

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Sumter County

S.C. SUPREME COURT

George C. James, Circuit Court Judge

NATHANIEL BRADLEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001121

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

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- II. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by calling Petitioner's brother to testify who harmed Petitioner's alibi defense by contradicting a prior alibi witness and by stating Petitioner was aware of the death prior to the police finding the body?
- III. Did trial counsel violate Petitioner's Sixth and Fourteenth right to the effective assistance of counsel by failing to present a telecommunications expert to use the cell phone records to support Petitioner's alibi defense?
- IV. Did trial counsel violate Petitioner's Sixth and Fourteenth right to the effective assistance of counsel by failing to present an arson expert to establish a timeline for when the car was set afire to enable Petitioner to defeat the testimony of Koenig, the state's only eyewitness?
- V. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to hearsay from the lead investigator in the case regarding the color of the tag on the car in which the deceased was last seen alive where the color of the tag was crucial to identify the car as the one alleged to have been driven by Petitioner shortly before it was found incinerated?
- VI. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to hearsay from Koenig about what his neighbors said had been reported on the news regarding the dead body in the pond and the car of interest?
- VII. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to hearsay from the two officers who were present for the identification procedure involving Koenig where their testimony improperly bolstered Koenig's identification?

STATEMENT

In May 2005, Ernest James was in a romantic relationship with Martha Ransom. App. 153, l. 24 – App. 154, l. 11; App. 171, ll. 10-18; App. 182, ll. 14-19; App. 199, ll. 2-4. Also during that time, James and Petitioner were “very close friends.” App. 154, l. 23 – App. 155, l. 2; App. 200, ll. 3-5; App. 372, ll. 2-5; App. 563, ll. 11-15.

On May 21, 2005, Leonard McCray, James’ brother, saw Petitioner at a nightclub in Rembert. App. 155, l. 22 – App. 156, l. 17. Petitioner was with another man. App. 156, l. 18 – App. 157, l. 5. McCray told Petitioner that James was at their family home. App. 156, ll. 18-20. Thereafter, Petitioner and his friend left the club in Petitioner’s blue Chevrolet Beretta. App. 157, ll. 8-23; see also App. 208, ll. 1-9. Petitioner and his friend arrived at the home where James and Ransom were living. App. 183, ll. 1-11; App. 207, ll. 10-16. James walked out of the house, and James and Petitioner talked outside. App. 184, l. 22 – App. 185, l. 3; App. 207, ll. 16-21. Petitioner and his friend drove away. App. 186, ll. 1-3. James then left, driving Ransom’s car, a blue Volvo. App. 185, ll. 8-16; App. 208, l. 25 – App. 209, l. 5.

Petitioner’s girlfriend’s daughter attended her prom on May 21, 2005. App. 837, l. 3 – App. 838, l. 4. Petitioner took her to get her hair done at a beauty shop in downtown Sumter. App. 839, ll. 3-19. When she was finished, Petitioner picked her up from the shop between 6:30 and 7. App. 839, l. 24 – App. 840, l. 2; App. 854, ll. 1-5 (phone records showing 7:37 p.m.). Afterward, she and Petitioner went to the home of Paul, Petitioner’s brother, to get some money. App. 840, ll. 11-15; App. 931, l. 16 – App. 932, l. 11; App. 933, ll. 8-15. The pair then went to Food Lion to buy a camera for her to use at prom. App. 840, ll. 12-15. They returned to her grandmother’s house so she could get dressed for prom. App. 842, ll. 2-5; App. 856, ll. 12-21. Petitioner was at her grandmother’s house in South Forge Apartments when she left at 8:30 p.m.,

and he was there when she returned at 1:30 a.m. App. 842, ll. 12-22. According to the grandmother, Petitioner stayed at her apartment with her from the time the daughter left until she returned. App. 857, ll. 15-20. Petitioner allowed her friend to drive his car – the blue Beretta – to prom. App. 842, l. 10 – App. 843, l. 1; App. 857, ll. 13-14.

Matt Bramlett lived “directly across” from Broad Branch Cemetery in Bishopville. App. 453, l. 23 – App. 454, l. 2; App. 457, ll. 2-13. During the early morning hours of May 22, 2005, his dog woke him up, barking at one spot in the corner of his lot toward the cemetery. App. 454, ll. 3-10; App. 455, ll. 2-11; App. 457, ll. 17-25. More specifically, Bramlett explained the dog was barking between midnight and 1:30 a.m. App. 459, ll. 14-19. The dog barked between forty and fifty minutes. App. 454, ll. 7-15; App. 455, ll. 12-17.

On Sunday morning, Petitioner stopped to visit his friend, Calvin Davis, Jr., in Bishopville. App. 862, ll. 17-18; App. 865, ll. 1-8; App. 866, ll. 21-24. When Petitioner left, he indicated he was going to get some paint so he could paint another friend’s home. App. 869, ll. 5-16.

Thomas McCutchen lived “on the adjacent side of Broad Branch from the cemetery.” App. 348, ll. 16-23. His house was approximately one-fourth of a mile from the cemetery. App. 348, l. 24 – App. 349, l. 1. During the afternoon on May 22, 2005, McCutchen was riding his golf cart around his property. App. 349, ll. 2-7; App. 351, ll. 9-24; see also App. 358, ll. 6-11; App. 360, ll. 6-13 (officer received the call for the car at 3:35 p.m.). He found “[a] car that had been burned.” App. 349, ll. 8-11. The car was no longer burning when he found it. App. 349, ll. 12-13. McCutchen did not see any smoke or fire when he found the car. App. 353, ll. 5-8.

The officer who responded to McCutchen’s call about the car reported that it “appeared to be recently burned” and that it “appeared to be a mid 80’s model Volvo.” App. 361, ll. 17-21.

It was a 240DL model. App. 363, ll. 5-7. The car was “burnt completely up” “inside and out.” App. 365, l. 23. “[E]ven the tires were burnt off of it.” App. 365, ll. 24-25. “[A]ll the interior was completely burned, dash burned, everything was burned away.” App. 366, ll. 1-2. The police used the partial VIN to match it to the blue Volvo owned by Ransom in which James was last seen driving away from her home. App. 701, ll. 3-10.

According to Robert Jones, Petitioner arrived at the house he was building in Sumter after noon on Sunday, May 22, 2005. App. 885, ll. 5-13; App. 887, ll. 5-10; see also App. 892, ll. 4-17. Petitioner worked for Donnie Hawkins who was the builder of the home. App. 884, ll. 8-25. Petitioner looked around the home for approximately forty-five minutes. App. 887, ll. 18-23. Additionally, Petitioner went to visit his friend Cody Kind in Sumter on Sunday afternoon. App. 922, ll. 17-22. Kind and Petitioner watched Kind’s son and his friends play basketball for several hours. App. 926, l. 22 – App. 927, l. 25.

On Monday, May 23, 2005, around 10 a.m., Petitioner went to the home of Tina Leon in Sumter to paint the trim around her windows. App. 901, ll. 11-24; App. 909, ll. 19-23; App. 910, ll. 1-7. Leon provided lunch for Petitioner from a nearby fast food restaurant. App. 904, ll. 20-25. Petitioner left around 4 p.m. App. 905, ll. 9-13; App. 905, ll. 22-24; App. 911, ll. 1-4.

Also on May 23, 2005, Walter Lundberg was fishing on Boyle’s Pond in Sumter. App. 104, ll. 8-10. He spotted a body in the water and called 911 for help. App. 104, ll. 14-25. The police removed the body from the water. App. 113, ll. 12-25; App. 122, l. 23 – App. 123, l. 2. The police found a wallet in the pocket of the short pants on the body. App. 671, ll. 13-16. Inside the wallet, there was an identification card, which the police used to identify the body as that of Ernest James. App. 671, ll. 16-19. Thereafter, the police learned that Petitioner was one

of the last people to see James alive. App. 682, ll. 2-15. The police then began investigating Petitioner. App. 682, l. 25 – App. 683, l. 12.

On May 24, 2005, Daniel Simon with the Lee County Sheriff's Office read in the newspaper that the Sumter County Sheriff was looking for a Volvo. App. 492, ll. 10-25; App. 493, ll. 14-16. As a result, Simon contacted the Sumter County Sheriff about the burned car found across from the cemetery. App. 493, ll. 2-6; App. 493, ll. 17-23; App. 690, l. 16 – App. 691, l. 9.

The pathologist performed the autopsy on the body on May 24, 2005. App. 408, ll. 8-10. According to the pathologist, the deceased suffered three gunshot wounds, one of which caused his death. App. 411, ll. 21-22; App. 435, ll. 17-22. He recovered two bullets from the body. App. 422, ll. 10-12. Additionally, he found signs of decomposition. App. 432, l. 18 – App. 433, l. 19. However, the pathologist was unable to determine the exact time of death. App. 434, ll. 9-14. The pathologist explained that he put the date of death as May 23, 2005, based upon information he received from the coroner, and not information gleaned from the autopsy. App. 438, l. 4 – App. 441, l. 18. Later, the coroner contacted the pathologist requesting he change his report to indicate the date of death was May 22, 2005. App. 441, l. 23 – App. 442, l. 3. Therefore, on the final autopsy report, the pathologist indicated the date of death was May 22, 2005. App. 443, ll. 5-14. The pathologist explained that the deceased could have died anytime between May 21 and May 23. App. 446, ll. 10-23.

On January 3, 2008, a Sumter County grand jury indicted Petitioner for murder of Ernest James and possession of a firearm during the commission of a violent crime (2007-GS-43-390). App. 1826-1827. The state, represented by Catherine Fant, called the case to trial before the Honorable R. Ferrell Cothran, Jr. App. 1. Ernest Finney represented Petitioner. App. 1.

During the trial, the lead investigator explained he did not have any eyewitness who saw Petitioner kill the deceased. App. 729, ll. 14-16. No one saw Petitioner with a gun. App. 729, ll. 17-18. There was no evidence from the scene or from the body of the deceased to indicate Petitioner killed him. App. 729, ll. 19-21. The investigator could not tell the jury “a precise date” when the deceased died.” App. 729, ll. 22-23. He could not even tell the jury what county in which the deceased died. App. 729, ll. 24-25.

Ultimately, the jury found Petitioner guilty of murder, but not guilty of possession of a weapon. App. 1065, l. 21 – App. 1066, l. 4. Judge Cothran sentenced Petitioner to thirty years incarceration. App. 1079, ll. 7-10; App. 1828.

Petitioner filed a notice of appeal, which was perfected by Joseph L. Savitz, III. App. 1081-1090. On appeal, Petitioner challenged the trial judge’s erroneous refusal to grant a directed verdict of acquittal. App. 1081-1090. On November 8, 2010, the Court of Appeals affirmed Petitioner’s conviction and sentence in an unpublished opinion. State v. Bradley, 2010-UP-494 (S.C. Ct. App. filed Nov. 8, 2010); App. 1122-1123. Subsequently, Petitioner filed for rehearing. App. 1124-1125. On December 30, 2010, the Court of Appeals denied the petition for rehearing. App. 1126. Thereafter, Petitioner, represented by Tristan M. Shaffer, filed a petition for writ of certiorari asking this Court to review his case. App. 1127-1139. This Court denied the writ on June 21, 2012. App. 1170. Remittitur was issued on July 5, 2012. App. 1171.

On July 27, 2012, Petitioner filed an application for post-conviction relief (PCR). App. 1172-1178. On September 19, 2013, Petitioner filed an amendment to his application for PCR. App. 1184. Thereafter, on April 9, 2015, Petitioner filed a second amendment to his application for PCR. Supp. App. 1-4. On April 15, 2015 and July 5, 2016, the Honorable George C. James,

Jr., convened an evidentiary hearing regarding Petitioner's application. App. 1185. Daniel F. Gourley and Julie Amanda Coleman represented the state, and Bradley Myers Kirkland represented Petitioner. App. 1185. By an order filed September 5, 2017, Judge James denied relief to Petitioner. App. 1745-1790. On September 22, 2017, Petitioner filed a motion to alter or amend the judgment. App. 1791-1824. On May 15, 2018, Judge James denied the motion. App. 1825.

After receiving written notice of the order on May 21, 2018, Petitioner served his notice of appeal on June 15, 2018. This petition for writ of certiorari follows.

ARGUMENT

Introduction

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686. To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. Thus, in a PCR action, the applicant must prove by a preponderance of the evidence that (1) counsel’s performance was deficient under prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. Id. at 695.

I. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to improper and speculative opinion testimony from Bobby Wayne Hughes, the deceased’s brother, who claimed that Petitioner either killed the deceased or knew something about the killing.

Bobby Wayne Hughes, the deceased’s brother, explained that the family gathered at a friend’s house on May 23, 2005. App. 564, ll. 7-10; App. 565, ll. 11-13. Petitioner arrived. App. 565, ll. 16-18. Hughes told the jurors that when he heard his brother had been murdered it “hurt” his “feelings.” App. 570, ll. 7-11. When asked if he thought the murder had anything to do with Petitioner, he said, “yeah, in a way. In a way I think it is and in a way I think it don’t.” App. 570, ll. 12-15. He further related that because Petitioner and the deceased were so close, then “somebody know a little more than what they saying.” App. 570, ll. 17-19. Later, the

solicitor returned to how Hughes felt. App. 580, ll. 6-10. Hughes said he was “hurt” and that his “heart dropped” when he found out his brother was dead. App. 580, ll. 11-12. Hughes also said he thought Petitioner was involved. App. 580, ll. 13-15. Specifically, Hughes said, “somewhere or another if he didn’t commit the murder himself, he knows something about it and he got something to do with it. If he actually didn’t do the killing, he know something about it, he’s involved some kind of way.” App. 580, ll. 16-21.

The PCR judge explained that Petitioner challenged Hughes’ testimony as inadmissible character evidence, speculation, and the danger of unfair prejudice outweighed any probative value. App. 1784. The judge found “some of [Hughes’ testimony] was certainly objectionable.” App. 1785.

Trial counsel should have objected to the solicitor’s question as to whether Hughes thought [Ppetitioner] had anything to do with the murder, because such testimony was irrelevant. Trial counsel should have also objected to Hughes’ testimony that he sort of did and sort of did not believe [Ppetitioner] was involved in the murder, and trial counsel should have objected to Hughes’ testimony that if [Ppetitioner] did not commit the murder himself, he knew something about the murder and was involved in some way.

App. 1785. Nevertheless, without explanation or analysis, the PCR judge found Petitioner did not suffer prejudice. App. 1785.

Hughes offered opinion testimony on the ultimate issue before the jury. See Rule 704, SCRE. Hughes’ opinion that Petitioner either committed the murder, was involved in the murder in some way, or knew more than he was telling was improper lay opinion. See Rule 701, SCRE; State v. Westmoreland, 421 S.C. 410, 418-419, 807 S.E.2d 701, 706 (Ct. App. 2017). Hughes’ opinion was pure speculation and went to the ultimate issue of Petitioner’s guilt. Witnesses are not permitted to opine on a defendant’s guilt. See State v. Ellis, 345 S.C. 175, 177-178, 547 S.E.2d 490, 491 (2001); State v. Commander, 396 S.C. 254, 269, 721 S.E.2d 413, 421 (2011);

see also Emerson v. State, 643 P.2d 1212, 1215 (Nev. 1966) (explaining a prosecutor may not offer his personal opinion as to the guilt or the character of the accused); State v. Williams, 650 P.2d 1202, 1210 (Ariz. 1982) (stating “a witness may not indicate his belief in defendant’s guilt”); State v. Colbert, 896 P.2d 1089, 1094 (Kan. 1995) (stating “[i]n a criminal trial, the defendant has the right to have the jury determine from the evidence whether the defendant is guilty”); People v. Bragdon, 369 N.W.2d 208, 209 (Mich. Ct. App. 1985) (explaining “[a]s with matters of credibility, it is clear that a witness cannot express an opinion on the defendant’s guilt or innocence of the charged offense”); Pendleton v. Com., 685 S.W.2d 549, 553 (Ky. 1985) (“An opinion as to whether the accused had the ability or propensity to commit such an act is improper because it is an opinion on the ultimate fact, that is, innocence or guilt. Consequently, it invades the proper province of the jury”).

Hughes’ opinion was pure speculation. Additionally, the danger of unfair prejudice by permitting the jury to hear his opinion regarding his belief on who was the culprit for his brother’s death substantially outweighed any probative value. See Rule 403, SCRE. As stated, the probative value was low because the opinion was improper lay opinion based upon pure speculation. The danger of unfair prejudice was extremely high as it permitted the jury to lessen its burden of reviewing the evidence and simply base its verdict on Hughes’ opinion. The jury may even assume Hughes was aware of facts that were not presented at trial, and therefore, his opinion was reliable. The danger that the jury would base its verdict on Hughes’ improper and speculative testimony was too high in this case.

II. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by calling Petitioner's brother to testify who harmed Petitioner's alibi defense by contradicting a prior alibi witness and by stating Petitioner was aware of the death prior to the police finding the body.

Petitioner defended against the charges by presenting an alibi. In light of the state's inability to pinpoint when or where the deceased was killed, Petitioner presented numerous witnesses who testified regarding Petitioner's whereabouts between May 21, 2005, and May 23, 2005 – the last time James was seen alive and when his body was found. One of the witnesses presented was Paul Bradley, Petitioner's brother. App. 930, ll. 20-22. Paul claimed he saw Petitioner on Monday, May 23, 2005. App. 933, ll. 23-25. He claimed Petitioner went to him about 1 p.m. crying because his friend had been killed. App. 934, ll. 1-5. This testimony *directly contradicted* the testimony of Tina Leon and Terrell Johnston who said Petitioner was at a painting job on Monday from 10 a.m. until 4 p.m. App. 901, ll. 11-24; App. 905, ll. 9-13; App. 905, ll. 22-24; App. 909, ll. 19-23; App. 910, ll. 1-7; App. 911, ll. 1-4.

The solicitor seized on defense counsel's error in closing. According to the solicitor, Paul "provided one of the most important pieces of evidence in this case." App. 1034, ll. 19-21. She even noted that it was defense counsel, not her, who asked Paul what time it was on Monday afternoon when Petitioner was crying about his friend's death. App. 1034, ll. 21-23. The solicitor explained that Paul claimed Petitioner was upset at 1:00 in the afternoon, but the body was not found until 1:45 p.m. App. 1034, l. 24 – App. 1035, l. 1.

Trial counsel called Paul as a witness because he "was the leader of the family," "an older gentleman," "very stable," and the man who "hired" trial counsel. App. 1471, ll. 7-10. He showed the jury "that the Bradley family was a solid family." App. 1471, ll. 10-12. Trial

counsel claimed he was unaware that Paul “was going to testify that [Petitioner] sa[id] that he was dead before the police got there.” App. 1472, ll. 7-10. When questioned about the impact of Paul’s testimony that Petitioner knew of James’ death prior to the police finding his body, trial counsel refused to admit the testimony from “this outstanding pillar of the community virtually destroyed [the] case” because trial counsel understood Paul to be testifying to an “estimation of time.” App. 1519, ll. 4-10. Trial counsel admitted he did not know Paul would estimate the time as 1 pm, and that if he knew Paul would testify accordingly, he would not have called Paul as a witness. App. 1520, ll. 6-11.

The PCR judge rejected Petitioner’s claim, finding that Paul testified to an estimated time of “around 1:00.” App. 1777. According to the PCR judge, Petitioner “ignore[d] the reality that time-of-day estimates are just that – estimates.” App. 1777. Ultimately, the judge found trial counsel’s calling of Paul was not deficient, and even if it were deficient, then the content of his testimony “did not likely play an important part in the jury finding [Petitioner] guilty.” App. 1777.

Trial counsel violated one of the basic rules of lawyering when he asked Paul what time Paul had the conversation with Petitioner regarding James’s death – do not ask a question you do not know the answer to. See Ingle v. State, 348 S.C. 467, 471, 560 S.E.2d 401, 403 (2002). Trial counsel called Paul to testify because he considered Paul a credible witness who would impress the jury. However, trial counsel elicited harmful testimony from Paul that contradicted an alibi witness and attributed knowledge of James’s death prior to the police find the body. See McKnight v. State, 378 S.C. 33, 43-45, 661 S.E.2d 354, 359-360 (2008). Trial counsel was simply unprepared to present Paul as a witness. The harmful testimony prejudiced Petitioner

where the state's case was a weak circumstantial evidence case. See Lounds v. State, 380 S.C. 454, 462-463, 670 S.E.2d 646, 650-651 (2008).

III. Violating Petitioner's Sixth and Fourteenth right to the effective assistance of counsel, trial counsel failed to present a telecommunications expert to use the cell phone records to support Petitioner's alibi defense.

During the trial, defense counsel introduced Petitioner's cell phone records through the lead investigator, Clarence McMillan. App. 768, ll. 14-22. The records indicated that Petitioner's first phone call on Sunday morning was made from a tower in Sumter. App. 774, ll. 2-13. At 7:16 a.m. on Sunday morning, the phone used a tower in Bishopville. App. 775, ll. 9-19. In fact, during the entire morning, Petitioner's phone used two towers in Bishopville and one in Camden. App. 775, l. 20 – App. 778, l. 14. According to McMillan, one of the towers indicated in the records that was used by Petitioner between 9 a.m. and 11 a.m. on Sunday morning was “[m]ore than 10 miles” from Boyle's Pond, where the deceased's body was recovered and where Darrell Koenig claimed he saw Petitioner. App. 786, l. 22 - App. 788, l. 6. McMillan claimed that he had no proof that Petitioner was the one using his phone, however. App. 788, ll. 2-6; App. 815, ll. 9-16. Additionally, in response to an open-ended question from defense counsel, McMillan claimed that Petitioner's phone used a tower “near Boyle's Pond” on Sunday afternoon at 3:23 p.m. App. 789, l. 1 – App. 790, l. 9.

When defense counsel presented McMillan with a map for him to show the jury where the phone towers were, McMillan was unable to do so. App. 784, ll. 3-11. In fact, McMillan had not investigated the towers associated with phone calls made by Petitioner. App. 787, ll. 6-11. It was clear McMillan was wholly unprepared to testify regarding Petitioner's phone records.

At the PCR hearing, trial counsel admitted the cell phone records were “the strongest” evidence he had to show Petitioner’s innocence. App. 1464, ll. 3-12. Nevertheless, he did not retain an expert. App. 1464, ll. 3-18. Instead, trial counsel, as stated, merely cross-examined McMillan on the records. Trial counsel admitted McMillan was not prepared to testify to the contents of the records. App. 1465, ll. 6-15; App. 1498, ll. 22-24.

During the PCR hearing, Petitioner called Ben Levitan, an expert in the historical analysis of cell phone records. App. 1244, ll. 19-25. Levitan explained that individuals who attempt to use the cell phone records and plot them on a map generally do not have “any knowledge of how the cell phone networks actually work[], or without the background and experience to actually make those opinions.” App. 1240, ll. 7-22. Levitan explained that the request made by the sheriff’s department for the cell tower location information was done poorly. App. 1257, ll. 11-14. Specifically, the records only showed the first cell tower that was used by the cell phone, and did not show if the cell phone changed towers during the call. App. 1258, ll. 2-18. He noted that at Petitioner’s trial, McMillan had “a typed list of 20 cell towers” and “some maps” from an unknown origin. App. 1260, ll. 10-18. The list was incomplete as it failed to include all the towers in the area, which were necessary to “make a plan.” App. 1260, l. 20 – App. 1261, l. 11.

Levitan was able “to fill in the gaps.” App. 1262, l. 3. Levitan then plotted the locations for Petitioner’s phone based on the cell tower location information on a map. App. 1264, ll. 9-16. Thereafter, Levitan provided lengthy and detailed testimony that showed how the cell tower information supported Petitioner’s alibi witnesses. App. 1270, l. 7 – App. 1301, l. 24; see Applicant’s Exhibit #3. Even the PCR judge’s summary of the testimony acknowledged that Levitan’s testimony established that Petitioner’s alibi was supported by the phone records and

could have been presented to the jury in such a way had trial counsel employed an expert. See App. 1766-1767. One of the most important pieces of corroborative evidence from the phone records was that between the hours of 8:34 and 10:32 on Sunday morning, Petitioner's phone was using a tower that was "23 and a quarter miles from where the witness Mr. Koenig said he witnessed the Volvo." App. 1285, ll. 5-15. Expert Levitan explained the phone records were "absolutely conclusive that the phone is excluded from being in the area of [Boyle]'s Pond and Cobblestone Road between 9:30 a.m. and 10:15. The phone in my opinion, is 23 miles away from that." App. 1302, ll. 8-14. Furthermore, the expert used the phone records to show that between the hours of 9:30 a.m. and 3 p.m. on the day the burnt Volvo was found, Petitioner's phone was nowhere near the cemetery. App. 1302, l. 25 – App. 1303, l. 13.

Without question, a trial attorney "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). Although attorneys are not required to investigate every conceivable defense no matter how unlikely the effort would be to assist the defendant, the decision not to investigate must be reasonable. Wiggins v. Smith, 539 U.S. 510, 533 (2003) (holding counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence); see also Hinton v. Alabama, 571 U.S. 263, 274 (2014) (requiring strategic choices to be made after a thorough investigation); Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004) (holding trial counsel's investigation concerning Von Dohlen's mental state was not reasonable despite the fact that counsel made "some effort" where the defense psychiatrist testified during

post-conviction proceedings that had he been provided with the additional medical and psychiatric records that post-conviction counsel uncovered, he would have testified Von Dohlen suffered from “major depressive episodes with severe symptoms of anxiety and possible prepsychotic features”).

Counsel also has a duty to call necessary experts to challenge the state’s evidence. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007); Reeves v. State, 415 S.C. 366, 376, 782 S.E.2d 747, 752 (Ct. App. 2015).

Despite the PCR judge’s determination that trial counsel’s cross-examination of McMillan on the phone records “was thorough and created a substantial question as to whether [Petitioner] was in the area where Mr. Koenig claims to have seen him driving the Volvo on Sunday morning,” the evidence in the record shows otherwise. McMillan was no expert, and his testimony showed only a passing familiarity with the records themselves and no understanding of the import of the records. Additionally, counsel was unable to make key points about the records because McMillan was unqualified and unprepared.

It is undisputed that the records supported Petitioner’s alibi defense as they placed Petitioner’s phone in the areas in which Petitioner presented witnesses who said Petitioner was present in those areas. The phone records could not be biased, as the state suggested some of Petitioner’s witnesses were; the phone records could not be mistaken as to time, as the state suggested some of Petitioner’s witnesses were; and the phone records could not have faulty memories, as the state suggested some of Petitioner’s witnesses had.

McMillan was a poor substitute for an actual telecommunications expert as a juxtaposition of McMillan’s testimony and Levitan’s testimony shows. When asked if he had conducted an analysis of the records, McMillan responded that he had “looked over it.” App.

769, ll. 2-4. He had not conducted in the in-depth analysis and prepared the companion charts and maps as Levitan had. Even the state was aware that McMillan was out of his depth as shown by the state's objection to "technical questions about cell phones." App. 772, ll. 8-10.

Trial counsel's failure to present an expert witness, such as Levitan, to testify at Petitioner's trial was deficient performance that was prejudicial to Petitioner. The records supported Petitioner's alibi and corroborated his alibi witnesses, who suffered from attacks by the state on allegations of bias, faulty memories, and simple mistakes. McMillan was unprepared and not qualified to testify as to the contents of the cell phone records. Had trial counsel presented an expert to explain the records to the jury and corroborate Petitioner's alibi defense in this weak circumstantial evidence case where the state was unsure of where or when the deceased died, there is a reasonable probability that the outcome of the trial would have been different.

IV. Violating Petitioner's Sixth and Fourteenth right to the effective assistance of counsel, trial counsel failed to present an arson expert to establish a timeline for when the car was set afire to enable Petitioner to defeat the testimony of Koenig, the state's only eyewitness.

In this weak circumstantial evidence case, Darrell Koenig was the state's star witness – his credibility was crucial. Koenig and his wife owned a six-acre lot at Boyle's Pond. App. 625, ll. 1-5. On May 22, 2005, Koenig was working on the entryway to his lot. App. 625, ll. 20-25. He recalled that it was "very early in the morning" when he "noticed a blue Volvo sedan" on the nearby road. App. 627, ll. 1-6. He estimated that he saw the car "about 9:30." App. 629, ll. 6-8; App. 659, ll. 8-9. He saw two black men sitting in the car. App. 627, ll. 11-12. Koenig claimed that he and the driver were looking directly at each other. App. 627, ll. 22-24. Koenig later identified Petitioner as the driver of the Volvo. App. 638, ll. 5-9.

An officer who examined the burnt Volvo claimed he could “tell that some type of accelerant probably was used in burning it and ... it was burnt beyond recognition really.” App. 693, ll. 8-12. The agent who processed the Volvo was unable “to obtain any physical evidence that would link it to any particular person or persons” because the car was “burnt so severe.” App. 698, ll. 2-8. The lead investigator indicated he did not know when the car was set afire or how long it took to burn, but he was “sure the burn would have been intense for a short period of time.” App. 737, ll. 11-23. Under the state’s theory, the car was burned between 11:00 a.m. and 2:30 p.m. on Sunday. App. 739, ll. 12-15; App. 747, ll. 19-24.

At the PCR hearing, Petitioner presented Daniel Olson, an undisputed expert in mechanical engineering and origin and cause of machinery and automobile fires. App. 1318, l. 22 – App. 1319, l. 12. Olson explained that Koenig claimed he saw Petitioner as early as 9:30 a.m. on the day the burnt Volvo was found. App. 1323, ll. 6-17. After finding the location of the cemetery, Olson plotted the shortest route from Koenig’s property to the cemetery where the car was found. App. 1328, ll. 14-20. The two locations were approximately 26.66 miles apart. App. 1329, ll. 17-18. Olson used posted speed limits to estimate that it would take almost forty-six minutes to travel that distance. App. 1330, ll. 3-4. Thus, if Petitioner were seen by Koenig at 9:30 a.m., then the earliest he could have made it to the cemetery was 10:17 a.m. App. 1330, ll. 8-16. Furthermore, Olson explained that a car set afire would have flames emanating from it within five to seven minutes. App. 1332, ll. 1-9. The car would produce “dense black smoke” and “high visible flames with plume as high as 20 feet.” App. 1332, ll. 18-20. Thereafter, the car would burn with intensity for forty-five minutes to an hour. App. 1339, ll. 12-17. The car fire would finally burn out a little bit past 11:30 a.m. App. 1339, ll. 21-23. The car would then cool. App. 1340, ll. 1-4. The car would not have cooled completely by the time it was found at

2:30 p.m. App. 1347, ll. 19-21. Many parts would have still been hot. App. 1348, ll. 1-6. Some parts would even have been still smoky. App. 1348, ll. 4-8. However, none of the witnesses who saw the car between 2:30 and 3 said that it was smoldering or smoking. App. 1348, ll. 9-24. Olson opined that the car that was seen at 9:30 am was not the car that burned in the cemetery. App. 1357, ll. 19-22. In short, Koenig did not see the blue Volvo in this case. App. 1357, l. 23 – App. 1358, l. 2. Olson noted that Matt Bramlett, a witness at Petitioner’s trial, remarked that his dog was barking around 1:30 a.m. App. 1361, ll. 3-7. Olson explained that the condition in which the Volvo was found in the cemetery would be more consistent with the car having been set on fire around 1:30 a.m., when Bramlett’s dog was barking. App. 1362, ll. 14-23.

According to the PCR judge, trial counsel’s failure to call an origin and cause expert amounted to deficient performance was “a closer question.” App. 1772. The PCR judge agreed that “Koenig’s testimony may have been discredited in the jury’s eyes by Olson’s testimony.” App. 1772. Nevertheless, the judge found Petitioner did not suffer any prejudice due to trial counsel’s failure to call an expert witness at his trial. App. 1772-1773. According to the trial judge, if the car were set on fire earlier in the morning, then Petitioner’s phone records would have placed him in Lee County at 7:16 a.m. App. 1773. The judge concluded this was “within the time frame Olson opine[d] the fire was set.” App. 1773. According to the judge, “[c]alling expert witnesses such as Olson and Levitan ‘sounds good on paper,’ but their testimony casts [Petitioner] in an incriminating light as well.” App. 1773. Therefore, the judge concluded trial counsel was not deficient and Petitioner suffered no prejudice. App. 1773.

It is axiomatic that trial counsel has a duty to investigate. See Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147; Wiggins v. Smith, 539 U.S. 510, 533 (2003); Hinton v. Alabama, 571 U.S. 263, 274 (2014); Von Dohlen v. State, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004).

Additionally, trial counsel has a duty to call necessary experts to challenge the state's evidence. See Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007); Reeves v. State, 415 S.C. 366, 376, 782 S.E.2d 747, 752 (Ct. App. 2015).

As an initial matter, had trial counsel presented an arson expert, such as Olson, trial counsel would have obliterated the testimony from the state's key witness, Koenig, that he saw Petitioner in the Volvo at 9:30 a.m. It was impossible for the Volvo to get from Koenig at 9:30 to the cemetery where it was found and burn until it was completely cool by 2:30. Olson's testimony made this clear. Thus, the jury would have been left with only one conclusion – Koenig was mistaken. Discrediting Koenig was necessary to the defense because he was the only witness that tied Petitioner to the deceased after the evening on which the deceased left his family home. Koenig was the key to the state's case. Calling an arson expert to discredit Koenig was a necessary tool in trial counsel's arsenal that should have been used; it was more than a strategy that simply "sound[ed] good on paper." The PCR hearing showed the testimony of such an expert was essential to tie together the testimony from the witnesses who found the car that it was not smoking or smoldering when it was found. Without Olson's expert testimony to explain the duration of a fire and the length of time required to cool, the testimony trial counsel elicited from those witnesses was meaningless.

Furthermore, in the PCR judge's analysis of how the phone records may have hurt Petitioner with the inclusion of an arson expert, the PCR judge failed to consider Olson's testimony that was corroborated by the state's witness, Bramlett, that the fire likely started around 1:30 a.m. While the phone records placed Petitioner in Lee County during the morning, the phone records did not place Petitioner in Lee County around 1:30 a.m. No calls were made or received around 1:30 a.m.; therefore, the records contained no cell site location information.

The PCR judge's conclusion that the records were incriminating when used in conjunction with the arson expert's testimony shows a misapprehension of the evidence presented.

V. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to hearsay from the lead investigator in the case regarding the color of the tag on the car in which the deceased was last seen alive where the color of the tag was crucial to identify the car as the one alleged to have been driven by Petitioner shortly before it was found incinerated.

According to Ransom, the Volvo was light blue and she had owned it for "about a month or two." App. 522, ll. 19-24. Ransom was "not sure" what the vehicle tag number was. App. 522, l. 25 – App. 523, l. 2. She thought she had "regular tags" on the Volvo. App. 523, ll. 3-6. In response to the state's leading question, she indicated there was "an Easy Auto Credit tag" on the Volvo. App. 523, ll. 7-10. She had purchased the car from Easy Auto Credit. App. 523, ll. 11-15. She then qualified her answer and said that the temporary tag "could have been" still on the car. App. 523, ll. 19-24. She thought the temporary tag was red. App. 523, l. 24 – App. 524, l. 1.

Darrell Koenig was the state's star witness. He claimed that on May 22, 2005, he saw two black men in a blue Volvo sedan driving very slowly on the road near his vacant lot. App. 625, ll. 20-25; App. 627, ll. 1-6; App. 627, ll. 11-12. Koenig claimed that "he noticed that on the back [of the Volvo] was a bright yellow license plate with red writing on it, temporary tag." App. 628, ll. 13-15; App. 710, ll. 15-20.

Officer Clarence McMillan told the jurors that after he spoke to Ransom about the blue Volvo, he went to Boyle's Pay Here, Buy Here, which was the place where Ransom purchased the car. App. 680, ll. 2-6. McMillan spoke to James Fields, who confirmed that Ransom

purchased the car there, provided a description of the car, provided the VIN, and “stated ... at the time of purchase it had bright yellow Easy Auto paper tag on it.” App. 680, ll. 2-14.

Trial counsel candidly admitted he did not conduct any investigation of the car dealership. App. 1459, ll. 13-14. Quite simply, trial counsel was not “impressed by the fact that there was a yellow tag.” App. 1460, ll. 5-6. Regarding McMillan’s testimony regarding what the car dealer told him, trial counsel admitted it was “technically hearsay,” but he did not “think it was hurtful to the case because the owner of the vehicle, Ms. Ransom, had testified at trial.” App. 1462, ll. 6-19. He also did not object because it was “information learned by this investigator in the course of an investigation.” App. 1492, ll. 11-13; App. 1496, ll. 2-13.¹

As the PCR judge concluded, McMillan’s testimony of what he was told by Mr. Fields was hearsay. App. 1762. “Other than McMillan’s hearsay testimony, no witness who was familiar with the car was able to describe the car as having a yellow paper tag on the day of the sale of the car or on the day of the killing.” App. 1762. Thus, the PCR judge found trial counsel should have objected and was “technically deficient.” App. 1762-1763.² However, the PCR judge found Petitioner did not suffer prejudice because “[i]f testimony about the color of the tag had never come into evidence, Koenig’s testimony would have been no more or less credible.” App. 1763-1764.

The PCR judge misapprehended the importance of the tag to identify the car. The distinctive yellow tag was significant to Koenig’s identification and significant to connect the car

¹ See State v. King, 422 S.C. 47, 67, 810 S.E.2d 18, 29 (2017) (explaining there is “no special kind of evidence known as ‘investigative hearsay.’”).

² The PCR judge’s remarks regarding trial counsel’s reasoning for not objecting as making “complete sense in the practical world of trial advocacy” where trial counsel testified he did not want the jury to think he was trying to hide anything must be rejected. See Stone v. State, 419 S.C. 370, 387, 798 S.E.2d 561, 570 (2017).

to the deceased. The testimony from Ransom indicated the car in which the deceased left her home was either a regular tag or a red tag. Koenig claimed the car he saw Petitioner driving had a bright yellow tag. Thus, one could conclude that the car Petitioner was driving was not connected to the deceased at all due to the discrepancies in the tag color. However, McMillan “sealed the deal” for the state when he was permitted to testify to hearsay from the car dealer that the car sold to Ransom, based upon the VIN, had a yellow tag on it. Thus, the necessary connection for the state was made.

VI. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to hearsay from Koenig about what his neighbors said had been reported on the news regarding the dead body in the pond and the car of interest.

The lead investigator made clear that Koenig’s testimony was extremely important for the state’s case. When asked for his theory of the case, his very first response was the information received from Koenig. App. 730, ll. 11-18. Specifically, he stated that Koenig “stated that he saw [Ppetitioner] driving the [deceased]’s vehicle on Sunday in the area that the body was located in.” App. 730, ll. 11-18.

Koenig explained that on Monday morning, he and his neighbor, Tom Patterson were talking. App. 634, ll. 12-18. Patterson informed Koenig that “they had found a body in the pond.” App. 634, ll. 19-20. Later that night, “some neighbors” told Koenig “that on the news that they were looking for a blue 1990 Volvo with a temporary tag on it.” App. 634, l. 24 – App. 635, l. 1. Koenig claimed “he immediately knew that that was the car that [he] had seen that day going by.” App. 635, ll. 1-2.³

³ Lori Van Wallendael, an undisputed expert in the psychology of eyewitness identification, explained that Koenig’s memory could have been altered by the information he received from his neighbors. App. 1220, ll. 2-9.

Trial counsel claimed Koenig's testimony was not objectionable hearsay. App. 1472, l. 23 – App. 1473, l. 4. He admitted “Koenig was the one witness that we were most probably most worried about.” App. 1473, ll. 5-6. He opined that there was nothing in the case “outside of Koenig.” App. 1473, ll. 6-8. He realized Koenig's testimony “was very important to the state's case.” App. 1473, ll. 8-10.

The PCR judge found “[i]t [was] clear the statement by the neighbors was hearsay.” App. 1778. Thus, the judge found trial counsel was deficient in failing to object. App. 1778. Nevertheless, the judge found Petitioner failed to establish prejudice. App. 1778. According to the judge “Koenig's credibility could well have been bolstered by this inadmissible evidence,” but that “[a]ny bolstering of Koenig's credibility through hearsay statements of his neighbors was minimal at best and cannot reasonably be considered to have made a difference in the outcome of the trial.” App. 1778.

The importance of Koenig to the state's case cannot be overstated. Every attempt by the state to bolster Koenig's credibility (and missed opportunities by defense counsel to diminish his credibility) harmed Petitioner's case. The state presented an extremely weak circumstantial evidence case against Petitioner. By all accounts, Koenig was the lynchpin in the state's case. Koenig provided the only eyewitness account placing Petitioner in the deceased's car on the morning of the day when the car was found burned and the day prior to the police finding the deceased's body. The state could not prove when or where the deceased died. The only other evidence linking Petitioner to the deceased's death was that he was last seen with the deceased. The rest of the state's case was rumor and innuendo. Trial counsel's failure to object to rank hearsay regarding the police looking for a particular car permitted the state to bolster Koenig's credibility. In light of the importance of Koenig's testimony to the state's case, this error

prejudiced Petitioner. See Smith v. State, 386 S.C. 563, 569-570, 689 S.E.2d 629, 633 (2010) (finding ineffective assistance of counsel for failing to object to improper bolstering).

VII. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments by failing to object to hearsay from the two officers who were present for the identification procedure involving Koenig where their testimony improper bolstered Koenig's identification.

Koenig explained that he contacted law enforcement after learning of their interest in a blue Volvo from his neighbors. App. 634, l. 24 – App. 635, l. 6: On May 26, 2005 at 3:45 p.m., he met with two officers for a photographic line-up. App. 621, ll. 4-13; App. 635, l. 21 – App. 636, l. 3. Koenig identified the photograph in position number three – Petitioner – as the person he saw in the blue Volvo. App. 638, ll. 5-9. Koenig claimed he was “absolutely” certain of the choice he made. App. 639, ll. 3-5. He also indicated that he told the police “how certain” he was about the identification. App. 639, ll. 17-20. Again, upon questioning by the prosecutor, Koenig told the jurors he “was a hundred percent sure” of his identification. App. 640, ll. 2-3. He then said he was “still a hundred percent sure” on the day of trial of his identification. App. 640, ll. 4-6.

When the prosecutor indicated that the police officers would testify that Koenig was “a hundred percent sure” about his identification, defense counsel said, “That’s fine.” App. 584, ll. 14-18. Therefore, it was no surprise to defense counsel when the police officers testified accordingly. The first officer, Wesley Gardner, explained that he and Clarence McMillan met with Darrell Koenig to show him a photo line-up. App. 612, ll. 3-8. Koenig selected the third photo from the line-up – Petitioner. App. 612, ll. 20-21. According to Gardner, the police asked him about his certainty and he said he was a hundred percent sure that was him. App. 613, ll. 11-

14. The second officer who was present for the photograph line-up procedure was Clarence McMillan. App. 712, ll. 20-23. According to McMillan, Koenig selected Petitioner from the line-up. App. 715, ll. 3-13. When the officers asked Koenig how certain he was, “he said he’s a hundred percent sure that that was the person that was driving that vehicle at that time.” App. 715, ll. 14-17.

Trial counsel indicated he did not “think that [Gardner’s testimony] was something [he] could object to.” App. 1482, ll. 1-5. According to trial counsel, “the witnesses were testifying about recollection of Mr. Koenig’s identification.” App. 1482, ll. 5-6.

Lori Van Wallendael, an undisputed expert in the psychology of eyewitness identification explained during the PCR hearing that “jurors are very influenced by the confidence of a witness.” App. 1216, ll. 15-17. She noted that “both Mr. Koenig and the two investigators who gave them the lineup, all stated that he had expressed 100 percent confidence in his identification.” App. 1216, ll. 17-20. This was problematic because “research shows very clearly that confidence and accuracy are very weakly related.” App. 1217, ll. 4-6.

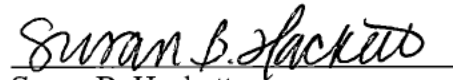
The PCR judge found that Gardner’s and McMillan’s testimony regarding Koenig’s certainty was “hearsay” for which “no exception” applied. App. 1786. “Trial counsel should have objected.” App. 1786. Nevertheless, the judge found Petitioner suffered no prejudice because “Koenig himself testified he was absolutely sure of his identification; he was clearly a confident witness and any bolstering by Gardner and McMillan was of no significance.” App. 1787.

As previously mentioned, Koenig was the state’s star witness and the only witness who provided any type of connection between Petitioner and the deceased after May 21, 2005. By placing Petitioner in the deceased’s car the day the car was found burnt and the day before the

deceased's body was found, Koenig provided additional circumstantial evidence to support the state's case. Part of trial counsel's strategy was to attack Koenig's credibility, particularly as to whether he saw Petitioner in the car. Thus, counsel's failure to object to testimony that improperly bolstered Koenig's identification of Petitioner was prejudicial. Van Wallendael explained that jurors rely heavily upon a witness's certainty when evaluating the witness's credibility. This jury heard from three individuals that Koenig was certain of his identification of Petitioner. The officers were vouching for Koenig's credibility concerning his identification. See State v. Jennings, 394 S.C. 373, 480, 716 S.E.2d 91, 94, 95 (2011). Therefore, the jury would evaluate Koenig's credibility surrounding his identification even stronger.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari on the issues presented.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of March, 2019.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County

George C. James, Circuit Court Judge

NATHANIEL BRADLEY,

PETITIONER

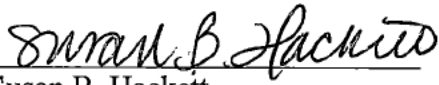
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STATE OF SOUTH CAROLINA,

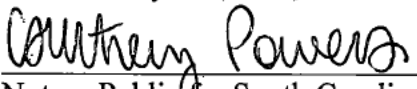
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Megan Harrigan Jameson, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Nathaniel Noel Bradley, #262526, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162, this 12th day of March, 2019.


Susan B. Hackett
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 12th day of March, 2019.

 (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.