

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-002353

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S.C. SUPREME COURT

Dameion J. Rivers,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

- I. Did the PCR court properly deny relief upon Petitioner's allegations that Counsel failed to adequately investigate witnesses Kory Little and Kenneth Louallen where Counsel had no reason to believe Little's expected testimony would differ from his sworn statement, where Little's testimony at the evidentiary hearing constituted a recantation and allegation of explicit coercion, where neither Louallen nor Louallen's statement were provided to the PCR court, and where the indicia of Louallen's statement in an incident report tends to show it was inculpatory, not exculpatory?
- II. Did the PCR court properly deny relief upon Petitioner's claim of newly discovered evidence where said evidence was the testimony of Petitioner's cellmate, Billy Lee Lisenby?
- III. Did the PCR court properly deny relief upon Petitioner's allegation he was advised he would serve only 65% of his sentence, where Counsel credibly testified he advised Petitioner he would serve 85%, and where the plea court advised Petitioner to expect to serve every day of his sentence?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Chesterfield County Clerk of Court. Petitioner was indicted at the November 2007 term of the Chesterfield County Grand Jury for murder (2007-GS-13-00814). Petitioner was additionally indicted at the December 2007 term of the same for possession of a weapon during the commission of a violent crime (2007-GS-13-00897). Paul Cannarella, Esq. represented Petitioner on the charges. Kernard E. Redmond, Esq., and Adam Foard, Esq., of the Fourth Circuit Solicitor's Office, prosecuted the case.

On August 30, 2010, Petitioner proceeded to hearings on pre-trial motions before the Honorable Paul M. Burch. On August 31, 2010, Petitioner pled guilty to the lesser-included offense of voluntary manslaughter, and as indicted for possession of a weapon during the commission of a violent crime. Judge Burch sentenced Petitioner to imprisonment for concurrent terms of 19 years for voluntary manslaughter, and 5 years for the weapons charge. Applicant did not appeal his plea or sentence.

Petitioner filed his application for post-conviction relief on June 9, 2011 (2011-CP-13-00210). He alleged the following grounds for relief in his application:

1. "Ineffective Assistance of counsel"
 - a. "Trial counsel failed to conduct an adequate pre-trial investigation to prepare for a trial defense."
2. "Involuntary plea"
 - a. "Plea was not voluntary, knowingly made."

Respondent made its return on August 19, 2011. By and through PCR counsel Andrew F. McLeod, Petitioner amended the application by filing on January 24, 2013, to allege the following additional grounds for relief:

1. "Ineffective assistance of counsel and counsel's failure to quash the indictment for murder;"

- a. "The indictment was invalid based on the fact that it states that the victim died in Chesterfield County when in fact the record clearly indicates that the victim was airlifted to Charlotte, North Carolina where surgery was performed and that ultimately the victim expired in Charlotte, North Carolina at the hospital and not in Chesterfield County."
2. "Ineffective assistance of counsel in failing to advise the applicant of the mandatory minimum penalty of the guilty plea involved."
 - a. "Counsel was ineffective in failing to advise the applicant concerning the mandatory minimum penalty for the guilty plea."

By and through PCR counsel McLeod, Petitioner again amended the application by filing on May 30, 2013, to allege the following additional grounds for relief:

1. Ineffective assistance of counsel due to:
 - a. "Failure to discover exculpatory evidence;"
 - b. "Failure to advise the plea court to give applicant all of his time served;"
 - c. "Failure to clarify plea court's erroneous language pertaining to the murder indictment;"
 - d. "Failure to advise the applicant of the mandatory minimum penalty based on the plea;"
 - e. "Failure to quash indictment for murder."

By and through PCR counsel McLeod, Petitioner again amended the application by filing on December 23, 2015, to allege the following additional grounds for relief:

1. Ineffective assistance of counsel, in that:
 - a. "Trial counsel was ineffective in not obtaining a continuance due to the fact that the State did not comply with the Brady request in it did not provide the recorded statement of Kenneth Louallen. Said statement was clearly referenced in the incident report and was not produced."
 - b. "Trial counsel was ineffective in not advising the PCR applicant concerning the fact that he would have to serve 85% of any sentence and the trial counsel advised that PCR application would only have to serve 65% of any sentence. Had PCR Applicant known this then, he would not have pled guilty and would have gone to trial."
 - c. "Trial counsel was ineffective in failing to raise all the issues possible concerning the validity of the indictment. The [indictment] was not signed by the grand jury foreman, and it incorrectly stated the location where the victim died."
2. "The police officer who was investigating this case for the Town of Pageland is currently on administrative leave and being investigated for improper conduct, and the PCR applicant believes that the police officer intentionally withheld evidence and did not investigate this case."
3. "There is a witness, Billy Lee Lisenby, Jr., who is prepared to testify that he informed Chief Brown, the investigating officer, after the shooting that he saw the

victim with a gun prior to the shooting at the scene, but the investigating officer did not get a statement from Billy Lee Lisenby, Jr. or bring this information to light during the investigation.”

Petitioner, by and through counsel McLeod, clarified the last above allegation constituted newly discovered evidence by supplement filed January 5, 2016, and further alleged an additional witness, Kory Little, intended to recant statements provided to law enforcement.

An evidentiary hearing into the matter was convened on January 11, 2016, before the Honorable Roger E. Henderson. Petitioner was present at the hearing and represented by counsel McLeod. Jessica E. Kinard, of the South Carolina Attorney General’s Office, represented Respondent. By written order dated July 1, 2016, and filed July 8, 2016, Judge Henderson denied and dismissed the application.

Petitioner thereafter filed a motion pursuant to Rule 59(e), SCRCP, on September 9, 2016. A hearing on the motion was convened on July 24, 2017. Petitioner was not present, but was again represented by counsel McLeod and the State was again represented by AAG Kinard. By written order dated October 18, 2017, filed October 19, 2017, and thereafter amended by filing on November 2, 2017, Judge Henderson denied the motion.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland, 466 U.S. at 689. “[E]very effort be made to eliminate the distorting effects of hindsight” and to evaluate counsel’s decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel’s tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that 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. With respect to guilty plea counsel, Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland, 466 U.S. at 696. A court need not first determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

ARGUMENT

I. THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSEL ARTICULATED A REASONABLE BASIS TO NOT PERSONALLY INTERVIEW LITTLE, BECAUSE LITTLE'S TESTIMONY AT THE EVIDENTIARY HEARING WAS UTTERLY LACKING IN CREDIBILITY, AND BECAUSE NEITHER LOUALLEN'S STATEMENT NOR TESTIMONY WAS PRESENTED AT THE EVIDENTIARY HEARING

This Court should deny certiorari because more than "any evidence" exists to support the PCR court's finding of no deficiency, but more importantly because the PCR court is entitled to deference in not finding Kory Little credible, and because the PCR court was left with mere speculation as to the substance of Kenneth Louallen's statement.

The underlying facts leading to Petitioner's prosecution and ultimate plea are straightforward. Law enforcement was called out to Pop's Game Room in Chesterfield County, where they found Tavish Dunlap ("Victim") bleeding out from a shotgun blast to the gut; Victim was airlifted to Charlotte where he perished. (Appx. 87-88). Witnesses indicated Petitioner drove up in a Pontiac Grand Am, stepped out, and shot Victim with a shotgun. (Appx. 87-88). Petitioner was arrested and gave a statement admitting he shot Victim; Petitioner thereafter assisted law enforcement in recovering the shotgun, which was matched to a shotgun shell casing found at the scene. (Appx. 88-89).

In mitigation, Counsel provided a substantially more detailed recitation of facts, but stated simply, Petitioner shot and killed Victim in a dispute over whether Petitioner had snitched on a third person called "Red Boy." (Appx. 91-105). Counsel acknowledged, among other things, that witness Eltoya Blakeney was expected to testify Petitioner stated before the killing "I'm getting the Mossburg and clean that crew out down at Pops." (Appx. 98, ll. 16-23; Appx. 113, ll. 1-9). Counsel noted Little's presence at the scene as a witness, but explained that he was facing a murder charge in North Carolina. (Appx. 99, ll. 5-8). Counsel expressed his belief that

Victim had a weapon, that somebody had taken the weapon from Victim after he was shot (along with the contents of his pockets and his shoes), and speculated by implication that Little had used the missing weapon in the commission of his North Carolina crime. (Appx. 104-05). Petitioner expressed remorse, noted “[t]he shot, it wasn’t meant for him[,]” and explained the gun accidentally went off when he backed up and fell onto the car. (Appx. 105, ll. 11-19). Petitioner noted Little’s presence, that Little ran up to Victim as Petitioner was leaving, and shared his belief that Little took everything off of Victim. (Appx. 105-06). The State rejected the conjecture. (Appx. 115-16).

The plea court inquired as to the potential availability of self-defense or accident defenses. (Appx. 108, ll. 3-9). Counsel explained his argument Petitioner was without fault in bringing the difficulty “would have been a stretch, both factually and legally.” (Appx. 108, ll. 10-23). Counsel noted one must be acting lawfully to begin with for an accident defense to succeed, and that Petitioner was acting unlawfully. (Appx. 108-09). Counsel wisely noted it was not in his client’s best interest to go to trial and try to “convince [the jury] that [Petitioner] was without fault in bringing about the immediate difficulty when he got out the car with a shotgun.” (Appx. 109-10).

a. Counsel reasonably relied upon Kory Little’s statement to law enforcement, and Little’s subsequent testimony at the evidentiary hearing was a recantation lacking in credibility

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). However, “it would be an absurdity to require criminal defense lawyers to interview *every* potential witness when they can articulate reasonable grounds not to.” Id., 392 S.C. at 457, 710 S.E.2d at 64-65

(emphasis original). The controlling standard counsel's performance is "reasonableness," and "[s]o long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient." Id., 392 S.C. at 457, 710 S.E.2d at 65. For example, this Court has noted with approval that Counsel's performance is not deficient for electing not to interview witnesses where he has read their prior statements, reviewed the state's file in the matter, was experienced in trying similar cases, was familiar with the applicable law, and was not surprised by other evidence. Id. (citing Daniels v. State, 676 S.E.2d 13, 18 (Ga. Ct. App. 2009)).

Additionally, the PCR court is entitled to extraordinary deference in determining the credibility of the witnesses before it. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012) (citing Solomon v. State, 313 S.C. 526, 443 S.E.2d 540 (1994)); Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012) (citing Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010)). "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." State v. Whitener, 228 S.C. 244, 261, 89 S.E.2d 701, 709 (1955) (citations omitted).

At the evidentiary hearing, Petitioner recalled Counsel explained Little would testify to show Petitioner brought about the initial difficulty by stepping out of the car with a shotgun in hand. (Appx. 174, ll. 17-23). Petitioner testified he later learned Little only wrote his inculpatory statement to law enforcement after they threatened to charge him as an accessory after the fact. (Appx. 179-80). Petitioner asserted he would not have pled guilty had he known

of Little's claim, and that Little's testimony was the only thing to establish Petitioner brought about the initial difficulty. (Appx. 180, ll. 3-12).¹

Little testified at the evidentiary hearing that his statement to law enforcement, which reported Petitioner stepped out of his car armed with the shotgun, was not true. (Appx. 202, ll. 10-18). Little claimed the statement was coerced because law enforcement would not let him use the restroom, eat, or otherwise leave until he wrote what they wanted him to write. (Appx. 202-03). Little testified that the car pulled up, and that "somebody got out the car with the long gun," but that he could not identify the person because it was dark. (Appx. 203, ll. 8-14). Little recalled Victim and the figure arguing, the figure backing up to try and get back in the car, a shot going off, and Victim falling. (Appx. 203, ll. 14-17). Notably, Little testified he ran inside Pop's and called 911. (Appx. 203, line 17). Little denied ever speaking to Counsel and asserted he would have explained his statement had been coerced. (Appx. 204, ll. 10-15).

Counsel conceded he never spoke with Little. (Appx. 224, ll. 9-10). Counsel explained he believed at the time that he "wouldn't get anything but a regurgitation of what he already had given in a statement." (Appx. 224, ll. 11-14). Counsel indicated broadly that he does not "necessarily try to interview people who I know are going to be against me[.]" (Appx. 224, ll. 15-16). Counsel testified that had he known Little's statement was inaccurate (in combination with Lisenby's testimony), he would have advised Petitioner differently about whether to take the plea or proceed to trial. Counsel opined it would have provided for "a strong self-defense argument and even if the gun went off accidentally, you know, I think you can might still get a charge on it everything you wanted." (Appx. 234, ll. 13-16).

¹ Again, Eltoya Blakeney would have testified to Petitioner's declaration of intent prior to the killing. (Appx. 113, ll. 1-9). Nordrea McBride was also a witness to the shooting and would have refuted allegations of aggression by the Victim. (Appx. 114-15). Petitioner racked the shotgun after blowing Victim away. Id.

The PCR court correctly, if perhaps a bit opaquely, found Counsel's conduct appropriately reasonable under Edwards. (Appx. 266-68). As noted above, this Court has previously cited with approval Georgia caselaw that found review of witness statements may be a reasonable basis to determine interviewing a witness is not necessary. Furthermore, Little's adjustment to his statement would not provide to support Counsel's defense strategies. Though not articulated by Counsel at the evidentiary hearing, Counsel's remarks during the plea proceeding indicate his original intent to portray Little as a dishonest actor, who swiped the shoes, gun, and petty possessions from a dying man and thereafter killed an innocent 15-year-old in North Carolina, impeaching Little's credibility into oblivion while providing an explanation as to why no gun was found on Victim. Additionally, the main difference between Little's statement and Little's testimony pertains to the identity of the shooter—it doesn't matter if Little could or could not identify the shooter when Petitioner admitted to being the shooter and had to argue self-defense or accident.

The PCR court properly found no prejudice either. In ruling on the motion to alter or amend, the PCR court found the record weighed "very heavily against placing credibility on the statements of these men[,]" referring to Little and Lisenby. (Appx. 297-98). The PCR court's finding that Little lacked credibility is entitled to great deference by this Court, especially where, as here, it constitutes in part a form of recantation that is suspect to begin with. Though the standard for relief from a guilty plea is whether an applicant would not have pled guilty but for counsel's alleged error, the validity of an applicant's claim to that end in the context of a "failure to investigate" allegation may be weighed in large part by weighing the actual value of the evidence which purportedly could have been discovered by additional investigation. Put another way, an applicant cannot escape his guilty plea by claiming he would have insisted upon a trial if

only his attorney had investigated and discovered valueless or irrelevant information. Here, the information Counsel could have ostensibly discovered by talking to Little is just that—of no help or value to Petitioner’s defense.

b. Neither Kenneth Louallen nor his statement to law enforcement was provided at the evidentiary hearing, and what little we have to show of its substance in the record indicates that it was inculpatory

Petitioner’s claims with respect to Kenneth Louallen are more simply resolved. In order to prevail upon a claim that counsel did not adequately prepare or 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 or defenses 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)).

Louallen was not presented as a witness at the evidentiary hearing. No purported statement was ever entered into evidence at the evidentiary hearing. The only indicia of a statement and its contents is in the narrative of a Pageland Police Department incident report, which was in Petitioner and Counsel’s possession:

I talked with Kenneth Louallen who witnessed the shooting. He states and his statement is on tape that he observed a guy named Dameion get out the passenger seat of a black [Grand Am] with a shotgun and shoot victim. He then states he racked the shotgun again and put it up to his chest and said “I should go ahead and kill you.” Mr. Louallen states that one of the victim’s friend’s, Steven Bradley . . . said “Man don’t do that you done enough.” He also states that Kory Little and Michael Dunlap were present when the victim was shot.

(Appx. 257). The introduction of a devastatingly inculpatory investigatory hearsay already known to Petitioner and Counsel prior to pleading guilty is inadequate to satisfy Petitioner's evidentiary burden.

For all of these reasons, the PCR court properly denied relief from Petitioner's allegations that Counsel failed to investigate witnesses Little and Louallen.

II. THE PCR COURT PROPERLY DENIED RELIEF BECAUSE THE TESTIMONY OF BILLY LEE LISENBY WAS BOTH UTTERLY DEVOID OF CREDIBILITY AND WAS IN ANY EVENT INCULPATORY

The PCR court also properly denied relief from Petitioner's claim of newly discovered evidence where it found the credibility of Petitioner's newly discovered witness and cellmate, Billy Lee Lisenby, to be sorely lacking. Indeed, Mr. Lisenby's history with this Court² is such that it would not be the most outrageous holding to find him not credible as a matter of law.

The Uniform Post-Conviction Procedure Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). A defendant requesting a new trial based on after-discovered evidence after a guilty plea must show:

(1) The newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the 'interest of justice' requires the applicant's guilty plea to be vacated.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014). As noted in the prior sections, the PCR court is entitled to great deference in determining the credibility of the witnesses before it. Hyman, 397 S.C. at 45, 723 S.E.2d at 380; Goins, 397 S.C. at 573, 726 S.E.2d at 3.

² Lisenby confirmed filing *thirty-five* different suits involving the South Carolina Attorney General and that he was subject to a restrictive filing order from this Court. (Appx. 216, line 24 – Appx. 217, line 15).

Lisenby testified at the evidentiary hearing. Despite never being mentioned by any other witnesses to the crime previously, Lisenby claimed that on the night in question he was sitting on the hood of a car in the parking lot of Pop's Game Room. (Appx. 209, ll. 5-11). Lisenby testified he saw Victim "walking around, you know, waving a gun, talking about he was gonna get this guy." (Appx. 209, ll. 12-17). Lisenby recalled seeing "a blue Grand Am or either a Grand Prix" pull up to Pop's. (Appx. 210, ll. 2-4). A man, who Lisenby later determined was Petitioner, got out of the passenger side of the car, at which time Victim approached Petitioner in an irate manner. (Appx. 210, ll. 4-13). Lisenby claimed Petitioner went to the front of the car, fell backward onto the hood of the car, and that a shot rang out. (Appx. 211, ll. 7-11). Victim fell and "all the Dunlap family just covered the body, ran up to him real quick and I saw a guy pulled the gun off of him." (Appx. 211, ll. 13-24). Lisenby testified he asked Larry Brown, of the Pageland Police Department, about the incident in January 2008 and reported he had been present at the scene, but that Brown never got back to him about it and Lisenby never brought it up to anybody else. (Appx. 212-13). Lisenby was first housed with Petitioner at Lee Correctional, but when they transferred to Ridgeland or Lieber,³ Lisenby talked to Petitioner and learned Petitioner was convicted for the shooting at Pop's. (Appx. 214, ll. 12-21). Two or three months later, Petitioner asked Lisenby to help him by verifying Victim had a gun; Lisenby initially did not wish to get involved but ultimately was contacted by PCR counsel. (Appx. 214-15). On cross-examination, Lisenby confirmed his prison record, prolific litigation history, and restrictions on his ability to file new PCR actions. (Appx. 216-18). Lisenby was uncertain as to who actually got out of the vehicle at Pop's and shot Victim. (Appx. 218, ll. 9-16).

³ Lisenby equivocates or corrects as to the detail.

The PCR court properly rejected this claim for relief. The PCR court ruled the facts “weigh very heavily against placing credibility on the statements of these men[,]” referring to Little and Lisenby. (Appx. 297-98). That credibility finding is entitled to deference. The wisdom of that finding is only reinforced by the facts and circumstances, which are similar to those in Jamison: an applicant for relief “discovered” another inmate who claims to have been present at the scene of a killing, where the applicant admits to having a gun and shooting the victim. The difference between the present matter and Jamison is that Lisenby’s testimony is of even less weight and quality. In addition to the PCR court’s credibility finding, whether Victim was or was not armed is irrelevant to the problem Counsel identified at the plea proceeding—that Petitioner showed up armed with a shotgun, with evidence to show ill intent, such that he could not be “without fault” or acting lawfully for the purposes of either a self-defense or accident strategy.

Petitioner discusses State v. South, 310 S.C. 504, 427 S.E.2d 666 (1993) and State v. Wells, 249 S.C. 249, 153 S.E.2d 904 (1967). Respondent cannot discern their relevance aside from the fact that they are also newly-discovered evidence cases.

“[I]t will be the rare case indeed where the interests of justice will require that a knowing and voluntary guilty plea be vacated through post-conviction relief on the basis of newly discovered evidence[.]” Jamison, 410 S.C. at 470, 765 S.E.2d at 130. Billy Lisenby cooking up a story at Petitioner’s request is not that rare case. The PCR court properly denied relief and certiorari should be denied.

III. THE PCR COURT PROPERLY DENIED RELIEF WHERE COUNSEL CREDIBLY TESTIFIED HE EXPLAINED TO PETITIONER HE WOULD SERVE AT LEAST 85% OF HIS SENTENCE AND WHERE THE PLEA COURT INSTRUCTED PETITIONER TO EXPECT TO SERVE EVERY DAY OF HIS SENTENCE

The PCR court properly denied relief from Petitioner's claim he was told he would serve only 65% of his sentence because both the record of the plea proceeding and Counsel's testimony refute the claim. "It is well settled that parole eligibility is a collateral consequence of sentencing, and that trial counsel need not advise a client of his parole eligibility or ineligibility in order to render effective assistance." Jackson v. State, 349 S.C. 62, 64, 562 S.E.2d 475, 476-77 (2002) (citations omitted). "When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether information conveyed by the plea judge cured any possible error made by counsel." Burnett v. State, 352 S.C. 589, 592, 576 S.E.2d 144, 145 (2003) (citing Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998)).

During the plea, Petitioner indicated unfamiliarity with the "85 Percent Rule or anything like that[.]" (Appx. 85, ll. 19-24). The plea court then explained to Petitioner he "could actually expect [to] serve the entire amount" of any sentence he may receive. (Appx. 86, ll. 1-8). Petitioner confirmed he understood. (Appx. 86, line 9).

At the evidentiary hearing, Petitioner claimed Counsel told him he "had to do 65% and [he] would be released from prison." (Appx. 173, ll. 5-8). Petitioner testified he pled guilty based on that advice. (Appx. 173, ll. 9-13). Confronted with the plea court's curative effort, Petitioner testified he thought he would only serve the whole time if he got in trouble while incarcerated. (Appx. 200, ll. 2-12). Counsel, on the other hand, denied ever telling Petitioner he would only have to serve 65%, and firmly asserted he told Petitioner he would have to serve 85%. (Appx. 229-30; Appx. 232-33). Counsel conceded he perhaps should have said something

when Petitioner denied discussing the subject during the plea, but asserted his explanation of mandatory minimums is “so automatic that I would’ve told him 85% because those are traditional run-of-the-mill arguments in PCR’s that I’ve faced for the last 35 years since the statute was in active.” [sic] (Appx. 233, ll. 14-23).

Petitioner asserts the present matter is similar to Jordan v. State, 297 S.C. 52, 374 S.E.2d 683 (1988). Petitioner’s own summary of Jordan shows that it is not similar at all. There is no prosecutorial bait-and-switch in the present matter. Nor is either Hinson v. State, 297 S.C. 456, 377 S.E.2d 338 (1989) or Alexander v. State, 303 S.C. 539, 402 S.E.2d 484 (1991); here, Counsel credibly testified he correctly advised Petitioner as to his sentencing exposure.

The PCR court relied upon Counsel’s testimony that he told Petitioner he would serve 85% in denying relief. (Appx. 267). As such, there is “any evidence” in the record to support the PCR court’s ruling. Additionally, any misunderstanding Petitioner may have had would have been cured by the plea court’s unconditioned admonition that Petitioner should expect to serve every day of his sentence. Accordingly, the petition for writ of certiorari should be denied.

[Conclusion and signature on following page]

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues identified by the Court.

Respectfully submitted,

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Attorney General

MEGAN HARRIGAN JAMESON
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By: 
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7 Dec., 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHESTERFIELD COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-002353

DAMEION J. RIVERS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

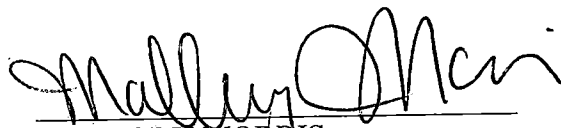
Respondent.

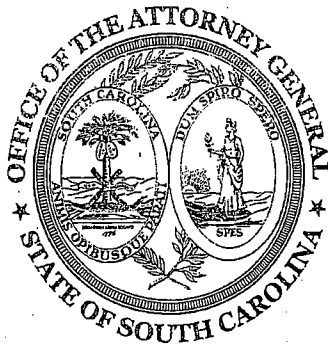
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Taylor D. Gilliam, Esquire
PO Box 11589
Columbia, SC 29201

This 7th day of December, 2018.


MALLORY MORRIS
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

DEC 07 2018

S.C. SUPREME COURT

December 7, 2018

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

RE: Dameion J. Rivers v. State of South Carolina
Appellate Case No. 2017-002353
Lower Court Case No. 2011-CP-13-0210

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johnny E. James Jr.
Assistant Attorney General
S.C. Bar No. 101260

JEJ/mm
Enclosures

cc: Taylor D. Gilliam, Esquire