

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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

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Appellate Case No. 2017-000790

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**RECEIVED**

**MAR 28 2018**

**S.C. SUPREME COURT**

TEVON MICHAEL JACKSON,

Respondent-Petitioner,

v.

STATE OF SOUTH CAROLINA,

Petitioner-Respondent.

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

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RESPONDENT

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## PETITIONER-RESPONDENT'S ISSUES PRESENTED

- I. Whether probative evidence supports the PCR court's finding that there was no Brady violation where the solicitor did not withhold exculpatory evidence regarding witness Kalyn Floyd.
  
- II. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object or move to suppress the decedent's cell phone records where the motion likely would have been unsuccessful and where the outcome of the trial would not have been different even if the records had been suppressed.

## 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. The conviction arose out of the murder of victim Marcus Finklin early in the morning on June 4, 2008, in Aiken, South Carolina. Finklin’s body was found in his vehicle with a gunshot wound to the head. A cigarette butt containing Applicant's DNA 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. Additionally, multiple witnesses testified that they had seen Applicant with the victim in the victim’s car on the evening of the murder. App. 171; App. 302; App. 351.

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, Esquire, and Michael Routzong, Esquire, represented Jackson. John William Weeks, Jr. prosecuted the case. 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 Anders<sup>1</sup> brief was submitted by Breen Stevens, Esquire, of the South Carolina Commission on Indigent Defense. 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.

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

Jackson filed an application for post-conviction relief on November 27, 2013 claiming he was being held unconstitutionally based on the following allegations:

1. Ineffective Assistance of Counsel
  - a. "Failure to prepare and investigate."
  - b. "Failure to call witnesses at trial."
2. Ineffective Assistance of Appellate Counsel.
  - a. Failure to raise all meritorious issues on appeal

On August 13, 2015, Applicant amended his application to include the following additional allegations:

1. Ineffective assistance of trial counsel for failure to properly prepare and investigate prior to trial, which resulted in prejudice to Applicant.
2. Ineffective assistance of trial counsel for failure to utilize witnesses at trial, which resulted in prejudice to Applicant.
3. Ineffective assistance of trial counsel in preparation for and at trial for failure to do the following, which resulted in prejudice to Applicant:
  - a. Failure to fully cross-examine and/or impeach the State's witnesses.
  - b. Failure to pursue available defenses, including but not limited to alibi, third party guilt and exonerating evidence.
  - c. Failure to properly prepare and utilize Applicant as a witness at trial.
  - d. Failure to disclose to Applicant representation by counsel of Jamar Green, witness for the State at trial.
  - e. Failure to make contemporaneous objections and/or move to suppress irrelevant evidence and testimony.
4. Ineffective assistance of trial counsel for failure to fully put the State's case to the test and/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant.
5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal.
6. Pursuant to Rule 15(b), SCRCPP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

On August 31, 2015, Applicant further amended his application to include the following additional allegations:

1. Ineffective assistance of trial counsel for failure to move to suppress and/or object to the phone records admitted as State Exhibit #54 and any testimony pertaining to such records. Failure to impeach the State's witnesses with evidence obtained from the victim's cell phone.
2. Prosecutorial misconduct and/or Brady violation for failing to disclose the interview and investigation into Kalyn Floyd prior to and/or during Applicant's trial based upon information received from Joseph Dick's that she provided Applicant with the murder weapon. Alternatively, if said information was not subject to disclosure by the State, and/or was disclosed by the State ineffective assistance of trial counsel for failure to investigate the matter, locate Kalyn Floyd and utilize her as a witness for the defense.

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. At the evidentiary hearing, Jackson presented testimony from Kalyn Shantay Floyd, Latika Shevone Elliott, Ernest Bush, Jeff Smith, Kevin Parker, Christy Parker, Sandra Smith, Wallis Alves (“Trial Counsel”), Felice Stallings, Peter Gordon Skidmore, and Jackson testified on his own behalf. The State presented testimony from Deputy Solicitor John William Weeks, Jr. An Order Granting Application for Post-Conviction Relief was signed by Judge Dickson on December 30, 2016 and filed on January 13, 2017. The Order granted relief on Jackson’s allegation that Trial Counsel was ineffective for failing to prepare and investigate the case prior to trial, but denied relief on the allegations of ineffective assistance of counsel for failure to move to suppress the victim’s cell phone records, prosecutorial misconduct, Brady violations, and ineffective assistance of appellate counsel. 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.

The Petition for a Writ of Certiorari on behalf of the State was filed November 6, 2017, which asserted the PCR court erred in finding Trial Counsel was ineffective for failing to investigate and prepare for trial. Jackson's Return to Petition for Writ of Certiorari was filed February 23, 2018. Jackson filed a timely notice of cross-appeal, and Jackson's Petition for Writ of Certiorari was filed October 30, 2017, which asserted the PCR court erred in failing to find a Brady violation and that Trial Counsel was ineffective for failing to move to suppress the cell phone records. This Return of Petitioner-Respondent to Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the petitioner bears the burden of proving the allegations in his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRPC; Butler, 286 S.C. at 441, 334 S.E.2d at 814. 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, 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. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. 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, 300 S.C. 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

## ARGUMENT

### I. Probative evidence supports the PCR court's finding that there was no Brady violation where the solicitor did not withhold exculpatory evidence regarding witness Kalyn Floyd.

Jackson asserts in his petition that the PCR court erred in failing to find prosecutorial misconduct in the form of a Brady<sup>2</sup> violation by withholding exculpatory information from witness Kalyn Floyd from him. However, probative evidence supports the PCR court's finding that the solicitor did not withhold Brady materials, and the PCR court's ruling on this issue should be affirmed.

Brady v. Maryland, 373 U.S. 83 (1963) requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

At the eve of trial, two of the State's main witnesses, Joseph Dicks and Jose Serrano, revealed to the prosecution that a woman named Kalyn Floyd was involved with the case, and Floyd brought a .38 caliber gun, which matched the description of the murder weapon, to Dick's house on the morning of the murder to deliver to Jackson. App. 1119-20. After learning this

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<sup>2</sup> Brady v. Maryland, 373 U.S. 83 (1963).

information, Deputy Solicitor John William “Bill” Weeks, Jr. was able to locate Kalyn Floyd. Although Weeks did not have any recollection at the evidentiary hearing of personally meeting with Floyd, he referred to a note in his file indicating that his investigator interviewed her on February 24, 2011, which was after the trial had begun. App. 1121. The State did not use Floyd as a witness at trial.

At trial, Joseph Dicks testified that a person named Kayla dropped off a .38 caliber pistol to him to deliver to Jackson. App. 235-237. He explained who Kayla was, her relationship to Jackson, and that Jackson called him in advance to tell him to get the gun and give it to him. App. 235-237. On cross-examination, Dicks admitted that he never mentioned Kayla during any of his pre-trial interviews, and he first told the solicitor about her the Monday before the trial. App. 262.

Kalyn Floyd testified at the evidentiary hearing. At the hearing, Floyd testified she had been subpoenaed to speak with the solicitor on the first day of the trial, and she met with someone that afternoon around five o'clock. App. 849. She stated she could not recall the name of the person she spoke to. App. 844, line 7-9. Floyd denied bringing a gun to Jackson and explained that she had been out of town in Augusta, Georgia, just across the state line, that entire week. App. 845-846. She stated the solicitor told her they would contact her if they needed her to testify at trial, but she never received a call from them. App. 848.

Trial Counsel testified at the evidentiary hearing that her notes indicated she met with Deputy Solicitor Weeks, as well as Assistant Solicitor Beth Ann Young and Investigator Norwood Bodie, and Weeks informed her that Dicks and Serrano told him that Jackson informed Dicks that a stud—or “a gay woman who dressed like a man”—named Kayla was bringing Dicks a package, but they had no further information about that person. App. 1005, line 1-16. Trial

Counsel claimed the solicitor did not disclose to her whether they had investigated Kayla or any information about if she had in fact provided the murder weapon in this case. App. 1006, line 19-23.

However, Solicitor Weeks testified at the evidentiary hearing that he would not have withheld any information from Trial Counsel:

Q: And did you disclose that information [regarding Kalyn Floyd] to Ms. Alves, [Jackson's] public defender?

Weeks: I can't swear I disclosed the indictment to her but I know I always do.

Q: Yes, sir.

A: Standard rule in my office is we give them everything. If a defense lawyer wants it – if I would want it as a defense lawyer, they get it.

Q: Okay.

A: I certainly would not have withheld this Floyd woman's role in this from Ms. Alves.

Now, do things come up right before court? Oh, yea. Because I'm pretty sure she was probably working, the Sunday night before court started on Monday and I can assure you we were.

But it wasn't a mystery. Once we knew about it we told her everything we knew. And we do that with all the witnesses. Before we have a major trial like this, Ms. Alves would come to our office, along with an investigator more than likely, and go through every single piece of paper in our file that isn't something that we would say is work product.

In this case there were a number of witnesses. There were a number of inconsistent witnesses. It was like a parade for a couple of weeks trying to get people in and out to interview them. I cannot remember whether or not she talked about a particular witness.

Q: Uh-huh.

A: I cannot remember whether Ms. Floyd, whether I ever met the lady. I have a note in my file that our investigator said, interviewed

her but it was dated February 24<sup>th</sup> which would have been during trial.

Q: Okay.

A: From my understanding, I just do not recall her being one of the witnesses that I interviewed.

Q: Okay.

A: And I certainly didn't call her as a witness in trial.

App. 1120, line 8 – App. 1121, line 20.

Jackson asserts Solicitor Weeks violated Brady because he withheld exculpatory evidence from Trial Counsel because he allegedly failed to inform Trial Counsel that Floyd denied delivering the murder weapon in this case. The PCR court disagreed, and found the “actions of the prosecutor’s office did not amount to misconduct for failing to properly disclose information regarding Ms. Floyd completely and timely to defense counsel or for eliciting false testimony.” App. 1278. The PCR court explained:

Here, the testimony clearly reflects that the Solicitor and/or his representative met with Ms. Floyd and the decision was made not to call her at trial and not to charge her in the matter. The testimony from defense counsel also establishes that she was on notice of this information and failed to investigate it and/or call Ms. Floyd as a witness as discussed above. This Court has carefully considered [Jackson’s] claims involving the handling of matters related to Ms. Floyd and finds no prosecutorial misconduct and specifically no Brady violation since the information was not suppressed by the prosecution. Therefore, [Jackson’s] claim of prosecutorial misconduct must fail.

App. 1279-1280.

The PCR court’s ruling was based on the testimony presented at the evidentiary hearing, specifically Solicitor Weeks’ testimony that he “certainly would not have withheld this Floyd woman’s role in this” from Trial Counsel. App. 1120. Trial Counsel’s notes from her file indicated that she met with Solicitor Weeks and he specifically told her all information that he knew about Floyd and Floyd’s role in the murder. Accordingly, because probative evidence

supports the PCR court's finding that the prosecution did not suppress information about Floyd from Trial Counsel, its ruling should be affirmed.

**II. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object or move to suppress the decedent's cell phone records where the motion likely would have been unsuccessful and where the outcome of the trial would not have been different even if the records had been suppressed.**

Jackson asserts the PCR court erred in finding Trial Counsel was not ineffective for failing to object to the admission of the decedent's cell phone records or to the testimony of the custodian of records who introduced them. This allegation is meritless, as probative evidence supports the PCR court's finding that there was no deficiency or prejudice in failing to object.

During trial, the State called witness William Hare, a Verizon Wireless employee in Aiken, to introduce the records from a cell phone found in the murder victim's vehicle. App. 139. Hare testified that Verizon kept the records as part of the ordinary course of business, that he was familiar with the records because he works with them every day, and that these were a true and accurate copy of the records as Verizon provided them to him. App. 141. Hare explained how the records were labeled and which markings indicated that a phone call was answered, went to voicemail, or were outgoing calls. App. 143-144. The records were used throughout the trial to match up to or contradict the timelines given by various witnesses.

Jackson claimed Trial Counsel should have objected to the admission of the records based on the lack of qualification or knowledge of the custodian of the records. The PCR court found in its order that, after "careful consideration of the record, testimony and evidence presented," Jackson failed to prove Trial Counsel was deficient in her handling of the testimony elicited from Hare, or establish resulting prejudice by showing how the alleged failure affected the outcome of the trial. Accordingly, the PCR court denied relief. App. 1277-1278.

The PCR court's ruling was correct. Even if Applicant had moved to suppress these phone records, Jackson has shown no reason why a motion to suppress could have been

successful in keeping these records out of trial. "Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." State v. Brockmeyer, 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (quoting In re Care & Treatment of Harvey, 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003)); Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." Id.; Rule 802, SCRE. Rule 803(6) of the South Carolina Rules of Evidence provides that records kept in the regular course of business are admissible as an exception to the exclusion of hearsay evidence:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness; provided, however, that subjective opinions and judgments found in business records are not admissible. The term "business" as used in this subsection includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

SCRE 803(6).

The cell phone records admitted at Jackson's trial were the verified phone records, provided by Verizon Wireless, of one of the five cell phones in the victim's vehicle. The custodian of the records from the cell phone company testified at trial to explain and verify the records, as required by the South Carolina Rules of Evidence. The records were admitted as a record kept in the ordinary course of business. Therefore, the records are relevant to the action and not unduly prejudicial to Jackson, and any inconsistencies could have been addressed on cross-examination. There is no reason why these records would not have come into evidence at

trial. Accordingly, Trial Counsel cannot be deficient for failing to object, as any objection would not have been successful.

Furthermore, these records likely did not sway the jury's mindset about whether Jackson was guilty of this crime, and the suppression of these records would not have changed the outcome of the case. Trial Counsel testified at the evidentiary hearing that there was testimony from multiple witnesses at trial that contradicted the State's timeline in the same way that suppressing these records might have. For example, there was testimony presented that Jackson was seen with the victim at 1:20 A.M. and at 1:30 A.M., which pointed out to the jury that it would have been impossible for the victim to be deceased by 1:20 A.M. Trial Counsel thoroughly cross-examined the witnesses on their inconsistent statements regarding the timeline in this case and impeached them with the fact that they gave inconsistent statements. Because these inconsistencies were elicited at trial, any discrepancies in the timeline created by the cell phone records were cumulative and therefore not prejudicial. Accordingly, there is no prejudice because the outcome of the trial would not have been different.

Because the PCR court's ruling that there was no deficiency or prejudice from this failure to object is supported by the probative evidence in the record and the testimony presented at the evidentiary hearing, the ruling should be affirmed.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari. Should this Court grant the Petition for Writ of Certiorari, Petitioner-Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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By:   
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March 23, 2018

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MAR 28 2018

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Aiken County

The Honorable Edgar W. Dickson, Circuit Court Judge

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Respondent-Petitioner,

STATE OF SOUTH CAROLINA

Petitioner-Respondent.

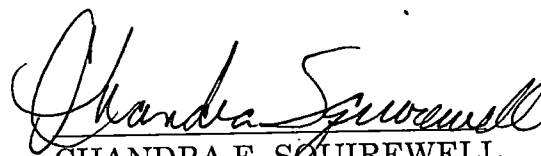
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**PROOF OF SERVICE**  
\_\_\_\_\_

I, CHANDRA E. SQUIREWELL, certify that I have served the Return to Petitioner-Respondent to 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 23<sup>rd</sup> day of March 2018.



CHANDRA E. SQUIREWELL  
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RECEIVED

MAR 28 2018

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

March 23, 2018

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

RE: Tevon M. Jackson v. State of South Carolina  
Appellate Case No. 2017-000790  
Lower Court Case No. 2013-CP-02-2693

Dear Mr. Shearouse:

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

Sincerely,

Julie A. Coleman  
Assistant Attorney General

JAC:ces  
Enclosures

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