STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-207126

PETITION FOR WRIT OF CERTIORARI

BREEN RICHARD STEVENS
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ISSUES PRESENTED

I.

Whether Counsel's performance was constitutionally deficient for failing to properly research and argue a motion to suppress Petitioner's statements to law enforcement due to a violation of his Miranda rights?

II.

Whether the incomplete nature of the PCR transcript prevents the appellate court from conducting meaningful appellate review and causes fundamental unfairness to Petitioner by preventing him from properly challenging factual findings of the PCR court where, due to malfunctions in the court reporter's recording systems, the complete testimony of three of Petitioner's witnesses and half of a fourth witness was not recorded, where reconstruction of the record was not possible, and where South Carolina law requires such challenges to show that no evidence of probative value exists in the record to support the PCR court's findings?

STATEMENT

Petitioner James Randolph Frady was indicted by the Oconee County Grand jury on December 14, 2004, for grand larceny, first degree burglary, second degree arson, possession of a weapon during the commission of a violent crime, and two counts of murder. App. 4, line 16—App. 5, line 3; App. 72, line 19—App. 73, line 6; App. 937—App. 938; App. 940—App. 941; App. 943—App. 944; App. 946—App. 947; App. 949—App. 950; App. 952—App. 953. The charges stemmed from Petitioner's alleged conduct in the killing of his father, James C. Frady, Jr. (Father), and brother, Barry Frady (Brother) by shooting them with a shotgun, and his purported subsequent attempt to leave in a van owned by Mike Harper. His case proceeded to trial from August 28 through 31, 2006, before the Honorable Perry M. Buckner, III, and a jury. Chuck Allen (Counsel) and Elizabeth Waldrep (Co-counsel) represented Petitioner, while Chrissy T. Adams and Mindy Hervey represented the State. App. 1; App. 189.

During the pre-trial motions hearing, Counsel moved to suppress statements Petitioner made to law enforcement on the night he was arrested based upon violation of Miranda v. Arizona.[1] At approximately midnight on September 23, 2004, Deputy Tim Hunnicutt (Hunicutt), of the Oconee County Sheriff's Office, arrived at Petitioner's residence to investigate possible involvement in the theft of a van. App. 8, line 16—App. 11, line 11; App. 13, lines 1-5. Petitioner answered the door and stood on the front porch with Hunnicutt. After Hunnicutt asked Petitioner questions regarding the van, he saw muddy boots inside Petitioner's home. App. 13, line 10—App. 14, line 17. Hunnicutt asked to see the boots, and the following exchange occurred:

> Yeah, I take the boots, he lets me see them, and they—I ask him if I can take a photo of them. First, he said yes and then he changed his mind and *says he wants to see his attorney, Julian Stoudemire.*

[1] 384 U.S. 436, 86 S.Ct. 1602 (1964).

App. 14, lines 20-23 (emphasis added). Hunnicutt ended the conversation and returned Petitioner's property. App. 14, line 24—App. 15, line 4.

Captain Stephen Jenkins (Jenkins) of the Oconee Sheriff's Department, also testified at the pre-trial hearing. Jenkins stated that on the morning of September 23, 2004, he responded to the home of Father, where two decedents were located—Father, Brother. At some point after going into the house of the incident, Jenkins "developed information that [petitioner] may or may not have been involved" in the incident. App. 50, line 9—App. 51, line 3. Petitioner was arrested at approximately 11:30 am on September 23, 2004 in front of his residence. Although the arrest was based upon two unrelated outstanding warrants, Jenkins admitted that "the reason that we were going up there was part of the investigation" of the homicide. App. 51, lines 3-23; App. 56, line 16—App. 57, line 7. With four officers present, Petitioner was ordered to the ground, arrested and handcuffed; prior to being Mirandized, Jenkins asked Petitioner *inter alia* the following:

> I asked him if there was anybody else in the residence. He stated no. Asked him if there was any weapons. [He s]tated that there was a shotgun.

App. 52, line 10—App. 53, line 4. All four officers then entered Petitioner's house and performed a "protective sweep;" no one was inside, and they did not see a shotgun.[2] Jenkins admitted that nobody else was "up there," and there was "really no threat" to the officers. The officers then returned outside and proceeded to read Petitioner his Miranda rights. App. 53, lines 5-23. Petitioner was immediately questioned again regarding the presence of weapons inside the house:

> He was asked once again that, the weapons inside the house, he stated there was a shotgun in there. He further stated that he had bought the shotgun from a friend. And he was asked when was the

[2] "Jenkins testified that "the three other guys that was with me didn't make any reference to it; so no, we were not looking for the shotgun, we were sweeping the house." App. 53, lines 14-17. Thus, Jenkins' statement readily indicates that all four officers entered the house at that time.

> last time he'd seen his family, and he responded it's been two or three months since he's seen his family.
>
> . . .
>
> At that point it pretty much—he wanted an attorney present, so there was no more questions being asked after that.

App. 54, line 18—App. 55, line 4. No contemporaneous objection was made. On cross-examination, Jenkins again confirmed that Petitioner "was asked about the shotgun in the house" by the officers after he was Mirandized. App. 58, lines 12-24.

Counsel argued to the trial court that Petitioner's statements to law enforcement *before* he was Mirandized regarding the presence of weapons in the house were inadmissible because it was an un-Mirandized custodial interrogation. App. 59, line 23—App. 61, line 20. The State argued the statement was admissible because the questions were asked due to officer safety. The State further asserted that it was "a voluntary encounter between the two," and that Petitioner understood his Miranda rights because he "had an encounter with police the night before. At that point *he indicated he didn't want to talk to them, that he wanted an attorney.*" App. 62, line 9—App. 65, line 3 (emphasis added). The trial court agreed the un-Mirandized questions were permissible due to officer and public safety, and Petitioner's statements were admissible. App. 68, line 24—App. 69, line 24; App. 181, line 20—App. 182, line 24.

During trial, Jenkins testified before the jury that he saw the wounds on the two decedents after he went into the house where the shooting occurred. App. 379, lines 1-12. He further stated that it was brought to his attention that Petitioner could possibly be a suspect; as a result, he and other officers went to Petitioner's home. App. 381, line 12—App. 382, line 12. Jenkins then testified regarding his encounter when he arrested Petitioner, including petitioner's statements regarding the presence of a shotgun inside his residence. App. 382, line 16—App. 385, line 3.

The jury found Petitioner guilty on all charges. App. 852, lines 5-22. The trial court imposed the following concurrent sentences: life imprisonment for each count of murder; thirty years for first degree burglary; twenty-five years for second degree arson; five years for grand larceny; and five years for possession of a weapon during the commission of a violent crime. App. 857, line 17—App. 858, line 19.

Petitioner appealed. On November 29, 2007, the final brief was filed on Petitioner's behalf. App. 861—App. 870. The South Carolina Court of Appeals dismissed the appeal on November 12, 2008, in an unpublished per curiam opinion pursuant Anders v. California,[3] and the matter was remitted on December 3, 2008. App. 871—App. 873.

Petitioner filed his application for post-conviction relief (PCR) on April 13, 2009, and amended the PCR application on July 26, 2010. App. 874—App. 888. An evidentiary hearing was held before the Honorable J. Cordell Maddox, Jr. on October 3, 2011. Rodney W. Richey represented Petitioner, while Kaelon E. May represented the State. App. 902.

The PCR evidentiary hearing began at approximately 10:36 a.m., and concluded at approximately 11:32 a.m. App. 904, lines 2-3; App. 912, lines 7-8. However, during the evidentiary hearing, the court reporter's equipment malfunctioned, and the first 44 minutes was not recorded or preserved:

> Due to equipment malfunction, the record of the first 44 minutes of this hearing were not preserved.

App. 904, lines 4-6. Although petitioner presented four witnesses on his behalf in his case-in-chief, namely, Michael Harper, Tammy Harper, Petitioner, and Counsel, the PCR hearing transcript did not include any testimony from Michael Harper, Tammy Harper, or Petitioner, and only contained a small portion of trial Counsel's testimony. As a result, the only testimony preserved from

Petitioner's PCR evidentiary hearing included: (1) the small portion of Counsel's cross-examination and short redirect testimony; (2) Co-counsel, who testified as a State witness; and (3) a short rebuttal by Petitioner.

Of the scant testimony preserved from the PCR evidentiary hearing, Counsel acknowledged his pre-trial argument regarding suppression of Petitioner's un-Mirandized statement. App. 904, line 11—App. 51, line 5. Co-counsel's testimony regarding the defense's motion to suppress Petitioner's statements was limited to a broad reference to her role in conducting research for the case:

> Q. Okay. And did you help—did you conduct any research, and case law research, for the case?
>
> A. Yes, I did. There was—we did some research, and we also—I helped [Counsel] with some motions.

App. 907, lines 15-18.

The PCR court filed its Order of Dismissal on January 19, 2012. App. 914. In the "Summary of Testimony and Evidence Presented at the PCR Evidentiary Hearing" section of the Order, the court indicated that Petitioner asserted that, if Counsel represented him properly, then the outcome of his trial would have been different. App. 919. Notably, there was no mention whatsoever in the court's "Summary of testimony" section from any witness pertaining to any testimony regarding Counsel's failure to properly research and argue the motion to suppress Petitioner's statements to law enforcement based upon violation of Miranda v. Arizona. However, in the "Findings of Fact and Conclusions of Law" section of the Order, the PCR court acknowledged Petitioner's claim regarding this issue. Specifically, the court held as follows:

> With regard to [Petitioner's] allegation that trial counsel failed to research and argue the motion to suppress based on a Miranda

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[3] 386 U.S. 738, 87 S.Ct. 1396 (1967).

> violation, [Petitioner] has failed to meet his burden of proof. [Co-counsel] testified that she conducted legal research regarding the motion presented at the pre-trial hearing. The record reflects counsel presented the motion to suppress and argued the motion at the pre-trial hearing. Counsel presented case law in support of his argument; however the trial court overruled counsel's objections and denied the motion to suppress. The Applicant did not present any evidence or testimony concerning a more adequate argument for the motion to suppress, nor did Applicant present any case law to support his allegation. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance.

App. 927—App. 928. The court found Counsel "articulated valid strategic reasons for his strategy in arguing the motion to suppress," and that petitioner did not show Counsel "was deficient in that choice of tactics." App. 928. Thus, the PCR court held "the necessary legal research was done and the motion properly presented and argued at trial. App. 928. Additionally, the court found Petitioner "failed to show any resulting prejudice." Accordingly, the claim was denied and dismissed, as was his application. App. 928; App. 936.

Petitioner appealed. On July 12, 2012, PCR appellate counsel filed a Motion to Remand for Record Reconstruction regarding the missing portion of the PCR evidentiary hearing to allow for meaningful appellate review. App. 955—App. 958; App. 959—App. 1027. The State filed a return, claiming a reconstruction hearing is unnecessary because "the findings of fact in the Order of Dismissal are specific and complete on every issue." App. 1028—App. 1030. In turn, PCR appellate counsel filed a reply on July 20, 2012, asserting that resort to the PCR court's Order of Dismissal for the facts from the evidentiary hearing necessary to reverse the PCR court's Order of Dismissal overlooks the standard of review; specifically, that "Petitioner will have to show that no 'evidence of probative value in the record exists to support the findings of the PCR court.' See, e.g., Narciso v. State, 397 S.C. 24, 29, 723 S.E.2d 369, 371 (2012)." App. 1031—App. 1033.

On August 10, 2012, the South Carolina Supreme Court granted Petitioner's Motion to Remand for Record Reconstruction. App. 1035 However, on February 28, 2013, the PCR court notified the Supreme Court that "the record could not be reconstructed adequately." App. 1036. Accordingly, on March 19, 2013, the Supreme Court notified PCR appellate counsel that, "[s]ince you are already in possession of all of PCR transcript that will be available, the petition for writ of certiorari and appendix must be served and filed . . . ." App. 1039.

This petition follows.

ARGUMENT

I. Counsel's performance was constitutionally deficient for failing to properly research and argue a motion to suppress Petitioner's statements to law enforcement due to a violation of his Miranda rights.

Counsel provided constitutionally deficient performance in his research and argument regarding the suppression of Petitioner's statements to law enforcement in violation of his Miranda rights. Counsel's only argument during the motion *in limine* to suppress Petitioner's statements regarding the presence of a shotgun inside his home was that he was un-Mirandized and in custody at approximately 11:30 a.m. on September 23, 2004, the first time he was asked by Jenkins if there were any weapons in his house. However, as the State's trial counsel admitted, Petitioner already invoked his right to counsel earlier the same night at approximately 12:00 a.m. when questioned by officer Hunnicutt. As such, Counsel should have asserted that any police initiated custodial interrogation after that point was violative of Petitioner's Fifth and Fourteenth Amendment rights as guaranteed by Miranda and Edwards v. Arizona. Counsel's failure to even mention the applicable constitutional law or case law regarding such a violation indicates a failure to properly investigate the facts and research the issue prior to trial, as well as a subsequent failure to properly argue the issue before the trial court. Furthermore, Counsel failed to contemporaneously object to Jenkins' testimony during trial about Petitioner's statements regarding the shotgun; as such, the issue was unpreserved for appellate review. Accordingly, Counsel's performance was constitutionally deficient.

The applicable standard to the present case is whether Counsel's performance fell below an objective standard of reasonableness, and the performance prejudiced Petitioner to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S.

Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989).

"Without a doubt, '[a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.'" Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007) (quoting Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986)); see also, McKnight, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008) ("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."). Further, counsel has a fundamental duty to prepare for trial. Sneed v. Smith, 670 F.2d 1348, 1353 (4th Cir. 1982) ("To meet this standard, an attorney must at a minimum, 'conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.'") (quoting Coles v. Peyton, 389 F.2d 224, 226 (4th Cir. 1968)).

In the present case, Counsel failure to properly investigate the facts and research the issue regarding violation of Petitioner's Miranda rights prior to trial, as well as a subsequent failure to properly argue and preserve the issue before the trial court. "In order to introduce into evidence a confession arising from custodial interrogation, the State must prove by a preponderance of the evidence that the statement was made freely and voluntarily, and taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1964)." State v. Moses, 390 S.C. 502, 512, 702 S.E.2d 395, 400 (Ct. App. 2010). "[T]he Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent."

Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 1689 (1980); State v. Howard, 296 S.C. 481, 488, 374 S.E.2d 284, 288 (1988).

"Miranda . . . declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." Edwards v. Arizona, 451 U.S. 477, 482, 101 S.Ct. 1880, 1883 (1981); see also U.S. Const. amend. V; State v. Wannamaker, 346 S.C. 495, 499, 552 S.E.2d 284, 286 (2001). Furthermore, "when an accused has invoked the right to have his counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards, 451 U.S. at 484, 101 S.Ct. at 1884-85. Thus, "[o]nce an accused requests counsel, police interrogation must cease unless the accused himself 'initiates further communication, exchanges, or conversations with the police.'" State v. Kennedy, 333 S.C. 426, 431, 510 S.E.2d 714, 716 (1998) (holding defendant's statement, "I think I need a lawyer," constituted an unambiguous invocation of the right to counsel); see also Edwards, 451 U.S. at 484-85, 101 S.Ct. at 1885.

The test of whether a person invoked the right to counsel is "whether the accused's statement 'can reasonably be construed to be an expression of a desire for the assistance of an attorney.'" Kennedy, 333 S.C. at 430, 510 S.E.2d at 715. (quoting McNeil v. Wisconsin, 501 U.S. 171, 178, 111 S.Ct. 2204, 2209 (1991)). As the Kennedy Court explained, no ambiguity or equivocation exists "[i]f the desire for counsel is presented 'sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.'" Kennedy, 333 S.C. at 430, 510 S.E.2d at 715 (quoting Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355 (1994)).

In the case at bar, Counsel apparently researched[4] and argued the issue of a Miranda violation, but failed to invoke and apply the full scope of the law to the facts of the case. Had Counsel properly investigated the facts, he would have realized that Petitioner invoked his right to Counsel at approximately 12:00 a.m. on September 23, 2004, when questioned by Hunnicutt. App. 8, line 16—App. 11, line 11; App. 13, lines 1-5; App. 62, line 9—App. 65, line 3. Further, had Counsel properly researched the full scope of law regarding Miranda, he would have been able to argue that all of Petitioner's statements to Jenkins at approximately 11:30 a.m. on the same day when he was ordered to the ground, handcuffed, questioned by Jenkins regarding inter alia the shotgun, then Mirandized shortly thereafter and questioned by Jenkins again regarding the shotgun, were inadmissible pursuant to Edwards and its progeny. App. 51, lines 3-23; App. 52, line 10—App. 53, line 23; App. 54, line 18—App. 55, line 4; App. 56, line 16—App. 57, line 7. Simply stated, petitioner invoked his right to counsel at 12:00 a.m.; in fact, the State conceded as much in its argument to the trial court: it admitted that Petitioner understood his Miranda rights because he "had an encounter with police the night before. At that point *he indicated he didn't want to talk to them, that he wanted an attorney.*" App. 62, line 9—App. 65, line 3 (emphasis added).

Moreover, there could be no ambiguity regarding Petitioner's invocation of his right to counsel either. Not only did Hunnicutt testify that Petitioner said he wanted to see his attorney:

> Yeah, I take the boots, he lets me see them, and they—I ask him if I can take a photo of them. First, he said yes and then he changed his mind and *says he wants to see his attorney, Julian Stoudemire.*

[4] Co-counsel indicated that she and Counsel conducted research for the case, and that she "helped [Counsel] with some motions." However, she only specifically referenced the motion to change venue, and never mentioned the motion to suppress Petitioner's statements as a Miranda violation. App. 907, line 15—App. 908, line 7.

App. 14, lines 20-23 (emphasis added). Also, this invocation was so unambiguous and unequivocal that Hunnicutt immediately ended the conversation and returned Petitioner's property. App. 14, line 24—App. 15, line 4. Thus, Petitioner's prior invocation of his Fifth and Fourteenth Amendment right to have counsel present during any custodial interrogation, as secured through Miranda and Edwards, were clearly asserted at midnight. Accordingly, had Counsel properly investigated the facts and researched the law, he could have properly and fully asserted Petitioner's rights and suppressed the subsequent statements to Jenkins. In other words, Counsel's failure to properly investigate the facts and research this issue prior to trial, as well as his subsequent failure to properly argue the matter before the trial court, amounted to constitutionally deficient performance.

Additionally, Petitioner was prejudiced by Counsel's deficient performance. A shotgun was identified by the State as the likely instrument that killed Father and Brother. As a result, any evidence linking Petitioner to a shotgun—particularly evidence from his own statements to law enforcement—would be highly detrimental to his defense. Moreover, because petitioner was arrested outside his residence, law enforcement should not have been permitted to search the inside of his home as a search incident to Petitioner's arrest; simply stated, there would be no way possible for petitioner to obtain a firearm from the inside of his home when he was outside, handcuffed, on the ground, and surrounded by at least four armed officers. Also, the shotgun was not found under the plain view doctrine when officers performed a "protective sweep" of Petitioner's home after he was already arrested outside the house, and that there was no threat.[5] See, e.g., State v. Brown, 289 S.C. 581 587-88, 347 S.E.2d 882, 885-86 (1986). Thus, law enforcement was led to the shotgun only by Petitioner's impermissible statements; it should therefore be considered tainted fruit of the poisonous tree. Id. Accordingly, Counsel's constitutionally deficient performance in failing to

[5] App. 53, lines 14-23.

suppress Petitioner's statements regarding the shotgun prejudiced Petitioner because it created "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984).

II. The incomplete nature of the PCR transcript prevents the appellate court from conducting meaningful appellate review and causes fundamental unfairness to Petitioner by preventing him from properly challenging factual findings of the PCR court where, due to malfunctions in the court reporter's recording systems, the complete testimony of three of Petitioner's witnesses and half of a fourth witness was not recorded, where reconstruction of the record was not possible, and where South Carolina law requires such challenges to show that no evidence of probative value exists in the record to support the PCR court's findings.

The drastically incomplete nature PCR transcript prevents Petitioner from receiving meaningful appellate review by the Court, and creates conditions of fundamental unfairness due to the enduring South Carolina law regarding the standard of review in PCR cases. In short, because 44 of the 54 minutes[6] of Petitioner's PCR hearing containing the testimony of Petitioner's own witnesses—ostensibly to establish his claims—was unrecorded and unpreserved through no fault of Petitioner, Petitioner is deprived of his ability to properly challenge the PCR court's order by showing no "evidence of probative value exists in the record to support the findings of the PCR court." See, e.g., Narciso v. State, 397 S.C. 24, 29, 723 S.E.2d 369, 371 (2012). Accordingly, Petitioner respectfully requests that the Order of Dismissal be vacated, and the matter remanded for a new PCR hearing.

A new hearing should be granted here because "the incomplete nature of this transcript prevents the appellate court from conducting a meaningful appellate review." State v. Ladson, 373 S.C. 320, 325, 644 S.E.2d 271, 274 (Ct. App. 2007) (internal quotations omitted); see also Whitehead v. State, 352 S.C. 215, 221, 574 S.E.2d 200, 203 (2002). This is largely due to South Carolina law regarding the standard of review governing PCR: when challenging the findings of the PCR court, Petitioner will have to show that no "evidence of probative value in the record exists to support the findings of the PCR court." See, e.g., Narciso, 397 S.C. at 29, 723 S.E.2d at

[6] The PCR evidentiary hearing began at approximately 10:36 a.m., and concluded at approximately 11:32 a.m. App. 904, lines 2-3; App. 912, lines 7-8.

371. Here, Petitioner can only show the PCR court's factual findings are without evidentiary support in the record on a given issue if the actual record exists for review. Further, it presents a logical impossibility and legal deprivation of fundamental fairness to require Petitioner to rely upon the PCR court's factual findings in its Order of Dismissal when seeking to show that no evidence of probative value in the record exists to support the findings of the PCR court. In other words, Petitioner cannot adequately prove that the PCR court's findings are unsupported by the evidence in the record if no record exists to which Petitioner can compare against the PCR court's Order of Dismissal.

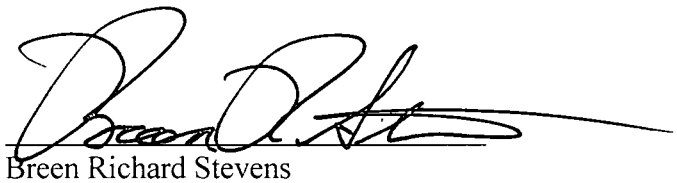
In the present case, all of the testimony from Petitioner's witnesses Michael Harper, Tammy Harper, or Petitioner, was omitted from the record. Further, only a small portion of trial Counsel's testimony was preserved. App. 903—App. 904, line 6. As a result, the only testimony from Petitioner's PCR evidentiary hearing for appellate review included: (1) the small portion of Counsel's cross-examination and short redirect testimony; (2) Co-counsel, who testified as a State witness; and (3) a short rebuttal by Petitioner. App. 904, line 11—App. 912, line 8. The paucity of this record was not caused by Petitioner. In fact, Petitioner diligently sought to remedy the matter through record reconstruction, which this Court subsequently authorized. App. 955—App. 957; App. 1031—App. 1033; App. 1035. However, as the PCR court later acknowledged, "the record could not be reconstructed adequately." App. 1036. Therefore, because the record is missing 44 of the 54 minutes of the PCR hearing, which includes nearly all of the testimony from Petitioner's witnesses to establish his 19 PCR claims, "the incomplete nature of this transcript prevents the appellate court from conducting a meaningful appellate review." Ladson, 373 S.C. at 325, 644 S.E.2d at 274 (internal quotations omitted); see also Whitehead, 352 S.C. at 221, 574 S.E.2d at 203 (2002). Requiring Petitioner to continue forward on such a record under the standard of

review governing PCR results in conditions of fundamental unfairness; it effectively strips him of his ability to fully challenge the PCR court's Order of Dismissal. Accordingly, Petitioner respectfully requests vacation of the PCR court's Order of Dismissal, and remand for a new PCR evidentiary hearing.

CONCLUSION

Pursuant to Issue I, Petitioner respectfully requests that this Court grant his petition for writ of certiorari, reverse the Order of Dismissal, and grant him a new trial. In the alternative, pursuant to Issue II, Petitioner respectfully requests that this Court grant his petition for writ of certiorari, vacate the PCR court's Order of Dismissal, and remand his case for a new PCR hearing.

Respectfully submitted,



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Oconee County
J. Cordell Maddox, Jr., Circuit Court Judge

JAMES RANDOLPH FRADY,

PETITIONER,

V.

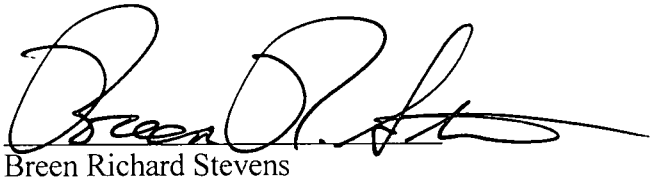
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2012-207126

CERTIFICATE OF SERVICE

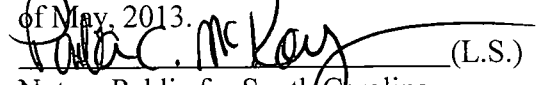
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on John Walt Whitmire, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 16th day of May, 2013.



Breen Richard Stevens
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 16th day of May, 2013.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022 .