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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County
Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000790

Tevon Michael Jackson, #344982,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

**PETITION OF PETITIONER-RESPONDENT
FOR A WRIT OF CERTIORARI**

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ISSUE PRESENTED

- I. Did the PCR court err as a matter of law in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to investigate Jackson's case prior to trial where no probative evidence supports its findings of neither deficiency nor prejudice?

- II. Did the PCR court err as a matter of law by using an improper cumulative error analysis that is not recognized by South Carolina law and an improper hindsight standard for deficiency that contradicts the Strickland standard?

STATEMENT OF THE CASE

Respondent-Petitioner (“Jackson”) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Jackson was indicted at the January 2009 term of the Aiken County Grand Jury for murder and possession of a firearm during commission of a violent crime (2009-GS-02-83; -84). Wallis Alves and Michael Routzong, Esquire, represented Jackson. Jackson proceeded to a jury trial before the Honorable Doyet A. Early, III. Jackson was subsequently convicted as indicted on all counts. Judge Early sentenced Jackson to thirty years imprisonment for Murder and five years’ concurrent imprisonment for possession of a weapon during the commission of a violent crime. A timely Notice of Appeal was filed on Jackson’s behalf and an appeal was perfected by Breen Stevens, Esquire. The South Carolina Court of Appeals affirmed Applicant’s conviction and sentence. State v. Tevon Jackson, Op. No. 2013- UP- 024 (Ct. App. filed January 16, 2013). The Remittitur was issued on February 4, 2013.

Jackson filed an application for post-conviction relief on November 27, 2013. Petitioner-Respondent (“the State”) submitted a Return on May 13, 2014. An evidentiary hearing was convened at the Aiken County Courthouse on September 10, 2015, before the Honorable Edgar W. Dickson. Jackson was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Daniel Gourley, Esquire, from the South Carolina Attorney General’s Office. An Order Granting Application for Post-Conviction Relief was signed by Judge Dickson on December 30, 2016 and was filed on January 13, 2017. The State filed a Motion to Reconsider Pursuant to Rule 59(e), SCRPC. Judge Dickson denied the motion by Order filed March 17, 2017, and then corrected and refiled on March 27, 2017. This Petition for a Writ of Certiorari on behalf of the State follows.

STANDARD OF REVIEW

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant of relief only if there is probative evidence to support his or her findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996)). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013)).

ARGUMENT

I. The PCR court erred as a matter of law in granting post-conviction relief on grounds that Trial Counsel was ineffective for failing to investigate Jackson's case prior to trial where no probative evidence supports its finding of either deficiency or prejudice.

In its Order Granting Post-Conviction Relief, the PCR court found Trial Counsel was ineffective for failing to prepare and investigate Jackson's case prior to trial. However, this finding was improper because no probative evidence supports its finding of either deficiency or prejudice.

Relevant Law

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 441, 334 S.E.2d 813, 814 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, at 442, 334 S.E.2d at 814. The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry v. State, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have

prejudiced the applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry at 117-18, 386 S.E.2d at 625.

Discussion

The record before the Court shows there is no probative evidence to support the PCR court’s finding of either prong of the Strickland test—deficiency and prejudice. Each prong will be addressed separately below.

Deficiency

Testimony

In order to find counsel ineffective, the court must first find deficiency. To find deficiency, an action or inaction by counsel must be unreasonable under professional norms. Cherry at 117, 385 S.E.2d at 625 (citing Strickland). At trial, the State called thirty-six witnesses to testify about Jackson’s involvement in the murder of Marcus Finklin in the early morning hours of June 4, 2008. The record shows Trial Counsel vigorously cross-examined each witness, attempting to call their credibility into question and pick apart the accuracy of their testimony. On cross-examination of Investigator Clay Adams, Trial Counsel introduced two photographs of the vehicle in which the victim’s dead body was found. App. 540-542. Trial Counsel used these photographs to elicit testimony from Adams about how some items in the car had been placed where they were after the victim had been shot and his blood had stained the seat, because the items were found on top of the blood spills. Trial Counsel also called Jackson to testify for the defense. Jackson explained to the jury how he knew and was close the victim, why they would have been seen together the day of the crime, why the State’s witnesses might not be credible,

and that the victim dropped him off at his house that night and he did not see him again before he was shot. App. 592-632. Trial Counsel did not present any additional witnesses for the defense.

At the evidentiary hearing, Trial Counsel testified she felt that she had adequate time to prepare this case. App. 1026, line 14-16. She stated that she had an investigator to assist her who spoke with witnesses, helped with investigation, went through discovery, talked to police officers, and spoke with Jackson. App. 1026, line 21 – App. 1027, line 2. She stated that she filed Rule 5 and Brady motions and reviewed all of these materials with the investigator. App. 1027, line 3-8. She stated that she would have had typed notes from her investigator and all of her discussions with him, but her computer crashed after the trial and she no longer has copies of these notes, so she cannot remember specifically which witnesses were investigated. App. 964; App. 1027, line 15 – App. 1028, line 3.

When questioned about her decisions not to call specific witnesses or pursue certain trial tactics, Trial Counsel simply answered that she could not remember why she did not do so, due in part to her missing notes and the length of time that had passed since the trial. Trial Counsel never testified that she did not have a strategic reason for choosing not to present the witnesses, but she simply could not recall. However, she could clearly recall that she had adequate time to prepare for trial, and at the time, she thought she did the best she could possibly do on cross-examination and impeaching the State's witnesses. App. 1029, line 4-6. Trial Counsel testified she would have had reasons at the time of the trial for choosing not to call the witnesses who had given statements to law enforcement, but she just could not recall what they were now. App. 1030, line 4-14.

It is important to note that the PCR court found Trial Counsel's testimony to be credible. App. 1263. The PCR judge was in the best position to determine credibility and, as such, his

findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the post-conviction relief judge's findings on the credibility of witnesses); Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (noting the heightened emphasis reviewing court's place the upon post-conviction relief court's credibility findings).

The PCR court held in its order that Trial Counsel was deficient for failing to prepare and investigate.¹ The court based its deficiency ruling on Trial Counsel's failure to remember specific instances of trial preparation and decisions, and the court incorrectly recounted—"When asked, counsel repeatedly admitted that she should have utilized the witnesses and evidence offered and she had no excuse for not doing so." App. 1264. In reality, as demonstrated by the transcript from the evidentiary hearing, Trial Counsel never conceded that she should have investigated or called these witnesses. Her answers at the evidentiary hearing, which was more than five years after the trial, were short and reflected only that she could not recall her reasoning at the time of the investigation and she did not know why she did not call the witnesses. See App. 953 ("Q. Is there any reason why you didn't make a visual aid or actually introduce a time line for the jury to see? A. I don't know why I didn't."); App. 961 ("Q. Why did you choose to not utilize [Latika Elliott] as a witness to refute the State's time line in this case? A. I don't remember."); App. 964-65 ("Q. And do you have any reason why you didn't speak with [Kevin Parker]? A. I can't say I did or I didn't. I mean...he says I didn't talk to him and I don't see any place in my notes. But my notes are lacking because I don't have all of the notes that I would have had, and I don't have any of my investigator notes. So I'll have to accept his word that I

¹ Petitioner-Respondent notes the PCR court did not actual make a formal finding of deficiency—the word "deficient" or "deficiency" never appears in the findings of fact, and no specific analysis is made. The deficiency prong is implied through the court's overall finding of ineffectiveness.

didn't talk to him. Q. And you don't have a specific memory of talking to him? A. I don't. Q. And to be fair, you work for the public defenders office. Approximately how many clients are you representing at any given time? A. At least 150 at any given time."); App. 968 ("Q. Is there any reason you didn't bring that out to the jury during the course of the trial? A. I don't know."); App. 976 ("Q. Do you have a specific reason why [Felice Michelle Stallings] wasn't called then as a witness in this case? A. I don't remember. ... Q. Do you have a specific recollection as to why, what you reason was for not calling [Sandra Smith] as a witness at trial? A. I don't.").

Trial Counsel did not admit "that she should have utilized the witnesses and evidence offered and she had no excuse for not doing so" as the order states. This is simply untrue, and no probative evidence in the record supports this finding. The order then states "[Trial Counsel] conceded that she had no reason for failing to investigate and raise a third party guilty defense." This is also untrue. The page to which the PCR court cited in making this finding only shows the following testimony from Trial Counsel: "Q. And you didn't request a third-party defense or pursue a third-party defense in this case? A. I don't remember. I mean, obviously I didn't since the transcript doesn't reflect that I did." App. 1035, line 10-13. There was no testimony about her reasoning for failing or choosing not to raise this defense. Again, there is no probative evidence to support this specific finding made by the PCR court.

As evidenced by her testimony and the trial transcript itself, Trial Counsel was clearly well-prepared for this trial and spent more than an adequate amount of time preparing and investigating potential witnesses, leads, and defenses. No probative evidence exists to support the PCR court's finding of deficiency and Jackson failed to meet his burden of proof in showing that Trial Counsel was deficient in any way for failing to investigate.

Hindsight

Furthermore, the PCR court's finding of deficiency is inappropriate because it was entirely based on hindsight, which holds Trial Counsel to an unreasonable standard under Strickland.

The Supreme Court of the United States has consistently ruled that defense attorneys should be held by PCR courts to a reasonable standard of professional competence based on their perspective at the time of their representation. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, at 689. Strickland also explains that defense counsel's duty to investigate should be assessed from counsel's view at the time of the investigation:

[T]he Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options. The court observed that counsel's investigatory decisions must be assessed in light of the information known at the time of the decisions, not in hindsight, and that "[t]he amount of pretrial investigation that is reasonable defies precise measurement."

Id. at 680, 104 S.Ct. at 2060-61 (citations omitted).

"[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 6, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). To be entitled to a deficiency finding, Jackson must prove that it was unreasonable at the time of Trial Counsel's representation for her to fail to investigate each of the potential witnesses that were not presented at trial. He failed to do so. This includes witness Kalyn Floyd, whose very existence was not

revealed to Trial Counsel until the end of the first day of trial. See PCR Tr. page 18 line 14; page 175.

It is clear from the trial transcript and testimony presented at the evidentiary hearing that Trial Counsel tried this case as well as she could based on her theory of defense at the time of trial. It is improper to compare that theory, which was not successful at trial, to a new theory on which to try the case with the benefit of hindsight that may or may not have been successful.

After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind.

Harrington v. Richter, 131 S. Ct. 770, 790, 562 U.S. 86, 109 (2011). Trial Counsel's strategy and investigation were well within reasonable professional norms at the time of the trial, and she should not be held ineffective just because her valid defense was not successful before the jury.

The record before this Court shows there is no probative evidence to support the PCR court's finding of deficiency. Therefore, because the first prong of the Strickland test is not met, the PCR court's finding of ineffective assistance of counsel must be reversed.

Prejudice

Failure to address prejudice prong

After a deficiency finding is made, a court must then make a finding of prejudice to grant post-conviction relief for ineffective assistance of counsel. Here, the PCR court's finding of ineffective assistance of counsel was improper because the court failed to address the prejudice prong of the Strickland test for each allegation of ineffective assistance of counsel for failure to investigate, and instead attempted to address prejudice as a monolithic concept. In order to prove

prejudice, an applicant must show that but for counsel's deficiency, the result of the trial would have been different.

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

Strickland at 693, 104 S.Ct. at 2067. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Id.

Furthermore, failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). To show prejudice, Jackson must prove that Trial Counsel's failure to investigate directly affected the outcome of the trial.

Here, the PCR court failed to make a finding of prejudice as to each individual allegation of deficiency. The order improperly groups several allegations of specific failures to investigate into one overarching allegation² and finds prejudice for all of them combined. This is improper. Jackson failed to prove that any of these alleged deficiencies alone were prejudicial to the

² This will be addressed further under the second issue on appeal below.

outcome of this case, and the PCR court's failure to specifically address the prejudice prong clearly shows that no probative evidence supports its finding of prejudice.

Jackson presented at least **ten** separate claims of ineffective assistance of counsel. The following allegations were addressed in the order as having proven Trial Counsel was ineffective: **(1)** Failure to prepare and investigate, App. 1263; **(2)** Failure to investigate and raise a third party guilt defense, App. 1264; **(3)** Failure to call witness Jeff Smith, App. 1264; **(4)** Failure to call witness Latika Elliott, App. 1264; **(5)** Failure to call witness Felice Stallings, App. 1265; **(6)** Failure to call witness Kevin Parker, App. 1266; **(7)** Failure to obtain video from gas station, App. 1266; **(8)** Failure to call witness Christy Parker, App. 1266; **(9)** Failure to call witness Sandra Smith, App. 1268; and **(10)** Failure to call witness Kalyn Floyd, App. 1268.

Jackson must prove in *each* of these ten allegations that Trial Counsel was deficient, and that but for this deficiency, the outcome of the trial would have been different. Then, the PCR court must specifically address the prejudice prong of this test for each allegation that it finds deprived Jackson of effective assistance of counsel. The court did not make these individual findings, but instead stated in sum, "In conclusion, this Court finds that [Jackson] has carried his burden and clearly shown that but for counsel's failure to prepare and investigate there is a reasonable probability that the outcome of the trial would have been different." App. 1275. This conclusive summary is improper, and the Court should not have granted relief on any of these individual allegations without first finding that each one of them individually changed the outcome of the trial.

While Jackson did present witnesses at the evidentiary hearing which he alleges might have contradicted the State's timeline or weakened the credibility of some of the State's witnesses, Jackson did not prove that this testimony would have changed the jury's verdict. The

discrepancies pointed out in the testimony of the witnesses presented at the PCR hearing, which was years after the trial, were minor and inconsistent. Their testimony was speculative and vague. None of the witnesses could say with credible, exact certainty that Jackson did not or could not have committed this crime. Additionally, some of these witnesses had criminal records that could have been used to impeach them if they had testified at trial.

Because the PCR court failed to address the prejudice prong for any of the specific allegations of deficiency, there is no probative evidence supporting the finding of prejudice. Accordingly, the second prong of the Strickland test has not been met, and the PCR court's finding of ineffective assistance of counsel must be reversed.

Overwhelming Evidence

Finally, Petitioner-Respondent submits that Jackson cannot prove prejudice as to any of his allegations of ineffective assistance of counsel because there is overwhelming evidence of his guilt.

Where there is overwhelming evidence of an applicant's guilt, deficiencies in defense counsel's representation cannot, as a matter of law, be prejudicial enough to change the outcome of the case. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

At trial, the State presented 36 witnesses to testify about evidence of Applicant's guilt. A cigarette butt was introduced containing Applicant's DNA that was found on the ground at the scene right next to the car where the Victim was shot in the head and killed. App. 87; App. 94-95; App. 504. Witnesses Joseph Dicks and Jose Serrano both testified that Applicant confessed that he killed the Victim and gave exact details of how and where he did it. App. 243; App. 248; App. 411-13. Multiple witnesses testified that they had seen Applicant with the Victim in his car on the evening of the murder. App. 171; App. 302; App. 351.

Petitioner-Respondent submits that this constitutes overwhelming evidence of Jackson's guilt. As a result, Jackson can show no prejudice from any of the allegations raised in his PCR application, individually or in total, as no deficiency on behalf of Trial Counsel could have reasonably changed the outcome of trial. Therefore, no probative evidence supports the PCR court's finding of prejudice.

In conclusion, because no probative evidence supports the finding of either prong of the Strickland test, the PCR court's finding of ineffective assistance of counsel is improper as a matter of law and should be reversed.

II. The PCR court erred as a matter of law by using an improper cumulative error analysis that is not recognized by South Carolina law and an improper hindsight standard for deficiency that contradicts the Strickland standard.

In reaching its conclusion that Jackson was prejudiced by Trial Counsel's alleged deficiencies, the PCR court incorrectly applied two incorrect legal standards—cumulative error analysis and a prejudice analysis that differs from the Strickland standard. Because neither of these standards is correct, the PCR court's findings should not be upheld as a matter of law, and the order granting post-conviction relief should be reversed.

Cumulative Error Analysis

The PCR court improperly used a cumulative error analysis in finding prejudice resulting in ineffective assistance of counsel. As explained above, Jackson alleged at least **ten** separate allegations of ineffectiveness. **(1)** Failure to prepare and investigate, App. 1263; **(2)** Failure to investigate and raise a third party guilt defense, App. 1264; **(3)** Failure to call witness Jeff Smith, App. 1264; **(4)** Failure to call witness Latika Elliott, App. 1264; **(5)** Failure to call witness Felice Stallings, App. 1265; **(6)** Failure to call witness Kevin Parker, App. 1266; **(7)** Failure to obtain video from gas station, App. 1266; **(8)** Failure to call witness Christy Parker, App. 1266; **(9)** Failure to call witness Sandra Smith, App. 1268; and **(10)** Failure to call witness Kalyn Floyd, App. 1268.

In its order, the PCR court combined all ten of these into one broad overarching allegation and granted post-conviction relief on that basis: "In conclusion, this Court finds that [Jackson] has carried his burden and clearly shown that but for counsel's failure to prepare and investigate there is a reasonable probability the outcome of his trial would have been different." App. 1275. This finding was improper.

South Carolina courts have consistently declined to apply a cumulative error analysis in PCR actions. See e.g., Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002) (declining to address whether applicant was entitled to relief based on supposed cumulative effect of counsel's alleged errors); Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (finding PCR court did not err in failing to conduct a cumulative error analysis where only one allegation had merit and the "record simply did not contain 'several errors' for the judge to cumulatively assess"); Lorenzen v. State, 376 S.C. 521, 535, 657 S.E.2d 771, 779 (2008) ("Although we recognize that whether the cumulation of several errors, 'which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina' we do not believe the facts of this case present an opportunity to definitively decide this question." (citations omitted)). In addition, a number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Because South Carolina Courts do not recognize a cumulative error analysis, the PCR court's finding of prejudice based on a combination of ten different alleged deficiencies is inappropriate. Unless Jackson can prove that one of these ten alleged deficiencies on its own would have changed the outcome of the trial, he cannot meet his burden of proof, and post-conviction relief must be denied. Petitioner-Respondent submits that none of these allegations alone would have changed the outcome of the trial. The PCR court's failure to individually address each alleged deficiency is improper. This impropriety is particularly evident when considering the PCR judge's ultimate conclusion: that the error was "counsel's failure to prepare

and investigate.” Every instance of failing “to call” a witness at trial has nothing to do with preparation and investigation. Rather it has to do with a decision about the trial itself. Accordingly, the individual findings do not support the conclusion. Therefore, because the PCR court used an improper legal standard that is not recognized under South Carolina law, its finding should be reversed.

Prejudice Analysis

In the order granting post-conviction relief, the PCR court granted the application based on its finding that “[d]efense counsel provided ineffective assistance when she failed to prepare and investigate Applicants case prior to trial, which was prejudicially evidenced by her failure to utilize available witnesses and evidence to refute the State's theory of the case, properly cross-examine the State's witnesses, and present a defense beyond merely calling Applicant to the stand.” App. 1259. In other words, the court found that (1) Trial Counsel was deficient because she failed to investigate; and (2) this failure to investigate prejudiced Applicant because witnesses and evidence were not presented at trial and a proper defense was not developed.

The court used the same analysis throughout the order—“The Court finds that trial counsel’s ineffective assistance derived from her failure to prepare and investigate and resulting prejudice is further evidenced by her failure to locate Ms. Floyd and call her as a witness at trial.” App. 1268. Again, the court’s ruling is that Jackson was prejudiced because Floyd did not testify at trial. This standard is incorrect and cannot prove ineffective assistance of counsel under Strickland.

In order to prove prejudice under the proper standard, Jackson must show that but for Trial Counsel's failure to investigate, *the result of the trial would have been different*. However, according to the order, the only thing Jackson proved through his application for PCR is that

these witnesses could have testified at trial if Trial Counsel had investigated them. This alone does not support the assertion that the jury would have found Jackson not guilty if these witnesses had in fact testified. The court did not find that Floyd or any other witness's testimony would have changed the jury's verdict. It only found that the witnesses did not testify because counsel failed to investigate.

Under the legal standard that the court applied in its order, Jackson has not proven ineffective assistance of counsel. Jackson failed to prove that the result of the trial would have been different but for Trial Counsel's alleged failure to investigate. The PCR court did not make a finding that the result of the trial would have been different based on any of Trial Counsel's specific failures to investigate. Therefore, because the finding relies on an incorrect legal standard which differs from the Strickland test, the PCR court erred as a matter of law and should be reversed.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to grant certiorari, dispense with further briefing, and correct this error by reversing the PCR court's ruling granting post-conviction relief. In the alternative, the State requests this Court to grant certiorari and allow the opportunity to fully brief the issue.

Respectfully submitted,

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November 6, 2017

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

The Honorable Edgar W. Dickson, Circuit Court Judge

TEVON M. JACKSON, #344982

Respondent-Petitioner,

STATE OF SOUTH CAROLINA

Petitioner-Respondent.

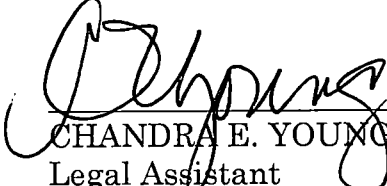
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Lara M. Caudy, Esquire
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 6th day of November 2017.



CHANDRA E. YOUNG
Legal Assistant
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S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

November 6, 2017

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

**RE: Tevon M. Jackson, #344982 v. State of South Carolina
2017-000790**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:cey
Enclosures

cc: Lara M. Caudy, Esquire
Trisha Allen, Victim Services (letter only)