

STATE OF SOUTH CAROLINA  
In The Supreme Court

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DEC 14 2015

APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable Larry R. Patterson, Trial Judge  
The Honorable D. Garrison Hill, Post-Conviction Relief Judge

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Appellate Case No. 2015-001087

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LaChrisha Shentayle Miller, ..... Respondent-Petitioner,

v.

State of South Carolina, ..... Petitioner-Respondent.

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**PETITIONER-RESPONDENT'S  
PETITION FOR WRIT OF CERTIORARI**

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RESPONDENT

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## QUESTION PRESENTED

1. Did the PCR judge err in finding Respondent met her burden of proving both that trial counsel was ineffective in not presenting a third-party guilt defense and that she was prejudiced as a result?

## STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Respondent-Petitioner (hereinafter “Respondent”) at the January 2008 term for two counts of attempt to obtain a controlled substance by fraud (2008-GS-23-0022, counts 1 and 2). (App.pp.353-56). Brian P. Johnson, Esquire represented Respondent.

After the State called the case to trial, Respondent was found guilty. On February 12, 2009, the Honorable Larry R. Patterson sentenced Respondent to concurrent sentences of one year on each count of attempt to obtain a controlled substance by fraud. (App.p.127; pp.351-52).

A notice of appeal was filed at the South Carolina Court of Appeals. Wanda H. Carter, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal in the form of an Anders<sup>1</sup> brief. (App.pp.129-40). The court of appeals dismissed the appeal. State v. Miller, Op. No. 2011-UP-228 (S.C. Ct. App. filed May 18, 2011). (App.pp.141-42).

Respondent filed an application for post-conviction relief (PCR) on May 27, 2011 (2011-CP-23-3652). (App.pp.143-83). A hearing was held at the Greenville County Courthouse on June 19, 2013. (App.pp.189-240). Respondent was present and represented by Kenneth C. Gibson, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General’s Office represented the State. In an order filed December 27, 2013, the Honorable D. Garrison Hill denied the application for post-conviction relief. (App.pp.242-50). Respondent filed a motion to reconsider and amend judgement (and a

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<sup>1</sup> Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

subsequent amended motion to reconsider and amend judgment). (App.pp.251-305). The parties reconvened for a hearing on this motion on February 24, 2015. (App.p.311-40). On April 16, 2015, Judge Hill filed an order granting post-conviction relief and ordered a new trial. (App.p.342-50).

### STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (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, 442, 334 S.E.2d 813, 814 (1985).

### ARGUMENT

**The PCR judge erred in finding Respondent met her burden of proving both that trial counsel was ineffective because he did not argue third-party guilt and that she was prejudiced as a result.**

Certiorari is warranted in this case because there is no probative evidence to support the PCR judge’s finding that Respondent met her burden of proving she is entitled to post-conviction relief. Respondent failed to demonstrate either that trial counsel was ineffective in not arguing third-party guilt at trial or that she suffered any resulting prejudice.

#### A.

At trial, Princess Mangle testified she was working as a pharmacy technician at Wal-Mart on September 20, 2007. (App.p.30; p.32). Ms. Mangle testified the pharmacy received a call for a prescription of 120 tablets of Lortab/Alprazolam for Kevin Smith.

(App.p.33; p.35). Ms. Mangle testified this was suspicious because she had never seen a prescription for more than 16 Lortab tablets. (App.p.35). Ms. Mangle testified they called the dentist's office that allegedly wrote the prescription and it was confirmed this was not a legitimate prescription. (App.p.35). Ms. Mangle testified the voice of the black female who arrived to pick up this prescription matched the voice of the person who called in the prescription. (App.p.36; p.38). Ms. Mangle testified the pharmacist asked for the female's identification and that he kept the driver's license and the female left the store. (App.p.36). Ms. Mangle testified the female whose name and picture was on the license was the same female who came to pick up the prescription. (App.p.37). Ms. Mangle identified Respondent as this female. (App.p.39).

Dr. Robert Thomas testified he did not issue the prescription in question. (App.p.64). Dr. Thomas testified he would not write a prescription for 120 tablets of Lortab or Alprazolam and that he would generally write a prescription for 12-16 tablets of these drugs. (App.pp.63-64). Dr. Thomas also testified neither Kevin Smith nor Respondent were his patients. (App.p.62).

Investigator Jeff Chilson – a drug inspector from the South Carolina Department of Health and Environmental Control – investigated this case. (App.p.45; pp.47-49). Investigator Chilson testified the prescription had not been authorized. (App.pp.52-53).

Respondent stated her driver's license was suspended and she did not get it back until November 26, 2003. (App.pp.83-84). Respondent stated she lost this license in November 2004, but that it had already been suspended for nonpayment of speeding tickets. (App.pp.86-87). Respondent stated her license was suspended until June 2006

and she received a new license on June 1, 2006.<sup>2</sup> (App.pp.87-88). Respondent stated she did not commit this crime. (App.p.91).

**B.**

At the PCR hearing, Respondent stated she reviewed the State's evidence with trial counsel and told him she was innocent. (App.p.224; p.229). Respondent stated her friend told her about Desmond Reeder, and she passed this information on to trial counsel. (App.p.225; pp.229-30). Respondent stated she never spoke to trial counsel about Tracy German. (App.p.226; p.230). Respondent stated she thought she was going to trial on the Walgreens charges and did not know it would be for the Wal-Mart charges until that day. (App.p.226). Respondent, admitted, however, that the trial strategy (of arguing the DMV and lost license issue) was the same for both sets of charges. (App.p.230). Respondent stated she knew Ms. Mangle would identify her at trial. (App.p.232). Respondent admitted she did not ask trial counsel at trial why he was not discussing Desmond Reeder or Tracy German but said this was because it was in the middle of trial and trial counsel said "he had it." (App.p.228; pp.231-32).

Trial counsel testified he was appointed to represent Respondent, who had charges from incidents at Walgreens and Wal-Mart. (App.pp.194-95). Trial counsel testified he filed discovery motions, received those materials, and reviewed them with Respondent (who said she was innocent). (App.p.196; p.216). Trial counsel testified the defense theory was that someone used Respondent's driver's license to commit the offenses.

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<sup>2</sup> The custodian of records from the South Carolina Department of Motor Vehicles stated Respondent completed an affidavit for a lost driver's license on May 31, 2006 (for a license that had been issued on November 26, 2003) and was issued a new license on June 2, 2006. (App.pp.71-72).

(App.pp.195-96). Trial counsel testified the trial strategy was to argue Respondent had lost her driver's license, reported this to the Department of Motor Vehicles, and someone else used it to obtain the prescriptions. (App.p.209; pp.220-22). Trial counsel testified the Walgreens incident (which was not the subject of Respondent's trial) was for the name Desmond Reeder and that Respondent's license had been used. (App.pp.196-98). Trial counsel testified he looked into Desmond Reeder but was not able to locate him. (App.p.206). Trial counsel testified he discovered Tracy German had similar charges as Respondent and had a boyfriend named Desmond Reeder. (App.p.199). Trial counsel testified he researched Tracy German's charges on the Public Index and that, though she was in jail on her own charges, she did not confess to those charged to Respondent. (App.pp.199-200; p.207; p.217). Trial counsel testified he brought this information to the assistant solicitor and Investigator Chilson but they were adamant Respondent committed these crimes because Ms. Mangle positively identified her. (App.pp.199-200; pp.207-08). Trial counsel testified he discussed this case with several other public defenders and determined he could not argue third-party guilty because he did not have sufficient, concrete evidence. (App.p.219; p.223). Trial counsel testified he "decided to simply rely upon what we did know, rather than what was speculative." (App.p.219).

In granting Respondent's application for post-conviction relief, the PCR judge found the connection between the Walgreens and Wal-Mart charges was "not unduly remote" and that the use of Respondent's driver's license in each location "provides a bridge allowing the Tracy German third party guilt evidence to enter the Walmart trial." The PCR judge found Respondent met her burden of prong both deficiency and prejudice.

(App.pp.349-50).

**C.**

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "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 trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

**D.**

The PCR judge erred in finding Respondent met her burden of proving both that trial counsel was ineffective because he did not argue third-party guilt and that she was prejudiced as a result.

The seminal case discussing third-party guilt in South Carolina is State v. Gregory, 198 S.C. 98, 16 S.E.2d 532 (1941). In Gregory, this Court noted:

the evidence offered by accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have (no) other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

Id. at 104, 16 S.E.2d at 534 (quoting 16 C.J. 560). This Court further noted:

before such testimony can be received, there must be such proof of connection with it, such a train of facts or circumstances, as tends clearly to point out such other person as the guilty party. Remote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose. An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury that someone other than he is more probably guilty.

Id. at 104, 16 S.E.2d at 535 (quoting 20 Am. Jur. 254). This Court has imposed “strict limitations on the admissibility of third-party guilt.” Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008). “Evidence offered by a defendant as to the commission of the crime by another person is limited to facts which are inconsistent with the defendant’s guilt.” Id. at 531-32, 657 S.E.2d at 777.

In this case, Respondent failed to demonstrate there was a viable third-party guilt case that trial counsel should have made at trial. While trial counsel clearly knew about Tracy German and her criminal history, he testified he did not believe he could establish a sufficient case of third-party guilt. Trial counsel’s testimony is supported by the record. Trial counsel would have been limited to presenting evident “limited to facts which are inconsistent with [Respondent]’s guilt.” Id. The facts concerning Tracy German, however, are not inconsistent with Respondent’s guilt. That there was another black female perpetrating similar crimes in Greenville County does not mean Respondent was innocent of the crimes at issue. Tracy German and Respondent simply could be committing similar crimes in the same area. Or Tracy German and Respondent could

have been working together. The facts do not raise “a reasonable inference” as to Respondent’s innocence where Ms. Mangle positively identified Respondent as being both the person pictured on the driver’s license and the person who came to pick up the prescription. Gregory, 198 S.C. at 104, 16 S.E.2d at 534. Rather, the background of Tracy German’s criminal history, without more, would simply serve to cast suspicion upon another – which is inadmissible. Id. Respondent failed to demonstrate the proof of a connection to Tracy German that pointed to her as the guilty party and instead is attempting to argue a “conjectural inference” of such. Id.

Further, Respondent failed to demonstrate trial counsel deficient in not presenting evidence of third-party guilt because he pursued a valid strategy at trial. Trial counsel testified he could not locate Desmond Reeder before trial and that Tracy German would not admit to these charges. Trial counsel testified that, as he did not believe he had sufficient evidence to argue third-party guilt, he determined his trial strategy would be to argue – and present witnesses – to show Respondent had lost her driver’s license well before the incident and another individual was using it to commit these crimes. Based upon the information available to him, this was a valid trial strategy. Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). “Counsel’s strategy will be reviewed under ‘an objective standard of reasonableness.’” Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). “Courts must be wary of second-

guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Based upon the information known to trial counsel at the time, it was objectively reasonable for him to pursue this trial strategy instead of attempting to argue third-party guilt.

Respondent also failed to demonstrate she was prejudiced because third-party guilt was not presented at her trial. Respondent has failed to present credible evidence that Tracy German was the actual perpetrator of these crimes. Neither Tracy German nor Desmond Reeder testified at the PCR hearing. PCR counsel merely presented argument and anecdotal stories about the similarity of the crimes at issue and the crimes allegedly perpetrated by Tracy German. Respondent presented evidence of Tracy German's prior arrest warrants but, as stated infra, the mere fact that another individual in the county was perpetrating similar crimes does not demonstrate Respondent's innocence. Without testimony from Tracy German or Desmond Reeder and without more definitive evidence about Tracy German's criminal history, this is all mere speculation and a "conjectural inference." See, e.g., Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); see also Butler, 286 S.C. at 442, 334 S.E.2d at 814.

#### E.

Accordingly, Respondent failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that she was prejudiced by trial counsel's performance.

As Respondent failed to meet this burden of proving ineffective assistance of trial

counsel on this issue, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

## CONCLUSION

For the reasons stated above, this Court should grant the Petitioner-Respondent's Petition for Writ of Certiorari and reverse the PCR judge's ruling. If this Court grants certiorari, however, the State asks permission under the rules to brief the issue discussed above fully.

Respectfully submitted,

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By:   
ATTORNEYS FOR PETITIONER-  
RESPONDENT

December 14, 2015

STATE OF SOUTH CAROLINA  
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The Honorable Larry R. Patterson, Trial Judge  
The Honorable D. Garrison Hill, Post-Conviction Relief Judge **S.C. Supreme Court**

Appellate Case No. 2015-001087

LaChrisha Shentayle Miller, ..... Respondent-Petitioner,

v.

State of South Carolina, ..... Petitioner-Respondent.

**CERTIFICATE OF SERVICE**

I, Karen C. Ratigan, certify that I have today served the within Petitioner-Respondent's Petition for Writ of Certiorari upon Respondent-Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

Kenneth C. Gibson, Esquire  
Post Office Box 5536  
Greenville, South Carolina 29606-5536

I further certify that all parties required by Rule to be served have been served.  
This 14th day of December, 2015.



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ATTORNEY FOR PETITIONER-  
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December 14, 2015

The Honorable Daniel E. Shearouse  
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DEC 14 2015

S.C. Supreme Court

**Re: LaChrisha Shentayle Miller v. State of South Carolina**  
**Appellate Case No: 2015-001087**  
**Lower Court Case No: 2011-CP-23-3652**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petitioner/Respondent's Petition for Writ of Certiorari** in the above-referenced case. The Appendix was filed November 12, 2015.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: Kenneth C. Gibson, Esquire  
Trisha Allen, Victim Services Counselor