

STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-001084

DaQwan Johnson,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Did the Lower Court err in not granting Post-Conviction Relief on the basis that the Petitioner was not provided or timely provided discovery?
2. Did the Court err in not granting Post-Conviction Relief based upon the fact that trial counsel was ineffective for not obtaining known discovery prior to trial?

RESPONDENT'S COUNTER-ISSUE PRESENTED

Did the post-conviction relief court correctly find Counsel was not constitutionally ineffective where (A) Petitioner wholly failed to establish the State committed any Brady violations, and (B) Petitioner did not present any evidence at the PCR hearing to prove he was prejudiced by Counsel's alleged failure to obtain evidence?

STATEMENT OF THE CASE

DaQwan Johnson (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Petitioner was indicted at the February 2011 term of the Court of General Sessions for Richland County for murder (2011-GS-40-0863) and attempted murder (2012-GS-40-0885). Petitioner was represented by Gregory B. Collins, Esquire (Counsel), and John Clark Newton, Esquire. Petitioner proceeded to trial on July 26, 2012; July 30-August 3, 2012; and August 8, 2012, before the Honorable R. Knox McMahon and a jury. He was convicted as indicted. Judge McMahon sentenced Petitioner to a term of fifty years' imprisonment for murder and thirty years' imprisonment for attempted murder. These sentences are to be served concurrently.

A timely notice of appeal was filed on Petitioner's behalf, and an appeal was perfected by Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Johnson, No. 2015-UP-192 (filed April 8, 2015). The remittitur was returned to the circuit court on April 29, 2015.

Petitioner then filed an application for post-conviction relief (PCR) on August 25, 2015. Respondent made its return on December 3, 2015. An evidentiary hearing into the matter was convened on March 19, 2018, at the Richland County Courthouse. Tommy A. Thomas, Esquire, represented Petitioner. Jessica E. Kinard, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel was also called to testify. After hearing testimony, the Court accepted post-trial briefs from both parties. The Court then issued an order denying relief and dismissing the action with prejudice on May 14, 2018.

Petitioner filed a timely notice of appeal from the denial of his application for relief. Through appellate counsel, Petitioner filed a Petition for a Writ of Certiorari on February 7, 2019. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

Petitioner and his codefendants – Marquez Prophet (Prophet), Terrance Patterson (Patterson), Brian Campbell (Campbell), and Detrick Walker (Walker) – were involved in a gang-related dispute between their gang, the Folk Nation, and the Bloods, which resulted in four shootings within roughly twelve hours on June 19-20, 2010. Petitioner’s murder and attempted murder charges stem from the third shooting, which occurred that night at an apartment complex in Bloods’ territory. Petitioner and his codefendants fired indiscriminately, approximately forty times, at anyone who happened to be present. Gary Reese, a Blood, was fatally struck in the back, and another shot grazed Lametress Stevenson, an innocent bystander.

The first shooting occurred on the afternoon of June 19, 2010. Kenneth St. John (St. John) and Whitney Wilson (Wilson) testified they saw a silver or tan, four-door Buick LeSabre pull into their apartment complex, where several people, including children, were gathered outside of the apartments. The Buick’s passenger leaned out the window and fired several shots at Wilson as he was taking out his trash. Wilson ran into his apartment and stayed there for hours. The Buick drove a short distance, made a U-turn, and waited for several minutes before it sped away from the scene. App. pp. 197-198, 201; 349-50. Wilson saw but did not recognize the car’s driver. However, when police showed him a photographic lineup, he circled photographs of three individuals, including Petitioner. App. pp. 350-54, 722-23, 822.

A second shooting occurred later on the afternoon of June 19. Prophet and Walker testified a man called “Weeny,” a Blood, shot at them, as they were riding in Petitioner’s Buick with Campbell on Farrow Road.¹ None of the men in the Buick were injured, but several bullets hit

¹ Both indicated Petitioner was not with them in the Buick at the time of the second shooting. App. pp. 402-04, 445-47.

Petitioner's car. When Campbell notified Petitioner of the incident, he became angry and told them to bring his car to his girlfriend's residence off of North Main Street. App. pp. 404-07, 443-49, 455. The codefendants testified they went to Petitioner's girlfriend's residence, picked up Petitioner, and headed out to find another friend, Patterson. Patterson distributed weapons to the group. Petitioner got a .233 semi-automatic weapon; Prophet got a .380 caliber pistol; Campbell got an SKS assault rifle; Patterson got an AK47 assault rifle; and Walker had his own handgun. Prophet testified their plan was to "shoot up on" Weeny's blue Crown Victoria. App. pp. 408-13, p. 449-55.

Although there was some dispute at trial as to who directed the group to the apartment complex, it is undisputed the group set out in Petitioner's car looking for Weeny. App. pp. 410-13, 449-55. The group parked the Buick in an apartment complex adjacent to the complex where they were headed, and they walked through a cut behind this complex to their intended destination. Prophet testified he stopped by the first or second building after they entered the complex because he saw people come out of a unit. However, Johnson, Patterson, Campbell, and Walker continued on and "went their own separate ways." Prophet thereafter heard gunshots, but claimed he could not see who fired the shots. After the shooting, the group ran back to the Buick and drove back to the home of Johnson's girlfriend. App. pp. 411-18, 429.

Walker's account generally corroborated Prophet's testimony as to how the group reached the apartments where the shooting occurred. App. pp. 455-56. The biggest discrepancy between Prophet's and Walker's versions of what happened was Walker's claim they were fired upon first. App. pp. 456-57. Walker testified, once in the apartment complex, he went to the left. Johnson and Patterson went to the right, Prophet went a different direction, and he did not know where Campbell went. App. p. 456. Walker testified that neither he nor Petitioner fired shots that night.

He also claimed he did not know whether Prophet or Campbell had fired any shots and said he heard the sound of an assault rifle, but he did not know whether Patterson had fired it. App. pp. 457-58. Walker also testified he saw Petitioner's gun jam. App. pp. 459-60.

Walker testified the group went to his house immediately after this incident and he changed clothes. Although Walker kept his handgun, Patterson took the remaining weapons and hid them at the residence of Patterson's girlfriend.² App. pp. 460-61. Everyone then went to Studio 54 to celebrate the birthday of Johnson's girlfriend. Later, "some Blood gang members came in and got into an altercation." When Petitioner and the group went outside, "they was (sic) waiting on us ... and there was another shootout." Walker admitted he participated in this exchange of gunfire, the fourth shooting of the day. App. pp. 461-63.

Multiple witnesses testified to the shooting at the apartment complex, including St. John; Whitney, the victim of the first shooting; Stevenson, the attempted murder victim; and Brittany Russell, a friend of the murder victim, Reese, who took cover in Russell's apartment after being shot. All of the witnesses agreed the shooting started suddenly, without provocation, and a large number of shots were fired within a short time. App. pp. 195-97, 202-04, 225-27, 230, 349-51, 481-83.

Sergeant Walter Rose, a crime scene supervisor in the City of Columbia Police Department (CPD), arrived at the apartment complex where the third shooting occurred around 1:00 a.m. on June 20, 2010. He met with Officer Gilliard, another member of the crime scene unit who was already present. After a walk through the large crime scene, they processed it together. App. pp. 241, 251-53, 257. The officers found shell casings in five areas around the complex. They found

² On July 1, 2010, Lt. Frieda Wyatt, of the Richland County Sheriff's Department recovered a .45 caliber handgun from Gary Reese's gravesite. Several persons were at the gravesite when she seized the weapon. App. pp. 554-58.

more shell casings in the parking lot in front of another complex across the road. Specifically, they found twenty-one 7.62 x 39 mm shell casings; fourteen .40 caliber shell casings in various locations around the complex; two unfired .223 cartridges; five .45 casings; and several bullet fragments, including inside some apartments. App. p. 253-75, 277-81, 286-96, 298-303, 323-28. Two or three vehicles in the apartment complex were also damaged that night and had bullet holes in them. Officers did not locate either projectiles or bullet fragments in those vehicles. App. pp. 270, 296-98, 303-08.

Sergeant Arthur Thomas also responded to the scene of the third shooting on June 19 and began his investigation, as others from his agency processed the scene. On June 21, Sgt. Thomas acquired the apartment complex's video surveillance footage from the property manager.³ This gave him "an idea of what transpired in the melee of gunfire that night." Of particular benefit was a night vision camera aimed at the "cut" where the shooters entered and exited the complex. The video cameras had also recorded some of the events surrounding the first shooting earlier that afternoon. App. pp. 207-08, 220-21, 724 -25.

The video was published to the jury. It depicts Wilson taking out his trash at roughly 3:27 p.m. on the afternoon of June 19. A silver, four-door Buick LeSabre pulls up beside him as he is emptying his trash. People in the car apparently draw weapons and fire at him, and Wilson runs away from the car. The Buick drives a sort distance, turns around, and briefly waits. When Wilson does not return, the car speeds away from the scene. App. pp. 726-27, 729-31. As to the shooting which killed Reese, the video shows there were a group of people outside of the apartments when the shooting began. The night-vision camera shows five men entering the complex through the

³ The complex had both still motion cameras and cameras that were activated by motion detectors. App. pp. 724-25.

“cut,” beginning at roughly 11:10 p.m. Once the shooting starts, Reese and several other bystanders scramble to take cover. Reese initially ducks, but he eventually runs back into the apartment building. App. pp. 731-33. The perpetrators begin to leave back through the cut approximately one minute later. One of them fires back at the complex before he retreats. The muzzle flash from the weapon is clearly visible on the video. App. pp. 733-34.

Investigator Kevin Reese was Sgt. Thomas’s partner at the time of this investigation. He testified the information developed in CPD’s investigation suggested the shooting in this case was part of an ongoing dispute between members of the rival gangs, the Bloods and Folk Nation. On June 23, 2010, Inv. Reese became aware of the shooting at Studio 54, and he and Sgt. Thomas then met with investigators from the Richland County Sheriff’s Department assigned to the Studio 54 shooting. It was determined the Studio 54 shooting was retaliation for the shooting at the apartment complex. In this meeting, Sgt. Thomas told the Richland County investigators he was looking for a silver Buick that was missing some molding on the driver’s side. Later that day, officers from Richland County telephoned Sgt. Thomas and told him that a vehicle matching the description he had given them had been located at a towing company off of Two Notch Rd. App. pp. 734-37. When Sgt. Thomas and Inv. Reese went to the towing company, they found the vehicle, which belonged to Petitioner and his mother, Mia Johnson. The car “was riddled with bullet holes,” and Sgt. Thomas directed the crime scene team to process it. App. pp. 737-38. Sgt. Rose did so and found paperwork with Johnson’s name on it in the car. App. pp. 304-08.

Inv. Kelvin Griffin, of the Richland County Sheriff Department’s (RCSD) gang unit, testified he responded to the apartment where Petitioner lived on June 24, 2010, and arrested Petitioner there. Petitioner was sitting in a car, and Campbell was in the back seat. After obtaining consent to search the apartment from Petitioner’s grandmother, officers searched the bedroom she

indicated belonged to Petitioner. They saw a weapon protruding from under Petitioner's bed, so they backed out of the residence and notified CPD. App. pp. 651-52, 662-66. Sgt. Rose from CPD later seized the weapon, which he described as "an AK rifle chambered with .223" bullets. The weapon's magazine was loaded and a round was "in the chamber ready to fire." App. pp. 310-14.

Finally, Inv. David Collins, of RCSD's forensic services laboratory, testified as an expert in firearms examination and identification. App. pp. 593-96. He examined the various weapons, cartridges, shell casings, and bullet fragments CPD recovered in this case. He opined the .223 semi-automatic pistol retrieved from under Petitioner's bed, which was a Eubanks Model EMAKN, had fired twenty shell casings;⁴ the .45 caliber handgun recovered from Gary Reese's gravesite fired all five of the .45 caliber casings found at the scene; a .40 caliber Smith and Wesson had fired items the fourteen .40 caliber casings; and a Norenko Model SKS had not fired any items submitted in this case.⁵ He further opined the two unfired .223 cartridges found at scene were consistent with ammunition found in the weapon seized from under Petitioner's bed; Collins testified this ammunition, which was imported from Korea, was "unusual," and he had never seen it before in the thousands of examinations he had performed. App. pp. 598-634, 636-44.

⁴ He explained that the weapon was "unusual" because, although classified by ATF as a pistol, it uses a rifle-type mechanism." App. p. 604.

⁵ The .40 and the SKS were found in a search of the apartment of Patterson's girlfriend. App. pp. 745-46.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

The post-conviction relief court correctly found Counsel was not constitutionally ineffective where Petitioner wholly failed to establish the State committed any Brady violations, nor did Petitioner present any evidence at the PCR hearing to prove he was prejudiced by Counsel's alleged failure to obtain evidence.

Petitioner alleges the PCR court incorrectly denied him post-conviction relief because the State did not timely produce discovery in violation of Brady⁶ and because Counsel failed to obtain known discovery prior to trial. Petitioner alleges eight instances of alleged Brady violations at trial: (1) failure to disclose DNA testing of swabs from spent cartridges and shell casings recovered at the scene; (2) failure to provide a meaningful opportunity to review physical evidence from the Sheriff's Office; (3) failure to provide information regarding a suspect detained at the scene; (4) failure to provide radio logs; (5) failure to provide Crimestoppers report; (6) disclosure of DNA evidence the morning of trial; (7) failure to provide key pages for interpreting phone records; and (8) failure to inform Counsel of the existence of a third-party's DNA profile in the local CODIS database. However, Petitioner wholly failed to meet his burden in establishing a Brady violation as Petitioner did not introduce any of this evidence itself during the PCR hearing, nor did Petitioner introduce any evidence to establish these items actually exist. Indeed, many of these items were turned over to Counsel prior to or during trial. Furthermore, much of the alleged non-disclosed evidence is not exculpatory, and therefore, Brady is inapplicable. Regardless, Counsel vigorously litigated discovery issues before and during trial and made all reasonable efforts to obtain known evidence prior to trial. For all of these reasons, this Court should deny certiorari and affirm the PCR court's decision.

⁶ Brady v. Maryland, 373 U.S. 83 (1963).

- A. Petitioner has failed to establish the State committed any *Brady* violations because the evidence he alleges was not disclosed was either turned over to Counsel prior to or during trial, or is not exculpatory and not subject to the requirements of *Brady*.

As an initial matter, Respondent contends Petitioner has not properly preserved the issue of whether the State committed various Brady violations in this case. Although the issue was raised at the evidentiary hearing, the PCR court's order of dismissal finds Petitioner "is attempting to frame a claim of Brady violation as a claim of ineffective assistance of counsel. However, [Petitioner] made no allegation of prosecutorial misconduct in his application and did not submit any amendments to include such a claim." App. pp. 1195-99, 1207-08. Petitioner did not move to alter or amend the PCR court's order pursuant to Rule 59(e), SCRPC. Therefore, this issue is not preserved and not properly before the Court. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007) ("Because [the applicant] did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review. . . .") Nonetheless, out of an abundance of caution and without waiving the procedural objection, Respondent will address the issue on its merits below.

Brady requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Under this requirement, "favorable" evidence includes both exculpatory evidence and impeachment evidence. State v. Kennerly, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct. App. 1998). Evidence is material if it tends to "negate the guilt of the accused

or mitigate the offense charged or... would tend to reduce the punishment of the accused.” Kyles v. Whitley, 514 U.S. 419, 437 (1995) (internal citations omitted).

First, Petitioner alleges the State failed to disclose DNA testing of swabs from spent cartridges and shell casings recovered at the scene. However, this evidence was turned over to Counsel, and Counsel obtained a continuance of over two months in order to allow time for the State to produce the evidence and for Counsel to review it. App. pp. 18, 1140-41. Similarly, when Counsel explained he had not been provided with a satisfactory opportunity to review the physical evidence prior to trial, the trial judge directed the State to do so immediately. App. pp. 73-74. Counsel testified he was eventually able to view the evidence, though it may have been after trial started. App. p. 1149. The physical evidence in this case consisted mainly of DNA swabs and the cartridges and casings collected at the scene. When the solicitor introduced these items into evidence at trial, she noted Counsel had an opportunity to view the items the day before, which Counsel did not dispute. App. pp. 276.

Next, Petitioner alleges the State failed to provide information regarding a suspect detained at the scene and the radio logs which may have revealed that information. However, at trial, the State produced one of the investigating officers who explained if someone was only briefly detained, their identifying information probably would not be recorded or included in any reports. App. pp. 77-78. The trial court directed the officer to review his file and attempt to track down the information Counsel requested. App. p. 78. Counsel cross-examined Sgt. Thomas on the issue of who was detained and why the information was not recorded, and Thomas explained that was not an unusual occurrence. Thomas testified he had reviewed the file in search of more information but nothing was recorded. App. pp. 805-06. Importantly, Petitioner did not introduce any evidence at the evidentiary hearing showing the State ever had this information in its possession. Counsel

testified only he could not recall whether the defense ever received the requested information. App. p. 1150. The logs themselves were not introduced into evidence at the evidentiary hearing, and thus Petitioner has failed to show this evidence was ever in the State's possession or that it was material or exculpatory. The State therefore did not violate Brady as to the information regarding who was detained at the scene or the radio logs from the night of the incident.

Similarly, Petitioner alleges the State failed to produce Crimestoppers reports with information regarding tipsters who called in about the shooting. As Counsel explained to the trial court, the State produced one report, which was turned over to the defense. App. pp. 23-24. Additionally, Counsel communicated with the attorney representing Crimestoppers who informed Counsel that was the only relevant report. App. pp. 69-70. A Crimestoppers' representative ran additional reports with specific criteria given by the defense and uncovered one additional report related to the Studio 54 shooting, not Petitioner's shooting. This report was then turned over to Counsel on the first day of trial, well before Counsel presented a defense. Counsel did not introduce the Studio 54 report into evidence. App. pp. 85-86, 249-50, 690. Although Counsel speculated there were additional reports, Petitioner did not produce any evidence additional reports existed and no reports were introduced at the evidentiary hearing. Therefore, because Petitioner's speculation as to the existence of additional reports is insufficient to support his burden of proof, there was no Brady violation as to the Crimestoppers reports.

Next, Petitioner alleges Counsel received DNA evidence on the morning of trial. In fact, Counsel received the DNA test results from the cartridge and casing swabs several weeks prior to trial. However, on the morning of trial, the State explained to Counsel how the cartridges and casings were swabbed and how many swabs were taken. App. pp. 282-83. Counsel then asserted any witnesses handling that evidence should wear gloves in order to preserve it for further testing

because more swabs could potentially be taken in the future. App. p. 283. Again, at the PCR evidentiary hearing, Petitioner did not introduce any evidence of further testing or any testimony or evidence showing how this information was material or exculpatory. Therefore, Petitioner has failed to establish a Brady violation as to this alleged evidence.

Petitioner further asserts the State failed to provide a key necessary for interpreting phone records. In fact, the key was turned over during trial, and the solicitor asserted the State was not going to introduce any information which required the key for interpretation. App. pp. 863-65. Nonetheless, the trial court directed the State to call a different witness in order to give Counsel time to review the records. Counsel informed the trial court he could review the information over the lunch break. App. pp. 865, 886. In any event, Petitioner again did not introduce the key records nor present any evidence showing that the phone records were material or exculpatory. Therefore, there was no Brady violation regarding this evidence.

Lastly, Petitioner alleges the State failed to inform Counsel of the existence of a third-party's DNA profile in the local CODIS database or that the DNA from the shell casings was entered into the local CODIS database. Third-party guilt was a major component of Petitioner's defense at trial. App. pp. 1167-68. Specifically, Petitioner alleged his codefendants were lying about his involvement in the shooting to cover for one of their gang leaders, Mr. O.B. Williams. App. p. 1167. Williams's DNA profile was contained within the local CODIS database, and after a DNA profile was extracted from the swabs from the spent cartridges and shell casings, the SLED agent ran the profile through the database. App. pp. 569-73, 581-86. Williams could not be matched to the DNA collected from the cartridges and casings. App. p. 583. Counsel testified at the evidentiary hearing he was not aware of the CODIS search and results until the witness testified to it during trial. App. p. 1146. This is contradicted by the trial transcript, in which the parties

stipulated the solicitor turned over the information about Williams's inclusion in the database earlier in the day before the State's forensic witness testified. The solicitor did not ask the witness to do the comparison until that morning, and she informed Counsel of the results as soon as she received them. App. pp. 683.

Additionally, despite Counsel's objection to the admission of the testimony, the trial court specifically ruled there had been no discovery violation. App. pp. 579-80. The trial court's ruling was correct because this information is not exculpatory. In fact, it discredited Petitioner's defense rather than aided it. Although Counsel testified he would have reviewed the parameters of the search and attempted to locate a match other than Williams had he known Williams was excluded, Petitioner again did not introduce evidence of what such a review or search would have yielded. App. pp. 1159-61. Therefore, regardless of whether such evidence is exculpatory, Petitioner failed to meet his burden of proof as to a Brady violation.

Because Petitioner has failed to establish any violation of Brady, even if the issue is properly before this Court, this Court should deny certiorari and affirm the PCR court's denial of relief.

B. Petitioner has failed to meet his burden of proving Counsel was constitutionally ineffective for failing to obtain known evidence prior to trial because Petitioner did not present any evidence, testimony, or defense – other than Counsel's speculation – at the evidentiary hearing, and therefore, Petitioner has not established any prejudice.

Petitioner alleges Counsel was constitutionally ineffective in failing to obtain known evidence prior to trial. Specifically, Petitioner alleges Counsel should have (1) obtained independent analysis of DNA material; (2) made a motion to obtain reference material not turned over; (3) processed DNA information obtained from the State's ballistics expert; (4) obtained information about the tangential federal gang investigation involving some of the State's witnesses; (5) investigated and processed information regarding Richland County's local CODIS

database; (6) reviewed the physical evidence prior to trial; (7) attempted to independently obtain the radio logs; and (8) obtained additional reports from Crimestoppers.

“[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006), abrogated on other grounds by Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). Additionally, to establish Counsel failed to adequately prepare for trial, Petitioner must present evidence of what Counsel could have discovered or what other defenses could have been pursued had Counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead, 329 S.C. at 334, 496 S.E.2d at 417 (holding trial counsel’s failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Because Petitioner has the burden of proving he was prejudiced by Counsel's alleged failure to obtain the above-listed evidence and discovery, Petitioner must present that evidence to the PCR court. The PCR Court correctly denied Petitioner's claim because he failed to show any specific prejudice from Counsel's allegedly deficient conduct. App. p. 1208. Petitioner presented only Counsel's speculative testimony as to what the "missing" evidence would show and how Counsel would have used it at trial. App. pp. 1131, 133-73. Applying the caselaw cited above, this is insufficient to meet Petitioner's burden of proof as to prejudice, and therefore, the PCR court correctly found Petitioner failed to establish Counsel's representation was constitutionally ineffective. App. p. 1208. Thus, this Court should deny certiorari and affirm the PCR court's denial of relief.


CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding the State did not commit any Brady violations in its disclosure of evidence, nor was Counsel constitutionally ineffective. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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June 12, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-001084

DAQWAN JOHNSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

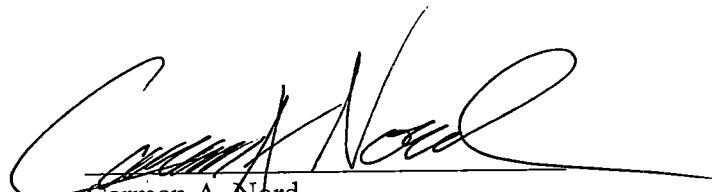
Respondent.

CERTIFICATE OF SERVICE

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

Tommy A. Thomas, Esquire
Post Office Box 88
Irmo, South Carolina 29063

This 12th day of June, 2019



Carmen A. Nord
Legal Assistant for Respondent



ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 12 2019
S.C. SUPREME COURT

June 12, 2019

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

Re: DaQwan Johnson v. State of South Carolina
Appellate Case No. 2018-001084
Lower Court Case No. 2015-CP-40-05213

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

for Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/can
Enclosures

cc: Tommy A. Thomas, Esquire (2 copies)