STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Circuit Court Judge

Case No. 2003-CP-32-0927

Willie J. Richardson, #265703,.....Respondent,

v.

State of South Carolina,.....Petitioner.

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable Brian M. Gibbons order dated November 24, 2014, and filed November 26, 2014, granting post-conviction relief to the Respondent. The State received notice of entry of the order on December 2, 2014. The State filed a Motion to Alter or Amend Judgment on December 15, 2014. The Motion was denied by Order filed April 11, 2016. The State received notice of entry of the Order on April 26, 2016. Copies of the orders on appeal are attached to this notice.

[SIGNATURE FOLLOWS]

STATE OF SOUTH CAROLINA
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The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2003-CP-32-0927

Willie J. Richardson, #265703,.....Respondent,

v.

State of South Carolina,.....Petitioner.

PROOF OF SERVICE

I, Patrick L. Schmeckpeper, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Rauch Wise, Esquire
305 Main St.
Greenwood, SC 29646

I further certify that all parties required by Rule to be served have been served this 28th day of April, 2016.

PLS

PATRICK L. SCHMECKPEPER
S.C. Bar. #102100
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
Attorney for the Petitioner

Respectfully submitted,

ALAN WILSON
Attorney General

PATRICK L. SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
Attorneys for the Petitioner

Columbia, South Carolina
April 28, 2016

Other counsel of record:

Rauch Wise, Esquire
305 Main St.
Greenwood, SC 29646

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Willie J. Richardson, 002655703)
)
Applicant,)
)
-vs-)
)
State of South Carolina,)
)
Respondent.)

ORDER

2003-CP-32-0927

FILED
2011 NOV 26 A 11:16
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

0927

This matter comes before me upon the Post Conviction Relief Petition filed by Willie J. Richardson. The procedural history of this case demonstrates numerous errors by previous Post Conviction Relief Counsel. As briefly as possible, the prior history of this Post Conviction Relief case shows that two previous counsel for the applicant failed to file a timely notice of appeal in the case after a PCR hearing. This resulted in the applicant filing two subsequent PCR's alleging his prior PCR counsel failed to a notice of appeal as he had requested. When the third PCR counsel, after a hearing on the sole issue of whether Mr. Richardson was entitled to a belated appeal, timely filed a notice of appeal, the record of the previous hearing had been destroyed and was therefore unable to be transcribed. As a result, the South Carolina Supreme Court on January 13, 2012 ordered that a new Post Conviction Relief hearing be held. This hearing is being held pursuant to that order.

Facts

Mr. Richardson was indicted on March 30, 1998 on for a murder that occurred on August 13, 1995. Due in part to the fact that he was being held on federal charges, Mr.

Richardson was tried and convicted on April 13, 2000. Mr. Richardson appealed his conviction which was affirmed on May 29, 2002. He then filed his original Post Conviction Relief action. While he has alleged numerous grounds for relief, at the hearing the issue was limited to ineffective assistance of counsel due to counsel's failure to interview and call his alibi witnesses.

Mr. Richardson was accused of shooting Alfred F. Jones in a bar in Lexington County near the Newberry County line. He was identified by several people who were in the bar. A tag number taken from an automobile that left the scene was traced by to an automobile that Mr. Richardson drove. The automobile actually belonged to his father. The state also presented testimony from Reginald Lucas who allegedly heard the applicant confess to the crime while they were housed together in jail in Virginia.

At the trial, Mr. Richardson's defense was alibi. He testified that we went to New York on July 20, 1995 for a funeral of a close friend. He stated he never left New York until well after the murder. He and his mother testified that Mr. Richardson was in New York at a birthday party at the time of the murder and could not have been in Lexington County. The only alibi witnesses who testified for Mr. Richardson were his mother. The jury convicted him Richardson of the murder.

At the Post Conviction Relief hearing Mr. Richardson presented several witnesses and documents, including pictures, that proved he was in New York at the time of the murder. Testifying for Mr. Richardson was Ernest J. Richardson, his brother. He testified that he remembered the birthday party in August of 1995. He provided several pictures which showed himself and the applicant at the party. Their mother, who did testify at the trial, is shown in one picture. He further testified that at the time of his brother's trial in April of 2000, he was present

in Lexington and observed the trial. He was not called as a witness. He remembered his mother testifying and wondered why he was not called.

Also testifying for the applicant was Greg Huge, another brother. Mr. Huge testified that he remembered his brother being in New York at the birthday party. He stated that his birthday was August 14th, which would have been on the Monday of the following week. He remembered that the birthday party was to celebrate several birthday's including his. He was leaving New York for Los Angeles before his birthday. He testified he remembered a call to New York saying that his brother had been involved in a shooting in Lexington on the week-end before his birthday. He stated that he remembered thinking that his brother could not have been in Lexington as he had been in New York for some time before the week-end of the birthday party. He further testified that no one contacted him about testifying at the trial in Lexington. Had he been contacted, he would have been willing to come to Lexington to testify.

None of the witnesses for the applicant were impeached by any criminal records. They both held responsible position with Mr. Huge being involved in the movies business in Hollywood. They testified forthrightly. In support of their testimony was the death certificate of the applicant's friend and several pictures taken at the birthday party. Their testimony was such that if the jury believed them, then the applicant woul dhave to be acquitted as their testimony established the impossibility of the applicant being in Lexington County at the time of the shooting.

Hervery Young, the trial attorney for the applicant, testified that he felt the case against Mr. Richardson was not that strong. He stated that he felt the alleged eye witnesses against Mr. Richardson were not strong. He had been told by the applicant that he was in New

York at the time of the murder. Mr. Young explained the failure to call the alibi witnesses was due in part to the scheduled date for the trial being changed at the last minute. He did not, however, ask for a continuance due to the fact that the alibi witnesses could not be present.

The South Carolina Supreme Court in *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007) recently set forth the obligation of defense counsel to investigate the case for his client. The Court said "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case." *Id.* at 331-332, 642 S.E.2d at 597(emphasis in original). Quoting from the American Bar Association guidelines the *Ard* court held "Counsel at every stage have an obligation to conduct thorough **and independent** investigations relating to the issue of both guilt and penalty." *Id.* (emphasis in original). Defense counsel cannot presume that a potential witness will not be helpful nor can they presume they will be unavailable when the trial is held.

More recently the South Carolina Supreme Court in *Lounds v. State*, Op. № 23083 (S.C. Sup. Ct. Filed December15, 2008) has again held that the failure to properly investigate and interview witnesses is ground for finding trial counsel to be ineffective. The fact that in *Lounds* the trial counsel failed to interview the witnesses does not distinguish that case from the one before the Court. In the present case, trial counsel failed to interview at least two witness, and while he used another witness, he failed to give an adequate explanation as to why he did not call the other two witnesses.

The South Carolina Supreme Court has also held that defense counsel is ineffective when he fails to call a witness who potentially could impeach the testimony of the alleged victim of a sexual assault. *Pauling v. State*, 331 S.C. 606, 503 S.E.2d 468 (1998). In

Pauling, defense counsel failed to call as a witness the triage nurse whose notes reflected that the alleged victim had told her she had not been penetrated. Our Supreme Court has further said "One component of that duty is to investigate alibi witnesses identified by a defendant, and the failure to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014)

Against these standards the decision of defense counsel not to call two alibi witnesses must be judged. The witnesses were not interviewed but defense counsel knew of their existence. As no strategic reason was given for not interviewing and calling the witnesses available to defense counsel, the failure to call the witnesses was ineffective as a matter of law. The error in this case is compounded by the fact that Sally Richardson, the mother of the applicant identified several people who were at the birthday party and no explanation was given for their not being present to testify. A reasonable juror would think as Mr. Richardson's mother could testify, so could the other people she named who were at the birthday party if in fact there were a party.

The question raised is whether the advise of counsel not to call two key alibi witness was reasonable under the circumstances. The only logical conclusion is the decision was not reasonable and that the performance of counsel was ineffective.

Our courts have held on numerous occasions that the failure of defense counsel to request an alibi instruction is grounds to grant an applicant a new trial. *Riddle v. State*, 308 S.C. 361, 418 S.E.2d 308 (1992). Thus, the failure to interview and call witnesses that would form a basis for the requested instruction of alibi should also be a ground for granting a new trial. Mr. Richardson presented only one witnesses even though the testimony identified witnesses who

would have been available to Mr. Richardson.

Prejudice

To meet the second prong of ineffective assistance of counsel as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. Richardson must show prejudice. Prejudice under *Strickland* means "but for counsel's errors there is a reasonable probability the result at trial would have been different." *Pauling v. State*, 331 S.C. 606, 609, 503 S.E.2d 468, 470 (1998). And "reasonable probability" means "a probability sufficient to undermine confidence in the outcome of the trial." *Id.* The standard does not mean the jury would have been required to reach another result, only that the errors of counsel deprived the defendant of a meaningful opportunity to present evidence to the jury that could result in an acquittal.

The case before this court is substantially the same as *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014). In *Walker* trial counsel failed to interview and present as a defense witness Robina Reed who testified at the PCR hearing that Mr. Walker had, in the months before the incident, spent every week-end with her up until the time of this arrest. The Court held trial counsel was ineffective in failing to call her as a witness. In addition, the Court found that Mr. Walker was prejudiced. As our court has said "To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different." *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001)

The applicant has proven prejudice in this case. The witnesses fo the applicant at the PCR hearing traveled considerable distances to testify on behalf of their brother. As noted above, neither had any record to impeach their credibility. Their testimony was buttressed by

pictures taken at the birthday party and the death certificate of the close friend of the applicant. The court finds they would have credibility before a jury. As noted above, this court is not required to find that a different result would have been obtained if the witnesses had testified, but only that is there a reasonable probability the result would have been different. Based upon the testimony presented at this hearing, the court believes there is a reasonable probality that the result in the murder trial would have been different if the witnesses had testified and the exhibits presented.

WHEREFORE it is hereby Ordered, Adjudged and Decreed that Willie J. Richardson be and he is hereby granted a new trial on the charge of murder and a new trial on the charge of possession of a firearm while engaged in a violent crime.

IT IS SO ORDERED

November 24, 2014

Honorable Brian M. Gibbons
Presiding Judge

FILED
2014 NOV 26 A 11: 16
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

ORIGINAL

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2003CP3200927

Willie James Richardson	State Of South Carolina
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

11/26/2014

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **1st of December 2014**, and a copy mailed first class or placed in the appropriate attorney's box on **1st of December 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

David Leon Morrison
7453 Irmo Dr., Ste. B Columbia, SC 29212

ATTORNEY(S) FOR THE PLAINTIFF(S)

Walt Whitmire
Salley W. Elliott PO Box 11549 Columbia, SC 29211
Mary Williams SCAG

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

* Copy give to Lex City GSecourt / Hope Frick

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Willie J. Richardson, 002655703)
)
Applicant,)
)
-vs-)
)
State of South Carolina,)
)
Respondent.)

Order Denying Rule 59(e) Motion

2003-CP-32-0927

This matter comes before me upon the Motion to Alter or Amend the judgement pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The Court has carefully considered the motion and denies the same for the following reasons:

1. The reference to two key alibi witnesses was in reference to the two new witnesses that testified at the Post Conviction Relief hearing.

2. a. The younger brother of the Applicant would obviously have been about 14 at the time of the trial. No credible evidence exists that would establish he would not have been a favorable witness at the time of the trial. His age certainly would not have precluded his testifying. H was in the pictures taken at the birthday party so his actually being at the party would not have been in question. As noted in the Order, this case, through no fault of the Applicant, had a long and tortured history. The long delay in this PCR simply cannot be held against the Applicant.

b. The Court notes that in may, if not most cases, all possible witnesses cannot be expected to testify. In the present case, the witness did travel at expense to themselves to testify

in this hearing. The fact that one witness was not able to make the trip does not impeach the credibility of the witnesses who did testify and therefore is not a basis for denying the relief to the Applicant.

c. The fact there may have been other witnesses who could have been of assistance to the Applicant does nothing to distract from the credibility of the witnesses who testified. Prior Post Conviction Relief Applications prepared by a pro se applicant, are not persuasive as to what is important or not in an application. Only with the guidance of trained counsel can any applicant fully understand and appreciate what is important to present at a Post Conviction Relief hearing.

d. Whether Michelle is credible or not credible is simply not a factor in the decision of this Court. She did not testify at the Post Conviction Relief hearing in this case.

e. While defense counsel did make some effort to confirm the alibi of the Applicant, he failed to conduct basic interviews with the Applicant's mother and failed to call a witness who was even present at the trial. Further, he failed to ask basic questions as to what evidence other than an airline ticket was available to prove the Applicant was in New York at the time of the shooting. Such investigation is basic. The Motion argues that defense counsel is not required to locate every potential witness. What happened in this case was not the failure to locate a witness, but the failure through basic investigation to identify many witnesses who would verify the alibi as well as other evidence that supported the alibi witnesses.

3. The State is correct that to some extent the evidence present in the Post Conviction Relief hearing was cumulative. But the character and type of evidence present at the hearing not only buttressed the testimony of the mother of the applicant, but gave credibility to her testimony as she is shown in the pictures of the party. Documentation that what one says is true is certainly

more than being merely cumulative. The error here was more than the mere failure to call another family member to testify as to his alibi.

4. The State makes an issue of the time of the party. First, the parties testified many years after the event. At the Post Conviction Relief hearing there were two undisputed facts. First, there was a birthday party which the Applicant attended and the party was in New York. Whether the party was at 2 or 6 pm is of little importance. The witnesses at the hearing testified he was in New York the entire week-end of the party and had been there for a friend's funeral. In fact, Mr. Huge testified that when he was informed the police were looking for his brother, he remembered thinking he could not have been in South Carolina because he had been in New York the entire week-end.

5. If no single witness ever testified they knew exactly where the applicant was at 10:30 pm on August 12, 1995, the Applicant would still be entitled to a new trial. The Applicant simply could not have been at the party on the afternoon of August 12, 1995 in New York and have then made a trip to rural Lexington County that night. The State fails to appreciate the testimony that the witnesses remembered the Applicant being in New York for the entire week-end of the party and for several days before.

6. In order for evidence to be discovered, an attorney must ask for the evidence and ask the right questions to learn the existence of the evidence. The Applicant testified that not until present counsel asked about pictures, did he even think of the existence of the pictures. In addition, trial counsel did not ask about any information concerning the funeral the Applicant attended in New York. The Applicant testified at the trial that on July 20, 1995 he flew to New York to attend the funeral of a friend. A basic question would have been to obtain proof of the

funeral of the friend. Trial counsel also failed to do this basic investigation.

The request of the State to alter or amend the judgement previously entered in this matter is respectfully denied.

IT IS SO ORDERED

4/8
March __, 2016

Hon. Brian M. Gibbons
Presiding Judge
Eleventh Judicial Circuit

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2003CP3200927

Willie James Richardson	State Of South Carolina
PLAINTIFF(S)	DEFENDANT(S)
Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

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☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Other: _____ ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

4/19/2016

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **19th of April 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

David Leon Morrison
7453 Irmo Dr., Ste. B Columbia, SC 29212

ATTORNEY(S) FOR THE PLAINTIFF(S)

Salley W. Elliott PO Box 21787 Columbia, SC 29221-1787

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/mh

Court Reporter

Beth A. Carrigg - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

ALAN WILSON
ATTORNEY GENERAL

April 28, 2016

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

Re: Willie J. Richardson, #265703, Respondent v. State, Petitioner
Case No. 2003-CP-32-0927

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Patrick L. Schmeckpeper
Assistant Attorney General

cc: Rauch Wise, Esquire
South Carolina Department of Corrections
Lexington County Clerk of Court
Honorable Donald V. Myers, Solicitor-Eleventh Circuit
Office of Appellate Defense
Trisha Allen, Victim Services