LAW OFFICE OF

TRICIA A. BLANCHETTE

April 20, 2017
VIA HAND DELIVERY

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

RE: Tevon Michael Jackson v. State; App. Case No: 2017-000790

Dear Sir:

For filing, attached please find a Notice of Cross-Appeal, Certificate of Service and copies of the Orders from the underlying PCR Application. I have not been retained to assist Mr. Cook with this Appeal. I have provided him an Affidavit of Indigency to complete, and I will forward it to the Office of Appellate Defense upon receipt.

Thank you for your assistant with this matter. Please contact me if any additional information is needed.

Yours truly,

Tricia A. Blanchette
Attorney at Law

cc: Aiken County Clerk of Court (without Orders)
Julie Coleman, Office of the Attorney General
Tevon Michael Jackson

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Edgar W. Dickson, Circuit Court Judge

RECEIVED
APR 20 2017
S.C. SUPREME COURT

App. Case No: 2017-000790
Case No: 2013-CP-02-02693

Tevon Michael Jackson, Respondent-Petitioner,

vs.

State of South Carolina, Petitioner-Respondent.

NOTICE OF CROSS-APPEAL

By way of this Notice, Tevon Michael Jackson cross-appeals the Order Granting Application for Post Conviction Relief issued by the Honorable Edgar W. Dickson on December 30, 2016 and filed on January 13, 2017. This Notice is timely filed pursuant to receipt of the Corrected Order Denying Respondent's Motion to Reconsider by undersigned counsel on March 24, 2017, which was filed on March 27, 2017.

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Tevon Michael Jackson, Respondent-Petitioner,

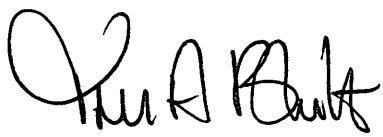
vs.

State of South Carolina, Petitioner-Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, certify that I served the Notice of Cross Appeal by depositing the same in the United States Mail this 20th day of April 2017 on the Attorney of Record for the Office of the Attorney General, addressed as follows:

Office of the Attorney General
Att: Julie A. Coleman, Assistant Attorney General
PO Box 11549
Columbia, SC 29211



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STATE OF SOUTH CAROLINA COUNTY OF AIKEN	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Tevon Michael Jackson, #344982, Applicant, v. State of South Carolina, Respondent.	2013-CP-02-2693 **ORDER GRANTING APPLICATION FOR POST CONVICTION RELIEF**

POST CONVICTION PROCEDURAL HISTORY

This matter comes before this Court pursuant to an Application for Post Conviction Relief filed on November 27, 2013. That State filed a Return on May 13, 2014. By way of his first Amendment filed prior to the evidentiary hearing, Applicant made the following claims of ineffective assistance of trial and appellate counsel:

1. Ineffective assistance of trial counsel for failure to properly prepare and investigate prior to trial, which resulted in prejudice to Applicant.

2. Ineffective assistance of trial counsel for failure to utilize witnesses at trial, which resulted in prejudice to Applicant.

3. Ineffective assistance of trial counsel in preparation for and at trial for failure to do the following, which resulted in prejudice to Applicant:
   a. Failure to fully cross-examine and/or impeach the State's witnesses.
   b. Failure to pursue available defenses, including but not limited to alibi, third party guilt and exonerating evidence.
   c. Failure to properly prepare and utilize Applicant as a witness at trial.
   d. Failure to disclose to Applicant representation by counsel of Jamar Green, witness for the State at trial.
   e. Failure to make contemporaneous objections and/or move to suppress irrelevant evidence and testimony.

4. Ineffective assistance of trial counsel for failure to fully put the State's case to the test and/or fully refute the State's theory of the case with available evidence and witnesses, which resulted in prejudice to Applicant.

5. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on

6. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

By way of his second Amendment filed prior to the evidentiary hearing, Applicant made the following additional allegations:

1. Ineffective assistance of trial counsel for failure to move to suppress and/or object to the phone records admitted as State Exhibit #54 and any testimony pertaining to such records. Failure to impeach the State's witnesses with evidence obtained from the victim's cell phone.

2. Prosecutorial misconduct and/or Brady violation for failing to disclose the interview and investigation into Kalyn Floyd prior to and/or during Applicant's trial based upon information received from Joseph Dick's that she provided Applicant with the murder weapon. Alternatively, if said information was not subject to disclosure by the State, ineffective assistance of trial counsel for failure to investigate the matter, locate Kalyn Floyd and utilize her as a witness for the defense

On September 10, 2015, an evidentiary hearing was convened in front of the Honorable Edgar W. Dickson at the Aiken County Courthouse. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Daniel F.Gourley, Assistant Attorney General. At the close of the hearing, this Court requested memorandums in lieu of closing argument and granted Applicant's counsel's request to obtain the evidentiary hearing transcript prior to the submission of her memorandum. After careful consideration of the memorandums from both parties, this Order follows.

GENERAL SESSIONS PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Aiken County Clerk of Court. Applicant was true bill indicted at the January 2009 term of the Aiken County Grand Jury for Murder and Possession of a Firearm during the Commission of a Violent Crime (2009-GS-02-083, 084). Wallis Alves, Esquire, and Michael Routzong, Esquire, represented Applicant. Applicant proceeded to a jury

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trial before the Honorable Doyet A. Early, III. On February 28, 2011, Applicant was found guilty as indicted and sentenced to a term of thirty years and a concurrent term of five years.

A timely notice of appeal was perfected on Applicant's behalf by Breen Stevens, from the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Tevon Jackson, Op. No. 2013-UP-024 (Ct. App. filed January 16, 2013). The Remittitur was issued on February 4, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Defense counsel provided ineffective assistance when she failed to prepare and investigate Applicant's case prior to trial, which was prejudicially evidenced by her failure to utilize available witnesses and evidence to refute the State's theory of the case, properly cross-examine the State's witnesses, and present a defense beyond merely calling Applicant to the stand.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). Where an application for post-conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Id. 466 U.S. at 686; see Butler v. State, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. Bell v. State, 321 S.C. 238 (1996); see also Cherry v. State, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies 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, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117 (citing Strickland, 466 U.S. at 688). 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. This court finds that Applicant's trial attorney rendered ineffective assistance of counsel by failing to properly prepare and investigate prior to trial, which resulted in prejudice to Applicant. See Ard v. Catoe, 372 S.C. 318 (2007) (stating that counsel has a duty to interview potential witnesses and to make an independent investigation of the facts); See also Lounds v. State, 380 S.C. 454 (2008) (holding that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts). In McKnight, the South Carolina Supreme Court held: "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" McKnight v. State, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

As a result of defense counsel's lack of investigation and preparation, she failed to pursue available defenses. As such, she failed to call witnesses and utilize evidence that would have refuted the State's timeline and theory of the case. Defense counsel repeatedly offered no legitimate reason or strategy for failing to utilize or cross-examine witnesses on the matters raised at the evidentiary hearing, oftentimes stating that she neglected to interview witnesses whose testimony would have been beneficial to Applicant's defense. Counsel repeatedly answered that the witnesses or evidence produced therefrom would have either aided the defense or been detrimental to the State's case. In a case where credibility was essential to the State's case, this Court finds that

defense counsel's failure to do the above constituted a violation of Applicant's Sixth and Fourteenth Amendment right to the effective assistance of counsel.

On February 22, 2011, Applicant was called to trial in Aiken County South Carolina in front of the Honorable Doyet A. Early on charges of murder and possession of a weapon during the commission of a violent crime. During the course of Applicant's trial, the State called thirty-six witnesses. Two of the State's witnesses, Joseph Dicks and Joey Serrano testified to being with Applicant before and after the murder and hearing Applicant admit to and brag about committing the murder. Applicant was the lone witness for the defense. After the jury rendered a verdict of guilty on both charges, Judge Early sentenced Applicant to a term of thirty years and a concurrent term of five years.

In opening argument, the State submitted to the jury that the murder of Marcus (Marc) Finklin occurred in the early morning hours of June 4, 2008. During closing, the State argued: "Well, the State's theory is Marcus Finklin died and didn't answer Kenisha Jackson's last phone calls, that he was dead by the time Joey Serrano walked back to his house that night.[1]" Trial p. 706, lns. 7-11. At the evidentiary hearing, counsel admitted that she failed to address that Ms. Jackson made multiple unanswered phone calls at varying times and she emphasized that it was important for the State to place the time of death prior to the time Mr. Serrano admitted walking home alone. PCR pp. 124, 126.

During her closing argument, defense counsel provided the jury with the timeline of events presented by the State. This timeline was listed on a sheet of paper from counsel's file marked as Applicant's Exhibit 5, and placed on the timeline exhibit (Applicant's Exhibit 17) prior to the start of the evidentiary hearing. PCR pp. 9, 122-23, Trial pp. 684-688. Counsel

[1] At trial, Mr. Serrano testified that he walked home at 3:00 a.m. Trial p. 439, lns. 20-25.

admitted she should have provided the jury with a visual aid regarding the timeline. PCR p. 123. She also agreed that the timeline was an important issue for the State, yet she failed to nail the State down to a specific time of death. PCR p. 124. During her closing, counsel argued that it was impossible for Applicant to commit the murder and complete all the actions testified to by Mr. Dicks and Mr. Serrano in a forty-three minute window from 2:17 a.m. to 3:00 a.m. Trial pp. 688-9. Never once did defense counsel mention all of the other entries on the timeline created at the evidentiary hearing that this Court finds refuted the State's timeline and theory of the case. When asked about this failure and the timeline exhibit at the evidentiary hearing, counsel testified: "In looking at this and looking at the information that was brought out, I probably would have pinned them down on that because it would have showed that they were lying." PCR pp. 202, 203, lns. 1-4. Counsel explained that the evidence at trial was not overwhelming and it boiled down to the timeline and the stories of Mr. Dicks and Mr. Serrano. As a result, the credibility of the State's witnesses was very important. PCR p. 186, lns. 5-11.

When Applicant took the stand at the evidentiary hearing, Applicant explained that during his three year wait for trial, he was "tossed around" to several public defenders. PCR p. 252, lns. 2-21. He acknowledged that he testified at trial that he had only met with Ms. Alves three to four times. PCR p. 252, lns. 10-17. He stated that he did not have the opportunity to review the discovery with defense counsel prior to trial. PCR p. 253, lns. 8-15. He explained that he had memorized Mr. Dicks' and Mr. Serrano's statements from the discovery, but he found out from counsel on the first day of trial that they had given new statements, which were not discussed with him by counsel. PCR pp. 254-6. He made it clear that he would have wanted a continuance for counsel to properly prepare. PCR p. 256, lns. 10-24. He stated that he would have wanted each witness from his evidentiary hearing called at his trial. PCR p. 268. He

explained that counsel did not discuss any of the witnesses called with him nor did they discuss a trial strategy. In sum, he testified that counsel was not prepared for trial. PCR pp. 269-71.

In Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999), the South Carolina Supreme Court addressed whether trial counsel was ineffective for failing to call a witness at trial. The Court reasoned as follows:

> This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998)(applicant established prejudice where nurse's notes presented at PCR hearing corroborated lack of penetration in sexual assault case); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995)(where witnesses applicant claimed could have provided an alibi defense did not testify at the PCR hearing, he could not establish any prejudice from counsel's failure to contact these witnesses); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992) (where applicant did not offer witnesses at PCR hearing but merely alleged they would have provided him with alibi defense and testified victims had recanted their trial testimony, he failed to establish prejudice); see also Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (applicant failed to establish prejudice from counsel's failure to investigate criminal backgrounds of victims and witnesses where he failed to substantiate at PCR hearing that victims and witnesses had criminal records). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, supra, S.C. at 498-99, S.E.2d at 540.

Bannister, 333 S.C. at 303, 509 S.E.2d at 809.

At the evidentiary hearing, Applicant called a number of witnesses and addressed evidence from the discovery not utilized at trial. The witnesses that were called at the evidentiary hearing that were not called at trial either gave a statement to law enforcement or were easily located as testified to by Pete Skidmore, private investigator. This Court finds the witnesses called, including Applicant and trial counsel, to be credible. This Court further finds that the witnesses called and discussed herein clearly demonstrate how counsel could have properly prepared and investigated Applicant's case resulting in the utilization of witnesses to call into

question the State's timeline and theory of the case. When asked, counsel repeatedly admitted that she should have utilized the witnesses and evidence offered and she had no excuse for not doing so. Defense counsel surmised that the witnesses and evidence offered demonstrated that she should have pinned Mr. Dicks and Mr. Serrano down on their timeline and shown the jury how the testimony and evidence showed they were lying. PCR p. 203. When asked by the State, she recalled thinking it was a third party guilt case, with the third parties being Mr. Dicks and Mr. Serrano. PCR p. 205. She conceded that she had no reason for failing to investigate and raise a third party guilt defense. PCR p. 205.

Turning to the witnesses and testimony offered, Jeff Smith, Deputy Coroner for Aiken County, testified. He acknowledged that he responded to the scene, conducted the coroner's investigation and testified at trial. Trial p. 355, PCR p. 53. He identified and counsel admitted a packet containing his report, notes and the coroner's report. Applicant's Exhibit 3. He acknowledged that the estimated time of death on the first report was 3:15 a.m., which was changed to 2:00 a.m. on the final report per "L.E." – meaning law enforcement. PCR p. 56. He further acknowledged that he had notes from speaking with Doris Jackson who lived one hundred yards from the murder scene and saw a car in the cul de sac with its lights on at 3:30 a.m. PCR p. 57-8. He could not provide any notes indicating that trial counsel had contacted him. PCR p. 59. In response, trial counsel conceded that she had the coroner's report in her file and was not sure what investigation she did into the neighbor's sighting. PCR pp. 136-137.

Latika Elliott testified at the evidentiary hearing and identified the statement she provided to law enforcement, which clearly indicated that she last spoke with the victim at 3:01 a.m and then he failed to show up as they had planned. PCR transcript p. 22-23. Ms. Elliott explained that she was present through the entire trial and wondered why she was not called by either side. PCR

p. 27. She explained that she knew the victim and Applicant, and she knew Applicant did not do what the State alleged at trial and that Applicant was not a threat to victim. PCR p. 27-28, 32. She candidly admitted that she told law enforcement she was holding drugs at her home for victim because he did not trust leaving them at his house since people had been stealing from him. PCR p. 24. She also explained that she had first-hand knowledge of Stephanie Green's (state's witnesses) drug use and could have refuted Ms. Green's trial testimony that the night of the murder was the first time she had bought cocaine. PCR p. 28, Trial p. 315.

When asked, trial counsel admitted that she had the statement of Latika Elliott and she was mentioned in the preliminary hearing transcript, along with the 3:01 phone call. PCR p. 131. She acknowledged that Ms. Elliott's testimony would have been helpful and she did not have a reason for not calling her at trial. PCR p. 134. In response to why she did not call Ms. Elliott to refute Stephanie Green, counsel stated: "I don't know if I knew about that." PCR p. 161.

In the same vein, Felice Stallings testified at the evidentiary hearing and affirmed her statement about being with victim on the night of his death and him leaving her home at 12:30 a.m. PCR p. 210-1. When asked about state's witness Tracy Serrano's testimony that she saw victim going to Ms. Stallings' home at 12:30 a.m., she said that testimony was not correct as he was leaving at that time. Trial p. 187, PCR p. 211. She recalled victim becoming aggravated by phone calls he was receiving while at her house from his brother "Poo-Poo" and that he left because his brother needed a ride.[2] PCR pp. 211-12. She recalled seeing his car pull into her back yard and then parking in her driveway around 2:00 a.m. PCR p. 212. She indicated that she

[2] Defense counsel admitted that she failed to ask Chiquita Ingram about her statement, which was also recounted at the preliminary hearing, stating that victim's brother was acting suspicious and was taking advantage of victim. PCR p. 150. She further admitted that she should have cross-examined Ms. Ingram on her testimony that she spoke to victim at 12:00 a.m. When the phone records admitted by the State recorded the phone call at 12:38 a.m. Trial p. 528. Counsel agreed that the 12:38 a.m. time reflected on the phone records fell into the window of time given (Applicant left at 12:40 and returned within 30-40 minutes) in the statements of Mr. Dicks and Mr. Serrano that also were not addressed by counsel at trial. PCR p. 149-150, 156-8.

would not have willingly testified for the defense at trial, but she would have complied, as she did at the evidentiary hearing, if she was under subpoena. PCR p. 213-4. She also testified that she was unaware that she was on the defense witness list since she did not talk with anyone from the defense. PCR p. 213-4. She recalled Solicitor Weeks telling her she was not needed at trial. PCR p. 213.

When asked about Ms. Stallings, defense counsel indicated she had notes in someone's handwriting about a Michelle Stallings. PCR p. 144-5. After acknowledging that she was on the defense witness list, she admitted that she did not have a reason why she did not call Ms. Stallings at trial. PCR p. 146. She also admitted that she had not contemplated why the State may have called Ms. Ealy, her neighbor, about the 2:00 a.m. sighting of the victim versus calling Ms. Stallings.[3] PCR p. 161.

Thereafter, counsel called Kevin and Christy Parker. Both witnesses explained that they were raised as "cousins" to the victim and ~~where~~ were regularly with victim. Both witnesses also acknowledged being familiar with Applicant and their personal opinion that he would not have murdered victim. Specifically, Kevin recalled seeing victim on the night of his murder during his midnight shift at a local gas station. He testified that no one from law enforcement or the defense ever contacted him or tried to obtain the gas station video. PCR p. 67-8. He recalled victim telling him about having a baby on the way and they discussed how he needed to leave the drug business alone. PCR p. 66. He testified that victim told him he was going to "do this one last thing with the drugs" the night he died. PCR p. 66, lines 19-22. When asked why he did not

[3] Defense counsel also admitted that she did not have a reason for failing to refute Ms. Ealy's testimony about the number and length of calls with the victim versus what was reflected on the phone records admitted by the State at trial and by Applicant at the evidentiary hearing. Applicant's Exhibit 7, State's Trial Exhibit 54. At trial, Ms. Ealy testified that she spoke with the victim for a long time at 11:00 p.m., yet the phone records list a call at 11:09 for 33 seconds, 11:19 for 22 seconds and 11:23 for 36 seconds. Trial p. 322.

contact law enforcement regarding his belief that Applicant did not commit the murder and about his encounter with the victim, he explained that he was "hurting" and it was against the rules in his neighborhood to go to the police. PCR pp. 68, 76, 80. When asked by the State about his opinion of who was violent in the neighborhood, he responded that the Serranos are "bad people" and Mr. Serrano is known for being violent. PCR pp. 71, 79.

Christy Parker affirmed the contents of her statement given to law enforcement. PCR p. 84. She testified that she saw Applicant, Mr. Dicks and Mr. Serrano together when she was leaving victim's residence after 3:00 a.m., which she later estimated to be 3:06 a.m. PCR p. 86, 90. She also explained that the phone call she got from Applicant at 3:11 a.m. was from Serrano's phone. PCR p. 86. She testified about Mr. Dicks stating Applicant was with him and at his house all night and her conversation with Applicant about waiting on victim to return. PCR p. 87. She explained that Applicant was always around victim's house when she was there and Applicant was "quiet." PCR p. 88. As to Mr. Serrano's reputation, she testified that he is known for fighting and being a violent person. PCR p. 91. She explained that she was subpoenaed to court by the State and never contacted by the defense. PCR pp. 88-9. She said she sat through each day of trial and was never called. PCR p. 89. She said she would have been willing to testify for the defense. PCR p. 89.

As to Kevin Parker, counsel testified that she did not have any notes regarding speaking with Kevin Parker. PCR pp. 134-5. She explained that she represents up to one hundred fifty clients at any given time, so she did not have a specific memory of him or reason for not utilizing him. PCR p. 135. She testified that she had Christy's statement, which was also addressed at the preliminary hearing. PCR p. 135. She indicated that she did not know of a reason why she did not utilize her at trial. PCR p. 135. When asked about Christy's testimony about seeing Applicant

with Mr. Dicks and Mr. Serrano after the time Mr. Serrano was allegedly home alone (3:00 a.m.), she agreed that eliciting such testimony probably would have hurt the State's case. PCR p. 163. Later, she concluded that she should have also pinned Dicks and Serrano down on the window of time they provided in their statements, which was omitted from their testimony and would have shown that they were lying. PCR pp. 156-8, 203. She made it clear that their credibility was very important to the State's case against Applicant. PCR p. 186.

Sandra Smith, Applicant's mother, testified and acknowledged her statements to the trial court at sentencing and explained that she truly questioned why counsel did not discuss some of those matters with her prior to trial or call her at trial. Specifically, she explained that she could have told the jury how she had removed the house key and gone through the events of that day leading up to Applicant being locked out of the house and not being able to get in while she was away. PCR pp. 102-3. She also testified regarding Applicant's love of his clean shoes, the reason he left the area and that she did not work with Applicant on his story. PCR pp. 101, 107. She also testified that her home and Applicant's car were not searched by law enforcement, despite the murder weapon being unaccounted for at trial. PCR p. 105. She simply did not understand why her son was left on an island, as the lone witness for the defense. She further explained that Applicant was truly devastated when he found out his friend was murdered PCR p. 101-2.

By way of the Amendment and at the evidentiary hearing, Applicant raised allegations of ineffective assistance and/or prosecutorial misconduct regarding the witness Kalyn Floyd. This Court finds that trial counsel's ineffective assistance derived from her failure to prepare and investigate and resulting prejudice is further evidenced by her failure to locate Ms. Floyd and call her as a witness at trial.

On the first day of trial, the jury was selected and court was recessed for the day. Trial p. 31. On the second day of trial, Mr. Dicks was called to the stand. While on the stand, he recounted the events of the night in question, which differed from his written statement. He recalled Applicant leaving for a "little period" and his "friends came through and dropped something off." Trial p. 233, lns. 15-22. He said the "something" was a loaded .38 caliber gun. Trial pp. 233, ln. 23, 234, lns. 5-6. He said the person's name was Kayla and she was a "dude, girl" or "like a man/female" who dressed like a man and he thought was gay. Trial pp. 234-5. He further recalled seeing her with Applicant occasionally. Trial p. 234.

On cross examination, Mr. Dicks further expanded upon his story by adding that he met Ms. Floyd on Nondrum Street because that is where Applicant told him to wait for her. Trial p. 260. He further admitted that he did not include any information about Ms. Floyd in his statement to police, after which defense counsel asked the following:

> Question: And the first you told the solicitor was what, last Monday?
>
> Answer: Yes, ma'am.

Trial p. 261, lns. 10-17.

At the evidentiary hearing, Kalyn Shantay Floyd was called to the stand. PCR p. 10. She explained that she knew Applicant from growing up on the same street. PCR pp. 11-12. Thereafter the following testimony was elicited:

Question:	Okay. Now, Kalyn, let me take you back to the time shortly before Tevon Jackson was tried in 2011. Did you come in contact with law enforcement in this case?
Answer:	Yes, I did.
Question:	Okay. And what happened with that?
Answer:	I was subpoenaed to go talk to the solicitor. And I went to go talk to him. He asked me what happened because Meat Man said I brought Tevon the murder gun but I was actually out of town that

whole week. And I had to give him my cell number so he could track my towers of where I was and I was never called.

Question: Okay. So, shortly before the trial is when you remember it, you were contacted that you had to go to the solicitor's office. Were you concerned when they contacted you?

Answer: Yes.

Question: And did you know what it was about at that point.

Answer: Yes.

Question: Okay. You talked to them, you provided them cell phone records?

Answer: Yes.

Question: And as a result, what did they tell you? Did they tell you those showed you were involved or did they give you any information back?

Answer: They said they were going to give me a call if I needed to take the stand, but I never received a call.

Question: Okay. And did you ever get a subpoena during the course of the week of trial and think that you were going to be needed to be there?

Answer: No. Just when I had to go talk to the solicitor.

PCR p. 12, ln. 18 – 13, ln. 23. She further recalled meeting at the Aiken County Detention Center on Hampton Avenue. PCR p. 14. She testified that no one from the public defender's office ever contacted her and no one had contacted her since besides PCR counsel. PCR P. 14. She clearly answered "yes" when asked if she would have been willing to testify for the defense at trial. PCR p. 15, lns. 1-4.

When asked if she was on Nondrum Street that night and provided Joseph Dicks with a gun as he testified to at trial, she responded: "No." PCR p. 15. She explained that she was out of town that whole week and, she was with a friend that could have attested to her whereabouts.

PCR p. 15. She also answered the obvious question that she was never charged in connection with the murder of the victim. PCR p. 16.

On cross-examination, she recalled providing a written statement during her meeting with the prosecution. PCR p. 17. She further stated that she was with Kayla Murray in Augusta, Georgia on the night in question. PCR p. 17. She recalled providing two cell phone numbers and being told that they were going to track her location via cell phone tower records. PCR p. 18. When asked about the subpoena, she recalled receiving it the first day of trial and meeting with the solicitor around five that afternoon. PCR p. 18-19. On redirect, she recalled being at home on Dry Branch Road and her mother answering the door when she received the subpoena. PCR p. 19-20.

While defense counsel was on the stand, she remembered hearing the name Kayla prior to trial then looked through her records / notes to provide a more specific answer. PCR p. 174. Then, she responded as follows:

> On February 22nd at 11:30 a.m. I met with Solicitor Bill Weeks, Solicitor Beth Ann Young and Investigator Norwood Bodie. And they discussed new information that they had gotten from Joseph Dicks and Jose Serrano when they met with them the week before. During that meeting the Solicitor, actually Solicitor Weeks approached me and told me that they wanted to meet with me to tell me about them. And I was specifically told that Tevon had gotten – that Joseph Dicks said that Tevon called him on the phone, and specifically that Tevon had some stud coming to see Joseph who was bringing him a package. And when I asked them for more details about what they meant by some stud, they told me it was a gay woman who dressed like a woman named Kayla and they didn't have any further information about that person.

PCR p. 175, lns. 1-16.

When asked about whether or not she utilized her investigator on the case to attempt to locate Ms. Floyd, counsel responded that she found out about her on 11:30 during the first day of trial and did not recall attempting to find her. PCR P. 178. She further admitted that she did not

ask the court for more time to investigate the matter and she had no reason for not addressing the matter with the court. PCR p. 178. She also deferred to the record when asked about raising the late disclosure of in the information by the Solicitor's Office to the court. PCR p. 179. Thereafter, the following testimony was elicited:

Question: And in this case your cross-examination, your closing argument is all about the credibility of Joseph Dicks and Jose Serrano. If Joseph Dicks was lying about this and it could have been proven that Kayla was nowhere in the area and did not provide the murder weapon, wouldn't that have aided in your defense?

Answer: It would have tremendously aided my defense.

Question: If you would have known Kayla testified today that she was investigated and she was able to provide proof that she wasn't present and she was informed essentially that she was cleared and not needed, if you would have known that information would you have raised that during the trial or made necessary motions regarding it?

Answer: I would have.

Question: And if Kayla in fact had provided the murder weapon based on your vast experience as a public defender, what could she have been charged with in this case?

Answer: Accessory before the fact.

PCR p. 179, ln. 16 -180, ln. 8.

When Applicant took the stand, he said he knew immediately that Mr. Dicks was referring to Kalyn Floyd. PCR p. 255. If counsel had asked him about her, he said he could have provided her last name and location since she lived just a couple houses down from him. PCR p. 255-6. When asked if he would have wanted counsel to ask for a continuance based upon the new information provided and for time to locate Ms. Floyd, he responded: "Very much so." PCR pp. 256-7. He testified that he wanted Ms. Floyd to come to court to testify since she allegedly supplied him with the murder weapon. PCR p. 257. He considered her not being charged as "the

biggest question I ever had." PCR p. 257-8. He explained: "I knew it wasn't true because they ain't locked her up for it." PCR p. 258, lns. 5-6.

After the State called Bill Weeks, Solicitor, to the stand, he was asked about Mr. Dicks and Mr. Serrano changing their statements, which he characterized as Mr. Dicks adding to his statement all the time but added "he did change some stuff." PCR p. 289, lns. 14-21. After which the following testimony was elicited,

Question: And did that include naming Kayla Floyd as the person who he received the .38 caliber weapon from that he then gave to Tevon Jackson.

Answer: Yes. I don't know that that was a change. It might have been a change or it might have been an addition to, but to the best of my memory that was in pretrial preparation where Joseph told us that and so did Joey.

Question: Okay.

Answer: It was at a joint meeting really when both of them were there at the office at the same time.

Question: And did you disclose that information to Ms. Alves., his public defender?

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

Question: Yes, sir.

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

Question: Okay.

Answer: I certainly would not have withheld this Floyd woman's role in this from Ms. Alves. Now do things come up right before court? Oh, yea. Because I'm pretty sure she was probably working the Sunday night before court started on Monday and I can assure you we were.

But it wasn't a mystery. Once we knew about it we told her everything we knew. And we do that with all the witnesses. Before we have a major trial like this, Ms. Alves would come to our office, along with an investigator more than likely, and go through

every single piece of paper in our file that isn't something that we would say is work product.

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

PCR p. 289 ln. 22 – 291, ln 9. He further testified that he could not recall whether he ever met Ms. Floyd but he had a note in his file that his investigator interviewed her on February 24th. PCR p. 291. He also was unsure if they "looked that hard" for her phone records.[4] PCR pp. 291-2.

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[4] When asked about the issue of charging Ms. Floyd, the following testimony was elicited:

Question:	Do you have any specific reason that you can provide to us today as to why Kalyn Floyd was not charged in this case or anything pursued against her?
Answer:	Absolutely. Because I didn't have a case against her for anything. On the information we had, you heard the information we that we had and I would be the most neglectful prosecutor in the state if I had hauled out an arrest warrant for that woman who's never told me to this day whether she gave him the gun or didn't. I'm not sure what she said on the witness stand, I wasn't in here. But absolutely couldn't charge that woman based on what we know then and couldn't charge her on what I know today because none of its very credible.
Question:	And the information though was coming from your witness, Joseph Dicks.
Answer:	Coming from Joseph Dicks. I called Joseph Dicks as a witness.
Question:	And – but you're saying the information that he have you was not credible?
Answer:	No, I didn't say that.
Question:	Okay. Then could you please clarify what you meant by saying you couldn't charge her because the information was not credible?
Answer:	It was given three years later, for one thing. And I never talked to Ms. Dicks – or Ms. Floyd, or never interviewed her to my knowledge. But if we did it was late in the game. And I wasn't trying to put a gun in Ms. Floyd's hand. I was trying to put a gun in Tevon's hands.
Question:	But you elicited testimony on direct of Joseph Dicks that Kayla provided a .38 to him which was the specific caliber of the murder weapon in this case, and you went into detail with him about that. So you submitted that information to the jury in this case to consider as part of the guilt or innocence of Tevon Jackson.
Answer:	I asked Mr. Dicks that question that the record reflects.

On cross-examination, he acknowledged that Mr. Dicks testified that he told him about Ms. Floyd the Monday before trial. When asked about defense counsel's testimony that the information was not turned over to her until the morning trial started, he responded: "That's not exactly what I heard. It's the first time she had a note of it, but that's not necessarily the first time she was told." PCR p. 298, lns. 20-22.

By counsel's own admission she failed to attempt to locate Ms. Floyd or ask for more time to locate Ms. Floyd. The failure of counsel to properly prepare and investigate further prejudiced Applicant when Ms. Floyd was not located and utilized since Ms. Floyd "would have tremendously aided" the defense and completely called the veracity of the State's witnesses and theory of the case into question.

In conclusion, this Court finds that Applicant has carried his burden and clearly shown that but for counsel's failure to prepare and investigate there is a reasonable probability the outcome of his trial would have been different. As a result of counsel's lack of investigation and preparation, she failed to pursue available defense strategies and failed to call and/or cross-examine certain witnesses as discussed in detail above. This Court finds that defense counsel rendered ineffective assistance of counsel in violation of Applicant's Sixth and Fourteenth Amendments. Therefore, this Court finds that a new trial must be granted.

2. Defense counsel was not ineffective when she failed to move to suppress and/or object to the phone records (State's Exhibit 54) admitted at trial and the testimony elicited regarding the phone records.

At trial, the State called William Hare from the local Verizon branch to introduce and interpret the records obtained from one of the phones (phone number: 803-295-8964) found in

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PCR p. 299, ln. 15-301, ln 3.

the possession of the victim. Trial pp. 137, 139. When asked by the State if he could tell from the records if a call was answered, he replied that he could since an answered call listed a time, in seconds, and a call that went to voicemail was marked "MF". Trial p. 141, lns. 5-7, 15. He further explained that "MT" equaled incoming call and "MF" equaled voicemail. Trial p. 141, lns. 11-22. During very brief cross-examination, he stated that "MT" equaled answered. Trial p. 144, lns. 3-8.

At the evidentiary hearing, defense counsel explained that she did not consider whether Mr. Hare was qualified to interpret the records as he did at trial. PCR p. 170-1. When counsel was shown pictures of the screen shots from victim's phone located in the Aiken County Sheriff's Office's file, she could not say if she had reviewed them. PCR p. 172. When shown the records, screen shots and testimony of Mr. Hare, she noted the inconsistencies and concluded that his testimony appeared incorrect. PCR p. 190-1. She admitted that she should have used the information contained in the screen shots at trial. PCR p. 191. She further admitted that she should have not made the following statement in closing argument: "We can take the word of the cell phone records because a computer has nothing to gain or lose in this case." Trial p. 684, lns. 18-24.

When Applicant took the stand at the evidentiary hearing, he made it clear that he would have wanted counsel to obtain all of the victim's cell phone records and that counsel did not review the cell phone records with him prior to testifying nor use the records during his testimony to help him establish a timeline. PCR pp. 261, 262-4. As a result, the State utilized the phone records against him in a way that he felt made him look like a liar to the jury. PCR p. 265. He explained that the prejudicial use of the records was further compounded by defense counsel's argument to the jury that records do not lie. PCR pp. 265-6.

At the evidentiary hearing, Pete Skidmore, private investigator, took the stand and explained the investigation he undertook in preparation for the evidentiary hearing. PCR p. 216. Regarding the issue of cell phone and cell phone records, he recalled reviewing the evidence at the Aiken County Sheriff's Department and being surprised by finding six cell phones, when the evidence records reported five. PCR p. 231. He also reviewed the pictures of the screen shots from victim's phone and explained how the information on the screen shots conflicted with the interpretation of the cell phone records at trial by William Hare. Trial pp. 139-144. He made it clear that he would have raised this issue with counsel prior to trial if he was investigating the case then as he did prior to the evidentiary hearing. PCR p. 234.

When Solicitor Weeks took the stand as the State's lone witness at the evidentiary hearing, he explained that he did not need to qualify the "Verizon guy" as an expert and his understanding of the cell phone records as follows:

> So I think that's why we just went on into the meat of the matter. As we had told and I had explained to her, I'm truly no cell phone expert and I don't know what MF and MT means and all of that on there. That day I did or at least that day I knew what the guy had told me, but that's the reason we didn't qualify him as I think both sides were using him for whatever it was worth.
>
> Because the cell phone records in this case were enough to drive you to drink. It just didn't seem to match up with any of the witnesses' time estimation. And to some degree I'm not sure they matched up with themselves. So that's the kind of what we had going on with the cell phone.

PCR p. 295, lns. 1-15.

After careful consideration of the record, testimony and evidence presented, this Court is not convinced that Applicant has shown that counsel failed to provide representation within the range of competence required in criminal cases in her handling of the testimony elicited from William Hare. Additionally, this Court finds that Applicant has failed to establish prejudice and

show how counsel's alleged failure affected the outcome of his trial. Therefore, this Court finds that this claim must fail.

3. The actions of the prosecutor's office did not amount to misconduct for failing to properly disclose information regarding Ms. Floyd completely and timely to defense counsel or for eliciting false testimony.

Our judicial system relies upon the integrity of the participants. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000). With this in mind, the Constitution requires only that a defendant receive a fair, not a perfect trial. U.S. Const. Am. VI; State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999), Riddle v. Ozmint, 369 S.C. 69, 631 S.E.2d 70 (2006). In Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633 (1935), the Supreme Court of the United States explained the importance of the prosecutor's role in the judicial process:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Here, Applicant has alleged a Brady violation and prosecutorial misconduct in the handling of matters related to Ms. Floyd. In Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), the prosecution failed to disclose that a witness, whose credibility was already in question, was taken to the scene and gave an additional version of events. After Gibson pled guilty this information was discovered during the course of a civil trial. The South Carolina Supreme Court addressed prosecutorial misconduct in the form of a Brady violation and reasoned:

> The prosecutor committed a Brady violation by not disclosing certain evidence to Gibson. A Brady violation is one type of prosecutorial misconduct. It is misconduct of a different type than, for instance, an attempt to introduce inadmissible evidence, tamper with the jury, or some other inappropriate action. E.g., United States v. Alderdyce, 787 F.2d 1365, 1370 (9th Cir. 1986) (finding no evidence of prosecutorial misconduct giving rise to a Brady violation); Buffington v. Copeland, 687 F. Supp. 1089, 1095-96 (W.D. Tex. 1988) (distinguishing Brady violations from other types of prosecutorial misconduct in which, for example, a prosecutor tries to inject prejudice into a trial by introducing inadmissible evidence or making inappropriate opening statements or closing arguments). We affirm the PCR judge's decision to set aside Gibson's guilty plea and grant him a new trial based on the Brady violation.

Id. at 528-9, 514 S.E.2d at 327.

A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of, or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Kyles v. Whitley, 514 U.S. 419, 115 S. Ct. 1555, 1565-69, 131 L. Ed. 2d 490, 505-10 (1995); Brady, 373 U.S. at 87, 83 S. Ct. at 1196, 10 L. Ed. 2d at 218; State v. Von Dohlen, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment evidence as well as exculpatory evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed. 2d 481, 490 (1985).

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

was not suppressed by the prosecution. Therefore, Applicant's claim of prosecutorial misconduct must fail.

4. Appellate counsel was not ineffective for failing to raise all meritorious issues on appeal.

In analyzing a claim of ineffective assistance of appellate counsel, the South Carolina Supreme Court has held that the lower court must apply the two prong Strickland test just as it would be to a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). In Bennett v. State, 383 S.C. 303,309, 680 S.E.2d 273, 277 (2009), the South Carolina Supreme Court explained that the lower court should "ask 1) whether appellate counsel's performance was deficient, and 2) whether Petitioner was prejudiced by appellate counsel's deficient performance."

By way of his Amendment and at the evidentiary hearing, Applicant alleged ineffective assistance of appellate counsel for failing to raise all meritorious issues on appeal. This Court finds that Applicant has failed to establish that appellate counsel's performance was deficient or he was prejudiced by such deficient performance. Therefore, this Court finds that this claim must fail.

CONCLUSION

Based upon the foregoing, this Court orders that the Application for Post Conviction Relief is hereby granted. This Court further finds that no other allegations were raised at the PCR hearing. Therefore, any additional allegations are deemed waived because no evidence was presented.

IT IS THERFORE ORDERED:

1. That Applicant has met his burden of proof as to his specific allegation of ineffective assistance of trial counsel as detailed above, but has failed to meet his burden of proof as to all other allegations of ineffective assistance of trial counsel as detailed above;

2. That Applicant has not met his burden of proof as to his allegation of prosecutorial misconduct and ineffective assistance of appellate counsel;

3. That the Application for Post Conviction Relief be granted and the Applicant's convictions be vacated and he be granted a new trial;

4. That Applicant be transferred from the custody of South Carolina Department of Corrections to the custody of Aiken County pending the disposition of his criminal case, with normal bond proceedings.

AND IT IS SO ORDRED this 30th day of December, 2016

~~Honorable~~ Edgar W. Dickson
Circuit Court Judge
First Judicial Circuit

Orangeburg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Tevon Michael Jackson, #344982,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

2013-CP-02-02693

CORRECTED

ORDER DENYING RESPONDENT'S MOTION TO RECONSIDER

This matter comes before the Court on Respondent's Motion to Reconsider the Order of this court pursuant to Rule 59(e), SCRCP, granting Applicant's application for post-conviction relief. An Order denying this motion was signed by this Court on March 14, 2017, and filed March 17, 2017, which contained inadvertent erroneous findings. The proper findings are as follows.

After due deliberation and review of the case law and motion of counsel, this Court finds that there is nothing warranting reconsideration.

THEREFORE, Respondent's Motion to Reconsider is DENIED.

AND IT IS SO ORDERED.

FILED 3-27 20 17 12:25 SP
C.C.C.P. & G.S.
Deputy Clerk

Edgar W. Dickson
Presiding Judge, Second Judicial Circuit

March 21, 2017
Orangeburg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Robert J. Harte, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

MAR 27 2017

C.C.C.P. & G., Aiken County, S.C.
Deputy Clerk SP