

{ STATE OF SOUTH CAROLINA }
{ IN THE SUPREME COURT }

APPEAL FROM ORANGEDURE COUNTY
HONORABLE KRISTA LEE HARRINGTON CIRCUIT COURT JUDGE

{ APPELLATE CASE No. 2016 - 000855 }

MARIO SHIVERS # 344174
PETITIONER

v. { PETITIONER'S PRO'SE RESPONSE BRIEF }

STATE OF SOUTH CAROLINA
RESPONDENTS

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JAN 05 2017

S.C. SUPREME COURT

RESPECTFULLY SUBMITTED
s. Mario Shivers

PRO'SE PETITIONER

MCCORMICK 9/2 F-24-1-
386 REDEMPTION WAY
MCCORMICK, SOUTH CAROLINA

DATED: 12/29/16

29899

{ STATE OF SOUTH CAROLINA }
{ IN THE SUPREME COURT }

APPELLATE CASE No. 2016-000855

{ CERTIFICATE OF SERVICE }

I AM THE PETITIONER IN THE ABOVE REFERENCED MATTER. AND I DO
HEREBY CERTIFY THAT A COPY OF PETITIONER'S PROPOSED RESPONSE
HAS BEEN SERVED ON OPPOSING COUNSEL BY DEPOSITING A COPY
OF THE SAME IN THE UNITED STATES MAIL POSTAGE PREPAID
AND ADDRESSED TO: AIAN WILSON ATT. GEN. FOR S.C.

POST OFFICE BOX 11549

COLUMBIA, SOUTH CAROLINA

29808

RESPECTFULLY SUBMITTED

Maria Shivers

M^S COAMICK 9/2 F-4-A

SUBSCRIBED BEFORE ME THIS

386 REDEMPTION WAY

29 DAY OF December 2016

M^S COAMICK, SOUTH CAROLINA

Franklin

29899

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES 12/16/2019

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{ ISSUES PRESENTED }

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2.) FAILURE TO PRESENT MISIDENTIFICATION DEFENSE

3.) FAILURE TO PRESERVE CLOSING ARGUMENT

{ STATEMENT }

AN ORANBEBURGS COUNTY GRAND JURY INDICTED PETITIONER FOR MURDER,
BURGLARY IN THE FIRST DEGREE, ARMED ROBBERY, POSSESSION OF A
WEAPON DURING THE COMMISSION OF A VIOLENT CRIME AND KIDNAPPING
DURING THE MAY 2010 TERM.

ON FRIDAY MARCH 12, 2010 THEN MINOR PATRICK T. CLAIMED THAT ALONG
WITH PETITIONER HE AND FOUR OTHERS MEN PLANNED TO PURCHASE
MARIJUANA PRIOR TO ROBBING SELLER.

APP. 466 L - 23 - 468 1-05 - 480 1-4 - 480 - 1-2

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{ ARGUMENT }

THE PCR COURT ERR IN DENYING PETITIONER RELIEF WHERE TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO CALL TWO ALIBI WITNESSES TO TESTIFY AT PETITIONER'S TRIAL.

THE PETITIONER ALLEGED THAT TRIAL COUNSEL DID NOT ADEQUATELY INVESTIGATED HIS CASE, AND HAD COUNSEL PROPERLY INVESTIGATED THE CASE COUNSEL WOULD HAVE DISCOVERED PETITIONER WAS AT HOME WHEN THE ALLEGED INCIDENT OCCURED, THAT PETITIONER YOUNGER BROTHER AND EX-GIRLFRIEND WOULD TESTIFY TO THAT EFFECT.

. . . . HAD COUNSEL CONDUCTED AN ADEQUATE INVESTIGATION COUNSEL WOULD HAVE DISCOVERED THAT, PATRICK T. WAS A MINOR AT THE TIME OF THE ALLEGED CRIME

. . . . THAT PATRICK T. A MINOR WAS UNCONSTITUTIONALLY QUESTIONED BY THE POLICE, AND GAVE STATEMENTS WITHOUT A GUARDIAN PRESENCE OR CONSENT.

THE PETITIONER FILED A MOTION FOR FUNDING IN ORDER TO HIRE AN INVESTIGATOR TO CONDUCT AN ADEQUATE INVESTIGATION.

A HEARING WAS HELD ON MAY 29, 2014 AT THE DORCHESTER COUNTY COURTHOUSE, PETITIONER AND COUNSEL WERE PRESENT, THE COURT DENIED THE MOTION BY WRITTEN ORDER AUGUST 22, 2014

COUNSEL STATED HE MET WITH PETITIONER ON NUMEROUS OCCASIONS AND DISCUSSED, DISCOVERY, AND DEFENSES AVAILABLE TO PETITIONER

. . . . COUNSEL STATED HE FILED A TIMELY NOTICE OF ALIBI WHERE HE LISTED PETITIONER'S YOUNGER BROTHER AND FORMER EX-GIRLFRIEND AS WITNESSES.

... COUNSEL STATED HE CONTACTED BOTH ALIBI WITNESSES.

... COUNSEL STATED PETITIONER'S THEN GIRLFRIEND WAS NOT WILLING TO TESTIFY IN THE CASE, ... WHAT DOES THAT HAS TO DO WITH THE FORMER GIRLFRIEND TESTIMONY?

... COUNSEL FURTHER STATED AFTER SPEAKING WITH PETITIONER'S YOUNGER BROTHER HE CONCLUDED HIS TESTIMONY WOULD NOT BE HELPFUL.

{ FARETTA V. CALIFORNIA } 422 US 806 95 S.Ct. 2585 45 LL. Ed 2d 63 (1975)

THE SIXTH AMENDMENT RIGHT TO CONFRONTATION NOTICE AND COMPIUSORY PROCESS GUARANTEES THAT A CRIMINAL CHARGE MAY BE CALLED THROUGH THE CALLING OF INTERROGATIONS OF FAVORABLE WITNESSES AND IN THE ORDERLY INTRODUCTION OF EVIDENCE THESE BASIC RIGHTS ARE APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT ESSENTIALLY CONSTITUTIONALIZED OF THE RIGHT TO PRESENT A DEFENSE IN AN ADVERSE CRIMINAL TRIAL.

AN ALIBI WOULD HAVE COUNTERED THE STATES MOST DAMAGING PEICE OF EVIDENCE; ... THE TESTIMONY OF A SIXTH CO-DEFENDANT.

App. 1331 L-14-19

COUNSEL SERVED NOTICE OF ALIBI ON PROSECUTION

App. 1308 L-8-11

... HOWEVER COUNSEL DID NOT CALL EITHER WITNESS

... NOR DID COUNSEL SUPREONA NEITHER ALIBI WITNESS

PETITIONER YOUNGER BROTHER SPOKE WITH COUNSEL AND WAS PRESENT AT THE TIME OF TRIAL.

App. 1333 L-25- 1333 L-12

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CRIMINAL DEFENSE ATTORNEYS HAVE A DUTY TO UNDERTAKE A REASONABLE INVESTIGATION WHICH AT A MINIMUM INCLUDES INTERVIEWING POTENTIAL WITNESSES AND MAKING INDEPENDANT INVESTIGATIONS OF THE FACTS AND CIRCUMSTANCES OF THE CASE.

{ EDWARDS V. STATE } 393 S.C. 449, 456 710 S.E. 2d 60, 64 (2011)

THE DUTY TO INVESTIGATE A POTENTIAL WITNESS IS EVEN MORE CRITICAL WHEN THAT WITNESS MIGHT PROVIDE ALIBI, ACCORDINGLY THE SIXTH AMENDMENT REQUIRES THAT CRIMINAL DEFENSE ATTORNEY THOROUGHLY INVESTIGATE POTENTIAL ALIBI WITNESSES.

THE PETITIONER CORRECTLY ASSERTS THAT COUNSEL WAS INEFFECTIVE BECAUSE HE DID NOT CALL EITHER ALIBI WITNESSES TO THE STAND DURING PETITIONER'S TRIAL. THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION GUARANTEES A DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

U.S. CONST. AMEND VI;

{ STRICKLAND V. WASHINGTON } 466 U.S. 668 (1984)

THE UNITED STATES SUPREME COURT HAS CREATED A TWO PRONG TEST TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL BY WHICH A (PCR) APPLICANT MUST SHOW:

- COUNSEL'S PERFORMANCE WAS DEFICIENT AND
- THE DEFICIENT PERFORMANCE PREJUDICED THE DEFENDANT.

{ SUPPORTING FACTS }

- COUNSEL FAILED TO SUBPOENA EITHER ALIBI WITNESS
- COUNSEL FAILED TO INFORM PETITIONER THAT HIS YOUNGER BROTHER TESTIMONY WOULD NOT BE HELPFUL.

SUCH CONDUCT FALLS WITHIN THE GAMUT OF DEFICIENCY.

..... COUNSEL KNOWINGLY AND WILLINGLY ABANDON PETITIONER'S ALIBI WITHOUT NOTICE TO PETITIONER.

..... COUNSEL KNOWINGLY AND INTELLIGENTLY WAIVED OR ABANDONED PETITIONER'S ALIBI AND IT WAS FLAGRANTLY AND HIGHLY PREJUDICIAL FOR COUNSEL TO INTRODUCE PARSLEY'S PRIOR STATEMENT BECAUSE DOING SO WAIVED FINAL ARGUMENT AND GAVE THE SOLICITOR A TACTICAL ADVANTAGE WHICH WAS HIGHLY PREJUDICIAL.

{ STATE V. CAMERON } 428 S.E. 2d 10, 311 S.C. 204 (1993)

HOLDING THAT THE DEFENDANT IS CONSTITUTIONALLY GUARANTEED A FAIR TRIAL BY AN IMPARTIAL JURY AND TO FULLY SAFEGUARD THIS PROTECTION THE JURY MUST RENDER ITS VERDICT FREE FROM OUTSIDE INFLUENCES OF WHATEVER KIND AND NATURE THEREOF.

THE PETITIONER ASSERTS THAT IT WAS HIGHLY PREJUDICIAL WHEN COUNSEL INTRODUCED PARSLEY PRIOR STATEMENT, THE PETITIONER WAS DENIED THE RIGHT TO A FAIR TRIAL AND PETITIONER'S TRIAL WAS NOT FREE FROM IMPARTIALITY UNDER (5, 21) + (5, 17) OF THE S.C. CONSTITUTION.

THE PETITIONER RESPECTFULLY SUBMITS THAT THE INTRODUCTION OF PARSLEY PRIOR STATEMENT CANNOT CONSTITUTIONALLY BE HELD A VALID TRIAL STRATEGIC REASON, IN THE FACE OF AN ALIBI AND SUCH FLAGRANT CONDUCT IS HIGHLY PREJUDICIAL.

APP. 538 L-8 - APP. 539 - 540 L-1-25

COUNSEL KNEW HIS CONDUCT WAS HIGHLY PREJUDICIAL AND IT FURTHER COMPROMISED THE ENTIRE TRIAL, HOW COULD SUCH CONDUCT BE BEST FOR MR. SHIVERS, IN THE FACE OF ABANDONING AN ALIBI?

App. 541 - App 545 L-1-25

UNDER THE UNITED STATES CONSTITUTION THAT ALLOWS, THAT REQUIRES THAT A DEFENDANT HAVE A FAIR TRIAL, . . . HIS DAY IN COURT, . . . DUE PROCESS. PETITIONER ASSERTS THAT THE STATE BEING ALLOWED TO JOIN ALL OF THIS HAS THROWN ALL OF THAT OUT THE WINDOW, AND WE ARE FORCED TO WORK TOGETHER AND AS A TEAM AND WE CERTAINLY SHOULD NOT HAVE TO DO THAT.

{ FAILURE TO PRESENT MISIDENTIFICATION DEFENSE }

THE PETITIONER ASSERTS THAT COUNSEL SHOULD HAVE PRESENTED A DEFENSE OF MISIDENTIFICATION TO THE JURY IS WITH MERIT.

{ U.S.V. TELFARE }

STATES THAT WHEN THERE IS EVIDENCE THAT AN EYE WITNESS HAS MADE AN IDENTIFICATION, . . . THE IDENTIFICATION, . . . IS CERTAINLY NOT CERTAIN WHICH MS. PARLEY STATED, . . . SHE IS NOT SURE, . . . SHE COULDN'T BE SURE, . . . IT'S IMPOSSIBLE IT WASN'T HIM.

THE TRIAL COURT CONDUCT AN INCAMERA HEARING { NEIL V. BIGGERS } COUNSEL KNEW BEFOREHAND AND STILL INTRODUCED THE HIGHLY PREJUDICIAL STATEMENT, . . . WITHOUT CONSULTING EITHER ATTORNEY, . . . NOR DID COUNSEL INFORMED PETITIONER THUS COMPROMISING THE OTHER ATTORNEYS.

App 133 - 136 L-1-25

App 1062 L-20-25

{ U.S.V. BROOKS } CITES { U.S.V. TELFARE }

THIS IS BASICALLY A CAUTIONARY INSTRUCTION

App 1063 - 1064 1-3-7

THE INSTRUCTION STATES WHEN A PARTICIPANT IN THE ACT PRESENTS EYE WITNESS IDENTIFICATION ABOUT WHO PARTICIPATED A CAUTIONARY INSTRUCTION CAN BE GIVEN, IF THAT PERSON HAS BEEN PAID FOR THEIR TESTIMONY, OR IF THEY RECEIVED IMMUNITY FOR THEIR TESTIMONY, OR IF THEY RECEIVED ANY SORT OF BENEFIT.

THE PETITIONER ASSERTS THAT PLEADING TO VOLUNTARY MANSLAUGHTER GIVES A PERSON A BENEFIT. SO CERTAINLY HIS TESTIMONY HAS PROVIDED A BENEFIT TO HIM.

App. 1070 1-9-14

{ FAILURE TO PRESERVE FINAL CLOSING ARGUMENT }

THE PETITIONER RESPECTFULLY SUBMITS THAT COUNSEL WAS UNDULY INEFFECTIVE AND THAT COUNSEL'S CONDUCT WAS FLAGRANT AND HIGHLY PREJUDICIAL AND UNCONSTITUTIONAL AND THAT IT DENIED PETITIONER DUE PROCESS AND THE PETITIONER WAS HIGHLY PREJUDICED BY COUNSEL'S PERFORMANCE AND PETITIONER HAS SHOWN A DEPRIVATION OF HIS DUE PROCESS RIGHTS BY THE COMPROMISE, DOING SO WITHOUT CONSULTING NEITHER ATTORNEY AND THIS CANNOT BE HELD TO BE A VALID STRATEGIC DECISION WHERE COUNSEL KNOWINGLY AND INTELLIGENTLY ABANDONED PETITIONER'S AFDI DEFENSE.

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{ CONCLUSION }

FOR THE FOREGOING REASONS, THE PETITIONER REQUEST THAT THE COURT GRANT HIS APPLICATION FOR POST-CONVICTION RELIEF AND REVERSE AND REMAND THE CASE FOR A NEW TRIAL.

RESPECTFULLY SUBMITTED
S. Mario Chivers

PRO'SE PETITIONER

MCCORMICK #1 F-H-A

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