THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Courtney Clyburn Pope, Circuit Court Judge
Honorable William P. Keesley, Circuit Court Judge

App. Case No.: 2022-000920

Dexter B. Brown, II, 330278, Petitioner,

vs.

State of South Carolina, Respondent.

AUSTIN PETITION FOR WRIT
OF CERTIORARI

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ISSUES PRESENTED

1. Whether the lower court (Honorable William P. Keesley) erred for failing to find that counsel was deficient and prejudice resulted when counsel failed to fully impeach the trial testimony of Roger Benjamin.

2. Whether the lower court (Honorable William P. Keesley) erred by failing to find that counsel was deficient and prejudice resulted when counsel failed to properly investigate prior to trial and utilize Brandon Parker as a witness at trial.

I. STANDARD OF REVIEW

In a Post Conviction Relief Appeal, great deference is given to the lower court's findings of fact but deference is not given to conclusions of law. *Smalls v. State*, 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on findings of fact. *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

II. STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to order of commitment from the Barnwell County Clerk of Court. During the January 2011 term of the Barnwell County Grand Jury, Petitioner was indicted for two counts of attempted armed murder (2011-GS-06-00010 to 00011) and possession of a weapon during a violent crime (2011-GS-06-00120). App. p. 238. Nicholas R. McCarley, Assistant Public Defender, represented Petitioner, and Lauren Maurice, Assistant Solicitor, prosecuted the case.

On May 11, 2011, Petitioner proceeded to trial in Barnwell County in front of the Honorable Edgar W. Dickson and a jury. App. p. 1. After the jury found Petitioner guilty as indicted, Judge Dickson sentenced Petitioner to thirty years on each count of attempted murder and five years consecutive for the weapons charge.

Following the pronouncement of the sentences, Judge Dickson modified the sentences to be run consecutively due to circumstances that unfolded in the courtroom. App. pp. 219-221. After a hearing on a motion for reconsideration, Judge Dickson

reinstated the original sentence via order filed November 15, 2011. App. pp. 222, 224, 237.

Thereafter, a timely direct appeal was filed and was perfected by Tommy A. Thomas, Esquire. App. pp. 246, 263. On July 30, 2011, the South Carolina Court of Appeals issued an unpublished opinion affirming Petitioner's convictions and sentences. *State v. Dexter B. Brown, II*, Unpub. Op. No. 2014-UP-303 (S.C. Ct. App. filed July 30, 2011). The remittitur was issued on August 15, 2014. App. p. 280.

On October 2, 2014, Petitioner filed a Post Conviction Relief Application (2014-CP-06-0369). App. p. 285. Respondent submitted a Return and Motion for More Definite Statement on January 15, 2015. App. p. 292. Petitioner filed an Amended Application on June 17, 2015, alleging: 1) Counsel failed to object to improper jury instructions; and 2) Counsel failed to move to quash improper indictment. App. p. 290.

On January 25, 2018, an evidentiary hearing was convened in front of the Honorable William P. Keesley. App. p. 298. Petitioner was present and was represented by Thurmond Brooker, Esquire. Respondent was represented by Julie Coleman, Assistant Attorney General. At the start of the hearing, Petitioner, through counsel, orally amended his Application to include the following allegations:

1. Ineffective assistance of counsel for failure to impeach Roger Benjamin by the testimony of Officer Trottie and Alice Thompson.

2. Ineffective assistance of counsel for failure to request a charge on lesser included offenses.

3. Ineffective assistance of counsel for failure to investigate and interview potential witnesses of which "Appellant" had advised his counsel of their existence.

App. p. 301, ln. 16 – p. 302, ln. 5.[1] Following the hearing, Judge Keesley denied relief and issued an Order on June 1, 2018, which was filed on June 4, 2018. App. p. 454. An appeal was not filed.

On June 5, 2019, Petitioner filed a Petition for Habeas Corpus in the United States District Court. App. p. 473. Respondent moved for summary judgment on July 31, 2019. App. p. 488. On January 31, 2020, United States District Judge Richard M. Gergel dismissed the petition without prejudice. App. pp. 556, 561.

On January 28, 2021, Petitioner filed an Application for Post Conviction Relief. App. p. 562. Respondent submitted a Return on May 3, 2021. App. p. 568. On May 13, 2022, a Consent Order Granting Appeal Pursuant to *Austin v. State* was issued by the Honorable Courtney Clyburn Pope, from which this appeal follows. App. p. 578.

III. ARGUMENT

A. Summary of the Law

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland*

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[1] The Order of Dismissal lists the claims made in an Amended Application filed on June 17, 2015 as listed herein. App. p. 457. Thereafter, the Order states: "At the evidentiary hearing, Applicant orally amended his application and informed this Court he was only proceeding on the following allegations: 1) Ineffective assistance of counsel for failure to impeach Roger Benjamin with his statement to Officer Trottie, 2) Ineffective assistance of counsel for failure to request the lesser included offense of Assault and Battery of a High and Aggravated Nature and First Degree Assault and Battery, 3) Ineffective assistance of counsel for failure to investigate witness Brandon Parker and other potential witnesses at trial." App. pp. 457-458. In contrast to the Order, counsel stated that he was moving to "supplement the application and add a couple more issues of ineffective assistance of counsel." App. p. 301, lns. 16-18. Counsel also did not state the additional issues in the exact manner reflected in the Order. App. p. 301, ln. 16 – p. 302, ln. 4. Following the issuance of the Order, counsel did not file a Motion pursuant to Rule 59, SCRCP, or a timely appeal.

Upon review of the evidentiary hearing record, to include testimony, exhibits and argument, it appears that Petitioner, through counsel, only addressed the three issues listed by counsel as supplemental issues at the evidentiary hearing. App. p. 301, ln. 16 - p. 302, ln. 4. Even though the Order incorrectly reflects that counsel stated that Petitioner was only proceeding on the three supplemental issues, the record demonstrates that the Petitioner only developed a record on the three supplemental issues and did not raise any additional issues, such as those in the Amendment Application, at the evidentiary hearing.

v. Washington, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State,* 300 S.C. 238 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry,* 300 S.C. at 117–118.

B. Summary of the Facts Deduced at Trial

On October 15, 2010, Brandon Parker and Roger Benjamin left a store called Harry's in Barnwell County with a guy named "T" in the backseat.[2] Mr. Parker was driving his mother's (Leslie Morrisey's) burgundy Blazer when they noticed a Mercury

[2] Brandon Parker did not testify at trial.

Grand Marquis following them.[3] App. pp. 85-87, 104-105. After attempting to take another route home, a "high-speed chase" ensued. App. p. 86, p. 99, lns. 20-22. After the Blazer turned off into Mr. Benjamin's grandmother's (Alice Thompson's) yard, "gunshots went off." App. p. 86, lns. 9-10, p. 99, lns. 18-19. Mr. Benjamin ran behind the side of his grandmother's house and looked back to see who was shooting. App. p. 86. At trial, Mr. Benjamin identified the shooters as Kendrick Jacobs and Petitioner. App. p. 86, lns. 14-17.

Thereafter, the Grand Marquis went down the street to a store called "Classy Mae's" turned around and stopped in the driveway and began shooting.[4] App. p. 89, 134-135. At trial, Alice Thompson recalled observing the second shooting incident. App. p. 134-135. She described how she identified Petitioner and how he left after she told Petitioner she was calling the police. App. p. 134-135, 144, 149. She identified the 911 call she made and was cross-examined about her assistance by Mr. Benjamin with her identification of the vehicle and Petitioner on the call. App. pp. 138-140, 142-143.

Officer Trottie of the Barnwell County Sheriff's Office was the first officer to arrive following the 911 call. App. pp. 47-48, 52-53. Upon arrival, he located Mr. Parker at Classy Mae's. App. p. 48, lns. 14-18. Mr. Parker told him: "Somebody tried to kill me." App. p. 48, lns. 19-20.

Investigator Chavis of the Barnwell County Sheriff's Office arrived at the scene and was requested by the Sheriff to "work the crime scene." App. pp. 57-58, p. 58, lns. 1-

[3] At trial, Investigator Croft testified that following a traffic stop of Petitioner and his girlfriend (Adrian Ingram) he discovered that Ms. Ingram's father had a 1992 Ford Grand Marquis registered in his name. App. pp. 115-116, 130.

[4] Alice Thompson testified that she saw Petitioner and Mr. Jacobs shooting at the Blazer, and she did not see them pointing at anybody. App. pp. 149-150.

2. He located shell casings from a 9 mm and .380 and several bullets, including one lodged in the headrest of the Blazer. App. pp. 58-66. Investigator Chavis only conducted a GSR test on Mr. Parker since the second GSR kit he had was not suitable for use.[5] App. pp. 72-74. Investigator Chavis testified: "There was no indication of gun being fired out of the victim's vehicle." App. p. 74, lns. 16-17.

As a result of an anonymous tip, Petitioner was located several days later in a residence with Mr. Jacobs and others. App. pp. 119-124. On the Sunday after the incident, law enforcement located Mr. Ingram's car at his home.[6] App. p. 126. Officers gained access to the car, noted vacuum marks, but did not process the car. App. pp. 126-127, 130. Law enforcement executed a search warrant at the residence of Petitioner's father, and no weapons were located during execution of the search warrant or the course of the investigation. App. pp. 127-128.

C. Discussion of the Issues

1. The lower court (Honorable William P. Keesley) erred for failing to find that counsel was deficient and prejudice resulted when counsel failed to fully impeach the trial testimony of Roger Benjamin.

Petitioner submits that the Honorable William P. Keesley erred for failing to find that counsel was deficient and prejudice resulted when counsel failed to fully impeach the trial testimony of Roger Benjamin. As a result, Petitioner submits the lower court must be reversed and relief granted.

At the evidentiary hearing, Mr. McCarley was asked about the report of Officer Trottie (Applicant's Exhibit One), and he agreed that the literal reading of the report was that Mr. Parker and Mr. Benjamin did not know who was shooting at them, but he came

[5] The GSR results for Mr. Parker were negative. App. p. 69, 77-81.
[6] The incident occurred on a Friday. App. p. 126.

to understand it that they did not know who was shooting at the time they were in the vehicle. App. pp. 311, lns. 13-21, 412. When asked about Mr. Benjamin's trial testimony, counsel agreed that Mr. Benjamin testified that he saw Mr. Jacobs and Petitioner shooting. App. pp. 324-324. When asked if the report and testimony were inconsistent, Mr. McCarley explained that he met with Mr. Benjamin at the incident location before trial and Mr. Benjamin told him exactly what he testified to at trial.[7] App. pp. 325-327. Counsel went on to explain:

> So what Deputy Trottie wrote down – and this is probably where I got what I told you earlier. They didn't know who it was while everybody was in cars. Roger Benjamin then turns around later after he's gotten out of the car and identifies him. Alice Thompson having identified him, obviously, from her porch as well.

App. p. 326, lns. 7-12. After agreeing with PCR counsel that the information reported by Officer Trottie, which was obtained from Mr. Benjamin, and Mr. Benjamin's testimony could be interpreted as inconsistent, PCR counsel questioned Mr. McCarley about his reasoning for not specifically asking Mr. Benjamin about the inconsistency. App. p. 329-330. Mr. McCarley explained that he did not ask specifically ask about the inconsistency "based on the fact that I had interviewed the witness and he had explained it to me." App. p. 330, lns. 15-17.

On cross-examination, Mr. McCarley agreed that Petitioner's trial was one of his first trials after being hired at the Public Defender's Office. App. p. 348. He explained that Circuit Public Defender De Grant Gibbons served as his second chair and he

[7] Counsel explained that he requested and was given the opportunity to meet with Mr. Benjamin and Ms. Thompson at the scene with the assigned Solicitor and the investigator from the Solicitor's Office. App. p. 327.

consulted with him on every decision of "any import." App. p. 349, lns. 2-8. Respondent called Mr. Gibbons to the stand, and he confirmed the same. App. pp. 385-386.

As is addressed in the Order of Dismissal, Mr. McCarley testified and the record reflects that counsel cross-examined Mr. Benjamin on his statement to law enforcement and Mr. Benjamin denied writing the statement.[8] App. pp. 92, 328-329, 358-359. After refreshing Mr. Benjamin's memory with the statement, Mr. McCarley went line by line through the statement with Mr. Benjamin and asked him about the content. App. pp. 95-97. In response to counsel's questions about the truthfulness of his statement, Mr. Benjamin agreed that parts of his statement were true and parts were false. App. p. 98. At trial, counsel did not specifically ask Mr. Benjamin about the information contained in Officer Trottie's report that was inconsistent with his trial testimony. App. p. 412.

In response to the lower court's review of the trial transcript and question of whether there was "some mention" that Mr. Benjamin's statement "was one in which he did not identify the shooter," PCR counsel responded that there is "a difference between him saying that you didn't identify who the shooter was in your statement versus you told the law enforcement you didn't know who the shooter was." App. p. 408, ln. 9 – p. 409, ln. 6. It is clear from the record that trial counsel failed to address the information given to Officer Trottie by Mr. Benjamin and reflected in Officer Trottie's report. App. p. 412.

By excusing counsel's failure to introduce the statement as valid trial strategy, the lower court erred by failing to properly consider counsel's admission that he did not ask Ms. Morrissey about writing Mr. Benjamin's statement, Office Trottie about his report or Mr. Benjamin's statement in an attempt to impeach the credibility of Mr. Benjamin's trial

[8] As is referenced in the statement, Mr. Benjamin explained that the statement was written by Leslie Morrisey. App. p. 92.

testimony, or Mr. Benjamin about the information in Officer Trottie's report.[9] At the evidentiary hearing, Mr. McCarley admitted that he did not cross-examine or recall Officer Trottie or Leslie Morrissey on the subject of Mr. Benjamin's written statement or the report. App. p. 340, 342, 371, 412. As the record reflects, counsel failed to impeach Mr. Benjamin or utilize cross-examination of Officer Trottie or Ms. Morrisey to address the apparent inconsistency between the report, statement and Mr. Benjamin's trial testimony. App. pp. 53, 106-107. Therefore, counsel was not only deficient in how he allowed his understanding of the reason for the inconsistency to control his cross-examination of Mr. Benjamin, but he was also deficient for his failure to address the matter with Officer Trottie and Ms. Morrisey.

It is clear from the record that counsel's failure to fully impeach Mr. Benjamin prejudiced Petitioner. *See Dawkins v. State*, 346 S.C. 151, 156, 551 S.E.2d 260, 262 (2001) ("To show prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." (*citing Brown v. State*, 340 S.C. 590, 593, 533 S.E.2d 308, 309–10 (2000)). When discussing his reasoning for not requesting the lesser-included offenses, counsel explained: "The trial strategy was that Dexter wasn't there, Dexter wasn't the shooter." App. p. 343, lns. 14-15, p. 354, lns. 17-25. In light of this trial strategy, it was highly prejudicial to Petitioner and in no way reasonable trial strategy for counsel to not use all

[9] By way of the Order of Dismissal, the lower court briefly explained that counsel's reasonable trial strategy was to not lose last closing argument. App. p. 465. Petitioner submits that counsel could have further impeached Mr. Benjamin without introducing the statement and without losing last closing argument since Mr. Benjamin, Ms. Morrissey and Officer Trottie were called by the State. *State v. Crowe*, 258 S.C. 258, 188 S.E.2d 379 (1972), *State v. Gellis*, 158 S.C. 471, 155 S.E. 849 (1930), *State v. Mouzon*, 321 S.C. 27, 467 S.E.2d 122 (S.C. Ct. App. 1995) (Holding where the defendant calls no witnesses and offers no evidence in his behalf, his counsel is entitled to have the concluding argument to the jury.).

means available to fully impeach Mr. Benjamin regarding his trial testimony whereby he directly implicated Petitioner as shooting versus his statement written by Leslie Morrissey and report given to Officer Trottie whereby he did not make such an identification. As a result, Petitioner urges this Court to reverse the lower court and grant relief.

2. The lower court (Honorable William P. Keesley) erred by failing to find that counsel was deficient and prejudice resulted when counsel failed to properly investigate prior to trial and utilize Brandon Parker as a witness at trial.

Petitioner submits that the Honorable William P. Keesley erred for failing to find that counsel was deficient and prejudice resulted when counsel failed to properly investigate prior to trial and utilize Brandon Parker as a witness at trial. As a result, Petitioner submits the lower court must be reversed and relief granted.

On October 19, 2017, the deposition of Brandon Parker was taken at Duplin County Detention Center located in Kenansville, North Carolina. Thurmond Brooker, Esquire, was present on behalf of Petitioner, and Respondent was represented by Julie Coleman, Assistant Attorney General. The transcript of the deposition, with accompanying exhibits, was admitted at the evidentiary hearing as Applicant's Exhibit Three. App. p. 318-319, 417.

At the outset of the deposition, Mr. Parker acknowledged that he was aware of the incident that took place on October 15, 2010 and that he was listed as a victim. App. p. 421. After being asked a series of qualifying questions, Mr. Parker provided his recollection of the events that took place. App. pp. 421-425. He recalled picking up a guy from the store that he knew from Allendale County, who he later identified as "T" and on their way back to Martin being chased by a car. App. p. 424, ln. 22 – p. 425, ln. 4, p. 427,

ln. 12 – p. 428, ln. 12. He recalled the guy saying: "I got some problems with the guys. I don't know what they going to do." App. p. 425, lns. 5-7. He explained that he was scared and hit the gas because he did not know who it was or what was going on. App. p. 425, lns. 7-10. He recalled pulling into Roger Benjamin's grandmother's house, hopping out, running for the woods and hearing a "bunch of gunshots." App. p. 425, lns. 12-19.

Thereafter, the following testimony was elicited:

Question: Now, the people that you say that was in the car that was pursuing you all, did you ever see who those individuals were?

Answer: No, I didn't never see who was in the car. Basically, it couldn't have been – nobody could really see who was in the car. They couldn't because the truck that we was in, my mother's truck, it was tinted windows. So ain't no way possible nobody could have seen who was in the car behind us at the time.

App. p. 425, ln. 23 – p. 426, ln. 6.

When asked about the statement given to Officer Trottie, he responded: "I remember somewhat, but I didn't ever give no – I didn't never – he asked me a question, but my mom had wrote a statement instead. I didn't know who – who was really the one that was shooting or whatever." App. p. 426, lns. 12-16. He reviewed the statement and said his mother signed it. Regarding the statement about "T", he explained: "He never said that was Dexter. I remember him saying that looked like Dexter." App. p. 431, lns. 11-16, p. 436, p. 437, lns. 14-16. On cross-examination, he explained that he told his mother what to write in the statement except for the part about "T" yelling Dexter. App. p. 441, lns. 18-24. When asked what was actually said, he responded: "That looked like Dexter and them. I don't remember him saying that's Dexter – Dexter. He said, that

looked like Dexter and them." App. p. 441, ln. 25 – p. 442, ln. 1-3. He could not recall reviewing the statement after his mother wrote it. App. p. 442.

After being asked about Officer Trottie's report that included the name Dexter, he tesitifed that he did not tell law enforcement who the shooters were because he never saw who they were. App. p. 428, ln. 13 – p. 429, ln. 9. He recalled being questioned by Officer Trottie with Mr. Benjamin. App. p. 435.

On cross-examination, he explained how he knew Petitioner, as follows: "Just from the neighborhood. I mean, I'm not – we're not on no chill-out basis, but I know him, you know. From the same neighborhood, plus he be in the same areas I be in down there or whatever." App. p. 440, lns. 17-20. He recalled that Mr. Benjamin knew Petitioner from growing up together. App. p. 441. He did not know how "T" knew Petitioner. App. p. 441, lns. 16-17.

Mr. Parker recalled returning home to North Carolina after the incident. App. pp. 443-444. He did not recall hearing from anyone prior to trial on behalf of Petitioner or anything about testifying at Petitioner's trial. App. pp. 444-445.

When asked at the evidentiary hearing about Mr. Parker, counsel recalled discussing Mr. Parker with Petitioner. App. p. 308. After being asked if he recalled Petitioner telling him that he had information that Mr. Parker's recollection may be of assistance to the defense, he testified: "I have no recollection, no notes whatsoever that Mr. Brown ever told me that Brandon Parker would be anything but an adversarial witness. App. p. 308, ln. 22 – p. 309, ln. 5. He explained that his information that Mr. Parker would be hostile to the defense came from sitting in on a meeting with Mr. Parker's mother at the Solicitor's Office and "information from the solicitor's office from

Deputy Trottie." App. p. 309, lns. 13-19. Turning to the report of Officer Trottie, Mr. McCarley agreed that the literal reading of the report was that Mr. Parker and Mr. Benjamin did not know who was shooting at them, but he came to understand it that they did not know who was shooting at the time they were in the vehicle.[10] App. p. 311, lns. 13-21.

After PCR counsel read Brandon Parker's statement into the record, Mr. McCarley agreed that the statement indicated that Parker did not know who the shooter was and that an unknown individual named "T" yelled "Dexter, Dexter."[11] App. pp. 314-315. When asked why he did not utilize Mr. Parker as a witness for the defense, Mr. McCarley explained the process utilized in making the decision as follows:

> In making the decision not to pursue Brandon Parker as a hostile witness for the defense, I would have discussed that, at least, at some juncture with Laura McCann, who was representing the codefendants. The State did not plan on trying them together.
>
> At the point where the trials were bifurcated, I would have discussed that with Grant Gibbons, who was my supervisor and second chair at the trial. I also met with the solicitor while she was, I believe, on the phone with Ms. Morsey, the mother of Mr. Parker, who indicated that he would – I think I would use the word adversarial, not hostile, but he would have been adverse witness to us.
>
> So in making that decision and, also, I learned that the State was going to call Ms. Morsey, I was hopeful that I would be able to somewhat impeach Mr. Parker without him even being present. And I believe that I was able to do that in my cross-examination of Ms. Morsey.

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[10] The report was introduced as Applicant's Exhibit One. App. p. 412. See also the discussion of the same under Issue Two.

[11] Brandon Parker's statement was read into the record, and the transcript reflects it was admitted as Applicant's Exhibit Two. App. pp. 314-316. Upon review of the evidentiary hearing exhibits, which are included in total in the Appendix, it appears Roger Benjamin's statement was marked as Applicant's Exhibit Two and Four. App. pp. 416, 453. Brandon Parker's statement is attached to his deposition as Deposition Exhibit Two. App. p. 452.

App. p. 316, ln. 21 – p. 317, ln. 12. He concluded: "I did not believe he would have been a witness that would have benefited the defense of Dexter Brown." App. p. 317, lns. 14-16, p. 360.

Thereafter, PCR counsel admitted the deposition of Brandon Parker taken on October 19, 2017, and Mr. McCarley acknowledged that he had reviewed it. App. pp. 319-320. He agreed that during the deposition Mr. Parker indicated that his prior statement was correct in that he could not identify the shooter and he testified that he still could not identify the shooter. App. pp. 319-321, 361. He also acknowledged that Mr. Parker testified that he recalled Officer Trottie asking him questions but his mother wrote his statement. App. p. 320. After being questioned about the testimony offered in the deposition, he responded that the testimony of Mr. Parker "could have been" helpful to the defense.[12] App. p. 321, lns. 3-6. He admitted that he did not meet with Mr. Parker, he knew where Mr. Parker was located, and he could have obtained Mr. Parker's testimony for trial. App. pp. 321-322. He further recalled having a conversation with Petitioner about Mr. Parker being able to implicate him in illegal activities. App. p. 322.

When Petitioner took the stand, he recalled discussing Mr. Parker with Mr. McCarley. App. pp. 379-380. He recalled discussing with Mr. McCarley that Mr. Parker could be a beneficial witness. App. p. 380. He further recalled that Mr. McCarley knew where Mr. Parker was located, but Mr. McCarley did not speak to him. App. pp. 308-381.

Following Petitioner's testimony, Respondent called Mr. Gibbons to the stand. App. p. 385. He recalled discussing Mr. Parker with Mr. McCarley prior to trial. App. p. 387. He recalled that Mr. McCarley had spoken with Mr. Parker's mother, and Mr.

[12] On cross-examination, Mr. McCarley responded that the information contained in the deposition would not have benefited Petitioner. App. p. 361, ln. 17- p. 362, ln. 8.

McCarley assessed Mr. Parker as hostile or neutral at best. App. p. 387, lns. 6-10. He further recalled reaching a decision with Mr. McCarley that there would be no benefit in bringing Mr. Parker. App. p. 387, lns. 15-20.

By way of the Order of Dismissal, the lower court excused counsel's failure "to call Brandon Parker as a witness because it was reasonable under the circumstances" and was reasonable trial strategy. App. p. 468. This finding must be reversed as counsel's preparation and strategy for trial regarding Mr. Parker was unreasonable as a result of his failure to make any effort to interview Mr. Parker and/or obtain his potential testimony.

It is well established that a criminal defense attorney has a duty to investigate, but that duty is limited to a reasonable investigation. When evaluating the reasonableness of counsel's conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). Moreover, while the scope of a reasonable investigation depends upon a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case. *Id.*

In *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008), this Court reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. This Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. *Lounds*, 380 S.C. at 460, 670 S.E.2d at 649, *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007).

In *McKnight*, this Court held: "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.'" *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). Here, speaking to Mr. Parker's mother, whom Mr. Parker testified incorrectly wrote his statement, and the Solicitor does not amount to a complete investigation that could be deemed a reasonable trial strategy.

Additionally, Petitioner submits that the lower court erred in finding Mr. Parker's "recantation" to not be credible. App. p. 468. Petitioner submits that Mr. Parker's deposition was not a recantation, but an explanation of information that was not previously in the record due to counsel's failure to investigate and have someone speak with Mr. Parker prior to trial. Even if the lower court questioned the credibility of the testimony offered by Mr. Parker, it does not excuse counsel from his failure to interview Mr. Parker, obtain the information and properly assess with Petitioner whether Mr. Parker's testimony could be helpful to the defense and raise a reasonable doubt with the jury.

After three hours of deliberation, the jury sent out the following question: "What do we do if the vote is not unanimous?" App. p. 207, lns. 5-10. In discussion with the attorneys, the trial court decided he would bring the jury back out and tell them "it's got to be unanimous." App. p. 207, lns. 15-17. After further discussion, it was agreed that the trial court would simply write back on the jury note "the verdict of the jury must be unanimous." App. p. 208, ln. 25- p. 209, ln. 10. Notably, the lower court failed to address

the jury's struggle to reach a verdict when dismissing the impact of counsel's failure to utilize Mr. Parker in his finding regarding prejudice due to the testimony of Ms. Thompson. App. p. 469.

Clearly, the jury was not as convinced as the lower court was by the strength of the case against Petitioner. Petitioner submits that counsel's failure to properly investigate and obtain Mr. Parker's testimony directly affected the outcome of trial. Thus, the lower court must be reversed as Petitioner has demonstrated both deficiency and prejudice.

IV. CONCLUSION

Based upon the arguments and record before this Court, Petitioner would respectfully ask that this Court grant certiorari, allow briefing of the issues addressed herein, and/or reverse the denial of post conviction relief by the Honorable William P. Keesley.

Respectfully submitted,

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October 7, 2022