

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

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SEP 19 2016

S.C. SUPREME COURT

DARRYL FRIERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-211091

BRIEF OF PETITIONER

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ISSUE PRESENTED

Was the guilty plea rendered involuntary by trial counsel's failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner's car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search?

STATEMENT

In September of 2007, the Richland County Grand Jury indicted Frierson for assault and battery of a high and aggravated nature [ABHAN], armed robbery kidnapping and criminal conspiracy, indictments #2007-GS-40-4362, 4363, 4364, 4429. On December 3, 2008, Frierson appeared before the Honorable J. Michelle Childs and pled guilty as charged. Sentencing was deferred to allow Frierson to testify as a State's witness in the trial of a co-defendant. On August 24, 2009, Frierson appeared before Judge Childs for sentencing. Deon O'Neil represented Frierson at both the guilty plea and the sentencing. Daniel L. Goldberg prosecuted the case on behalf of the State. Judge Childs sentenced Frierson to 10 years for ABHAN, 5 years concurrent for criminal conspiracy, and 30 years for both kidnapping and armed robbery to be served consecutively to the ABHAN and conspiracy charges, resulting in an aggregate sentence of 40 years. A petition for reconsideration was filed and denied without a hearing. A timely notice of intent to appeal was filed but later dismissed by the Court of Appeals on January 8, 2010.

On June 28, 2010, Frierson filed an application for post conviction relief. The State filed a return on July 20, 2010. An evidentiary hearing was held on February 14, 2010 before the Honorable Clifton B. Newman. Nicole Singletary represented Frierson at the PCR hearing. Rob Corney was present on behalf of the State. In a written order filed March 27, 2012, Judge Newman denied relief and dismissed the application. A timely notice of intent to appeal was filed on April 4, 2012. On January 10, 2013, the petition for writ of certiorari was filed. The State filed a return on May 24, 2013. On February 22, 2014, this Court granted the petition for writ of certiorari. This brief of petitioner follows.

ARGUMENT

The guilty plea was rendered involuntary by trial counsel's failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner's car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search.

Frierson pled guilty to his involvement with the robbery of an armored truck. (App. p. 4-5). Frierson worked for the armored car company and was one of the drivers at the time of the robbery. (App. p. 4, lines 24-25). During the course of the investigation, officers with the Richland County Sheriff's Department placed a monitoring device on Frierson's car. (App. p. 114, lines 2-12). During the PCR hearing Frierson testified that during the preliminary hearing Investigator Eisenhower admitted that they did not have a warrant or order to place the tracking device on Frierson's car. (App. p. 75, lines 4-10). Plea counsel confirmed that the investigator did not have a warrant or order to place the tracking device. (App. p. 100, lines 12-16).

In regard to plea counsel's advice to Frierson regarding the tracking device, Frierson testified that counsel told him the device was legal because it was placed on the outside of the car. (App. p. 76, lines 20 – p. 77, lines 1-8). Frierson testified that he was unaware of the existence of any South Carolina statute regarding tracking devices. (App. p. 78, lines 5-8). Plea counsel admitted advising Frierson that based on United States v. Knotts, 460 U.S. 276, 281, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983)¹, the placement of the tracking device was legal. (App. p. 101, lines 4-20). Counsel admitted that he was unaware of S.C. Code §17-30-140. (App. p. 101, lines 21 – p. 102, lines 1-3).

¹ Counsel admitted that there was subsequent case law calling the Knotts holding in question. (App. p. 101, lines 17-20) See United States v. Jones, --- U.S. ---, 132 S.Ct. 945, 181 L.Ed 2d 911 (2012).

Counsel admitted that S.C. Code §17-30-140 could have been used to support a motion to suppress based on the State's failure to comply with the statute. (App. p. 104, lines 13-24). Frierson testified that if he had known about the statute, he would not have pled guilty and instead would have proceeded to trial. (App. p. 77, lines 19-25; p. 90, lines 9-23). Counsel was ineffective in not advising Frierson about the existence of the statute that could have been used to challenge the placement of the tracking device and suppress critical evidence. The guilty plea was rendered involuntary based on counsel's deficient performance.

South Carolina Code §17-30-140 provides:

(A) The Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State.

(B) An application under subsection (A) of this section must include:

- (1) a statement of the identity of the applicant;
- (2) a certification by the applicant that probable cause exists to believe that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State which may provide evidence relating to any offense or any evidence of any conspiracy or solicitation to commit any violation of the laws of this State;
- (3) a statement of the offense to which the information likely to be obtained relates; and
- (4) a statement whether it may be necessary to use and monitor the mobile tracking device outside the jurisdiction of the court from which the authorization is being sought.

(C) Upon application made as provided under subsection (B), the court, upon a finding that the certification and statements required by subsection

(B) have been made in the application and probable cause exists, must enter an ex parte order authorizing the installation and use of a mobile tracking device. The order may authorize the use of the device within the jurisdiction of the court and outside that jurisdiction but within the State of South Carolina if the device is installed within the jurisdiction of the court.

(D) A court may require greater specificity or additional information beyond that which is required by this section as a requisite for issuing an order.

(E) The standards established by the United States Supreme Court for the installation and monitoring of mobile tracking devices apply to the installation and use of any device as authorized by this section.

(F) As used in this section, a "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

In the order of dismissal the PCR judge wrote, "Counsel said he did not investigate the legality of the GPS tracking device based on S.C. Code §17-30-140, nor was he aware of the statute at the time of Applicant's plea. Counsel stated, had Applicant proceeded to trial, his main strategy would have been to suppress any evidence gathered against Applicant as a result of the GPS device, but he did not believe there were any valid grounds to support the extremely incriminating and damaging statements given by co-defendants against Applicant. Counsel finished by stating he believed there was 'very slim' chance of Applicant winning at trial based on the State's evidence against him." (App. pp. 145-146). The record reflects that plea counsel actually testified, "I think the most damning thing for Mr. Frierson was his own statement. And I think the mobile tracking device, if we won that argument at a hearing, then we could have got his own, Mr. Frierson's, statement suppressed, and then at least we'd have a fighting chance at trial. We could just say that the other co-defendants are just blaming him because he's the

obvious fall guy. That would have been my advice to him. You know, of course it would have been Mr. Frierson's decision whether he wanted to take it." (App. p. 123). Counsel, however, never advised Petitioner Frierson about challenging the mobile tracking device based on S.C. Code §17-30-140. Petitioner testified that if he had known about the statute, he would have proceeded to trial. (App. p. 77, lines 19-25; p. 90, lines 9-23). The PCR judge erred in refusing to find counsel ineffective for not advising Petitioner about the ability to move to suppress critical evidence because it was obtained in violation of S.C. Code §17-30-140.

In the order of dismissal the PCR judge made a credibility finding writing, "Based on the testimony presented at the [sic] and a thorough review of the plea transcript, this Court finds Applicant failed to carry his burden in proving counsel was ineffective in this regard [Failure to challenge the GPS]. Further, this Court finds counsel's testimony to be credible while finding Applicant's testimony to be wholly incredible." (App. p. 146). Counsel's testimony at the PCR hearing, however, did not contradict Petitioner's testimony. Counsel testified:

It – I was not aware of that statute [§17-30-140] at the time we had this discussion. Upon me being aware of the statute – I guess mainly because Mr. Frierson's PCR application – I've since looked at the statute. It, it appears on its face to be applicable to his situation, and it would have availed to him a opportunity to have a pretrial hearing to determine whether or not the state had followed the prescriptions of that statute and if not – my understanding of, my reading of the statute is that he would have had an opportunity to try to get all evidence derived from the illegal tracking device suppressed at trial.

(App. p. 104, lines 13-24). Counsel then testified to a summary of the evidence that he would have moved to suppress had he been aware of the statute. (App. p. 105, line 1 – p. 106, lines 1-8).

Addressing the prejudice prong the PCR judge wrote, "Applicant has failed to convince this Court that, had counsel taken some further action regarding this GPS device or done some further investigation into S.C. Code §17-30-140, Applicant would have proceeded to trial to face

such serious charges rather than enter a plea.” The PCR judge’s finding is not supported by the record. If Petitioner had been properly advised about §17-30-140, there is nothing in this record to support that he would not have taken advantage of that opportunity to try and suppress critical evidence by proceeding with a trial. This is especially true in light of the fact that, although the sentences for ABHAN, armed robbery and kidnapping were run concurrently, Petitioner received the maximum sentence on each of those charges and a five year consecutive sentence for criminal conspiracy.

In the return to the petition for writ of certiorari the State argues that the permissive “may” of S.C. Code §17-30-140(A) does not mandate compliance writing, “S.C. Code §17-30-140(a)[sic] reads certain prosecuting officials **may** petition a court for authorization to install a mobile tracking device to a vehicle of particular interest. Simply, the statute does not mandate compliance nor does it sanction non-compliance.(emphasis added).” (Return to Petition for Writ of Certiorari p. 7). The State’s reading of the statute is strained, at best.

S.C. Code §17-30-140(A) provides, “The Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State.” The clear reading of the statute is that the Attorney General or any solicitor, as opposed to officers with the Richland County Sheriff’s Department or any other law enforcement, are the **only** people who **may** apply for an order for such an extraordinary measure as installing a mobile tracking device on an individual’s vehicle.

S.C. Code §17-30-140(B) then provides four specific criteria that must be included in the application for an order authorizing the installation of a mobile tracking device. S.C. Code §17-30-

140(C) provides that the court, upon finding that the application meets the requirements of subsection (B), and finding that probable cause exists must enter an ex parte order. Subsection (D) provides that the court may require additional information beyond that required by the section as a requisite for issuing an order. Requiring the specifics contained in subsection (B) would not make sense if subsection (A) was merely a suggestion. Reading subsection (A) together with the other subsections of the statute supports that the intent of §17-30-140 is to mandate an order prior to placing a mobile tracking device on the vehicle of an individual.

In the return the State also argues that because §17-30-140 was enacted as part of the South Carolina Homeland Security Act and the express purpose of the Act is to “enhance, not restrict, law enforcement’s ability to conduct investigations in South Carolina,” the statute does not mandate compliance. (Return to Petition for Writ of Certiorari p. 7). The purpose of the Act is far broader than to “enhance, not restrict, law enforcement’s ability to conduct investigations in South Carolina” and in passing the Act the South Carolina General Assembly recognized South Carolina’s long tradition of protecting individual liberties.

In passing the Homeland Security Act the South Carolina General Assembly wrote:

The General Assembly finds that:

(1) because of the tragic events of September 11, 2001, involving acts of terrorism against the people of the United States and because of continued threats against the peace and safety of our nation, appropriate measures must be taken to ensure the safety of the citizens of South Carolina;

(2) legislative enhancements must be enacted to provide law enforcement, public health officials, and other emergency workers with the proper means and tools to enable them to protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties and also to maintain order, preserve the peace, preserve health, and reduce injuries and casualties in the event that terrorist acts occur on South Carolina soil.

2002 S.C. Acts No. 339, §§ 1-2.

The vast majority of the addition of Chapter 30 to Title 17 deals with specific procedures and guidelines to be followed by law enforcement for the interception of wire, electronic or oral communications. Reading Chapter 30 as a whole there is nothing to indicate that in enacting §17-30-140 the General Assembly was merely suggesting that an order could be obtained prior to the placement of a mobile tracking device. Quite to the contrary, the overall reading of Chapter 30 supports that §17-30-140(A) mandates, prior to placement of a mobile tracking device, that either the Attorney General or a solicitor apply for an order with the requirements set forth in subsection (B). In enacting Chapter 30 the South Carolina was attempting to balance the need to protect South Carolina citizens from terrorism while protecting individual constitutional rights and individual liberties.

In further support that §17-30-140 is a mandate rather than a suggestion, the South Carolina Constitution contains a specific prohibition against unreasonable invasions of privacy. In State v. Forrester, 343 S.C. 637, 644, 541 S.E.2d 837, 840-841 (2001) the South Carolina Supreme Court wrote:

In addition to language which mirrors the Fourth Amendment, S.C. Const. art. 1 § 10 contains an express protection of the right to privacy:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures *and unreasonable invasions of privacy* shall not be violated, ...(emphasis added).

Initially, even in the absence of a specific right to privacy provision, this Court could interpret our state constitution as providing more protection than the federal counterpart. However, by articulating a specific prohibition against “unreasonable invasions of privacy,” the people of South Carolina have indicated that searches and seizures that do not offend the federal Constitution may still offend the South Carolina Constitution resulting in the exclusion of the discovered evidence.

The plain meaning of S.C. Code §17-30-140(A) is that only the Attorney General or any

solicitor may apply for an order authorizing the installation of a mobile tracking device. “When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into which are not in the legislature’s language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.” Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000). The permissive “may” in subsection (A) does not render the code section a mere suggestion. Rather, the clear meaning of the entire section is that an order is required. The legislative intent behind the statute as well as South Carolina’s heightened protection of privacy support that S.C. Code §17-30-140 mandates an order prior to placement of a mobile tracking device. The Richland County Sheriff’s Department violated the statute by placing the mobile tracking device on Petitioner’s car without an order. The violation of the statute serves as a ground to suppress critical evidence. “Exclusion of evidence is not the only means available to insure that warrants are properly issued. State v. Sachs, *supra*. When, however, the State is unable to demonstrate a good faith attempt to comply with the statute, exclusion is the proper remedy. Id.” State v. McKnight, 291 S.C. 110, 113, 352 S.E.2d 471, 473 (1987). There was no good faith attempt to comply with the statute in this case. Instead, the Richland County Sheriff’s Department simply ignored the statute.

In the return the State cites United States v. Narri, 789 F.Supp.2d 645 (D.S.C 2011) as providing guidance on S.C. Code §17-30-140. (Return to Petition for Writ of Certiorari p. 7). As noted by the State in footnote 1 in the return, Narri was decided prior to the United States Supreme Court decision in United States v. Jones, ---U.S.---, 132 S.Ct. 945, 181 L.Ed2d 911 (2012) finding the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a search under the Fourth Amendment. The district judge in Narri, finding that the placement of the GPS device did not constitute a search, denied the

defendant's motion to suppress based on the fact that the GPS tracking device was placed on the vehicle without a warrant. In what can only be considered dicta by a federal judge improperly attempting to interpret state law, the district judge wrote:

In addition to the concerns expressed by the *Maynard*² court, law enforcement in this case could have gotten a warrant pursuant to S.C.Code Ann. section 17-30-140. That statute provides that “[t]he Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device” If the application includes certain information about why the tracking device is necessary, and probable cause exists, then the judge “must enter an ex parte order authorizing the installation and use of a mobile tracking device.” *Id.* While that statute did not require law enforcement to obtain a warrant before employing the GPS tracking device, it did provide a mechanism for them to obtain a warrant. The better practice in this case would have been to obtain a warrant.

U.S. v. Narrl, 789 F.Supp.2d 645, 651-652 (D.S.C.,2011) (footnote added).

In Narrl the district judge based his ruling on then existing federal case law prior to the decision in United States v. Jones and not on S.C. Code §17-30-140. S.C. Code §17-30-140 was not litigated before the district judge in Narrl. The district judge misinterpreted the plain meaning of the statute. Importantly, as noted by the district judge, the better practice would have been to obtain a warrant. Pursuant to United States v. Jones the placement of the GPS tracking device in Narrl would now be considered a search for Fourth Amendment purposes.

In State v. Adams, 397 S.C. 481, 725 S.E.2d 523 (Ct.App.2012)(cert. granted Nov. 6, 2013) this Court found that the North Charleston Police Department conducted an unlawful search by installing a tracking device on a vehicle and monitoring the vehicle's movements without obtaining a prior warrant. This Court found, however, that the unlawful search did not

² United States v. Maynard, 615 F.3d 544 (2010). The appellants in *Maynard* were Antoine Jones and Lawrence Maynard. Their appeals were consolidated by the D.C. Circuit, and that court reversed Jones's conviction and affirmed Maynard's. Maynard, 615 F.3d at 548. The government appealed the D.C. Circuit's decision as to Jones in United States v. Jones, — U.S. —, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

require suppression because of intervening criminal acts sufficient to cure the taint of the unlawful search. In Adams the Court did not address the issue in regard to the failure to comply with S.C. Code §17-30-140 because the Court decided the issue based on Fourth Amendment grounds.

Counsel was ineffective in failing to advise petitioner he could move to suppress critical evidence based on a violation of S.C. Code §17-30-140. There is a reasonable probability that but for counsel's error, Petitioner would not have pled guilty and instead would have gone to trial moving to suppress based on the violation of the statute. "A defendant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the defendant would not have pled guilty, but would have insisted on going to trial." Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009).

"To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him." Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000). "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea 'may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both.' " Pittman v. State, 337 S.C. 597, 599, 524 S.E.2d 623, 625 (1999) (quoting State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174 (1993)). "The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.' " Hill, 474

U.S. at 56, 106 S.Ct. 366 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970)).

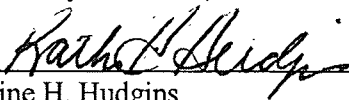
“In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). “Specifically, the voluntariness of a guilty plea is not determined by an examination of a specific inquiry made by the sentencing judge alone, but is determined from both the record made at the time of the entry of the guilty plea, and also from the record of the PCR hearing.” Roddy, 339 S.C. at 33, 528 S.E.2d at 420.

Petitioner did not enter the guilty plea knowingly and intelligently. Counsel was unaware of S.C. Code §17-30-140 and failed to advise petitioner that the violation of statute could result in the suppression of critical evidence. There is a reasonable probability that but for counsel’s error, Petitioner would not have pled guilty and instead would have gone to trial moving to suppress based on the violation of the statute. The guilty plea was rendered involuntary by counsel’s failure to advise Petitioner that he could challenge the placement of a mobile tracking device on Petitioner’s car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search.

CONCLUSION

Based on the above argument, the conviction and sentence should be reversed and the case remanded for a new trial.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 27th day of May, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

DARRYL FRIERSON,

PETITIONER,

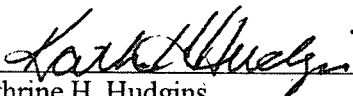
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STATE OF SOUTH CAROLINA,

RESPONDENT

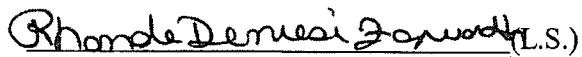
CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Robert D. Corney, Esquire, this 27th day of May, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 27th day
of May, 2014.


Notary Public for South Carolina
My Commission Expires: October 17, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Certiorari to Richland County
Honorable L. Casey Manning, Circuit Court Judge
Appellate Case No: 2012-211091

S.C. SUPREME COURT

The State,

Respondent,

vs.

Darryl Frierson,

Petitioner.

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 of knowledge of an obscure and dormant statute constituted deficient
 performance; furthermore, ample probative evidence supports the PCR
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 proceeded to trial instead of pleading guilty had counsel advised of the
 statutory suppression defense at issue9**

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ISSUE ON APPEAL

- I. Whether the PCR Judge made a sound finding that Petitioner failed to prove that counsel lack of knowledge and advice on a statutory suppression defense pursuant to S.C. Code §17-30-140 constituted deficient performance that denied Petitioner his right to constitutionally effective assistance of counsel?**

STATEMENT OF THE CASE

The Richland County Grand Jury indicted Petitioner at the September 2007 term of General Sessions for assault and battery of a high and aggravated nature, armed robbery, kidnapping, and criminal conspiracy (2007-GS-40-4362; -4363; -4364; and -4429). **App.pp.24-35.** Deon O'Neil, Esq., represented Petitioner.

On December 3, 2008, Petitioner entered guilty pleas as indicted. The Honorable J. Michelle Childs accepted Petitioner's plea and deferred sentencing until the disposition of co-defendant Dominic Lyde's case. **App.pp.1-13.**

On August 10, 2009, Judge Childs convened a joint sentencing hearing for Petitioner and three of co-defendants. Judge Childs further incorporated co-defendants Kelby and Domonique Blakney's motions for reconsideration of sentence into the hearing. Petitioner and his co-defendants were present and were all represented by various attorneys. At the conclusion of the hearing, Judge Childs took all matters under advisement and deferred sentencing for two weeks. **Supp. App.pp.1-139.**

On August 24, 2009, Judge Childs convened a final hearing to pronounce the sentences. Petitioner was sentenced to a term of ten (10) years imprisonment for assault and battery of a high and aggravated nature, a term of five (5) years imprisonment for criminal conspiracy. Those sentences were to be served concurrently. Petitioner was sentenced to two thirty (30) year terms of imprisonment for kidnapping and armed robbery. Those sentences were to be served concurrently. The assault and battery of a high and aggravated nature and the criminal conspiracy convictions were to be served consecutively to the kidnapping and armed robbery convictions for an aggregate forty (40) year term of imprisonment. **App.pp.14-22.**

A notice of appeal was filed at the South Carolina Court of Appeals. The Court of Appeals subsequently dismissed the appeal on January 8, 2010.

Petitioner filed an Application for Post-Conviction Relief (PCR) on June 28, 2010. **App.pp.36-57.** A hearing was convened at the Richland County Courthouse on February 14, 2012. **App.pp.62-133.** Petitioner was present and represented by Nicole L. Singletary, Esq. Rob A. Corney, Esq., of the Office of the Attorney General represented Respondent. The Honorable Clifton B. Newman denied Petitioner's Application from the bench. Subsequently an order denying and dismissing the Application was filed on March 27, 2012. **App.pp.134-50.** This appeal follows.

STATEMENT OF FACTS

Petitioner was the architect to one of the “top five armored car robberies in United States history based upon the amount taken.” **Supp. App.p.21.** Petitioner was employed by Express Teller Services ‘Express Teller’ and was the co-driver of the armored vehicle during a heist that occurred on May 10, 2007. Petitioner and co-worker, Victim Jones, were transporting over eighteen (18) million dollars from various consumer banks along the South Carolina coast to Columbia. **Supp. App.p.21.** Petitioner determined the various roles of his cohorts in the affair. Dominique Lyde and Jeremy McPhail were muscle that assaulted and kidnapped Victim Jones at gunpoint. The initial phase was executed at a filling station on Shop Road, Richland County, near Express Tellers’ headquarters. Victim Jones suffered a broken orbital socket, nose, teeth and had his eye completely swollen. **Supp. App.p.14.** The assailants bound Victim Jones and Petitioner and placed them in the armored car before it was driven several miles to a nearby dirt road where the Blakney brothers awaited to unload the money into their Jeep Cherokee. The Blakney’s packed the getaway vehicle to full capacity; the size constraints forced them to leave over nine (9) millions dollars in the armored car. They escaped to the Pee Dee. At the direction of Petitioner, Paul Whitaker, also an employee of Express Teller, falsified protocol that delayed detection and allowed for the successful heist. **Supp. App.25-26.**

Sergeant Isenhoward, of the Richland County Sherriff’s Department, led a team of numerous detectives and investigators on the case. Dozens of additional South Carolina law enforcement officers from across the State took part in the investigation. **Supp. App.pp.40-41.** Wayne Cook, Director of Corporate Security for Express Teller and Andre Yudo, an investigator for the Company that insured Express Teller aided law enforcement. **Supp.pp.20-21.**

Victim Jones, despite suffering substantial injuries, was able to free himself, escape, and walk a good distance to a nightclub on Bluff Road to phone the police. He informed police of his co-driver, Petitioner. **Supp. App.14.** The responding officers found Petitioner inside the armored car at the scene. Petitioner was transported to a hospital after he self-reported injuries to the responding officers. He had no bruises, abrasions, or other physical manifestations of injury unlike Victim Jones. **Supp. App.14.** Sergeant Isenhoward and a team of investigators arrived at the hospital to interview the purported second victim. Petitioner gave a fictitious account that immediately alerted the investigative team to his dishonesty. They noted that it was unusual for a victim to provide such an overly-descriptive statement almost immediately after enduring a traumatic ordeal. **Supp. App.pp.16-17.** He further provided a detailed description of the surrounding crime scene around the abandoned armored car despite it being pitch black at the time of the offense. **Supp. App.pp.17-18.** Also, Petitioner claimed to have been too badly injured to have escaped from the abandoned armored car while his substantially injured co-driver unbound himself and walked a great distance to get help. **Supp. App.p.18.**

After a brief examination of Petitioner's non-existent injuries at the hospital, he agreed to a second interview with police at the Sherriff's Department. **App.p.17.** During this encounter, the investigative team determined Petitioner was a potential suspect and not a victim. Despite Petitioner's descriptive version of the facts, he was unable to recall how he was restrained by the assailants; unlike Victim Jones, there was no visible duct tape residue on his person. **App.p.18.** Second, "[Petitioner] was also seen during a break in the interview through the 2-way mirror actually moving his arm and shoulder around that he had a sling on" in contradiction to the injury he claimed. **Supp. App.p.18, ln. 11-**

14. Third, he failed a polygraph. **Supp. App.p.18.** Before the interview concluded, the police placed a GPS device on his car. **Supp. App.p.18.**

Information obtained from the GPS device showed Petitioner made an inordinate number of trips to various parts of the Pee Dee within the twenty-four hour period after the he left the Sherriff's Department; merely another indicia of suspicion. **Supp. App.p.18.** After, the crime scene unit fully complemented its collection of physical evidence, the investigative team examined abandoned trash outside of Petitioner's residence and located a blue glove that was a near identical match to a glove recovered at the scene. **Supp. App.p.20.**

Only after the collection of the physical evidence did the investigative team direct its attention to Paul Whitaker. They learned that Petitioner had recommended Paul Whitaker for his job at Express Teller. Sergeant Ishenhoward met with Paul Whitaker during his work shift; he immediately confessed to his role in Petitioner's scheme.¹ He detailed Petitioner's substantial planning that predated the heist. **Supp. App.pp.23-24.** A subsequent search of Paul Whitaker's home yielded a large sum of money and a litany of Petitioner's recent purchase receipts. As a result Paul Whitaker's confession and the evidence obtained from his home, a warrant was issued for Petitioner's arrest. **Supp. App.p.24.**

On May 16, 2007, the warrant was served on Petitioner during a traffic stop in Columbia; Domonique Blakney was his passenger. **Supp. App.p.24.** Police conducted a search of Petitioner's car incident to arrest that yielded a large sum of money. **Supp.**

¹ During the sentencing hearing, Attorney Pride apprised the Plea Judge that he reviewed the State's case and had no meritorious basis to move to suppress Paul Whitaker's non-custodial statement to Sergeant Ishenhoward.

App.p.24. The investigative team conducted a third interview with Petitioner.² Simultaneously, the investigative team conducted separate interviews with Paul Whitaker and Domonique Blakney. Paul Whitaker provided more incriminating details of the heist. Domonique Blakney's confessed once he was confronted with incriminating evidence. He implicated his brother, Kelby, Jeremy McPhail and Dominic Lyde in the heist and also disclosed that Petitioner was the mastermind of the crime.³ **Supp. App.pp.27-28.** Domonique Blakney disclosed that the assailants, absent Petitioner, met at a hotel in the Pee Dee to divide the money. Petitioner collected his share of the plunder the following day in Darlington. **Supp. App.p.28.**

Domonique Blakney also provided police pictures, stored on his cellular phone, "of large bags of money" that "had numbers on it written in the millions. [O]ne of the bags a photograph was taken of actually said Federal Reserve on it." **Supp. App.p.26, ln.6-8; p.26, ln.8-10.** When confronted with the photographs, Petitioner gave a confession that was mostly consistent to Domonique Blakney and Paul Witaker's accounts of the crime. **Supp. App.p.28.**

Jeremy McPhail and Kelby Blakney immediately confessed to police upon their subsequent arrests. **Supp. App.p.30.** Dominic Lyde was apprehended in North Carolina the following year; he made a partial admission of guilt to police. **Supp. App.pp.31-32.** The investigative team matched Dominic Lyde's DNA to a sample taken from the blue

² The interview occurred subsequent to Petitioner's waiver of his Miranda rights. **Supp. App.p.24. Miranda v. Arizona, 384 U.S. 436 (1966).**

³ Domonique Blakney explained to police that Dominic Lyde replaced Delayne Sadler after he backed out prior to the heist. Assistant Solicitor Goldberg noted that Delayne Sadler had previously pled guilty to conspiracy before the Plea Judge. **Supp. App.p.27.**

glove that was collected from the crime scene.⁴ **Supp. App.p.31.**

The investigative team recovered seven hundred thousand (700,000) dollars from the Blakney's home and five hundred and fifty thousand dollars (550,000) from individuals that Jeremy McPhail had dispersed his share among. Two point seven million dollars (2,700,000) was recovered within a few days of the initial arrests. **Supp. App.p.32.** Despite Attorney McCulloch's contention that the heist was unsophisticated crime, ultimately over five point seven million dollars remained unaccounted for as of the joint sentencing hearing. **Supp. App.p.99, ln.6-8; p.41.** Assistant Solicitor Goldberg poignantly commented, "this is not your typical armed robbery." **Supp. App.p.46, ln.11-12.** Numerous persons suffered on account of Petitioner's grand scheme to strike it rich. It caused the company that was in the process of purchasing Express Teller to terminate the transaction, which adversely impacted hundreds employees. **Supp. App.38.**

⁴ Additionally, Kendrick King, a friend of Domonique Lyde, gave a statement to police that Lyde instructed him to disperse twenty thousand dollars to Lyde's mother and hide another twenty thousand dollars for potential bail money. **Supp. App.p.32.**

ARGUMENT

The PCR judge correctly found Petitioner failed to prove counsel's lack of knowledge of an obscure and dormant statute constituted deficient performance; furthermore, ample probative evidence supports the PCR Judge's finding that Petitioner failed to prove that he would have proceeded to trial instead of pleading guilty had counsel advised of the statutory suppression defense at issue.

Petitioner alleged counsel was ineffective for failing to further investigate a suppression defense based upon the police's failure to comply with S.C. Code §17-30-140 in placing the GPS device on his car. **App.pp.42-45.** Petitioner testified that counsel did not advise him on the statute in question. **App.pp.76-77.** Petitioner testified he would have proceeded to trial instead of pleading guilty had counsel not been allegedly deficient. **App.p.78.** Petitioner testified counsel advised him of 'hand of one is the hand of all' accomplice liability theory of guilt. **App.p.81.** He dismissed it as just a "practice theory." **App.p.81, ln.11-12.** He testified that Paul Whitaker's testimony would have proven not credible had the case proceeded to trial. **App.p.85.** However, Petitioner also testified that he would have "took the plea that was initially offered from my initial lawyer." **App.p.94, ln.18-19.** Petitioner opined that counsel "tried his best" and aggressively represented him. **App.p.87, ln.13-15.**

At the PCR hearing, counsel testified to his course of conduct during the representation. He noted that he argued for suppression during representation at a preliminary hearing. **App.pp.100-01.** Counsel testified to his recollection of the State's case against Petitioner.⁵ He noted that he thoroughly researched relevant case law, discussed the jurisprudence with his colleagues and formed the opinion that the placement

⁵ Respondent notes that counsel incorrectly testified that Kelby Blakney, instead of his brother was the passenger in Petitioner's car when Petitioner was arrested. **App.p.105.**

of the GPS device on Petitioner's car did not implicate Fourth Amendment protections. **App.pp.102-06.** Counsel noted that the GPS device was installed on Petitioner's car at a public location. **App.p.105.** Counsel was unaware of §17-30-140 because he knew of no South Carolina jurisprudence on the matter. **App.p.116.** Counsel reviewed the victim's and co-defendant's statements with Petitioner. **App.p.113.** He ultimately advised Petitioner of the potential mitigation benefits of not delaying a guilty plea in mitigation for sentencing. **App.p.112.** After the Blakney brothers entered guilty pleas, counsel advised Petitioner that they would most probably testify as State's witnesses against Petitioner if decided to proceed to trial. **App.pp.111-12.** Counsel stated that he would have utilized §17-30-140 in a suppression hearing had he known about it. **App.p.104.** Counsel testified in regard to placement of the GPS device, that

the information that [police] could not have gotten from any other means were, were the fact that he was traveling to these other locations. He was going to the mall. That was, that's what raised their suspicions about him more than anything else. He had just been a victim of a crime, but yet, according to him, he was out shopping, out going to malls, various clubs, and that sort of thing.

App.p.116, ln. 11-15. Counsel further opined that information of Petitioner's travel collected from the GPS device, "led [police] to stop his vehicle and ultimately get a picture off the cell phone of one of his passengers, and then ultimately both him and one of his passengers/co-defendant's to confess and give statements implicating themselves."⁶

App.p.116, ln. 20-24. Counsel waived on the extent of evidence that could have potentially been rendered inadmissible from a successful suppression argument on the

⁶ Respondent notes that counsel's recollection here is faulty. In the intervening years between Petitioner's plea and the PCR hearing, counsel forgot that Petitioner was arrested pursuant to an arrest warrant that resulted from Paul Whitaker's confession and evidence obtained from the consent search of his home. See Allen v. Mullin, 368 F.3d 1220, 1240-41 (10th Cir. 2004) (internal quotations omitted) (noting the "alleged inability to remember the details of plea advice – the shifting sands of recent memory, was of little utility.").

matter. App.p.117. Upon questioning from the PCR Judge, counsel opined that absent Petitioner's statement and Domonique Blakney's post-arrest statements, all of the statements and evidence obtained from the other co-defendants would have been admissible at trial. Counsel noted that a successful suppression of Petitioner's confession would have allowed him present a credibility defense against the co-defendant's statements and potential testimonies had the case proceeded to trial. App.p.123.

In denying and dismissing Petitioner's PCR Application, the PCR Judge found Petitioner failed to meet his burden to prove he would have proceeded to trial but counsel's purported deficient performance. App.p.131, ln.20-24. The PCR Judge further found, "I think that given the review of the total record of this case as I have done, that notwithstanding [counsel]'s not knowing about the particular statute, that the results would have been the same." App.p.132, ln.19-22.

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).

EFFECTIVE ASSISTANCE OF COUNSEL

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 (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)). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985).

DISCUSSION

A.

The PCR Judge correctly found Petitioner failed to prove counsel was deficient for failing to advise him on an obscure statutory suppression defense unsupported by the governing jurisprudence at the time of the representation. Counsel rendered competent legal advice at the time of representation pursuant to U.S. v. Knotts, 460 U.S. 276 (1983). Regardless, counsel could not have been deficient for failing to anticipate a change in constitutional law and statutory interpretation.

Prior to South Carolina Supreme Court’s opinion in State v. Adams, 409 S.C. 641, 763 S.E.2d 341 (2014), United State v. Narri, 789 F.Supp.2d 645 (D.S.C. 2011) provided the only guidance to the Criminal Defense Bar on S.C. Code §17-30-140’s potential application. The Federal Judge announced in the order that, “while [S.C. Code §17-30-140] did not require law enforcement to obtain a warrant before employing the GPS tracking device, it did provide a mechanism for them to obtain a warrant.”⁷ Id. at 652.

⁷ The order was issued in 2011 prior to the United States Supreme Court decision in United States v. Jones. see United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) (holding the “the government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements,

S.C. Code §17-30-140 reads as follows: “(1) it gives the Attorney General and Circuit solicitors express authority to request a court order for a tracking device and (2) makes the USSC standards for the installation and monitoring of tracking devices apply. S.C. Code §17-30-140(a) further reads “certain prosecuting officials may petition a court for authorization to install a mobile tracking device to a vehicle of particular interest.” (emphasis added). See Hodges v. Rainey, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) (“When the language of a statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.”).

The legislative intent also conforms to the statute's plain meaning. The South Carolina General Assembly enacted §17-30-140 to expand and streamline law enforcement's investigatory capabilities. “In 2002, the Legislature enacted the “Homeland Security Act” (the “Act”), expressly finding that legislative enhancements were required to ensure the safety of South Carolina's citizens, including the enhancement of tools available to law enforcement, in light of “the tragic events of September 11, 2001, involving acts of terrorism against the people of the United States and ... continued threats against the peace and safety of our nation.” See 2002 S.C. Acts No. 339, § 2. The express purpose of the Act is clearly to enhance, not restrict, law enforcement's ability to conduct investigations in South Carolina.

Thus, the PCR Judge correctly found that Strickland does not demand a criminal defense attorney possess the unworldly gift of clairvoyance. **App.p.146, n.1.** “This Court has never required an attorney to anticipate or discover changes in the law, or facts which

constitutes a search.”). The order followed the now defunct Knotts holding that the use of a tracking device to follow a suspect's movement on public roadways did not constitute a search. Knotts, 460 U.S. at 276, Because Petitioner was convicted in 2008, the federal judge's analysis provides guidance here.

did not exist, at the time of the trial.” Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993). Prior to the State v. Adams decision, the South Carolina appellate courts remained silent on the pre-United States v. Jones statutory applicant of S.C. Code §17-30-140. Adams, 409 S.C. at 643, 763 S.E.2d at 343. Furthermore, the procedural posture of Adams renders it inapposite to the present case. The court in Adams was presented with a categorically distinct issue that concerned whether the ‘good faith’ exception would have exempted the case from the intervening United States Supreme Court precedent issued while Adams’ case awaited directed appellate review. Id. at 650, 763 S.E.2d at 346.

Thus, the plain meaning, legislative history, and only available, yet non-binding, jurisprudence supported the PCR Judge’s findings that counsel’s failure to make a novel argument did not constitute deficiency. Accordingly, the PCR Judge correctly found that Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Thus, the plain meaning, legislative history, and only available yet non-binding jurisprudence dictated that a suppression defense predicated upon the purported statutory violation lacked merit.

B.

Similarly, the PCR Judge made a sound finding that Petitioner failed to prove the second prong of the Strickland test – that he was prejudiced by counsel’s performance. Ample probative evidence supports the PCR Judge’s finding that Petitioner failed to prove that a suppression defense pursuant to §17-30-140 would have been outcome determinative to guilt or innocence. Petitioner’s arrest, the search of his vehicle incident to arrest, Petitioner’s custodial confession, and Domonique Blakney’s confession resulted

from the discovery of employment records.

The investigative team determined Paul Whitaker was a person of interest from an independent source categorically distinct from the information obtained from the GPS device. The investigative team decided to interview Paul Whitaker after they established his connection to Petitioner through employment records that were categorically distinct from the evidence obtained from the GPS device.

“The fruit of the poisonous tree doctrine provides that evidence must be excluded if it would not have come to light but for the illegal actions of the police, and the evidence has been obtained by the exploitation of that illegality.” State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (citing Wong Sun v. United States, 371 U.S. 471 (1963)) (internal quotations omitted). “However, the challenged evidence is admissible if it was obtained from a lawful source independent of the illegal conduct.” Id. (internal citations omitted). “The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.” Nix v. Williams, 467 U.S. 431, 443 (1984).

Petitioner contends he was stopped and arrested solely based upon evidence that had been illegally obtained from the GPS device. Yet, the investigative team catalogued six separate suspicious events and occurrences within days of the offense that resulted in the determination that Petitioner was the prime suspect. Evidence collected from the GPS device only showed that Petitioner engaged in frequent travel throughout South Carolina and made numerous visits to commercial establishments. It was determined that Petitioner’s travel habits were uncommon from the prototypical victim of a violent crime.

At most, the evidence merely created an inference that Petitioner might have been on a spending spree; behavior associated with the acquisition of a substantial sum of money.

Specifically, four separate events and occurrences predated the instillation of the GPS device. First, Petitioner provided a suspect version of facts the heist; second, his co-driver suffered substantial injuries but still sought out help while Petitioner, appearing unscathed, claimed he was too injured to leave the crime scene; third, Petitioner was observed moving his shoulder without duress or limitation despite his account of severe injury that resulted in hospitalization; fourth, Petitioner failed a lie detector test. Last and similarly distinct, the investigative team retrieved a blue glove from Petitioner's abandoned trash outside of Petitioner's home that matched the glove collected at the crime scene. Based upon all these independently suspicious occurrences, the investigative team developed Petitioner as their prime suspect.

The chronological account of the investigation showed that the police consulted with Wayne Cook, Express Teller's Director of Corporate Security prior to turning their attentions to Paul Whitaker. **App.p.20; p.21.** Logic dictates that Wayne Cook provided basic employment records that connected Paul Whitaker to Petitioner. Certainly, a 'high brass' corporate security tsar would have had access to any of the company's employment records that connected others employees to Petitioner. Regardless of the uncertainty here, Wayne Cook's disclosure to police that Petitioner recommended Paul Whitaker for a job would have undeniably been inevitable. See State v. Spears, 393 S.C. 466, 482, 713 S.E.2d 324, 332 (Ct. App. 2011). Unlike the controlled delivery investigative procedure employed by law enforcement in Adams, a standard routine procedure for the interdiction of narcotics trafficking, the investigation in this case was unrivaled in scope and resources; the heist held national notoriety. Adams, 409 S.C. at

648, 763 S.E.2d at 345.

Most importantly, Paul Whitaker immediately confessed to Sergeant Isenhoward in a non-custodial setting while on shift at Express Teller. Again, logic dictates that the police would have interviewed a known friend and fellow work colleague of its prime suspect, an 'inside man,' in a heist that involved numerous assailants during early course of the investigation. Paul Whitaker's confession and consent for the police to search his home resulted in the issuance of Petitioner's arrest warrant; not, information of Petitioner's travel itinerary obtained from the GPS device. At the sentencing hearing, Attorney Pride poignantly stated, "Paul Whitaker is the principle defendant in this case that broke this case. And Paul did it because Paul knew right from wrong." **Supp. App.p.105, ln.3-6**. Thus, Petitioner's arrest was supported by probable cause developed from evidence that was provided from an independent source unrelated to the GPS device.

Hutto v. State, 387 S.C. 244, 692 S.E.2d 196 (2010), is applicable to the present case. The Hutto petitioner similarly alleged that his attorney was ineffective for failing to mount a suppression defense pursuant to a statutory violation. Id. at 248, 692 S.E.3d at 198. The Hutto petitioner claimed that the police improperly obtained incriminating evidence of Hutto's physical condition from a probation agent. Id. The Hutto petitioner argued that the victim's identification and the DNA match was rendered inadmissible evidence because it was obtained as a result of the underlying statutory violation. Id. at 249, 692 S.E.2d at 198. In affirming the denial of PCR, the court stated, "[probation agent]'s disclosure was not the sole piece of information that led to the victim's identification and subsequent DNA evidence. The crimewatchers tip was also relied upon in including [Hutto]'s photograph in the line-up." Id. at 250, 692 S.E.2d at 199.

Here, the investigative team decided to interview Paul Whitaker after they established his connection to Petitioner through employment records. Unlike Hutto where the reviewing courts were afforded the benefit of a well-developed trial record, Petitioner's decision to plead guilty denied this Court such luxury. Thus, Petitioner fatally spouts facts born from hinterlands of speculation and innuendo in arguing to this Court for the reversal of the PCR Judge's denial of his PCR Application. See Miller v. Johnson, 200 F.3d 274, 282 (5th Cir. 2000) ("A conclusory allegation of ineffectiveness raises no constitutional issue because a petitioner must show how counsel was deficient and how there was prejudice.").

Kolle v. State, 386 S.C. 578, 591, 690 S.E.2d 73, 80 (2010), is further instructive here. In granting the Kolle petitioner PCR relief, the Circuit Judge found his attorney was ineffective for failure to inspect discoverable State records and materials that, if presented, would have been outcome determinative for suppression under the exclusionary rule.⁸ The Kolle petitioner presented critical evidence that negated the justification made to the General Session Judge at the pre-plea motion hearing that established the exigency for the warrantless entry into the apartment. Id. (emphasis added). Similar to the present case, the Kolle petitioner pled guilty and challenged the voluntariness of the plea in PCR. Notably distinct, the Kolle petitioner actually presented tangible evidence to support his PCR case that included exhibits of the police call/dispatch logs among other things. Id. at 590-91, 690 S.E.2d 79, 80. Here, Petitioner

⁸ The narcotics that established the factual predicate for the State's trafficking case were the inadmissible fruits of an unlawful search. The police responded to notice complaint concerning Kolle's apartment. No one answered the door. The officer observed what he reasoned to be "fresh" evidence of forced entry on the Apartment's exterior. Concerned about the welfare of possible occupants, the officer discovered crack cocaine during his protective sweep. A field test positively identified the narcotics. He obtained a search warrant and returned to the apartment within the hour. More narcotics were recovered. Kolle, at 582-84, 690 S.E.2d at 75-76.

ignored his burden and did not introduce any credible evidence in presuming that Paul Whitaker's confession and the other co-defendant's confessions among penelope of inculpatory evidence was fatally tainted because it was uniquely derived from evidence obtained from the GPS device. App.p.62-63. Simply, the State possessed a mountain of evidence against Petitioner that established his overwhelming culpability.

Alternatively dispositive, the PCR Judge even commented Petitioner failed to meet his most basic burden to prove he would not have pled guilty but for counsel's lack of knowledge of S.C. Code §17-30-140. App.p.132, ln.3-5. See Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) ("The PCR court's findings on matters of credibility are given great deference by this Court."). Petitioner's inconsistent posture in testifying that he was innocent and involuntarily pled guilty but for ineffective assistance of counsel while also testifying that he would have accepted a purported earlier and more favorable guilty plea offer supports the PCR Judge's finding on the matter.

Last, Respondent contends that this case presents another troubling example of yet another competent attorney's abuse of the PCR process in testifying in an unprepared manner tailored to his former client's *post hoc* benefit. See Eberts v. Gaetz, 610 F.3d 415 (7th Cir. 2010) ("[A]n attorney's reflection about what should have been done after the fact is irrelevant to the question of ineffective assistance of counsel."). In contrast, Assistant Solicitor Goldberg presented a meticulous accounting of the sequence of the investigation fitting for the complexity and magnitude of the heist. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." Dalton v. State, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct. App. 2007) (citing Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)).

“Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. Id. at 138, 654 S.E.2d at 874 (citing Crawford v. United States, 519 F.2d 347 (4th Cir.1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir.1976)).

It is of mention that not only did counsel stipulate to the State’s factual recitation of the heist and its subsequent investigation, Attorneys Pride, Kendrick, Swarat, McCulloch, and Johnson also did not dispute the State’s factual recitation. Only Attorney McCulloch contested an isolated matter confined to Jeremy McPhail’s culpability. **Supp. App.p.82.** Thus, the sentencing hearing transcript proves Petitioner’s *post-hoc* attempt to collaterally attack his conviction and sentence to be even more incredible. Simply, Petitioner hoped to receive a less harsh sentence by pleading guilty and now is perturbed that the Plea Judge did not employ her discretion in his favor. See Wolfe v. State, 326 S.C. 158, 165, 485 S.E.2d 367, 371 (1997) (Wishful thinking regarding sentencing does not equal a misapprehension of the constitutional effectiveness of counsel’s performance.)

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. 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

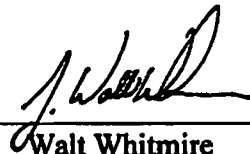
For the foregoing reasons, Respondent submits this Court should deny and dismiss the Petition for Writ of Certiorari as Improvidently Granted.

Respectfully submitted,

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Attorney General**

**WALT WHITMIRE
Assistant Attorney General**

BY:



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ATTORNEYS FOR RESPONDENT

November 11, 2014

STATE OF SOUTH CAROLINA
In Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Appellate Case No. 2012-211091

Darryl Frierson,.....Petitioner,

v.


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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

**Kathrine H. Hudgins, Esquire
Post Office Box 11589
Columbia, South Carolina 29211**

This 12th day of November, 2014.



J. WALT WHITMIRE, # 100793
ATTORNEY FOR RESPONDENT

SWORN to before me this 12th day of November, 2014.



Notary Public for South Carolina.
My Commission Expires: 6/29/20

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

Clifton Newman, Circuit Court Judge

RECEIVED

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S.C. SUPREME COURT

DARRYL FRIERSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-211091

REPLY BRIEF OF PETITIONER

KATHRINE H. HUDGINS
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ATTORNEY FOR PETITIONER.

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ARGUMENT IN REPLY

The guilty plea was rendered involuntary by trial counsel's failure to advise petitioner that he could challenge the placement of a mobile tracking device on petitioner's car by the police without an order pursuant to S.C. Code §17-30-140 and move to suppress any evidence gained as a result of the illegal search.

During the course of an investigation of the robbery of an armored truck, officers with the Richland County Sheriff's Department placed a monitoring device on Frierson's car. (App. p. 114, lines 2-12). The officers did not obtain a warrant or order authorizing placement of the monitoring device. Addressing a warrantless placement and monitoring by the police of a GPS device, the South Carolina Supreme Court in State v. Adams, 409 S.C. 641, 652, 763 S.E.2d 341, 347-48 (2014) (footnote omitted) wrote:

Prior to Jones, no South Carolina appellate decision addressed the constitutionality of the warrantless installation and monitoring of a GPS device. There is, however, a state statute that squarely addresses law enforcement's use of electronic tracking devices. In 2002, as a part of the South Carolina Homeland Security Act, the legislature enacted a statute that provides that "[t]he Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State." S.C.Code Ann. § 17-30-140(A). This statutory requirement "provide[s] law enforcement ... with the proper means and tools to enable them to protect and defend South Carolina and her citizens while preserving individual constitutional rights and liberties." Act No. 339, 2002 S.C. Acts 3625.

The statute referenced by the Court in Adams is S.C. Code §17-30-140. South Carolina Code §17-30-140 provides:

(A) The Attorney General or any solicitor may make application to a judge of competent jurisdiction for an order authorizing or approving the installation and use of a mobile tracking device by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State.

(B) An application under subsection (A) of this section must include:

- (1) a statement of the identity of the applicant;
- (2) a certification by the applicant that probable cause exists to believe that the information likely to be obtained is relevant to an ongoing criminal investigation being conducted by the South Carolina Law Enforcement Division or any law enforcement entity of a political subdivision of this State which may provide evidence relating to any offense or any evidence of any conspiracy or solicitation to commit any violation of the laws of this State;
- (3) a statement of the offense to which the information likely to be obtained relates; and
- (4) a statement whether it may be necessary to use and monitor the mobile tracking device outside the jurisdiction of the court from which the authorization is being sought.

(C) Upon application made as provided under subsection (B), the court, upon a finding that the certification and statements required by subsection (B) have been made in the application and probable cause exists, must enter an ex parte order authorizing the installation and use of a mobile tracking device. The order may authorize the use of the device within the jurisdiction of the court and outside that jurisdiction but within the State of South Carolina if the device is installed within the jurisdiction of the court.

(D) A court may require greater specificity or additional information beyond that which is required by this section as a requisite for issuing an order.

(E) The standards established by the United States Supreme Court for the installation and monitoring of mobile tracking devices apply to the installation and use of any device as authorized by this section.

(F) As used in this section, a "tracking device" means an electronic or mechanical device which permits the tracking of the movement of a person or object.

The Adams case was pending direct appeal at the time the United States Supreme Court decided United States v. Jones, 565 U.S. ___, 132 S.Ct. 945 (2012) (holding the Government's installation of a GPS device constituted a search for Fourth amendment purposes). In Adams the Court found that the warrantless placement of a GPS device violated the Fourth Amendment. The Adams Court further held that suppression of the evidence obtained through the warrantless placement of the GPS device could not be avoided based on the intervening criminal acts doctrine or any other alternate sustaining ground such as the good faith exception.

At the time of Frierson's plea in December of 2008, plea counsel could not have predicted the 2012 Jones decision by the United States Supreme Court or the 2014 Adams decision by the South Carolina Supreme Court. Plea counsel, however, should have been aware of the requirements of S.C. Code §17-30-140. Counsel admitted that he was unaware of S.C. Code §17-30-140. (App. p. 101, lines 21 – p. 102, lines 1-3). Counsel admitted that S.C. Code §17-30-140 could have been used to support a motion to suppress based on the State's failure to comply with the statute. (App. p. 104, lines 13-24). Counsel was ineffective in not advising Frierson about the existence of the statute that could have been used to challenge the placement of the tracking device and suppress critical evidence. The guilty plea not knowing and intelligent and was rendered involuntary based on counsel's deficient performance.

Respondent argues that, "The PCR judge correctly found petitioner failed to prove counsel's lack of knowledge of an obscure and dormant statute constituted deficient performance." (Brief of Respondent p. 9). The Court in Adams, however, did **not** find S.C. Code §17-30-140 obscure or dormant as it provided grounds against the State's argument that the good faith exception should apply to the officer's placement of the GPS device without a

warrant. In Adams, 409 S.C. 641, 652-53, 763 S.E.2d 341, 348 (2014) (footnote omitted) the Court wrote:

At the suppression hearing, the State acknowledged to the trial court that the officers involved in the investigation did not know about this statutory requirement but sought to justify the failure to obtain a court order pursuant to the statute on the basis that the officers “didn't know they had to.” We reject this proposition, for it is a well-established principle, often advanced by the State in criminal prosecutions, “that ignorance of the law is no excuse.” State v. Binnarr, 400 S.C. 156, 160 n. 7, 733 S.E.2d 890, 892 n. 7 (2012). There would be a “fundamental unfairness [in] holding citizens to ‘the traditional rule that ignorance of the law is no excuse,’ while allowing those ‘entrusted to enforce’ the law to be ignorant of it.” United States v. Chanthasouvat, 342 F.3d 1271, 1280 (11th Cir.2003) (internal citation omitted) (quoting Bryan v. United States, 524 U.S. 184, 196, 118 S.Ct. 1939, 141 L.Ed.2d 197 (1998)). In fact, the officers' lack of knowledge of the existence of section 17-30-140 is exacerbated in this case because the statute had been in effect for almost *six years* at the time the NCPD was investigating Adams.

Because the only binding law in this case was a statute that *forbade* law enforcement officers from installing a GPS device on Adams' car without court authorization, there is no support for the State's invocation of the good-faith reliance exception as an additional sustaining ground to uphold the conviction.

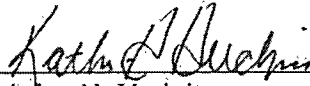
Counsel was ineffective in failing to determine and advise Frierson about a motion to suppress evidence based on the officer's failure to comply with the requirements S.C. Code §17-30-140. There is a reasonable probability that but for counsel's deficient performance, Frierson would have proceeded to jury trial in order to move to suppress evidence obtained as a result of the warrantless placement of the GPS device. As plea counsel testified at the PCR hearing, “I think the most damning thing for Mr. Frierson was his own statement. And I think the mobile tracking device, if we won that argument at a hearing, then we could have got his own, Mr. Frierson's, statement suppressed, and then at least we'd have a fighting chance at trial. We could just say that the other co-defendants are just blaming him because he's the obvious fall guy. That would have been my advice to him. You know, of course it would have been Mr.

Frierson's decision whether he wanted to take it." (App. p. 123). Frierson testified that if he had known about the statute, he would not have pled guilty and instead would have proceeded to trial. (App. p. 77, lines 19-25; p. 90, lines 9-23). Frierson met his burden of proving deficient performance by plea counsel rendering the guilty plea involuntary.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.

Respectfully submitted,


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of November, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
Clifton Newman, Circuit Court Judge

DARRYL FRIERSON,

PETITIONER,

V.

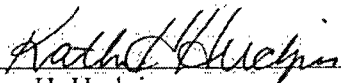
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APPELLATE CASE NO. 2012-211091

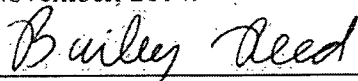
CERTIFICATE OF SERVICE

I certify that a true copy of the reply brief of petitioner, in this case has been served on Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 18th day of November, 2014.


Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of November, 2014.

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