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OCT 18 2018

THE STATE OF SOUTH CAROLINA  
SUPREME COURT

APPEAL FROM HORRY COUNTY

S.C. SUPREME COURT

William H. Seals Jr., Circuit Court Judge

\_\_\_\_\_  
Case. Number 2016-CP-26-02627  
\_\_\_\_\_

Zachary Bullock #357427..... Petitioner,

v.

State of South Carolina..... Respondent.

\_\_\_\_\_  
BRIEF FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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## QUESTIONS PRESENTED

- 1) Whether the Court should grant a Writ of Certiorari to review the circuit court's decision denying post-conviction relief where trial counsel failed to subpoena phone records prior to Petitioner's trial, Petitioner asked trial counsel to subpoena the phone records, and the exculpatory nature of the phone records was established at the PCR hearing.

## STATEMENT OF THE FACTS

Petitioner was indicted in October of 2012 for burglary first degree. He was represented by John M. Hilliard, Esquire. Petitioner's case proceeded to a jury trial before the Honorable Steven H. John on October 7, 2013. He was found guilty of burglary first degree on October 8, 2013 and sentenced to 15 years in prison. Petitioner's conviction was affirmed by the Court of Appeals in an unpublished opinion on December 2, 2015. (App. 15-18).

Prior to trial, Petitioner informed trial counsel that he was not guilty of the burglary, that his involvement was limited to selling items for his co-defendants, and that he was unaware at the time that the items were stolen. (App. 316, lines 17-24). Petitioner also notified trial counsel that his co-defendants had sent him text messages that confirmed his lack of involvement in the burglary. (App. 306, line 23-307, line 16).

Although Petitioner informed trial counsel of the text messages, trial counsel did nothing to obtain the text messages prior to trial. (App. 307, line 17-23). When PCR counsel attempted to obtain the text messages after the trial, they were no longer available. (App. 310, line 21-311, line 7).

Despite the uncontradicted testimony at the PCR hearing of the exculpatory nature of the text messages, that trial counsel was notified of the text messages, and that trial counsel made no effort to obtain the text messages prior to trial, the PCR court denied post-conviction relief to Petitioner on the grounds that the nature of the text messages was merely speculative. (App. 4-13).

## STANDARD OF REVIEW

In order to establish a claim of ineffective assistance of counsel, a PCR applicant must show: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant's case. Strickland v. Washington, 466 U.S. 668, 687 (1984).

This Court has held that it gives great deference to the PCR court's findings of fact and conclusions of law. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000). Thus, on review, a PCR judge's findings will be upheld if there is any evidence of probative value sufficient to support them. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). If no probative evidence exists to support the findings, this Court will reverse. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000). Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992).

In order to prevail upon a claim that counsel did not adequately investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop and present had counsel been more prepared. Harris v. State, 377 S.C. 66, 75-76, 659 S.E.2d 140, 145-46 (2008) (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998)). Furthermore, an applicant must also present evidence to show how the discoverable matters would have resulted in a different outcome. Id. (citing Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997); Skeen v. State, 325 S.C. 210, 214, 481 S.E.2d 129, 132 (1997)). Mere speculation as to how the alleged lack of

preparation prejudiced an applicant is not sufficient to support a grant of relief. *Id.*, 377 S.C. at 75, 659 S.E.2d at 145 (citing Glover v. State, 318 S.C. 496,498, 458 S.E.2d 538,540 (1995)).

## **ARGUMENT**

Trial counsel's failure to investigate, obtain, and present exculpatory text messages at Petitioner's trial was ineffective assistance of counsel. The exculpatory nature of the text messages was established by Petitioner's uncontradicted testimony at the PCR hearing, there is a reasonable probability that the evidence would have affected the outcome of the trial, and post-conviction relief should be granted.

### **Mere Speculation**

Although mere speculation as to the prejudicial effect of a failure to investigate is not enough, post-conviction relief *is* appropriate when there is testimony or evidence presented that shows there is a reasonable probability that the missing evidence could have affected the outcome of the trial.

In Ard v. Catoe, 642 S.E.2d 590, 372 S.C. 318 (S.C., 2007), the SC Supreme Court affirmed the grant of post-conviction relief where petitioner's trial counsel failed to investigate the findings of a gunshot residue expert which would have shown that a third party handled a gun. Testimony at the petitioner's PCR hearing established that, had trial counsel investigated the findings, trial counsel would have been prepared to elicit testimony from the expert that the third party handled the gun in question, which would have undermined the state's case. *Id.*

Similarly, in Bagwell v. State, 410 S.C. 259, 763 S.E.2d 630 (S.C. App., 2014), the SC Court of Appeals reversed the PCR Court's denial of post-conviction relief where trial counsel

failed to investigate DNA evidence that was found on pieces of glass at the crime scene. At trial, the State argued that Bagwell had cut his face on the shards of glass. Blood samples from the glass were in the State's possession, but trial counsel did not have them tested. PCR counsel tested the blood samples and discovered that it was not Bagwell's blood on the shards of glass.

On the other hand, *mere speculation* as to how a failed investigation prejudiced a PCR applicant is not enough to grant post-conviction relief. See, Skeen v. State, 325 S.C. 210, 216-217, 481 S.E.2d 129, 133 (S.C., 1997) (PCR denied where there was no testimony presented as to how a "better" cross examination would have helped petitioner's case), Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (S.C., 1997) (PCR denied where there was no testimony as to how additional preparation by trial counsel would have resulted in a different outcome), Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (S.C., 1995) (PCR denied where testimony of missing witnesses would not have established an alibi defense as claimed), Harris v. State, 659 S.E.2d 140, 377 S.C. 66 (S.C., 2008) (PCR denied where there was no testimony as to how additional preparation by trial counsel would have resulted in a different outcome), Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (S.C., 1998) (PCR denied where no evidence was presented as to what the witnesses' criminal records were or how trial counsel's failure to obtain the criminal records of witnesses prejudiced petitioner).

#### **Petitioner Established the Exculpatory Nature of the Phone Records**

As in Ard v. Catoe and Bagwell v. State, evidence was presented, through Petitioner's testimony at the PCR hearing, as to what the missing evidence would have shown and why it was exculpatory.

Petitioner testified that his codefendants, Deasia Denton and Emmanuel Foriest, had contacted him on his cell phone, asked him to sell some items for them, that he was unaware that the items were stolen, and that this was documented on his cellphone:

Q Okay. And did you have a cell phone during this time?

A Yes, ma'am.

Q And who were you in contact with after this burglary?

A My codefendants.

Q And what are your codefendants' names?

A Deasia Denton and Emmanuel Ferrice [Foriest].

Q Could you annunciate a little bit.

A Deasia Denton and Emmanuel Ferrice [Foriest].

Q Emmanuel Ferrice [Foriest] and Deasia Denton. And why were you in communication with your codefendants?

A Because they had called me, telling me they had something to sell, so I sold it for them.

Q Okay. And did you know it was from the burglary of the neighbor of your mom's house?

A No, ma'am.

Q Okay. And was this documented on your cell phone?

A Yes, ma'am.

App. 306, line 23-307, line 16.

This testimony was uncontradicted at the PCR hearing.

### **Petitioner Told Trial Counsel About the Text Messages**

Furthermore, Petitioner testified on direct examination that he informed trial counsel of the text messages and that trial counsel did not attempt to subpoena them:

Q Did you tell Mr. Hilliard about it?

A Yes, ma'am.

Q And did he ever get copies of those text messages?

A No.

Q And did he ever subpoena your phone records?

A No, ma'am.

App. 307, lines 17-23.

Petitioner affirmed his testimony on cross examination by the Assistant Attorney General:

Q Did you tell him to pull the phone records?

A Yes, sir.

Q You did tell him to pull the phone records?

A Yes, sir. Yes.

App. 309, lines 4-7.

On direct examination by the Assistant Attorney General, trial counsel testified that Petitioner told him that he was not guilty of the burglary charge:

Q What if anything did Mr. Bullock tell you about what happened?

A He denied that he was involved in the burglary. He told me that he was a fence for these folks in the beginning. And then on this particular burglary, he denied that he was involved in the burglary.

App. 316, lines 17-24.

On direct examination, trial counsel testified that he did not remember whether Petitioner asked him to subpoena phone records, that he did not know if he would have made a note of it in his file, but that the phone records "would have been something that was of interest" in the case:

Q If he had asked you to seek phone records, would you have made a note of that in your file?

A I don't know whether I would have done that or not, that's -- I don't know.

App. 317, lines 16-19.

Q So do you deny that Mr. Bullock ever asked you to subpoena phone records?

A I don't deny that because I don't remember.

App. 318, lines 3-5.

Q Did you ever consider independently seeking out those phone records?

A Again, I don't -- phone records, I remember that phone records were part of the case, that our defense was that the two codefendants who were boyfriend and girlfriend had gotten together to throw him under the bus, to make him the bad guy in the whole case. So the phone information would have been something that was of interest.

App. 318, lines 11-19.

On cross examination by Petitioner's counsel, trial counsel affirmed that, although he did not remember if Petitioner had asked him to subpoena the records, Petitioner did tell him that

there were communications on his cell phone related to who committed the burglary, and that trial counsel did not subpoena the records:

Q But he did tell you he had heard from his codefendants who committed the burglary; isn't that true?

A Yes.

Q And that was via his cell phone; correct?

A Yes.

Q And did you ever subpoena those phone records?

A Never.

App. 333, lines 4-11.

#### **The Phone Records are No Longer Available**

Melinda Ellison testified that PCR counsel's office attempted to subpoena the phone records prior to the PCR hearing, and that the records were now unavailable:

Q And what specifically with the cell phone records did you do in this case?

A I served a subpoena through e-mail and through the mail to the phone carrier.

Q Okay. So you assisted in trying to get the phone records; is that true?

A Yes.

Q Okay. And did you get a response?

A They e-mailed us the records that they had.

Q Okay. And did that include the text messages?

A It did not include text messages.

Q All right.

App. 310, line 21-311, line 7.

Although the messages were no longer available by subpoena, the uncontradicted testimony at trial established that:

- There were text messages exchanged between Petitioner and his codefendants;
- The text messages were exculpatory in nature;
- Petitioner informed trial counsel of the nature of the text messages;
- Petitioner asked trial counsel to subpoena the text messages; and
- Trial counsel failed to investigate further or obtain the phone records.

#### **There was No Valid Trial Strategy**

Trial counsel did not articulate any trial strategy that would explain his failure to subpoena the phone records prior to Petitioner's trial.

#### **No Probative Evidence Exists to Support the PCR Court's Findings**

Furthermore, no probative evidence exists that would support the PCR Court's findings on this issue. The Order of Dismissal states:

Melinda Ellison, a member of PCR counsel's staff, testified she attempted to obtain such records, but was informed they no longer existed. As such, no records were introduced at the hearing. Consequently, this Court is left only to speculate as to what, if anything, the records would have shown – they could have exculpated Applicant by placing him somewhere other than the location of the crime or they could have further inculpated him by placing him on scene. Mere speculation is not enough.

App. 12.

This correctly states the law as applied to trial counsel's failure to investigate a matter, but it completely ignores Petitioner's uncontradicted testimony that the phone records contained conversations between himself and his codefendants where they acknowledged that they asked him to sell items for them and that he was unaware of the burglary.

The Court did not state that Petitioner's testimony was not credible or that the Court discounted Petitioner's testimony. The Order simply ignores his testimony, which was uncontradicted by any other witness.

To state that the phone records "could have further inculpated him by placing him on scene" *is* speculative, and there is no evidence in the record to support it. To state that "they could have exculpated Applicant by placing him somewhere other than the location of the crime," however, is not speculative at all, because it is based on uncontradicted testimony in the record.

### **CONCLUSION**

Petitioner's testimony at the PCR hearing establishes that he informed trial counsel that there were exculpatory text messages in his phone records, that Petitioner asked trial counsel to obtain these records, and that trial counsel failed to investigate further or subpoena the phone records.

Trial counsel's failure to investigate and obtain Petitioner's phone records prior to trial, was ineffective assistance of counsel, and there is a reasonable probability that the jurors would have voted for acquittal if the evidence had been presented at trial.

For the foregoing reasons, Petitioner respectfully asks this Court to grant his Petition for Writ of Certiorari and to grant a new trial based on ineffective assistance of counsel.

THE STATE OF SOUTH CAROLINA  
SUPREME COURT

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OCT 18 2018

APPEAL FROM Horry COUNTY

S.C. SUPREME COURT

William H. Seals Jr., Circuit Court Judge

Case Number 2016-CP-26-02627

Zachary Bullock #357427,.....Petitioner,

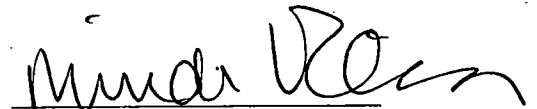
v.

State of South Carolina.....Respondent.

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Writ of Certiorari to the following recipient by depositing a copy of it in the United States Mail, postage prepaid, on October 17, 2018, addressed to:

South Carolina Attorney General's Office  
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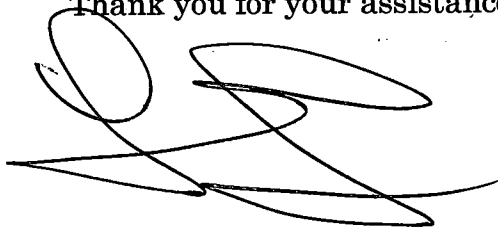
October 17, 2018

SC Supreme Court Building  
Clerk of Court  
1231 Gervais St.  
Columbia, SC 29201

RE: Zachary Bullock #357427 v. State of South Carolina  
Appellate Case No.: 2018-000496

Enclosed are two (2) copies of the Appendix, one unbound copy, and seven (7) copies of the Petition for Writ of Certiorari.

Thank you for your assistance



Lacey Thompson  
Attorney at Law

Enclosure

Cc: Johnny James, Esquire

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