

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Post Conviction Relief
Honorable D. Craig Brown, Circuit Court Judge

Appellate Case No. 2015-002033

Gregory Daniels, 297449,.....Petitioner,

vs.

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

PETITION FOR
WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

- I. The lower court erred in finding that trial counsel did not render ineffective assistance of counsel due to his failure to properly prepare and investigate prior to trial since such a finding was premised on an error of law due to a presumption of a valid strategy on the part of deceased trial counsel.

- II. The lower court erred in failing to make a finding of ineffective assistance and prosecutorial misconduct due to the allegations raised and testimony offered regarding Gary Bostic.

STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact and conclusions of law. McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1984). When it is argued that the lower court's decision is controlled by an error of law, a *de novo* review is required. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

STATEMENT OF THE CASE

I. General Sessions

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. The Florence County Grand Jury indicted Petitioner in April 2009 for murder and possession of a weapon during the commission of a violent crime (2009-GS-21-427, Counts 1 & 2). App. p. 639. Jack W. Lawson Jr., Esquire, represented Petitioner. On April 16, 2010, a jury convicted Petitioner as indicted. The Honorable Thomas A. Russo sentenced Petitioner to life in prison for murder and a concurrent five (5) years for weapon possession. App. pp. 641, 647.

Petitioner filed a timely notice of appeal. Tristan M. Shaffer, Esquire, and Wanda H. Carter, Esquire, of the Office of Appellate Defense represented Petitioner on appeal. The South Carolina Supreme Court affirmed Petitioner's conviction on October 10, 2012. State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012). App. pp. 643, 659. The remittitur was returned to the circuit court on October 26, 2012. App. p. 655.

II. Post Conviction Relief

On February 1, 2013, Petitioner filed an Application for Post Conviction Relief filed February 1, 2013. App. p. 671. The State filed a Return on or about September 17, 2013. On September 22, 2014, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief, which amended the Application by adding the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to provide Applicant with a complete copy of discovery and review it with him prior to trial.
2. Ineffective assistance of trial counsel for failure to conduct an independent investigation and properly prepare Applicant's case for trial. Ineffective assistance of trial counsel for failure to call witnesses at trial. Specifically, failure to

interview Gary Bostic and subpoena him for trial, which would have resulted in the discovery of a Brady violation and/or prosecutorial misconduct for failing to disclose the law enforcement interview of Gary Bostic. See attached Affidavit of Gary Bostic, Transcript pp. 598, lns. 22-25. Alternatively, prosecutorial misconduct and/or newly discovered evidence of a Brady violation regarding the failure of the State to disclose the law enforcement interview of Gary Bostic.

3. Ineffective assistance of trial counsel for failure to object to the State being allowed to proceed on two theories: murder for hire and argument at cookout. Failure to file a motion to elect theory, motion to quash indictment, raise the argument on directed verdict or request a charge for the jury to be unanimous on the theory.
4. Ineffective assistance of trial counsel for failure to raise a third party guilt defense and utilize exculpatory evidence at trial.
5. Ineffective assistance of trial counsel for failure to make all viable contemporaneous objections at trial.
6. Ineffective assistance of trial counsel for failure to review Applicant's statement with him prior to trial, utilize Applicant at the Jackson v. Denno hearing and make a proper argument for suppression of Applicant's statement.
7. Ineffective assistance of trial counsel for failure to utilize Applicant as a witness at trial.
8. Ineffective assistance of trial counsel for failure to investigate and object at trial to the search and resulting records obtained on and from Applicant's phone.
9. Ineffective assistance of trial counsel for failure to advise Applicant of the State's intention to use his girlfriend's letters as evidence against him, failure to utilize the complete letters and/or additional letters to put the selected text into context, failure to prepare and utilize Applicant to testify in response to the introduction of the letters.
10. Ineffective assistance of trial counsel for failure to impeach the state's witnesses with contradictory testimony, oral and written statements and other discovery documents.
11. Ineffective assistance of trial counsel for failure to advise Applicant of the evidence the state intended to introduce involving the phone call between the victim and Gass. Failure to effectively argue against the admission of the testimony/evidence under the present sense impression exception.

12. Ineffective assistance of trial counsel for failure to review the statements of Andre Bradley and Jasmine Barrett and proffer agreement of Andre Bradley with Applicant prior to trial. Failure to make the record clear as to the disclosure of the proffer agreement by the State and ensure the issue was properly preserved for appeal. Failure to effectively cross-examine Andre Bradley and Jasmine Barrett.
13. Ineffective assistance of trial counsel for failure to properly preserve the arguments made by appellate counsel regarding the impermissible jury charge. See State v. Daniels, 410 S.C. 251, 737 S.E.2d 473 (2012).
14. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal and address the credibility and inconsistent testimony of the State's witnesses. Specifically, failure to raise the following motions/objections made by trial counsel:
 - a. Objection to the testimony of Gass regarding the call with the victim and the admission of such under the present sense impression exception.
 - b. Objection to the admission of the Applicant's letters to his girlfriend.
 - c. The Jackson v. Denno hearing and admission of Applicant's statement.
15. Pursuant to Rule 15(b), SCRPC, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

App. p. 694.

An evidentiary hearing was set for October 6, 2014. On September 29, 2014, Respondent filed a Motion for Continuance and Motion for Discovery. App. p. 700, 704. On September 30, 2014, Petitioner, through counsel, submitted a Motion in Opposition to Respondent's Motion for Continuance and Discovery. App. p. 704. On October 1, 2014, the Honorable William H. Seals, Jr., issued an Order granting Respondent's request for a continuance. App. p. 710. On October 6, 2014, a motion hearing was held in front of the Honorable Edgar W. Dickson. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Croom Hunter, Assistant Attorney General. After hearing from both parties, the Honorable Edgar W. Dickson ordered that an evidentiary hearing be set for a full day of Petitioner's choosing during the next term of court and granted Respondent's request for limited discovery.

An Order Granting Limited Discovery was issued on October 22, 2014, which was filed on October 30, 2014. App. p. 739.

An evidentiary hearing was conducted at the Florence County Courthouse on April 14 and 17, 2015 in front of the Honorable D. Craig Brown. App. p. 745. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by J. Croom Hunter, Assistant Attorney General, and Josh Thomas, Assistant Attorney General. Petitioner was called to the stand, along with the following witnesses on his behalf: Tristan Shaffer, Esquire, Gary Bostic, Johnny Etheridge, Esquire, Andrew Williams, and Pete Skidmore. Respondent called the following witnesses: Lieutenant Timothy Compton, Grayson Smith, Esquire, and John Jepertinger, Assistant Solicitor for the Twelfth Judicial Circuit.¹ Petitioner attempted to admit thirty-one exhibits. Respondent admitted one exhibit. At the conclusion of the hearing, the Honorable D. Craig Brown instructed the parties to prepare proposed orders. Following the submission of proposed orders, an Order of Dismissal was issued by the Honorable D. Craig Brown on June 8, 2015 and filed on June 10, 2015. App. p. 1168.

On June 25, 2015, Petitioner timely filed a Motion Pursuant to Rule 59 (a) & (e), SCRCF. App. p. 1200. Respondent filed a Return on or about June 30, 2015. App. p. 1233. The Honorable D. Craig Brown issued an Order of denial on August 5, 2015, which was filed on August 24, 2015. App. p. 1236. This appeal timely follows.

¹ At the time of trial Timothy Compton had the title "Investigator" and will be referred to as Investigator Compton and Lieutenant Compton.

ARGUMENT

- I. The lower court erred in finding that trial counsel did not render ineffective assistance of counsel due to his failure to properly prepare and investigate prior to trial since such a finding was premised on an error of law due to a presumption of a valid strategy on the part of deceased trial counsel.

In order to prove counsel was ineffective, a PCR applicant must show: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 Rhodes v. State, 349 S.C. 25, 561 S.E.2d 606 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Without a doubt, “[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986). “[W]hile the scope of a reasonable investigation depends upon the number of issues, ‘at a minimum, counsel has a duty to interview potential witnesses and to make an **independent** investigation of the facts and circumstances of the case.’” Id. at 331-32, 642 S.E.2d at 597 (quoting Troedel v. Wainwright, 667 F. Supp. 1456, 1461 (S.D.Fla.1986) (emphasis in original)).

In the instant case, Jack Lawson, trial counsel, lost his battle to cancer eight months after handling Petitioner’s trial; therefore, his testimony could not be offered to address whether he reviewed all of the evidence with Petitioner, how he prepared with Petitioner for trial, what strategy factored into his presentation of Petitioner’s defense and if Petitioner made a fully informed decision when he chose not to take the stand at trial. Over Petitioner’s objection, the lower court allowed the State to offer testimony regarding the reputation of Jack Lawson as an excellent attorney, but, as was argued by Petitioner’s counsel, the lower court was in error when he allowed reputation testimony to refute the specific allegations made by Petitioner. App. pp.

991, 1036. See Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009) (The decision of the PCR judge may be reversed when it is controlled by an error of law). In Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) this Court made the following clear:

Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. Roseboro, supra.

Here, the lower court could not assess the reasonableness of counsel's preparation or trial strategy since counsel was not present to testify and the testimony the court allowed from the State's witnesses did not address the specific allegations made by Petitioner.² See Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008). (Reversing the lower court and granting relief since trial counsel did not testify at the PCR hearing and did not offer an objectively valid strategic reason for not calling witnesses). Nevertheless, the lower court held that is "must presume" a "valid strategy" and relied upon this presumption thus committing an error of law requiring reversal. App. p. 1179.

Furthermore, the record establishes that trial counsel rendered ineffective assistance of counsel in his preparation with Petitioner prior to trial, which resulted in Petitioner not being utilized as a witness at trial and a prejudicial outcome for Petitioner in both the circuit and appellate court. Here, prejudice is evidenced by Petitioner being found guilty despite the State's admission at trial that there was no physical evidence or eyewitnesses to the murder. App. p. 83. Clearly, the defense fell short, when this Court reasoned that Petitioner's conviction should not

² The State did call Grayson Smith, Esquire, who served as second chair, but his testimony established that Petitioner's case was solely handled by Mr. Lawson and he only testified to observing counsel working on Petitioner's case but to no meetings or interaction between counsel and Petitioner. App. pp. 1034-5, 1039-42. He also explained that he only assisted as a note taker and in making arguments on the court's charge at trial. App. pp. 1038-9.

be reversed since the State “presented substantial circumstantial evidence that Appellant committed the crime charged.” Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 478. As a result of a thorough review of the record, and in consideration of the testimony and evidence offered at the evidentiary hearing, Petitioner submits that counsel’s below detailed ineffective assistance on the matters relating to preparation and investigation affected the outcome of his trial and appeal.

As is addressed in detail herein, Petitioner offered numerous evidentiary items, turned over to PCR counsel as being contained in trial counsel’s file, that he claimed that counsel failed to review with him.³ App. pp. 792-3. He explained how he would have wanted for counsel to utilize such in the preparation and defense of his case and how such would have affected his

³ In contrast to the lower court accepting opinion testimony and speculation regarding trial counsel to refute Petitioner’s allegations, the lower court sustained the State’s objections to the admission of the majority of the evidentiary items that were contained in trial counsel’s file and turned over to the State in advance of continuance obtained in October of 2014. App. pp. 717-18, 1019-20, 1073. It appears that the State made a hearsay objection to the exhibits, which the court through commentary and a chambers meeting chose to sustain, but it also appears the court found the evidence was cumulative to Petitioner’s testimony. App. pp. 810, 813-20, 824, 826, 860, 865-69, 872, 886, 908, 911. As was argued to the lower court, Petitioner submits that the lower court’s ruling to exclude a majority of the exhibits offered was in error. PCR counsel’s reasoning for moving to admit the exhibits was to show it was in counsel’s file, which was not disputed by the State, and was available to be utilized in preparation of the defense. App. pp. 1008-16. This reasoning is very similar to the reasoning found in Player v. Thompson, 259 S.C. 600, 609-10, 193 S.E.2d 531, 535 (1972), as follows:

"Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of- court asserter." Our Court has recognized this sound and very basic proposition in Watson v. Wall, 239 S.C. 109, 121 S.E. (2d) 427 (1961). Also See 5 Wigmore on Evidence § 1361 (3rd ed. 1940). "If, then, an utterance can be used as circumstantial evidence, i.e. without inferring from it as an assertion to the fact asserted, the Hearsay rule does not oppose any barrier, because it is not applicable." 6 Wigmore on Evidence § 1788 (3rd. ed. 1940). It would not be improper in this case for the plaintiff to elicit testimony from Nancy Carder that a filling station attendant stated to both Mrs. Thompson and her that the automobile had bad tires. It would be receivable, not as a testimonial assertion by the attendant to prove the fact of slick tires, but as indicating that Nancy Carder and Mrs. Thompson obtained knowledge of the slick tires, the fact of slick tires being proved by other evidence. Inasmuch as the testimony was not offered to prove the truth of the matter stated, but solely to prove notice, which is a state of mind, the hearsay rule does not apply.

Petitioner submits it was error for the lower court to sustain the State’s objection on the basis of hearsay on twelve exhibits that were contained in trial counsel’s file and provided as part of the discovery in the underlying criminal case. This error hindered Petitioner in further satisfying his burden of proof and this Court from conducting a full and proper review of the items testified to by Petitioner that were located in trial counsel’s file and integral to the allegations of ineffective assistance of counsel.

decision to take the stand at trial. Petitioner also offered the testimony of Pete Skidmore, private investigator, and Andrew Williams to demonstrate how further preparation and investigation would have materially aided his defense. App. pp. 949-58.

At the evidentiary hearing, Petitioner explained that he met with trial counsel two to three times at the detention center, and he attempted to regularly communicate with counsel when he was present at the jail meeting with other clients and through written correspondence. App. pp. 789-90. At the evidentiary hearing, Respondent admitted a letter written by Petitioner to counsel. This letter clearly demonstrates that Petitioner was trying to raise issues he recognized in the case documents he was provided, but the letter, despite being introduced as Respondent's exhibit, fails to address what counsel did in response to Petitioner's concerns. App. pp. 936, 1152.

At the evidentiary hearing, Petitioner testified about several issues that pertained to Nyrena Goodman (his girlfriend at the time) who testified for the State. Petitioner explained that Andrew Williams (Petitioner's uncle) was present in the hotel room with himself and Nyrena Goodman and that counsel failed to contact Andrew Williams and utilize him as a witness at trial. App. pp. 800-1. Andrew Williams was called at the evidentiary hearing, and he made it clear that he was never alone in the hotel room with Nyrena Goodman, which directly refutes the testimony she provided at trial.⁴ App. pp. 391-3, 407-10. As is addressed above, counsel did not

⁴ In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), this Court addressed whether trial counsel was ineffective for failing to call a witness at trial. This Court reasoned as follows:

This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C.

testify regarding interviewing Andrew Williams nor did counsel provide a strategic reason for failing to utilize him at trial.

Also, Petitioner testified that counsel failed to put him on notice that the State intended to utilize a number of letters he exchanged with Nyrena Goodman while in the county detention center as evidence against him at trial. App. pp. 803-808, 1092. Petitioner pointed out that counsel informed the Court about what he anticipated the State's plan to be for the letters and made an objection to the introduction of the letters. App. pp. 327-8. Petitioner explained that he would have provided counsel with additional letters and taken the stand to explain the context of the letters, as he did at the evidentiary hearing, if counsel had informed him about and reviewed the letters with him prior to trial. App. pp. 803-11. The lower court failed to recognize that the letters were not a minor piece of evidence as the State quoted and heavily relied upon the letters in their opening and closing arguments. App. pp. 84, 563, 586. More importantly, this Court deemed the letters the "most revealing evidence of guilt" and quoted the letters in reaching the finding that the "State presented substantial circumstantial evidence that Appellant committed the crime charged." Daniels, 401 S.C. 251, 260-63, 737 S.E.2d 473, 478-79. The State provided no testimony that trial counsel reviewed the letters with Petitioner prior to trial, discussed the potential of introducing additional letters, or utilizing Petitioner to refute the letters at trial.

560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, S.C. at 498-99, S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809.

Turning to Petitioner's statements admitted at trial, Petitioner alleged that counsel was ineffective for failing to review the statement with him prior to trial, utilize him as a witness at the Jackson v. Denno hearing, and ultimately call him as a witness at trial to address the statements to the jury. App. p. 834. Petitioner explained that he was arrested on an unrelated charge when he spoke to Investigator Compton and gave the audio recorded statement that was transcribed and admitted at trial. App. p. 837. Petitioner was adamant that he would have requested counsel and not gone forward with the interview if he had known that he was being questioned as a murder suspect.⁵ App. pp. 837-8. Additionally, Petitioner testified that he did not give the statement on September 11, 2008 that Investigator Compton testified to at trial. App. pp. 841-3. At the evidentiary hearing, Respondent did not offer any testimony or evidence to establish that counsel discussed the statements with Petitioner or offer a strategic reason for counsel not utilizing Petitioner as a witness at the Jackson v. Denno hearing or at trial to address the admission and contents of the statements attributed to him.

Additionally, a majority of Petitioner's testimony at the evidentiary hearing centered around counsel's failure to discuss evidence with him that could have been used to establish a third party guilt defense, used as exculpatory or impeachment evidence at trial, or would have caused him to take the stand if it had been addressed with him prior to trial. It appears the lower court completely disregarded Petitioner's testimony regarding all these matters and specifically the following: 1) the testimony of Nyrena Goodman, 2) the investigative report contained in counsel's file regarding the victim being involved as a witness in an unrelated murder case (App. pp. 857-62), 3) the statement and polygraph findings regarding Bernard Cooper (App. p. 862-64), 4) the statement of Brian Timmons and Investigator Compton's testimony regarding

⁵ At trial, Investigator Compton admitted that Petitioner was being held on an unrelated charge, but he intended to get a murder warrant, and Petitioner was not advised of his intention. App pp. 53, lns. 23-24, 58, lns. 12-20.

Timmons (App. pp. 870-2), 5) the information contained in Investigator Compton's report regarding the victim being involved in a robbery the week prior (App. p. 874), 6) the information contained in Investigator Compton's report regarding threats made by the Fludd's father (App. pp. 874-6), 7) the information contained in the investigative reports and audio recordings that Tiesha Brown thought it was "set up" and providing details about threats being made to the victim from a green SUV, seeing Ryan Evans next to the body immediately after hearing the shot, and confronting Evans at the home of Shavonne Gass (App. pp. 876-889), 8) the conflicting/evolving information from Tiesha Brown regarding what she saw and from where (as to the shot and the suspect) (App. pp. 876-897), 9) counsel's failure to fully cross-examine Ryan Evans and Gabriel Peterson and object when the State bolstered their testimony in cross-examination (App. pp. 908-10), and 10) the State's failure to call Reginald Coleman regarding the information he gave to Investigator Compton regarding Gary Bostic paying for the murder of the victim and that such information could be confirmed with inmate Ventrez Davis (App. 798-9).

Despite counsel eluding to "other" reasons for the victim being shot in his opening argument, counsel never addressed these "other" reasons during the course of the trial. App. p. 88. Counsel did not offer a strategic reason for failing to make a motion to present third party guilt evidence or for failing to elicit a majority of the information testified to by Petitioner in cross-examination of the State's witnesses. See Miller v. State, 397 S.C. 108, 665 S.E.2d 596 (2008) (Reversing the lower court and finding counsel was ineffective by inadequately cross-examining a witness related to the defense of mistaken identity and third party guilt).

In addition to his testimony, Petitioner offered the testimony of Pete Skidmore, private investigator, who affirmed that he reviewed Mr. Lawson's file, went to the scene and conducted an investigation. App. pp. 657-61. He specifically testified about his investigation into issues

involving the scene and the information given by Tiesha Brown regarding what she saw and the location from where she saw it. App. pp. 961-981. He also testified about walking the route allegedly taken by the victim and provided a video of it. App. pp. 961-981. He also explained the information he would have provided to trial counsel based upon his investigation. App. pp. 961-983. Respondent did not provide testimony from a private investigator that worked on Petitioner's case to establish what was looked into prior to trial or offer any testimony as to why a private investigator was not called at trial or a request made for the jury to visit the scene, as recommended by Pete Skidmore.

As a final matter regarding counsel's lack of preparation and the impact of such on trial, Petitioner testified that counsel asked him during trial if he knew Andre Bradley and Jasmine Barrett. App. p. 912. Petitioner explained that counsel failed to review the audio statements of Andre Bradley and statement of Jasmine Barrett with him prior to trial, and he explained that he reviewed the audio of each and corresponding transcription for the first time in preparation for his evidentiary hearing. App. pp. 912-919. Petitioner testified that he would have wanted to take the stand to refute their testimony and he would have wanted counsel to further question both of them if he had known that their testimony was going to be utilized against him at trial. App. pp. 912-99. Specifically, the phone call referenced by Mr. Bradley at trial did not appear on the phone records admitted by the State at trial and counsel failed to discuss the call with Petitioner or ask Mr. Bradley about it at trial. App. p. 852. Not only was their testimony considered by the jury without the input of Petitioner, but this Court considered their unrefuted testimony and cited to the testimony of Andre Bradley that Petitioner was paid by Gary Bostic to murder the victim and reasoned that his girlfriend corroborated such in finding that the State presented "substantial circumstantial evidence" against Petitioner. 401 S.C. 251, 260-1, 737 S.E.2d 473, 478.

The record contains ample testimony regarding the evidentiary items that Petitioner would have wanted to review with counsel prior to trial, what he would have wanted to discuss with counsel and how the information contained therein should have been utilized as part of his defense strategy, which would have included him choosing to take the stand at trial. The record is void of any testimony refuting the allegations and testimony of Petitioner or his private investigator, as discussed above, yet the Court found that a valid trial strategy must be presumed. Therefore, Petitioner asks this Court to not ignore his lengthy testimony on the matters addressed above and to not uphold the lower court's findings in the face of it.

In conclusion, Petitioner asks this Court to find that the lower court committed an error of law and should have properly held that trial counsel rendered ineffective assistance of counsel in his preparation with Petitioner prior to trial, which resulted in Petitioner not being utilized as a witness at trial, and a prejudicial outcome for Petitioner in both the circuit and appellate court. Here, the prejudice suffered by counsel's failure is evident since Petitioner was found guilty despite the State's admission at trial that there was no physical evidence or eyewitnesses to the murder. App. p. 83. Clearly, the defense fell prejudicially short, when this Court reasoned that Petitioner's conviction should not be reversed since the State "presented substantial circumstantial evidence that Appellant committed the crime charged." 401 S.C. 251, 260, 737 S.E.2d 473, 478. As a result of a thorough review of the record and in consideration of the testimony and evidence offered at the evidentiary hearing, Petitioner submits that the lower court must be reversed since counsel rendered ineffective assistance in his preparation and investigation which resulted in an unreasonable trial strategy that affected the outcome of Petitioner's trial and appeal.

- II. The lower court erred in failing to make a finding of ineffective assistance and prosecutorial misconduct due to the allegations raised and testimony offered regarding Gary Bostic.

By way of his Amendment, Petitioner made the following allegation:

Ineffective assistance of trial counsel for failure to conduct an independent investigation and properly prepare Applicant's case for trial. Ineffective assistance of trial counsel for failure to call witnesses at trial. Specifically, failure to interview Gary Bostic and subpoena him for trial, which would have resulted in the discovery of a Brady violation and/or prosecutorial misconduct for failing to disclose the law enforcement interview of Gary Bostic. See attached Affidavit of Gary Bostic, Transcript pp. 598, lns. 22-25. Alternatively, prosecutorial misconduct and/or newly discovered evidence of a Brady violation regarding the failure of the State to disclose the law enforcement interview of Gary Bostic.

App. p. 695.

In support of this allegation, an affidavit of Gary Bostic dated September 15, 2014, was attached to the Amendment, which stated:

1. I affirm that I was interviewed by law enforcement regarding the murder of Corey L. Byrd on September 5, 2008.
2. I affirm that I was not contacted by Jack Lawson, Esquire, or anyone on behalf of Gregory D. Daniels prior to the trial held on April 12-16, 2010.
3. I affirm that I was not notified about the trial held on April 12-16, 2010 nor was I transported as a witness to the Florence County Courthouse.
4. I affirm that I am willing to testify to the above information.

App. p. 698.

At the evidentiary hearing, Gary Bostic was called to the stand. App. p. 768. He affirmed the information contained in his Affidavit. App. 773-4. He further explained that law enforcement spoke with him about the murder investigation of Corey Byrd. App. pp. 770-71. He told them he was not involved, and he heard nothing further from any of the parties. App. p. 771. He explained that he received probation for a charge involving an allegation of shooting at Corey Byrd. App. p. 770. He acknowledged that he had read through the trial transcript and was

surprised to see his name in it. App. p. 770. When asked about Jack Lawson's statement in closing that no one ever spoke to him, he responded that that the detectives did speak to him. App. p. 772. He affirmed, as stated in his Affidavit, that he was not contacted by anyone on behalf of Gregory Daniels. App. pp. 771-2. He further affirmed, as stated in his Affidavit, that he would have spoken with trial counsel or an investigator for Gregory Daniels, and he would have testified at trial for the defense. App. pp. 771-2.

When Johnny Etheridge, Esquire, was called to the stand, he recalled his representation of Bostic prior to his current incarceration, which began in September 2010. App. p. 781. He recalled being contacted by Investigator Compton about meeting with Bostic about another "violent crime." App. pp. 781-2. He recalled that the meeting did not take place in his office nor did he attend since he had a good relationship with law enforcement. App. p. 781. When asked, he explained that he knew that the meeting took place since Bostic reported back to him about it. App. p. 783.

In response, the State called John Jupertinger, Solicitor for the Twelfth Circuit, to the stand. App. p. 987. He testified that no one interviewed Bostic in relation to the investigation of Petitioner. App. p. 989. He opined it would have been a waste of time to interview Bostic. App. p. 989. On cross-examination, he deferred to the record as to whether the State's theory at trial was that Bostic paid Petitioner to commit the murder at issue. App. p. 994. Nevertheless, he answered affirmatively that Bostic could have been charged with solicitation to commit murder or as a conspirator but not for the principal offense. App. pp. 994-5. When asked about his determination regarding Bostic's involvement, the following took place:

Question: And what --- investigation did you do to determine Mr. Bostick's involvement in this case?

Answer: I was not trying Mr. Bostick.

Question: But you were trying Mr. Daniels on the theory that Mr. Bostick hired him to commit this murder; correct?

Answer: My main focus was to prosecute Mr. Daniels for the murder.

App. p. 995, lns. 3-10.

When asked, he deferred to the record regarding eliciting testimony from Andre Bradley that Bostic hired Petitioner to kill the victim. App. p. 996. He then gave additional references to connections between Petitioner, Bostic, and the murder, including the motive of “bad blood” for Bostic with the victim. App. pp. 997-8. In contrast, he responded that he could not speak to why Bostic was not charged. App. pp. 997-8.

When Lieutenant Timothy Compton took the stand, he testified that wanted to interview Gary Bostic, but he never “could get up with him.” App. p. 1049, lns. 8-14. He explained that Bostic was not charged because “he did not have enough to charge him.” App. p. 1049, lns. 15-18, p. 1052. Yet, he admitted that he assisted the State at trial in advancing the theory that Bostic hired Petitioner to kill the victim. App. p. 1052. When further asked about Bostic, he stated “I don’t recall ever talking to Mr. Bostic.” App. p. 1054, lns. 2-5. Towards the conclusion of his cross-examination, Lt. Compton identified a letter originally marked as a potential exhibit for Respondent and admitted as Applicant’s Exhibit 31, which was a letter from Attorney Etheridge regarding a meeting between law enforcement and Gary Bostic after the incident date and before the Petitioner’s trial. App. pp. 1070-71, 1151. Lt. Compton explained that he searched his files prior to the evidentiary hearing and located the letter in his file on Gregory Daniels. App. pp. 1071-2.

After the State proceeded at trial on the theory that Petitioner was hired to kill the victim by Bostic, trial counsel raised the common sense argument to the jury about the absence of

Bostic from the trial, counsel argued: “It does not stand the test of critical judgment. Bostic supposedly paid someone to hit someone, he is never interviewed. He is never accused. He is never confronted.” App. p. 598, lns. 22-5. Throughout the course of the trial, the jury repeatedly heard the name Gary Bostic. The State elicited testimony from Andre Bradley, Nyrena Goodman and Investigator Compton attempting to connect Bostic to Gregory Daniels and attempting to show Bostic as the person that orchestrated the murder of Corey Byrd.⁶ The State also elicited testimony and offered phone records to show forty-one phone calls between Petitioner and Bostic, and the State offered testimony and introduced evidence of the screen shot (money) that was utilized in Petitioner’s phone for Bostic. App. pp. 350-1, 493. All of the testimony and evidence regarding Bostic culminated in his name specifically being included in the facts section of this Court’s opinion. Not only did the jury appear to accept the fact that Gary Bostic hired Gregory Daniels to murder the victim, but this Court did as well.

As a threshold matter, Petitioner urges this Court to find that trial counsel rendered ineffective assistance when he failed to contact Johnny Etheridge, Esquire, and Gary Bostic as part of his investigation of Petitioner’s case. Obviously, counsel had the questions he posed to the jury regarding Bostic prior to closing argument, but no evidence has been offered to establish that he did anything about it. Bostic testified that he was not contacted by anyone on behalf of Petitioner, and the State provided no testimony or evidence that the failure to do so was part of a reasonable trial strategy. Here, Petitioner utilized a private investigator and obtained an Affidavit of Bostic and offered his testimony at the evidentiary hearing, which amounted to a basis for a viable defense. Yet, the lower court was not provided any reason or explanation as to why no one for the defense contacted nor subpoenaed Bostic for trial. In light of the State’s theory of the case

⁶ Andre Bradley testified that Petitioner was hired by Gary Bostic to murder Corey Byrd due to a drug deal gone bad for one thousand dollars. App. pp. 425-6.

and the importance of the testimony and evidence offered regarding Bostic, Petitioner submits it was error for the lower court to fail to find ineffective assistance due to counsel's failure to contact and utilize Bostic. As is addressed above, it is clear from the record that such ineffective assistance affected the outcome of Petitioner's trial and appeal.

Additionally, Petitioner submits that this issue is not simply a matter of ineffective assistance, but it is also a matter of prosecutorial misconduct. It is clear from the absence of information regarding an investigation into or meeting with Bostic in counsel's file and from counsel's closing argument that nothing was disclosed to Jack Lawson regarding an investigation into Bostic. It is also clear from his cross-examination of Investigator Compton at trial that counsel was not aware of his investigation into Bostic or the determination regarding arresting / charging Bostic as testified to at the evidentiary hearing. Finally, it is clear from the testimony of Bostic and Johnny Etheridge, Esquire, that a meeting took place between Bostic and law enforcement.⁷ It is also clear that Jack Lawson, had no disclosure regarding attempts to meet

⁷ The testimony of Investigator Compton and Solicitor Jepertinger from the evidentiary hearing is reminiscent of a situation that played out during the trial prior to the testimony of Andre Bradley. At trial, Jack Lawson, Esquire, made a motion regarding any deals made with Andre Bradley. App. p. 372. Thereafter, the trial court specifically questioned Solicitor Jepertinger and Investigator Compton about any knowledge of any deals or information regarding his federal charges, stating: "I'm not going to tolerate hiding anything, step up to the plate. Has there been any conversation with the federal authorities for this guy's cooperation in this case?" App. pp. 373-374, lns 1-14. In response, Investigator Compton admitted that he had been told it was a possibility that he could get leniency for his cooperation, but he explained that he had not met Bradley. App. p. 374. The following morning when court resumed, the trial court gave a stern warning to the prosecution, specifically, to Investigator Compton, he stated: "You had better disclose everything you know because I am not messing around. I'm not playing anything hiding under the table springing something on anybody." App. pp. 375, ln. 17 - 376, ln. 4. After which the following took place:

Compton: I haven't lied or done anything.

Court: I haven't said you lied, but I am going to say you withheld the facts that this guy's got a deal cut in federal court and you knew it.

Compton: I didn't know what the law was in the court. I didn't know about that. I didn't know what to do in this courtroom, Your Honor.

Court: Well, you know that this gentleman, John Jepertinger, is your prosecutor and he needs to be given full disclosure when he's going to use a witness on the witness stand.

with Bostic or a meeting with Bostic, otherwise he made a fraudulent closing argument before the court and jury.

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). With this in mind, the Constitution requires only that a defendant receive a fair, not a perfect trial. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), Riddle v. Ozmint, 369 S.C. 69, 631 S.E.2d 70 (2006). In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the Supreme Court of the United States explained the importance of the prosecutor's role in the judicial process:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Petitioner urges this Court to find that relief must be granted on the basis of a Brady violation and prosecutorial misconduct. In Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), the prosecution failed to disclose that a witness, whose credibility was already in question, was taken to the scene and gave an additional version of events. After Gibson pled guilty this information was discovered during the course of a civil trial. This Court addressed prosecutorial misconduct in the form of a Brady violation and reasoned:

Solicitor: Judge, we'll provide whatever or call the federal entities here and provide it to the defense.

App. p. 376, lns. 11-24.

The prosecutor committed a Brady violation by not disclosing certain evidence to Gibson. A Brady violation is one type of prosecutorial misconduct. It is misconduct of a different type than, for instance, an attempt to introduce inadmissible evidence, tamper with the jury, or some other inappropriate action. E.g., United States v. Alderdyce, 787 F.2d 1365, 1370 (9th Cir. 1986) (finding no evidence of prosecutorial misconduct giving rise to a Brady violation); Buffington v. Copeland, 687 F. Supp. 1089, 1095-96 (W.D. Tex. 1988) (distinguishing Brady violations from other types of prosecutorial misconduct in which, for example, a prosecutor tries to inject prejudice into a trial by introducing inadmissible evidence or making inappropriate opening statements or closing arguments). We affirm the PCR judge's decision to set aside Gibson's guilty plea and grant him a new trial based on the Brady violation.

Id. at 528-9, 514 S.E.2d at 327.

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of, or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1565-69, 131 L. Ed. 2d 490, 505-10 (1995); Brady, 373 U.S. at 87, 83 S. Ct. at 1196, 10 L. Ed. 2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985).

Here, Petitioner has shown that law enforcement investigated Gary Bostic and this investigation per Lieutenant Compton and Solicitor Jepertinger culminated in a decision not to arrest or charge Bostic in connection with the murder of Corey Byrd. Through the trial record and evidentiary hearing record, Petitioner has further shown that the evidence, that Bostic's involvement was investigated and did not warrant any charges, and that Bostic's testimony in which he told law enforcement that he was not involved, would have been very favorable to the defense if disclosed. Clearly, defense counsel thought it was favorable enough to argue to the jury that Bostic was not accused, investigated or confronted, so it can be deduced how much

more favorable it would have been to argue that Bostic was accused, investigated and/or confronted and was not charged. Additionally, the State's theory hinged on Bostic's involvement and culpability, so is clearly material to the issue of guilt and punishment. Under the State's theory of the case, Petitioner was guilty of committing the murder of Corey Byrd as hitman hired by Gary Bostic. At the evidentiary hearing, Bostic clearly testified that he was not involved and that he told such to law enforcement. It is clear from the record that the investigation of Gary Bostic, as testified to by Lieutenant Compton and Solicitor Jepertinger, as well as the interview of Gary Bostic, as testified to by Bostic and Attorney Etheridge, were not disclosed to the defense; otherwise, Jack Lawson made a fraudulent argument by telling the jury that Bostic was never accused, investigated or confronted.

In Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006), this Court reversed the lower court's denial of relief on the basis of a Brady violation and prosecutorial misconduct when the prosecution suppressed evidence involving a trial witness (defendant's brother). Despite having an open-file policy, this Court found that the prosecution did not meet its burden of disclosing information to the defense that the witness had been taken to the scene by an investigator and given an additional statement and details prior to trial. Id. at 46-47, 631 S.E.2d at 74.

Additionally, this Court made a finding of prosecutorial misconduct since the prosecutor had knowledge of this information and failed to correct discrepancies and inconsistencies during the witness's trial testimony. Id. at 47-8, 631 S.E.2d at 75.

In the instant case, this Court should be concerned that the prosecution not only failed to disclose the investigation of Bostic, but the prosecution, with Lieutenant Compton sitting at their

table in the courtroom, failed to correct knowingly false information offered by trial counsel that Bostic was never accused, investigated or confronted.⁸

Similar concerns are addressed in Washington v. State, 324 S.C. 232, 235-236, 478 S.E.2d 833, 834 (1996), where this Court affirmed the granting of relief on the issue of prosecutorial misconduct and held:

Here, the PCR court found that Washington was entitled to a new trial because of the State's misconduct in failing to fully disclose the nature of its relationship with a witness. The United States Supreme Court in Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) stated that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice; the same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.

Under the present facts, the State allowed to go uncorrected false information about its relationship with one of its witnesses. Although it had entered into a plea agreement with this witness, the State, in its opening argument, told the jury that no such agreement existed. Furthermore, there was testimony that no deal existed between the State and the witness. The PCR court's findings are supported by competent evidence of probative value in the record.

Accordingly, the granting of relief is affirmed.

Petitioner beseeches this Court to defend the fairness of the judicial system; and therefore, find that a new trial must be granted. It is unrefuted that the prosecution investigated Bostic and no evidence has been presented to show that it was disclosed to defense counsel in a case where the State's entire theory hinged on the actions of Bostic. As explained by the United States Supreme Court:

The overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor's responsibility for fair play. In close cases, "the prudent prosecutor will resolve doubtful questions in favor of disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the

⁸ As stated previously, Petitioner submits this matter is highly similar to the matter involving Andre Bradley as referenced above.

representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."

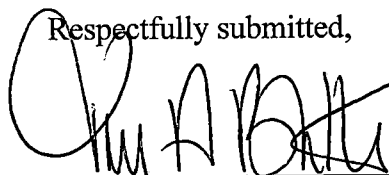
Kyles v. Whitley, 514 U.S. at 438-40 (quotes omitted) (citing Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935)).

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). Here, the truth was not disclosed or uncovered by the defense regarding the investigation of Gary Bostic. Therefore, Petitioner urges this Court to find that new trial must be granted.

CONCLUSION

As is argued in detail above, Petitioner would respectfully request that this Court grant certiorari and allow Petitioner to further address the above arguments via brief and/or oral argument. Ultimately, Petitioner would respectfully request that this Court reverse the denial of relief by the lower court and find that a new trial must be granted.

Respectfully submitted,



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Attorney for Petitioner

This 2 day of February 2017.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Post Conviction Relief
Honorable D. Craig Brown, Circuit Court Judge S.C. SUPREME COURT

FEB 02 2017

Appellate Case No. 2015-002033

Gregory Daniels, 297449,.....Petitioner,

vs.

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

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I hand delivered the Petition for Writ of Certiorari and Appendices (3 volumes) to Lindsey A. McCallister, Assistant Attorney General at:

Office of the Attorney General
1000 Assembly Street, Fifth Floor
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Attorney for Petitioner

February 2, 2017

LAW OFFICE OF
TRICIA A. BLANCHETTE

February 2, 2017
VIA HAND DELIVERY

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

RECEIVED

FEB 02 2017

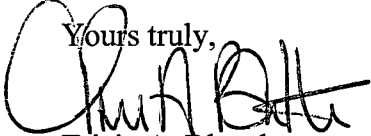
S.C. SUPREME COURT

RE: Gregory Daniels #297449 v. State; Appellate Case No.: 2015-002033

Dear Sir:

For filing in the above referenced PCR appeal, attached please find an original and six copies of a Petition for Writ of Certiorari, Certificate of Service, and an unbound original and one copy of the Appendices (3 volumes). Please notify me if I need to arrange to have the non-paper exhibits transferred from the Florence County Clerk of Court.

Thank you for your assistance with this matter.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Lindsey A. McCallister, Office of the Attorney General
Gregory Daniels