

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Lexington County

Honorable Brooks P. Goldsmith, Circuit Court Judge  
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QUINCY A. MCCANTS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001436  
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PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

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S.C. SUPREME COURT

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## **ISSUES PRESENTED**

I. Whether the PCR court erred in denying relief, where trial counsel failed to develop and establish a trial strategy of mistaken identity in an armed robbery case, where counsel failed to use testimony from two witnesses under subpoena in order to establish reasonable doubt?

II. Whether the PCR court erred in denying relief, where trial counsel failed to utilize a report produced by SLED showing that none of the three fingerprints lifted from a bag of chips at the gas station matched fingerprints in AFIS, where Petitioner had previously been arrested and fingerprinted?

III. Whether the PCR court erred in denying relief, where trial counsel failed to object to prejudicial and improper remarks by the solicitor in closing which commented on his choice not to testify, where the solicitor told the jury they could consider that Petitioner did not say?

IV. Whether the PCR court erred in denying relief, where trial counsel failed to elicit testimony from Petitioner in a Jackson v. Denno<sup>1</sup> hearing, where counsel offered no strategic reasons justifying the decision not to put Petitioner on the stand pre-trial in order to support the argument that his statements were involuntary, and where Petitioner had a ninth-grade education?

V. Whether the PCR court erred by failing to comply with the deadline established by this Court, where a PCR hearing was neither scheduled nor heard within the sixty-day timeframe required by this Court's order.

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<sup>1</sup> 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

## STATEMENT

Through no fault of his own, Quincy McCants has been waiting on a final resolution on his PCR since he filed it over ten years ago, on September 18, 2009. App. 464 – 470. He was indicted by a Lexington County grand jury in December 2005 for an armed robbery which allegedly occurred on November 7, 2004. App. 937. He proceeded to trial before the Honorable Knox McMahon on October 16, 2006. Jonathan Harvey and Stanley Myers represented Petitioner; Rick Hubbard, III appeared on behalf of the state. After a two-day trial, the jury found Petitioner guilty as indicted. App. 442 ll. 2 – 7. Judge McMahon sentenced Petitioner to twenty-two years' incarceration. App. 461 ll. 18 – 21.

Petitioner's conviction was affirmed. State v. McCants, Op. No. 2009-UP-194 (S.C. Ct. App. Filed May 6, 2009). As mentioned, he filed an application for post-conviction relief on September 18, 2009. App. 464 - 470. He contended that trial counsel was ineffective for multiple reasons, including general allegations such as failure to prepare for trial, failure to object, and failure "to properly address the forensic evidence and SLED report regarding that evidence." App. 466. Assistant Attorney General A. West Lee filed a Return on or about February 23, 2010. Through PCR counsel Tricia Blanchette, an Amendment in November 2012. App. 471 – 474.

According to the Order of Dismissal, an evidentiary hearing was held on April 13, 2013 before the Honorable Edgar W Dickson.<sup>2</sup> App. 478. An Order of Dismissal was signed on November 24, 2014, over one year later. App. 478 – 504. The Order was not filed until February 11, 2015. App. 508. A Motion for Rehearing and/or to Alter or Amend pursuant to

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<sup>2</sup> April 13, 2013 was a Saturday. Upon information and belief, the hearing occurred in August 2013. App. 562 ll. 13 – 22.

Rule 59(e), SCRCF, was filed on or about February 24, 2015. App. 505 – 509. An Order denying the Rule 59(e) motion was signed on September 7, 2015. App. 511 – 512.

Because the transcript from the evidentiary hearing on April 13, 2013 could not be produced, the undersigned filed a Motion to Remand for Reconstruction on September 21, 2016. App. 513 – 518. The state made its Return on October 3, 2016. A Reply to the Return was filed October 14, 2016. App. 549 – 553.

On December 1, 2016, this Court issued an order remanding the case to the Lexington County Court of Common pleas to reconstruct the PCR record. App. 557 – 558. A hearing to that effect was held on November 8, 2017 before the Honorable Edgar W. Dickson. App. 559. The undersigned represented Petitioner; Joe Maye, Ed Salter, and Samuel Bailey appeared on behalf of the state. The court heard testimony from six witnesses: Walt Whitmire, prior counsel for the state; Stanley Myers, trial counsel; Jonathan Harvey, trial counsel; Hazella Baylor, SLED analyst and witness from prior PCR; Tricia Blanchette, prior PCR counsel, and Quincy McCants. At the conclusion of the hearing. Judge Dickson requested proposed orders from both parties. App. 713 ll. 2 – 25.

Over two years after the matter was remanded, the PCR court issued an order finding that reconstruction was not possible. App. 716 – 725. Accordingly, the undersigned moved before this Court to vacate the Order of Dismissal and remand for a new PCR hearing. App. 726 – 729. By way of an order date February 1, 2019, this Court granted the motion and remanded for a new hearing within 60 days.<sup>3</sup> App. 731.

A PCR evidentiary hearing was held before the Honorable Brooks P. Goldsmith, IV on June 26, 2019. App. 733. Donald Thompson represented Petitioner, and Taylor Smith appeared

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<sup>3</sup> This deadline was not met.

on behalf of the state. Petitioner and both members of his trial counsel team testified at the hearing. At the conclusion of the hearing, even after only performing a “cursory review” of the transcript, the PCR court denied relief. App. 883 l. 18 – App. 884 l. 4. An Order of Dismissal was filed on July 30, 2019. App. 894 – 935.

This petition follows.

## ARGUMENT

**I. The PCR court erred in denying relief, where trial counsel failed to develop and establish a trial strategy of mistaken identity in an armed robbery case, where counsel failed to use testimony from two witnesses under subpoena in order to establish reasonable doubt.**

Petitioner's family hired Jonathan Harvey to represent him on the armed robbery charge. App. 744 ll. 5 – 16. Following disagreements between Harvey and Petitioner, Stanley Myers was appointed to the defense team as well. *Id.* The defense theory of the case was the store employee misidentified Petitioner. App. 793 ll. 14 – 17; App. 813 ll. 1 – 4. Counsel Harvey indicated that the “soundest trial strategy” was to “call to the jury’s attention the inconsistencies or the unreliability or the doubts” which were present in the clerk’s testimony. App. 836 ll. 10 – 18. According to counsel Myers, Petitioner agreed with this theory. App. 793 ll. 18 – 19. Petitioner alerted his attorneys to the fact that he was innocent. App. 794 ll. 20 – 23; App. 852 ll. 20 – 23.

Chandra Wright gave a description of the man who robbed the gas station. Wright testified that the man who robbed the convenience store drove away in a tan Cutlass. App. 187 ll. 14 – 21. She gave a description to law enforcement that the man was a Black male, 5’11”, between 150 and 160 pounds, and wore a tan shirt, tan pants, and a blue and yellow hat. App. 890. This description was placed in a bulletin created by the Lexington County Sheriff’s Department. App. 891. Counsel Harvey never interviewed Wright. App. 866 ll. 9 – 10. He admitted that he never spoke with her during the entirety of his representation. App. 866 ll. 2 – 14.

Petitioner's mother as well as his girlfriend, Kimmy Graves were at his trial and prepared to testify. App. 218 ll. 2 – 14; App. 774 ll. 14 – 22. Neither were called as witnesses during trial. Petitioner's mother suffered a stroke in 2010 and lost the ability to speak. App. 776 ll. 2 – 6. Petitioner was not advised what Graves' testimony would entail. App. 776 ll. 13 – 15. Counsel Myers could not recall why their testimony was not utilized. App. 809 ll. 10 – 17. He speculated that they were subpoenaed in order to support the theory of misidentification. App. 814 ll. 3 – 8.

Petitioner's aunt, Maxine Brown, testified after the state rested. She advised the jury that the man in the surveillance video was not Petitioner. App. 368 l. 25 – App. 369 l. 2. Remarkably, she testified that she would not lie for her nephew. App. 375 l. 25 – App. 376 l. 1. Identical questions could have been asked of Petitioner's mother and girlfriend. Counsel Myers contemplated that Petitioner's mother may not have been called as a witness because she had trouble recalling certain things. App. 814 ll. 12 – 23. Candidly, Brown was asked whether the man in the surveillance video was Petitioner, not whether she recalled various events.

Counsel Harvey testified that he made a "strategic trial decision" to use Brown instead of Petitioner's mother because she had an "aura of objectivity." App. 838 ll. 10 – 20. Although he could not remember with great detail, he noted that Brown's testimony helped establish "a reason to doubt." App. 839 ll. 1 – 14. He acknowledged that Petitioner's other two witnesses would have provided similar testimony. App. 838 ll. 21 – 25. Counsel Harvey never offered any risks associated with calling either of those two witnesses who he had subpoenaed. He admitted that he could not recall much about the decision. App. 138 ll. 3 – 11.

"There is a two-prong test for evaluating claims of ineffective assistance of counsel. First, a PCR applicant must show that his counsel's performance was deficient such that it falls below

an objective standard of reasonableness.” Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Alexander v. State, 303 S.C. 539, 541, 402 S.E.2d 484, 485 (1991) ). “Second, an applicant must show there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. (citing Strickland, 466 U.S. at 687, 104 S.Ct. 2052; Alexander, 303 S.C. at 541–42, 402 S.E.2d at 485).

A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the state. Nance v. Ozmint, 367 S.C. 547, 557 n. 8, 626 S.E.2d 878, 883 n. 8 (2006) (quoting Wiggins v. Smith, 539 U.S. 510, 524–25, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

Petitioner’s mother was unavailable to testify after she lost the ability to speak. Petitioner did not know where his former girlfriend was at the time of his second PCR hearing, almost thirteen years after trial. App. 776 ll. 13 – 18. Nonetheless, counsel Harvey was aware that their testimony would have bolstered the reasonable doubt theory of the case. Neither member of Petitioner’s defense counsel team offered a strategic reason as to why the two witnesses were not called. Because Petitioner’s aunt testified, there was no claim that counsel was holding out for the last argument. There was no risk to putting those two witnesses on the stand, and Petitioner was prejudiced by the failure of counsel to do so. Further, counsel failed to interview the state’s eyewitness. Petitioner received ineffective assistance of counsel for this reason in addition to the issues listed below.

**II. The PCR court erred in denying relief, where trial counsel failed to utilize a report produced by SLED showing that none of the three fingerprints lifted from a bag of chips at the gas station matched fingerprints in AFIS, where Petitioner had previously been arrested and fingerprinted.**

SLED produced a forensic services laboratory report which concluded that none of the three fingerprints pulled from a chip bag matched prints located within the South Carolina Automated Fingerprint Identification System (“AFIS”). App. 886. That report was not used to cast reasonable doubt upon the state’s case. The defense team did not call Special Agent Edward Porter, author of the report, to testify on Petitioner’s behalf at trial in order to establish reasonable doubt on the state’s expert’s findings.

Counsel Harvey advised the PCR court that Quincy had been arrested and fingerprinted before. App. 867 ll. 19 – 25. As such, his prints were likely in AFIS. However, counsel Harvey performed no additional investigation to explore whether this was true. App. 868 ll. 1 – 18. In addition to failing to use the SLED report which cast reasonable doubt upon the state’s expert witness, counsel Harvey failed to take additional action in the form of an investigation which could have helped Petitioner’s case. Instead, he sat idle with this information and thereby provided Petitioner ineffective assistance of counsel.

Counsel Harvey appeared unwilling to adapt to developments in the case leading up to trial. When asked why he did not consider putting the SLED report into evidence, he offered the following:

I thought in my experiences with SLED agents as witnesses are very articulate, very well trained, that as a strategy to have a SLED agent explain the inconclusive nature of that could have been counter productive. I felt as though the strategy that we had developed for the trial was the best strategy.

App. 868 l. 19 – App. 969 l. 7.

Counsel Harvey failed to interview Agent Porter or perform any additional follow-up. An articulate agent can only testify as to so much beyond the inconclusive report. Further, the thorough training could have been used against SLED and in Petitioner's favor: an inconclusive report performed by a well-trained agent creates reasonable doubt in the minds of the jury. Counsel Harvey allowed a fear of sidetracking the jury to dictate his trial strategy and the result was a rigid position with no flexibility for change. App. 869 ll. 8 – 19.

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.” See Von Dohlen v. State, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (quoting Wiggins v. Smith, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

Counsel failed to perform a complete investigation. As such, his reasonings cannot be relied on as strategic, because he was operating without all of the necessary information required to defend Petitioner.

**III. The PCR court erred in denying relief, where trial counsel failed to object to prejudicial and improper remarks by the solicitor in closing which commented on his choice not to testify, where the solicitor told the jury they could consider that Petitioner did not say.**

Although a witness testified on his behalf, Petitioner did not testify at his trial. The solicitor used that fact against him during the state's closing argument:

Firmly convinced: Fingerprints, the I.D. by Ms. Wright, and Mr. McCants' own statements. **You can consider what he didn't say.** He didn't say anything about the potato chip bag, like: I've been in that store a million times. He didn't say anything like that.

App. 418 ll. 3 – 8 (emphasis added). Neither member of Petitioner’s defense team objected to this prejudicial and improper remark. Counsel Myers could not recall the context in which the solicitor made the above assertion. App. 820 ll. 8 – 13.

It is improper for the state to refer to or comment upon a defendant’s exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). In particular, the state may neither comment upon nor present evidence at trial of a defendant’s decision to exercise his right to remain silent or be represented by an attorney. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).

These principles are rooted in due process and the belief that justice is best served when a trial is fundamentally fair. See Brecht v. Abrahamson, 507 U.S. 619, 629, 113 S.Ct. 1710, 1717, 123 L.Ed.2d 353, 367 (1993); Wainwright v. Greenfield, 474 U.S. 284, 291, 106 S.Ct. 634, 638, 88 L.Ed.2d 623, 630 (1986); Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions. Such an inference is constitutionally impermissible because the burden at all times remains upon the state to prove beyond a reasonable doubt every element of a crime with which the accused is charged. In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Schrock, 283 S.C. 129, 322 S.E.2d 450 (1984).

Counsel’s failure to object to the remarks in closing arguments prejudiced Petitioner.

**IV. The PCR court erred in denying relief, where trial counsel failed to elicit testimony from Petitioner in a Jackson v. Denno hearing, where counsel offered no strategic reasons justifying the decision not to put Petitioner on the stand pre-trial in order to support the argument that his statements were involuntary, and where Petitioner had a ninth-grade education.**

While speaking with law enforcement, Petitioner advised them that he would only provide verbal statements and would not make any written statement. App. 765 l. 10 – App. 766 l. 6. A pretrial hearing occurred, and the trial judge heard testimony from only the state’s witness, Brett Sims. App. 35 – App. 57. Regarding the suppression hearing, counsel Myers testified that his involvement was “[j]ust to show that the statement was not voluntarily, knowingly, and intelligently made.” App. 803 ll. 3 – 6. When asked whose decision it was not to have Petitioner testify at the hearing, counsel Myers remarked that “it was discussed by all.” App. 805 ll. 20 – 22. He stated that “it was a joint effort and a joint decision.” App. 805 ll. 23 – 24. When asked what the reasoning was for not having Petitioner testify in support of the notion that the statements he gave were not voluntarily, knowingly, and intelligently made, counsel Myers responded:

You know, you give an individual, you know, or a prosecutor, experienced prosecutor cracks multiple times where they can still use, the person is still under oath, you know, whatever is said during the Jackson v. Denno could then still be used later on so it was just better not for him to testify.

App. 806 ll. 1 – 8.

Counsel Harvey, when asked why he could rely on cross-examination of the state’s witness during the suppression hearing to determine the voluntariness of Petitioner’s own statement rather than Petitioner’s testimony, seemingly overlooked the usefulness of Petitioner’s testimony and how it would have impacted the underlying motion:

Well, again, one thing as a lawyer you can – cross examination is different than direct examination because that’s one class I did pay attention to in law school and you can through artful cross examination elicit answers that go with the theory of your case and be able to make sure - - Through cross examination you can elicit responses that are consistent with your trial strategy and gives you an opportunity to articulate that trial strategy. And again, subjecting Quincy to rigorous cross examination I didn’t know if there was a risk or reward issue and I felt in terms of trial strategy risky.

App. 854 l. 25 – App. 855 l. 14.

Notably, the reasoning counsel Harvey provided to the PCR court as to why he did not wish for Petitioner to testify could be applied to this issue in favor of Petitioner. Counsel Harvey suggested that Petitioner would not have fared well when questioned, seemingly proving that his statements to law enforcement likely were not voluntary:

Well, Quincy’s a very nice guy, very sincere, very earnest individual, but I felt as though Quincy as a witness may be problematic. You know, Quincy, he’s able to express himself, process things, but the rigors of cross examination in a trial especially in an armed robbery trial and with all these other pending charges I felt as though we could present a defense and present it most effectively without the risk of Quincy’s testimony.

App. 837 l. 25 – App. 838 l. 9.

“Whenever evidence is introduced that was allegedly obtained by conduct violative of a defendant's constitutional rights, the defendant is entitled to have the trial judge conduct an evidentiary hearing outside of the presence of the jury at the threshold point to establish circumstances under which it was gained.” State v. Creech, 314 S.C. 76, 84, 441 S.E.2d 635, 639 (Ct.App.1994). A defendant in a criminal case is entitled to an independent evidentiary hearing to determine the voluntariness of statements made by the defendant prior to the submission of such statements to the jury. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Petitioner only completed the ninth grade in school, and he was enrolled in special education classes. He relied on his attorneys to inform him of the risks and benefits of each decision. In this instance, the downside to having Petitioner testify at the Denno hearing was minimal. Contrary to counsel Myers' conclusion that the Petitioner's testimony could have been used against him later, Myers and Harvey could have controlled the scope of Petitioner's testimony during the hearing. Had they prepared him for direct examination and called him as a witness, he could have testified that his statements were not voluntarily made. If a concern existed that he would testify beyond the scope of the pre-trial hearing on cross-examination, counsel could have objected. Because the decision appeared to have been made early on for Petitioner not to testify at trial, he would not have been subject to cross-examination before the jury. The testimony Petitioner would have given at the hearing was only information he could provide. Testimony that his statements were not voluntarily made while he was in custody is not evidence which damages the defense's case; had the prosecution somehow attempted to use that information later in the trial as counsel Myers suggested, it would not have hindered Petitioner's case. Therefore, his defense team failed in failing to elicit that helpful information and thereby strengthening the argument that his statements should have been suppressed.

Via special education classes, Petitioner completed only the ninth grade in school. App. 746 ll. 14 – 23. He testified that it takes “a little more effort and a little more time” for him to understand things. Id. Harvey and Myers did not take the extra time and effort to develop a trial strategy in his case, as noted above. Further, they did not ensure that he understood everything that was explained to him. Pp. 746 l. 19 – App. 747 l. 2. His testimony was not utilized in order to suppress his statements; his attorneys provided ineffective assistance of counsel.

**V. The PCR court erred by failing to comply with the deadline established by this Court, where a PCR hearing was neither scheduled nor heard within the sixty-day timeframe required by this Court's order.**

Quincy McCants has been patiently waiting resolution of his post-conviction relief for a long time. The state sought and received a continuance at one point because the Assistant Attorney General was filming a television show called *Bachelorette*. App. 563 l. 9 – App. 569 l. 35. While he has been waiting, his mother suffered a stroke. His son was in a motorcycle accident and treated at the Augusta Burn Hospital.

The court reporter from his first PCR was unable to produce the transcript of that evidentiary hearing. App. 513 – 518. The Order of Dismissal could not serve as a worthwhile record in order for Petitioner to receive meaningful appellate review. Notably, it contained a statement that Petitioner confessed. App. 549 – 555. Had the trial transcript been unavailable, Petitioner may have been unable to refute that contention. Nonetheless, the matter could not be reconstructed, and Petitioner was awarded a new PCR by this Court in February 2019.

In the Order granting Petitioner's motion to vacate the prior PCR Order of Dismissal, this Court remanded the matter to the circuit court judge to be heard within sixty days. App. 731. That did not occur. The doctrine of laches should be applied here, and the case should be reversed and remanded for a new trial.

Laches is “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other

party.” Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002), citing Hallums v. Hallums, 296 S.C. 195, 198–199, 371 S.E.2d 525, 527 (1988).

Petitioner filed his original application for post-conviction relief on September 18, 2009. App. 464. He did not receive an evidentiary hearing until almost four years later, in August 2013. The Order of Dismissal was signed on November 24, 2014, over one year later. It was not filed until February 11, 2015. Prior PCR counsel, Tricha Blanchette, filed a Motion to Alter or Amend soon thereafter. An Order denying that motion was signed on September 7, 2015. App. 511 – 512.

The undersigned moved for a remand on September 21, 2016. App. 513 – 516. The state opposed the motion. App. 520 – 521. After this Court granted the motion and ordered a remand, eleven months passed until the reconstruction hearing occurred. App. 559. After another year, the circuit court judge signed an Order finding that reconstruction was not possible. App. 716 – 725. Soon thereafter, this Court issued the order containing the two-month timetable.

At the second PCR hearing, many of the witnesses had difficulty recalling events from Petitioner’s trial in 2006, almost thirteen years earlier. Some variation of “I don’t recall” was spoken dozens of times; both defense attorneys and Petitioner were unable to remember what transpired. Some speculation occurred, as did *post hoc* rationalization. The transcript which was created likely would have looked much different had the hearing occurred soon after the original PCR application was filed in 2009. However, through no fault of Petitioner’s, that transcript of lost.

This Court has previously held that a petitioner’s PCR claim was barred by laches. Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005). In that case, the petitioner’s PCR application was not filed until seven year after the denial of his first PCR application. Id. At 141, 620 S.E.2d at

745. The tapes from his hearing had been destroyed, likely according to Rule 607(i), SCACR. according to Rule 607(i), SCACR. Id. Laches should now be used against the state for failure to hear Petitioner's post-conviction relief in a timely manner.

The entirety of Petitioner's PCR action and subsequent appeal has been marred by repeated, unreasonable delays. His mother was unavailable to testify at his PCR because of her stroke. Petitioner did not delay in filing his PCR application; he filed it less than five months after the remittitur was issued in his direct appeal.

**CONCLUSION**

Based upon the foregoing, Petitioner respectfully requests that this Court grant the petition for writ of certiorari to allow further briefing.

s/Taylor D. Gilliam \_\_\_\_\_  
Taylor D Gilliam  
Appellate Defender

ATTORNEY FOR PETITIONER

This 22nd day of June, 2020.