling erred in limiting his cross-examination of the co-defendant on his prior conviction. State v. Bennett, Op. No. 2004-UP-439, 2004 WL 6331253 (S.C. Ct. App. filed Aug. 13, 2004). The court of appeals found Judge Milling erred in limiting the cross-examination, but that the error was harmless "in light of the overwhelming level of impeachment otherwise permitted" during cross-examination. Id. This Court affirmed the court of appeals, finding Judge Milling did not abuse his discretion in limiting the cross-examination and Respondent "was not deprived of the impeachment value inherent" in the prior conviction. State v. Bennett, Op. No. 2007-MO-040, 2007 WL 8434565 (S.C. Sup. Ct. filed June 25, 2007).

Respondent filed an application for post-conviction relief on June 26, 2008. (App. p. 340). The Horry County Clerk of Court delivered a copy of the application to

¹ Respondent was subject to a mandatory life sentence, pursuant to S.C. Code § 17-25-45, based on his prior first degree burglary conviction. (App. p. 324, line 20-p. 325, line 23).

Petitioner on September 18, 2012.² Petitioner filed a return on December 3, 2012. (App. p. 346) The Honorable Benjamin H. Culbertson (“the post-conviction relief judge”) convened an evidentiary hearing on the application at the Horry County Courthouse on June 19, 2014. (App. p. 350). Respondent was present and represented by Charles T. Brooks III, Esquire. (App. p. 350). The post-conviction relief judge granted relief in an order dated August 14, 2014, and filed August 19, 2014. (App. p. 414). This Petition for a Writ of Certiorari follows.

² See Gary Wayne Bennett VS State of South Carolina, Horry County Public Index, <http://publicindex.sccourts.org/Horry/PublicIndex/CaseDetails.aspx?County=26&CourtAgency=26002&CaseNum=2008CP2605031&CaseType=V> (last visited March 17, 2015) (indicating the filing of a certificate of service by email on September 18, 2012).

ARGUMENT

I. The post-conviction relief judge erred in finding trial counsel ineffective for failing to prepare an alternative defense strategy if the trial judge ruled against the admission of details of the co-defendant's prior conviction, for failing to meet with Respondent and review discovery him, for failing to object to the introduction of telephone records, and for failing to investigate an alibi defense.

The post-conviction relief judge concluded trial counsel's "performance as [Respondent's] attorney fell well below the 'professional norms'" because he "never met with [Respondent] personally until the day of trial[,] never conducted any investigations into the case, never contacted any alibi witnesses[,] never reviewed pre-trial discovery[,] never sought suppression of the phone records introduced into evidence[,] and because his "entire strategy was to impeach the State's key witness with the witness' prior criminal record." (App. p. 416-417). The post-conviction relief judge noted the existence of prejudice was a "more difficult question" (App. p. 417), but nevertheless concluded trial counsel's "performance as [Respondent's] criminal trial attorney so undermined the proper function of the adversarial process that the trial cannot be relied upon as having produced a just result." (App. p. 418). In reaching this conclusion, the post-conviction relief judge erroneously applied well settled law regarding presumptions and burdens of proof when an inmate raises a constitutional challenge to his trial attorney's performance. Because the post-conviction relief judge committed reversible errors of law in finding trial counsel ineffective, this Court must grant certiorari to correct his mistake.

A. Standard of Review

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Regarding allegation of ineffective assistance of counsel, the proper measure of performance is

whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). 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." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)). This Court must also reverse the post-conviction relief judge's decision when it is controlled by an error of law. Talley v. State, 371 S.C. 535, 540, 640 S.E.2d 878, 880 (2007) (citing Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000)). This court reviews questions of law de novo. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (citing Goins v. State, 397 S.C. 568, 726 S.E.2d 1 (2012)).

B. Trial counsel articulated a valid strategy of attempting to discredit the co-defendant that is not subject to post-hoc judicial scrutiny.

The fatal flaw in the post-conviction relief judge's order is his determination that trial counsel's performance was deficient where his "entire strategy was to impeach the State's key witness with the witness' prior criminal record." (App. p. 417). In finding trial counsel ineffective in this regard, the post-conviction relief judge failed to give appropriate deference to trial counsel's decision to pursue this trial strategy to the exclusion of others. When reviewing claims of constitutionally defective counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. Here, the post-conviction relief judge substituted his post-hoc judgment for that of trial counsel's judgment at the time of trial. Had he observed his constitutional mandate to "not second-guess counsel's assistance after conviction or adverse sentence[,] to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time[,] he would have determined counsel's strategy was reasonable under the circumstances. Id.

Respondent alleged trial counsel's decision to pursue a strategy of impeaching the co-defendant with his prior conviction was unreasonable. His argument, with which the post-conviction relief judge agreed, was that that trial counsel should have anticipated the trial judge would limit his cross-examination of the co-defendant on the details of the conviction. In this vein, trial counsel testified on several occasions that he would have pursued things differently had he known his cross-examination would be limited. (App. p. 392, line 20-p. 393, line 1; p. 393, lines 18-21; p. 394, lines 7-10; p. 395, lines 11-23; p. 398, lines 7-11). However, trial counsel's hindsight rationalizations of what he would

have done differently are not sufficient to prove him ineffective in formulating his trial strategy. Harrington v. Richter, 562 U.S. 86, 109 (2011) (“After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome.”). Instead, deference should be given to the decision trial counsel made at the time of trial to pursue the strategy of discrediting the co-defendant with details of his prior conviction. See Sallie v. N.C., 587 F.2d 636, 640 (4th Cir. 1978) (“Marzullo was not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.”). Trial counsel’s testimony makes clear he was fully prepared to implement his strategy at that time. The fact trial counsel’s strategy proved unsuccessful does not make him constitutionally ineffective. See, e.g., United States v. Guerrero, 938 F.2d 725, 730 (7th Cir. 1991) (“The fact that the jury chose not to believe this defense does not mean that this court is required ‘to conclude that a particular act or omission of counsel was unreasonable.’” (citing Strickland, 466 U.S. at 689)).

Furthermore, trial counsel was not constitutionally ineffective for not preparing an alternative strategy in the event the trial judge limited his cross-examination of the co-defendant. The United States Supreme Court addressed a similar allegation of ineffectiveness in Harrington v. Richter, 562 U.S. 86 (2011). There, the lower court found an attorney deficient for not being prepared to offer expert testimony to rebut the State’s evidence where the attorney had not expected the State to offer expert testimony on an issue. Harrington, 562 U.S. at 110. The Supreme Court held the lower court “erred in suggesting counsel had to be prepared for ‘any contingency[.]’” Id. In so holding, the

Supreme Court noted that an attorney need not be a “flawless strategist or tactician[.]” and cannot be faulted for a “reasonable miscalculation or lack of foresight” in preparing for the State’s possible arguments. Id.

Here, the post-conviction relief judge committed the same error as the lower court in Harrington. Trial counsel admitted the trial judge’s ruling limiting his cross-examination was unexpected. However, trial counsel’s representation was not constitutionally ineffective merely because the trial judge’s ruling limited his presentation of the case. Trial counsel was not aware ahead of trial that the State would seek to limit his cross-examination of the co-defendant. (App. p. 394, line 25-p. 395, line 3). See id. (“Here, Richter's attorney was mistaken in thinking the prosecution would not present forensic testimony. But the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt.”). Trial counsel’s expectation of being able to use the details of the crime was a reasonable interpretation of the law on impeachment with prior convictions.³ Trial counsel cannot be faulted for not foreseeing the adverse ruling. See Gilmore v. State, 314 S.C. 453, 457, 445 S.E.2d 454, 456 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) (“We have never required an attorney to be clairvoyant[.]” (citations omitted)).

³ The court of appeals agreed with trial counsel, finding the trial judge erred in limiting the cross-examination. Bennett, 2004 WL 6331253, at *3. This Court disagreed, finding the trial judge did not abuse his discretion in imposing the limitation. Bennett, 2007 WL 8434565, at *2. The fact reasonable minds can differ on whether the trial judge’s ruling was proper does not mean trial counsel should have anticipated an adverse ruling on this issue. Strickland, 466 U.S. 668, 689 (“There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.”).

Regardless, trial counsel lack of a contingency plan did not prejudice Respondent. Even with the trial judge's limitation, trial counsel still vigorously cross-examined the co-defendant about the details of his plea bargain, his multiple statements, his flight to Arizona, and the circumstances of his current incarceration. In light of trial counsel's vigorous cross-examination of the co-defendant, the lack of a contingency plan did not make him ineffective in presenting Respondent's defense. *Id.* at 111 ("Here Richter's attorney represented him with vigor and conducted a skillful cross-examination.").

Similarly, Respondent failed to propose an alternative strategy trial counsel could have pursued. Instead, the post-conviction relief judge merely assumed trial counsel could have pursued some alternate alibi theory had he had the foresight to anticipate the trial judge's adverse ruling. However, as noted *infra*, Respondent failed to present evidence of any alibi defense. Furthermore, there was no physical evidence linking Respondent to the crime. Because the only direct evidence of Respondent's guilt came from the co-defendant's testimony, trial counsel pursued an appropriate strategy of attempting to discredit him. *Id.* at 109 ("To support a defense argument that the prosecution has not proved its case it sometimes is better to try to cast pervasive suspicion of doubt than to strive to prove a certainty that exonerates."). The fact the trial judge prohibited trial counsel from implementing this strategy does not amount to *per se* prejudice. *See, e.g., Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) ("[T]he Confrontation Clause guarantees an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish" (emphasis in original)).

The post-conviction relief judge succumbed to the temptation to second-guess trial counsel's strategy based on the fact it was unsuccessful. Not only did this legally flawed review lead him to find counsel ineffective in failing to prepare an alternate strategy, it also permeated his analysis of trial counsel's actions in other regards. As will be shown infra, the post-conviction relief judge allowed his disapproval of trial counsel's overall trial strategy to lead him to conclude trial counsel was ineffective in preparing for trial and conducting trial. This Court should grant certiorari and review trial counsel's actions through the appropriate lens of a strong presumption of adequate assistance.

C. Further face-to-face meetings between Respondent and trial counsel were not necessary.

Respondent testified he never had a chance to discuss the State's discovery with trial counsel. (App. p. 383, lines 5-7). However, he did not testify he never reviewed discovery on his own. In fact, he testified he was familiar with the phone records (App. p. 357, line 19-p. 358, line 6; p. 359, lines 23-24) and the witness statements prior to trial (App. p. 361, lines 1-20; p. 362, line 3-p. 363, line 16). In contrast, trial counsel testified he independently reviewed discovery and reviewed it with Respondent prior to trial. (App. p. 399, lines 14-15; p. 408, lines 12-24). Counsel disputed that he never met face-to-face with Respondent, but acknowledged it may not have been until the days before trial. (App. p. 408, lines 5-11). However, both Respondent and trial counsel admitted they corresponded extensively prior to trial. Respondent recalled sending numerous letters to trial counsel and detailing his version of events the day of the murder. (App. p. 382, line 22-p. 383, line 15). Trial counsel testified he communicated sufficiently with Respondent to be prepared for trial. (App. p. 399, lines 10-19).

The post-conviction relief judge erred in finding trial counsel failed to properly consult with Respondent because he imposed a requirement that an attorney have extensive face-to-face meetings with a client. However, the Constitutional right to effective counsel does not include a specified number of face-to-face meetings between client and attorney. Moody v. Polk, 408 F.3d 141, 148 (4th Cir. 2005) (“As to Moody's claim that his counsel did not meet with him frequently enough, there is no established ‘minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.’” (citing United States v. Olson, 846 F.2d 1103 (7th Cir. 1988))). Simply put, “brevity of time spent in consultation, without more, does not establish that counsel was ineffective.” Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). Furthermore, clients may benefit more from a single meeting with an experienced attorney than from multiple meetings with an inexperienced one. Olson, 846 F.2d at 1108 (“A lawyer as experienced as Mr. Coffey in criminal law can get more out of one conference with his client than a less well-trained lawyer could get out of several.”).

Trial counsel, a very experienced attorney, corresponded extensively with Respondent. From this correspondence, he developed a trial strategy to discredit the co-defendant. The record indicates trial counsel was fully prepared for trial and was fully informed of Respondent’s version of events. Furthermore, Respondent presented no evidence as to what further information counsel would have gathered had he met with Respondent more often. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) (“Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had

counsel more fully prepared for the trial.”). Instead, the post-conviction relief judge merely relied on his post-hoc determination that trial counsel pursued an inappropriate strategy of discrediting the co-defendant to determine trial counsel did not meet with Respondent sufficiently. Under the facts of this case, the post-conviction relief judge applied an inappropriate legal standard in finding trial counsel deficient merely because his face-to-face meeting with Respondent did not occur until the eve of trial.

D. Trial counsel articulated objectively reasonable grounds for not objecting to phone records that were not prejudicial to Respondent’s defense.

At Respondent’s trial, the State presented testimony from Sharon Davis, a custodian of records from Verizon Wireless. (App. p. 73-83). Davis testified Verizon’s records indicated a call was made from the victim’s residence at 8:39 P.M. on the day of the murder. (App. p. 74, lines 3-20). The State did not enter into evidence the record from which Davis based her testimony. Trial counsel did not object to Davis’s testimony. Instead, he cross-examined her on the lack of any other phone calls appearing on the record from the day of the murder, and the fact she could not identify who made or received the call. (App. p. 78, line 14-p. 79, line 12).

Trial counsel’s overall trial strategy was to discredit the co-defendant and place blame for the murder on him. (App p. 401, line 23-p. 402, line 3; p. 56, lines 2-14). Trial counsel testified at the evidentiary hearing that he reviewed discovery and was prepared to go forward with trial. (App. p. 399, lines 10-15). When asked if Davis’s testimony was unexpected, he replied that her testimony was not important at the time of the trial. (App. p. 51, lines 13-20).

The post-conviction relief judge erroneously found trial counsel ineffective because trial counsel articulated that the records were not harmful to Respondent’s

defense at the time. Trial counsel cannot be found ineffective for failing to object to certain testimony where he articulates an objectively reasonable strategy for not raising an objection. Rhodes v. State, 349 S.C. 25, 33, 561 S.E.2d 606, 610 (2002) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Here, trial counsel articulated that he did not object to the introduction of testimony regarding the victim's phone records because it was not relevant to his trial strategy at the time. The record supports the reasonableness of this strategy. Trial counsel's strategy was to place the co-defendant in the victim's home at the time of the murder. Davis's testimony that a phone call was made from the victim's home supports the co-defendant's testimony that he was in the victim's home and made a phone call. This fact was not in dispute. The factual dispute was whether Respondent was also in the home. Davis's testimony does not make it more likely Respondent was there. In fact, her testimony helps to discredit the co-defendant's testimony where trial counsel elicited testimony from the co-defendant that he actually made two phone calls from the victim's home the day of the murder. (App. p. 191, line 11-p. 192, line 4). Instead of harming Respondent's efforts to discredit the co-defendant, Davis's testimony bolstered Respondent's strategy to show the co-defendant was untruthful. Therefore, trial counsel articulated a valid strategic reason for not objecting to her testimony.

The post-conviction relief judge erred because he relied on trial counsel's statement that Davis's testimony sounds like "a pretty big deal" today. (App. p. 400, lines 19-20). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at

the time.” Strickland, 466 U.S. at 689. Here, the post-conviction relief judge substituted his, and trial counsel’s, hindsight judgment for that of trial counsel’s at the time of trial. At that time, pursuing an appropriate strategy of attempting to discredit the co-defendant, trial counsel decided to forego an objection to Davis’s testimony. Such a decision was not unreasonable in the context of this record, and the post-conviction relief judge erroneously allowed the fact Respondent was convicted to cloud his judgment of trial counsel’s actions. Id. (“[I]t is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” (citing Engle v. Isaac, 456 U.S. 107 (1982))).

Furthermore, the post-conviction relief judge erred in finding counsel should have raised an objection to the testimony on the grounds the records were not disclosed prior to trial because such an objection would not have been successful if raised.⁴ The State is required to disclose documents that are: 1) material to the preparation of a defense; 2) intended for use as evidence in chief; or 3) favorable to the defendant and material to his guilt or punishment. Rule 5(a)(1)(C), SCRCrimP; Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citations omitted). The State did not introduce the actual phone record as evidence at trial. (App. p. 4, lines 6-14). Therefore, Respondent must show the records were material to his defense. See State v. Proctor, 358 S.C. 417, 421, 595 S.E.2d 476, 478 (2004) (materiality test is same under Brady and under Rule 5 (citing State v. Kennerly, 331 S.C. 442, 503 S.E.2d 214 (Ct. App. 1998))). Evidence is material if there is a reasonable probability that disclosure of the evidence would have changed the result

⁴ Initially, Petitioner submits the post-conviction relief judge’s finding these records were not disclosed is not supported by probative evidence in the record. Nothing in the record clearly indicates the records were not disclosed prior to trial. Trial counsel testified he reviewed every document the State provided to him. (App. p. 401, lines 5-6). No testimony supports a conclusion trial counsel was not familiar with the records. In fact, his thorough cross-examination indicates he was familiar with the record’s contents.

of the trial. Id. (citing State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996)). A determination of materiality must be made in consideration of the whole record. Id. at 422, 595 S.E.2d at 479 (citing United States v. Agurs, 427 U.S. 97 (1976)).

Here, the records were not directly related to Respondent's guilt or innocence. They merely corroborated a portion of the co-defendant's testimony about making a call from the victim's house. The fact the records indicated the call was made at 8:39 P.M. did not bolster any timeline of the co-defendant because he testified he did not recall what time he and Respondent went to the victim's house. (App. p. 166, lines 16-18). The State also never presented evidence to confirm the number called from the victim's phone matched the business the co-defendant alleged he called. In the context of the entire trial, introduction of the records did not provide the jury with any additional information tending to prove Respondent's guilt. In fact, trial counsel adeptly used the records to impeach the co-defendant's testimony regarding the number of calls he claimed he made. Therefore, the records were not material to Respondent's guilt or innocence. Trial counsel could not have successfully objected to their use at trial even if the State had not disclosed the records.

Furthermore, even if trial counsel had successfully suppressed the records, the lack of Davis's testimony would not have reasonably changed the outcome of Respondent's trial. As noted above, her testimony was only tangentially related to the issue of Respondent's guilt or innocence. Accordingly, Respondent failed to show he was prejudiced by trial counsel's decision to forgo an objection to the use of the records. Bannister v. State, 333 S.C. 298, 304, 509 S.E.2d 807, 810 (1998) (finding no prejudice from failing to object to admission of a statement where objection would have been

overruled, statement was not prejudicial, and statement assists the defense). Because trial counsel articulated objectively reasonable grounds for not objecting to Davis's testimony, and because Respondent was not prejudiced by this decision, the post-conviction relief judge erred in granting relief on this ground.

E. Respondent failed to present any evidence to support his alleged alibi.

The post-conviction relief judge erred in finding trial counsel ineffective for failing to investigate alibi witnesses where Respondent presented no evidence at the evidentiary hearing that established an alibi. Respondent presented no alibi witnesses at the evidentiary hearing. This Court has consistently held that an alleged alibi witness must testify at the evidentiary hearing to establish prejudice from trial counsel's failure to investigate the alibi. Bannister, 333 S.C. at 303, 509 S.E.2d at 810; Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992). Here, Respondent presented no testimony from his alleged alibi witnesses. Therefore, the post-conviction relief judge erred in finding trial counsel ineffective for failing to investigate an alibi.

Furthermore, the proffered testimony⁵ from Respondent at the evidentiary hearing does not establish an alibi. The first alibi witnesses, Mr. Gallipie, allegedly would have testified the victim picked Respondent and Gallipie up at 7:10 P.M., dropped Respondent off at his home, and then dropped Gallipie off at 8:20 P.M. (App. p. 360, line 14-p. 361, line 18). The second alibi witness, Ms. Walker, allegedly would have testified she spoke with Respondent when he arrived home. (App. p. 362, lines 3-17). These witnesses'

⁵ Petitioner reiterates that Respondent's testimony, standing alone, is not sufficient to overcome the mandate that he produce his alleged alibi witnesses at the evidentiary hearing. Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (citing Glover, 318 S.C. at 498-99, 458 S.E.2d at 540). However, Petitioner offers this discussion of the merits of Petitioner's allegation to highlight the absurdity of the post-conviction relief judge's granting of relief on this ground.

testimony would merely establish Respondent was at his home sometime well before 8:20 P.M. This timeframe is not inconsistent with the State's theory that the co-defendant picked Respondent up at his home before going to the victim's home because the co-defendant did not testify about when he specifically picked Respondent up. (App. p. 166, lines 16-18). Because it would have been possible the co-defendant could have still picked Respondent up and gone to the victim's home even if these witnesses had testified, these witnesses do not present a true alibi.⁶ State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (“[S]ince an alibi derives its potency as a defense from the fact that it involves 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.” (quoting 21 Am. Jur. 2d Criminal Law § 136)); see also United States v. Adamo, 882 F.2d 1218, 1227 (7th Cir. 1989) (“It appears from counsels’ comments that they somehow believed that Ms. DiPalo could — to some extent — contradict testimony offered by Adamo’s co-conspirators, which would perhaps undermine the co-conspirators’ credibility, but from our examination of the record we fail to understand how her testimony would serve to absolve Adamo of guilt and warrant a conclusion that Ms. DiPalo is an alibi witness.”). Therefore, the post-conviction relief judge would have erred in granting relief on this ground even if Respondent had presented these witnesses at the evidentiary hearing.

Respondent would also submit that trial counsel’s post-hoc rationalization that these witnesses may have been helpful to his defense (App. p. 405, line 23-p. 406, line 9) stands in stark contrast to his statements at trial that he considered calling these witnesses but chose to present no defense. (App. p. 242, lines 15-19). As noted above, the

⁶ Respondent even acknowledged at the evidentiary hearing that his proposed witnesses may not have established an alibi. (App. p. 360, lines 14-14).

witnesses do not establish an alibi for Respondent. Trial counsel's decision to forego calling witnesses that would not effectively establish an alibi could not have been unreasonable at the time. Accordingly, the post-conviction relief judge erred in failing to indulge the presumption that counsel's decision to forgo calling these witnesses was reasonable despite trial counsel's insistence otherwise. Harrington, 562 U.S. at 109 (“Although courts may not indulge ‘post hoc rationalization’ for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions.”).

CONCLUSION

For the foregoing reasons, Petitioner submits the post-conviction relief judge committed numerous errors of law by applying an improper standard of review to trial counsel's performance. Accordingly, Respondent requests this Court grant certiorari to review the post-conviction relief judge's grant of relief.

Respectfully submitted,

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March 23, 2015

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Supreme Court
The Honorable Benjamin H. Culbertson, Circuit Court Judge

GARY W. BENNETT,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

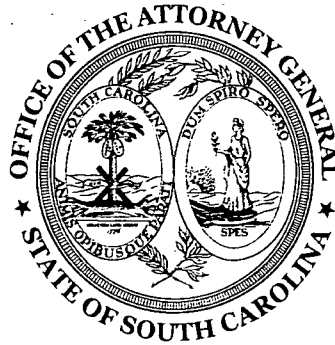
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Petition for Writ of Certiorari and the Appendix**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Kathrine H. Hudgins
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 23rd day of March, 2015


NORMA BIGBEE
LEGAL ASSISTANT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAR 23 2015

S.C. Supreme Court

March 23, 2015

VIA HAND DELIVERY

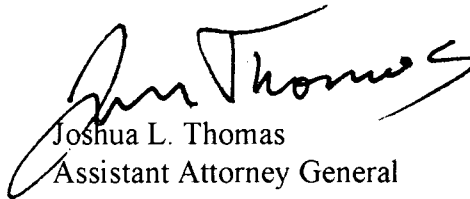
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: Gary W. Bennett v. State of South Carolina
Appellate Case No: 2014-002026

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Petition for Writ of Certiorari and the Original and One Bound Copy of the Appendix** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Appellate Defender Kathrine H. Hudgins (2 copies)