
The State of South Carolina

In the Supreme Court

PETITION FOR A WRIT OF CERTIORARI FROM SUMTER COUNTY
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

Case No. 2016-001481

RECEIVED

FEB 13 2017

MAURICE LIONEL ABRAMS,

S.C. SUPREME COURT
Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Bradley M. Kirkland
ATTORNEY AT LAW
2007 Lincoln Street
Columbia, South Carolina 29201
(803) 386-1116
Attorney for Petitioner

Other Counsel of Record:
Julie A. Coleman
S.C. ATTORNEY GENERAL'S OFFICE
Post Office Box 11549
Columbia, South Carolina 29211
(803)734-3737

Attorney for Respondent

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
ISSUES PRESENTED.....	1
STATEMENT.....	1
Indictment and Trial.....	1
Appeal.....	1
PCR Application and Evidentiary Hearing.....	2
Summary of Allegations Against Applicant at Trial	3
Maurice Abrams (Petitioner)	3
Alibi Testimony	3
Failure to Communicate with Client Testimony.....	5
Failure to Investigate and Call Exculpatory Witnesses	6
Catherine McFadden (Mother of Applicant)	6
Alibi Testimony	6
Michael McFadden (Uncle of Applicant).....	8
Alibi Testimony	8
Charles Brooks (Trial Counsel).....	9
Alibi Testimony	9
Failure to Communicate with Client.....	13
Failure to Investigate Potential Witnesses	13
Steve Witherspoon (Witness)	14
Mary Witherspoon (Sister of Steve Witherspoon).....	14

Order of Dismissal	14
Motion for Reconsideration	14
ARGUMENT	15
1. The PCR court erred in finding that the applicant’s trial counsel, Charles Brooks, III, visited Mr. Abrams a sufficient number of times prior to trial to prepare the case for trial.....	15
Standard of Review	15
Argument	15
Deficient Performance	15
Prejudice	16
2. The PCR court erred in determining that trial counsel’s decision to not present an alibi defense was a strategic decision and the alibi witnesses were not credible.....	17
Standard of Review	17
Deficient Performance	17
A. Investigation.....	18
B. Valid Trial Strategy.....	19
Prejudice	20
3. The PCR court erred in finding that counsel did not fail to investigate or call witnesses to discredit the testimony of the alleged co-defendants in the case.....	21
Standard of Review	21
Argument	22
Deficient Performance	22
Prejudice	23

CONCLUSION.....24

CERTIFICATE OF SERVICE25

TABLE OF AUTHORITIES

Page(s)

CASES

<u>Ard v. Catoe,</u> 372 S.C. 318, 642 S.E.2d 590 (2007)	22
<u>Caprood v. State,</u> 338 S.C. 103, 525 S.E.2d 514 (2000)	15, 17, 22
<u>Council v. State,</u> 380 S.C. 159, 670 S.E.2d 356 (2008)	18
<u>Edwards v. State,</u> 392 S.C. 449, 710 S.E.2d 60 (2011)	17
<u>Glover v. State,</u> 318 S.C. 496, 458 S.E.2d 538 (1995)	20, 21
<u>Harris v. State,</u> 377 S.C. 66, 659 S.E.2d 140 (2008)	15
<u>Ingle v. State,</u> 348 S.C. 467, 560 S.E.2d 401 (2002)	18
<u>Jackson v. State,</u> 329 S.C. 345, 495 S.E.2d 768 (1998)	15
<u>McKnight v. State,</u> 378 S.C. 33, 661 S.E.2d 354 (2008)	22
<u>Pierce v. State,</u> 338 S.C. 139, 526 S.E.2d 222 (2000)	15, 17, 22
<u>Roseboro v. State,</u> 317 S.C. 292, 454 S.E.2d 312 (1995)	18
<u>Shumpert v. State,</u> 378 S.C. 62, 661 S.E.2d 369 (2008)	15, 17, 21
<u>Simpson v. Moore,</u> 367 S.C. 587, 627 S.E.2d 701 (2006)	22

Smith v. State,
404 S.C. 493, 745 S.E.2d 378 (2012)15

Solomon v. State,
313 S.C. 526, 443 S.E.2d 540 (1994) 15, 17, 21-22

Stokes v. State,
308 S.C. 546, 419 S.E.2d 778 (1992)18

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....18, 19, 20, 22

Walker v. State,
397 S.C. 226, 723 S.E.2d 610 (2012)17, 20, 21

ISSUES PRESENTED

1. Did the PCR court erred in finding that the applicant's trial counsel, Charles Brooks, III, visited Mr. Abrams a sufficient number of times prior to trial to prepare the case for trial.
2. Did the PCR court err in determining that trial counsel's decision to not present an alibi defense was a strategic decision and the alibi witnesses were not credible
3. Did the PCR court err in finding that counsel did not fail to investigate or call witnesses to discredit the testimony of the alleged co-defendants in the case

STATEMENT

Indictment and Trial

The Applicant was indicted during the July 2010 term of the Sumter County Grand Jury for Murder Armed Robbery, Burglary 1st Degree, and Possession of a Firearm During Commission of a Violent Crime (2010-GS-43-0885). Applicant was represented by retained counsel. Applicant proceeded to a jury trial before the Honorable Howard P. King. Applicant was found guilty on all charges on June 8, 2011. Judge King sentenced the applicant to life imprisonment for Murder, life imprisonment for Burglary 1st Degree, thirty years for Armed Robbery, and 5 years imprisonment for Possession of a Weapon During a Violent Crime, with all sentences to run consecutively. App. 1-4.

Appeal

The Applicant appealed to the South Carolina Court of Appeals, and an order of dismissal was issued on March 15, 2012, after Applicant notified the Court of his desire to withdraw the appeal. The Remittitur was issued on April 24, 2012.

PCR Application and Evidentiary Hearing

On April 27, 2012, the Petitioner filed his application requesting post-conviction relief. In his original application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following allegations:

1. Ineffective assistance of Counsel
 - a. "Failure to call witnesses."
 - b. "Failure to object to evidence/Brady violations."
 - c. "Conflict of Interest/exist attorney represented victim in this case." App. 535.

Through PCR Counsel, Bradley Kirkland, Applicant amended his application to include the following grounds:

1. Applicant's trial counsel, Charles Brooks, III, failed to visit Mr. Abrams a sufficient number of times prior to trial to prepare the case for trial.
2. Counsel failed to move to suppress several items introduced at the trial of Mr. Abrams. Mr. Abrams specifically asked Mr. Brooks to make the motions and Mr. Brooks failed to do so.
3. Applicant's counsel failed to investigate and present an alibi defense on behalf of Mr. Abrams despite being informed of the defense by Mr. Abrams and his mother, Catherine McFadden.
4. Counsel failed to call witnesses that would have discredited the testimony of the co-defendants at Mr. Abrams' trial and failed to properly cross examine the witnesses called by the state at trial.
5. Counsel failed to object to the introduction of several pieces of physical evidence that had not been provided to the defense prior to trial.
6. Counsel failed to disclose to Applicant a conflict of interest in representing Applicant. App 546.

An evidentiary hearing was subsequently held at the Sumter County Courthouse before the The Honorable R. Ferrell Cothran, Jr., December 19, 2013, at the Sumter County Courthouse. The Applicant was present at the hearing and was represented by Bradley M. Kirkland. The Respondent was represented by Assistant Attorney General Mary Williams of the South Carolina Attorney General's Office. App. 551.

Summary of Allegations Against Applicant at Trial

On May 19, 2009, Maurice Abrams, Tony Lowery, Frederick and others allegedly planned an armed robbery and burglary in which they would take money and/or drugs from Markeith Ford. Markeith Ford was killed during the incident. Theresa Ford, sister of Mr. Ford, claimed they were both watching a L.A. Lakers game when the assailants, their faces partially covered with something, entered the house and demanded money. One of the individuals had a gun. The assailants demand money from Mr. Ford and searched for the money. At one point one of the assailants allegedly yells to the person with the gun, "We got it Moe, let's go". At that point the assailant with the gun shoots and kills Markieth Ford. App. 89-92.

Maurice Abrams (Petitioner)

Alibi Testimony

Maurice Abrams, the Applicant, testified that on March 7, 2011, as evidenced by Exhibit 4 of the PCR hearing, had a jail visit with private investigator Benny Webb. App. 749. Mr. Webb had been retained by Charles Brooks, trial attorney for the Applicant, to investigate Mr. Abrams' cases.¹ At that meeting Mr. Abrams testified that he told Mr. Webb that he had an alibi for the "Markieth Ford" case. The Markieth Ford case is the subject of this PCR hearing. He told Mr. Webb that his alibi witnesses were his mother, Catherine McFadden; his uncle, Michael McFadden; and his brother, who did not testify at the PCR hearing. Mr. Abrams also testified that he told his attorney about his alibi on the day of his trial. He did not tell his attorney earlier because his attorney did not specifically discuss the Markieth Ford trial with Mr. Abrams prior to the actual trial. App. 609-611.

¹ Mr. Brooks represented the Applicant on two separate cases referred to as the "Markieth Ford" case and the "Dubose Siding" case. The Markieth Ford case is the subject of this PCR.

Mr. Abrams testified that on the day of the murder, May 19, 2009, he and his family were having a "memorial dinner" for his grandmother that had passed several years prior. At this time Mr. Abrams was living with his mother. He recalled waking up at around 10:00 am that morning and that his mother was cooking for the dinner later that day. He did not leave the house until later in the day when the Applicant and his mother, Catherine McFadden, went to the Gate gas station to purchase gas with her DSS voucher at about 4:00 pm. Ms. McFadden owned two cars and asked the Applicant to follow her to the gas station in one of the cars so she could put fuel in both. App. 613-615.

The Applicant followed his mother to the gas station and she filled up the car she was driving and then the Applicant pulled up to the pump to add fuel to the car he was driving. At that point a dispute occurred between Ms. McFadden and an employee at Gate gas station. The Applicant believed the dispute involved fueling two cars with a DSS voucher. Once the dispute was resolved the Applicant and his mother went to visit his grandmother. The Applicant fed his dogs that were at his grandmother's house and went home. His mother stayed with his grandmother for some time after the Applicant left. App. 615-617.

The Applicant arrived home at around 6 or 7 pm the same day. From that point forward the Applicant ate and socialized. He did not leave the apartment again until the next morning. He recalls that his uncle, his mother and his little brother were present. The Applicant slept on the couch and recalled being awakened at around 10:30 pm when his uncle left to go to Karaoke. He woke up because the alarm system in the apartment makes a noise whenever the front door was opened. However, the Applicant did not leave the apartment at that time. App. 617-624. Therefore, according to the Applicant's testimony, he could not have been present at the location of the murder because he was asleep at his mother's house.

Failure to Communicate with Client Testimony

The Applicant testified that he met with his attorney for the first time on during the month of February, 2010. At that meeting the Applicant said he talked briefly with trial counsel about his alibi in the Markeith Ford murder case (the subject of this PCR). App. 556, ll. 6-8; 558, ll. 16-19. The Applicant claimed that he did not have any discovery materials concerning the Markieth Ford² case at that time. App. 558, ll. 11-13. The next time the Applicant says he saw trial counsel of in August of 2010. At that time trial counsel only discussed the Dubose Siding case as it was going to trial that month. App. 560-562. After that meeting the Applicant went to trial on the Dubose Siding case. The case ended in a mistrial. App. 562, ll. 13-16.

The next meeting that the Applicant claims to have had with trial counsel was on June 6, 2011, the first day of the Markeith Ford murder trial which is the subject of this PCR. Between the Dubose Siding case and the Markeith Ford murder trial Applicant claimed that the only contact he had with trial counsel was copies of several letters asking the prosecutor for a bond hearing. App. 565-566.

The next contact that the Applicant claims to have had with his attorney was on the first day of the Markeith Forder murder trial. In support of his position the Applicant introduced a letter from trial counsel post marked June 3, 2011, advising him of his trial on June 6, 2011. App. 747. The Applicant claimed he did not receive the letter until June 7, 2011, the second day of the Markeith Ford trial. App 567-568. In further support of his claim that trial counsel failed to meet with him to discuss his cases in detail, the Applicant introduced the detention center log files for all visits made to the Applicant. App 749. There is no indication in the records that trial

² Mr. Brooks represented the Applicant on two separate cases referred to as the "Markieth Ford" case and the "Dubose Siding" case. The Markieth Ford case is the subject of this PCR.

counsel met with Mr. Abrams. However, the records did indicate that the investigator hired by trial counsel did meet with Mr. Abrams. App. 569-572.

The Applicant testified that trial counsel sent him the discovery materials but never met with him to review the materials. In support of his claim the Applicant introduced a certificate of mailing of the discovery materials dated May 16, 2011. App 761. This date was approximately 3 weeks prior to the start of the Markeith Ford trial.

Failure to Investigate and Call Exculpatory Witnesses

The Applicant introduced Plaintiff's 6 and 7 into evidence. App. 761-762. These were written statements made by Tony Lowery. In each of the statements it is alleged that Steve Witherspoon was with them just prior to the armed robbery and Murder. Furthermore Mr. Owens and Mr. Lowery testified at the Applicant's trial that Steve Witherspoon was with Mr. Abrams just prior to the robbery and murder. App 241-242, 315. Tony Lowery also testified that Steve Witherspoon met with the Applicant and saw the marijuana and money taken during the robbery. App 327-329. However, Steve Witherspoon was not called as a witness by trial counsel to discredit the testimony that he was with Mr. Abrams just prior to the armed robbery and murder. Maurice Abrams testified that he told his investigator, Benny Web, to find Mr. Witherspoon because he knew that he was not with Mr. Witherspoon the night of the crime. App 585-586. However trial counsel admitted that he knew Mr. Witherspoon was a potential witness but never attempted to contact him. App. 728-729.

Catherine McFadden (Mother of Applicant)

Alibi Testimony

Catherine McFadden corroborated the testimony given by the Applicant. Initially, Ms. McFadden testified that she, shortly after retaining Mr. Brooks, informed him of the alibi in the

Markieth Ford case. She also at some point spoke to the investigator, Benny Webb, concerning the alibi. App. 668-669.

Ms. McFadden said that her grandmother was born on May 17 and on each May 17 since her passing they would have a memorial dinner in her honor.³ However, the year of the murder, her birthday fell on a Sunday. Ms. McFadden's mother and brother are members of a church choir group that travelled to North Carolina that Sunday to perform. Consequently, most of the family was in North Carolina on May 17 of that year. For that reason they were unable to hold the memorial dinner on May 17. Ms. McFadden moved the memorial dinner to Tuesday. She was unable to have the dinner on Monday because she had to work that day. App. 674-675.

Ms. McFadden recalled on Tuesday, May 19, 2009, that she began cooking when she woke up and continued cooking until around 2:00 pm. At around 4:00 pm she and the Applicant went to the Gate gas station to put fuel in both her vehicles. There was an argument between the store clerk and Ms. McFadden because the clerk believed she was using her DSS voucher to put gas in a car that belonged to someone else. Ms. McFadden showed the clerk that both registrations were in Ms. McFadden's name. At that point the Applicant and Ms. McFadden went to Ms. McFadden's mother's house. Ms. McFadden remained at her mother's house for approximately 1.5 hours. At that point she returned home. App. 677-680.

When she arrived home a few people had eaten and were leaving. However, the Applicant, his brother and his uncle were still present. She corroborated the Applicant's testimony that the Applicant socialized, played video games and did not leave the apartment for more than 5 minutes at a time to smoke cigarettes on occasion. She also said that her front door

³ Plaintiff's exhibit 17 (App. 779), an obituary for Ms. McFadden's grandmother, was introduced into evidence. The exhibit indicated that the date of birth for Ms. McFadden's grandmother was May 17, 1919, and her death was June 8, 2007.

makes a beeping noise when someone opens it and she could see into the living room from her bedroom. She was certain that the Applicant did not leave that evening. App. 680-682.

Ms. McFadden testified that she had to go to work at 4:00 am the next morning (May 20) but did not go to bed until after 11:15 pm. She recalls that time specifically because she watches the first 15 minutes of the evening news every night at 11:00 pm. After she went to sleep she does recall the front door opening and her brother said he was going to Karaoke. She believes it was around 12:00 am. App. 680-684. Ms. McFadden was adamant that the Applicant did not leave the house that evening.

Michael McFadden (Uncle of Applicant)

Alibi Testimony

Michael McFadden, the brother of Catherine McFadden and uncle of the Applicant testified as to the alibi as well. Mr. McFadden corroborated the testimony of both the Applicant and Ms. McFadden. Mr. McFadden recalled going to North Carolina on Sunday for his church choir on May 17. He recalled that May 17 was the date his grandmother was born. He recalled that they were unable to hold the memorial dinner on Monday because Ms. McFadden had to work that day. He stated that he arrived at Ms. McFadden's apartment at around 4:00 pm and the Applicant and Ms. McFadden were leaving to go get gas. He recalled the names of the people that were at the gathering. He stated that the Applicant and Ms. McFadden got back to the apartment around 6:30 or 7:00 pm. At that point everyone still in attendance socialized and watched videos of his grandmother. App. 688-692.

He described the apartment and corroborated the fact that a person sitting in the bedroom could see into the living room. He corroborated that the Applicant did not leave the apartment for more than 5 minutes at a time to smoke a cigarette. He testified that he did not leave the

apartment until around 12:00 am and, at that time, the Applicant was asleep on the couch. App 692-694. Additionally, Mr. McFadden specifically testified that he attended the trial and was available as a witness. App. 696, ll. 14-16.

Charles Brooks (Trial Counsel)

Alibi Testimony

Trial attorney for the Applicant, Charles Brooks, testified that he hired an investigator to assist him with the Applicant's cases. Mr. Brooks testified that his investigator did discuss the alibi defense with the Applicant's family. App. 708-709; 169, ll. 14-25. He also admitted that he spoke to Ms. McFadden about the alibi defense. App. 722-723. However, Mr. Brooks did not find the alibi credible because he did not think close family members made good alibi witnesses. App 708-709; 722, ll. 11-20. Mr. Brooks did not offer any other specific reason as to why the alibi was not credible.

At times Mr. Brooks appeared to be somewhat confused as to which case the alibi might apply to since he represented the Applicant on several cases:

Q: Okay. And do you recall Ms. Catherine McFadden telling you about the alibi in this case?

A: She indicated to me -- remember now, he had three separate cases, all serious. So remember one of them was assault and battery with intent to kill. She indicated that on one of these, he may have been someplace with some family. But that's why I got Mr. Webb. (PCR Tr. p. 158).

[...]

Q: And you don't recall Maurice telling you [during trial] he was with his mom or his dad?

A: That would have been the time he could have said, I was with my mother. Even though, you know, there might have been some issue about whether or not they were alibi and that kind of stuff. (PCR Tr. p. 161).

[...]

Q: Okay. From what I understood, based on the conversations that you had with Benny, I believe you said his name is?

A: Benny Webb.

Q: Benny Webb, Mr. Webb. That you realized that there was a possibility of raising an alibi defense. Something was mentioned that raised the possibility of it?

A: Well, an alibi defense, but it was never as to what case. Okay.

Q: Okay. Okay.

A: Because remember now, he's got Dubose Siding Road, he's got this one, and he also has this other one. App. 719-720.

There is no indication in the record that Mr. Brooks tried to clear up any confusion as to which case the alibi would actually apply. He also did not testify as to what his understanding was of the alibi defense. Nevertheless, he repeatedly claimed that he did not feel the alibi was credible. App 708-709; 722-723; 183, ll. 8-12; 735, ll. 11-13.

Mr. Brooks claimed that he believed the state's case was very weak. Although there was some physical evidence in the case, Mr. Brooks testified that he was not concerned about it at all as it did not clearly tie the Applicant to the crime. His main concern was that two of the five participants in the robbery were going to testify against the Applicant and implicate him in the crime. App. 717-718. Mr. Brook's strategy to defend the case was to "hard-cross" the two cooperating witnesses and he did not consider raising an alibi defense. App. 723, ll. 11-14.

However, prior to the start of the trial, Mr. Brooks was informed that the victim's sister, Teresa Ford, intended to identify the Applicant at the trial as the shooter. The fact that she could identify the Applicant was never revealed in the discovery materials. App. 702-704. Mr. Brooks objected to her identifying the Applicant at the trial because he was given no notice of her ability to identify his client but his objection was overruled. This, according to Mr. Brooks, had a dramatic impact on his planned defense:

A: The first time I learned of Teresa Ford's ability to identify him was in court.

Q: Right?

A: And I raised that issue as you see that in the transcript.

Q: I saw it. You did.

A: And obviously --- so going in, you know, I had a different game plan.

Q: Right.

A: Obviously, that game plan had to change in light of Judge King's ruling ... App. 725.

However, Mr. Brooks was resolute that despite the fact that he needed to change his "game plan" to counter Ms. Ford's testimony he never considered a potential alibi defense despite being aware the defense existed:

Q: But at that point in time, don't you think it would have been prudent to start thinking, you know, maybe this alibi thing, maybe I need to start looking into this. Or maybe Steve Witherspoon or Terrance Lemon, maybe I need, you know, figure out if I need to call them. Because now the dynamics have changed. Did you ever -- did that cross your mind?

A: No. App. 728, ll. 14-21.

Instead, it appears that Mr. Brooks believed that the best course of action was for his own client to waive his constitutional right against self-incrimination and take the stand to defend himself:

A: As a matter of fact, during the trial Mr. Webb was there, I thought Maurice could have and should have taken the stand.

Q: Okay.

A: And I still think if he had taken the stand, then he probably would not have been convicted of murder. [. . .] App 709 line 25 - 710 line 1.

[. . .]

Q: You were put in a position where my understanding from your direct testimony -- I mean, on direct, was that you felt like to save the save the case at that point, and things had changed ...

A: That's correct.

Q: ... you needed Maurice to take the stand?

A: Correct.

Q: Because you didn't have anything that effectively combated what you felt like was that identification by...

A: Teresa Ford. App. 732, 1-11.

When Mr. Abram's exercised his right to not take the stand in his own defense, Mr. Brooks felt that there as simply no other defense available to him despite the fact he earlier admitted to having known about the alibi and had spoken to, at least, his investigator and the mother of the Applicant about the alibi.

Q: Mr. Brooks, when your client didn't want to testify, did you feel like you wanted to put up a case at that point?

A: When he did not want to testify?

Q: Uh-huh (affirmative).

A: We didn't have anything else. App. 732, ll. 16-21.

However, despite never having considered calling any alibi witnesses, Mr. Brooks did admit at one point that he and his investigator might have spent more time trying to develop the alibi had he known that Theresa Ford would identify the Applicant at trial:

A: [. . .] I say that to get, you know, to his -- to be fair to Maurice, if we knew that Teresa was going to say, yes, I pointed him out etcetera, etcetera, then perhaps, you know, we may have done some things differently as far as whether or not, you know, maybe -- I'm speaking -- I want to be careful. I'm not speaking for Benny Webb. Maybe he would have done a little more in terms of maybe developing more of an alibi. App. 735 ll. 6-13.

Failure to Communicate with Client

Trial counsel admitted that the dates on the June 3, 2011, letter were accurate. He stated that he often visited inmates at the detention center but gave no specifics as to how many times he met with the Applicant or what they discussed. At the hearing he did not refer to any notes concerning visits with the Applicant and did not recall specific dates of meetings with the Applicant. He stated that he would have known about the trial in advance but did not specifically testify as to when he met with the Applicant or when he notified him about the trial. However, he said that he spoke with the Applicant's mother very often. App. 704, ll. 17-18.

Trial Counsel also stated that, even though he had discussed the alibi with Catherine McFadden and his investigator, Benny Webb, he never discussed the alibi with his client. He simply stated that, "It's not like Maurice said, I was here such and such day. I know I was here. He never really, he never really said anything like that, he didn't." App. 733, ll. 12-14. There was no indication in the record that he ever asked Applicant about the potential alibi despite knowing of the potential defense. In fact, trial counsel testified that every time he went to see the Applicant, the Applicant was not particularly vocal during the meetings. Nevertheless he never bothered to ask the Applicant about information that he had received during his investigation. App. 730 ll. 21-22.

Failure to Investigate Potential Witnesses

Trial counsel admitted that he knew Mr. Witherspoon was a potential witness but never attempted to contact him. App. 728 line 22 – 729 line 5. Trial counsel admitted that he wanted to put up a defense but, "We didn't have anything else." App. 732 ll. 16-21, 183 line 6.

Steve Witherspoon (Witness)

At the PCR hearing Steve Witherspoon testified that he recalled that on the day of the murder he was with his sister picking up a new dog and that he was with her throughout the even into the early morning hours of the 20th. App. 642-647. He specifically did not recall going to El Cheapo's or interacting with Tony Lowery, Maurice Abrams or Frederick Owens. App 647. Although He was interviewed by police he was never asked about being at El Cheapo's with anyone on the night of the murder. App 648 ll. 11-17.

Mary Witherspoon (Sister of Steve Witherspoon)

Steve Witherspoon's sister Mary Smith also testified at the PCR hearing. She believed that they picked up the dog on a Wednesday (rather than Tuesday, May 19th). App 105.

Order of Dismissal

On April 8, 2016, Judge Cothran ruled in his Order of Dismissal that Petitioner failed to establish plea counsel provided ineffective assistance of counsel. He specifically found that trial counsel had met with the applicant and his family a sufficient number of times, that his decision not to use an alibi defense was a strategy decision and his decision not to call one of the co-defendants was not necessary as he had thoroughly cross examined the witnesses presented by the State. App. 780.

Motion for Reconsideration

On April 26, 2015, the Petitioner filed a Motion for a New Trial or Reconsideration pursuant to Rule 59, SCRPC. App 798. On July 15, 2016, the Court denied the motion on the basis that it was substantially the same as the applicant's proposed order and offered no new grounds for consideration. App. 826.

ARGUMENT

- 1. The PCR court erred in finding that the applicant's trial counsel, Charles Brooks, III, visited Mr. Abrams a sufficient number of times prior to trial to prepare the case for trial**

Standard of Review: An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000). If no probative evidence exists to support the findings, the Court will reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

Argument: It is well settled law that a lawyer must communicate with his client a sufficient number of times to ensure that the defendant understands the charges, the evidence against him and the defendant has an opportunity to assist in the preparation of his defense. See Smith v. State, 404 S.C. 493, 745 S.E.2d 378, (2012.). The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation. Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008). Additionally, a petitioner must offer evidence of how additional preparation or communication would have resulted in a different outcome. See Jackson v. State, 329 S.C. 345, 353–54, 495 S.E.2d 768, 772 (1998).

Deficient Performance

The Applicant had a clear recollection of his visits with trial counsel. Trial counsel, on the other hand, had no direct recollection of when he visited the Applicant or what was discussed during those meetings. Both the jail visitation logs as well as trial counsel's last minute notice of

trial corroborate the Applicant's testimony that he had very little contact with trial counsel concerning the Markeith Ford case. The Applicant, as well as Catherine McFadden, made it clear that they wanted to discuss an alibi defense with trial counsel. Trial counsel did not indicate that he had any notes concerning his meetings with the defendant and that he had no recollection of the defendant claiming to have an alibi defense. This corroborates Applicant's testimony that he only discussed his defense briefly one time in February of 2010. Clearly, under these circumstances trial counsel was not sufficiently aware of or prepared to present an alibi defense. Although trial counsel indicated that the Applicant was not particularly loquacious during his meetings, his duty to investigate is not mitigated by this fact as he was aware of defenses that would have allowed him to put up a case in chief during the trial. Trial counsel further admitted that he felt it was necessary to put of a case in chief but felt as if he had nothing to present. Therefore it is clear trial counsel's performance was deficient as to this issue.

Prejudice

Trial counsel was minimally aware of an alibi defense and appeared confused as to which case the alibi would apply. Further communication with the Applicant would have clearly been beneficial in resolving any misunderstanding trial counsel might have had and led to a better understanding of the possible defenses in the case. Additionally, trial counsel did not indicate that he discussed the possibility of calling Mr. Witherspoon to the stand to discredit the co-defendant's with the Applicant. Nevertheless, neither defense was ever considered by trial counsel, in large part it appears, because of his lack of information concerning the defendant. By failing to adequately communicate with the Applicant trial counsel's representation was deficient and likely had an impact on the outcome of the Applicant's trial. The Applicant is, therefore, entitled to a new trial.

2. **The PCR court erred in determining that trial counsel's decision to not present an alibi defense was a strategic decision and the alibi witnesses were not credible.**

Standard of Review: An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000). If no probative evidence exists to support the findings, the Court will reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

Deficient Performance

The South Carolina Supreme Court recently addressed the issue of failing to investigate or call a potential alibi witness. Walker v. State, 397 S.C. 226, 723 S.E.2d 610, (2012). In the Walker case trial counsel had never been told about the alibi but was aware of the alibi based on her review of the evidence. “[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards, 392 S.C. at 456, 710 S.E.2d at 64. The Walker Court determined that duty to investigate a potential witness is even more critical when the witness might provide an alibi. Accordingly, the Sixth Amendment requires that criminal defense attorneys thoroughly investigate potential alibi witnesses.

The Walker Court cited Strickland, in which the Supreme Court of the United States stated that strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional

judgments support the limitations on investigation.... [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. 466 U.S. at 690–91, 104 S. Ct. 2052; see Council v. State, 380 S.C. 159, 175, 670 S.E.2d 356, 364 (2008).

“Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness.” Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citing Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992)). “Where counsel articulates a strategy, it is measured under an objective standard of reasonableness.” *Id.* (citing Roseboro, 317 S.C. at 294, 454 S.E.2d at 313). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” Strickland, 466 U.S. at 691, 104 S. Ct. 2052.

A. Investigation

In the present case there is no indication that a thorough investigation was ever conducted by trial counsel. Trial counsel recalls speaking with his investigator and Ms. McFadden about the alibi defense but gave no details of the conversations he had with either and Mr. Webb did not testify at the PCR hearing. Trial counsel admitted that he never spoke with his client concerning the alibi and there is no indication that either the investigator or trial counsel ever spoke to Mr. McFadden or any other witness that were present at the memorial dinner. At times he appeared confused as to which case the alibi might have been applied. Even after trial counsel’s original strategy to “hard-cross” the alleged co-defendants fell apart he still insisted that he did not consider presenting an alibi defense. Trial counsel admitted that he and his

investigator might have put more emphasis in their investigation of the alibi had they know that Ms. Ford would identify the Applicant at trial. It should be noted that in S.C. depositions are not allowed in criminal cases and, therefore, often witnesses will state something that is not available in discovery. Experienced criminal defense attorneys are well aware of the “trial by ambush” nature of criminal trials and should expect and be prepared for the unexpected. Therefore, it is clear that trial counsel failed to properly investigate the alibi defense and this conduct fell below the standard of care.

B. Valid Trial Strategy

Trial counsel was unable to articulate a strategic reason for more fully investigating or potentially utilizing the alibi defense other than his opinion that the alibi was not credible based on the fact that the alibi witnesses were family members. Trial counsel clearly expressed a general belief that family members are not credible alibi witnesses and repeated this belief throughout his direct and cross examination. Despite saying numerous times that he found the alibi to be not credible he offered no reason other than his belief that “family members...especially daddy’s and mama’s, tend to not be very credible when it comes to an alibi.” App. 708, line 23 – 709, line 2. As the record indicates there were numerous people at the memorial dinner and trial counsel failed to speak to any of them but the Applicant’s mother.

However, counsel for Applicant has been unable to find case law indicating that such a strategy or general belief is acceptable under Strickland and its progeny. It is often the case that defendants that wish to raise an alibi defense must rely on their friends and family to testify. It is only natural that a person would spend more of their time with friends and family than with others.

Finally, Ms. McFadden and Michael McFadden were both present at the trial and could have been called as witnesses on short notice despite trial counsel being completely unprepared to present such a defense. App 670, ll. 13-23; 696, ll. 14-16. It is clear that the first prong of Strickland has been met by the applicant and trial counsel's performance was deficient. Therefore, it is clear that trial counsel's failure to present the alibi primarily or wholly on the basis that family members aren't credible indicates deficient performance.

Prejudice

The Walker Court provided guidance on determining if failing to investigate or present an alibi defense was prejudicial to the Applicant. According to the Walker opinion, Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995), established a framework for analyzing an alleged failure to investigate an alibi witness. When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under Strickland. First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant. *Id.*

In the present it is clear that the testimony of Catherine McFadden, Michael McFadden and Maurice Abrams clearly met the legal definition of alibi. The armed robbery and murder were allegedly committed on May 19, 2009, at approximately 10:30 p.m. App. line 21 – 165 line 7. Both Ms. McFadden and Mr. McFadden testified that they clearly remember being at the

apartment with the Applicant at that time. Therefore, the testimony clearly meets the definition of alibi as set out in Glover.

Both Ms. McFadden and Mr. McFadden appeared to remember May 19, 2009, in great detail. The reason that they remembered this date in particular was because it was the date that a memorial dinner was being held honoring their deceased mother. The witnesses were able to recall with great clarity what they did throughout the day. There is simply no reason for the Court to believe, applying the standard set forth in Glover, that the testimony given by the McFadden's would have been considered unreliable to a jury, particularly when considering the testimony in the light most favorable to the Applicant. During cross examination of each of these witnesses each was steadfast in their recollection of events and particularly that the Applicant was with them at the time of the armed robbery and murder.

Therefore, the PCR court abused its discretion in finding the alibi witnesses not credible considering the ruling set out in the Walker case. The Court offered no reasoning for its finding that the alibi witnesses were not credible other than their "their demeanor and presentation during the PCR hearing". Absolutely no further details were offered. Furthermore, and most importantly, the PCR court appeared to adopt the reasoning of trial counsel that family members aren't good witnesses by stating, "that both Catherine McFadden and Michael McFadden are close relatives of Applicant." App 792 first paragraph.

3. **The PCR court erred in finding that counsel did not fail to investigate or call witnesses to discredit the testimony of the alleged co-defendants in the case**

Standard of Review: An appellate court gives great deference to the PCR court's findings of fact and conclusions of law. Shumpert v. State, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008). If matters of credibility are involved, then this court gives deference to the PCR court's findings because this court lacks the opportunity to directly observe the witnesses. Solomon v.

State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994). Any evidence of probative value in the record is sufficient to uphold the PCR court's ruling. Caprood v. State, 338 S.C. 103, 109–10, 525 S.E.2d 514, 517 (2000). If no probative evidence exists to support the findings, the Court will reverse. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

Argument: Counsel has a duty to undertake reasonable investigations or to make a decision that renders a particular investigation unnecessary. Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State.” McKnight v. State, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008). Moreover, counsel’s decision not to investigate should be assessed for reasonableness under all the circumstances with heavy deference to counsel’s judgment. Simpson v. Moore, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006). “[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.” Ard v. Catoe, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (internal quotation marks omitted) (emphasis omitted). “[C]ounsel’s conversations with the defendant may be critical to a proper assessment of counsel’s investigation decisions....” Strickland, 466 U.S. at 691, 104 S. Ct. 2052. “[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690, 104 S. Ct. 2052.

Deficient Performance

In the present case Mr. Witherspoon was clearly a material witness as he was alleged to have been with all of the co-defendants just prior to and potentially during the murder. App 585

ll. 9-15, 729 ll. 3-15. However he was not ever interviewed or called as a witness at the applicant's trial. No reason whatsoever was given by trial counsel for failing to investigate this particular witness. The witness appeared to have a very clear recollection of where he was on May 19th, the day of the murder. His sister however, seemed to recall that they bought the dog on Wednesday the 20th, rather than May 19th. This detail does not appear to be particularly relevant as Mr. Witherspoon was certain he never met up with Tony Lowery, Frederick Owens, Terrance Lemon or Maurice Abrams at the El Cheapos gas station and he certainly did not admit to being involved in the murder. Therefore, failing to investigate Mr. Witherspoon was deficient performance.

Prejudice

Mr. Witherspoon clearly had exculpatory evidence concerning the credibility of the witnesses against the Applicant. His testimony directly contradicted the story told to the jury by the two co-defendants that Witherspoon was present with Applicant and the co-defendants on the evening of the murder. Trial counsel, throughout the PCR hearing, noted that he thought his cross examination was extremely effective. Further, the PCR court found that, "A brief review of the trial transcript reveals that Trial Counsel thoroughly impeached both Frederick Owens and Tony Lowery at trial." App 793 first paragraph. However, it is clear that the jury did not agree with that assessment.

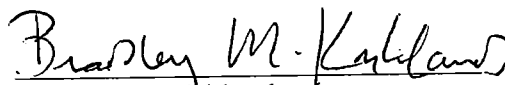
Further, trial counsel admitted that he was very uneasy with the identification of the Applicant by the victim's sister and wanted to put up a defense. This is a clear indication that trial counsel felt that the trial was not going well despite his assertions otherwise. His only suggestion was to convince the Applicant to testify despite the fact the Applicant wished to invoke his right not to take the stand in his defense. Trial counsel, once the Applicant invoked

his right to remain silent, admitted that he simply didn't have anything else to put up which is undoubtedly due to the fact that he never fully investigated potential witnesses including Mr. Witherspoon or discussing a potential alibi defense with his client. It is clear that had trial counsel conducted a full investigation into all potential witnesses and been prepared to call these witnesses at trial the outcome of the trial would have likely been different and the Applicant should be granted a new trial.

CONCLUSION

Based on the foregoing reasons, Maurice Abrams petition for writ of certiorari should be granted to allow full briefing on the issue.

Respectfully submitted,


Bradley M Kirkland
Attorney for Petitioner
2007 Lincoln Street
Columbia, South Carolina 29201
(803) 386-1116

February 13, 2017

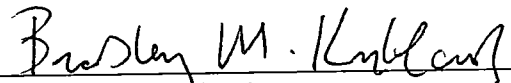
CERTIFICATE OF SERVICE

The Petition and Appendix have been served via, U.S. Mail, postage prepaid, to Counsel

for the Respondent:

Julie A. Coleman
S.C. Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211
(803)734-3737

This 13th day of February, 2017.



Bradley M. Kirkland