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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

On Petition for Writ of Certiorari
Appeal from Spartanburg County
The Honorable Daniel D. Hall, Post-Conviction Relief Court Judge
Appellate Case No. 2022-001341

DEVEN MICHAEL FORD (AKA DEVON MICHAEL FORD) #312731,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF ISSUES PRESENTED

I. The record amply supports Judge Hall's finding that Petitioner's purported "newly discovered evidence" consisting of a 2020 statement from the surviving victim of Petitioner's crimes in which he recanted his 2004 identification of Petitioner as the shooter, even if the recantation was credible, could have been discovered before 2020.

II. The record amply supports Judge Hall's findings and conclusions regarding the credibility of the witnesses and evidence presented at the hearing, and the sufficiency of the evidence Petitioner offered in support of his "newly discovered evidence" claim.

STATEMENT OF THE CASE

Conviction & Direct Appeal

In August 2005, the Spartanburg County Grand Jury indicted Petitioner Deven Michael Ford (aka Devon Michael Ford) for murder and assault and battery with intent to kill, arising from the December 7, 2004, shootings of Ikethia Davis (Davis), who died on December 8, 2004, and Jonathan Martin (Martin). Davis identified Petitioner as the shooter in a dying declaration. In a statement to police on December 8, 2004, Martin also identified Petitioner as the shooter.

Michael Bartosh represented Petitioner, and Assistant Solicitor Robert Coler prosecuted the case. On December 5, 2005, Petitioner entered an Alford[1] guilty plea to both charges before the Honorable Doyet A. Early, III. The State's only recommendation was that the sentences run concurrently. Judge Early sentenced Petitioner to concurrent terms of thirty-seven years' imprisonment for murder and twenty years' imprisonment for assault and battery with intent to kill.

Petitioner filed a timely appeal. Robert M. Dudek, Esquire, filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal and granted counsel's motion to be relieved by unpublished opinion. State v. Ford, 2007-UP-365 (S.C. Ct. App. filed Sept. 17, 2007). The Remittitur was issued on October 3, 2007.

First Post-Conviction Relief Action

Petitioner filed his first post-conviction relief (PCR) application on January 24, 2008, amended July 30, 2008 and August 22, 2008, in which he alleged ineffective assistance of counsel, conflict of interest and involuntary guilty plea, and the State filed a Return on or about April 9,

[1]North Carolina v. Alford, 400 U.S. 25 (1970).

2008. After an evidentiary hearing, the Honorable Roger L. Couch issued an Order of Dismissal denying the relief and dismissing the PCR application with prejudice.

Petitioner filed a motion to amend or alter, dated January 4, 2010. On March 18, 2010, Judge Couch issued an Amended Order of Dismissal.

Petitioner filed a petition for writ of certiorari in the Supreme Court of South Carolina, which the Supreme Court denied by written Order filed on November 30, 2011. The Supreme Court issued the Remittitur on December 19, 2011.

Habeas Corpus Action

Petitioner filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. §2254 on August 14, 2012, alleging ineffective assistance of counsel in failing to advise Petitioner of an exculpatory ballistics test prior to entry of Petitioner's guilty plea, and violation of due process by the State's failure to disclose the ballistics report prior to the Petitioner's guilty plea. The State filed its Return and Motion for Summary Judgment on or around November 8, 2012.

On April 23, 2013, Magistrate Judge Jacquelyn D. Austin issued the Report and Recommendation that the State's summary judgment motion be granted and Petitioner's petition be denied. Ford v. McCall, 8:12-cv-02266-GRA-JDA (D.S.C. filed Apr. 23, 2013). Petitioner's objection to the Report and Recommendation was filed on May 13, 2013. On August 14, 2013, the district court adopted the Magistrate's Report and Recommendation to grant the State's Motion for Summary Judgement and dismissed the petition. Ford v. McCall, 8:12-cv-02266-GRA-JDA (D.S.C. filed Aug. 14, 2013).

Petitioner filed a notice of appeal to the United States Court of Appeals for the Fourth Judicial Circuit, which denied a certificate of appealability and dismissed the appeal by

unpublished order filed March 10, 2014. Petitioner sought certiorari review in the United States Supreme Court, which denied the petition for writ of certiorari on October 6, 2014.

Second Post-Conviction Relief Application

Petitioner filed a second PCR application on April 9, 2020, alleging his guilty pleas and sentences should be vacated based on newly discovered evidence in the form of a January 17, 2020, affidavit from Jonathan Martin stating Petitioner was not the shooter. Petitioner contended he could not have discovered Martin's statement prior to pleading guilty, and the interests of justice required that his pleas and sentences be vacated. The State filed a Motion to Dismiss on October 7, 2020, seeking dismissal on the grounds Petitioner could have discovered the purported newly discovered evidence (Martin's statement) prior to entering his guilty pleas, and Martin's statement was not credible.

At an evidentiary hearing before the Honorable Daniel Dewitt Hall, Circuit Court Judge, on February 10, 2022 (Appendix, pp. 522-585), Judge Hall indicated he was not going to rule on the State's Motion to Dismiss until he looked at everything presented, heard testimony from Martin, and looked at "anything else [PCR counsel] may have." (Appendix, p. 541). Petitioner then presented Martin, who testified he wrote his 2020 statement because "[o]ver the years, I felt like he ain't, he ain't do it . . . [s]o I felt it was only right to do it." (Appendix, pp. 544-545)

Martin stated he originally identified Petitioner as the shooter because the police "were trying to make me say that he did it" by threatening Martin with drug charges if he did not cooperate, but "I don't - - in my heart, I don't think he - - he didn't do it." (Appendix, p. 545-547). Martin further testified Davis was unconscious after she was shot and "in his opinion" she was not able to make a statement. Even though he was inside "the hot dog stand" when emergency personnel and police were outside with Davis, Martin stated he never saw Davis talking to the

police before she was taken away by ambulance, and in his "opinion" she was not able to make a statement at that time. (Appendix, pp. 547-550).

On cross-examination, Martin acknowledged his affidavit stated the shooting incident involved five people (including Davis and Martin), but testified he could not recall who was really there. He stated it was dark and the shooting happened so fast he could not see anything, but he knew Petitioner was not the shooter. When pressed, Martin stated "I just don't believe he, he, he could of, he, he could of do nothing like that," and his reason for making the 2020 statement was he just did not believe Petitioner could be the shooter even though it was dark and he did not see who actually did the shooting. He could not remember the names of the police officers who threatened him, and he did not tell anyone at that time that they threatened him. (Appendix, pp. 550-558).

Petitioner testified someone Martin "had on the street" contacted Petitioner's family about Martin's recantation, and his family hired a private investigator to meet with Martin to get the affidavit. He stated he never talked to Martin about making any statement. (Appendix, pp. 561-563).

On cross-examination, Petitioner acknowledged he and Martin were located in the same prison for a period of time, but stated they never communicated with each other. Petitioner then claimed the man that was in the car with Petitioner the night of the shooting (Kim Lilly aka KO) was the shooter. Petitioner acknowledged he told the police he fired shots at Martin's car because Martin tried to shoot him, and he was so angry he planned to find Martin and kill him, but stated he was lying then "trying to protect what was really going on." (Appendix, pp. 564-569, 572).

After Petitioner testified, Judge Hall asked if he had heard "all the evidence that needs to be presented as far as the motion to dismiss and any newly discovered evidence," and stated that

if he denied the motion to dismiss, another hearing would be scheduled. He stated he had all the documents filed in the case, including the attachments to the PCR Petition, noting he received them at 5:53 a.m. the morning of the hearing. The State and PCR counsel agreed that all the necessary evidence had been presented, and Petitioner's counsel stated Judge Hall had "every relevant document that you would need to, to make a decision in this matter." (Appendix, pp. 582-584).

By Order of Dismissal filed May 24, 2022, Judge Hall denied the PCR petition and dismissed the matter with prejudice. The Order set forth a detailed procedural history, as well as a detailed summary of Martin's and Petitioner's testimony at the hearing. The Order also set forth findings of fact and conclusions of law, with specific references to the documents and evidence Judge Hall reviewed and considered. The Order stated Judge Hall had observed Martin and Petitioner during the hearing, had the opportunity to "closely pass upon their credibility," and to weigh the testimony accordingly. (Appendix, pp. 587-598).

Judge Hall found Petitioner's newly discovered evidence allegation was meritless. He expressly found Martin's affidavit and hearing testimony was not credible, in part because he claimed that after fifteen years, he finally realized it was not right Petitioner was serving time for something he did not do. Judge Hall also noted Martin's sudden realization occurred a little over a month after Martin and Petitioner were inmates at the same prison, which may have caused their families to talk about the incident and ultimately led to Martin's affidavit. (Appendix, pp. 595-596)

Judge Hall further found Martin's hearing testimony was unbelievable. In addition to the lengthy delay in time between the crimes and Martin's recantation, Judge Hall found Martin's claims that he only said Petitioner was the shooter because police officers threatened to imprison

Martin for life if he did not identify Petitioner, and that the police wanted Petitioner identified because "everyone on the street said he did it," were "fantastical" and "unbelievable." Judge Hall also noted Martin's failure to state who the shooter was when only four people were present at the scene was "telling." As to Martin's affidavit, Judge Hall found it was "most likely fallacious" and did not constitute grounds to vacate Petitioner's plea. (Appendix, p. 596).

Judge Hall also found Petitioner could have discovered the information contained in Martin's affidavit before entering his guilty plea. According to Martin, he and Davis met Lilly and Petitioner on the side of the road, and their cars were side by side when the shots were fired. Martin testified at the hearing he did not know who the shooter was, but he did know it was not Petitioner, and he was unaware of Davis' dying declaration.

Judge Hall found Martin's statement and testimony indicated Martin was with Petitioner immediately before, during and after the shooting, and Martin's identification of the shooter could have been discovered prior to the plea, particularly given the near life-long relationship between Petitioner and Martin. Further, Petitioner should have known about Martin's identification of him as the shooter before Petitioner entered his guilty plea, and if Martin's identification of the shooter was inaccurate, Petitioner could have pursued the identification issue as a defense at trial rather than pleading guilty, but Petitioner's guilty plea waived his defenses, including the ability to impeach Martin on the stand. (Appendix, pp. 596-597).

Judge Hall concluded that because the affidavit and Martin's testimony were unbelievable, it was insufficient in weight or quality to justify vacating Petitioner's guilty plea. Based on his findings and conclusions, Judge Hall denied the PCR petition and dismissed it with prejudice. (Appendix, pp. 597-598).

Petitioner filed a Motion to Alter or Amend the Order of Dismissal, contending the testimony, evidence and argument presented at the evidentiary hearing "necessitate the (sic) that this Court should have denied Respondent's motion to dismiss." He further contended "the procedure followed by this Court denied [Petitioner] an opportunity to have his PCR claims adjudicated by an independent judicial officer" because "the Court did not provide the State with specific findings for denying [Petitioner's] claims other than delegating the responsibility of drafting an order of dismissal," and "adopted the State's adversarial Order of Dismissal." (Appendix, pp. 599-615). The State served a Return to the Motion on July 7, 2022. (Appendix, pp. 616-621). After a hearing on August 11, 2022, Judge Hall issued an Order Denying Applicant's Motion for Reconsideration on September 15, 2022. (Appendix, pp. 622-641).

Petitioner filed a notice of appeal on September 22, 2022, and filed a Petition for Writ of Certiorari and Appendix on March 20, 2023. The State now submits this Return to the Petition for Writ of Certiorari.

STANDARD OF REVIEW

The PCR court's findings of fact receive great deference during appellate review. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). The appellate court's view must be limited to whether there is "any evidence of probative value" to sustain the PCR court's findings. Buckson v. State, 423 S.C. 313, 815 S.E.2d 436, 440 (2018). The appellate court will "defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them." Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018); *see also* Sellner v. State, 416 S.C. 606, 787 S.E.2d 525, 527 (2016) (appellate court must uphold PCR court's findings of fact if there is evidence in the record to support them). "This Court gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 701 S.E.2d 738, 739 (2010); *see also* Hines v. State, 435 S.C. 476, 868 S.E.2d 387, 392 (Ct. App. 2021) (same). Reversal is warranted only if the PCR court's conclusions are controlled by an error of law or are unsupported by the evidence. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60, 64 (2011).

ARGUMENT

I. The record amply supports Judge Hall's finding that Petitioner's purported "newly discovered evidence" consisting of a 2020 statement from the surviving victim of Petitioner's crimes in which he recanted his 2004 identification of Petitioner as the shooter, even if the recantation was credible, could have been discovered before 2020.

Petitioner asserts that based on Martin's contention he only identified Petitioner because he was threatened by the police, Judge Hall erred in finding Martin's recantation of his 2004 identification of Petitioner could have been discovered prior to Petitioner's 2005 guilty pleas. He further contends Judge Hall failed to cite any evidence attacking Martin's credibility, and any challenge to Martin's credibility "is purely speculative and not based on any evidence presented during the evidentiary hearings." To the contrary, the documents attached to Petitioner's own PCR petition and motion seeking reconsideration, combined with testimony presented at the evidentiary hearing, more than amply support Judge Hall's findings and conclusions regarding Martin's credibility and the weight of his recantation.

When a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appropriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the interest of justice requires vacating the applicant's guilty plea. Jamison v. State, 410 S.C. 456, 765 S.E.2d 123, 130 (2014). An intelligent and voluntary guilty plea generally precludes any subsequent challenge to factual guilt, and the interest of justice will rarely require vacating a knowing and voluntary guilty plea through post-conviction relief on the basis of newly discovered evidence. *Id.*

Guilty pleas must be treated as final in the vast majority of cases, and courts must exercise caution not to undermine the solemn nature of a guilty plea and the finality that generally attaches to it. Garren v. State, 423 S.C. 1, 813 S.E.2d 704, 710 (2018). While a defendant entering an Alford guilty plea cannot or will not admit guilt, an Alford plea is **not** conditional, and it carries the same weight, effect and finality as a regular guilty plea or guilty verdict. State v. Fraley, 437 S.C. 135, 876 S.E.2d 703-705 (Ct. App. 2022); *see also* Zurcher v. Bilton, 379 S.C. 132, 666 S.E.2d 224, 227 (2008) (a defendant may make a calculated choice to accept a beneficial plea arrangement rather than face overwhelming evidence of guilt); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528, 529 (1982) (conditional guilty pleas are not valid in South Carolina).

South Carolina courts are held to a high standard when considering the credibility of recantation testimony. Such testimony is ordinarily unreliable and "should be subjected to the closest scrutiny when offered as ground for a new trial." State v. Wright. 269 S.C. 414, 421, 237 S.E.2d 764, 768 (1977); *cf.* State v. Harris, 391 S.C. 539, 706 S.E.2d 526, 529 (Ct. App. 2011) (noting that the granting of a new trial based on after-discovered evidence is disfavored). "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." Brady v. United States, 397 U.S. 742, 757 (1970).

In this case, Petitioner continually asserts that the mere fact Martin is "the only living victim and eyewitness" to the December 7, 2004, shootings make his affidavit and testimony purporting to exonerate Petitioner of such quality and weight as to require vacating Petitioner's guilty pleas and sentences in the "interest of justice." The record reveals Martin was as much the

only surviving victim of Petitioner's crimes in 2005 as he was in 2020.[2] Indeed, according to the guilty plea transcript (PCR Application Attachment G), Martin was present in the courtroom and acknowledged by the assistant solicitor when Petitioner entered his guilty pleas in 2005. Further, when reciting the facts for the court, the assistant solicitor stated "[Davis] gave a dying declaration of who the shooter was," and "Mr. Martin identified the shooter for the police." (Appendix, pp. 362, 375-376).

Thus, it does not require speculation to conclude Petitioner **knew** before he pled guilty that Martin had identified him as the shooter. The transcript of Petitioner's recorded statement on December 8, 2004, after his arrest, which was before Judge Hall as Attachment E to Petitioner's PCR application, makes that conclusion absolutely clear. During that statement, Petitioner talked about Davis and Martin identifying Petitioner as the shooter, and Petitioner admitted he fired shots into Martin's car, but claimed he acted in self-defense after Martin shot at him.[3] Petitioner further stated he threw his gun in the river (lake) after they left the scene, but he planned to "go get me another gun" and "go hit [Martin]" the next day. (Appendix, pp. 318, 320-326, 333-335, 340-

[2] When Petitioner pled guilty in 2005, there was another living witness to the shootings. Kim Lilly (aka KO) was driving the car Petitioner was in the night of the shootings, and according to the guilty plea transcript, he was going to testify for the State if the case proceeded to trial. (Appendix, pp. 296, 303-304, 311-312, 319-320, 328, 340-341, 376).

[3]Significantly, at the February 10, 2022, hearing, Petitioner testified for the first time that Kim Lilly was the shooter. (Appendix, pp. 567-568). This testimony was directly contrary to Petitioner's statements to police after the shooting. During Petitioner's interview on December 8, 2004, the investigator specifically asked if Lilly had anything to do with the shooting, and Petitioner stated Lilly "didn't even know what the hell was going on the whole time," an assertion he repeated several times. (Appendix, pp. 326-328, 338, 348). In addition, as noted above, the assistant solicitor stated at the plea hearing that Lilly would have testified for the State if the case proceeded to trial. (Appendix, p. 376). The timing of Petitioner's new revelation is particularly suspect because Lilly was deceased by February 10, 2022, and therefore, unavailable to contradict Petitioner's new claim. (Appendix, p. 536).

341). As Judge Hall found, if Martin's identification of Petitioner as the shooter was wrong, Petitioner could have used that as a defense at trial rather than pleading guilty.

The transcript of Petitioner's statement further indicates Davis gave the investigating detective her dying declaration identifying Petitioner as the shooter. Petitioner stated the only reason Davis "went to the police and told the police my name is to keep her [and Martin] out of trouble," "[t]hat is the reason why she sit up there and told you what she told," and "that is why she said the last words to [Detective Richard Gary]." When asked if Davis was "accurate" in saying Petitioner was the shooter, Petitioner replied "**yes she was accurate on that.**" (Appendix, pp. 340-343) (emphasis added).

In his December 8, 2004, statement to police, Martin stated Davis said Petitioner shot them, and she was "praying for both of us" and "crying" as Martin drove away from the scene. He further stated Davis responded to him with "yeah" when he told her they were going to be alright. (Appendix, pp. 313-314).

Thus, prior to pleading guilty, Petitioner knew evidence regarding Davis' dying declaration would be presented during trial, and his defense counsel's assessment regarding the devastating impact of that evidence was entirely accurate. Fifteen years later, Martin's "opinion" that Davis was unable to make any statement to the police has no credence, weight or relevance.[4]

Petitioner argues Judge Hall's findings regarding whether Petitioner could have discovered Martin's statement prior to pleading guilty were error because "Martin testified that he was

[4]According to his own statement and testimony, Martin was inside the convenience store while emergency personnel and police were outside with Davis, so his ability to see or hear any interactions between Davis and the individuals around her was extremely limited at best. Further, Martin is not a medical professional, and he could not possibly know anything about Davis' condition and ability to communicate before she was placed in the ambulance, while in the ambulance, or at the hospital before she died.

threatened by the police to implicate Petitioner and would not have provided a different statement prior to Petitioner's guilty plea." He further contends Martin's recantation "corroborates the exculpatory SLED ballistics report (which Petitioner had no knowledge of prior to his Alford Plea and was not in plea counsel's file after he had died).[5] Petitioner's argument ignores the fact Judge Hall heard Martin's sworn testimony about the purported police intimidation, had the entire documentary history in Petitioner's case, including Martin's 2020 handwritten statement and affidavit, and after considering the entire record, he expressly found Martin's police intimidation allegation was not credible. *See* State v. Mayfield, 235 S.C. 11, 109 S.E.2d 716, 729 (1959) (the credibility of newly discovered evidence and the power to weigh such evidence, including recantation testimony, is a matter for the circuit court judge to whom it is offered, and appellate courts will not disturb that judgment absent error of law or abuse of discretion).

Petitioner's assertion Judge Hall "failed to provide any direct, competent evidence attacking the credibility of Martin's testimony" is based on a misunderstanding of burden and credibility assessment, and patently inaccurate. Contrary to this assertion, Judge Hall gave specific reasons for finding Martin's recantation statement and testimony was not credible, including the fact the recantation came fifteen years after the crime when Martin simply "'realized that it is not

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[5]Petitioner essentially attempts to indirectly re-litigate his ineffective assistance of counsel claim regarding the SLED ballistic report concluding the shell casings and bullet recovered from the crime scene did not match the gun Petitioner produced several days after the shootings, which was decided adversely to Petitioner in his first PCR proceeding. In that proceeding, the assistant solicitor who prosecuted Petitioner's criminal case submitted an affidavit stating he believed Petitioner's defense counsel was aware of the SLED ballistic report based on the solicitor's notes from the file that specifically referenced telling the jury in opening statement an expert would testify the gun Petitioner turned over to police did not match the items from the shooting, and that expert was subpoenaed for the trial. The affidavit further stated the State's theory regarding the ballistic report was that the gun Petitioner produced was not the gun Petitioner used in the shooting, which Petitioner originally told police he threw in a pond. (Appendix, pp. 485-488 [PCR Application Attachment L).

right that Mr. Ford is serving time . . . [b]ecause Mr. Ford did not do anything wrong," and coincidentally came "a little over a month after both Martin and Applicant were both inmates at Ridgeland Correctional Institution." (Appendix, p. 596). Judge Hall also stated Martin's hearing testimony about police intimidation was unbelievable, and Martin's "failure to state who the shooter was when only four people were present, including himself, Applicant and the deceased" was "telling." (Appendix, p. 596).

Petitioner had an opportunity at the hearing on his reconsideration motion to at least proffer any additional evidence he could submit to bolster Martin's credibility but failed to do so. Rather, he essentially read the substance of the pending motion with his conclusory arguments regarding the validity of Judge Hall's Order of Dismissal. (Appendix, pp. 622-639). In short, Judge Hall had all the information Petitioner identified as relevant to the credibility of his newly discovered evidence (Martin's recantation) claims.

Petitioner's categorization of Judge Hall's finding that Martin was not credible as "purely speculative and not based on any evidence presented during the evidentiary hearings" is conclusory at best, and contrary to Judge Hall's express findings of fact based on Martin's testimony and the record. Judge Hall's findings and conclusions regarding whether Petitioner could have discovered the circumstances of Martin's erroneous identification prior to pleading guilty and the credibility of Martin's 2020 recantation as newly discovered evidence are amply supported by the record. Accordingly, this Court should deny the Petition for a Writ of Certiorari on this issue.

II. The record amply supports Judge Hall's findings and conclusions regarding the credibility of the witnesses and evidence presented at the hearing, and the sufficiency of the evidence Petitioner offered in support of his "newly discovered evidence" claim.

Petitioner asserts Judge Hall erred by "denying Petitioner an opportunity to have his claim of newly discovered evidence adjudicated by an independent judicial officer in violation of the separation of powers doctrine because the Court did not provide any specific findings of fact or conclusions of law other than delegating the responsibility to the State and adopting the State's adversarial order of dismissal." He again asserts Judge Hall's findings regarding Martin's credibility were "purely speculative," and "not based on any evidence presented during the evidentiary hearings. These assertions ignore significant evidence in the record before Judge Hall, and are clearly meritless.

Petitioner's "separation of powers" argument is premised solely on his contention Judge Hall "adopted the State's adversarial order of dismissal," which denied him "an opportunity to have his claim of newly discovered evidence adjudicated by an independent judicial officer." Even assuming the State prepared the order Judge Hall ultimately issued, Judge Hall was "an independent judicial officer" who heard the purported newly discovered evidence regarding Martin's recantation and had the entire documentary history of Petitioner's case before issuing the Order of Dismissal.[6] Petitioner's patently conclusory claims do not establish anything different.

Rule 5(b)(3), SCRCP, provides that a "party providing a proposed order, proposed findings of fact or conclusions of law, or proposed judgment or other paper to the court for its consideration in any pending matter shall serve the same on all counsel of record at the same time and by the

[6]Petitioner does not identify which "independent judicial officer" would satisfy his requirement. Indeed, Judge Hall would have been the "independent judicial officer" who presided over any additional hearings on Petitioner's PCR Application.

same means." "The prevailing party often prepares a proposed order for the PCR court." Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584, 589 (2019) (*citing* Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335, 341 (2004) ["[I]t is common practice for judges to ask a party to draft a proposed order for the sake of efficiency."]). "When counsel for either side prepares the proposed order, the order must include findings of fact and conclusions of law as to all issues raised by an applicant, and a copy of the proposed order should be transmitted to opposing counsel," who "should promptly review the proposed order and alert preparing counsel and the PCR court as to any deficiencies in the proposed order." *Id.*; *see also* Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 (1992) (same).

Petitioner does not contend the State failed to comply with the requirement of Rule 5(b)(3) regarding service of a proposed order on Petitioner's counsel, which indicates any proposed order from the State was served on Petitioner's counsel, and Petitioner had an opportunity to review the proposed order, object to any part of the proposed order and/or submit his own proposed order. Having failed to do so, Petitioner's separation of powers argument rings hollow at best.

Significantly, Petitioner does not assert any error of law, or even assert Judge Hall relied on an erroneous fact. Rather, he simply offers conclusory assertions of error while ignoring that Judge Hall properly considered all the documents in the record, the testimony presented at the hearing and the arguments of counsel. (Appendix, pp. 594-595).

The mere fact Petitioner disagrees with Judge Hall's findings and conclusions regarding the strength and veracity of Petitioner's purported newly discovered evidence does not establish Judge Hall was less than an "independent judicial officer," or invalidate the ample evidentiary

support for Judge Hall's findings and conclusions.[7] The Order of Dismissal was filed May 24, 2022, well after the February 10, 2022, PCR hearing, and became Judge Hall's order when he reviewed and adopted it. *See* Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335, 341 (2004) (expressing preference for judge drafted orders in capital cases but affirming when the evidence indicates the judge had sufficient time to review and adopt the party drafted language). Accordingly, the Petition for Writ of Certiorari should be denied on this issue.

[7]Petitioner's repetition of his assertion Martin was credible simply because he "was the only living victim and eyewitness" to the shootings does not make the assertion a basis for reversing Judge Hall's findings and conclusions regarding the credibility of Martin's recantation and hearing testimony. As discussed above, one reason Martin was the only "living" witness when he recanted was because the only other witness, Kim Lilly, was deceased by February 10, 2022, and other than his self-serving testimony that Lilly was "somewhere on the street," Petitioner presented no evidence to the contrary at either the PCR hearing or the Rule 59 hearing.

CONCLUSION

Based on the foregoing, the State submits this Court should deny the Petition for Writ of Certiorari in its entirety.

Respectfully submitted,

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