STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

DOMINIC A. GALLMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001179

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did trial counsel violate Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution by failing to pursue the motion to sever Petitioner's trial from his co-defendants where it was undisputed that "all of the evidence was against" one co-defendant and the joint trial permitted the state to introduce numerous inculpatory statements made by the co-defendant, which had to be redacted, albeit haphazardly, to remove reference to Petitioner?

II. Did trial counsel violate Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to a summary of phone records where the summary was inaccurate when compared to the actual phone records, specifically as those records related to the critical time around the murders?

III. Did the PCR court erroneously deny Petitioner a new trial based on after-discovered evidence where Petitioner's co-defendant, Stanley Oliver, testified for the first time that he alone committed the crimes and where the only physical evidence in the case implicated only Oliver and the other evidence presented by the state at the trial implicated Oliver?

STATEMENT

In September 2005, George "Jim" Batie and Desiree Felder sold large quantities of cocaine. App. 586, l. 16 – App. 587, l. 5; App. 588, ll. 24-25; App. 590, ll. 15-17; App. 592, ll. 8-12; App. 609, l. 24 – App. 610, l. 2. Stanley Oliver was a drug dealer as well. App. 935, ll. 17-21.

On September 4, 2005, Kevin Miller lived with his friend, Christopher Cochran. App. App. 562, ll. 1-3; App. 563, ll. 15-17; App. 565, ll. 16-21. Around 2 a.m., Cochran sent Miller to Batie's house to buy cocaine for him. App. 563, ll. 10-14; App. 565, ll. 16-25. Cochran gave Miller his ATM card and PIN to get money from his bank account to purchase the cocaine. App. 566, ll. 8-11.[1] However, Kevin did not return. App. 569, ll. 13-24. On September 5, 2005, Miller went to Batie's house to find out what happened with Kevin. App. 570, ll. 17-23. Miller knocked on the front door, but no one answered. App. 571, ll. 13-16. Miller then left. App. 572, ll. 7-12.

Later on September 4, Zondria McKie went to Batie's house to find her friend, Desiree. App. 595, ll. 11-24; App. 596, ll. 1-3. She knocked on the door, but no one answered. App. 597, ll. 14-21. However, when she turned the doorknob, the door opened. App. 597, ll. 21-22. She found a man on the floor by the door. App. 597, ll. 23-24. Believing the man to be sleeping, she walked over him. App. 598, ll. 8-15. However, she soon discovered Batie's body and blood. App. 598, l. 19 – App. 599, l. 16. Realizing the two men were dead, McKie called 911. App. 599, ll. 16-17. Zondria looked for Felder, but she could not find her. App. 600, l. 15 – App. 601, l. 16.

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[1] According to the ATM receipt, Miller withdrew cash at 2:40 a.m. App. 575, ll. 13-18.

One identifiable print was lifted from a shoebox collected from a bedroom in Batie's home. App. 671, ll. 8-15. An officer compared the print to one from Stanley Oliver. App. 675, ll. 8-11. According to the officer, the prints matched. App. 675, ll. 8-11; App. 679, ll. 1-15; App. 679, ll. 19-24.

On September 7, 2005, Joseph Angelino was walking his dog when he noticed a dead body on the side of the street. App. 767, ll. 14-17; App. 768, ll. 3-8. Angelino called 911. App. 768, ll. 9-10. Presumably, this was the body of Felder.

Ultimately, it was determined that Felder died as a result of "[l]aceration to the brain due to the gunshot wound to the head." App. 1532, ll. 1-6. Similarly, Miller "died as a result of a cerebral laceration secondary to a penetrating gunshot wound to his head." App. 1702, ll. 16-20. Likewise, Batie "died as a result of a cerebral laceration due to a gunshot wound to his head." App. 1716, ll. 10-11.

On November 16, 2005, a Richland County grand jury indicted Petitioner for burglary first degree (2005-GS-40-9696), three counts armed robbery (2005-GS-40-9695; -9697; -9698), kidnapping (2005-GS-40-9699), and three counts of murder (2005-GS-40-9700; -9701; -11581). App. 2848-2849; App. 2851-2852; App. 2854-2855; App. 2857-2858; App. 2860-2861; App. 2863-2864. The state, represented by John Meadors, David Ross, and Joanna McDuffie, called Petitioner and two other defendants, Kenneth Joy and Stanley Oliver, to trial on December 3, 2007, before the Honorable G. Thomas Cooper, Jr., and a jury. App. 1. Jonathan Milling represented Petitioner. App. 1. Douglas Strickler and Mary LaFave represented Oliver, and John Delgado represented Joy. App. 1.

At the close of the state's case, Judge Cooper directed a verdict of acquittal on one of the armed robbery charges. App. 1803, l. 24 – App. 1804, l. 3. Ultimately, the jury acquitted

Petitioner on one of other armed robbery charges as well. App. 2328, ll. 16-19. However, the jury found Petitioner guilty as charged on the remaining counts. App. 2328, l. 4- App. 2329, l. 6. Pursuant to the state's notice to seek life without parole under the recidivism statute, Judge Cooper sentenced Petitioner to life without the possibility of parole for burglary in the first degree and three counts of murder. App. 2346, ll. 13-17; App. 2350, l. 25 – App. 2351, l. 21; App. 2850; App. 2859; App. 2862; App. 2865. He also sentenced Petitioner to thirty years imprisonment for kidnapping and for armed robbery. App. 2350, ll. 17-24; App. 2853; App. 2856.

Petitioner filed a notice of appeal, which was perfected by Robert M. Dudek. App. 2355-2375. On January 20, 2011, the Court of Appeals affirmed Petitioner's conviction in an unpublished opinion. App. 2416-2417; State v. Gallman, 2011-UP-006 (S.C. Ct. App. filed Jan. 20, 2011). Petitioner filed a petition for rehearing challenging the opinion. App. 2418-2426. On February 28, 2011, the Court of Appeals denied the petition. App. 2435-2436. Thereafter, Petitioner sought review in this Court. App. 2437-2463. On June 7, 2012, this Court denied review. App. 2491. On June 12, 2012, remittitur was issued. App. 2492.

On July 20, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 2493-2499. On March 9, 2018, Petitioner, through counsel, filed an amended application for PCR. App. 2507-2509. On March 15, 2018, Petitioner filed a second amended application for PCR. App. 2510-2512. On March 20 and 23, 2018, the matter proceeded to an evidentiary hearing before the Honorable Brooks P. Goldsmith. App. 2513. Kristy Goldberg represented Petitioner, and Jessica Kinard represented the state. App. 2513. By an order filed June 5, 2018, Judge Goldsmith denied Petitioner relief. App. 2793-2847.

Petitioner served his notice of appeal on June 22, 2018. This petition for writ of certiorari follows.

ARGUMENT

Introduction

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). "The benchmark for judging any claim of ineffectiveness must be whether 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." Id. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel's performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Id. at 695.

I. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to pursue the motion to sever Petitioner's trial from his co-defendants where it was undisputed that "all of the evidence was against" one co-defendant and the joint trial permitted the state to introduce numerous inculpatory statements made by the co-defendant, which had to be redacted, albeit haphazardly, to remove reference to Petitioner.

Relevant facts

On October 29, 2007, trial counsel filed a motion to sever Petitioner's trial from that of his co-defendant, Stanley Oliver. App. 2656, ll. 2-5; App. 2740. Nevertheless, trial counsel failed to pursue the motion. According to trial counsel he thought that by having a joint trial where there was a lack of evidence against one defendant with a single piece of physical

evidence against a second defendant, then the first defendant had "a tactical advantage" of being able to "draw and distinguish one defendant from the next." App. 2658, ll. 8-18. Trial counsel also wanted to be able to rely upon the lawyers of the other two defendants, Doug Strickler and John Delgado, to "challenge and discredit the witnesses," in order to benefit Petitioner. App. 2657, l 23 – App. 2658, l. 7. Trial counsel opined that the judge would have denied the severance motion because the state had "all the same witnesses." App. 2658, ll. 16-18. Instead of focusing on the severe prejudice of permitting the statements made by Oliver to be admitted at a joint trial, trial counsel insisted the "allegations" were "that everybody did everything together and so there's really no need to sever it." App. 2658, ll. 19-24.

Prior to trial, hundreds of pages and hours of time were devoted to resolving the admissibility of statements attributed to Stanley Oliver that implicated, either directly or by inference, Petitioner. App. 186, ll. 7-9; App. 187, l. 21 – App. 197, l. 16; App. 244, ll. 10-18; App. 250, l. 10 – App. 254, l. 24; App. 256, l. 1 – App. 260, l. 3; App. 294, l. 20 – App. 295, l. 10; App. 297, l. 19 – App. App. 298, l. 1; App. 303, l. 5 – App. 310, l. 19; App. 351, l. 11 – App. 361, l. 16. In fact, the judge remarked that at least one statement was "rife with Crawford[2] issues." App. 254, l. 25 – App. 255, l. 7. By all accounts, those statements were not admissible because Oliver was an unavailable witness and could not be cross-examined. However, the state sought to admit the statements by redacting certain portions of the statements. App. 192, ll. 1-13; App. 195, l. 19 – App. 196, l. 2; App. 255, ll. 8-22; App. 304, ll. 7-17. Instead of the jury hearing Petitioner's name, the jury heard "another person."

Despite the number of hours dedicated to this discussion during the pre-trial hearing, the issue recurred with numerous witnesses called by the state. See e.g., App. 1056, l. 7 – App.

[2] Crawford v. Washington, 541 U.S. 36 (2004).

1057, l. 8; App. 1241, l. 20 – App. 1244, l. 2. Although there was an effort to redact Petitioner's name, the obvious implication was that Petitioner was the "other person" in Oliver's statements. In fact, during the testimony of Jason Brown, a jailhouse snitch against Oliver, counsel for Oliver used Petitioner's name in reference to a statement previously given by Brown. App. 1409, ll. 18-25; App. 1411, ll. 21-25; App. 1438, ll. 1-2; App. 1453, ll. 3-21. Had Petitioner not been on trial with Oliver, none of Brown's very damaging and inflammatory testimony would have been admissible.

There was no physical evidence linking Petitioner to the crimes; however, there was a single fingerprint linking Oliver to the murders. App. 2646, ll. 2-8. Thus, the state's case against Petitioner relied solely upon circumstantial evidence and guilt by association.

During the trial, Renata Williams testified that she was romantically involved with Stanley Oliver in September 2005. App. 829, ll. 2-4; App. 831, ll. 2-6. Williams claimed that over the Labor Day weekend after 2 a.m., she saw that Oliver called Petitioner on the phone. App. 835, l. 12 – App. 836, l. 15. After the phone call, Oliver left the home. App. 836, ll. 20-21. Williams claimed that the following afternoon, she saw Oliver with money and drugs. App. 837, ll. 11-20. When she asked where he got it, he said "something about doing a lick." App. 838, ll. 1-2. Later in the week, she and Oliver went shopping. App. 838, ll. 23 – App. 840, l. 1. Oliver also gave her $50. App. 840, ll. 4-9. On September 7, 2005, she and Oliver stayed in a hotel room with Oliver paying for the room in cash. App. 843, ll. 10-25. While in the room, the two watched a program involving murders. App. 844, ll. 9-14. Oliver asked her "if something was to happen to him and he'd get locked up, would [she] let people know that he was [her] husband." App. 844, ll. 15-19.

Had Petitioner not been on trial with Oliver, none of Williams' testimony would have been admissible against him.

Ulcien "Mike" Allen claimed that on Monday morning, Oliver called him requesting to see him. App. 902, ll. 3-14. Allen went to see Oliver at Williams' house. App. 902, ll. 17-19. According to Allen, Oliver had "guns, a .12-gauge shotgun," "bundles of money," "crack cocaine," "cocaine and like digital scales for drug sales." App. 903, ll. 10-13. Allen asked Oliver if he had "pulled off a lick," and Oliver answered affirmatively. App. 903, ll. 14-16. When Allen inquired if he needed to be worried about the owner of those items seeking revenge, Oliver said, "nah, you ain't got to worry about that. The guy we got this from ain't going to be looking for us." App. 903, ll. 22-24. Oliver then gave Allen $150. App. 903, l. 25.

When Allen learned of the murders, he "automatically" felt like Oliver had "some type of involvement" in them. App. 907, ll. 1-7. Allen called Oliver to discuss this feeling and that he had learned that "homicide" was looking for Oliver. App. 908, ll. 17-19. Allen claimed that Oliver said he was aware the police were looking for him because his fingerprint was found at the scene of a murder. App. 908, l. 23 – App. 909, l. 1. According to Allen, Oliver said he did not have anything to do with the murder, but he said, "We tore the due up. We tore the dude up, but I didn't kill nobody." App. 909, ll. 2-5. Later, Oliver told Allen he "didn't kill the woman." App. 909, ll. 12-17. Allen told the jurors that Oliver frequently had a 9-millimeter, a .40 caliber, and a .12-gauge shotgun. App. 928, l. 25 – App. 929, l. 4.

When Allen was reporting all of this to police, he also told them that Oliver was affiliated with Petitioner and Kenneth Joy. App. 924, ll. 17-24. The police may have told Allen that they did not know where Petitioner lived in order to question him. App. 925, ll. 3-10; App. 950, ll. 1-12 (denying that the police wanted to speak to Petitioner). Allen went to Petitioner's home and

got his cell phone number, which he then provided to the police. App. 925, ll. 10-20. When Allen questioned as to why Petitioner allowed Oliver to leave his prints all over the crime scene, Petitioner allegedly told him that Oliver was on cocaine and there was no way to control him. App. 927, ll. 1-8. Allen also claimed that Petitioner told him that "they rushed" into the house to gain entry. App. 928, ll. 10-17.

Had Petitioner not been on trial with Oliver, none of Allen's testimony regarding Oliver's statements would have been admissible.

On Labor Day weekend of 2005, Tatanisha Robinson was visiting friends in Columbia. App. 1190, l. 24 – App. 1191, l. 8. During this visit, she saw Oliver. App. 1191, ll. 13-14. Robinson testified pursuant to an immunity agreement with the state and federal government. App. 1287, l. 1 – App. 1288, l. 9. Despite the grant of immunity, Robinson disclaimed a statement she had given to police previously. See e.g., App. 1203, ll. 9-12; App. 1203, l. 24; App. 1204, ll. 6-8; App. 1206, ll. 12-13. Robinson explained that she was expecting Oliver's child at the time she gave the statement, and she was mad at him because he refused to leave his girlfriend for her. App. 1204, ll. 6-8. The state used her statement to police to impeach her, revealing that she indicated Oliver said he had $2,300 and cocaine. App. 1206, l. 5 – App. 1207, l. 10. According to the statement, Oliver said he had gotten himself into something and could get "life." App. 1211, ll. 17-20. Her statement also indicated that she asked Oliver about the murders and he was too emotional to talk about it. App. 1212, ll. 2-5. In the statement, Robinson allegedly claimed that Joy said the cops would never find the watch and wallet because they had destroyed them. App. 1225, ll. 16-22.

The statement also included that Petitioner was bragging about the murders, but Robinson denied writing the statement. App. 1216, ll. 7-13. Further, the statement indicated that

Petitioner had some money around this time. App. 1216, l. 22 – App. 1217, l. 19. In the statement, Robinson claimed Joy said he gave the drugs from the robbery to Blue. App. 1226, l. 4 – App. 1227, l. 4.

Robinson's disavowed statement claimed that Oliver "always" had a gun, including a .38 revolver and a .12-gauge shotgun, that Petitioner had several guns, including a .40 caliber that he allowed Oliver to use, and Joy had a 9-millimeter. App. 1218, l. 15 – App. 1219, l. 19.

Had Petitioner not been tried with Oliver, none of Robinson's testimony regarding statements by Oliver would have been admissible.

Omekas "Blue" Moaney sold dope for a living. App. 1074, ll. 17-18; App. 1075, ll. 6-14; App. 1080, ll. 7-11; App. 1083, ll. 7-8. Moaney claimed that on September 5, 2005, Kenneth Joy arrived at his house with Oliver. App. 1081, ll. 8-12. Petitioner arrived alone approximately thirty minutes later. App. 1083, l. 13; App. 1082, ll. 8-10. According to Moaney, Petitioner and Oliver "had a large amount of cocaine" that they wanted him to distribute. App. 1082, l. 24 – App. 1083, l. 1. Then, Petitioner and Oliver left, only to return "with a large bag of cocaine." App. 1083, ll. 16-18. They cooked the cocaine. App. 1083, ll. 19-22. Moaney claimed Petitioner and Oliver took some of the cooked crack and left, leaving the rest with him. App. 1084, ll. 13-20. Moaney further claimed they sold approximately $3,000 worth of cocaine. App. 1086, ll. 1-8.

Moaney alleged that he got suspicious about the origin of the cocaine. App. 1090, l. 12. He questioned Petitioner and Oliver accordingly. App. 1090, ll. 18-20. He claimed that Oliver indicated they got the cocaine through robbery. App. 1091, ll. 3-7. Oliver also stated there was no intent to harm anyone, "but things got out of hand, things went wrong." App. 1091, ll. 9-13. It was revealed that Moaney was incarcerated in federal prison and hoped to get a downward

departure for his cooperation against Petitioner and Oliver. App. 1108, l. 16 – App. 1111, l. 8; App. 1112, ll. 7-18. Moaney had not received a downward departure for any other information he had provided to the federal government because he was found to be not credible. App. 1124, l. 10 – App. 1125, l. 3.

Had Petitioner not been tried with Oliver, none of Moaney's testimony regarding statements by Oliver would have been admissible.

Petitioner's girlfriend, Leticia Jones, explained that Petitioner arrived at her home on the morning of September 4, 2005. App. 1030, ll. 1-15. He was upset, crying. App. 1031, ll. 2-4. Petitioner told her that his friend "had gotten him into trouble and that he made him do something that he didn't want to do and that he didn't know what to do." App. 1031, ll. 15-21. She further claimed that Petitioner indicated "they knocked on the door and somebody opened the door and his friend shot the guy that opened the door." App. 1032, ll. 1-4. Then "they were trying to rob the man" who would not tell them where his money was. App. 1032, ll. 4-7. The friend "flipped out," "got really mad and angry and just shot the man." App. 1032, ll. 8-9. A woman was there and Petitioner's friend insisted they take the woman with them because she probably knew where the money was. App. 1033, ll. 16-18. While away with the woman, the friend was trying to hurt the woman, which Petitioner prevented. App. 1033, ll. 22-25. The friend then put a gun to Petitioner's head and told him to shoot the woman or he would get shot. App. 1033, l. 25 – App. 1034, l. 2. According to Jones, Petitioner said he "just closed his eyes and pulled the trigger." App. 1034, ll. 3-4.

Jones was impeached by two prior statements to law enforcement and a statement to a private investigator in which she made no mention of this alleged tearful confession. App. 1041, l. 8 – App. 1044, l. 1; App. 1045, l. 24 – App. 1045, l. 19. She admitted that at the time of trial,

her parents had custody of her son and were refusing to allow her to be involved in his life unless she "cut off all ties" with Petitioner. App. 1048, ll. 9-22. Jones further admitted that she had told Petitioner that the allegations against him were lies and that she believed he was innocent. App. 1049, ll. 4-25.

Had Petitioner not been jointly tried with Oliver, Jones' testimony would have been admissible against him.

Discussion

"A motion for severance is addressed to the sound discretion of the trial court." State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002); State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006); see also State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 1996). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Rice, 368 S.C. at 613, 629 S.E.2d at 395; see also State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005); see also Harris, 351 S.C. at 652-653, 572 S.E.2d at 273; State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). "A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009) (citing Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Thompson, 279 S.C. 405, 408, 308 S.E.2d 364, 366 (1983)).

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987). In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable, and the defendant had a prior opportunity to cross-examine the witness. Statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006); see also State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009). The United States Supreme Court also held that admission of a non-testifying co-defendant's statement that expressly inculpates the defendant violates the defendant's Confrontation Clause in a joint trial. Bruton v. United States, 391 U.S. 123, 136-137 (1968). Additionally, a limiting instruction is not sufficient to remove any prejudice to the defendant. Id. The Supreme Court recognized that in some cases the use of redactions may comply with Bruton. Richardson, 481 U.S. at 208-209.

Examining this issue again, the Supreme Court held that redactions that are simply replacements of the defendant's name with a blank space, a symbol, or a word such as "deleted," are not sufficient. Gray v. Maryland, 523 U.S. 185, 197 (1998). The Court explained the necessity of looking at the kind of inferences necessary to connect the defendant, not the fact of the existence of the inference, in order to determine the applicability of Bruton. Id. at 196. In Gray, the inferences drawn from the statements, even in redacted form, "obviously refer[red] directly to someone, often obviously the defendant, and which involve[d] inferences that a jury ordinarily could make immediately." Id. at 196. Such statements are forbidden under Bruton. Id. at 196-197.

In Holder, 382 S.C. at 285-286, 676 S.E.2d at 694, this Court held a trial court erred in admitting a statement by Holder's non-testifying co-defendant concerning injuries to the victim

where the statement was redacted to replace the defendant's name with "she." The "jury could readily determine that the statement referred to her as she was the only female defendant." Id. In a similar case, State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010), this Court held the trial court erred in admitting a redacted statement by a non-testifying co-defendant in which a nickname was blacked out with magic marker. The redaction eliminated the words "and Knock." Id. at 605, 703 S.E.2d at 219. Although no evidence was introduced to indicate the defendant was known as "Knock," the statement clearly referred to another person. Additionally, the officer testified that based on this statement, he arrested the defendant. Id. at 606, 703 S.E.2d at 220. This "effectively told the jury that [the co-defendant]'s unredacted statement named [the defendant]." Id.

In Bruton, 391 U.S. 135-137, the United States Supreme Court held that an example of a specific trial right that may be prejudiced due to a joint trial is the constitutional right to cross-examination when a co-defendant's confession expressly implicates another co-defendant, but the confessor fails to testify during the trial. A curative instruction cannot remedy this violation. Id. Applying Bruton and its progeny, this Court held a redacted statement violated the Confrontation Clause due to the nature of the redaction. State v. Henson, 407 S.C. 154, 166, 754 S.E.2d 508, 514 (2014). This Court explained that "[w]hile severing trials certainly impacts judicial economy and state resources, these factors should not take precedence over the protection of a defendant's constitutional rights." Id. at 167, 754 S.E.2d at 515. This Court held that "unless the [co-defendant]'s statement could be redacted in such a way that Henson was not implicated, the only alternatives were to not admit the confession or to grant Henson's motion to sever." Id.

Despite the case law favoring severance, the PCR court denied Petitioner relief on this ground relying upon what it termed "significant" benefits testified to by trial counsel to a joint trial. App. 2821-2823. These alleged "significant" benefits were that the state "would have to distinguish

the evidence between all three co-defendants," a joint trial would "remove some of the focus from [Petitioner], whereas if he had proceeded to trial alone, all of the state's resources and attention would be solely focused on [Petitioner]." App. 2821-2823. Further, a benefit was collaborating with counsel for Oliver and Joy to challenge the state's evidence. App. 2821-2823. Thus, the PCR court determined trial counsel had a reasonable trial strategy. App. 28281-2823. Turning to prejudice, the PCR court accepted trial counsel's view that a severance would have been difficult to obtain because "all of the evidence was against Oliver and not [Petitioner]." App. 2821-2823. Further, the PCR court accepted that Oliver's statements to others would not have been admissible against Petitioner if he were tried alone, but noted that the testimony of Jones would have been admissible against Petitioner and was very damaging. App. 2821-2823.

Trial counsel filed the motion to sever prior to trial, but he failed to pursue the motion. At some point, trial counsel saw the advantages of having a trial without the co-defendants, particularly Oliver. The evidence against Oliver consisted of his fingerprint at the crime scene and numerous confessions to individuals, including two girlfriends, a family member, and a jailhouse snitch. In each of those statements, Oliver implicated Petitioner. Therefore, under clearly established case law from the United States Supreme Court and this Court, trial counsel had a very good basis for filing the motion as his right to cross-examination was compromised by a joint trial. Trial counsel performed deficiently by failing to pursue the motion in light of the evidence against Oliver and his statements that harmed Petitioner's right to cross-examination.

Trial counsel's deficient performance prejudiced Petitioner. While the PCR judge was correct that if the cases had been severed, then Jones' testimony would have been admitted against Petitioner. However, Jones' credibility suffered from a brutal cross-examination. For years, she maintained that Petitioner was innocent and that she had no information to provide to police about

the murders. When her parents took her child and conditioned her parent-child relationship upon her "cutting all ties" with Petitioner, Jones then changed her story. Jones' motive to fabricate the alleged tearful confession was unmistakable. The joint trial permitted numerous witnesses to testify to Oliver's confessions that implicated Petitioner. While the judge required the confessions to be redacted, the redactions did little to remove what was obvious – Petitioner was the "other person" in the statements. In fact, this point was made even more apparent when Oliver's counsel referred to Petitioner by name when he was cross-examining the jailhouse snitch, Brown, about Oliver's confession. Petitioner had no opportunity to cross-examine Oliver because he was a non-testifying co-defendant. The prejudice caused by the joint trial, which is the only way the state could have introduced Oliver's statements in a trial involving Petitioner cannot be overstated as a review of the evidence in the case demonstrates. Any advantage trial counsel hoped to obtain through the assistance of the seasoned lawyers, Strickler and Delgado, was far outweighed by the disadvantages of permitting the joint trial where the state presented significant and damaging evidence against Oliver that allowed the jury to convict Petitioner based on guilt by association due to Oliver's statements.

II. In violation of Petitioner's rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, trial counsel provided ineffective assistance by failing to object to a summary of phone records where the summary was inaccurate when compared to the actual phone records, specifically as those records related to the critical time around the murders.

Relevant facts

In September 2005, Renata Williams was romantically involved with Stanley Oliver. App. 829, ll. 2-4; App. 831, ll. 2-6. Occasionally, Oliver lived with Williams. App. 830, ll. 9-23; App. 831, ll. 7-10. At her apartment, Williams had a landline with the number 779-6080.

App. 831, ll. 11-15. Williams along with "anybody" else who visited would use the phone. App. 831, ll. 18-23. Leticia Jones and Petitioner were in a romantic relationship as well. App. 1027, ll. 6-14. In September 2005, the two were living together. App. 1027, ll. 17-19. However, at "the very end of August," Petitioner left following an argument between the two. App. 1029, ll. 2-17. Petitioner did not return to their home until Sunday morning – the day before Labor Day. App. 1030, ll. 1-8. Jones had a cellphone with the number 599-0434. App. 1036, ll. 6-7. She stated that Petitioner would use her cellphone "from time to time." App. 1036, ll. 8-10.

The state introduced the phone records associated with Jones' cellphone for September 1, 2005 through September 20, 2005. App. 1161, l. 9 – App. 1162, l. 7. Trial counsel did not object to the records. App. 1162, l. 3. Further, the state introduced the records from Williams' phone from September 2, 2005 through September 11, 2005. App. 1293, l. 20 – App. 1295, l. 18. Trial counsel did not object to these records; rather, he requested only redactions of some handwritten marks on the documents. App. 1294, ll. 17-24. The judge ordered the records to be redacted, and allowed the records to be admitted. App. 1295, ll. 4-8.

During the trial, the state provided trial counsel "21 pages of telephone records that may or may not be accurate summations under rule 1006" according to Joy's counsel. App. 1732, ll. 19-22. The state claimed the document was "a summary of things already in evidence." App. 1732, l. 25 – App. 1733, l. 1. Specifically, the state asserted "these are a summary of the phone records that are already in evidence through the phone record custodians. And they show calls made to and from those phone numbers which are listed in the records already in evidence." App. 1733, ll. 4-8. The state proffered the testimony from Dana Outen who prepared the summary to support admission. App. 1736, l. 21 – App. 1745, l. 9. Outen claimed that she "just

took the two phone records and looked at them and just because they were on the same day and the same time and just the times, the time would just be off a little differently because of the incoming and outgoing calls." App. 1737, l. 25 – App. 1738, l. 4. "To the best of [her] knowledge," it was "a fair and accurate summary of what was contained in the four sets of phone records entered into evidence." App. 1738, ll. 9-12.

Trial counsel indicated he had not had an opportunity to review the actual records to compare them to the summary. App. 1748, ll. 15-22. He re-iterated that he had "not had a chance to go through and verify" the summary with the records yet. App. 1751, ll. 17-19. After objections were placed on the record, the court took a break. App. 1761, l. 21. When the trial resumed, trial counsel indicated he was "in the process of verifying or attempting to verify the accuracy of the summary." App. 1764, ll. 4-6. He stated he caught "two errors" during the break. App. 1764, ll. 6-7. He wanted the opportunity to continue to go through to verify the accuracy of the calls. App. 1764, ll. 9-13. The judge indicated that he would permit the state to present their witness to the jury, but not admit the summary until the parties had the opportunity to make "accuracy corrections." App. 1768, l. 21 – App. 1770, l. 8; App. 1772, l. 15. Trial counsel did not object to this procedure. App. 1769, l. 25 – App. 1770, l. 1. After a break, counsel objected to numbers attributed to a different witness. App. 1777, l. 25 – App. 1778, l. 17. When he mentioned the need for another redaction, the judge assured that he would "have plenty of time to look at the redactions." App. 1780, ll. 19-20. Trial counsel made no other motions regarding the accuracy of the records.

In his closing argument, trial counsel told the jurors to examine the phone records. App. 2200, ll. 5-7. According to trial counsel, the records showed "phone calls on the early morning of September the 4th." App. 2200, ll. 8-10. Counsel argued "there were six phone calls made

between 2 and 4," which was the time the state alleged the murders occurred. App. 2200, ll. 10-12. Counsel rhetorically asked if Petitioner would be making and receiving six phone calls in a two-hour period if he were committing a triple homicide. App. 2200, ll. 13-17.

The solicitor's closing argument explained just how important the phone records were. According to the solicitor, he was going to talk about the phone records because he would be fired if he did not – that was how important they were. App. 2242, ll. 13-17. According to the solicitor, the phone records were "what helps tie them together." App. 2242, ll. 17-18. Thereafter, the solicitor, using the inaccurate summaries prepared by his paralegal, claimed there were phone calls at 12:45 p.m., 1:30 a.m., 1:43 a.m., and 1:53 a.m. from "a number which has been testified to that [Petitioner] used as his cellphone" to Renata's phone, "which is testified somewhere Stanley Oliver stayed." App. 2242, ll. 19-24; see also App. 2244, ll. 17-25; App. 2262, ll. 1-7. The solicitor improperly attributed two phone numbers to Petitioner as well. App. 2244, ll. 1-7. While there had been testimony that Petitioner had access to those phone numbers, there was no testimony that Petitioner was the exclusive user of those numbers. The solicitor called the phone records, and the summary in particular, "good evidence" and claimed "[i]t ties them altogether." App. 2245, ll. 18-21.

In light of the strong evidence the state had against Oliver, including the state's only direct evidence against any of the defendants, a fingerprint at the crime scene, the solicitor desperately wanted to connect Petitioner to Oliver around the time of the murders. Thus, the solicitor claimed that the early morning phone calls were the two planning the robbery. App. 2255, ll. 18-25. While Williams, Oliver's girlfriend, testified that Oliver left shortly after an early morning phone call, she did not indicate that Oliver left with Petitioner. App. 835, l. 5 – App. 836, l. 21. Nevertheless, the solicitor argued to the jury that he did. App. 2255, ll. 23-25.

During the PCR hearing, Petitioner explained that the telephone records were inconsistent and were not accurately reflected in the state's summary. App. 2582, l. 9 – App. 2583, l. 3. Petitioner elaborated that there were some calls on one phone record, but not on another record. App. 2583, ll. 4-10. Despite the obvious lack of support of the phone calls in both records, the state included the phone calls on its summary. App. 2581, ll. 14-16.

Petitioner noted that Renata Williams, Oliver's girlfriend at the time, claimed that Oliver called Petitioner around the time of the murders and then he left the residence. App. 2584, ll. 4-6. The phone records for Williams did not include evidence of this alleged call or calls. App. 2584, ll. 10-20. However, the phone records for Leticia Jones, Petitioner's girlfriend at the time, showed the phone calls. App. 2584, ll. 16-18. The state attributed Jones' records to Petitioner at trial. App. 2584, ll. 16-18. With no regard to this discrepancy in the "raw" data, the state included the phone calls in its summary. App. 2584, ll. 23-25.

During the PCR hearing, trial counsel admitted that at least three phone calls did not appear on the phone records of Renata Williams' phone, but did appear on the phone records for Leticia Jones' phone. App. 2694, ll. 1-5. Specifically, the phone records for Renata Williams did not show three phone calls to 599-0434 during the early morning of September 4, 2005. App. 2753. However, the records for Leticia Jones showed the three phone calls. App. 2765-2767. Despite this discrepancy, the calls were listed in the state's summary. App. 2780. Counsel indicated he could not say whether he should have objected to the admission of the phone records and the summary based upon the discrepancies. App. 2694, ll. 18-23.

Trial counsel indicated that phone records "generally" did not "concern" him. App. 2673, ll. 7-10. According to counsel, he did not worry about phone records much, despite the

fact that the phone companies providing the records would have no "dog in the fight," because the records did not show "who" was on the phone. App. 2672, l. 24 – App. 2673, l. 10.

The PCR judge denied Petitioner relief on this claim. App. 2837-2839. According to the PCR judge, trial counsel "testified the phone records merely showed calls were made around the time these crimes took place and did not indicate who placed the calls." App. 2837-2839. The PCR judge determined trial counsel's failure to object to the records, including the summary, was reasonable "[b]ecause these records did not indicate [Petitioner] placed these calls, much less implicating him in these crimes." App. 2837-2839. In light of the records custodians testifying that the records were kept in the ordinary course of business, the PCR court determined that "it was unlikely that an objection made by counsel to these records would have been successful, particularly in light of the fact the records contained no identifying information" for Petitioner. App. 2837-2839.

Turning to the matter of the summary produced by the state, the PCR court determined "[b]ecause counsel did, in fact, object to the introduction of the summary of the records and was successful in excluding identifying information of [Petitioner] attributed with this summary," Petitioner failed to establish any deficiency on the part of counsel. App. 2838. The PCR court also found no prejudice because "[t]he information in this summary was gleaned from records for four different telephone numbers, all of which had already been admitted into evidence." App. 2838-2839.

Discussion

Pursuant to Rule 1006 of the South Carolina Rules of Evidence,

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation, provided the underlying data are admissible into evidence. The originals, or

> duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Rule 1006, SCRE (emphasis added). The notes to South Carolina Rule of Evidence 1006 provide that the South Carolina rule is identical to Rule 1006 of the Federal Rules of Evidence, with the exception of South Carolina's inclusion of the phrase, "provided the underlying data are admissible into evidence." Rule 1006, SCRE, Note. Where the language of a South Carolina rule mirrors that of a federal rule, courts frequently look to federal case law for guidance in interpreting the common language and intent of the rule. See State v. Broadnax, 414 S.C. 468, 473-78, 779 S.E.2d 789, 791-94 (2015) (finding that federal precedent interpreting the application of Rule 609 consistent with South Carolina common law and legislative intent).

The purpose of a summary is to aid the jury by distilling voluminous records or data that are themselves admissible into evidence into a more manageable form for review at trial. U.S. v. Janati, 374 F.3d 263, 272 (2004). To be admissible, a summary must fairly and accurately represent the evidence being summarized and the underlying evidence itself must also be admissible. Id.; United States v. Bakker, 925 F.2d 728, 736 (4th Cir.1991). Parties may not use summaries to "abrogate other restrictions on admissibility," such as the prohibition against hearsay, and Rule 1006 does not preempt other rules and requirements governing the admission of evidence at trial. U.S. v. Johnson, 594 F.2d 1253, 1255 (9th Cir. 1979). The burden remains on the moving party to establish a foundation for the summary by establishing the admissibility of the underlying evidence upon which the summary is based and is not on the non-moving party to seek out independent evidence to establish a lack of foundation. Id.

Telephonic communications and other electronically stored information, like traditional evidence, are subject to all rules of evidence. See Lorraine v. Markel American Ins. Co., 241

F.R.D. 534 (2007). Therefore, summaries of telephonic communications and other electronically stored information fall squarely within the purview of Rule 1006 and are admissible only if all the requirements of Rule 1006 regarding accuracy, admissibility of the underlying data, prior disclosure for copy and inspection at a reasonable time and place, and opportunity to cross-examine regarding the summaries have been satisfied. See id.

Trial counsel's failure to object to the summary based upon its inaccuracies regarding the three critical phone calls that were not on both records was deficient performance. Although trial counsel received the summary during the trial, the judge provided counsel with ample time to review the summary, specifically for accuracy. The judge required corrections when trial counsel sought corrections. Trial counsel's failure to find the errors at issue in this case fell below professional norms as those were the three phone calls that connected Petitioner and Oliver around the time of the murders. This was the critical time period that trial counsel should have been examining.

Trial counsel's deficient performance was prejudicial to Petitioner in light of the weak case against him and the state's use of the summary in its closing. The state desperately needed to connect Petitioner to Oliver, especially around the time of the murders. The state used the inaccurate summary to do so and counsel failed to object or rebut the state's argument with the phone records that did not show those critical phone calls. As stated, the state's evidence against Oliver was strong – the fingerprint and his numerous confessions. However, the state had very little evidence against Petitioner. Absent the obvious inference of Petitioner being referred to in Oliver's redacted confessions, the only other evidence against Petitioner came from his ex-girlfriend who admitted she had to cut all ties with Petitioner, including her belief in his innocence, in order to regain custody of her son.

III. The PCR court erroneously denied Petitioner a new trial based on after-discovered evidence where Petitioner's co-defendant, Stanley Oliver, testified for the first time that he alone committed the crimes and where the only physical evidence in the case implicated only Oliver and the other evidence presented by the state at the trial implicated Oliver.

Relevant facts

Stanley Oliver took the stand at Petitioner's PCR hearing and delivered a bombshell – he alone committed the crimes. App. 2522, ll. 16-19. Oliver had not accepted responsibility for the offenses and absolved Petitioner previously, even in discussions with PCR counsel to prepare for his testimony. App. 2523, l. 23 – App. 2526, l. 1. Oliver did not seek to absolve Petitioner prior to trial because he believed Petitioner would not be convicted based upon the lack of evidence against Petitioner. App. 2525, l. 24 – App. 2526, l. 7.

Oliver explained that he had arranged with Felder to rob her boyfriend, Batie. App. 2529, ll. 8-11. He admitted that during the robbery, he shot Batie. App. 2529, l. 11. He then shot Felder because he realized she would "stab [him] in the back" and she did not uphold her end of the agreement by ensuring the money was in a place where he could get it. App. 2529, ll. 13-20.

The PCR judge denied Petitioner's request for a new trial based upon Oliver's confession during the PCR hearing. App. 2845-2846. The PCR court found Oliver's testimony at the hearing was "not credible." App. 2845-2846. The judge noted that at the conclusion of the trial, Oliver intimated that he was not guilty through his statements to the trial judge. App. 2845-2846. Further, the PCR judge concluded that Oliver had "nothing to lose" by claim sole responsibility for the crimes because he had completed direct appeal and post-conviction relief proceedings. App. 2845-2846. Other than remarking that "there was evidence at trial presented

specifically against [Petitioner] from which the jury convicted [Petitioner]," the PCR court failed to engage in the proper analysis for this claim for relief. See App. 2845-2846.

Discussion

Pursuant to the Uniform Post-Conviction Procedure Act, an individual may file an application for relief "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence." S.C. Code Ann. § 17-27-45(C). According to this subsection, the application must be filed within one year of the date of actual discovery of the new evidence. Id.

"The standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence." McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013). A motion for a new trial based on after-discovered evidence must be granted if the evidence "(1) is such that it would probably change the result if a new trial were granted; (2) has been discovered since the trial; (3) could not in the exercise of due diligence have been discovered prior to trial; (4) is material; and (5) is not merely cumulative or impeaching." State v. Mercer, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) (citing State v. Spann, 334 S.C. 618, 619-620, 513 S.E.2d 98, 99 (1999)); see also Clark v. State, 315 S.C. 385, 387-388, 434 S.E.2d 266, 267 (1993). The "general rule is that newly discovered evidence which 'merely impeaches or contradicts the testimony of a witness at the trial' affords no sufficient grounds for a new trial." State v. Strickland, 201 S.C. 170, 170, 22 S.E.2d 417, 418 (1942). However, "there may be exceptional cases warranting a new trial on merely cumulative or impeaching testimony." Id. When the newly discovered evidence is "so directly applicable to the main point involved that it would be a denial of justice to refuse the motion," the general rule must not apply. Id.

In Spann, 334 S.C. at 619, 513 S.E.2d at 99, this Court held a trial judge erred in failing to grant a new trial based on after-discovered evidence. Spann "was convicted of the 1981 sexual assault, robbery, and murder of Melva Neill, as well as the burglary of her home, and received a death sentence." Id. At his motion for new trial based on after-discovered evidence, Spann claimed he was entitled to a new trial because expert testimony would have shown that the killing was the work of a serial killer in the area, not Spann. Id. at 620, 513 S.E.2d at 99. Although Spann presented other matters during his motion for new trial, which the trial judge concluded were merely impeaching or not credible, the South Carolina Supreme Court granted Spann a new trial based on the expert testimony and did not reach the remaining issues. Id.

The Court explained the context of the crime for which Spann was convicted to place the proposed after-discovered evidence in the correct context. Id. at 620, 513 S.E.2d at 99. These three events "occurred within a twelve-mile radius in York County between July and November 1981." Id. First, "[o]n July 18, 1981, the body of Mary Ring was discovered in the bathtub of her home." Id. She was "a heavy-set white woman, fifty-seven years old, who had been beaten about the head, sexually assaulted, and strangled to death. Her nude body was found in her partially filled tub." Id. Second, "two months later, the nude body of eighty-one-year-old Mevla Neill was found in the bathtub of her home." Id. She "had been beaten around the face and chest, had been brutally sexually assaulted, and strangled, her body then placed in the partially filled tub." Id. She too "was a heavy-set white woman." Id. Finally, "[o]n November 16, 1981, the mostly nude body of Bessie Alexander was found on her dining room floor." Id. Her face and neck were injured, and bruises were on other parts of her body. Id. She had been sexually assaulted and then strangled. Id. Like Ms. Ring and Ms. Neill, Ms. Alexander "was a heavy-set white woman" who lived alone. Id. Unlike Ms. Ring and Ms. Neill, however, Ms. Alexander was not found in her bathtub. Id.

However, her bathtub was "inaccessible from her home's interior," and her body was found "drenched in liquids, including fruit juice." Id.

The police never arrested anyone for the death of Ms. Ring. Id. Spann was arrested for the murder of Ms. Neill, and Johnny Hullett was arrested and convicted for the murder of Ms. Alexander. Id. Importantly, Ms. Alexander was killed "approximately two months after" Spann was arrested for Neill's death. Id. In 1981, the police said publicly there was no connection between the three murders, and the local pathologist "did not recognize any pattern" among the three deaths. Id. at 620-621, 513 S.E.2d at 99-100.

At his hearing on the motion for new trial, Spann presented three expert witnesses who testified the three murders were related. Id. at 621, 513 S.E.2d at 100. One expert "testified all three women were strangled in a unique way." Id. Based on this and other similarities, the expert "opined that one perpetrator was responsible for all three murders." Id. A second expert "testified the three murders were committed by a single individual, a sexual sadistic murderer." Id. This expert "opined based upon his examination of [Spann] that it was 'impossible' that [Spann] had committed these offenses." Id. This expert also "testified that sexual sadistic killers are almost always psychiatrically disturbed white males." Id. Spann was a black man with no history of psychiatric problems; Johnny Hullett was a white man with a long psychiatric history. Id. Finally, a third expert "profiled the killer of these three women as a white male in his mid-20's to mid-30s with a history of mental illness, who was either single or had a dysfunctional marriage, a person with bizarre fantasies, a history of childhood abuse, and knowledge of the area." Id. Spann simply did "not fit this profile." Id.

The trial court rejected Spann's bid for a new trial, "finding the evidence and science upon which their opinions were based was all in existence at the time of [Spann]'s trial." Id. Thus, the

trial court concluded the evidence "could have been discovered by his attorneys with the exercise of due diligence." Id. This Court disagreed. Id. This Court explained the attorneys would have needed to recognize the similarities between the three deaths, which were not recognized even by experts in the field at the time of the trial. Id. at 621-622, 513 S.E.2d at 100. The "due diligence standard imposed upon [the] trial attorneys" by the trial judge was too high. Id. at 622, 513 S.E.2d at 100. The Court granted Spann a new trial. Id.

In another capital murder case, this Court affirmed a trial judge's decision to deny a motion for new trial based on after-discovered evidence. State v. Mercer, 381 S.C. 149, 170, 672 S.E.2d 556, 567 (2009). At trial, "[t]he centerpiece of Mercer's guilt phase defense was third-party guilt." Id. at 163, 672 S.E.2d at 563. He pointed the finger at his co-defendant, Marcus Thompson, as the triggerman. Id. "This theme was pursued throughout the trial, as the defense sought to create a reasonable doubt that Mercer was the triggerman." Id. at 164, 672 S.E.2d at 563. During the trial, Mercer argued the police and the state had a "myopic view to focus on Mercer at the expense of a thorough and proper investigation." Id. at 164, 672 S.E.2d at 563-564.

Shortly after Mercer's trial ended in guilty verdicts and a death sentence, Kevin Fuller contacted the state, claiming Thompson had confessed to shooting the deceased. Id. at 165, 672 S.E.2d at 564. Based on this information, Mercer filed a motion for new trial. Id. at 165-166, 672 S.E.2d at 564. The trial judge denied the motion, finding Fuller was not credible. Id. at 167, 672 S.E.2d at 565. The judge based on his credibility finding on his observations of Fuller's demeanor, the inconsistencies in Fuller's statements, the inconsistencies of Fuller's testimony with "known facts." Id. In the judge's estimation, Fuller's testimony, which was inconsistent with evidence presented at trial, was not the result of a "mistake or failure of recollection," but

was "intentional calculated misrepresentation." Id. In short, the trial judge "believe[d] Fuller fabricated the story" of Thompson's confession. Id.

On appeal, this Court engaged in "careful scrutiny of the actual statements Fuller attribute[d] to Thompson." Id. at 168, 672 S.E.2d at 566. "Given the inconsistencies with Fuller's story," the Court found "a basis to sustain the trial court's lack of credibility finding." Id. Additionally, a second inmate, whom Fuller claimed would support his testimony, testified at the hearing, but he denied Fuller's account of Thompson's confession. Id. The trial court credited the second inmate's testimony. Id. Finally, the appellate court contrasted "the purported Thompson confession against what [were] fairly solid facts." Id. Of particular interest to this Court was the description of the assailant provided by the only eyewitness to the crime – the deceased's roommate. Id. This description "closely matched the much bigger Mercer and not the slender Thompson." Id.

This Court held the trial judge's decision to deny Mercer's motion for new trial was not an abuse of discretion. Id. at 170, 672 S.E.2d at 567. This Court was careful to note that "a mere finding of a witness's lack of credibility does not complete the analysis, because a witness may lack persuasive credibility and still create reasonable doubt." Id. Nevertheless, this Court affirmed the trial judge's ruling based upon the judge's credibility determination and view of the evidence presented at trial. Id.

Petitioner is entitled to a new trial based upon Oliver's testimony in which he accepted full responsibility for the crimes and exonerated Petitioner. It cannot be disputed that Petitioner discovered Oliver's admission and exoneration of Petitioner after the trial as it was only reviewed when Oliver took the stand at the PCR hearing. Additionally, Petitioner could not have discovered Oliver's willingness to accept responsibility prior to trial as Oliver was represented by counsel and

testified at the hearing that he was unwilling to testify previously to his solo involvement. If Petitioner were to be granted a new trial and Oliver were to testify as he did at the PCR hearing, then it would probably change the result. As mentioned numerous times, the evidence against Petitioner was extremely weak. The only physical evidence pointed to Oliver, and the substantial circumstantial evidence, in the form of Oliver's confessions, also pointed to Oliver. The evidence is material as it completely exonerates Petitioner. Finally, it is not merely cumulative of impeaching because the state's theory at trial was that Oliver acted in conjunction with Petitioner. Oliver's confession to his lone involvement was not cumulative to other evidence presented in support of the state's theory and was not merely impeaching as Oliver did not take the stand at the trial. For these reasons, Petitioner is entitled to a new trial.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of March, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Brooks P. Goldsmith, Circuit Court Judge

DOMINIC A. GALLMAN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Dominic A. Gallman, #234627, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 19th day of March, 2019.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 19th day of March, 2019.

Mary Allgood (L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027.