ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Benjamin H. Culbertson, Circuit Court Judge

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AUG - 6 2015
S.C. Supreme Court

GARY W. BENNETT,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-002026

RETURN TO PETITION FOR WRIT OF CERTIORARI

KATHRINE H. HUDGINS
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT

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RESPONDENT'S COUNTER QUESTIONS PRESENTED

1. Whether the record supports the PCR judge's grant of relief in finding that trial counsel was ineffective in basing the entire defense on attacking the credibility of the State's key witness solely by cross examining the witness about a prior murder conviction but failing to develop other evidence which would additionally attack the credibility of that witness and his testimony when the trial judge limited cross examination to asking about a prior felony conviction?

2. Whether the record supports the PCR judge's grant of relief in finding that trial counsel was ineffective in failing to meet with Respondent and review discovery until the day of trial and failing to conduct any investigations to challenge the State's case?

3. Whether the record supports the PCR judge's grant of relief in finding that trial counsel was ineffective by failing to either object to the non-disclosed incomplete Verizon phone records or failing to utilize the records to impeach Lindsay?

4. Whether the record supports the PCR judge's grant of relief in finding that trial counsel was ineffective in failing to investigate possible alibi witnesses listed in the discovery material provided to trial counsel by the State?

PETITIONER'S QUESTIONS PRESENTED

1. Is certiorari warranted to review the post-conviction relief judge's finding that counsel was ineffective for failing to prepare an alternate 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 assistance of 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 that 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

In February of 2002, the Horry County Grand Jury indicted Respondent, Gary W. Bennett, for murder, indictment #2002-GS-26-772. In July of 2002, the Horry County Grand Jury indicted Bennett for armed robbery, indictment #02-GS-26-2765. On August 12, 2002, Bennett proceeded to jury trial before the Honorable John M. Milling. Johnny Gardner represented Bennett at trial. Stephen Kodman prosecuted the case. The jury returned with verdicts of guilty and Judge Milling sentenced Bennett to life without parole. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Bennett, Op. No. 2004-UP-439 (S.C.Ct.App. filed Aug. 13, 2004). Upon the grant of Bennett's petition for writ of certiorari, the South Carolina Supreme Court affirmed the sentence and conviction. State v. Bennett, 2007-MO-040 (S.C.Sup.Ct. filed June 25, 2007).

On June 26, 2008, Bennett filed an application for post conviction relief. The State filed a return on November 30, 2012. On June 19, 2014, an evidentiary hearing was held before the Honorable Benjamin H. Culbertson. Charles T. Brooks, III represented Bennett at the PCR hearing. Joshua L. Thomas represented the State. In an order filed August 19, 2014, Judge Culbertson granted relief and remanded for a new trial. The State did not file a Rule 59(e) motion to alter or amend the order. On September 18, 2014, the State filed a timely notice of intent to appeal. On March 23, 2015, the State filed the petition for writ of certiorari. This return follows.

ARGUMENTS

1. The record supports the PCR judge's grant of relief in finding that trial counsel was ineffective in basing the entire defense on attacking the credibility of the State's key witness solely by cross examining the witness about a prior murder conviction but failing to develop other evidence which would additionally attack the credibility of that witness and his testimony when the trial judge limited cross examination to asking about a prior felony conviction.

The jury found Bennett guilty of the murder and armed robbery of Marie Martin in her home. Martin was a manager at the Taco Bell in Surfside Beach where Amber Vrooman, Bennett's girlfriend, and the mother of his child, also worked. (App. pp. 143-144). The State's case against Bennett was based on the testimony of co-defendant Andrew Lindsay. (App. p. 9, line 23 – p. 10, lines 1-9). Lindsay claimed that on May 23, 2000, he and Bennett went to Martin's home because Martin had agreed to give Bennett the combination to the safe at the Taco Bell. (App. p. 167, lines 10-16). According to Lindsay, when they arrived at Martin's house she was reluctant to give Bennett the combination to the safe. Lindsay claimed that Bennett and Martin argued and then Bennett cut her throat with a knife. (App. pp. 172-173). Three months after the murder law enforcement received a phone call from Lindsay's wife indicating that Lindsay had been involved in some crimes. (App. p. 220, lines 1-6). Detective George Merritt with the Horry County Police Department found Lindsay in Arizona and he was eventually charged with the murder of Martin. (App. p. 220, lines 10-22). At trial Lindsay testified that after the murder he drove Bennett back to his house. Lindsay claimed that Bennett left the combination to the Taco Bell safe in Lindsay's car. (App. p. 178, lines 2-10). According to Lindsay, when he was

arrested in Arizona, he had the combination that Bennet allegedly left in his car, in his wallet.

At the time of trial Lindsay was serving a ten year sentence for seven counts of burglary second degree. (App. p. 158, lines 12-24). Based on a plea agreement with the State, Lindsay agreed to testify against Bennett in exchange for a guilty plea to the lesser charge of accessory after the fact for a sentence of fifteen years to be run consecutively to his burglary sentence. (App. p. 159, lines 4-16). Lindsay also had a 1991 conviction for second degree murder from Illinois. Prior to trial the State moved to exclude reference to the murder conviction. (App. pp. 5-15). The judge limited the cross examination of Lindsay by only allowing defense counsel to ask about a prior "felony" conviction without identifying the prior as a conviction for second degree murder. (App. p. 14, lines 20-23).

During the PCR hearing Respondent raised numerous instances of counsel failing to attack the credibility of the co-defendant Lindsay with additional evidence other than the prior felony conviction. As discussed in further detail below, counsel failed to challenge the incomplete, undisclosed Verizon phone records purporting to corroborate Lindsay's testimony that he made a phone call from Martin's house the night of the murder. (App. pp. 73-83; p. 359, lines 6-22). During the PCR hearing, Respondent testified that counsel failed to cross examine the pathologist about his opinion as to whether the cut to Martin's neck was inflicted by a right handed or left handed person. (App. pp. 363-367). Respondent testified that he is left handed and Lindsay is right handed. (App. p. 367, lines 1-3). Respondent also testified that trial counsel failed to question Mary Young, the general manager for the Taco Bell in Surfside, to determine if the combination Lindsay claimed

Respondent left in his car was actually the combination to the Taco Bell safe. (App. p. 367, lines 11 – p. 368, 369, 370, lines 1-24). Respondent testified that the combination found on Lindsay when he was arrested in Arizona and that he claimed was the combination to the Taco Bell safe was actually the combination to Lindsay's locker at work[1] (App. p. 370, lines 17-19).

Additionally, Respondent testified that counsel was ineffective in failing to capitalize on the prior inconsistent statements made by Lindsay. (App. p. 376, line 8 – p. 377, 378, lines 1-19). Detective Merritt confirmed at trial that Lindsay provided three different statements. (App. pp. 224-225). While Lindsay admitted giving inconsistent statements, (App. pp 183-188), trial counsel's limited cross examination about the first statement and failure to question about the second statement constituted deficient performance.

In the order granting relief the PCR judge wrote:

> In the case at hand, Attorney Gardner never met with Bennett personally until the day of trial. He never conducted any investigations into the case, contacted any alibi witnesses provided to him by Bennett, and never reviewed pre-trial discovery with Bennett. Further, he never sought suppression of the phone records introduced into evidence by the State even though the State failed to produce the records in pre-trial discovery. Attorney Gardner's entire strategy was to impeach the State's key witness with the witness' prior criminal record. This performance as Bennett's attorney fell well below the "professional norms."

(App. pp. 416-417).

Petitioner argues that the PCR judge found trial counsel 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

[1] At trial Lindsay testified that prior to the murder and fleeing to Arizona he worked at Myrtle Beach National Golf

effective counsel does not require trial counsel to prepare for every potential contingency at trial. (Petition for Writ of Certiorari p. 1, Questions Presented #1). The PCR judge, however, did not find trial counsel ineffective for failing to prepare an **alternative** defense strategy. Instead, the PCR judge found trial counsel ineffective in failing to attack the credibility of the co-defendant with evidence in addition to the prior felony conviction. As the PCR judge wrote in the order granting relief, "Attorney Gardner's entire strategy was to impeach the State's key witness with the witness' prior criminal record."

Trial counsel admitted that his defense strategy was to argue that Lindsay, the co-defendant and State's witness providing the main testimony against Respondent, was not credible because he had a prior murder conviction. (App. p. 396, lines 20-24; p. 397, lines 19-25). Trial counsel admitted that he was surprised by the trial judge limiting the cross examination to asking about a prior felony conviction rather than the prior murder conviction. (App. p. 391, lines 3-18). Trial counsel admitted he would have approached the case differently if he had known the judge was going to limit cross examination. (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). While trial counsel cross examined Lindsay in reference to the prior felony conviction, (App. p. 182, lines 10-18), he failed to further discredit Lindsay by failing to either object to the incomplete phone records or utilize the records to impeach Lindsay, failing to cross examine the pathologist in regard to whether the perpetrator was right handed or left handed, failing to question Mary Young, the general manager of the Taco Bell, about the safe combination and failing to capitalize on the inconsistent statements of Lindsay.

Course.

In the petition for writ of certiorari Petitioner writes, "Respondent alleged trial counsel's decision to pursue a strategy of impeaching the co-defendant with his prior conviction was unreasonable." Respondent did **not** allege that trial counsel's decision to pursue a strategy of impeaching the co-defendant with his prior conviction was unreasonable. Impeaching the co-defendant with his prior felony conviction was a limited part of what should have been an overall strategy to generally discredit Lindsay with available evidence. Rather than relying solely on the prior conviction, trial counsel should have used the additional evidence discussed above to discredit Lindsay. The strategy to discredit Lindsay was valid. Trial counsel, however, did not execute the strategy in a constitutionally effective manner. Petitioner's reliance on Harrington v. Richter, 562 U.S. 86, 87, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011) is misplaced. First, the analysis in Harrington v. Richter involves the limited review federal courts have to review state court habeas decisions. As noted by the Court, "The pivotal question is whether the state court's application of the Strickland standard was unreasonable. This is different from asking whether defense counsel's performance fell below Strickland's standard." Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011). In the present case the PCR judge found that trial counsel's performance fell below the Strickland standard and there is evidence to support that finding.

Richter was convicted in state court of murder, attempted murder, burglary and robbery. Richter sought state habeas relief alleging that trial counsel was ineffective in failing to present expert testimony on blood evidence, because it could have disclosed a blood pool's source and bolstered Richter's theory that his co-defendant shot in self defense. The state court denied habeas relief. The Ninth Circuit granted relief. The

Supreme Court reversed finding that the Ninth Circuit Court of Appeals, in granting habeas relief, failed to accord the required deference to the decision of a state court adjudicating the same claims later presented in the federal habeas petition. The Court wrote, "A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. Yarborough v. Alvarado, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004)." Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 786, 178 L. Ed. 2d 624 (2011). The procedural posture and standard of review in the present case differentiates the present case from Harrington v. Richter.

In contrast to the federal court reviewing a state court's habeas rulings in Harrington v. Richter, the present case involves a state appellate court reviewing a state trial court's PCR ruling. This Court gives great deference to the PCR judge's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005). In regard to standard of review in the present case, "On certiorari in PCR cases, the Court applies an 'any evidence' standard of review. Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989))". "This Court will uphold the findings of the PCR judge when there is any evidence of probative value to support them," and it "will reverse the PCR judge's decision when it is controlled by an error of law." Suber v. State, 371 S.C. 554, 558–59, 640 S.E.2d 884, 886 (2007). There is evidence to support the PCR judge's findings in the present case.

Second, under the proper deference afforded to the state the court findings, the Supreme Court in Harrington v. Richter wrote, "Here it would be well within the bounds

of a reasonable judicial determination for the state court to conclude that defense counsel could follow a strategy that did not require the use of experts regarding the pool in the doorway to Johnson's bedroom." 562 U.S. 86, 106-07, 131 S. Ct. 770, 789, 178 L. Ed. 2d 624 (2011). In contrast, in the present case, the failure to properly attack the credibility of Lindsay with evidence in addition to the prior conviction was not part of trial counsel's strategy.

A criminal defendant is guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Courts evaluate allegations of ineffective assistance of counsel using a two-pronged test. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 668, 104 S.Ct. 2052). First, the applicant must demonstrate counsel's representation was deficient, which is measured by an objective standard of reasonableness. Strickland, 466 U.S. at 687–88, 104 S.Ct. 2052. "Under this prong, '[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'" Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S.Ct. 2052). Second, the applicant must demonstrate he was prejudiced by counsel's performance in such a manner that, but for counsel's error, there is a reasonable probability the result of the proceedings would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

Trial counsel was ineffective in failing to attack the credibility of the co-defendant with evidence other than just the prior felony conviction. Respondent was prejudiced by the

deficient performance as the State's case depended on the testimony of the co-defendant. Under the "any evidence" standard of review, this Court must affirm the findings of the PCR judge as those findings are supported by the record.

2. The record supports the PCR judge's grant of relief in finding that trial counsel was ineffective in failing to meet with Respondent and review discovery until the day of trial and failing to conduct any investigations to challenge the State's case.

Respondent testified at the PCR hearing that counsel was appointed to represent him five months prior to trial but only met with him the day of trial. (App. p. 371, line 13 – p. 372, lines 1-24). Respondent testified that he never had a chance to review the discovery with trial counsel. (App. p. 383, lines 5-7). When trial counsel was asked if he remembered how many times he met with Respondent prior to trial, counsel answered, "I do not. It wasn't very many though. He's right about that." (App. p. 390, lines 9-12). When asked if his testimony would be consistent to the testimony of Respondent in regard to meeting, counsel answered, ""I think so. Yeah." (App. p. 390, lines 13-15). The PCR judge asked trial counsel if he only met with Respondent on the day of trial. (App. p. 408, lines 5-7). Trial counsel answered, "I don't -- that doesn't – that may be correct, Judge. I don't want to mislead the Court. . . . .But that doesn't sound correct." (App. p. 408, lines 8-11). Trial counsel admitted that he did not recall visiting Respondent in the South Carolina Department of Corrections where Respondent was housed prior to trial. (App. p. 408, line 25 – p. 409, lines 1-2). Trial counsel admitted that because Respondent was not housed at the J.Reuben Long County Jail, he may not have reviewed the discovery material with Respondent until the day before or the day of trial. (App. p. 408, lines 12-24). Trial

counsel admitted that he did not hire an investigator to assist with trial preparation. (App. p. 393, lines 2-4).

In the order granting relief the PCR judge wrote:

> In the case at hand, Attorney Gardner never met with Bennett personally until the day of trial. He never conducted any investigations into the case, contacted any alibi witnesses provided to him by Bennett, and never reviewed pre-trial discovery with Bennett. Further, he never sought suppression of the phone records introduced into evidence by the State even though the State failed to produce the records in pre-trial discovery. Attorney Gardner's entire strategy was to impeach the State's key witness with the witness' prior criminal record. This performance as Bennett's attorney fell well below the "professional norms."

(App. pp. 416-417). Later in the order of dismissal the PCR judge wrote, "Be that as it may, this court is convinced that Attorney Gardner's performance as Bennett's criminal trial attorney so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." (App. p. 418).

Petitioner argues that, "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-fact meetings with a client." (Brief of Petitioner p. 11). The PCR judge did not impose a requirement that an attorney have extensive face-to-face meetings with a client. Instead, the PCR judge found that trial counsel's failure to meet with Respondent until the day of trial, his failure to conduct any investigation, failure to contact any alibi witnesses, failure to review discovery with Respondent, and failure to move to suppress phone records constituted a deficient performance, well below the "professional norms," that so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.

Petitioner's reliance on Moody v. Polk, 408 F. 3d 141 (4th Cir. 2005) and United States v. Olson, 846 F.2d 1103 (7th Cir. 1988) is misplaced because in both cases trial counsel met with their clients prior to trial and conducted independent investigation of the State's case. In the present case trial counsel did not meet his client until the day of trial and he conducted no independent investigation of the State's evidence.

Petitioner argues that Respondent presented no evidence as to what further information counsel would have gathered had he met with Respondent more often. (Brief of Petitioner p. 11). Respondent, however, presented several instances where trial counsel simply failed to investigate the State's evidence. The deficient performance in the case is the result of only meeting with Respondent the day of trial **and** the failure to conduct an independent investigation of the State's evidence. As discussed above in issue one, meeting with Respondent prior to trial and investigating the case would have prepared counsel to discredit the co-defendant Lindsay with evidence other than just the prior felony conviction. Counsel failed to investigate the phone records, failed to investigate whether the perpetrator was right handed or left handed and failed to investigate the combination to the Taco Bell safe. Additionally, as discussed in issue three, trial counsel failed to investigate witnesses William Gallipie and Diane Walker. (App. pp. 361-362). Trial counsel failed to investigate the prior record and potential plea bargain accepted by Respondent's girlfriend and State's witness, Amber Vrooman. (App. pp. 378-379).

The order granting relief does not specifically discuss prejudice and Petitioner failed to file a Rule 59(e) motion to alter or amend the order. As discussed in issue one however, Respondent demonstrated prejudice in trial counsel's failure to attack the credibility of the

co-defendant Lindsay with evidence other than just the prior felony conviction because the State's case relied so heavily on Lindsay's testimony.

Additionally, trial counsel's failure to meet with Respondent until the day of trial and complete failure to investigate the State's evidence presents the rare occasion where this Court should presume prejudice pursuant to United States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). In Nance v. Ozmint, 367 S.C. 547, 551-52, 626 S.E.2d 878, 880 (2006) this Court wrote:

> In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

In Florida v. Nixon, 543 U.S. 175, 190, 125 S. Ct. 551, 562, 160 L. Ed. 2d 565 (2004), the Court, discussing Cronic, wrote:

> The Court elaborated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." Id., at 659, 104 S.Ct. 2039; see Bell v. Cone, 535 U.S. 685, 696-697, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (for Cronic's presumed prejudice standard to apply, counsel's "failure must be complete").

Trial counsel failed to subject the prosecution's case to a meaningful adversarial testing in violation of Respondent's Sixth Amendment rights. Counsel's failure to investigate renders the adversary process presumptively unreliable. The PCR judge correctly found that that ". . . Attorney Gardner's performance as Bennett's criminal trial attorney so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." (App. p. 418). Trail counsel relied solely on the co-defendant's prior murder conviction instead of investigating other avenues in which to impeach the testimony of the co-defendant. Additionally, trial counsel's statements during opening undermined the defense position that Respondent was not at the victim's house on the night of her murder. During opening statements trial counsel told the jury:

> Now, the Solicitor, I agree with almost everything that he said, the way the day started out right up to him being taken home, and he sympathizes with this death, this horrible death, but he disagrees with the Solicitor he had anything to do with it. From there on out, we disagree with the way the night unfolded. In fact, his position is that he never went there until he ---

(App. p. 69, lines 7-14). The State objected and the judge sustained the objection. (App. p. 69, lines 15-18). Trial counsel continued, "Very well. I agree with everything he said up until he started talking about the knife, and that's where we disagree." (App. p. 69, lines 19-21). As Respondent testified at the PCR hearing, the State did not discuss the knife in their opening statement. (App. p. 374, lines 19-22). Trial counsel's statement conveys to the jury that trial counsel agrees with the State's contention that Respondent was at the victim's house, when Respondent maintained he was not.

Trial counsel's comments during opening statement combined with the failure to meet with Respondent until the day of trial combined with trial counsel's failure to

investigate the phone records, failure to investigate whether the perpetrator was right handed or left handed, failure to investigate the combination to the Taco Bell safe, failure to investigate witnesses William Gallipie and Diane Walker and failure to investigate the prior record and potential plea bargain accepted by Respondent's girlfriend and State's witness, Amber Vrooman demonstrate that trial counsel failed to subject the prosecution's case to a meaningful adversarial testing in violation of Respondent's Sixth Amendment rights. The record supports the PCR judge's grant of relief in finding that trial counsel was ineffective in failing to meet with Respondent and review discovery until the day of trial and failing to conduct any investigations to challenge the State's case.

3. The record supports the PCR judge's grant of relief in finding that trial counsel was ineffective by failing to either object to the non-disclosed Verizon phone records or failing to utilize the records to impeach Lindsay.

During trial the first witness called by the State was Sharon Davis, the custodian of records at Verizon. (App. pp. 73-83). Davis testified, without objection, that the Verizon record pulled in 2000 showed one phone call being made from the victim's residence (843-445-9013) to another residence (843-365-6633) at 8:39 PM and lasting 83 seconds. (App. p. 74, lines 3-22). Davis could not testify if other calls were made from that phone on that date. (App. p. 74, line 24 – p. 75, lines 1-11; p. 80, lines 9-17).

In the order granting relief the PCR judge wrote, "Further, he [trial counsel] never sought suppression of the phone records introduced into evidence by the State even though the State failed to produce the records in pre-trial discovery." (App. pp. 416-417). Respondent testified at the PCR hearing that the Verizon phone record was not included in

discovery. (App. p. 357, line 12 – p. 358, 359, 360 lines 1-5). When asked if the Verizon testimony was unexpected trial counsel testified, "You know, that's so long ago, I don't want to mislead the Court, but I, I think my mindset back then would have been it was not much of an issue to me, but the way the client testified about it today, it sounded like it was a pretty, pretty big deal." (App. p. 400, lines 13-20).

The Verizon phone record was important in a number of aspects some harmful to Respondent some beneficial to Respondent. Trial counsel, however, failed to recognize either the detriment or the benefit of the Verizon record. Lindsay testified at trial that while he and Respondent were at the victim's home, Lindsay called his wife. (App. p. 169, line 24 – p. 170, line 1-21; p. 190, line 21 – p. 191, 191, 192,lines 1-21). When asked how many phone calls he made Lindsay testified, "Two – the one –or one was not really a phone call. I hung up and I called – I tried calling my wife at work. I realized my wife wasn't at home at the time, so I hung up there and tried calling my wife's place of work." (App. p. 191, lines 24 – p. 192, lines 1-4). Lindsay's wife was working at K-Mart at the time. (App. p. 170, lines 10-18). The phone record corroborates Lindsay's trial testimony. Trial counsel should have objected to the testimony in regard to the phone record because it was not disclosed in discovery and because the record was not complete, only showing one phone call.

Petitioner argues that the record does not support the PCR judge's finding that the Verizon record was not disclosed. (Brief of Petitioner, n. 4 p. 14). The order granting relief states, "Further, he [trial counsel] never sought suppression of the phone records introduced into evidence by the State even though the State failed to produce the records in pre-trial discovery." (App. pp. 416-417). Petitioner did not file a Rule 59(e) motion to alter or

amend the order granting relief. Any argument that the records may have been disclosed in discovery is not preserved for review.

In Hyman v. State, 397 S.C. 35, 45-46, 723 S.E.2d 375, 380 (2012) this Court wrote:

> "The Brady disclosure rule requires the prosecution to provide to the defendant any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment." Porter v. State, 368 S.C. 378, 384, 629 S.E.2d 353, 356 (2006) (citation omitted). Brady evidence is either favorable exculpatory evidence or favorable impeachment evidence. Porter, 368 S.C. at 384, 629 S.E.2d at 356 (citing United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)). "Materiality of evidence is determined based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense." Id. (citing Kennerly, 331 S.C. at 453, 503 S.E.2d at 220). A "reasonable probability" is demonstrated when the suppression "undermines confidence in the outcome of the trial." Id. (quoting Bagley, 473 U.S. at 678, 105 S.Ct. 3375). The State must disclose Brady evidence even when a criminal defendant does not specifically request the evidence. Id. (citing United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

The Verizon record was material Brady evidence that should have been disclosed. Trial counsel was ineffective in failing to object to the surprise testimony.

There was some benefit that could have been derived from the Verizon record had the record been disclosed. Trial counsel, however, failed to capitalize on those benefits. First, as testified by Respondent at the PCR hearing, (App. pp. 359-360) the Verizon record established a time frame from which Respondent could have developed an alibi defense. Respondent, however, was unaware of the record and trial counsel, as discussed in issue four, failed to investigate the alibi witnesses.

Second, later phone records introduced at trial reveal that Lindsay's home number was 843-365-9069. (App. pp. 204-207). The Verizon record reveals that the phone call made from the victim's house was to a residence with the phone number (843-365-6633)

not Lindsay's home number, or K-Mart as he testified. Trial counsel should have cross examined Lindsay about the inconsistency.

Petitioner argues, "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." (Brief of Petitioner p. 13). It is unclear where in the PCR transcript trial counsel articulated this trial strategy. It was undisputed, based on Lindsay's statement to the police and his testimony at trial that he was in the victim's home at the time of the murder.

The record supports the PCR judge's finding that trial counsel was ineffective in failing to object to the Verizon phone record. Respondent was prejudiced by the deficient performance. The record was not disclosed, corroborated the testimony of the State's main witness and appears to be incomplete. Respondent was unaware of the record and as a result was unable to develop a time frame to establish an alibi defense. As an additional sustaining ground in regard to counsel's deficient performance and the Verizon phone record, trial counsel was ineffective in failing to impeach Lindsay with the fact that the phone number called was neither his home phone number nor the phone number for the K-Mart as Lindsay testified.

4. The record supports the PCR judge's grant of relief in finding that trial counsel was ineffective in failing to investigate possible alibi witnesses listed in the discovery material provided to trial counsel by the State.

Trial counsel admitted that he failed to investigate any alibi witnesses. (App. p. 409, lines 3-14). Trial counsel admitted that he did not hire an investigator but acknowledged that having an investigator interview the alibi witnesses would have been critical. (App. p. 393, lines 2-9). Respondent testified that on May 23, 2000, the victim, Marie Martin, drove Respondent home from the Taco Bell between 7:10 and 7:30 PM. Martin was also giving William Gallipie, a Taco Bell employee, a ride home and Gallipie could have testified as to the time Martin dropped Respondent off at his home. (App. pp. 360-361). Respondent testified that after Martin dropped him off he talked with his neighbor, Diane Walker, for fifteen to twenty minutes. (App. p. 362, lines 3-24). Both Gallipie and Walker were listed as witnesses in the discovery material provided by the State and as potential witnesses to be called at trial. Neither witness testified at trial.

In the order granting relief the PCR judge wrote, "He [trial counsel] never conducted any investigations into the case, contacted any alibi witnesses provided to him by Bennett, and never reviewed pre-trial discovery with Bennett." (App. p. 416). The PCR judge also found, "Attorneys have a duty to make reasonable investigations or make reasonable decisions that make particular investigations unnecessary. Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), citing Strickland, supra. One component of that duty is to investigate alibi witnesses identified by a defendant, and that failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable. Walker id. Therefore, I find as a matter of law that Attorney Gardner was deficient in his

representation of Bennett." (App. p. 417). The PCR judge noted that while neither Gallipie nor Walker testified at the PCR hearing, the crimes giving rise to this case occurred twelve years prior to the PCR hearing, the PCR case had been pending for six years and locating witnesses to events that occurred over a decade ago may be difficult if not impossible. (App. p. 414, n2 of the Order granting Relief).

The order granting relief does not address prejudice and Petitioner did not file a Rule 59(e) motion to alter or amend the order. Although the alibi witnesses did not testify at the PCR hearing, this Court should affirm the grant of relief by the PCR judge and find prejudice based on Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002). In Green the South Carolina Supreme Court wrote, "Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina. Compare State v. Peterson, 287 S.C. 244, 335 S.E.2d 800 (1985) (accumulation of errors warranted reversal, but Court also found each individual error caused prejudice), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), with State v. Freeman, 319 S.C. 110, 459 S.E.2d 867 (Ct.App.1995) (finding multiple errors, which were not prejudicial separately, could be prejudicial to deny an individual a right to a fair trial when they were viewed together)." 351 S.C. at 197, 569 S.E.2d at 324.

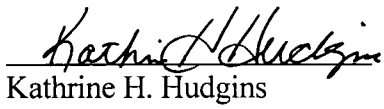
Respondent established prejudice in regard to the failure to discredit the co-defendant with evidence other than the prior felony conviction discussed in issue one and with regard to the Verizon phone record discussed in issue three. As discussed in issue two, trail counsel's failure to meet with Respondent until the day of trial and complete failure to investigate the State's evidence presents the rare occasion where this Court should presume prejudice pursuant to Cronic. Viewing all the errors discussed in issues one, tow and three

together with trial counsel's failure to investigate the alibi witnesses, Respondent was prejudiced by the cumulative effect of the numerous errors committed by trial counsel.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be denied and the case remanded for a new trial as ordered by the PCR judge.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 6th day of August, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Benjamin H. Culbertson, Circuit Court Judge

GARY W. BENNETT,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO. 2014-002026

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Joshua L. Thomas, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Gary Bennett #276951 at Broad River Correctional Institution this 6th day of August, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 6th day
of August, 2015.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021