STATE OF SOUTH CAROLINA COUNTY OF GEORGETOWN Terron G. Dizzley SCDC No. 359480, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS IN THE FIFTEENTH JUDICIAL CIRCUIT 2015-CP-22-0845 Applicant's Rule 59 (e) Motion for Reconsideration of the Denial of Post-Conviction Relief

Applicant, through undersigned counsel, submit this motion to reconsider its Order in light of the arguments set forth herein. Counsel received written notice of the entry of the Order by email from the Georgetown County Clerk of Court on December 2, 2019.

Applicant reiterates all arguments made in prior filings and hearings and asserts that a transcript of the Post-Conviction Relief hearing will reflect the facts as laid out in Applicant's Post-Trial Motion. None of the issues raised in the post-trial motion are abandoned by their exclusion from discussion in this motion.

1. In the recitation of material before the Court, the Order does not reflect that the Court considered the following items which were included in the record. At the hearing, the parties agreed, with the Court's consent, that relevant portions of the 2012 Trial Transcript would be submitted by Applicant's counsel, and those were submitted to the Court. The Court also admitted the following exhibits: (1) Applicant's Exhibit #1 - DVD containing the 911 call from Naomi Alston on November 29, 2008, which had been admitted at trial as State's Exhibit 3; (2) Applicant's Exhibit #2 – Curriculum Vitae of Lori D. Van Wallendael, Ph.D.; (3) Applicant's Exhibit #3 – Police Report entitled "Additional Narrative"; (4) Applicant's Exhibit #4 – Google

map of distance from alibi witnesses' location at Jamison Avenue to Oatland ; (5) Applicant's Exhibit #5 – Google map of distance from Applicant's residence at Middle Willow Road to Oatland; (6) Applicant's Exhibit #6 – hand drawn map of alibi's location; (7) Applicant's Exhibit #7 - transcript of police interviews used at 2014 murder trial; and (8) Applicant's Exhibit #8 – CD of police interview with Naomi Alston.

2. This Court misunderstood the testimony of Laquesha Felder. She did not testify that she and Applicant lived in Greeleyville at the time of the shooting. She testified that she and Applicant lived in Bolen Town near Norway, which the evidence showed is thirty minutes West of Orangeburg. In the portion of its Order assailing her credibility, the Court states that Felder testified to the "practical implausibility of traveling from Orangeburg to Greeleyville in thirty minutes." Order at 30. This was NOT her the testimony. Perhaps the confusion comes from the fact that Felder lived in Greeleyville at the time of trial.

3. In addition, this Court failed to address the fact that trial counsel did not establish a legal alibi defense because he did not establish the distance from the places where the alibi witnesses stated they saw Applicant and the crime scene. The trial counsel expected the jury to somehow know the distance from Orangeburg to Georgetown, which is an unrealistic assumption. His failure to establish these distances, and the impossibility of Applicant being in the Georgetown, was a critical error and it was that which allowed the prosecutor to state in her closing.

> Now, Mr. Barr is going to have you believe that Mr. Dizzley was in Orangeburg for the night. Most of his witnesses put Mr. Dizzley in Orangeburg till 9:30 or ten. You heard from that 911 call that the murder happened at 11:30. So I didn't spend much time with those witnesses because I don't really care where Mr. Dizzley was at nine or 9:30. It's not relevant to whether or not he committed this murder.

2014 Trial Tr. 722, line 19 -723, line 11.

In the recent case of *Martin v. State*, Op. No. 27900 (S.C. Sup. Ct. filed Jul. 17, 2019), the Supreme Court held "as a matter of law that Petitioner's trial attorneys were deficient for not eliciting the specific alibi timeline testimony from Petitioner's mother." The Court found that "[w]ithout the specific timeline testimony, Petitioner failed to establish a legal alibi." Id. (citing *State v. Robbins*, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980)) ("[A] purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." (citation omitted)). Id.

The Court found that failure to establish specific alibi testimony is grounds for post-conviction relief where there is not overwhelming evidence of guilt. Similarly, trial counsel's failure to establish specific testimony showing that Applicant could not have been at the scene of the crime was ineffective and Applicant was prejudiced by that error.

In *Martin*, *supra*, the Supreme Court emphasized that overwhelming evidence exists in those cases where there is evidence "such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of a reasonable probability the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* (internal citations omitted). Absolutely *none* of this evidence exists in Applicant's case.

4. This Court mistakenly found that Applicant had not submitted evidence at the PCR hearing that Naomi Alston had stated that the decedent had warrants against him. In its Order the Court states that this was established through hearsay testimony of Bennie Webb. This is incorrect. In an audio tape of Alston's police interview, which was introduced at the PCR hearing, Alston told police that the victim, who she called her fiancé, was not staying with her because he had outstanding warrants against him. She stated that he wanted to come home to her but Alston did not want to be involved. She told police he was planning to turn himself in in December, the month after his death. (Applicant's Exhibit #8, at 48:17 to 49:50). Therefore, this was not

speculation as to what the witness's testimony would have been. At trial, if Alston had denied the statement then trial counsel could have impeached her with her police interview. There was no need to have Alston testify at the PCR hearing because the necessary evidence was in the record. Counsel testified he reviewed all of the discovery, which included this police interview. His lack of a memory or failure to listen to all of the tapes in a murder trial does not excuse his failure to bring forth this critical evidence.

If the jury had known that the reason the victim stayed at his alternate girlfriend's house on the days leading up to his death was to avoid warrants, rather than to avoid Dizzley, their decision would likely have been different. The assistant solicitor would not have been able to make the prejudicial statement in her closing that "the day, the first time [the victim] came out of hiding at his girlfriend's house is when he was murdered." This was clearly error and Applicant was prejudiced by this error.

5. This Court in its Order failed to recognize that Applicant's defense hinged on his assertion that he was not known as "Little D" and that the victim was not referring to him when he named "Little D" as his assailant. Therefore, the testimony presented at the PCR hearing that he did not use this nickname was critical to his defense. The Court mistakenly refers to this as evidence of third-party guilt.

In addition, the Court failed to recognize that the jury misunderstood the testimony to be that the victim stated "Diz" had shot him. There was no such testimony. The only testimony was that the victim stated that "Little D" shot him. When "a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked." *Martin, supra.* Any trial attorney worth his salt would ask that the testimony on which the jury is focusing critical attention be replayed when their question shows

they misunderstood the entire crux of the case. Instead, as outlined in the post-trial memorandum, the trial judge dissuaded the jury from hearing a replay and the trial counsel said that was fine with him. The idea that this is acceptable in a murder trial where a person's life is on the line is absolutely alarming.

6. This Court should also review the numerous prejudicial comments made by the Solicitor, as well as the plethora of errors pointed out in the post-trial memorandum, in light of our Supreme Court's recent decision in *Fortune v. State*, Op No. 27932 (S.C. Sup. Ct. filed Dec. 4, 2019). Certain errors can infect "a trial with such a high degree of unfairness as to make his conviction a denial of due process." This is such a case. The record is replete with examples that Applicant was denied due process.

7. Finally, counsel asked this Court to address the motion to be relieved in a separate Order so that she would not be forced to argue it in conjunction with the strong and meritorious post-conviction relief claims that Applicant has. However, this Court declined to do so. Counsel must, therefore, reiterate that because Applicant is currently suing counsel in the Richland County Court of Common Pleas for monetary damages, for which counsel has had to retain counsel to represent her, and which is ongoing, she has a conflict of interest. This Court mistakenly asserts that only a "little more action" is required of counsel, and this is simply incorrect, as reviewing the voluminous record and lengthy motions and orders in this case is not a "little action" under any definition. It is error to allow counsel to remain as Applicant's counsel, against his wishes and when he *retained* her, under these circumstances.

CONCLUSION

Based on the foregoing, Applicant respectfully requests that his motion for reconsideration pursuant to Rule 59, SCRCP, be granted.

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December 9, 2019

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Applicant's Rule 59 (e) Motion for Reconsideration of the Denial of Post-Conviction Relief was mailed to the below-named attorneys on this 10 day of December 2019 by depositing it in the US Mail with appropriate postage affixed thereto:

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