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STATE OF SOUTH CAROLINA
In the Court of Appeals

CERTIORARI TO LEXINGTON COUNTY
The Honorable Gary E. Clary, Trial Judge
The Honorable Brian M. Gibbons, Post-Conviction Relief Judge

Appellate Case No. 2016-000885

WILLIE J. RICHARDSON,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

BRIEF OF PETITIONER

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
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ATTORNEYS FOR PETITIONER

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QUESTION PRESENTED

Whether the post-conviction relief court erred in finding that Respondent had satisfied his burden in proving that Trial Counsel was constitutionally ineffective for failing to interview and call alibi witnesses whose testimony would have been cumulative at best and harmful at worst and for failing to introduce photographs whose existence was not known until after trial?

STATEMENT OF THE CASE

Respondent, Willie J. Richardson, is incarcerated with the South Carolina Department of Corrections pursuant to the Lexington County Clerk of Court's orders of commitment. Respondent was indicted during the March 1998 term of the Lexington County Grand Jury for murder and possession of a firearm during the commission of a violent crime (1998-GS-32-1242). Hervery B. O. Young, Esquire, represented Respondent. Samuel R. Hubbard, III, and August Gustav Swarat, II, of the Eleventh Circuit Solicitor's Office prosecuted the case.

On April 13, 2000, Respondent appeared before the Honorable Gary E. Clary and a jury, and was found guilty after a jury trial. He was sentenced to life imprisonment for murder and five years' incarceration for possession of a firearm during the commission of a violent crime.

A timely Notice of Appeal was filed on Respondent's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Respondent's conviction and sentence. State v. Richardson, Op. No. 2002-UP-377 (filed May 29, 2002). The Remittitur was issued on July 9, 2002.

Respondent's PCR Cases

Respondent filed an application for post-conviction relief on March 7, 2003. An evidentiary hearing was held on December 12, 2005. By Order filed March 3, 2006, the Honorable Clyde N. Davis, Jr., denied and dismissed the application with prejudice. On or about March 28, 2006, Respondent filed a *pro se* Notice of Appeal. By Order of Dismissal dated June 1, 2006, the Supreme Court of South Carolina dismissed Respondent's appeal due to Respondent's failure to comply with the filing procedures found in the South Carolina Appellate Court Rules. The Remittitur was issued on June 29, 2006.

Respondent filed applications for post-conviction relief on two more occasions (2006-CP-32-2572 and 2007-CP-32-0838) because multiple of Respondent's PCR attorneys had failed to appeal the denial of Respondent's first PCR application. Eventually, an appeal was filed on Respondent's behalf by Appellate Defender LaNelle Durant. By an order dated January 13, 2012, the South Carolina Supreme Court vacated the Order of Dismissal signed by Judge Davis in 2003-CP-32-0927 and the subsequent PCR orders issued in Applicant's second and third PCR cases, and remanded for a new hearing on Respondent's first PCR application (2003-CP-32-0927). The remittitur was sent January 30, 2012.

Remanded PCR Hearing

A hearing was held on January 22, 2014, in Lexington County before the Honorable Brian M. Gibbons. Respondent was present and represented by C. Rauch Wise, Esquire. Assistant Attorney General Mary Williams represented the State. Respondent's trial counsel, Hervery Young, Esquire, testified. Also testifying were Respondent, Ernest Richardson, Greg Huge, and Michelle Richardson. Respondent argued that Young was ineffective for failing to investigate and call Huge and Ernest and Michelle Richardson as witnesses at his trial.

By an order dated November 24, 2014, Judge Gibbons granted Respondent's application for post-conviction relief. The State filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e). By an order dated April 8, 2016, Judge Gibbons denied the State's motion.

The State timely filed a notice of appeal. The State filed its Petition for Writ of Certiorari on May 24, 2017. Respondent filed its Return on July 24, 2017. The Supreme Court transferred the case to the Court of Appeals by Order filed October 30, 2017. The Court of Appeals granted certiorari by Order filed January 25, 2019, and directed further briefing. This brief follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). The findings of the PCR court will not be upheld if not supported by probative evidence. Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

ARGUMENT

The post-conviction relief court erred in finding that Respondent satisfied his burden of proving that Trial Counsel was constitutionally ineffective for failing to interview and call alibi witnesses whose testimony would have been cumulative at best and harmful at worst and for failing to introduce photographs into evidence whose existence was not known until after trial.

Summary

Trial Counsel called as a witness at trial the only alibi witness of whom he had been made aware by Respondent who was willing to testify on Respondent's behalf. Respondent's alibi witnesses at the PCR hearing presented testimony ranging from cumulative to harmful to the alibi testimony that was presented on Respondent's behalf at trial, and none of the alibi testimony at trial or the PCR hearing supported a complete alibi. Trial counsel was not ineffective for failing to use as evidence photographs that Trial Counsel and even Respondent himself did not know existed until years after the trial.

Background

Respondent was convicted of murdering Alfred Jones, who was shot three times during a bar fight that occurred in the early hours of August 13, 1995. Testimony from Respondent's trial revealed that Respondent and his group of friends and acquaintances arrived at the bar between 1:35AM and 2:00AM. App. 187, ll. 16-17. The fight leading up to the killing occurred between 2:30AM to 2:45AM. Respondent's main defense at trial was an alibi defense, wherein he asserted that he was not in Lexington County at the time of the killing, but was at his sister's house in Brooklyn, New York for a family gathering to celebration of the birthdays of Greg Huge and Michelle Richardson, his brother and sister respectively. App. 440. Respondent testified that Huge's birthday was on August 14 and that Michelle Richardson's birthday was on August 15. App. 441. He testified that, prior to his attending the birthday party, he flew to New York on July 20, 1995, to attend a funeral for a close friend. App. 440, ll. 19-21. Respondent testified that, on

the night of August 12, he arrived at the party at about 9:30PM and stayed until about 2:30AM on the morning of August 13. App. 441, ll. 9-13. He further testified that his sister, niece, brother, nephew, children, his brother's wife, and his sister's children were all present at the birthday party. App. 443, ll. 9-12.

On cross examination, Respondent could not remember the exact day of the party, testifying that it was either on Friday, August 11, or Saturday, August 12. App. 451. He then testified that the party was on Saturday, August 12, because he was notified of the killing on the day after the party. App. 451, ll. 7-10. Respondent testified that his family called his then-fiancé, Aletha Gaymon, to notify Respondent that a detective had called and wanted to discuss the killing with Respondent. App. 451, l. 11 – 452, l. 453, l. 4.

Respondent further testified that his parents traveled to Lexington County a week after the killing to find out what was happening, but that they did not tell any law enforcement officer that Respondent was at a birthday party at the time of the killing. App. 455, ll. 16-23. Respondent testified that his parents went to the Lexington County Sheriff's Department and waited inside to talk to someone. App. 455. He testified that his father got frustrated with the wait and went outside, and that law enforcement officers surrounded him and drew their weapons, possibly because they mistakenly believed that Respondent's father was Respondent. App. 457, l. 20 – 458, l. 4. He testified that his parents had the opportunity to talk to law enforcement but left after guns were drawn. App. 459, ll. 6-22. Respondent further testified that neither he nor his parents told Detective Frier about the birthday party in New York. App. 470, ll. 15 – 471, l. 17. When asked if any family member who attended the birthday party contacted the Sheriff's Department, the Federal Bureau of Investigation, a news outlet, or the Solicitor's Office to say that Respondent was at the birthday party in New York at the time of the killing in

Lexington County, Respondent testified that his parents came to Lexington to find out what was going on and "let them know where [Respondent] was at", but he did not identify any family member had told anyone that Respondent was at a birthday party at the time of the killing. App. 463, l. 20 – 464, l. 6. Respondent further testified that he never made an attempt to turn himself in to law enforcement or talk with Detective Frier about the case. App. 475, ll. 3-9.

Respondent testified at the PCR hearing that his trial date was moved from April 17, 2000, to April 10, 2000, and as a result, only his mother and younger brother, Ernest Richardson, were able to attend his trial, and that only his mother testified. App. 689, l. 5 – 690, l. 14.

Respondent's mother, Sally Richardson, testified at trial on Respondent's behalf. She testified that she was at the birthday party for the entire night and that she saw Respondent arrive around 10:00 PM on August 12, and last saw him around 12:00 to 12:30 AM on August 13. She testified that she never disclosed information concerning Respondent's alibi to anyone from law enforcement because "[n]o one asked." App. 480, l. 24 – 481, l. 1.

Although the PCR court stated in its Order Denying Rule 59(e) Motion that Respondent's sister, Michelle Richardson, did not testify at the PCR hearing, she did in fact so testify. App. 724-33, 745. She testified that either her mother or father told her about coming to Lexington County to testify at Respondent's trial on April 17, 2000. App. 725, l. 21 – 726, l. 1. She testified that neither Hervery Young, Esquire ("Trial Counsel") nor Trial Counsel's investigator contacted her about her testifying at trial. App. 726, ll. 15-19. She further testified that she was planning on attended the trial until she learned that it had been rescheduled for an earlier date. App. 726, ll. 9-13. She testified that, if she had testified at the trial, she would have testified that Respondent was at her house for the birthday party. App. 726, ll. 20-23. She testified that the party started at 2:00-3:00PM on August 12, 1995. App. 732, l. 25 – 733, l. 1.

Ernest Richardson testified at the remanded PCR hearing. He testified that he is seventeen years younger than Respondent and that he had attended the trial with his mother. App. 708, ll. 4, 9-16. He testified that he never talked to Trial Counsel. App. 708, ll. 19-20. At the remanded PCR hearing, Ernest was shown the photographs from the party and testified that they were taken in August "of '95 or something like that." App. 710, ll. 1-3. He testified that his mother and Respondent are in the photographs from the party. App. 710, l. 16 – 711, l. 7. Ernest testified that his older brother, Greg Huge, was not in the photographs, and that he could not remember if Huge was at the party. App. 711, l. 15. Ernest further testified that he would have brought the photographs to the trial if someone had told him to bring them. App. 711, l. 24 – 712, l. 1. App. 715, ll. 15-18. He testified that the time of the party was around midday on August 12, 1995, and that it could have lasted until 1:00 AM on the following day. App. 715, ll. 23-25.

Huge testified at the remanded PCR hearing. He testified that he was in New York on August 12 and 13, 1995, to celebrate his and others' birthdays. App. 718, ll. 2-23. He testified that he has no doubt that Respondent was at that party. App. 720, ll. 21-23. He testified that he never talked to Trial Counsel or an investigator about this case and was never notified about a trial date. App. 721, ll. 5-13. Huge further testified that he arrived at the party at about 3:30 PM on August 12, 1995, but he was not sure when Respondent arrived. App. 722, ll. 11-16. He testified that he left the party at about 10:30 PM the same day. App. 722, ll. 19-22.

During Respondent's remanded PCR hearing, Respondent's trial counsel, Hervery Young testified. Trial Counsel testified that, from the beginning of his representation of Respondent, Respondent maintained that he was not in South Carolina at the time of the murder but was actually in New York. App. 654, l. 24 – 655, l. 5. He testified that Respondent told him that he went to New York for a funeral and then a family birthday party. App. 655, ll. 6-15. Trial

Counsel indicated that he had a list of people who would helped establish Respondent's alibi and that he gave it to his private investigator, Dave McDougal, so that they could locate as many of the people as possible. App. 658, ll. 15-21. McDougal died one week before Respondent's remanded PCR hearing. Trial Counsel testified that McDougal gave him written reports after contacting the witnesses before Respondent's trial but also that these reports would be in his file that his former office was unable to locate. App. 669, ll. 4-6; 670, ll. 9-16.

Trial Counsel testified that Respondent and Respondent's mother testified at trial, and that he had anticipated having Gaymon and Respondent's sister testify as well. App. 656, ll. 14-16. He testified that Respondent's sister was not able to attend the trial because she could not afford to travel. App. 656, ll. 16-19. He testified that he tried to get funds to pay for her travel but there was another issue related to child care that prevented her from attending the trial. App. 656, ll. 20-22. He testified that these particular witnesses were cooperative in talking to him. App. 656, l. 25. Trial Counsel testified that he was never able to locate Gaymon because Respondent did not have contact information for her. App. 657, ll. 4-6. Trial Counsel testified that every time he talked with Respondent about his contacting the potential witnesses, Respondent told him to contact his mother to find out how to get in touch with them. App. 667, ll. 14-16. He testified that he also relied on Respondent's mother to give him contact information for Respondent's sister and girlfriend. App. 657, ll. 7-9. Trial Counsel testified that Respondent's sister was "adamant that she wasn't able to come" to Respondent's trial, and he added that "no one that was talked to in New York was coming voluntarily." App. 657, ll. 10-14. Trial Counsel testified that he was in contact mostly with Respondent's mother and sister because he was trying to arrange for the sister's transportation to Respondent's trial. App. 657, ll. 19-23.

At the PCR hearing, Respondent entered exhibits consisting of five pictures that were alleged to have been taken at the birthday party in New York on August 12-13 in 1995. App. 664, ll. 13-16. Supp App. 1-7. Notably, nothing in the photographs confirms what date the photographs were taken. Supplemental App. 3-7. When asked about the photographs and if they were available at an earlier date, Respondent simply responded that "no attorney never, ever asked me about no pictures or nothing." Ernest Richardson testified that he had recently found the photographs in a scrapbook in a family member's home. App. 705, ll. 2-3. Ms. Richardson testified that the photographs depict the party at her house and include Respondent, Ernest, and their mother. App. 727, ll. 7-22. Trial Counsel testified that he could not recall whether they had photographs of the party or whether they were in his possession, but added that Respondent probably did mention them. App. 658, ll. 1-4. Trial Counsel testified that he recalls that Respondent had dreadlocks at the time of trial, and that Respondent was shown on the photographs without dreadlocks. App. 670, ll. 3-8.

The PCR Court granted Respondent's PCR application, finding that Trial Counsel was ineffective when he failed to interview Ernest Richardson and Greg Huge and failed to give an adequate explanation as to why he did not call these witnesses in support of Respondent's alibi at trial. App. 740. The PCR Court found that there was a reasonable probability that the outcome would have been different had the alibi witnesses been interviewed and called at trial and had the photographs from the PCR hearing been presented as exhibits during the trial. App. 743.

Analysis

Trial Counsel was not ineffective for failing to interview and call certain alibi witnesses at trial because Trial Counsel's performance was not deficient, the witnesses would not have aided in an alibi, and because there was overwhelming evidence of Respondent's guilt.

Trial Counsel's Performance

Trial Counsel was not deficient in his performance as he undertook a reasonable investigation given the very limited information that he received from Respondent and Respondent's family. When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant 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 v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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). Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

"[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). Before the trial started, the State asked for clarification on Respondent's notice of alibi, and Trial Counsel responded that he would be relying on the notice of alibi filed

by Respondent while Respondent was a *pro se* litigant before the appointment of Trial Counsel. *See* App. 71-72. The only witnesses listed on the notice of alibi were Respondent's mother (Sally Richardson), girlfriend (Aletha Gaymon), and Angela Cole. App. 72, ll. 1-20. This is consistent with Respondent's testimony in the PCR hearing that he only submitted the names of these three alibi witnesses for his trial. App. 697, l. 24 – 699, l. 5. When asked to verify that he did not give any other names of alibi witnesses to the trial court, Respondent was non-responsive, stating "I was dodging at the time." App. 699, ll. 8-13. At the remanded PCR hearing, Trial Counsel testified that there were three alibi witnesses in Respondent's case—Respondent's mother, sister, and girlfriend—but that only Respondent's mother testified at the trial. App. 565, ll. 14-15.

Trial Counsel worked closely with his private investigator, Dave McDougal, in an attempt to locate as many people as possible for Respondent's trial. App. 658, ll. 15-21. Trial Counsel testified that he was never able to locate Respondent's girlfriend, Aletha Gaymon, because Respondent did not have her contact information. App. 657, ll. 4-6. Because Respondent did not know how to locate this alibi witness, Trial Counsel could not rely upon her testimony in Respondent's defense. App. 666, ll. 14-16. Even the police were unable to locate Angela Cole after making an initial contact with her during their investigation. App. 323, ll. 1-7. Trial Counsel also went to great lengths to ensure that Respondent's sister could attend the trial, even trying to get funds to pay for her airline travel. App. 656, ll. 20-21. Due to no fault of Trial Counsel, it became clear that Michelle Richardson was "adamant" that she would not be able to come to the hearing and no one from New York would come voluntarily. App. 657, l. 11-14.

Regarding the photographs that are alleged to show Respondent at the party, Trial Counsel could not recall at the remanded PCR hearing, almost fourteen years after his representation of Respondent, whether they had any photographs. App. 658, ll. 1-4. Given the

fact that these photographs were found just prior to the remanded PCR hearing and were never mentioned by Respondent in any of his prior applications for post-conviction relief, it should be clear that neither Respondent nor Trial Counsel knew that these photographs existed. Thus it was not unreasonable that Trial Counsel's investigation did not produce these photographs as evidence for Respondent's trial.

"So long as a defendant's attorney conducts a reasonable investigation, including interviewing potential witnesses when it is reasonable to do so, his performance will not be deficient." Edwards v. State, 392 S.C. 449, 457, 710 S.E.2d 60, 65 (2011). Trial Counsel conducted a reasonable investigation on Respondent's behalf. He personally spoke about the case with each of the witnesses identified by Respondent prior to trial or else relied upon his investigator do so on his behalf. At his remanded PCR hearing, Respondent testified to the fact that McDougal had indeed interviewed witnesses on Respondent's behalf. App. 704, ll. 12-17. Trial Counsel called as a witness at Respondent's trial the only potential alibi witness whom he had learned of from Respondent who was not also a reluctant witness. In the end, only Respondent's mother testified on his behalf at trial since, as Respondent testified at the PCR hearing, "[s]he was the only one could make it." App. 690, ll. 1-7.

Alibi Witnesses

Even if Trial Counsel's performance was deemed deficient, Respondent failed to prove prejudice as these new witnesses would have only provided cumulative testimony and, at best, an imperfect alibi. It is clear from the testimony at the PCR hearing that no witness added additional information to the defense that was not already brought out by Respondent or his mother at trial. See Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989) (no prejudice where witness testimony would have been cumulative and would not establish an alibi); State v. Jackson, 329 S.C. 345,

350-352; 495 S.E.2d 768, 770-771 (1998) (where same testimony was offered at trial by another witness, applicant failed to show prejudice). Respondent's mother testified at trial that she saw Respondent in New York from 10:00PM on August 12 to 12:00 to 12:30AM on August 13. Aside from varying timeframes, no other new alibi witness could give any additional information aside from the cumulative testimony from various family members that Respondent was in New York at a party the night leading up to the murder. See People v. Woodard, 225 Ill.App.3d 1069, 1075, 589 N.E.2d 924, 928 (Ill. App. Ct. 1992) (finding the exclusion of testimony from an alleged alibi witness resulted in no prejudice to the defendant in light of the fact he and two other witnesses testified about his alleged alibi during trial).

"[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995). It is clear from the testimony that even if Ernest Richardson, Greg Huge, and Michelle Richardson had testified at trial, their varying testimonies would have been more harmful than helpful to Respondent's alibi and would have left open the possibility that Respondent could have committed the crime. See United States v. Thomas, 58 F. App'x 952, 958 (4th Cir. 2003) (unpublished) ("Defense counsel could have reasonably determined that he could not present a viable alibi defense based on discrepancies in testimony concerning the timing of events"). Ernest Richardson claimed that he was at the party, which he testified was "in '95 or something like that." App. 710, ll. 1-3. Ernest stated that the party was midday and could have lasted to 1:00 AM. App. 715, ll. 23-25. He did not provide any testimony about when Respondent arrived or departed the party, leaving the possibility that Respondent could have committed the crime. He also testified that he did not remember whether his brother Greg Huge

was at the party, saying "I don't think so." App. 711, l. 15. Huge testified at the remanded PCR hearing that he arrived at the party at about 3:30PM, that the party was "probably" on August 12, and that he was not sure when Respondent arrived. 722, ll. 3-16. Although Huge says he has no doubt that Respondent was at the party, he is uncertain of the date when he testifies that Respondent was there "if that's the day the party was." App. 453, ll. 14-19. Huge left the party at 10:30PM and did not provide any testimony of when Respondent left the party, leaving the possibility that Respondent could have committed the crime. App. 722, ll. 19-22. Michelle Richardson testified that the party started at 2:00-3:00PM. App. 732, l. 25 – 733, l. 1. She did not provide any testimony about when Respondent arrived or departed the party, leaving the possibility that Respondent could have committed the crime.

Given the fact that the testimony comes strictly from family members, in addition to the fact that that there are discrepancies in their testimonies of when the party occurred or the times that Respondent arrived to and departed from the party, their testimonies would not have been helpful to Respondent's defense. See Bergman v. Tansy, 65 F.3d 1372, 1380 (7th Cir. 1995) (concluding trial counsel was not ineffective for failing to call family members who would easily have been impeached for bias); McCauley-Bey v. Delo, 97 F.3d 1104, 1106 (8th Cir. 1996) (finding no prejudice from failure to call three witnesses, and noting that credibility problems of the uncalled witnesses and the witness' close relationship to the defendant along with strong prosecution evidence may undercut the impact of these witnesses); Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995) (proposed alibi testimony by a defendant's family members is of significantly less exculpatory value than the testimony of an objective witness); Woods v. Schwartz, 589 F.3d 368, 377-78 (7th Cir. 2009) (counsel was not ineffective in failing to present defendant's brother as alibi witness, where the brother's alleged alibi testimony was ambiguous

and inconclusive). Trial Counsel stated that the additional witnesses were not particularly cooperative in their willingness to travel to Lexington County, and it is logical to reason that uncooperative witnesses would not have been beneficial to the defense. Sally Richardson's testimony at the trial, despite its not presenting a complete alibi, was much stronger than the spotty testimony of Respondent's siblings for the purpose of establishing Respondent's alibi, placing Respondent at the party between 10:00PM and 12:30AM. Trial Counsel recognized that Respondent's relatives did not provide a complete alibi when he testified at the PCR hearing that they "were not able to establish that at the time of the actual incident whether [Respondent] was at the part or still at the party or whether he had left at some point in time prior. . ." App. 659, ll. 12-15. Trial Counsel even attempted to get more evidence in order to hopefully establish a complete alibi by attempting to subpoena airline records, but was unsuccessful in getting those records. App. 659, ll. 15-20. Since the additional witnesses' testimonies would not have made it physically impossible for Respondent to have committed the crime and were not as definitive as the testimony of Respondent's mother, Respondent can show no prejudice by Trial Counsel's failure to call them at trial and expose them to cross-examination.

Additionally, Ernest Richardson presented the PCR court with photographs that allegedly show Respondent at this party. Supp. App. 3-7. As noted by Trial Counsel, while the photos presented appear to show Respondent at a party, the only support for the assertion that they were taken on August 12, 1995, comes from Respondent's family members. The photographs bear no indicia of time, date, or location, and no one knows who took them. Trial Counsel testified that he recalls that Respondent had dreadlocks at the time of trial, and that Respondent was shown on the photographs without dreadlocks. App. 670, ll. 3-8. Assuming that Trial Counsel's recollection about the discrepancy between Respondent's hairstyles in the photographs and at the

time of trial, a recollection that was not contradicted by other testimony at the remanded PCR hearing, it is reasonable to question the assertions of Respondent's family that the photographs verify Respondent's presence at the birthday party. Counsel was not ineffective for failing to present these completely unverified photographs at trial as they would in no way establish an alibi. Without any indicia of time, date, location, or photographer, all the photographs show is that Respondent attended a party at some place at some time in his life, undoubtedly leaving the possibility that Respondent could have committed the crime in question.

Furthermore, the photographs were apparently in a family member's scrapbook, and there is no evidence that they were brought to the attention of Counsel or his investigator at any point in time. Indeed, they were only discovered by Respondent's younger brother in 2013, meaning that Respondent, Respondent's own alibi witnesses, and Trial Counsel were all unaware of the existence of the photographs until years after Respondent's trial. Trial Counsel would have had to be clairvoyant to be aware of the existence of the photographs. Thornes v. State, 310 S.C. 306, 426 S.E.2d 764 (1993) (finding trial counsel was not ineffective for failure to interview the victim who had already given a damaging statement to police. Counsel, "unless clairvoyant, could not have reasonably known that any additional benefit would accrue to his client.").

Overwhelming Evidence of Guilt

Lastly, Respondent cannot show that he was prejudiced by Trial Counsel's actions because there was overwhelming evidence of his guilt. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (finding an applicant cannot establish prejudice where there is overwhelming evidence of his guilt); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied,* 535 U.S. 1114 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result

of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

Respondent arrived to the C&L Social Club in a white Landcruiser. App. 130, ll. 5-13. Witnesses at the club gave the police what they believed to be the tag number of the vehicle. App. 310, ll. 16-19. Two club patrons, Alfred Jones and John Bookman, testified at trial that when the fight broke out they heard a woman scream, "Willie, it's not worth it." App. 264, l. 23; 262, l. 7. Several patrons saw Respondent retrieve a gun from the white Landcruiser. App. 138, ll. 2 – 139, ll. 1-9. The security guard, Kirby Blocker, heard someone call the man with the gun, "Rah." App. 140, ll. 17-25. Kirby Blocker identified the shooter "Rah" as Respondent in a photo lineup. App. 308, ll. 12-14. Respondent testified at trial that he goes by the name "Raheem". App. 429, l. 24.

Reginald Lucas, who was incarcerated in Virginia with Respondent, testified that Respondent preferred to be called "Raheem" or "Rah" rather than his legal name, and recalled Respondent having a tattoo on his arm which read "Raheem." App. 371, ll. 1-18. At trial, Detective Frier with the Lexington County Sheriff's Office testified that he had seen the tattoo on Respondent's arm as well. App. 327, ll. 2-10. Lucas testified that Respondent confessed to shooting someone during a fight at a nightclub. App. 367, ll. 7-23. Lucas testified that Respondent revealed that he had a bogus alibi about being in a funeral in New York, photographs from the day before the funeral with family members, and had a white Landcruiser in his father's name. App. 365-368.

A white Landcruiser with University of South Carolina license plate U6803 was registered on July 27, 1995, just two weeks prior to the shooting, to a Willie J. Richardson on

Park Street in Columbia. App. 316-317. Residents of the Park Street address include Respondent's family members, and possibly a sister of Respondent. App. 317. Through investigation, officers learned that Respondent may have been planning to purchase a home in Newberry, South Carolina. App. 316. At the address police had discovered through their investigation, which they believed was the location of the home that Respondent had purchased or was purchasing, police found the white Landcruiser with tag U6803 only three days after the murder. App. 316. Law enforcement knew Respondent to be the owner or possessor of the Landcruiser. App. 281. Upon their search of the home, they discovered that a woman named Angela Cole was living therein, and she told police that she knew Respondent. App. 317, ll. 21-318, ll. 4. Cole also had a white Landcruise registered in her name at that Newberry address, a fact which police discovered after running checks using variations of the tag number given to them by witnesses at the club on the night of the murder. App. 321, ll. -322, l. 9. Respondent admitted he owned the home where the Landcruiser was found and the keys were in the house. App. 443-444.

Given the totality of the evidence at trial, Respondent cannot show prejudice as there was overwhelming evidence of his guilt.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the PCR court's finding that trial counsel was ineffective for failing to interview and call two of Respondent's alibi witnesses at trial, vacate the grant of post-conviction relief, and enter an order denying Respondent's application for post-conviction relief.

Respectfully submitted,

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By: _____
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May 28, 2019

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CERTIORARI TO LEXINGTON COUNTY
The Honorable Gary E. Clary, Trial Judge
The Honorable Brian M. Gibbons, Post-Conviction Relief Judge

Appellate Case No. 2016-000885

Willie J. Richardson,.....Respondent,

v.

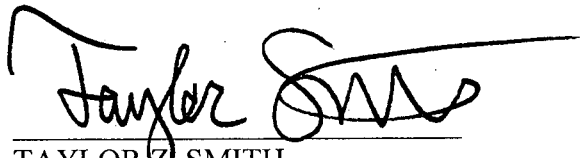
State of South Carolina,.....Petitioner.

CERTIFICATE OF SERVICE

I, Taylor Smith, certify that I have today served the within Brief of Respondent Pursuant to Austin v. State upon Petitioner by depositing a copy of the same in inter-agency mail and addressed to:

Clarence Rauch Wise, Esquire
305 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served. This 28th day of May, 2018.



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May 28, 2019

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: **Willie J. Richardson v. State of South Carolina**
Appellate Case No. 2016-000885
Lower Court Case No. 2003-CP-32-0927

Dear Ms. Kitchings:

Attached are the original and fifteen (15) copies of the **Brief of Petitioner** in the above referenced case for filing in your office.

Sincerely,

Taylor Z. Smith
Assistant Attorney General
SC Bar #103282

TZS/ch

cc: C. Rauch Wise, Esquire
Victim Advocacy Division (without enclosure)