ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Spartanburg County

Honorable Edward W. Miller, Circuit Court Judge

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JAN 16 2018

S.C. SUPREME COURT

GABRIEL JON RIOS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2017-001549

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# PETITION FOR WRIT OF CERTIORARI

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DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

# INDEX

## ISSUES PRESENTED

1.

Whether trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment?

2.

Whether trial counsel's failure to impeach the victim's claim that she recognized appellant as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment?

3.

Whether trial counsel's failure to object to the solicitor's burden-shifting closing argument that appellant had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment?

## STATEMENT

On November 24, 2010, petitioner Gabriel Jon Rios was indicted by a Spartanburg County grand jury for armed robbery, a weapons charge, grand larceny, kidnapping, first-degree assault and battery, and first degree burglary. App. 561 – 570. On February 26, 2013, petitioner was tried before the Honorable R. Lawton McIntosh and a jury. App. 1. Timi Poulos and Russell Ghent represented the State. App. 1. Matthew Shealy represented petitioner. App. 1. Petitioner was convicted and sentenced to a total of forty-five years' imprisonment. App. 376, ll. 11 – 22. The Court of Appeals affirmed petitioner's convictions. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. Mar. 11, 2015).

On June 3, 2015, petitioner filed a PCR application. App. 426. On January 30, 2017, a hearing was held before the Honorable Edward W. Miller. App. 440. Susannah C. Ross represented petitioner. App. 440. Caitlin B. Hastings represented the State. App. 440. Judge Miller denied petitioner's application in an amended order after a timely Rule 59(e) Motion. App. 544. This petition follows.

## ARGUMENT

1.

Trial counsel's failure to use cell phone records to substantiate petitioner's alibi constitutes ineffective assistance under the Sixth Amendment.

*Introduction*

Petitioner's defense to this home invasion was alibi. App. 288, l. 6 – 292, l. 6. At trial, the jury heard the victim testify that she "[i]mmediately" recognized petitioner as her attacker because he worked for her husband's construction company. App. 108, ll. 4 – 24. The jury also heard the solicitor discredit petitioner's wife's testimony that she received a call from him on a landline sixteen minutes away from the crime scene near the time of the break-in. App. 322, ll. 8 – 15. The solicitor called petitioner's phone call alibi "just a story." App. 322, ll. 8 – 15.

The jury did **not** see phone records substantiating petitioner's alibi. App. 460, ll. 6 – 20. App. 485 – 487. The jury did not hear a 911 call that would have discredited the victim's claim that she "immediately" recognized petitioner during the attack. (Applicant's Ex. 1). Nor did trial counsel object to the solicitor's burden-shifting closing about petitioner's alibi. App. 322, l. 24 – 323, l. 3. Trial counsel's failure to ensure the jury heard this crucial evidence undermines confidence in this verdict and creates a reasonable probability that the outcome of petitioner's trial would have been different. See Tappeiner v. State, 416 S.C. 239, 249, 785 S.E.2d 471, 476 (2016) (reciting burden of proof in a PCR case).

## Factual and Procedural Background

*The Trial and Appeal*

The victim in this case, Gail Holt, claimed that on the morning of August 14, 2010, a man broke into her house, held "a sharp object" to her neck, and demanded she open a safe. App. 106, l. 9 – 111, l. 2. She did not know the combination. App. 110, ll. 17 – 23. The man then taped her hands behind her back, stole her car, and left. App. 111, l. 9 – 114, l. 7. Ms. Holt freed her hands of the tape in "a few minutes" and called her husband, Phil Holt. App. 114, ll. 4 – 16. Mr. Holt called the police. App. 114, ll. 15 – 16. App. 149, ll. 16 – 23.

Mr. Holt testified that petitioner worked "off and on" for his foam insulation business. App. 149, l. 24 – 150, l. 11. Petitioner helped Mr. Holt install the safe to which the intruder led Ms. Holt. App. 150, l. 12 – 151, l. 4. After his wife broke free and called him, Mr. Holt called the police, told them about the break-in, and "suggested they get there quickly, too." App. 149, ll. 16 – 23. Mr. Holt then hung up and called his wife. App. 149, ll. 16 – 23. Mr. Holt beat the police to his house. App. 129, l. 25 – 130, l. 5. Ms. Holt claimed at trial that she "immediately" recognized petitioner during the attack. App. 108, ll. 4 – 24.

The timing of the break-in was approximately 7:30 AM. App. 312, l. 11 – 314, l. 11. Ms. Holt woke up "a little bit before 7:30." App. 107, ll. 4 – 5. She had been awake "for a little bit" when she heard glass break. App. 107, ll. 18 – 23. A neighbor, Marie Ollinger, took her routine morning walk at 7:30 that morning and noticed a man she had not seen before walking in the neighborhood towards the Holts' house. App. 163, ll. 3 – 24. App. 164, l. 20 – 165, l. 4. She lived "about seven houses away" from the Holts. App. 162, ll. 17 – 23. She described the person as an "unremarkable" black man and made no in-court identification of petitioner. App. 164, ll. 1 – 5.

Contrary to the vast majority of criminal trials, the State did not call the first officer to respond to the scene. App. 264, ll. 9 – 19. Petitioner called the officer, David Welch. App. 264, ll. 9 – 19. Trial counsel failed to ask Officer Welch what time he arrived. App. 264, l. 6 – 266, l. 17. Officer Welch testified that Mr. and Ms. Holt failed to give him petitioner's name when he arrived. App. 264, l. 6 – 266, l. 17.

The next defense witness was Mrs. Estar Byrd. App. 267, l. 20 – 269, l. 2. Mrs. Byrd testified that she did not "really" know petitioner, but let him use her landline phone from time to time. App. 267, l. 20 – 269, l. 2. She testified her phone number was 864-___-2858. App. 267, l. 20 – 269, l. 2. She told the jury she had no memory of the date of the crime, August 14, 2010. App. 269, ll. 1 – 2. On cross-examination, she told the solicitor, "I can't honestly speak on that," when asked if she knew for sure whether petitioner used her phone that day. App. 269, ll. 19 – 25.

Petitioner's wife then testified that she received a telephone call from her husband on Mrs. Byrd's land line the morning of the crime at 7:25 AM. App. 271, l. 10 – 277, l. 5. Trial counsel then attempted to use the phone records at issue in this PCR. App. 271, l. 10 – 277, l. 5. The State strenuously objected, arguing the records had not been authenticated. App. 271, l. 10 – 277, l. 5. During this argument, the court ruled trial counsel could use the records to refresh recollection, but they could not be admitted unless they were properly authenticated. App. 271, l. 10 – 277, l. 5. Trial counsel told the court, "I have no plans on entering it into evidence." App. 275, ll. 10 – 11.

The defense's last witness was trial counsel's investigator, Curtis Jones. App. 280, l. 1 – 283, l. 7. Jones drove the route from Mrs. Byrd's house to the Holts' house. App. 280, l. 1 – 283, l. 7. The distance was 5.2 miles and took sixteen minutes. App. 280, l. 1 – 283, l. 7.

Trial counsel asked the court to instruct the jury on alibi, but Judge McIntosh refused. App. 288, l. 6 – 292, l. 5. The court reasoned that the evidence only showed a partial alibi, which did not warrant giving the charge. App. 288, l. 6 – 292, l. 5. However, Judge McIntosh allowed petitioner to argue the defense of alibi to the jury. App. 288, l. 6 – 292, l. 5. Trial counsel argued that petitioner could not have committed the crime because testimony (not phone records) showed petitioner was at Mrs. Byrd's house which was too far away for him to have committed the crime during the time window alleged by the State's witnesses. App. 312, l. 11 – 314, l. 11.

During its closing argument, the State attacked petitioner's alibi defense with great effect. App. 322, l. 1 – 323, l. 3. The solicitor addressed Ms. Byrd's testimony about the phone: "But she couldn't say for sure if she let him borrow it that morning or not. She told you she couldn't even say that she saw him that morning." App. 322, ll. 3 – 7. The solicitor then attacked petitioner's wife, arguing:

> . . . she thinks that she got a phone call from her husband around 7:20 something from a number that she believes was Ms. Byrd's number. She wasn't with him. She didn't even see him that morning, and let's not forget that yeah, she was convicted in 2008 of giving false information to police, for lying to police. So, you, you guys take that for what it's worth.

App. 322, ll. 8 – 15. Again, entering the phone records would have taken these powerful arguments away from the solicitor that the phone calls were a fiction.

On direct appeal, petitioner raised the failure to charge alibi. App. 384. The State argued petitioner never established a complete alibi. App. 398. In its brief to the Court of Appeals, the State argued:

> **Notably, the cell phone record was never admitted into evidence.** Furthermore, there is no other evidence presented by the defense which would warrant a charge on the defense of alibi—no testimony, no one mentioned Rios

was in their presence during the commission of the crime. **The entire closing argument on the alibi defense is a hypothetical theory based on nothing but the alleged phone call.**

App. 407, n.2 (emphasis added). The Court of Appeals affirmed the failure to give an alibi charge.

*The PCR Hearing*

Petitioner entered the vital phone records into evidence at the PCR hearing. App. 460, ll. 6 – 20. App. 485 – 487. The phone records show calls between petitioner's wife and Mrs. Byrd's landline at 7:16 and 7:22 AM. App. 485 – 487. Petitioner testified at PCR that trial counsel failed to enter the phone records into evidence because he neglected to subpoena a phone company representative to authenticate the records. App. 459, ll. 11 – 18. The State did not object when petitioner entered the records into evidence. App. 460, ll. 6 – 20.

Trial counsel inexplicably testified that calling a phone company witness to authenticate the records would also have required petitioner to testify—even though the records were those of his wife (who did testify). App. 472, ll. 9 – 24. He also claimed the jury would have "tuned that out." App. 472, ll. 9 – 24. He said his witnesses adequately covered the substance of the records and he "suggested their existence by kind of sneaky-peek." App. 472, ll. 9 – 24.

The PCR court credited trial counsel with a strategic reason for not admitting the phone records. App. 553. The court found trial counsel's strategy to be reasonable because "he did not believe that Ms. Boyd's phone records would be especially helpful either because it is unclear from the records who placed a call. They only indicate that a call was made." App. 553. The court also found petitioner did not satisfy the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). App. 553-554.

**Discussion**

The PCR court erred in crediting trial counsel with a reasonable strategy and in finding no prejudice. Unlike a legitimate trial strategy where counsel must make a choice between defenses, the phone records here provided additional support for the defense that counsel actually presented. Introducing the phone records would have been completely in line with the strategy used by counsel—presentation of alibi. Presenting the phone records would have prevented the State from making the powerful argument that the phone calls were a recent invention. The Attorney General, in its brief in the direct appeal, specifically pointed out trial counsel's failure to introduce the records during the trial.

Trial counsel's failure to introduce the phone records is similar to the deficiencies in Putnam v. State, 417 S.C. 252, 789 S.E.2d 594 (Ct. App. 2016) and Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991). In Putnam, trial counsel performed deficiently when he failed to serve subpoenas on witnesses to secure their attendance at trial. Putnam at 264-66, 789 S.E.2d at 600-01. Like Putnam, trial counsel here failed to subpoena the necessary witness to authenticate and introduce the phone records.

Even more like petitioner's case is Martinez. Martinez was a rape case and the victim reported the crime immediately afterwards, somewhere between 2:00 and 2:15 AM. Martinez at 40, 403 S.E.2d at 113. The police found a wallet containing the defendant's driver's license at the victim's home. Id. at 40, 403 S.E.2d at 113. The defendant presented evidence he reported the wallet stolen at a lounge between 12:00 AM and 1:00 AM. Id. at 40-41, 403 S.E.2d at 113. The defendant testified he left the lounge at 1:45 AM. Id.

Trial counsel neglected to call a witness who would have corroborated the defendant's evidence that he left the lounge "fifteen minutes prior to the conclusion of the rape." Id. at 41, 403 S.E.2d at 113-14. This Court found both deficient performance and prejudice under Strickland and reversed. Id. The witness did not provide the defendant in Martinez with a complete alibi, but corroborated the defendant's testimony that his presence elsewhere would have made it difficult for him to commit the crime. Just like in Martinez, the phone records do not provide a complete alibi, but they do prove that the phone calls from Mrs. Byrd's landline to petitioner's wife's phone were not a complete invention. The records demonstrate that petitioner was sixteen minutes away, making his commission of the crime difficult. Under Martinez, trial counsel was deficient and failing to enter the records made petitioner's defense seem like an invention, especially in the modern age when juries are certainly aware of the existence of phone records that can substantiate such claims.

If trial counsel thought the records were valuable enough to give the jury a "sneaky-peek" at them, then they were valuable enough to enter into evidence. Like Putnam and Martinez, the failure to enter these records was through negligence, not part of any reasonable trial strategy. See also Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014) (reversing in PCR because trial counsel failed to present alibi defense). Petitioner was prejudiced because the State could claim his defense was entirely fiction, especially given his wife's conviction of a crime of dishonesty. This Court should grant certiorari and reverse.

2.

Trial counsel's failure to impeach the victim's claim that she recognized petitioner as the intruder "immediately" with the 911 call, made by her husband with the victim's voice audible in the background, on which the 911 operator asks, "Who is he? Do you know who he was?" and the husband replied, "Don't know," constitutes ineffective assistance under the Sixth Amendment.

Unlike the vast majority of criminal trials, the solicitors in this case did not introduce the 911 call into evidence. Undoubtedly the reason the solicitors did not use the 911 call was because it undercut their key piece of evidence—Ms. Holt's claim that she "immediately" recognized petitioner during the attack. App. 108, ll. 4 – 24. Had the jury heard the 911 call, this key claim would have been disproved and the result of this trial would have been different.

Petitioner introduced the recording of the 911 call at the PCR hearing. App. 451, l. 7 – 452, l. 11. App. 460, ll. 6 – 20. Applicant's Ex. 1. Mr. Holt is the primary speaker on the 911 call recording, but Ms. Holt can be heard in the background. Applicant's Ex. 1. The dispatcher asks, **"Who is he? Do you know who he was?"** Applicant's Ex. 1 (emphasis added). Mr. Holt responds, **"Don't know."** Applicant's Ex. 1 (emphasis added).

Trial counsel testified he did not admit the 911 call "because I had Investigator Welch, ultimately." App. 471, l. 11 – 472, l. 1. He thought the jury hearing from a police officer who only testified that Ms. Holt did not initially identify petitioner was "a little more powerful" than hearing from Mr. Holt's own mouth that they did not know the intruder's identity. App. 471, l. 11 – 472, l. 1. Without identifying any specific "risks," the PCR court credited trial counsel with a reasonable strategic decision because "he felt that introducing the 911 tape posed more risks

than benefits, and he felt he could introduce the helpful information through other evidence." App. 553.

The purported trial strategy, much like the phone records, is illogical because the 911 call substantiated a strategic decision trial counsel actually made. Trial counsel used Officer Welch to show that Ms. Holt did not immediately identify petitioner as she powerfully claimed during her testimony, which meant that he knew he needed to discredit her identification. Omitting recorded evidence from Mr. Holt's own mouth that would also have impeached the State's key witnesses was, like in Issue 1, important evidence that supported trial counsel's chosen strategy. Nothing in the 911 call is inflammatory and was cumulative to the Mr. and Ms. Holt's testimony, except for the critical impeachment evidence. Failing to enter this evidence constituted deficient performance. See Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016) (reversing in PCR because of trial counsel's failure to impeach a witness with a prior inconsistent statement).

The failure to impeach a witness is deficient performance that prejudices a defendant. Driscoll v. Delo, 71 F.3d 701, 710-11 (8th Cir. 1995); Berryman v. Morton, 100 F.3d 1089, 1097 (trial counsel failed to impeach with inconsistent eyewitness identifications). In Driscoll, defense counsel's failure to impeach an eyewitness with prior inconsistent statements was held prejudicial. Id. The defendant was sentenced to death for stabbing a prison guard. Trial counsel failed to impeach a prosecution witness who claimed at trial that the defendant confessed to the murder with a prior statement omitting the confession. Id. at 709-12. The centrality of the witness's testimony was an important factor in the court's consideration. Id.

Here, Ms. Holt's "immediate" identification was the key fact for the prosecution and the failure to impeach her testimony could not have been more prejudicial. See also Peebles v. State, 958 S.W.2d 533, 536-37 (Ark. 1998) (holding that defendant was prejudiced by trial counsel's

failure to impeach a witness with a prior denial that a crime occurred); Delarosa v. State, 24 So.3d 741, 741-42 (Fla. Ct. App. 2009) (remanding case for prejudice inquiry because of trial counsel's failure to impeach police officer with prior statement claiming he was attacked by three Mexicans when same officer testified at trial he was only attacked by defendant).

The solicitors' decision to omit the 911 call from their case-in-chief further demonstrates its value for the defense. The State routinely admits 911 calls into evidence. The State declined to do so in this case because it would have discredited their own witness. Trial counsel's failure prejudiced petitioner under the Sixth Amendment and this Court should grant certiorari and reverse.

3.

Trial counsel's failure to object to the solicitor's burden-shifting closing argument that petitioner had "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody," constitutes ineffective assistance under the Sixth Amendment.

Trial counsel admitted at the PCR hearing that he should have objected to the solicitor's burden-shifting closing argument. App. 474, ll. 9 – 18. Trial counsel conceded, "It sounded like it was burden shifting. I missed that." App. 474, ll. 9 – 18.

The solicitor made his burden-shifting argument during his attack on petitioner's alibi defense. App. 322, l. 1 – 323, l. 3. The solicitor told the jury, "over two and a half years, since this incident happened, to come up with this story and that is all this is is just a story. No one said they were with him that morning, Nobody, nobody that testified for him accounted for his whereabouts. Nobody." App. 322, l. 1 – 323, l. 3.

Despite trial counsel's admission that he should have objected, the PCR court found neither deficient performance nor prejudice. App. 550. This conclusion was error. The Due Process Clause requires the proof of every fact necessary to convict a defendant to meet the beyond-a-reasonable-doubt standard. U.S. Const. amends. V, XIV. In re Winship, 397 U.S. 358 (1970). "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. at 364. The prosecution bears this burden of

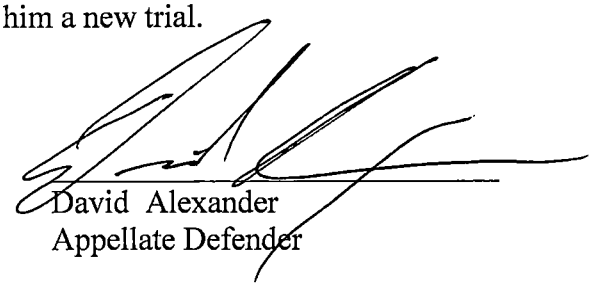
proof. Mullaney v. Wilbur, 421 U.S. 684, 703 (1975); Tot v. United States, 319 U.S. 463, 469-70 (1943).

A criminal defendant may stand silent throughout the trial. U.S. Const. amends, V, XIV. Doyle v. Ohio, 426 U.S. 610 (1976). It is always the State's responsibility to overcome the presumption of innocence and dispel reasonable doubts. The solicitor's argument that petitioner had years "to come up with this story" and that "nobody testified for him" was improper and the failure to object constituted deficient performance.

The solicitor's burden-shifting argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). This satisfies the prejudice prong of Strickland. The prejudice is magnified in this case because the improper argument concerned petitioner's alibi defense and gave the jury the impression that it was petitioner's burden to prove alibi, not the State's burden to disprove it. Combined with trial counsel's errors to admit the crucial evidence described in Issues 1 and 2, the improper argument allowed the State to not only discredit petitioner's defense, but to foist an additional erroneous burden of proof on his case. This Court should grant certiorari and reverse.

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari with the ultimate result of reversing petitioner's convictions and granting him a new trial.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of January, 2018.

STATE OF SOUTH CAROLINA

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Certiorari to Spartanburg County

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GABRIEL JON RIOS,

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CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Gabriel Jon Rios, #344751, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 16th day of January, 2018.

David Alexander
Appellate Defender

SUBSCRIBED AND SWORN TO before me this 16th day of January, 2018.

ATTORNEY FOR PETITIONER

(L.S)

Notary Public for South Carolina
My Commission Expires: July 3, 2023