

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Certiorari to Aiken County

Honorable Edgar W. Dickson, Circuit Court Judge

RECEIVED

FEB 28 2018

TEVON MICHAEL JACKSON,

S.C. SUPREME COURT

RESPONDENT/PETITIONER

V.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

APPELLATE CASE NO. 2017-000790

RETURN TO PETITION FOR WRIT OF CERTIORARI

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR RESPONDENT/PETITIONER

INDEX

INDEX i

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT

1.

The post-conviction relief court correctly granted Respondent/Petitioner Jackson a new trial where there is ample probative evidence to support the court’s finding that (1) trial counsel’s performance was deficient where she inexcusably failed to adequately investigate and prepare for trial, including by failing to interview and present the testimony of seven witnesses, all who testified at the evidentiary hearing, and (2) that Respondent/Petitioner Jackson was prejudiced by counsel’s deficient performance since counsel’s failure to adequately investigate and ultimately utilize these witnesses at trial prevented her from refuting the state’s theory of the case and timeline of events and impeaching state witnesses whose credibility was essential to the prosecution.5

2.

The post-conviction relief court correctly granted Respondent/Petitioner Jackson a new trial where the court did not use an improper cumulative error analysis or an improper hindsight standard for deficiency as argued by the state.21

CONCLUSION.....25

ISSUES PRESENTED

1.

Whether the post-conviction relief court correctly granted Respondent/Petitioner Jackson a new trial where there is ample probative evidence to support the court's finding that (1) trial counsel's performance was deficient where she inexcusably failed to adequately investigate and prepare for trial, including by failing to interview and present the testimony of seven witnesses, all who testified at the evidentiary hearing, and (2) that Respondent/Petitioner Jackson was prejudiced by counsel's deficient performance since counsel's failure to adequately investigate and ultimately utilize these witnesses at trial prevented her from refuting the state's theory of the case and timeline of events and impeaching state witnesses whose credibility was essential to the prosecution?

2.

Whether the post-conviction relief court correctly granted Respondent/Petitioner Jackson a new trial where the court did not use an improper cumulative error analysis or an improper hindsight standard for deficiency as argued by the state?

STATEMENT OF THE CASE

The state alleged at trial that Respondent/Petitioner Tevon Michael Jackson, then seventeen years old, shot and killed Marcus Finklin during the early morning hours of June 4, 2008 in Aiken, South Carolina. The state's case against Jackson relied almost entirely upon the testimony of Joseph Dicks and Jose Serrano, who claimed Jackson confessed to murdering the decedent. Their credibility was critical to the prosecution. Dicks and Serrano, who were both suspects in the murder, repeatedly changed and added to their account of what occurred up until Jackson's trial.

An Aiken County Grand Jury indicted Jackson on January 29, 2009 for murder and possession of a firearm during the commission of a violent crime. App. 1295-1298. His case was called to trial on February 22, 2011 before the Honorable Doyet A. Early, III, and a jury. App. 3. Chief Solicitor John William Weeks and Assistant Solicitor Elizabeth Young represented the state, and Wallis Alves represented Jackson. App. 3. After a five day trial, the jury found Jackson guilty. App. 739, ll. 5-19. Judge Early sentenced him to thirty years for murder and five years concurrent for the weapons offense. App. 781, ll. 6-11.

On November 27, 2013, after his direct appeal was dismissed pursuant to Anders v. California, 386 U.S. 738 (1967), Jackson filed an application for post-conviction relief (PCR). App. 805-810. The state filed a return to this application dated May 13, 2014. App. 811-27. On August 13, 2015, Jackson filed his first amended application. App. 826-828. On August 31, 2015, Jackson filed a second amended application. App. 829-830.

An evidentiary hearing was convened on September 10, 2015 before the Honorable Edgar W. Dickson. App. 831. Assistant Attorney General Daniel Gourley represented the state, and Tricia Blanchette represented Jackson. App. 831. Jackson called eleven witnesses during

his presentation of evidence and submitted seventeen exhibits. App. 832-833. At the conclusion of the hearing, Judge Dickson took the matter under advisement. App. 1212.

On September 12, 2016, Jackson filed a memorandum in support of application for post-conviction relief. App. 1213-1240. Also on September 12, 2016, the state filed a memorandum in support of denying post-conviction relief. App. 1241-1256. By order filed January 13, 2017, Judge Dickson granted Jackson a new trial. App. 1257-1281. He found trial counsel was ineffective for failing to properly investigate and prepare for trial. Due to counsel's lack of investigation and preparation, the judge found she failed to call numerous witnesses to testify at trial and utilize evidence that would have refuted the state's timeline of events and theory of the case. App. 1260. However, Judge Dickson denied Jackson relief on his remaining allegations. App. 1257-1281.

On February 1, 2017, the state filed a motion to reconsider pursuant to Rule 59(e), SCRC. App. 1282-1292. Judge Dickson denied the motion to reconsider by order dated March 17, 2017. App. 1293. A corrected order was filed March 27, 2017. App. 1294. The state and Jackson both filed a timely notice of appeal.

On October 30, 2017, Jackson filed a petition for writ of certiorari arguing Judge Dickson erred by finding the state did not commit prosecutorial misconduct when it failed to disclose evidence favorable to the defense pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and that counsel was not ineffective for failing to object to the testimony of William Hare, the so called records custodian for the decedent's telephone records, and the admission of said telephone records. On November 6, 2017, the state likewise filed a petition for writ of certiorari challenging Judge Dickson's finding that trial counsel was ineffective for failing to adequately investigate and prepare for trial arguing no probative evidence supports the judge's finding of either deficiency or prejudice. The state also argued Judge Dickson erred as a matter of law by

using both an improper cumulative error analysis and an improper hindsight standard for deficiency.

This return to the state's petition for writ of certiorari follows.

ARGUMENT

1.

The post-conviction relief court correctly granted Respondent/Petitioner Jackson a new trial where there is ample probative evidence to support the court's finding that (1) trial counsel's performance was deficient where she inexcusably failed to adequately investigate and prepare for trial, including by failing to interview and present the testimony of seven witnesses, all who testified at the evidentiary hearing, and (2) that Respondent/Petitioner Jackson was prejudiced by counsel's deficient performance since counsel's failure to adequately investigate and ultimately utilize these witnesses at trial prevented her from refuting the state's theory of the case and timeline of events and impeaching state witnesses whose credibility was essential to the prosecution.

“On certiorari in PCR cases, the Court applies an ‘any evidence’ standard of review.” McHam v. State, 404 S.C. 465, 472, 746 S.E.2d 41, 45 (2013) (citing Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011)). “This Court will uphold the findings of the PCR judge when there is *any* evidence of probative value to support them, and it will reverse the PCR judge’s decision when it is controlled by an error of law.” Id. at 473, 746 S.E.2d at 45 (quoting Suber v. State, 371 S.C. 554, 558-559, 640 S.E.2d 884, 886 (2007)) (internal quotation marks omitted) (emphasis added). This Court gives great deference to the PCR judge’s findings of fact. Id. (citing Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005)). However, the Court reviews “questions of law de novo, with no deference to trial courts.” Smalls v. State, Op. No. 27764 (S.C. Supreme Court filed February 7, 2018).

In order to show ineffective assistance of counsel as a ground for relief, an applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that

the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. An applicant must prove “counsel’s performance was deficient” and fell below an objective standard of reasonableness, and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989) (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland, 466 U.S. at 668). “Furthermore, when a defendant’s conviction is challenged, ‘the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.’” Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (quoting Strickland, 466 U.S. at 695).

“Without a doubt, ‘[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.’” Id. (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)) (alteration in original). “When evaluating the reasonableness of counsel’s conduct, ‘the court should keep in mind that counsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.’” Id. (quoting Strickland v. Washington, 466 U.S. at 690). “Moreover, while the scope of a reasonable investigation depends upon a number of issues, ‘at 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, 372 S.C. at 331-332, 642 S.E.2d at 597 (quoting

Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), aff'd, 828 F.2d 670 (11th Cir. 1987)) (emphasis in original).

In Lounds v. State, 380 S.C. 454, 670 S.E.2d 646 (2008), this Court held trial counsel was deficient for failing to adequately prepare for trial and conduct a reasonable investigation. Citing Ard, this Court emphasized that a reasonable investigation includes interviewing potential witnesses. Id. at 460, 670 S.E.2d at 649. Lounds was indicted for armed robbery and kidnapping. Id. at 457, 670 S.E.2d at 647. The jury found Lounds not guilty of armed robbery, but convicted him of kidnapping. Id. Todd Garrett testified at trial that Lounds entered his warehouse, eventually drew a firearm, and demanded his money. Id. According to Garrett, after he told Lounds he only had a couple of dollars on him, Lounds forced Garrett into his truck outside. Garrett claimed he told Lounds he did not have an ATM card to withdraw cash from the bank and suggested they drive to Garrett's parents' house to find money there. Id. Once they arrived at his parents' house, Garrett testified that he punched Lounds in the face and ran away. Id. at 457, 670 S.E.2d at 648. Lounds then left in Garrett's truck. Id.

Lounds testified in his own defense and relayed a much different account. Id. at 458, 670 S.E.2d at 648. He testified that Garrett bought crack cocaine from him on several occasions and owed him about five hundred fifty dollars in connection with these drug deals. Id. Lounds went to Garrett's warehouse and asked for his money. Id. Lounds testified that he did not have a gun and did not threaten Garrett. Id. According to Lounds, Garrett volunteered to go to his parents' house to get money. Id. Garrett drove. When they arrived at the house, Garrett got out of the truck and ran. Id. Lounds admitted taking Garrett's truck back to the warehouse. Id.

At the outset of trial, counsel informed the trial judge that Lounds' family was "supposed to bring several witnesses with them" to testify on behalf of the defense. Id. "Counsel then requested a continuance because he had 'found out the names of these people *just this morning*'

and therefore had not had a chance to subpoena them.” Id. (emphasis in original). After a pretrial hearing, counsel informed the trial judge that there were two witnesses who would be arriving in the afternoon, but two others who were not available. Id. Counsel claimed the unavailable witnesses would not “add much” to the defense, although he stated these witnesses would be able to connect Garrett, who claimed he had never seen Lounds before the day of the incident, with Lounds through drug dealing. Id. at 460-461, 670 S.E.2d at 649. Counsel told the judge he had spoken to the two other witnesses, but claimed they would not “add that much” to the case. Id. at 461, 670 S.E.2d at 649. As a result, Lounds was the sole defense witness. Id.

Lounds presented two witnesses at his PCR hearing. Id. at 461, 670 S.E.2d at 650. George Lounds, Lounds’ brother, testified that Garrett and Lounds bought and used drugs together. Id. George asserted Lounds and Garrett were always “smoking together at a crack house.” Id. George said counsel spoke to him before trial and said he would get back with him, but George never heard from counsel again. Id. Preston Lounds, Lounds’ nephew, testified that he had seen Lounds and Garrett together in Garrett’s truck.¹ Id. at 461-462, 670 S.E.2d at 650. Preston further testified he was at the courthouse during trial, but counsel never spoke to him. Id. at 462, 670 S.E.2d at 650.

This Court held there was no probative evidence to support the PCR court’s finding that counsel conducted a proper investigation. Id. While noting counsel told the trial judge he believed the witnesses would not add much to Lounds’ defense, this Court held counsel’s belief was not objectively reasonable given the defense theory of the case. Id. The only defense trial counsel presented to the jury was that Lounds and Garrett knew each other through drug dealing.

¹ The state introduced evidence that Lounds’ fingerprint was found on the rearview mirror of Garrett’s truck to prove its theory that Lounds’ kidnapped Garrett. See Lounds, 380 S.C. at 458, 670 S.E.2d at 648.

Id. This Court asserted that, if witnesses other than Lounds were willing to testify to this fact, it would have certainly added to the credibility of Lounds' defense. Id.

The Court concluded the evidence clearly showed counsel simply had not adequately prepared for trial. Id. at 463, 670 S.E.2d at 650. This Court emphasized counsel's admission to the trial judge that he had only learned of potential defense witnesses that morning, and therefore they had neither been interviewed nor subpoenaed. Id.

As to the prejudice resulting from counsel's deficient performance, this Court held Lounds was clearly prejudiced by counsel's failure to subpoena and call witnesses who would have supported Lounds' own testimony at trial. Id. at 463, 670 S.E.2d at 650-651. With its not guilty verdict on the armed robbery indictment, the jury necessarily rejected several aspects of Garrett's account, and accepted as true certain parts of Lounds' testimony. Id. at 463, 670 S.E.2d at 651. The Court asserted that if additional witnesses had confirmed Lounds' testimony, there is a reasonable likelihood the result of the trial would have been different. Id.

In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), this Court held Bannister failed to prove prejudice from counsel's failure to call a specific witness to testify at trial because Bannister did not produce this witness' testimony at the evidentiary hearing and, consequently, what her testimony would have been at trial was "purely speculative." In so holding, this Court asserted:

This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness or *otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995) (where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial

testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, *supra*, 318 S.C. at 498-99, 458 S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (emphasis in original).

During the lower court proceedings, Jackson alleged trial counsel was deficient due to her inadequate preparation and lack of independent investigation prior to trial. In order to support his allegation that counsel was deficient for failing to adequately prepare and investigate, and that he was prejudiced as a result, Jackson presented the testimony of Kayln Floyd, Latika Elliott, Jeff Smith, Kevin Parker, Christy Parker, Sandra Smith, and Felice Stallings at the evidentiary hearing, among other witnesses. Significantly, the PCR judge found all of these witnesses to be credible. App. 1263; See Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999) (stating where matters of credibility are involved, this Court gives deference to the PCR court's findings because this Court lacks the opportunity to directly observe the witnesses). Jackson argued that if counsel would have conducted an adequate investigation and properly prepared for trial, she would have discovered the favorable testimony of these witnesses and utilized them to attack the state's theory of the case and timeline of events. The PCR judge ultimately agreed.

In the order granting Jackson a new trial, the PCR judge laid out his findings of fact and conclusions of law concerning each of these witnesses and analyzed their testimony at the evidentiary hearing. The judge concluded the evidence presented clearly demonstrated trial counsel failed to properly prepare and investigate prior to trial. App. 1263; App. 1275. The judge further found Jackson was prejudiced by counsel's deficient performance because, due to her lack of preparation and investigation, she failed to call specific witnesses who would have

challenged the state's theory of the case and timeline of events, which ultimately would have created reasonable doubt as to guilt. App. 1275. There is ample probative evidence in the record to support the PCR judge's findings of facts and conclusion of law in this regard.

Kayln Floyd

On the second day of Jackson's trial, Joseph Dicks testified that sometime on the night of June 3, 2008 into the early morning hours of June 4, 2008, the morning the decedent was killed, Kayln Floyd, at the direction of Jackson, gave Dicks a .38 caliber revolver. Shortly thereafter, Dicks gave the firearm to Jackson. App. 235, l. 20 – 237, l. 20. This allegation was extremely significant because, while the murder weapon was never found, David Black, who was qualified as an expert in firearm analysis and identification, testified that the projectile recovered from the decedent's body during autopsy was "a fired .38 caliber jacketed hollow point bullet." App. 480, l. 17 – 482, l. 23. Black also "determined, through examination [of] the weight and characteristics, that the bullet is loaded in some .38 Special and .357 magnum caliber cartridges." App. 484, ll. 1-4.

Specifically, Dicks claimed during direct examination by the solicitor:

Q: Okay. What happened when he [Jackson] left?

A: Nothing. He left and one of his friends came through and dropped something off to me.

Q: And what did they drop off to you?

A: A .38 caliber gun.

Q: What kind of gun was it?

A: A .38 small. It was like a little small pistol.

Q: Was it a revolver or an automatic?

A: It was a revolver thing with the little spinning, spinning thing on it?

Q: Was it loaded?

A: I think so, yes, sir.

Q: And what was his friend - - who was his friend that did that?

A: A person named Kayla.

Q: What was her name?

A: Kayla.

Q: Describe her.

A: You know like a regular dude, girl. I don't know which one you call her. Like a man/female or a dike or a stud or whatever you want to call it.

Q: You thought she was gay?

A: Yes, sir.

Q: All right. And did she live around there? Did you know her?

A: No, sir.

Q: Okay. Had you seen her before that day?

A: No sir, I seen her occasionally with Tevon [Jackson], you know, but I didn't know her.

Q: All right. What did she deliver to you?

A: A pistol.

Q: And that was the .38 you just mentioned?

A: Yes, sir.

Q: Was she dressed like a man?

A: Yes, sir.

Q: All right. What happened after that with you and Tevon [Jackson] after you got a visit from her?

A: I met back up with him.

Q: Where at?

A: On the same, on Nondrum [Street] at my house, and I gave it to him.

Q: Why did you give it to him?

A: Because it was meant for him.

Q: All right. How do you know it was meant for him?

A: Because he was the reason why I picked it up from her.

Q: Okay. Did he call you or something and tell you to get it?

A: Yes, sir.

Q: How did he do that?

A: He called me on my phone, on my mother's phone.

App. 235, l. 20 – 237, l. 20.

On cross-examination, Dicks admitted that, despite multiple interviews, he never mentioned anything about Kayla bringing him a .38 caliber revolver to law enforcement. He said he first told the solicitor about Kayla the Monday before trial, which would have been February 14, 2011. App. 262, l. 9 – 263, l. 19.

During the evidentiary hearing, Kalyn Floyd testified that she “was subpoenaed to go talk to the solicitor. And I went to go talk to him. He asked me what happened because Meat Man [Joseph Dicks] said I brought Tevon [Jackson] the murder gun but I was actually out of town that whole week.” App. 842, l. 18 – 843, l. 3. Floyd said she received the subpoena on the first day of Jackson's trial and met with the solicitor the following day. App. 848, ll. 13-24. The solicitor told her Dicks alleged she gave Jackson a gun on the morning of the murder. App. 847, ll. 21-23. Floyd told the solicitor that she had been in Augusta, Georgia that whole week and did not bring Jackson a gun. App. 847, ll. 12-16. She also gave the solicitor a signed written statement indicating that she did not give Jackson a firearm that morning. App. 846, l. 23 – 847, l. 11.

Significantly, the PCR judge found Kalyn Floyd's testimony credible. App. 1263.

During her testimony at the evidentiary hearing, trial counsel, Wallis Alves, remembered hearing the name Kayla prior to trial. App. 215, ll. 18-25. Upon reviewing at her notes, counsel testified:

On February 22nd [the first day of trial] at 11:30 I met with Solicitor Bill Weeks, Solicitor Beth Ann Young and Investigator Norwood Bodie. And they discussed new information that they had gotten from Joseph Dicks and Jose Serrano when they met with them the week before.

During that meeting and the solicitor, actually Solicitor Weeks approached me and told me that they wanted to meet with me to tell me about them. I took notes about what they told me. And I was specifically told that Tevon [Jackson] had gotten - - that Joseph Dicks said that Tevon called him on the phone, and specifically that Tevon had some stud coming to see Joseph [Dicks] who was bringing him a package. And when I asked them more details about what that meant by some stud, they told me it was a gay woman who dressed like a man named Kayla and they didn't have any further information about that person.

App. 1005, ll. 1-16 (emphasis added).

Despite becoming aware of the new allegations made by Dicks on the morning of the first day of trial, counsel made no effort to attempt to identify or locate “Kayla” to determine whether Dicks’ account was credible or whether “Kayla’s” potential testimony could be used to impeach Dicks.² Moreover, counsel did not communicate this new information to Jackson to determine whether Jackson knew who “Kayla” was or how to locate her. Jackson testified at the evidentiary hearing that he immediately knew Dicks was referring to Kayln Floyd after listening to his testimony during trial. Jackson explained that Kayln Floyd lived two to three houses down from him at the time and that he “easily” could have assisted counsel in locating her during the

² Not surprisingly, based on the new information provided by Dicks on the eve of trial, the state conducted its own independent investigation into the identity of “Kayla” and discovered that Floyd’s testimony would not be favorable to the state. Consequently, she was not called as a witness by the state at trial. Under reasonable professional norms, trial counsel likewise should have conducted an independent investigation and attempted to locate and interview “Kayla.” If counsel had done so, she would have discovered the identity of Kayln Floyd and learned of her extremely beneficial testimony to the defense in that it would have impeached the credibility of Joseph Dicks, a key witness for the state.

trial. However, again, counsel never shared this new information with Jackson or requested his assistance in identifying and locating “Kayla.” App. 1085, l. 9 – 1087, l. 20.

Accordingly, there is *ample* probative evidence in the record to support the PCR court’s finding that: “By counsel’s own admission she failed to attempt to locate Ms. Floyd or ask for more time to locate Ms. Floyd. The failure of counsel to properly prepare and investigate further prejudiced [Jackson] when Ms. Floyd was not located and utilized since Ms. Floyd ‘would have tremendously aided’ the defense and completely called the veracity of the State’s witnesses and theory of the case into question.”³ App. 1275. It is beyond question, as the PCR court found, that trial counsel was deficient for failing to adequately investigate, since an *independent* investigation would have uncovered the identity of Kayln Floyd and her extremely favorable evidence to the defense, and that Jackson was prejudiced as a result.

Jeff Smith

Jeff Smith, Deputy Coroner for Aiken County, conducted the coroner’s investigation into the death of the decedent and testified for the state at trial. App. 357, ll. 1-18; App. 883, ll. 9-16. His notes and report were marked as Applicant’s Exhibit No. 3. App. 883, l. 21 – 884, l. 19. Smith admitted during his testimony at the evidentiary hearing that the estimated time of death based on the coroner’s investigation was 3:15 a.m. However, the time of death was later changed on the coroner’s final report to 2:00 a.m. per law enforcement. App. 885, l. 18 – 887, l. 13. This evidence, which was available to trial counsel before trial, contradicts the state’s timeline of events and theory as to when the decedent was murdered. Consequently, if trial counsel had adequately prepared prior to trial, she would have discovered this discrepancy and been able to utilize the evidence at trial to call into question the state’s theory.

³ Trial counsel admitted at the evidentiary hearing if “it could have been proven that Kayla was nowhere in the area and did not provide the murder weapon” it “would have tremendously aided” the defense. App. 1009, ll. 16-22.

Smith also testified that he spoke to Doris Jackson, who lived “right down the street” from where the murder occurred, during his investigation. Doris told Smith that she saw a car in the cul-de-sac, near where the decedent was killed, around 3:30 a.m. App. 887, l. 18 – 888, l. 20. Despite this evidence in the coroner’s report, there is no evidence trial counsel investigated Doris Jackson. App. 972, l. 19 – 973, l. 1. However, counsel admitted that if Doris Jackson had seen a car in the cul-de-sac at 3:30 a.m., it would “have refuted the State’s case that Marcus [the decedent] was deceased and sitting in his car in the cul-de-sac at 3:30 a.m.” App. 973, ll. 4-8.

This is further evidence that supports the PCR court’s finding that counsel was deficient for failing to adequately prepare and investigate for trial and that Jackson was prejudiced as a result.

Latika Elliott

Latika Elliott testified at the evidentiary hearing and identified the statement she provided to law enforcement, which indicated she last spoke with the decedent on the telephone at 3:01 a.m. and then he subsequently failed to arrive at her house as they had planned. App. 852, l. 2 – 854, l. 4. Elliott also admitted she told law enforcement that she was storing drugs at her house for the decedent “because he had several boys staying with him and every time something was coming up missing, somebody was stealing his money, somebody was stealing his drugs, but he couldn’t pinpoint who it was because it was so many young men around. So he asked me to hold it [the drugs] for him.” App. 855, ll. 4-23. Lastly, Elliott asserted that she had personal knowledge of Stephanie Green’s drug use, a state witness at trial, which would have contradicted Green’s testimony that she did not use drugs. App. 858, ll. 3-17.

Elliott asserted that she was present throughout the entire trial, but was not called to testify by either party. App. 856, l. 16 – 857, l. 23. Trial counsel admitted at the evidentiary hearing that Elliott’s testimony would have been helpful to the defense “to show Marcus

[decedent] was still alive and speaking to somebody at 3:01 a.m.” App. 961, ll. 10-20. Counsel further stated this evidence would have refuted the state’s timeline of events. App. 962, ll. 13-16. While, she received Elliott’s statement as part of discovery, she could not recall why she did not utilize Elliott as a witness at trial. App. 963, ll. 21-25.

This is further evidence that supports the PCR court’s finding that counsel was deficient for failing to adequately prepare for trial and conduct an independent investigation, and that Jackson was prejudiced as a result.

Felice Stallings

Felice Stallings testified at the evidentiary hearing and affirmed her statement to law enforcement, which was available to counsel, in which she admitted being with the decedent on the night of his death and that the decedent left her home around 12:30 a.m. App. 1039, l. 21 – 1041, l. 14. When questioned about state witness Tracy Serrano’s testimony at trial in which she claimed she saw the decedent driving *to* Stallings’s home at 12:30 a.m., Stallings asserted this testimony was incorrect as the decedent was leaving her home at that time. App. 1041, ll. 10-17. Stallings also recalled the decedent becoming aggravated by telephone calls he repeatedly received from his brother that night and that he ultimately left her house because his brother needed a ride. She testified that the decedent returned to her house around 2:00 a.m. and parked in her driveway, but never came inside. App. 1041, l. 18 – 1042, l. 17.

After acknowledging that Stallings was named on the defense witness list at trial, counsel could not recall why she did not present Stallings as a witness at trial. App. 975, l. 7 – 976, l. 4.

This is further evidence that supports the PCR court’s finding that counsel was deficient for failing to adequately prepare for trial and conduct an independent investigation, and that Jackson was prejudiced as a result.

Kevin Parker

Kevin Parker testified at the evidentiary hearing that he was “raised as cousins” with the decedent and was regularly with the decedent before his death. Kevin recalled seeing the decedent at the convenience store where Kevin worked the night before the decedent died. App. 893, l. 4 – 895, l. 6. Kevin testified, “He [the decedent] told me - - this was his exact words. He was going to go ahead, he got to do this one last thing with the drugs. And he didn’t tell me exactly what it was. He said he’s going to do one last thing.” App. 896, ll. 16-25.

This is further evidence that supports the PCR court’s finding that counsel was deficient for failing to adequately prepare for trial and conduct an independent investigation, and that Jackson was prejudiced as a result.

Christy Parker

Christy Parker affirmed the contents of her statement given to law enforcement, which was available to trial counsel before trial. App. 913, l. 17 – 915, l. 1. Christy testified that she saw Jackson, Dicks, and Serrano together when she was leaving the decedent’s house around 3:06 a.m. on the morning of his death. She also explained that the telephone call she received from Jackson at 3:11 a.m. was from Serrano’s telephone. She testified about Dicks stating Jackson was with him at his house all night and her conversation with Jackson about waiting for the decedent to return. App. 915, l. 2 – 917, l. 22. This testimony would have either impeached Serrano or Dicks, or corroborated Jackson’s testimony at trial. Therefore, this is further evidence that supports the PCR court’s finding that counsel was deficient for failing to adequately prepare for trial and conduct an independent investigation, and that Jackson was prejudiced as a result.

Sandra Smith

Sandra Smith, Jackson’s mother, testified during the evidentiary hearing. She acknowledged her statements to the trial judge during sentencing and asserted that she truly

questioned why counsel did not discuss some of the matters she raised to the judge with her prior to trial or call her as a witness during trial. Specifically, Sandra explained that she could have told the jury how she removed the hideaway house key and gone through the events of the day leading up Jackson getting locked out of their house the night before the decedent's death. App. 927, l. 11 – 934, l. 15. She also testified that Jackson “kept his shoes clean” and that he would not have walked through “wet grass” or “any kind of dirt” in his “white Nikes” as the state alleged at trial. App. 936, l. 24 – 937, l. 21. All of this would have corroborated or supported Jackson's testimony at trial. Accordingly, this is further evidence that supports the PCR court's finding that counsel was deficient for failing to adequately prepare for trial and conduct an independent investigation, and that Jackson was prejudiced as a result.

The evidence presented at the evidentiary hearing clearly shows trial counsel inadequately prepared for trial and failed to conduct an independent investigation, which requires at a minimum interviewing potential witnesses. See Ard, 372 S.C. at 331-332, 642 S.E.2d at 597 (“at a minimum, counsel has the duty to interview potential witnesses). Kayln Floyd, Jeff Smith, Latika Elliott, Kevin Parker, Christy Parker, Sandra Smith, and Felice Stallings were all available to testify at trial and their testimony would have significantly undermined the state's theory of the case and timeline of events and, perhaps more importantly, impeached state witnesses whose credibility was essential to the prosecution. Consequently, there is ample evidence in the record to support the PCR court's finding that counsel was deficient under reasonable professional norms, and that Jackson was prejudiced as a result.

The evidence against Jackson at trial was far from overwhelming. See App. 1015, l. 22 – 1016, l. 4. The state's case against Jackson relied almost entirely upon the testimony of Joseph Dicks and Jose Serrano, who claimed Jackson confessed to murdering the decedent. See App. 1119, ll. 9-13. Solicitor Weeks, who prosecuted the case, admitted Dicks and Serrano were “key

witnesses.” App. 1119, ll. 9-13. Consequently, their credibility was critical to the prosecution. Dicks and Serrano, who were both suspects in the murder, repeatedly changed and added to their account of what occurred up until Jackson’s trial. Even Solicitor Weeks admitted “[t]here were a number of inconsistent witnesses” and that Dicks and Serrano were constantly changing and adding to their statements. App. 289, l. 9 – 1121, l. 9. Moreover, trial counsel admitted that impeaching Dicks and Serrano was very important to the defense. App. 1016, ll. 5-11. The witnesses Jackson presented at the evidentiary hearing challenged Dicks and Serrano’s credibility and impeached their testimony at trial, along with other state witnesses. It is obvious that Jackson was prejudiced by counsel’s failure to adequately prepare and investigate, including interviewing these witnesses who were all available to counsel prior to trial, and ultimately utilize their testimony at trial. There is a reasonable probability that the jury would have had a reasonable doubt respecting guilt but for counsel’s deficiency. See Ard, 372 S.C. at 331, 642 S.E.2d at 596. Therefore, again, there is ample probative evidence to support the PCR judge’s finding of both deficiency and prejudice.

Accordingly, Respondent/Petitioner Jackson respectfully requests this Court affirm the order of the PCR court granting Jackson a new trial.

The post-conviction relief court correctly granted Respondent/Petitioner Jackson a new trial where the court did not use an improper cumulative error analysis or an improper hindsight standard for deficiency as argued by the state.

“On certiorari in PCR cases, the Court applies an ‘any evidence’ standard of review.” McHam, 404 S.C. at 472, 746 S.E.2d at 45 (citing Terry, 394 S.C. at 66, 714 S.E.2d at 328). “This Court will uphold the findings of the PCR judge when there is *any* evidence of probative value to support them, and it will reverse the PCR judge’s decision when it is controlled by an error of law.” Id. at 473, 746 S.E.2d at 45 (quoting Suber, 371 S.C. at 558-559, 640 S.E.2d at 886) (internal quotation marks omitted) (emphasis added). This Court gives great deference to the PCR judge’s findings of fact. Id. (citing Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005)). However, the Court reviews “questions of law de novo, with no deference to trial courts.” Smalls v. State, Op. No. 27764 (S.C. Supreme Court filed February 7, 2018).

In order to show ineffective assistance of counsel as a ground for relief, an applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686); Butler 286 S.C. 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. Strickland, 466 U.S. at 687-688.

A two pronged test is used in evaluating allegations of ineffective assistance of counsel. An applicant must prove “counsel’s performance was deficient” and fell below an objective standard of reasonableness, and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-118, 386 S.E.2d at 625 (citing Strickland, 466 U.S. at 688). “A reasonable probability is a probability sufficient to

undermine confidence in the outcome of the trial.” Johnson, 325 S.C. at 186, 480 S.E.2d at 735 (citing Strickland, 466 U.S. at 668). “Furthermore, when a defendant’s conviction is challenged, ‘the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.’” Ard, 372 S.C. at 331, 642 S.E.2d at 596 (quoting Strickland, 466 U.S. at 695).

“Without a doubt, ‘[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.’” Id. (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)) (alteration in original). “Moreover, while the scope of a reasonable investigation depends upon a number of issues, ‘at 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, 372 S.C. at 331-332, 642 S.E.2d at 597 (quoting Troedel v. Wainwright, 667 F.Supp. 1456, 1461 (S.D.Fla.1986), aff’d, 828 F.2d 670 (11th Cir. 1987)) (emphasis in original).

Unlike the state argued in its petition, the PCR judge did not did not utilize a cumulative error analysis. See Pet. at 15. As in Lounds, *supra*, discussed thoroughly above and incorporated herein, the PCR judge found trial counsel was deficient for failing to properly prepare for trial and conduct an adequate investigation, which required at a minimum interviewing potential witnesses. See App. 1259 and App. 1275. Jackson did not allege “at least **ten** separate allegations of ineffectiveness” as the state claimed.⁴ Pet. at 15 (emphasis in original). Rather, Jackson alleged trial counsel was deficient for failing “to properly prepare and

⁴ The state listed Jackson’s “ten separate allegations of ineffectiveness” as (1) failure to prepare and investigate; (2) failure to investigate and raise a third party guilt defense; (3) failure to call witness Jeff Smith; (4) failure to call witness Latika Elliott; (5) failure to call witness Felice Stallings; (6) failure to call witness Kevin Parker; (7) failure to obtain video from gas station; (8) failure to call witness Christy Parker; (9) failure to call witness Sandra Smith; and (10) failure to call witness Kalyn Floyd. See Pet. at 15.

investigate prior to trial, which resulted in prejudice to [Jackson].” App. 823. Because of counsel’s inadequate investigation, Jackson asserted counsel failed to utilize available witnesses. App. 823. During the evidentiary hearing, in order to meet his burden of proving counsel was both deficient and that he was prejudiced by counsel’s deficiency, Jackson presented the testimony of witnesses who were readily available to counsel and whose testimony, if called to testify at trial, would have challenged the state’s theory of the case and timeline of events, or impeached various state witnesses. See Bannister, 333 S.C. at 303, 509 S.E.2d at 809 (“This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness’ failure to testify at trial.”) (emphasis in original).

In granting Jackson relief, the PCR judge ruled upon the single claimed raised by Jackson in his amended application and during the evidentiary hearing: that counsel failed “to properly prepare and investigate prior to trial, which resulted in prejudice to [Jackson].” App. 823. Therefore, there is no evidence to support the state’s contention that the PCR judge applied an improper cumulative error analysis.

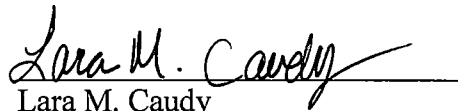
Moreover, the PCR judge did not utilize an improper hindsight standard for deficiency as alleged by the state. See Pet. at 9. By way of the evidence presented during the evidentiary hearing, Jackson proved trial counsel was deficient for failing to adequately investigate and prepare for trial under reasonable professional norms. Based on the evidence available to counsel at the time of trial, including all the discovery materials provided by the state, such as witness statements, counsel should have investigated and interviewed Kayln Floyd, Jeff Smith, Latika Elliott, Kevin Parker, Christy Parker, Sandra Smith, and Felice Stallings and utilized their testimony at trial.

Accordingly, Respondent/Petitioner Jackson respectfully requests this Court affirm the order of the PCR court granting Jackson a new trial.

CONCLUSION

Based on the foregoing argument, Respondent/Petitioner Jackson respectfully requests this Court deny Petitioner/Respondent's petition for writ of certiorari. However, if this Court grants certiorari, Jackson requests the opportunity to fully brief the issues presented above. In the alternative, Jackson respectfully requests this Court affirm the ruling of the PCR court granting him a new trial.

Respectfully Submitted,


Lara M. Caudy
Appellate Defender

ATTORNEY FOR
RESPONDENT/PETITIONER

This 23rd day of February, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Edgar W. Dickson, Circuit Court Judge

TEVON MICHAEL JACKSON,

RESPONDENT/PETITIONER

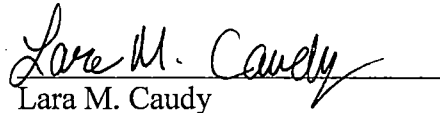
V.

STATE OF SOUTH CAROLINA,

PETITIONER/RESPONDENT

CERTIFICATE OF SERVICE

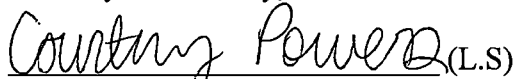
The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Tevon Michael Jackson, #344982, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 23rd day of February, 2018.



Lara M. Caudy
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER

SUBSCRIBED AND SWORN TO before me this
23rd day of February, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.