

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals
Appeal from Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2023-000647

S.C. SUPREME COURT

CHARLES GREEN, JR.,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

SUPPLEMENTAL APPENDIX

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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

CHARLES GREEN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-001204

PETITION FOR WRIT OF CERTIORARI

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SUPP. APP'X 1

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ISSUES PRESENTED

I. Whether the PCR Court erred by limiting Petitioner's testimony and PCR counsel's questioning at a post-conviction relief evidentiary, where the PCR court relied on Rule 11, SCRCP, in limiting the hearing to only a fraction of Petitioner's claims, and where Rule 11, SCRCP, has been held not to apply to PCR proceedings?

II. Whether the PCR court erred in denying relief, where trial counsel failed to introduce a witness statement which would have provided evidence to support a self-defense charge, where counsel also failed to request a continuance to secure the witness' attendance?

III. Whether the PCR court erred in denying Petitioner relief, where appellate counsel failed to raise the issue of Petitioner's right to a speedy trial, where the issue was preserved and meritorious, and where Petitioner was tried almost a year after a date certain was set and approximately thirty-three months after he was arrested?

STATEMENT

On May 19, 2011, Petitioner was indicted by a Beaufort County grand jury on the charges of attempted murder, possession of a weapon during a violent crime, and possession of a firearm by a person convicted of a felony. App. 332 – 337. He proceeded to trial before the Honorable J. Ernest Kinard and a jury on November 18, 2013. App. 29. Thomasine Trasi Campbell represented Petitioner, and Hunter Swanson appeared on behalf of the State. The jury found Petitioner not guilty of attempted murder but found him guilty of the lesser-included charge of assault and battery of a high and aggravated nature. App. 233 l. 8 – App. 234 l. 3. Petitioner was found guilty of the two possession of a weapon charges. Id. Judge Kinard sentenced Petitioner to two years' incarceration on the possession of a person previously convicted of a violent crime charge, five years' incarceration on the possession of a weapon while committing a violent crime charge, and fifteen years for the assault and battery of a high and aggravated nature. App. 243 ll. 3 – 8.

Appellant appealed his convictions and sentences, and the Court of Appeals affirmed. State v. Green, Op. No. 2015-UP-458 (filed on September 16, 2015). App. 346 – 372. Petitioner then filed a timely application for post-conviction relief on October 1, 2015. App. 245 – App. 254. Through the original application and follow-up amendments, Petitioner alleged that trial counsel and appellate counsel provided him with ineffective assistance of counsel for multiple reasons, including claims that trial counsel failed to object and present witnesses, and that appellate counsel failed to raise certain issues. Id.

The State made its Return on or about May 13, 2016. App. 255 – 261. An evidentiary hearing was convened on January 29, 2018 before the Honorable R. Lawton McIntosh. App. 262. James Falk represented Petitioner, and DeShawn Mitchell appeared on behalf of the State.

At the conclusion of the hearing, Judge McIntosh denied relief as to certain allegations and requested follow-up briefing from the parties on an issue regarding a witness' statement. App. 308 1. 4 – App. 311 1. 2. The parties submitted memoranda. App. 338 – 345. An Order of Dismissal was issued on or about June 18, 2018. App. 317 – 331. It contained the PCR court's finding that Petitioner "failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel." App. 324. The PCR court noted its imposition of Rule 11, SCRCR: "[P]rior to testimony being taken, Applicant proceeded on only the following grounds for relief as additional grounds were disallowed by this court over Applicant's objections." Id.

This petition follows.

ARGUMENT

I. The PCR Court erred by limiting Petitioner's testimony and PCR counsel's questioning at a post-conviction relief evidentiary, where the PCR court relied on Rule 11, SCRCF, in limiting the hearing to only a fraction of Petitioner's claims, and where Rule 11, SCRCF, has been held not to apply to PCR proceedings.

At the outset of the evidentiary hearing in Petitioner's matter, the PCR court inquired as to Petitioner's allegations. In response, PCR counsel began articulating Petitioner's claims but was interrupted by the PCR court within seconds. App. 267 l. 12 – App. 269 l. 25. After only being allowed to remark that Petitioner was “alleging that he is prejudiced by the fact - -” the PCR court cited Rule 11, SCRCF:

No. Pursuant to Rule 11 and by other grounds, what are his grounds? And we're going to go forward with that. I'm not going to let him just throw out anything and see if it sticks. I want to hear what the grounds are that we're going to pursue, and not just throw everything out there. Okay, sir?

App. 267 l. 23 – App. 268 l. 3. The court noted PCR counsel's objection but indicated that the hearing would proceed following a ruling that Petitioner could proceed under only one claim, that counsel failed to object to prejudicial hearsay. App. 268 l. 25 – App. 269 l. 25.

In the middle of trial counsel's testimony at the evidentiary hearing, a bench conference took place with the following remarks being offered by the PCR court afterwards:

For the record, we had a bench conference, and counsel is concerned - - counsel for applicant is concerned that the applicant has brought here to these proceedings. I, of my own volition, *sua sponte*, have excluded the grounds that I'll articulate on the record earlier as not being relevant or acknowledged, grounds that we can - - what's the term I'm looking for, I'm drawing a blank. They are - - they're not meritorious grounds, and therefore, I'm excluding them from the testimony.

And I'm going to tell you, Mr. Green, that your attorney is fighting for you, and he is concerned that you're not going to be allowed to testify as to these other

grounds that you're claiming. But I'm not going to let you testify as to that. You're protected on the record that if I make a mistake in saying that they're not meritorious or recognizable grounds, then, somebody will correct me. But I'm not going to let you testify to them, and your attorney is fighting for you on that behalf. Okay?

App. 281 l. 22 – App. 282 l. 16. The PCR court indicated that he felt like that “cover[ed] [Petitioner] sufficiently and [PCR counsel].” App. 282 ll. 18 – 19.

Ten years ago, this Court addressed the applicability of Rule 11, SCRCP in PCR proceedings. Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009). In Hiott, the applicant was convicted following a two-day trial in 2003 and filed his PCR application the same year. Id. at 624, 674 S.E.2d at 491. The PCR judge found Hiott's claims were “absurd” and “patently frivolous” and ruled that many issues raised by Hiott were without merit. Id. at 624, 674 S.E.2d at 492. The PCR judge imposed a \$3,000 sanction on Hiott under Rule 11, SCRCP after finding that both Hiott's testimony and claims were frivolous. Id. The Court of Appeals affirmed the sanction imposition. Hiott v. State, 375 S.C. 354, 652 S.E.2d 436 (Ct. App. 2007). This Court granted certiorari and reversed.

Noting the standard of review, namely that a decision by the PCR judge may be reversed when it is controlled by an error of law, this Court determined that Rule 11, SCRCP, is inapplicable to PCR proceedings. Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494 (2009). This Court analyzed the legislative and judicial systems already in place designed to deter abuse in the PCR process, including the statutory requirements that a petitioner must raise all available grounds in the first PCR application, that an applicant must abide by the one year statute of limitations, and that an application asserting a newly created standard or newly discovered fact must be raised within one year and reached the conclusion that as a matter of public policy,

“Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings.”
Id. at 630, 674 S.E.2d at 630.

The PCR judge in the matter *sub judice* did not allow Petitioner to testify on the stand. This action was more egregious than the situation in Hiott, wherein the PCR judge at least listened to Hiott’s testimony. Here, the PCR judge *sua sponte* ruled that Petitioner could not testify regarding issues which were not deemed to be meritorious, in direct contravention to the law created in Hiott:

Given the public policy considerations involved, including our recognition in Wade that PCR actions are treated differently than traditional civil cases and that sanctions of any kind could chill a petitioner’s pursuit of PCR, as well as the fact that there are already limitations in place that serve to curb the potential abuse of the PCR process, we hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.

Id. at 629, 674 S.E.2d at 494-5.

The facts allegedly giving rise to Petitioner’s arrest stem from an incident at Food Lion on April 6, 2011. App. 129 l. 16 – App. 132 l. 10. Clifton Henry testified that Petitioner and “his wife” drove up to the house where Henry was. According to Henry, Petitioner gave him approximately forty dollars after supposedly bragging about spending \$700. Id. Henry and Channon Preston then walked to Food Lion where Petitioner then purportedly requested his money back. App. 132 ll. 1 – 10. Henry testified that he gave Petitioner the money back and then Petitioner shot him with a shotgun. Id.

Petitioner listed approximately nineteen claims in his subsequent post-conviction relief application amendments. App. 252 – 254. Petitioner was not allowed to testify or otherwise expand on allegations such as counsel’s failure to object to judge’s improper comments in the presence of the jury, impeaching witnesses, failure to object to false statements by the State, failure to object contemporaneously and preserve claims for appellate review, unreasonable and

prejudicial conduct during sentencing, and others. It is difficult to recognize what these claims were in reference to considering the original source of the claims, Petitioner, was not allowed to testify about them.

Of note, on the failure to speak adequately in mitigation, counsel did not offer much following the jury's verdict. The trial judge noted that defense counsel did not tell him "anything" in mitigation and asked Petitioner if he would like to say anything. App. 240 ll. 3 – 7. Petitioner responded that he would miss his family and children. App. 240 ll. 8 – 9. When counsel did finally speak up, she did not mention anything about Petitioner's work history or education background.

Under S.C. Code Ann. 16-3-600(B)(2), the maximum sentence for assault and battery of a high and aggravated nature is twenty years. Petitioner received fifteen; on this single allegation, one of the few upon which enough information can be gleaned to analyze, Petitioner did not appear prepared to speak in mitigation. The trial judge even noted Petitioner "has a problem allocating" and inquired to counsel whether Petitioner was married or employed App. 240 ll. 8 – 9. Neither trial counsel nor Petitioner were prepared for this phase of trial.

The remaining, unaddressed allegations cannot be adequately analyzed without Petitioner's testimony. In other words, although Petitioner bore the burden of proving his claims, that opportunity was taken from him. The PCR court prejudged his allegations and forced an arbitrary and irrelevant limitation on Petitioner's "one bite at the apple." Petitioner did not waive this right; the decision was made for him, without his consent, and against his will. After filing an application for post-conviction relief and two subsequent amendments, the majority of his claims were not considered by the PCR court under the guise of Rule 11 which this Court has held to be irrelevant in PCR proceedings.

II. The PCR court erred in denying relief, where trial counsel failed to introduce a witness statement which would have provided evidence to support a self-defense charge, where counsel also failed to request a continuance to secure the witness' attendance.

Trial counsel testified that Ashley Thomas “was with Charles throughout most of these events” and would have been useful to the defense:

So she would have been someone that I could have argued to the jury was there and saw that Charles was taking fire, and not giving fire, and it was more of a self-defense sort of situation.

App. 277 ll. 18 – 24.

Although Thomas did not testify at trial, she gave a statement to investigators. App. 278 l. 17 – App. 282 l. 19; App. 313. Trial counsel believed she could have gotten the statement into evidence through the investigator. Id.

Counsel characterized the statement as “helpful to the defense” but noted that Thomas was difficult to reach. Id. Counsel admitted that had Thomas testified consistently with the statement, she would have wanted Thomas to testify at trial. App. 278 l. 24 – App. 279 l. 23. Additionally, Thomas’s testimony could have helped secure a self-defense charge. App. 279 l. 24 – App. 280 l. 1.

An attempt to serve Thomas with a subpoena was unsuccessful. Id. However, counsel did not move for a continuance on the day of trial when Thomas did not appear. App. 280 l. 9 – App. 281 l. 1. Even though the Grand Marquis car belonging to Thomas and seen on surveillance video was found at Thomas’s house, counsel did not move for a continuance. App. 295 ll. 12 – 24.

Following the PCR court’s refusal to allow Petitioner to testify fully and “[s]ubject to [PCR counsel’s] prior objection,” Petitioner was allowed to testify briefly. App. 285 l. 24. –

App. 295 l. 24. While on the stand, he explained that Thomas was his girlfriend. App. 286 l. 23 – App. 287 l. 3. She would have testified that Petitioner was robbed, thereby setting the stage for a self-defense charge. App. 287 l. 15 – App. 288 l. 15.

While the court waited for appellate counsel to return to court, the PCR judge questioned counsel for the State regarding Thomas's statement. App. 298 ll. 11 – 19. The State conceded that the statement "would raise the issue of whether or not these alleged victims were trying to rob [Petitioner]." Id. Upon review of the trial transcript, counsel for the State observed that the defendant requested a self-defense charge. App. 182 l. 6 – App. 183 l. 9; App. 299 ll. 20 – 25. After counsel for the State suggested that the statement was not corroborated, the PCR court recited the standard for jury charges, that "if there's any evidence in the record, the trial judge is required, as a matter of law, required to charge what the record would present to the jury." App. 300 ll. 1 – 21.

When counsel for the State noted that trial counsel attempted to subpoena Thomas, the PCR court immediately responded that "there was no request for a continuance." App. 301 ll. 6 – 20. Counsel for the State agreed that "would be the second step in that process." Id. The PCR court requested additional briefing on that issue from the parties. App. 301 ll. 18 – 20.

At the conclusion of the hearing, the PCR judge expressed his concern over trial counsel's failure to call Thomas and the trial judge's refusal to charge on self-defense:

Now, I have to tell you... I am concerned that this failure to call Ms. Thomas and the judge's refusal to charge on self-defense is concerning to me. Number one, I don't think that there is a speedy trial issue here ... because to the extent there is, your applicant has not met his burden of proof. You've got to show the reason for the delay. You've got to show that the delay caused you prejudice by a loss of evidence or witness testimony, et cetera, et cetera. In this case, that's not what was going on. They tried to find Ms. Thomas. The witness himself said she was in the courtroom. The trial counsel said I didn't want to call her because I didn't feel like she was credible.

My concern is that if she would have testified consistently with her written statement to the police that this was a self-defense situation, that matter would've been charged to the jury. There's already a lesser-included finding from the jury of ... assault and battery of a high and aggravated nature[.]

App. 309 ll. 2 – 23. (emphasis added). The PCR judge noted “the jury was leading that direction.” App. 309 l. 24.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that counsel's performance was deficient, and he was prejudiced by counsel's deficient performance. See Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. Cherry v. State, 300 S.C. at 117–18, 386 S.E.2d at 625. In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

Prior to trial, defense counsel proffered Thomas's testimony, specifically that she began screaming “They started it; they shot at him first.” App. 40 l. 20 – App. 41 l. 16. Notably, the State indicated it did not object to those two sentences being elicited. Id. Not only did this testimony come in through the State's investigator, Jeremiah Fraser, but Fraser also spoke about Thomas's statement. App. 141 ll. 3 – 6; App. 163 ll. 6 – 20. As such, defense counsel could have admitted the statement on cross-examination.

Defense counsel was able to inquire whether Thomas's statement matched the accounts of other witnesses on cross-examination. App. 168 ll. 9 – 18. The assistant solicitor, on redirect, questioned Fraser with the specific contents of Thomas's statement:

Q: Investigator Fraser, did you find any evidence throughout this investigation that corroborated Ashley Thomas's statement: They started it, they shot at him first?

A: No. And that's actually why we went back to the house and talked to the grandmother. We looked all through the yard. There was no evidence of any kind of altercation. It was a dirt yard, if I remember right, so you would have seen where an altercation took place.

App. 171 l. 24 – App. 172 l. 6. Fraser then admitted that his reports indicated that the dirt yard had been raked up. App. 172 ll. 10 – 12.

The Order of Dismissal gave deference to defense counsel's supposed trial strategy for not calling Ashley Thomas and also noted that "the statement if true did not rise to a valid self-defense argument for Applicant." App. 326. Counsel's reason for not calling Thomas was allegedly based on the witness's criminal record. However, as admitted by counsel, Thomas's testimony could have opened the door to a self-defense charge. App. 277 l. 18 – App. 280 l. 1. The PCR court analyzed the elements of self-defense in the light most favorable to the State, in opposition to the standard Petitioner would have had to establish at trial. Stating "[i]t is uncontested that Applicant returned to his car, turned, retrieved a shotgun from the front passenger floorboard, exited the vehicle, and opened fire" directly contradicts Thomas's statement which Petitioner is alleging defense counsel should have admitted. Had her statement or live testimony been introduced, testimony favorable to Petitioner would have forced the trial judge to allow a self defense charge. The deficiency upon which Petitioner bases this allegation is the reason why an advantageous narrative did not exist. As noted by the Court of Appeals, "[u]pon request, a defendant is entitled to a jury instruction on self defense *if he has produced*

evidence tending to show the four elements of that defense.” (emphasis in original). State v. Green, Op. No. 2015-UP-458 (filed on September 16, 2015) citing Stone v. State, 294 S.C. 286, 287, 363 S.E.2d 903, 904 (1988). Thomas’s statement unequivocally shows how Petitioner was without fault in asking for his money, believed he was in imminent danger of losing his life when a gun was pointed at him, where the circumstances would have caused a reasonable person to believe the same, and where Petitioner was unable to act before a gun was pointed at him. App. 313.

The PCR court also failed to take into consideration trial counsel’s failure to request a continuance to locate Thomas, the self-described “second step” in the process when a witness is unavailable. App. 301 ll. 13 – 22. Counsel’s failure to move for a continuance has been held to be ineffective assistance. See Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

Petitioner indicated Ashley Thomas was in the lobby of the courthouse at Petitioner’s trial. App. 288 l. 18 – App. 2. Had defense counsel moved for a continuance or even considered Thomas’s testimony vital to establishing a self-defense charge, she could have possibly been located. Counsel could have made a well-supported argument for a continuance, but the belief that her testimony was unimportant likely preempted such a motion. The result was a trial which did not introduce enough evidence to satisfy the low burden of receiving a favorable self-defense charge. Counsel was deficient, and the prejudice in Petitioner’s case manifested itself in the trial judge’s refusal to allow a charge on self-defense, a decision affirmed at the Court of Appeals.

III. The PCR court erred in denying Petitioner relief, where appellate counsel failed to raise the issue of Petitioner's right to a speedy trial, where the issue was preserved and meritorious, and where Petitioner was tried almost a year after a date certain was set and approximately thirty-three months after he was arrested.

At the outset of trial, defense counsel moved to dismiss Petitioner's charges for failure to comply with a previously filed speedy trial motion. App. 41 l. 22 – App. 43 l. 14. Counsel articulated the following rationale for the motion to dismiss:

I will hand up to Your Honor a bond paperwork that was signed by Judge Stephanie McDonald, September 17, 2012. Within that paperwork, Judge McDonald orders the State of South Carolina to dispose of and try this case by a certain date in 2012. And the State failed to do that. And we would take an interpretation of Judge McDonald's order that by the State failing to bring Mr. Green to trial under her order, that the State lost the opportunity to bring him to trial. And that the charges against Mr. Green, per that order, should be dismissed at this time for the State's failure to meet that deadline set by the Circuit Court.

Id. The motion was denied. App. 42 l. 22 – App. 43 l. 12. The same paperwork was before the PCR judge at the evidentiary hearing. App. 292 ll. 8 – 12; App. 314 – App. 316.

Petitioner testified that he was prejudiced by appellate counsel's failure to raise a meritorious issue on appeal, namely the denial of his motion for a speedy trial. App. 289 l. 4 – App. 291 l. 25. Petitioner expanded upon this allegation with great detail, noting that he had a date certain for trial on November 26, 2012. App. 292 l. 15 – App. 294 l. 18. Judge McDonald's Order from September 17, 2012 clearly sets forth "Defendant must be tried by conclusion of November 26, 2012 term of General Sessions Court." App. 315. Almost a year after that date certain, on November 13, 2012, his trial began.

Appellate counsel did not recall specifically the motion to dismiss at the outset of Petitioner's trial. App. 303 ll. 4 – 7. The applicable pages were not included in the record on appeal. App. 303 ll. 11 – 23. Appellate counsel indicated that he would have read and thought

about this issue. App. 304 ll. 13 – 15. Regarding his choice to brief a different issue, counsel noted that it was a strategic decision. App. 305 ll. 5 – 20.

In response, PCR counsel cited Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2181, 33 K.Ed.2d 101 (1972). App. 305 l. 21 – App. 306 l. 6. Appellate counsel agreed that Petitioner had arguable grounds for prejudice. Id. On cross-examination, appellate counsel speculated that this issue was not a meritorious one, after looking at the transcript and “knowing [his] practice of looking up that issue specifically.” App. 307 ll. 10 – 18.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, Petitioner must prove that appellate counsel's performance was deficient, and that he was prejudiced by appellate counsel's deficient performance.

The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. Similarly, the South Carolina Constitution provides that “Any person charged with an offense shall enjoy the right to a speedy and public trial.” S.C. Const. art. I, § 14. A speedy trial means a trial without unreasonable and unnecessary delay. State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012) (quoting Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in

providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. Barker v. Wingo, 407 U.S. 514, 519, 92 S. Ct. 2182, 2186, 33 L. Ed. 2d 101 (1972).

The Supreme Court of the United States, in Barker v. Wingo, introduced a balancing test to allow circuit courts to approach speedy trials on an ad hoc basis. Id. at 530, 92 S.Ct. at 2192. The four factors to be assessed are lengthy of delay, reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Id. None of these factors appear to have been weighed by the trial court in Petitioner's case.

An accused's speedy trial right begins when he is "indicted, arrested, or otherwise officially accused." Langford, 400 S.C. at 442, 735 S.E.2d at 482 (citing United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)). To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. Doggett v. U.S., 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness. See Doggett, 505 U.S. at 651–52, 112 S.Ct. 2686 (1992).

Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied. Barker v. Wingo, *supra*; see also Langford, 400 S.C. at 441, 735 S.E.2d at 482. A speedy trial claim must be "analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing Barker, 407 U.S. at 530, 92 S.Ct. 2182).

The remedy for a speedy trial violation is dismissal of the charges. Langford, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. Id. at 442, 735 S.E.2d at 482 (internal citation omitted). An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. at 442, 735 S.E.2d at 482 (internal citation omitted).

In State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368, (2016), this Court held that the trial court erred in denying the petitioner's speedy trial motion.

Petitioner was arrested on April 7, 2011, the day after the altercation. App. 46 ll. 3 – 11. He was indicted the following month. App. 332 – 337. Judge McDonald's order was issued over a year later, in September 2012. App. 315. It was not until over thirteen months later that Petitioner's trial began. The violation of Judge McDonald's order should have been sufficient to trigger review by the trial court. As articulated by defense counsel, the State failed to try Petitioner by the date certain, and the remedy should have been dismissal of the charges. App. 41 l. 25 – App. 43 l. 1.

A twenty-three month delay was presumptively prejudicial in Langford. In State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), a twenty-eight month delay was enough to prompt a speedy trial analysis. Even if there had not been a date certain, the approximately thirty-three month delay from Petitioner's arrest in April 2011 to trial in November 2013 should have been enough to trigger an analysis by the trial judge.

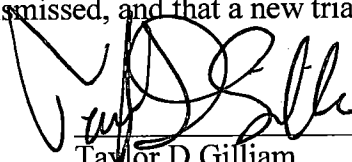
At the evidentiary hearing in Petitioner's case, the State does not suggest that the reasons for delay could be attributed to Petitioner. Nor is this factor, or any other of the speedy factors, discussed in the Order of Dismissal. Petitioner noted that he requested a speedy trial motion be

filed during one of his first meetings with defense counsel. App. 292 l. 19 – App. 294 l. 12. The unnecessary delay resulted in presumptive prejudice especially considering the inability to track down Ashley Thomas, Petitioner’s girlfriend at the time of the incident.

Appellate counsel was ineffective for failing to raise this issue on appeal. It was unquestionably preserved by trial counsel, contained merit as shown above, and there was a reasonable likelihood for success on appeal. Given the potential remedy—dismissal of the charges—there was no downside to raising this issue. The PCR court’s findings of fact and conclusions of law regarding the ineffective assistance of appellate counsel claim did not contain a lengthy analysis, rather a general overview of the concept. Following an analysis of the above factors in Petitioner’s case, the Court of Appeals may have granted relief following the State’s failure to try Petitioner in accordance with the date certain.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the PCR court's decision to deny relief be reversed, that the charges be dismissed, and that a new trial be granted.

A handwritten signature in black ink, appearing to read 'Taylor D Gilliam', is written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

CHARLES GREEN, JR.

PETITIONER

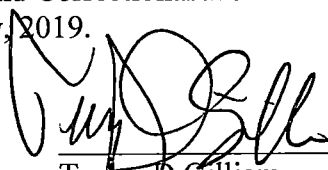
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

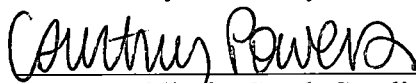
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Ben Limbaugh, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Charles Green, #320693, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 28th day of January, 2019.



Taylor D. Gilliam
Appellate Defender

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SUPP. APP'X 21

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

I.

The post-conviction relief judge did not abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Green's counsel as having arguable merit because he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Green and his counsel and to prevent the introduction of matter that was not relevant to the identified claims.

II.

The post-conviction relief judge correctly determined Green failed to establish his ineffective assistance of trial counsel claim because: (1) trial counsel was not deficient for failing to introduce an inadmissible hearsay statement and deciding not to seek a continuance as a matter of trial strategy; and (2) no prejudice resulted from trial counsel's actions since the hearsay statement did not establish Green was acting in self-defense and nothing was presented to establish the missing witness would have actually testified in a manner that supported a self-defense claim.

III.

The post-conviction relief judge correctly determined Green failed to establish his ineffective assistance of appellate counsel claim because appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained he reviewed the portion of the record dealing with the denial of trial counsel's dismissal motion and consciously elected not to raise that issue after researching the matter and determining it was not likely to be meritorious under the circumstances involved.

STATEMENT OF THE CASE

Procedural History

In April of 2011, Petitioner Charles Green, Jr. was arrested following an investigation into a shooting that occurred a day earlier outside a grocery store in Beaufort, South Carolina. In May of 2011, the Beaufort County Grand Jury indicted Green for attempted murder, possession of a weapon during the commission of a violent crime, and possession of a firearm by a person convicted of a felony. On November 18, 2013, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable J. Ernest Kinard, Jr., circuit court judge,

presiding. At the conclusion of the three-day trial, the jury convicted Green of the lesser-included offense of assault and battery of a high and aggravated nature along with both weapon charges. Following the verdict, the trial judge sentenced Green to an aggregate term of imprisonment of fifteen years. Green then timely initiated an appeal.

On appeal, the Court of Appeals issued an unpublished opinion in which it unanimously affirmed Green's convictions following briefing by counsel. State v. Green, Op. No. 2015-UP-458 (S.C. Ct. App. filed Sept. 16, 2015). Thereafter, on October 27, 2015, remittitur was issued.

Subsequent to the issuance of the remittitur, Green timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing. Green then filed several pro se amendment to his PCR application. On January 29, 2018, an evidentiary hearing was conducted in the Beaufort County Court of Common Pleas with the Honorable R. Lawton McIntosh, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge orally denied several of the allegations raised in the application but requested briefing from the parties on some matters. Thereafter, following briefing, the PCR judge denied and dismissed Green's PCR application through an order filed on June 18, 2018. Green then timely filed a notice of appeal.

Factual History

Summary of Green's Crimes and the Ensuing Investigation

On the afternoon of April 6, 2011, Clifton Henry ("Victim") was brought to the hospital with multiple puncture wounds to his hip, thigh, and arm that were caused by pellets fired from a shotgun. (App'x p. 83; p. 85; pp. 90-91; p. 130; p. 132; p. 135). Because he was suffering from gunshot injuries, law enforcement was notified, and investigators from the Beaufort County Sheriff's Office headed to the hospital to find out what was going on. (App'x pp. 80-82; pp. 95-

96; pp. 108-109; p. 135; pp. 152-153). Once there, Investigator Jeremiah Fraser spoke with Victim, and Victim reported he had just been shot by Green outside a Food Lion grocery store without provocation after Green sought the return of money Green had just given to him and his friend, Channon Preston. (App'x pp. 130-136; pp. 142-144; pp. 153-160). Investigator Fraser then obtained a photographic lineup containing Green's picture, and, when presented with the lineup, Victim immediately identified Green from it as the person who shot him. (App'x pp. 137-139; pp. 155-157). Meanwhile, other investigators interviewed Preston in the parking lot of the hospital, and Preston provided an account of the shooting consistent with Victim's account. (App'x pp. 96-97; pp. 108-109; p. 144; pp. 161-162).

Based on Victim's and Preston's statements, Investigator Fraser obtained an arrest warrant for Green, and officers immediately began searching for him. (App'x p. 162). However, he could not be located that day despite extensive efforts to find him. (App'x p. 162). Beyond the efforts to find Green, several investigators responded to the scene of the shooting, and they found blood droplets on the grounds in front of some propane tanks located outside the grocery store along with some shotgun wadding on the ground in the store's parking lot. (App'x pp. 97-101; p. 104; p. 109). Furthermore, surveillance footage was obtained from a nearby restaurant, and the events depicted in that footage were consistent with what had been reported by Victim and Preston. (App'x p. 110; p. 119; pp. 161-162).

On the following day, Investigator Fraser received a tip Green was back at his residence, and the home was surrounded by officers. (App'x pp. 162-163). Eventually, Green was coaxed out of the home, surrendered, and was placed under arrest. (App'x p. 163). As Green was being taken into custody, his girlfriend, Ashley Thomas, excitedly shouted out Green did not start "it" and "they" shot at him first. (App'x p. 161; p. 163). After that, Investigator Fraser transported

Green to his office, advised him of his rights, and attempted to speak with him about the incident. (App'x pp. 163-164). However, Green reported he did not know anything and declined to make any further statements. (App'x p. 164).

Thereafter, Investigator Fraser interviewed Thomas, and, during the interview, she provided an account of the events that allegedly preceded the shooting. (App'x p. 313). Specifically, Thomas reported she saw Victim and Preston take Green's money "off the ground," Green asked for the money back, and they declined to return it. (App'x p. 313). She claimed Victim then asked Preston to get a gun, Preston retrieved one and pointed it at Green, Victim took the gun from Preston and also pointed it at Green, and Preston took the gun back before firing two shots. (App'x p. 313). After the shots were purportedly fired, Thomas asserted Green walked away "shocked" while Victim and Preston began to walk off with Green's money. (App'x p. 313). At that point, Thomas claimed Green again asked for his money back, Victim and Preston laughed in response, and the two headed towards the grocery store on foot while waving the gun and insisting Green was not getting anything back. (App'x p. 313). Thomas then concluded her account without mentioning anything that occurred at the grocery store, including how or why Victim was shot there. (App'x p. 313).

Ultimately, at the conclusion of the investigation, Green was indicted for attempted murder along with several weapon charges. (App'x pp. 3-4; pp. 332-337). He then elected to proceed forward to trial. (App'x pp. 3-4).

Relevant Details from Green's Trial

Towards the outset of trial, Green's trial counsel indicated Green wanted her to move to dismiss the case at that time. (App'x pp. 41-42). As support for the motion, trial counsel asserted bond paperwork that had been signed by a circuit court judge ordered the State to try

Green's case by a certain date in 2012, and she contended "an interpretation" of that order would be the State lost the ability to try the case by failing to try it by the specified date. (App'x p. 42). Based on that and that alone, trial counsel asserted Green's charges should be dismissed. (App'x p. 42). In rebuttal, the solicitor contended the appropriate remedy for the State's failure to try Green by the date specified in the order was for Green to be released from custody, and she noted he was, in fact, released. (App'x p. 42). Additionally, the solicitor indicated the circuit court judge's order did not say Green's charges should be dismissed if his case was not tried by the specified date, and she further contended she was unaware of any prejudice suffered by Green. (App'x p. 42). Upon considering the matter and reviewing the relevant order, the trial judge denied the motion to dismiss while confirming the circuit court judge's order did not address dismissal as a sanction for non-compliance, and trial counsel responded by indicating she did not have anything further on the matter. (App'x pp. 42-43).

Thereafter, the trial proceeded forward, and Victim—who still had shotgun pellets embedded in his body—testified about the circumstances of the shooting. (App'x pp. 129-151). Specifically, on the date of the incident, Victim asserted he was outside of Preston's home visiting with him when Green approached them and reported he had just spent \$700. (App'x pp. 129-130). In response to the claim, Victim indicated Preston asked Green to share some of his money and Green reacted by throwing two \$20 bills at them and telling them to take it because they were broke. (App'x p. 130; p. 144). After that, Victim stated he and Preston walked over to a nearby grocery store with the money, and, when they arrived, Green pulled up in his girlfriend's car. (App'x p. 132). Victim testified Green then approached them with tears in his eyes, claimed he was only joking about the money, and asked for it to be returned. (App'x p. 132; p. 148). In response, Victim asserted he and Preston returned the money to Green, and

Green returned to his car. (App'x p. 132; p. 145). At that point, Victim stated Green suddenly pulled out a sawed-off shotgun, fired it at them, and told them to "laugh at that" before fleeing from the area in the vehicle. (App'x pp. 132-135). Victim further noted he was unarmed at the time he was shot, did nothing to provoke the shooting, and had not engaged in any altercations with Green prior to it. (App'x pp. 135-136; pp. 140-141).

In addition to that testimony, Investigator Fraser and the other law enforcement officers involved in the response to the shooting recounted the details of their investigation that culminated in Green's arrest. (App'x pp. 95-119; pp. 152-172). Notably, during his testimony, Investigator Fraser confirmed—in response to questions from both the solicitor and trial counsel—Thomas excitedly shouted out Green did not start "it" and "they" shot at him first when Green was being arrested.¹ (App'x p. 163; p. 168). However, Investigator Fraser was not asked by either party to recount the statements Thomas made during her subsequent interview, which would have clearly constituted inadmissible hearsay. (App'x pp. 152-172).

Thereafter, at the conclusion of the State's case, Green elected not to testify on his own behalf, and trial counsel did not call any defense witnesses. (App'x pp. 174; pp. 181-182). The defense then rested, and trial counsel asked the trial judge to instruct the jury on self-defense as part of jury charge. (App'x p. 182; p. 186). However, the trial judge declined to do so based on the absence of any actual evidence of self-defense. (App'x p. 182).

Subsequently, at the conclusion of trial, the jury convicted Green of assault and battery of a high and aggravated nature along with the indicted weapon charges. (App'x pp. 233-234).

¹ Prior to the evidentiary phase of trial, the solicitor advised the trial judge she intended to elicit Thomas's unprompted statements at the time of Green's arrest as excited utterances, and trial counsel asserted she had no objection to those statements—and those statements only—being elicited. (App'x p. 41).

The trial judge then sentenced Green to an aggregate fifteen-year term of imprisonment. (App'x p. 243).

Summary of the Post-Conviction Relief Proceedings

Following an unsuccessful appeal in which Green's appellate counsel challenged the trial judge's decision not to instruct the jury on self-defense, Green sought relief—through his initial PCR application and several subsequent pro se amendments to that application—on a number of grounds, including on the basis his speedy trial rights were violated, trial counsel was ineffective for a variety of different articulated and unarticulated reasons, appellate counsel was ineffective for not raising an unidentified reversible error, prosecutorial misconduct occurred, some unspecified false evidence was presented, his rights pursuant to a wide variety of constitutional amendments were violated, and “miscellaneous.” (App'x pp. 245-249; pp. 252-254). In response, the State filed a return requesting an evidentiary hearing while further noting some of Green's claims were simply too vague to comply with the requirements of the Uniform Post-Conviction Procedures Act. (App'x pp. 256-260).

At the outset of the ensuing hearing, the PCR judge indicated he was not sure what grounds Green was actually asserting and—while referencing Rule 11 of the South Carolina Rules of Civil Procedure *and* “other grounds”—asked PCR counsel sua sponte to definitively identify the precise grounds that were being raised. (App'x pp. 267-268; pp. 281-282). The PCR judge further cautioned he was not going to permit Green to simply “throw out anything and see if it sticks” during the hearing. (App'x pp. 267-268). Based on the PCR judge's directives, PCR counsel ultimately indicated he believed there was a basis to proceed forward on claims of ineffective assistance of trial counsel for failing to object to prejudicial hearsay and ineffective assistance of trial counsel for failing to call Thomas as a witness. (App'x pp. 268-

269; p. 278). PCR counsel further appeared to raise a claim of ineffective assistance of appellate counsel for failing to raise a speedy trial issue on appeal. (App'x pp. 290-291).

As the evidentiary hearing proceeded forward, trial counsel testified about several instances in which alleged hearsay was admitted without objection, including Thomas's statements at the time of Green's arrest. (App'x pp. 273-277). Likewise, trial counsel confirmed she attempted to subpoena Thomas—unsuccessfully—because she believed Thomas's testimony could have potentially been beneficial to Green. (App'x pp. 278-279). However, due to her personal knowledge of Thomas, trial counsel further indicated she was concerned about Thomas's credibility, about whether Thomas would have actually testified in a manner consistent with her earlier written statement, and about whether Thomas's testimony “could have done more harm than good.” (App'x pp. 279-280). In light of those concerns, trial counsel stated she did not seek a continuance due to Thomas's absence. (App'x p. 280). Trial counsel further confirmed she believed Green was better served through the admission of the limited statements from Thomas that were elicited during Investigator Fraser's testimony. (App'x p. 280).

Beyond trial counsel's testimony, Green testified on his own behalf solely as to the issues identified following the PCR judge's demand for a more definite statement of the claims being raised. (App'x pp. 281-282; pp. 287-295). In support of the ineffective assistance of trial counsel claim, Green asserted trial counsel should have subpoenaed Thomas—who, significantly, did not testify during the PCR hearing—because she purportedly would have told the jury “the dudes” robbed him. (App'x p. 278; pp. 287-288). Similarly, while claiming he was being “real true,” Green disclosed—for the first time—he observed Thomas in the lobby of the courthouse during the course of trial when he took a bathroom break. (App'x pp. 288-289). However, he conceded he did not talk with trial counsel about Thomas testifying. (App'x p.

295). Furthermore, Green testified—as support for his claim of a violation of his right to a speedy trial—he had trial counsel file a speedy trial motion in his case in an effort to get out of jail, was not tried by the date set in the bond order subsequently issued by a circuit court judge, and was released from jail as a result. (App’x p. 293).

Following Green’s testimony, appellate counsel testified about his representation of Green on appeal and indicated he elected to raise an issue with the trial judge’s failure to instruct the jury on self-defense after reviewing the record from trial. (App’x pp. 302-304). He further explained he was aware trial counsel had filed a motion to dismiss towards the beginning of Green’s trial based on the State’s failure to comply with a scheduling order. (App’x pp. 302-304). However, he indicated he reviewed that issue, considered it, and elected not to raise it out of a belief it would not have proved to be meritorious on appeal due to the fact he did not think dismissal was warranted under the circumstances. (App’x pp. 304-307).

Thereafter, once all the testimony and evidence had been introduced, the PCR judge denied relief on the claim of ineffective assistance of trial counsel based on the failure to object to hearsay testimony. (App’x p. 308). Furthermore, the PCR judge determined Green failed to meet his burden of proof in regard to his speedy trial claim and specifically found any delays that occurred did not cause the loss of Thomas’s testimony. (App’x p. 309). However, the PCR judge expressed concern over trial counsel’s failure to present Thomas as a witness, and, based on that, he requested briefing from the parties as to whether Green could meet his burden of proof solely by relying on Thomas’s written statement along with as to whether trial counsel was, in fact, ineffective for failing to call Thomas as a witness. (App’x pp. 309-310). He then denied relief on the remaining allegations and took the matter under advisement. (App’x p. 310).

Subsequently, upon considering the matter along with the briefs submitted by the parties, the PCR judge issued an order formally denying Green's PCR application. (App'x pp. 317-331; pp. 338-345). In denying relief, the PCR judge again rejected the hearsay-based claim and specifically determined Green's allegation in regard to trial counsel's failure to present Thomas's testimony also failed due to fact he solely presented a written statement from Thomas that constituted inadmissible hearsay instead of offering her testimony. (App'x pp. 324-326). Additionally, the PCR judge concluded Green failed to prove prejudice in regard to the failure to call Thomas as a witness because trial counsel identified a valid trial strategy for not calling her and also attempted to locate and subpoena her. (App'x pp. 326-327). Moreover, the PCR judge found Thomas's statement—even if true—did not establish Green was acting in self-defense. (App'x pp. 327-329). Finally, the PCR judge found Green failed to establish either deficiency or prejudice in regard to his claim of ineffective assistance of appellate counsel. (App'x pp. 329-330).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the

PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

Furthermore, when reviewing “a PCR court’s resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure,” the appellate court will analyze the matter solely to determine whether an abuse of discretion occurred.

Mangal v. State, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017); Sweet v. State, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (applying an abuse of discretion standard when reviewing a procedural ruling in a post-conviction relief matter). Ultimately, if the PCR judge’s decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I.

The post-conviction relief judge did not abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Green’s counsel as having arguable merit because he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Green and his counsel and to prevent the introduction of matter that was not relevant to the identified claims.

Green contends the PCR judge erred by limiting the testimony presented and questioning conducted during the evidentiary hearing solely to matters related to the grounds identified by PCR counsel as having arguable merit. In support of that contention, Green maintains the PCR judge committed an error of law by relying on Rule 11 of the South Carolina Rules of Civil Procedure to place limitations on the claims permitted to be addressed during the hearing. To the contrary, the PCR judge properly exercised his authority pursuant to the provisions of the Uniform Post-Conviction Procedure Act, our civil procedure rules, and our evidentiary rules to require Green and his PCR counsel to specifically identify the grounds upon which there was a

legitimate basis to proceed forward and to the limit the evidence and testimony subsequently introduced solely to matter relevant to the specified grounds. As a result, the PCR judge's discretionary decision to place proper limits on the matter raised and discussed during the evidentiary hearing did not constitute either an abuse of discretion or error of law. Green's petition for a writ of certiorari should be denied.

When seeking relief, every PCR applicant is entitled to a full and fair opportunity to present claims in a single application. Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Importantly though, pursuant to the requirements of the Uniform Post-Conviction Procedure Act, the applicant must set forth any claims being raised with *specificity*. See S.C. Code Ann. § 17-27-50 (“The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, *specifically set forth the grounds upon which the application is based*, and clearly state the relief desired.” (emphasis added)); see also Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974) (“[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of adequate and effective assistance of counsel is insufficient.”). If the applicant's claims are not set forth with sufficient specificity and clarity, it is incumbent on appointed counsel—when counsel has been appointed—to ensure the application complies with the necessary requirements. See Rule 71.1(d), SCRPC (“Counsel shall insure that all available grounds for relief are included in the application and *shall amend the application if necessary*.” (emphasis added)). Beyond that, the PCR judge is also vested with authority to require the applicant or appointed counsel to amend the application to conform to the requirements of the Uniform Post-Conviction Procedure Act when necessary. See S.C. Code

Ann. § 17-27-70(a) (“At any time prior to entry of judgment the court may, when appropriate, *issue orders for amendment of the application or any pleading or motion*, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading.” (emphasis added)); see also Rule 12(e), SCRPC (permitting a circuit court judge to require a more definite statement when vague or ambiguous pleadings are filed).

In the case sub judice, Green filed a PCR application along with a number of pro se amendments to it raising a wide variety of vague and unspecific claims, including a claim of simply “miscellaneous.” See Coardes, 262 S.C. at 497, 206 S.E.2d at 265 (instructing bare assertions of ineffective assistance are not sufficient to constitute valid PCR claims). Based on the vague and unspecific nature of Green’s claims, the PCR judge was unclear as to what claims were actually being raised and, therefore, sensibly asked PCR counsel to specifically identify the supportable claims that were going to be pursued during the hearing, and his decision to do so was wholly permissible, reasonable, and proper under the circumstances. See S.C. Code Ann. § 17-27-70(a) (authorizing the PCR judge to require a PCR application to be amended when necessary). At that point, PCR counsel specifically identified the claims that could legitimately be raised as he was required to do by both our civil procedure rules and his ethical responsibilities, and the hearing proceeded forward solely on those claims as was proper. See Rule 3.1, RPC, Rule 407, SCACR (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”); Rule 71.1(d), SCRPC (mandating PCR counsel amend a PCR application when necessary); see also Jones v. Barnes, 463 U.S. 745, 751 (1983) (explaining no authority suggests an “indigent defendant has a constitutional right to compel appointed counsel to press

nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points”). Thereafter, during the course of the hearing, Green was permitted to present all the evidence and testimony he wished in support of the claims that had been validly identified to the PCR judge, and the PCR judge solely placed limitations on the questioning and testimony as needed to ensure relevant evidence, which was the only type of evidence that could properly be introduced, alone was admitted. See Rule 402, SCRE (“Evidence which is not relevant is not admissible.”); see also State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) (“*Only* relevant evidence is admissible.” (emphasis added)).

Because the limits placed on the testimony presented and questioning conducted were entirely proper and supported by a multitude of provisions of South Carolina law, the PCR judge neither abused his discretion nor committed an error of law by imposing the reasonable limits imposed.² Cf. Sweet, 255 S.C. at 296, 178 S.E.2d at 658 (finding no abuse of discretion occurred by the circuit court judge’s discretionary decision to decide a post-conviction relief issue without hearing testimony from a witness who was not present when nothing was presented

² Since the PCR judge’s discretionary decision to impose reasonable limitations was authorized by various provisions of South Carolina law, the fact the PCR judge—who did not impose any sanctions on Green or PCR counsel—referenced Rule 11 of the South Carolina Rules of Civil Procedure was irrelevant to the propriety of his ruling even assuming that rule had not been applicable under the circumstances. See Sec. & Exch. Comm’n v. Chenery Corp., 318 U.S. 80, 88 (1943) (“[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.” (citations and internal quotations omitted)); Weir v. Citicorp Nat’l Servs., Inc., 312 S.C. 511, 517, 435 S.E.2d 865, 868 (1993) (“A correct decision of the trial court on the wrong ground will be affirmed on appeal.”); see also Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494-495 (2009) (“[W]e hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.”).

to establish the witness's testimony would have been relevant or material to the issue raised).

Green's petition for a writ of certiorari should be denied.

II.

The post-conviction relief judge correctly determined Green failed to establish his ineffective assistance of trial counsel claim because: (1) trial counsel was not deficient for failing to introduce an inadmissible hearsay statement and deciding not to seek a continuance as a matter of trial strategy; and (2) no prejudice resulted from trial counsel's actions since the hearsay statement did not establish Green was acting in self-defense and nothing was presented to establish the missing witness would have actually testified in a manner that supported a self-defense claim.

Green contends the PCR judge erred by finding trial counsel was not constitutionally ineffective. In support of that contention, Green maintains trial counsel either should have introduced Thomas's out-of-court written statement during trial in order to establish he was acting in self-defense when he shot his victim or sought a continuance when Thomas could not be located. Furthermore, Green maintains he was prejudiced by trial counsel's failure to undertake those actions because Thomas's written statement and testimony purportedly would have entitled him to a self-defense jury instruction. Initially, the PCR judge correctly found trial counsel was not deficient for failing to introduce Thomas's written statement because that out-of-court statement unquestionably constituted inadmissible hearsay. Likewise, the PCR judge correctly determined trial counsel was not deficient for failing to seek a continuance in light of the fact trial counsel, who expressed concerns regarding Thomas's potential testimony, identified a valid trial strategy for not wanting to present Thomas as a witness. Furthermore, the PCR judge correctly concluded Green failed to establish he was prejudiced by trial counsel's actions because he did *not* present Thomas's testimony during the evidentiary hearing and because Thomas's written statement, which did not recount any events that occurred at the scene of the crime, would not have entitled Green to a self-defense jury instruction. As a result, the PCR

judge correctly determined trial counsel was not constitutionally ineffective. Green's petition for a writ of certiorari should be denied.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly, effective assistance of counsel does *not* mean perfect representation. See Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel's assistance is considered to be constitutionally ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel's representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341,

343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). When analyzing counsel's performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Id. Furthermore, the reviewing court will scrutinize counsel's performance in a highly deferential manner, will make every effort "to eliminate the distorting effects of hindsight," and will "evaluate the conduct from counsel's perspective at the time" in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel's performance was deficient, the applicant must demonstrate "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Thus, counsel's performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply "deviated from best practices or most common custom." Harrington v. Richter, 562 U.S. 86, 105 (2011).

Beyond satisfying the burden required by deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691. In order to for that burden to be met, counsel's deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been

different but for counsel's unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." Richter, 562 U.S. at 112 (emphasis added).

In the case at bar, Green failed to meet his burden of establishing trial counsel's performance in regard to Thomas and her written statement fell below the prevailing standard of professional norms. Initially, as to Thomas's written statement, that statement, which was made out-of-court during a law enforcement interview, constituted inadmissible hearsay, and, therefore, trial counsel had no legitimate means by which to introduce it during trial. See Rule 801(c), SCRE (explaining hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); see also State v. Ladner, 373 S.C. 103, 116, 644 S.E.2d 684, 691 (2007) ("The general rule is that hearsay is not admissible."). Likewise, as to trial counsel's decision not to seek a continuance so Thomas could be located, trial counsel explained she elected not to do as a matter of trial strategy based on her knowledge-based belief Thomas's testimony might ultimately prove to be more harmful than helpful to Green, which constituted a valid trial strategy. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where . . . counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel."); cf. Jackson v. State, 329 S.C. 345, 351, 495 S.E.2d 768, 771 (1998) ("[T]he decision not to call Stanford as a witness was trial strategy. Counsel claimed he thought the testimony concerning the corroboration of respondent's statement would be more credible if presented through the testimony of the police officer instead of Stanford. This is a valid reason for

deciding not to call Stanford since Stanford's credibility would have been at issue if he testified."). As a result, Green failed to meet his burden of establishing trial counsel's representation was constitutionally deficient and fell below a level of reasonable competence. See Stokes, 308 S.C. at 548, 419 S.E.2d at 779 (affirming the PCR judge's finding trial counsel was not ineffective for failing to call certain witnesses during trial where trial counsel articulated a valid trial strategy for not calling the witnesses by explaining he chose not to do so based on his belief their testimony would not have been of value to Stokes's case).

Likewise, notwithstanding Green's failure to establish deficiency on the part of trial counsel, Green additionally failed to establish he suffered any actual prejudice as a result of trial counsel's actions. Initially, as to trial counsel's failure to obtain a continuance so Thomas could be located, Green did *not* offer Thomas's testimony during the evidentiary hearing, which meant he failed to establish Thomas's testimony would have benefited him in any way had it actually been introduced. See Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." (emphasis added)); see also Glover v. State, 318 S.C. 496, 498-499, 458 S.E.2d 538, 540 (1995) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." (footnote omitted)). Moreover, as to trial counsel's failure to introduce Thomas's written statement, that statement detailed events allegedly occurring *before* Victim and Preston walked off to the grocery store where the shooting took place and, thus, in no way established Green was acting in self-defense when he subsequently followed the two to that location. See State v. Bixby, 388 S.C. 528, 554, 698 S.E.2d 572, 586

(2010) (“It is an axiomatic principle of law that the defense has not been established if any one element is disproven.”); cf. State v. Patterson, 63 So. 3d 140, 149 (La. Ct. App. 2011) (“At trial, defendant testified that, after the victim arm-robbed him of his money and drugs, the victim walked toward his vehicle. Defendant admitted that, after the victim walked away, he retrieved his gun, ran toward the victim’s car, opened the passenger-side door, and shot the victim. . . . The law does not permit an individual to track down his enemy, shoot him with a pistol, and then claim justification for the homicide because of prior threats.” (footnote, citation, and internal quotations omitted)). Accordingly, just as the PCR judge found, Green failed to satisfy his burden of establishing prejudice. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) (rejecting Underwood’s claim of ineffective of trial counsel for failing to call several witnesses to establish an alibi defense because none of the witnesses testified during the PCR hearing).

Because trial counsel was not deficient for either failing to admit an inadmissible statement or strategically choosing not to seek a continuance and no prejudice resulted from trial counsel’s valid tactical decisions, the PCR judge correctly concluded Green failed to meet his required burden of establishing both deficiency and prejudice, and that ruling was neither unsupported by the evidence appearing in the record nor legally erroneous. See Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (instructing a post-conviction relief judge’s factual finding will be upheld if supported by any evidence and a post-conviction relief’s judge’s decisions will only be reversed where controlled by an error of law). Accordingly, Green’s application for post-conviction relief was properly rejected. See Strickland, 466 U.S. at 700 (“Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim.”). Green’s petition for a writ of certiorari should be denied.

III.

The post-conviction relief judge correctly determined Green failed to establish his ineffective assistance of appellate counsel claim because appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained he reviewed the portion of the record dealing with the denial of trial counsel's dismissal motion and consciously elected not to raise that issue after researching the matter and determining it was not likely to be meritorious under the circumstances involved.

Green contends the PCR judge erred by finding appellate counsel was not constitutionally ineffective. In support of that contention, Green maintains appellate counsel should have raised a constitutional speedy trial issue on appeal that was purportedly preserved and meritorious.³ Significantly though, appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained during the evidentiary hearing he reviewed the record from Green's trial, was aware of and researched the issue related to the dismissal motion made by defense counsel, and consciously elected not to raise that particular issue based on his view it was lacking in merit. Under such circumstances, the PCR judge correctly determined appellate counsel was not constitutionally ineffective for simply choosing as a matter of professional

³ Although Green contends a constitutional speedy trial issue was properly preserved for appellate review, the precise speedy trial argument he is now advancing was never actually presented to or ruled upon by the trial judge and, therefore, was not, in fact, so preserved. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (explaining a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); see also State v. Patterson, 324 S.C. 5, 19, 482 S.E.2d 760, 767 (1997) ("Appellant is limited to the grounds raised at trial."); cf. Gilchrist, 364 S.C. at 178, 612 S.E.2d at 705 ("[A]ppellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review."). Moreover, since the trial judge was not presented with any constitutional speedy trial arguments and did not analyze or rule upon on the matter, the record from Green's trial does not contain the information that would be necessary to effectively respond to his claim of ineffective assistance of appellate counsel on the merits. See State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) ("Because Appellant did not argue these grounds in support of his objection at trial, Appellant's argument is not preserved for review. . . . *If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.*" (emphasis added)); see also State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) (recognizing "delay alone is not dispositive" when analyzing a speedy trial issue).

judgment to raise a different issue in place of the one Green now contends should have been raised on appeal. Green's petition for a writ of certiorari should be denied.

Beyond the right to effective assistance of counsel at trial, a criminal defendant in South Carolina has a right to effective assistance of appellate counsel on direct appeal. Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990); see McMann, 397 U.S. at 771 (“[T]he right to counsel is the right to the effective assistance of counsel.”); see also Evitts v. Lucey, 469 U.S. 387, 393-394 (1985) (“[A] State that afforded a right of appeal to make that appeal more than a ‘meaningless ritual’ by supplying an indigent appellant in a criminal case with an attorney.” (citation omitted)). Importantly though, appellate counsel is *not* required to raise every nonfrivolous issue present in the record in order to provide effective assistance on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004). In fact, appellate counsel may provide the most effective assistance by focusing on a single strong issue instead of raising every conceivable issue that could possibly be raised. See Barnes, 463 U.S. at 751-752 (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.”).

In order to prevail on a claim of ineffective assistance of appellate counsel, a PCR applicant must overcome the strong presumption appellate counsel provided adequate representation by establishing both deficiency and prejudice. Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); see Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (“The burden of proof is on [the applicant] to show that counsel’s performance was deficient as measured by prevailing professional norms, and that [the applicant] was prejudiced by this deficiency.”); see also Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing “the law requires

[a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment”). Significantly, meeting that burden is generally “difficult” for an applicant raising an ineffective assistance of appellate counsel claim. Smith v. Robbins, 528 U.S. 259, 288 (2000).

In Green’s case, appellate counsel explained during the evidentiary hearing he reviewed trial counsel’s dismissal motion and consciously elected to raise an unrelated issue after researching the matter and determining Green was unlikely to prevail on appeal by raising an issue related to the dismissal motion under the circumstances involved. See Thrift, 302 S.C. at 539-540, 397 S.E.2d at 526 (“[A]ppellate counsel is not required to raise every nonfrivolous issue that is presented by the record. . . . The testimony of petitioner’s appellate attorney that she reviewed the requested charge and the charge as given and consciously decided not to brief the issue, clearly supports the PCR judge’s finding that appellate counsel was not ineffective.”). As appellate counsel had no duty to raise every possible nonfrivolous claim on appeal, appellate counsel’s judgment-based decision not to raise the dismissal motion issue was a valid and reasonable strategic one, and it did not constitute deficient representation under the circumstances. See Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985) (“Given that this was a strategic decision on appellate counsel’s part based on what we consider to be reasonable professional judgment, it is not proper for us to second-guess the judgment of appellate counsel so as to impose a duty to raise every colorable claim.”). Accordingly, Green failed to meet his burden of establishing appellate counsel’s representation was constitutionally ineffective, and the PCR judge properly rejected Green’s application for post-conviction relief. See Smith, 528 U.S. at 288 (recognizing “it is difficult to demonstrate that counsel was incompetent” for failing to raise a particular claim on appeal). Green’s petition for a writ of certiorari should be denied.

CONCLUSION

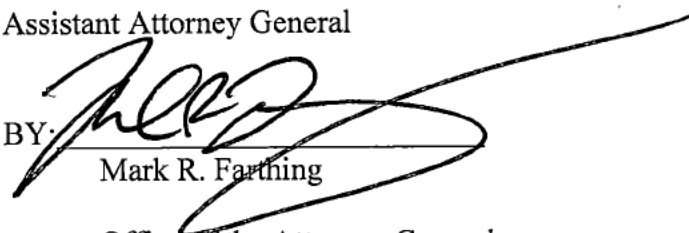
For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

BY:

A large, stylized handwritten signature in black ink, appearing to read 'M. Farthing', is written over a horizontal line.

Mark R. Farthing

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ATTORNEYS FOR RESPONDENT

July 15, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

Respondent.

PROOF OF SERVICE

I, Shana Montgomery, certify I have served the within Return to Petition for Writ of Certiorari on Petitioner by sending two copies of the same to:

Taylor D. Gilliam, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 15th day of July, 2019.


SHANA MONTGOMERY
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(803) 734-3727

The Supreme Court of South Carolina

Charles Green, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001204

ORDER

Pursuant to Rule 243(l) of the South Carolina Appellate Court Rules, this post-conviction relief appeal is hereby transferred to the South Carolina Court of Appeals.

FOR THE COURT

BY Drenda I. Shealy
Chief Deputy CLERK

Columbia, South Carolina
July 26, 2019

cc:

Taylor Davis Gilliam, Esquire
Mark Reynolds Farthing, Esquire
The Honorable Jenny A. Kitchings

SUPP. APP'X 49

The South Carolina Court of Appeals

Charles Green, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001204

ORDER

This matter is before the Court on a petition for a writ of certiorari. Based on the vote of the panel, the petition for a writ of certiorari is granted as to Questions 1 and 3 and denied as to Question 2. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

FOR THE COURT

BY V. Claire Allen
CLERK

Columbia, South Carolina

cc:

Taylor Davis Gilliam, Esquire
Mark Reynolds Farthing, Esquire
Alan McCrory Wilson, Esquire
The Honorable R. Lawton McIntosh

FILED
Oct 07 2021

SUPP. APP'X 50

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

CHARLES GREEN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001204

BRIEF OF PETITIONER

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ATTORNEY FOR PETITIONER

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ISSUES PRESENTED

I. Whether the PCR Court erred by limiting Petitioner's testimony and PCR counsel's questioning at a post-conviction relief evidentiary hearing, where the PCR court relied on Rule 11, SCRCP, in limiting the hearing to only a fraction of Petitioner's claims, and where Rule 11, SCRCP, has been held not to apply to PCR proceedings?

II. Whether the PCR court erred in denying Petitioner relief, where appellate counsel failed to raise the issue of Petitioner's right to a speedy trial, where the issue was preserved and meritorious, and where Petitioner was tried almost a year after a date certain was set and approximately thirty-three months after he was arrested?

STATEMENT

On May 19, 2011, Petitioner was indicted by a Beaufort County grand jury on the charges of attempted murder, possession of a weapon during a violent crime, and possession of a firearm by a person convicted of a felony. App. 332 – 337. He proceeded to trial before the Honorable J. Ernest Kinard and a jury on November 18, 2013. App. 29. Thomasine Trasi Campbell represented Petitioner, and Hunter Swanson appeared on behalf of the State. The jury found Petitioner not guilty of attempted murder but found him guilty of the lesser-included charge of assault and battery of a high and aggravated nature. App. 233 l. 8 – App. 234 l. 3. Petitioner was found guilty of the two possession of a weapon charges. Id. Judge Kinard sentenced Petitioner to two years' incarceration on the possession of a person previously convicted of a violent crime charge, five years' incarceration on the possession of a weapon while committing a violent crime charge, and fifteen years for the assault and battery of a high and aggravated nature. App. 243 ll. 3 – 8.

Appellant appealed his convictions and sentences, and the Court of Appeals affirmed. State v. Green, Op. No. 2015-UP-458 (filed on September 16, 2015). App. 346 – 372. Petitioner then filed a timely application for post-conviction relief on October 1, 2015. App. 245 – App. 254. Through the original application and follow-up amendments, Petitioner alleged that trial counsel and appellate counsel provided him with ineffective assistance of counsel for multiple reasons, including claims that trial counsel failed to object and present witnesses, and that appellate counsel failed to raise certain issues. Id.

The State made its Return on or about May 13, 2016. App. 255 – 261. An evidentiary hearing was convened on January 29, 2018 before the Honorable R. Lawton McIntosh. App. 262. James Falk represented Petitioner, and DeShawn Mitchell appeared on behalf of the State. At the conclusion of the hearing, Judge McIntosh denied relief as to certain allegations and requested

follow-up briefing from the parties on an issue regarding a witness' statement. App. 308 l. 4 – App. 311 l. 2. The parties submitted memoranda. App. 338 – 345. An Order of Dismissal was issued on or about June 18, 2018. App. 317 – 331. It contained the PCR court's finding that Petitioner "failed to carry his burden in this action regarding any of his allegations of ineffective assistance of counsel." App. 324. The PCR court noted its imposition of Rule 11, SCRCP: "[P]rior to testimony being taken, Applicant proceeded on only the following grounds for relief as additional grounds were disallowed by this court over Applicant's objections." Id.

A Petition for Writ of Certiorari was filed on January 28, 2019. The state made its Return on July 15, 2019. This Court granted certiorari in part and denied in part by way of a written Order dated October 7, 2021. This Brief of Petitioner follows.

STANDARD OF REVIEW

Appellate courts defer to a PCR court's findings of fact and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

ARGUMENT

I. The PCR Court erred by limiting Petitioner's testimony and PCR counsel's questioning at a post-conviction relief evidentiary hearing, where the PCR court relied on Rule 11, SCRCP, in limiting the hearing to only a fraction of Petitioner's claims, and where Rule 11, SCRCP, has been held not to apply to PCR proceedings.

At the outset of the evidentiary hearing in Petitioner's matter, the PCR court inquired as to Petitioner's allegations. In response, PCR counsel began articulating Petitioner's claims but was interrupted by the PCR court within seconds. App. 267 l. 12 – App. 269 l. 25. After only being allowed to remark that Petitioner was “alleging that he is prejudiced by the fact - -” the PCR court cited Rule 11, SCRCP:

No. Pursuant to Rule 11 and by other grounds, what are his grounds? And we're going to go forward with that. I'm not going to let him just throw out anything and see if it sticks. I want to hear what the grounds are that we're going to pursue, and not just throw everything out there. Okay, sir?

App. 267 l. 23 – App. 268 l. 3. The court noted PCR counsel's objection but indicated that the hearing would proceed following a ruling that Petitioner could proceed under only one claim, that counsel failed to object to prejudicial hearsay. App. 268 l. 25 – App. 269 l. 25.

In the middle of trial counsel's testimony at the evidentiary hearing, a bench conference took place with the following remarks being offered by the PCR court afterwards:

For the record, we had a bench conference, and counsel is concerned - - counsel for applicant is concerned that the applicant has brought here to these proceedings. I, of my own volition, *sua sponte*, have excluded the grounds that I'll articulate on the record earlier as not being relevant or acknowledged, grounds that we can - - what's the term I'm looking for, I'm drawing a blank. They are - - they're not meritorious grounds, and therefore, I'm excluding them from the testimony.

And I'm going to tell you, Mr. Green, that your attorney is fighting for you, and he is concerned that you're not going to be allowed to testify as to these other grounds that you're claiming. But I'm not going to let you testify as to that. You're protected on the record that if I make a mistake in saying that they're not

meritorious or recognizable grounds, then, somebody will correct me. But I'm not going to let you testify to them, and your attorney is fighting for you on that behalf. Okay?

App. 281 l. 22 – App. 282 l. 16. The PCR court indicated that he felt like that “cover[ed] [Petitioner] sufficiently and [PCR counsel].” App. 282 ll. 18 – 19.

Over ten years ago, the South Carolina Supreme Court addressed the applicability of Rule 11, SCRPC in PCR proceedings. Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009). In Hiott, the applicant was convicted following a two-day trial in 2003 and filed his PCR application the same year. Id. at 624, 674 S.E.2d at 491. The PCR judge found Hiott’s claims were “absurd” and “patently frivolous” and ruled that many issues raised by Hiott were without merit. Id. at 624, 674 S.E.2d at 492. The PCR judge imposed a \$3,000 sanction on Hiott under Rule 11, SCRPC after finding that both Hiott’s testimony and claims were frivolous. Id. This Court affirmed the sanction imposition. Hiott v. State, 375 S.C. 354, 652 S.E.2d 436 (Ct. App. 2007). Our Supreme Court granted certiorari and reversed.

Noting the standard of review, namely that a decision by the PCR judge may be reversed when it is controlled by an error of law, the Court determined that Rule 11, SCRPC, is inapplicable to PCR proceedings. Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494 (2009). The Court analyzed the legislative and judicial systems already in place designed to deter abuse in the PCR process, including the statutory requirements that a petitioner must raise all available grounds in the first PCR application, that an applicant must abide by the one year statute of limitations, and that an application asserting a newly created standard or newly discovered fact must be raised within one year and reached the conclusion that as a matter of public policy, “Rule 11 of the South Carolina Rules of Civil Procedure does not apply to PCR proceedings.” Id. at 630, 674 S.E.2d at 630.

The PCR judge in the matter *sub judice* did not allow Petitioner to testify on the stand. This action was more egregious than the situation in Hiott, wherein the PCR judge at least listened to Hiott's testimony. Here, the PCR judge *sua sponte* ruled that Petitioner could not testify regarding issues which were not deemed to be meritorious, in direct contravention to the law created in Hiott:

Given the public policy considerations involved, including our recognition in Wade that PCR actions are treated differently than traditional civil cases and that sanctions of any kind could chill a petitioner's pursuit of PCR, as well as the fact that there are already limitations in place that serve to curb the potential abuse of the PCR process, we hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.

Id. at 629, 674 S.E.2d at 494-5.

The facts allegedly giving rise to Petitioner's arrest stem from an incident at Food Lion on April 6, 2011. App. 129 l. 16 – App. 132 l. 10. Clifton Henry testified that Petitioner and "his wife" drove up to the house where Henry was. According to Henry, Petitioner gave him approximately forty dollars after supposedly bragging about spending \$700. Id. Henry and Channon Preston then walked to Food Lion where Petitioner then purportedly requested his money back. App. 132 ll. 1 – 10. Henry testified that he gave Petitioner the money back and then Petitioner shot him with a shotgun. Id.

Petitioner listed approximately nineteen claims in his subsequent post-conviction relief application amendments. App. 252 – 254. Petitioner was not allowed to testify or otherwise expand on allegations such as counsel's failure to object to judge's improper comments in the presence of the jury, impeaching witnesses, failure to object to false statements by the State, failure to object contemporaneously and preserve claims for appellate review, unreasonable and prejudicial conduct during sentencing, and others. It is difficult to recognize what these claims

were in reference to considering the original source of the claims, Petitioner, was not allowed to testify about them.

Of note, on the failure to speak adequately in mitigation, counsel did not offer much following the jury's verdict. The trial judge noted that defense counsel did not tell him "anything" in mitigation and asked Petitioner if he would like to say anything. App. 240 ll. 3 – 7. Petitioner responded that he would miss his family and children. App. 240 ll. 8 – 9. When counsel did finally speak up, she did not mention anything about Petitioner's work history or education background.

Under S.C. Code Ann. 16-3-600(B)(2), the maximum sentence for assault and battery of a high and aggravated nature is twenty years. Petitioner received fifteen; on this single allegation, one of the few upon which enough information can be gleaned to analyze, Petitioner did not appear prepared to speak in mitigation. The trial judge even noted Petitioner "has a problem allocuting" and inquired to counsel whether Petitioner was married or employed App. 240 ll. 8 – 9. Neither trial counsel nor Petitioner were prepared for this phase of trial.

The remaining, unaddressed allegations cannot be adequately analyzed without Petitioner's testimony. In other words, although Petitioner bore the burden of proving his claims, that opportunity was taken from him. The PCR court prejudged his allegations and forced an arbitrary and irrelevant limitation on Petitioner's "one bite at the apple." Petitioner did not waive this right; the decision was made for him, without his consent, and against his will. Further, the state did not file a motion to make more definite and certain, as is seen in other cases. After filing an application for post-conviction relief and two subsequent amendments, the majority of his claims were not considered by the PCR court under the guise of Rule 11 which this Court has held to be irrelevant in PCR proceedings.

II. The PCR court erred in denying Petitioner relief, where appellate counsel failed to raise the issue of Petitioner’s right to a speedy trial, where the issue was preserved and meritorious, and where Petitioner was tried almost a year after a date certain was set and approximately thirty-three months after he was arrested.

At the outset of trial, defense counsel moved to dismiss Petitioner’s charges for failure to comply with a previously filed speedy trial motion. App. 41 l. 22 – App. 43 l. 14. Counsel articulated the following rationale for the motion to dismiss:

I will hand up to Your Honor a bond paperwork that was signed by Judge Stephanie McDonald, September 17, 2012. Within that paperwork, Judge McDonald orders the State of South Carolina to dispose of and try this case by a certain date in 2012. And the State failed to do that. And we would take an interpretation of Judge McDonald’s order that by the State failing to bring Mr. Green to trial under her order, that the State lost the opportunity to bring him to trial. And that the charges against Mr. Green, per that order, should be dismissed at this time for the State’s failure to meet that deadline set by the Circuit Court.

Id. The motion was denied. App. 42 l. 22 – App. 43 l. 12. The same paperwork was before the PCR judge at the evidentiary hearing. App. 292 ll. 8 – 12; App. 314 – App. 316.

Petitioner testified that he was prejudiced by appellate counsel’s failure to raise a meritorious issue on appeal, namely the denial of his motion for a speedy trial. App. 289 l. 4 – App. 291 l. 25. Petitioner expanded upon this allegation with great detail, noting that he had a date certain for trial on November 26, 2012. App. 292 l. 15 – App. 294 l. 18. Judge McDonald’s Order from September 17, 2012 clearly sets forth “Defendant must be tried by conclusion of November 26, 2012 term of General Sessions Court.” App. 315. Almost a year after that date certain, on November 13, 2012, his trial began.

Appellate counsel did not recall specifically the motion to dismiss at the outset of Petitioner’s trial. App. 303 ll. 4 – 7. The applicable pages were not included in the record on appeal. App. 303 ll. 11 – 23. Appellate counsel indicated that he would have read and thought

about this issue. App. 304 ll. 13 – 15. Regarding his choice to brief a different issue, counsel noted that it was a strategic decision. App. 305 ll. 5 – 20.

In response, PCR counsel cited Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2181, 33 L.Ed.2d 101 (1972). App. 305 l. 21 – App. 306 l. 6. Appellate counsel agreed that Petitioner had arguable grounds for prejudice. Id. On cross-examination, appellate counsel speculated that this issue was not a meritorious one, after looking at the transcript and “knowing [his] practice of looking up that issue specifically.” App. 307 ll. 10 – 18.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, Petitioner must prove that appellate counsel's performance was deficient, and that he was prejudiced by appellate counsel's deficient performance.

The Sixth Amendment to the United States Constitution provides, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. Const. amend. VI. Similarly, the South Carolina Constitution provides that “Any person charged with an offense shall enjoy the right to a speedy and public trial.” S.C. Const. art. I, § 14. A speedy trial means a trial without unreasonable and unnecessary delay. State v. Langford, 400 S.C. 421, 441, 735 S.E.2d 471, 482 (2012) (quoting Wheeler v. State, 247 S.C. 393, 400, 147 S.E.2d 627, 630 (1966)).

The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. Barker v. Wingo, 407 U.S. 514, 519, 92 S. Ct. 2182, 2186, 33 L. Ed. 2d 101 (1972).

The Supreme Court of the United States, in Barker v. Wingo, introduced a balancing test to allow circuit courts to approach speedy trials on an ad hoc basis. Id. at 530, 92 S.Ct. at 2192. The four factors to be assessed are lengthy of delay, reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Id. None of these factors appear to have been weighed by the trial court in Petitioner's case.

An accused's speedy trial right begins when he is "indicted, arrested, or otherwise officially accused." Langford, 400 S.C. at 442, 735 S.E.2d at 482 (citing United States v. MacDonald, 456 U.S. 1, 6, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982)). To trigger a speedy trial analysis, the accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay, since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. Doggett v. U.S., 505 U.S. 647, 652, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992). Presumptively prejudicial delay exists when an accused is not prosecuted with ordinary promptness. See Doggett, 505 U.S. at 651–52, 112 S.Ct. 2686 (1992).

Once the accused has met this initial burden, a court must look to four factors, among the totality of the circumstances, to decide whether the defendant's right to a speedy trial has been denied. Barker v. Wingo, *supra*; see also Langford, 400 S.C. at 441, 735 S.E.2d at 482. A speedy trial claim must be "analyzed in terms of the circumstances of each case, balancing the conduct of the prosecution and the defense." State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2008) (citing Barker, 407 U.S. at 530, 92 S.Ct. 2182).

The remedy for a speedy trial violation is dismissal of the charges. Langford, 400 S.C. at 442, 735 S.E.2d at 482 (internal citation omitted). The trial court's ruling on a motion for speedy trial is reviewed under an abuse of discretion standard. Id. at 442, 735 S.E.2d at 482 (internal

citation omitted). An abuse of discretion occurs when the court's decision is based on an error of law or upon factual findings that are without evidentiary support. Id. at 442, 735 S.E.2d at 482 (internal citation omitted).

In State v. Hunsberger, 418 S.C. 335, 794 S.E.2d 368, (2016), The South Carolina Supreme Court held that the trial court erred in denying the petitioner's speedy trial motion. In that case, Hunsberger was arrested in January 25, 2002, indicted two months later, and tried ten years after his arrest. Id. at 344, 794 S.E.2d at 372. The Supreme Court reversed this Court's decision and held that Hunsberger proved prejudice. Id. at 352, 794 S.E.2d at 377.

In the case at hand, Petitioner was arrested on April 7, 2011, the day after the altercation. App. 46 ll. 3 – 11. He was indicted the following month. App. 332 – 337. Judge McDonald's order was issued over a year later, in September 2012. App. 315. It was not until over thirteen months later that Petitioner's trial began. The violation of Judge McDonald's order should have been sufficient to trigger review by the trial court. As articulated by defense counsel, the state failed to try Petitioner by the date certain, and the remedy should have been dismissal of the charges. App. 41 l. 25 – App. 43 l. 1.

A twenty-three month delay was presumptively prejudicial in Langford. In State v. Waites, 270 S.C. 104, 240 S.E.2d 651 (1978), a twenty-eight month delay was enough to prompt a speedy trial analysis. Even if there had not been a date certain, the approximately thirty-one month delay from Petitioner's arrest in April 2011 to trial in November 2013 should have been enough to trigger an analysis by the trial judge.

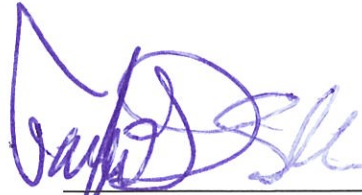
At the evidentiary hearing in Petitioner's case, the state did not suggest that the reasons for delay could be attributed to Petitioner. Nor is this factor, or any other of the speedy factors, discussed in the Order of Dismissal. Petitioner noted that he requested a speedy trial motion be

filed during one of his first meetings with defense counsel. App. 292 l. 19 – App. 294 l. 12. The unnecessary delay resulted in presumptive prejudice especially considering the inability to track down Ashley Thomas, Petitioner’s girlfriend at the time of the incident.

Appellate counsel was ineffective for failing to raise this issue on appeal. It was unquestionably preserved by trial counsel, contained merit as shown above, and there was a reasonable likelihood for success on appeal. Given the potential remedy—dismissal of the charges—there was no downside to raising this issue. The PCR court’s findings of fact and conclusions of law regarding the ineffective assistance of appellate counsel claim did not contain a lengthy analysis, rather a general overview of the concept. Following an analysis of the above factors in Petitioner’s case, this Court may have granted relief following the state’s failure to try Petitioner in accordance with the date certain.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that this Court reverse the denial of post-conviction relief.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 8th day of November, 2021.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

CHARLES GREEN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001204

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Brief of Petitioner in the above referenced case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Charles Green, #320693, at Ridgeland Correctional Institution, PO Box 2039, Ridgeland, SC 29936, this 8th day of November, 2021.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

SUPP. APP'X 68

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI

I.

“Whether the PCR Court erred by limiting Petitioner’s testimony and PCR counsel’s questioning at a post-conviction relief evidentiary hearing, where the PCR court relied on Rule 11, SCRCP, in limiting the hearing to only a fraction of Petitioner’s claims, and where Rule 11, SCRCP, has been held not to apply to PCR proceedings?”

II.

“Whether the PCR court erred in denying Petitioner relief, where appellate counsel failed to raise the issue of Petitioner’s right to a speedy trial, where the issue was preserved and meritorious, and where Petitioner was tried almost a year after a date certain was set and approximately thirty-three months after he was arrested?”

COUNTER-STATEMENT OF ISSUES ON CERTIORARI

I.

Did the post-conviction relief judge somehow abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Green’s counsel as having arguable merit when he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Green and his counsel and to prevent the introduction of matter that was not relevant to the identified claims?

II.

Did the post-conviction relief judge somehow err by determining Green failed to establish his ineffective assistance of appellate counsel claim when: (1) the constitutional speedy trial issue Green now contends appellate counsel was ineffective for not raising on appeal was itself neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review; (2) appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained he reviewed the portion of the record dealing with the denial of the dismissal motion that was actually raised by trial counsel and consciously elected not to raise that issue after researching the matter and determining it was not likely to be meritorious under the circumstances involved, which demonstrated the legitimate and strategic nature of his decision; and (3) Green suffered no prejudice from appellate counsel’s decision not to raise any issues related to the denial of the dismissal motion because Green could not establish such an issue would have been successful on appeal if it had actually been raised?

STATEMENT OF THE CASE

In April of 2011, Petitioner Charles Green, Jr. was arrested following an investigation into a shooting that occurred a day earlier outside a grocery store in Beaufort, South Carolina. In May of 2011, the Beaufort County Grand Jury indicted Green for attempted murder, possession of a weapon during the commission of a violent crime, and possession of a firearm by a person convicted of a felony. On November 18, 2013, a jury trial was commenced in the Beaufort County Court of General Sessions with the Honorable J. Ernest Kinard, Jr., circuit court judge, presiding. At the conclusion of the three-day trial, the jury convicted Green of the lesser-included offense of assault and battery of a high and aggravated nature along with both weapon charges. Following the verdict, the trial judge sentenced Green to an aggregate term of imprisonment of fifteen years. Green then timely initiated an appeal.

On appeal, the Court of Appeals issued an unpublished opinion in which it unanimously affirmed Green's convictions following briefing by counsel. State v. Green, Op. No. 2015-UP-458 (S.C. Ct. App. filed Sept. 16, 2015). Thereafter, on October 27, 2015, remittitur was issued.

Subsequent to the issuance of the remittitur, Green timely filed an application for post-conviction relief ("PCR"), and, in response, the State filed a return requesting an evidentiary hearing. Green then filed several pro se amendments to his PCR application. On January 29, 2018, an evidentiary hearing was conducted in the Beaufort County Court of Common Pleas with the Honorable R. Lawton McIntosh, circuit court judge, presiding. At the conclusion of the hearing, the PCR judge orally denied several of the allegations raised in the application but requested briefing from the parties on some matters. Thereafter, following briefing, the PCR judge denied and dismissed Green's PCR application through an order filed on June 18, 2018. Green then timely filed a notice of appeal.

After initiating his appeal, Petitioner filed a petition for a writ of certiorari with the Supreme Court, and the Supreme Court transferred the matter to this Court. Subsequently, on October 7, 2021, this Court granted the petition on two of the three issues raised.

STATEMENT OF THE FACTS

Summary of Green's Crimes and the Ensuing Investigation of Them

On the afternoon of April 6, 2011, Clifton Henry ("Victim") was brought to the hospital with multiple puncture wounds to his hip, thigh, and arm that were caused by pellets fired from a shotgun. (App'x p. 83; p. 85; pp. 90-91; p. 130; p. 132; p. 135). Because he was suffering from gunshot injuries, law enforcement was notified, and investigators from the Beaufort County Sheriff's Office headed to the hospital to find out what was going on. (App'x pp. 80-82; pp. 95-96; pp. 108-109; p. 135; pp. 152-153). Once there, Investigator Jeremiah Fraser spoke with Victim, and Victim reported he had just been shot by Green outside a Food Lion grocery store without provocation after Green sought the return of money Green had just given to him and his friend, Channon Preston. (App'x pp. 130-136; pp. 142-144; pp. 153-160). Investigator Fraser then obtained a photographic lineup containing Green's picture, and, when presented with the lineup, Victim immediately identified Green from it as the person who shot him. (App'x pp. 137-139; pp. 155-157). Meanwhile, other investigators interviewed Preston in the parking lot of the hospital, and Preston provided an account of the shooting consistent with Victim's account. (App'x pp. 96-97; pp. 108-109; p. 144; pp. 161-162).

Based on Victim's and Preston's statements, Investigator Fraser obtained an arrest warrant for Green, and officers immediately began searching for him. (App'x p. 162). However, he could not be located that day despite extensive efforts to find him. (App'x p. 162). Beyond the efforts to find Green, several investigators responded to the scene of the shooting, and they found blood droplets on the grounds in front of some propane tanks located outside the grocery store along with some shotgun wadding on the ground in the store's parking lot. (App'x pp. 97-101; p. 104; p. 109). Furthermore, surveillance footage was obtained from a nearby restaurant,

and the events depicted in that footage were consistent with what had been reported by Victim and Preston. (App'x p. 110; p. 119; pp. 161-162).

On the following day, Investigator Fraser received a tip Green was back at his residence, and the home was surrounded by officers. (App'x pp. 162-163). Eventually, Green was coaxed out of the home, surrendered, and was placed under arrest. (App'x p. 163). As Green was being taken into custody, his girlfriend, Ashley Thomas, excitedly shouted out Green did not start "it" and "they" shot at him first. (App'x p. 161; p. 163). After that, Investigator Fraser transported Green to his office, advised him of his rights, and attempted to speak with him about the incident. (App'x pp. 163-164). However, Green reported he did not know anything and declined to make any further statements. (App'x p. 164).

Thereafter, Investigator Fraser interviewed Thomas, and, during the interview, she provided an account of the events that allegedly preceded the shooting. (App'x p. 313). Specifically, Thomas reported she saw Victim and Preston take Green's money "off the ground," Green asked for the money back, and they declined to return it. (App'x p. 313). She claimed Victim then asked Preston to get a gun, Preston retrieved one and pointed it at Green, Victim took the gun from Preston and also pointed it at Green, and Preston took the gun back before firing two shots. (App'x p. 313). After the shots were purportedly fired, Thomas asserted Green walked away "shocked" while Victim and Preston began to walk off with Green's money. (App'x p. 313). At that point, Thomas claimed Green again asked for his money back, Victim and Preston laughed in response, and the two headed toward the grocery store on foot while waving the gun and insisting Green was not getting anything back. (App'x p. 313). Thomas then concluded her account without mentioning anything that occurred at the grocery store, including how or why Victim was shot there. (App'x p. 313).

Ultimately, at the conclusion of the investigation, Green was indicted for attempted murder along with several weapon charges. (App’x pp. 3-4; pp. 332-337). He then elected to proceed forward to trial. (App’x pp. 3-4).

Relevant Details from Green’s Trial

Toward the outset of trial, Green’s trial counsel indicated Green wanted her to move to dismiss the case at that time. (App’x pp. 41-42). As support for the motion, trial counsel asserted bond paperwork that had been signed by a circuit court judge ordered the State to try Green’s case by a certain date in 2012, and she contended “an interpretation” of that order would be the State lost the ability to try the case by failing to try it by the specified date. (App’x p. 42). Based on that and that alone, trial counsel asserted Green’s charges should be dismissed “per that order.” (App’x p. 42). In rebuttal, the solicitor contended the appropriate remedy for the State’s failure to try Green by the date specified in the order was for Green to be released from custody, and she noted he was, in fact, released. (App’x p. 42). Additionally, the solicitor indicated the circuit court judge’s order contained nothing stating Green’s charges should be dismissed if his case was not tried by the specified date, and she further contended she was unaware of any prejudice suffered by Green. (App’x p. 42). Upon considering the matter and reviewing the relevant order, the trial judge denied the motion to dismiss while confirming the circuit court judge’s order did not address dismissal as a sanction for non-compliance, and trial counsel responded by indicating she did not have anything further on the matter. (App’x pp. 42-43).

Thereafter, the trial proceeded forward, and Victim—who still had shotgun pellets embedded in his body—testified about the circumstances of the shooting. (App’x pp. 129-151). Specifically, on the date of the incident, Victim asserted he was outside of Preston’s home visiting with him when Green approached them and reported he had just spent \$700. (App’x pp.

129-130). In response to the claim, Victim indicated Preston asked Green to share some of his money and Green reacted by throwing two \$20 bills at them and telling them to take it because they were broke. (App’x p. 130; p. 144). After that, Victim stated he and Preston walked over to a nearby grocery store with the money, and, when they arrived, Green pulled up in his girlfriend’s car. (App’x p. 132). Victim testified Green then approached them with tears in his eyes, claimed he was only joking about the money, and asked for it to be returned. (App’x p. 132; p. 148). In response, Victim asserted he and Preston returned the money to Green, and Green returned to his car. (App’x p. 132; p. 145). At that point, Victim stated Green suddenly pulled out a sawed-off shotgun, fired it at them, and told them to “laugh at that” before fleeing from the area in the vehicle. (App’x pp. 132-135). Victim further noted he was unarmed at the time he was shot, did nothing to provoke the shooting, and had not engaged in any altercations with Green prior to it. (App’x pp. 135-136; pp. 140-141).

In addition to that testimony, Investigator Fraser and the other law enforcement officers involved in the response to the shooting recounted the details of their investigation that culminated in Green’s arrest. (App’x pp. 95-119; pp. 152-172). Notably, during his testimony, Investigator Fraser confirmed—in response to questions from both the solicitor and trial counsel—Thomas excitedly shouted out Green did not start “it” and “they” shot at him first when Green was being arrested.¹ (App’x p. 163; p. 168). However, Investigator Fraser was not asked by either party to recount the statements Thomas made during her subsequent interview, which would have clearly constituted inadmissible hearsay. (App’x pp. 152-172).

¹ Prior to the evidentiary phase of trial, the solicitor advised the trial judge she intended to elicit Thomas’s unprompted statements at the time of Green’s arrest as excited utterances, and trial counsel asserted she had no objection to those statements—and those statements only—being elicited. (App’x p. 41).

Thereafter, at the conclusion of the State’s case, Green elected not to testify on his own behalf, and trial counsel did not call any defense witnesses. (App’x pp. 174; pp. 181-182). The defense then rested, and trial counsel asked the trial judge to instruct the jury on self-defense as part of jury charge. (App’x p. 182; p. 186). However, the trial judge declined to do so based on the absence of any actual evidence of self-defense. (App’x p. 182).

Subsequently, at the conclusion of trial, the jury convicted Green of assault and battery of a high and aggravated nature along with the indicted weapon charges. (App’x pp. 233-234). The trial judge then sentenced Green to an aggregate fifteen-year term of imprisonment. (App’x p. 243).

Summary of the Post-Conviction Relief Proceedings

Following an unsuccessful appeal in which Green’s appellate counsel challenged the trial judge’s decision not to instruct the jury on self-defense, Green sought relief—through his initial PCR application and several subsequent pro se amendments to that application—on a number of grounds, including on the basis his speedy trial rights were violated, trial counsel was ineffective for a variety of different articulated and unarticulated reasons, appellate counsel was ineffective for not raising an unidentified reversible error, prosecutorial misconduct occurred, some unspecified false evidence was presented, his rights pursuant to a wide variety of constitutional amendments were violated, and “miscellaneous.” (App’x pp. 245-249; pp. 252-254). In response, the State filed a return requesting an evidentiary hearing while further noting some of Green’s claims were simply too vague to comply with the requirements of the Uniform Post-Conviction Procedures Act. (App’x pp. 256-260).

At the outset of the ensuing hearing, the PCR judge indicated he was not sure what grounds Green was actually asserting and—while referencing Rule 11 of the South Carolina

Rules of Civil Procedure *and* “other grounds”—asked PCR counsel sua sponte to definitively identify the precise grounds that were being raised. (App’x pp. 267-268; pp. 281-282). The PCR judge further cautioned he was not going to permit Green to simply “throw out anything and see if it sticks” during the hearing. (App’x pp. 267-268). Based on the PCR judge’s directives, PCR counsel ultimately indicated he believed there was a basis to proceed forward on claims of ineffective assistance of trial counsel for failing to object to prejudicial hearsay and ineffective assistance of trial counsel for failing to call Thomas as a witness. (App’x pp. 268-269; p. 278). PCR counsel further appeared to raise a claim of ineffective assistance of appellate counsel for failing to raise a speedy trial issue on appeal. (App’x pp. 290-291).

As the evidentiary hearing proceeded forward, trial counsel testified about several instances in which alleged hearsay was admitted without objection, including Thomas’s statements at the time of Green’s arrest. (App’x pp. 273-277). Likewise, trial counsel confirmed she attempted to subpoena Thomas—unsuccessfully—because she believed Thomas’s testimony could have potentially been beneficial to Green. (App’x pp. 278-279). However, due to her personal knowledge of Thomas, trial counsel further indicated she was concerned about Thomas’s credibility, about whether Thomas would have actually testified in a manner consistent with her earlier written statement, and about whether Thomas’s testimony “could have done more harm than good.” (App’x pp. 279-280). In light of those concerns, trial counsel stated she did not seek a continuance due to Thomas’s absence. (App’x p. 280). Trial counsel further confirmed she believed Green was better served through the admission of the limited statements from Thomas that were elicited during Investigator Fraser’s testimony. (App’x p. 280).

Beyond trial counsel’s testimony, Green testified on his own behalf solely as to the issues identified following the PCR judge’s demand for a more definite statement of the claims being

raised. (App’x pp. 281-282; pp. 287-295). In support of the ineffective assistance of trial counsel claim, Green asserted trial counsel should have subpoenaed Thomas—who, significantly, did not testify during the PCR hearing—because she purportedly would have told the jury “the dudes” robbed him. (App’x p. 278; pp. 287-288). Similarly, while claiming he was being “real true,” Green disclosed—for the first time—he observed Thomas in the lobby of the courthouse during the course of trial when he took a bathroom break. (App’x pp. 288-289). However, he conceded he did not talk with trial counsel about Thomas testifying. (App’x p. 295). Furthermore, Green testified—as support for his claim of a violation of his right to a speedy trial—he had trial counsel file a speedy trial motion in his case in an effort to get out of jail, was not tried by the date set in the bond order subsequently issued by a circuit court judge, and was released from jail as a result. (App’x p. 293).

Following Green’s testimony, appellate counsel testified about his representation of Green on appeal and indicated he elected to raise an issue with the trial judge’s failure to instruct the jury on self-defense after reviewing the record from trial. (App’x pp. 302-304). He further explained he was aware trial counsel had filed a motion to dismiss toward the beginning of Green’s trial based on the State’s failure to comply with a scheduling order. (App’x pp. 302-304). However, he indicated he reviewed that issue, considered it, and elected not to raise it out of a belief it would not have proved to be meritorious on appeal due to the fact he did not think dismissal was warranted under the circumstances because “[i]t would take something in addition to have a charge thrown out besides a mere failure to meet a deadline.” (App’x pp. 304-307).

Thereafter, once all the testimony and evidence had been introduced, the PCR judge denied relief on the claim of ineffective assistance of trial counsel based on the failure to object to hearsay testimony. (App’x p. 308). Furthermore, the PCR judge determined Green failed to

meet his burden of proof in regard to his speedy trial claim and specifically found any delays that occurred did not cause the loss of Thomas's testimony. (App'x p. 309). However, the PCR judge expressed concern over trial counsel's failure to present Thomas as a witness, and, based on that, he requested briefing from the parties as to whether Green could meet his burden of proof solely by relying on Thomas's written statement along with as to whether trial counsel was, in fact, ineffective for failing to call Thomas as a witness. (App'x pp. 309-310). He then denied relief on the remaining allegations and took the matter under advisement. (App'x p. 310).

Subsequently, upon considering the matter along with the briefs submitted by the parties, the PCR judge issued an order formally denying Green's PCR application. (App'x pp. 317-331; pp. 338-345). In denying relief, the PCR judge again rejected the hearsay-based claim and specifically determined Green's allegation in regard to trial counsel's failure to present Thomas's testimony also failed due to the fact Green solely presented a written statement from Thomas that constituted inadmissible hearsay instead of offering her testimony at the evidentiary hearing. (App'x pp. 324-326). Additionally, the PCR judge concluded Green failed to prove prejudice in regard to the failure to call Thomas as a witness because trial counsel identified a valid trial strategy for not calling her and also attempted to locate and subpoena her. (App'x pp. 326-327). Moreover, the PCR judge found Thomas's statement—even if true—did not establish Green was acting in self-defense. (App'x pp. 327-329). Finally, the PCR judge found Green failed to establish either deficiency or prejudice in regard to his claim of ineffective assistance of appellate counsel. (App'x pp. 329-330).

STANDARD OF REVIEW

In PCR cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a PCR judge's factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) ("Under the proper standard of review, the appellate court's 'view' must be limited to whether there is probative evidence to support the PCR court's factual findings."). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the PCR judge's rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Furthermore, when reviewing "a PCR court's resolution of procedural questions arising under the Post-Conviction Procedure Act or the South Carolina Rules of Civil Procedure," the appellate court will analyze the matter solely to determine whether an abuse of discretion occurred. Mangal v. State, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017); Sweet v. State, 255 S.C. 293, 296, 178 S.E.2d 657, 658 (1971) (applying an abuse of discretion standard when reviewing a procedural ruling in a post-conviction relief matter). Ultimately, if the PCR judge's decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I.

The post-conviction relief judge did not abuse his broad discretion by reasonably limiting the evidence and testimony introduced during the evidentiary hearing solely to matters relevant to the grounds specifically identified by Green's counsel as having arguable merit because he had the authority pursuant to the Uniform Post-Conviction Procedure Act along with other provisions of South Carolina law to require the claims being raised to be specifically identified by Green and his counsel and to prevent the introduction of matter that was not relevant to the identified claims.

Green contends the PCR judge erred by limiting the testimony presented and questioning conducted during the evidentiary hearing solely to matters related to the grounds identified by PCR counsel as having arguable merit. In support of that contention, Green maintains the PCR judge committed an error of law by relying on Rule 11 of the South Carolina Rules of Civil Procedure to place limitations on the claims permitted to be addressed during the hearing. To the contrary, the PCR judge properly exercised his authority pursuant to the provisions of the Uniform Post-Conviction Procedure Act, our civil procedure rules, and our evidentiary rules to require Green and his PCR counsel to specifically identify the grounds upon which there was a legitimate basis to proceed forward and to the limit the evidence and testimony subsequently introduced solely to matter relevant to the specified grounds. As a result, the PCR judge's discretionary decision to place proper limits on the matter raised and discussed during the evidentiary hearing did not constitute either an abuse of discretion or error of law. The PCR judge's order denying relief to Green should be affirmed.

When seeking relief, every PCR applicant is entitled to a full and fair opportunity to present claims in a single application. Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). Importantly though, pursuant to the requirements of the Uniform Post-Conviction Procedure Act, the applicant must set forth any claims being raised with *specificity*. See S.C.

Code Ann. § 17-27-50 (“The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, *specifically set forth the grounds upon which the application is based*, and clearly state the relief desired.” (emphasis added)); see also Coardes v. State, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974) (“[M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of adequate and effective assistance of counsel is insufficient.”). If the applicant’s claims are not set forth with sufficient specificity and clarity, it is incumbent on appointed counsel—when counsel has been appointed—to ensure the application complies with the necessary requirements. See Rule 71.1(d), SCRCP (“Counsel shall insure that all available grounds for relief are included in the application and *shall amend the application if necessary*.” (emphasis added)). Beyond that, the PCR judge is also vested with authority to require the applicant or appointed counsel to amend the application to conform to the requirements of the Uniform Post-Conviction Procedure Act when necessary. See S.C. Code Ann. § 17-27-70(a) (“At any time prior to entry of judgment the court may, when appropriate, *issue orders for amendment of the application or any pleading or motion*, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading.” (emphasis added)); see also Rule 12(e), SCRCP (permitting a circuit court judge to require a more definite statement when vague or ambiguous pleadings are filed).

In the case sub judice, Green filed a PCR application along with a number of pro se amendments to it raising a wide variety of vague and unspecific claims, including a claim of simply “miscellaneous.” See Coardes, 262 S.C. at 497, 206 S.E.2d at 265 (instructing bare assertions of ineffective assistance are not sufficient to constitute valid PCR claims). Based on

the vague and unspecific nature of Green's claims, the PCR judge was unclear as to what claims were actually being raised and, therefore, sensibly asked PCR counsel to specifically identify the supportable claims that were going to be pursued during the hearing, and his decision to do so was wholly permissible, reasonable, and proper under the circumstances. See S.C. Code Ann. § 17-27-70(a) (authorizing the PCR judge to require a PCR application to be amended when necessary). At that point, PCR counsel specifically identified the claims that could legitimately be raised as he was required to do by both our civil procedure rules and his ethical responsibilities, and the hearing proceeded forward solely on those claims as was proper. See Rule 3.1, RPC, Rule 407, SCACR ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."); Rule 71.1(d), SCRCP (mandating PCR counsel amend a PCR application when necessary); see also Jones v. Barnes, 463 U.S. 745, 751 (1983) (explaining no authority suggests an "indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points"). Thereafter, during the course of the hearing, Green was permitted to present all the evidence and testimony he wished in support of the claims that had been validly identified to the PCR judge, and the PCR judge solely placed limitations on the questioning and testimony as needed to ensure relevant evidence, which was the only type of evidence that could properly be introduced, alone was admitted. See Rule 402, SCRE ("Evidence which is not relevant is not admissible."); State v. Saltz, 346 S.C. 114, 127, 551 S.E.2d 240, 247 (2001) ("*Only* relevant evidence is admissible." (emphasis added)).

Because the limits placed on the testimony presented and questioning conducted were entirely proper and supported by a multitude of provisions of South Carolina law, the PCR judge neither abused his discretion nor committed an error of law by imposing the reasonable limits imposed.² Cf. Sweet, 255 S.C. at 296, 178 S.E.2d at 658 (finding no abuse of discretion occurred by the circuit court judge’s discretionary decision to decide a post-conviction relief issue without hearing testimony from a witness who was not present when nothing was presented to establish the witness’s testimony would have been relevant or material to the issue raised). The PCR judge’s order denying relief to Green should be affirmed.

² Since the PCR judge’s discretionary decision to impose reasonable limitations was authorized by various provisions of South Carolina law, the fact the PCR judge—who did not impose any sanctions on Green or PCR counsel—referenced Rule 11 of the South Carolina Rules of Civil Procedure was irrelevant to the propriety of his ruling even assuming that rule had not been applicable under the circumstances. See Sec. & Exch. Comm’n v. Chenery Corp., 318 U.S. 80, 88 (1943) (“[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.” (citations and internal quotations omitted)); Weir v. Citicorp Nat’l Servs., Inc., 312 S.C. 511, 517, 435 S.E.2d 865, 868 (1993) (“A correct decision of the trial court on the wrong ground will be affirmed on appeal.”); see also Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494-495 (2009) (“[W]e hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.”).

II.

The post-conviction relief judge correctly determined Green failed to establish his ineffective assistance of appellate counsel claim because: (1) the constitutional speedy trial issue Green now contends appellate counsel was ineffective for not raising on appeal was itself neither raised to nor ruled upon by the trial judge and, thus, was not properly preserved for appellate review; (2) appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained he reviewed the portion of the record dealing with the denial of the dismissal motion that was actually raised by trial counsel and consciously elected not to raise that issue after researching the matter and determining it was not likely to be meritorious under the circumstances involved, which demonstrated the legitimate and strategic nature of his decision; and (3) Green suffered no prejudice from appellate counsel's decision not to raise any issues related to the denial of the dismissal motion because Green could not establish such an issue would have been successful on appeal if it had actually been raised.

Green contends the PCR judge erred by finding appellate counsel was not constitutionally ineffective. In support of that contention, Green maintains appellate counsel should have raised a constitutional speedy trial issue on appeal that was purportedly preserved and meritorious. To the contrary, Green's appellate counsel was not constitutionally ineffective for failing to raise any speedy trial issues on appeal for several different reasons. Initially, no constitutional speedy trial issue was actually raised to or ruled upon by the trial judge during trial, and, thus, such an issue could not properly be raised or addressed for the first time on appeal, which meant appellate counsel could not have been ineffective for failing to raise one. Additionally, regarding any issues related to the limited non-constitutional-speedy-trial-based dismissal motion that was actually raised and ruled upon during Green's trial, appellate counsel, who was under no obligation to raise every nonfrivolous issue appearing in the record, explained during the evidentiary hearing he reviewed the record, was aware of and researched the issue related to trial counsel's actual dismissal motion, and consciously elected not to raise that particular issue based on his view it was lacking in merit, which demonstrated the legitimate and strategic nature of his decision. Furthermore and finally, even assuming appellate counsel had somehow been

ineffective for failing to raise an issue related to the denial of the dismissal motion, Green suffered no prejudice as a result of that decision because he could not establish such an issue would have been successful on appeal if raised. Under such circumstances, the PCR judge correctly determined appellate counsel was not constitutionally ineffective for simply choosing as a matter of professional judgment to raise a different issue in place of the one Green now contends should have been raised on appeal. The PCR judge's order denying relief to Green should be affirmed.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) ("The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors."). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) ("An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, ___ U.S. ___, 137 S. Ct. 1899, 1910 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.' " (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms.

Strickland, 466 U.S. at 687-688. Meanwhile, counsel’s assistance is considered to be constitutionally ineffective only when “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) (“Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.” (citation and internal quotations omitted)).

Beyond the right to effective assistance of counsel at trial, a criminal defendant in South Carolina has a right to effective assistance of appellate counsel on direct appeal. Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990); see McMann, 397 U.S. at 771 (“[T]he right to counsel is the right to the effective assistance of counsel.”); see also Evitts v. Lucey, 469 U.S. 387, 393-394 (1985) (recognizing “a State that afforded a right of appeal” must “make that appeal more than a ‘meaningless ritual’ by supplying an indigent appellant in a criminal case with an attorney.” (citation omitted)). Importantly though, appellate counsel is *not* required to raise every nonfrivolous issue present in the record in order to provide effective assistance on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004); see Evitts, 469 U.S. at 394 (“[T]he attorney need not advance *every* argument, regardless of merit, urged by the appellant[.]”). In fact, appellate counsel may provide the most effective assistance by focusing on a single strong issue instead of raising every conceivable issue that could possibly be raised. See Barnes, 463 U.S. at 751-752 (“Experienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on *one* central issue if possible, or at most on a few key issues.” (emphasis added)).

In order to prevail on a claim of ineffective assistance of appellate counsel, a PCR applicant has the burden of overcoming the strong presumption appellate counsel provided

adequate representation and, to do so, must establish both deficiency and prejudice. Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005); see Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (“The burden of proof is on [the applicant] to show that counsel’s performance was deficient as measured by prevailing professional norms, and that [the applicant] was prejudiced by this deficiency.”); Thrift, 302 S.C. at 537, 397 S.E.2d at 525 (“The burden is on the applicant in post-conviction proceedings to prove the allegations in his application.”); see also Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing “the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment”). To establish deficiency, the applicant must demonstrate appellate counsel’s performance objectively amounted to incompetence under prevailing professional norms and did *not* simply deviate “from best practices or most common custom.” Richter, 562 U.S. at 105; see Dunn v. Reeves, ___ U.S. ___, 141 S. Ct. 2405, 2410 (2021) (“[E]ven if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that *no* competent lawyer would have chosen.” (emphasis added and citation, internal quotations, and brackets in original omitted)). Meanwhile, to establish prejudice, “the applicant must show that, but for [appellate] counsel’s errors, there is a reasonable probability he would have prevailed on appeal.” Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003); see Hill v. State, 415 S.C. 421, 433, 782 S.E.2d 414, 420 (Ct. App. 2016) (affirming the denial of Hill’s claim appellate counsel was ineffective for failing to raise a directed verdict issue on appeal because Hill would not have been entitled to reversal on appeal had the issue been raised and, thus, Hill could not meet his burden of establishing “a reasonable probability of a different outcome” existed); see also Richter, 562 U.S. at 112 (“The likelihood of a different result must be *substantial*, not just conceivable.” (emphasis added)).

Significantly, meeting the requisite burden of establishing both deficiency and prejudice is generally “difficult” for an applicant raising an ineffective assistance of appellate counsel claim. Smith v. Robbins, 528 U.S. 259, 288 (2000).

In the case at bar, Green contends the PCR judge erred by failing to find appellate counsel was constitutionally ineffective. (Pet. Br. pp. 9-13). More specifically, Green maintains appellate counsel provided ineffective assistance because he failed to raise a *preserved* and *meritorious* constitutional speedy trial issue on appeal. (Pet. Br. p. 9-13). In making that particular claim, Green alleges trial counsel moved to dismiss his charges toward the outset of trial purportedly “for failure to comply with a previously filed speedy trial motion” but the motion was denied. (Pet. Br. p. 9). Green then points to the speedy trial factors articulated by the United States Supreme Court in Barker v. Wingo, 407 U.S. 514 (1972), and asserts this Court “*may*” have granted appellate relief following an analysis of those factors had a constitutional speedy trial issue been raised on appeal. (Pet. Br. pp. 11-13) (emphasis added). However, Green also concedes the trial judge did not analyze or weigh the relevant speedy trial factors during trial when ruling on trial counsel’s dismissal motion, and he appears to further concede there is nothing appearing in the record that provides any explanations as to the reasons for the delays involved in his case.³ (Pet. Br. pp. 11-12).

³ Although Green appears to concede there is nothing in the record identifying the cause of the delays involved, Green seems to fault the State for the record’s lack of such information by stating “the state did not suggest that the reasons for the delay could be attributed to [him].” (Pet. Br. p. 12). By seemingly faulting the State in such a manner, Green ignores the fact he bore the burden—for both appellate and PCR purposes—to establish the merits of his claims. See Speaks v. State, 377 S.C. 396, 399, 660 S.E.2d 512, 514 (2008) (“In post-conviction proceedings, the burden of proof is on the applicant to prove the allegations in his application.”); State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (“The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error.”).

Significantly, the reason why the trial judge did not rule on the factors relevant to a constitutional speedy trial analysis is because a constitutional speedy trial issue was *not* actually raised during Green’s trial. Instead, toward the beginning of trial, trial counsel simply moved for the trial judge to dismiss Green’s case based on the State’s failure to try the matter by a date contained in a previously-issued order that directed the case to be tried before the end of an earlier term of court, and, in doing so, trial counsel made clear her dismissal motion was based on the violation of “that order” alone without ever asserting Green’s constitutional speedy trial rights had been infringed. (App’x p. 42). Meanwhile, trial counsel never asked the trial judge to analyze the relevant speedy trial factors, never argued an analysis of those factors would or could support a conclusion Green’s speedy trial rights had been violated, and never presented anything to establish a speedy trial violation had occurred. (App’x pp. 42-43). In fact, trial counsel never used the words “speedy trial” during Green’s trial, and those words do not appear at any point in the entirety of the trial transcript. (App’x pp. 1-244).

Because no constitutional speedy trial issue was ever raised to or ruled upon by the trial judge during trial, the constitutional speedy trial issue Green now contends should have been raised by appellate counsel was simply not properly preserved for appellate review. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (explaining a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court); State v. Gee, 262 S.C. 373, 379, 204 S.E.2d 727, 729 (1974) (“Only matter that has been ruled on below can be reviewed[.]”); In re Walter M., 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.”); In re Care and Treatment of Corley, 365 S.C. 252, 258, 616 S.E.2d 441, 444 (Ct. App. 2005) (“Constitutional issues, like most others,

must be raised to and ruled upon by the trial court to be preserved for appeal.”); State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912-913 (Ct. App. 2004) (“There are four basic requirements to preserving issues at trial for appellate review. The issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.” (citation and internal quotations omitted)); cf. State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-489 (2007) (“Because Appellant did not argue these grounds in support of his objection at trial, Appellant’s argument is not preserved for review. . . . *If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call.*” (emphasis added)); Powers v. City of Aiken, 255 S.C. 115, 117, 177 S.E.2d 370, 371 (1970) (“We have searched the record and agree that the trial judge was not given an opportunity to rule upon this issue, and accordingly, the question is not properly before us. This is a court of review.”). As a result, appellate counsel could *not* have been ineffective for failing to raise that particular issue on appeal since it was procedurally barred pursuant to South Carolina’s long-standing issue preservation rules. See Gilchrist, 364 S.C. at 178, 612 S.E.2d at 705 (“[A]ppellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review.”); cf. Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 618, 620 (2002) (“At trial, trial counsel objected to Detective McPherson’s testimony on the ground that he was not competent to give testimony on petitioner’s demeanor and on Miranda grounds. However, at the PCR hearing, petitioner stated he wanted appellate counsel to argue on appeal that the testimony should have been objected to because the testimony was an attempt to show petitioner lacked remorse. Because the issue would not have been preserved for appeal, appellate counsel cannot be ineffective for failing to raise the issue.” (footnotes omitted)).

Additionally, regarding appellate counsel's decision not to raise any issue related to the limited non-constitutional-speedy-trial-based dismissal motion that was actually presented and ruled upon during trial, appellate counsel explained during the evidentiary hearing he reviewed trial counsel's dismissal motion and consciously elected to instead raise an unrelated issue after researching the matter and determining Green was unlikely to prevail on appeal by raising an issue related to that motion. See Thrift, 302 S.C. at 539-540, 397 S.E.2d at 526 (“[A]ppellate counsel is not required to raise every nonfrivolous issue that is presented by the record. . . . The testimony of petitioner's appellate attorney that she reviewed the requested charge and the charge as given and consciously decided not to brief the issue, clearly supports the PCR judge's finding that appellate counsel was not ineffective.”). As appellate counsel had no duty to raise every possible nonfrivolous claim on appeal, appellate counsel's judgment-based decision to raise an issue other than the dismissal motion issue was a valid and reasonable one, and, under the circumstances involved, it certainly did not objectively constitute incompetence as would be necessary for appellate counsel's representation to be deemed constitutionally deficient. See Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985) (“Given that this was a strategic decision on appellate counsel's part based on what we consider to be reasonable professional judgment, it is not proper for us to second-guess the judgment of appellate counsel so as to impose a duty to raise every colorable claim.”); see also Robbins, 528 U.S. at 288 (“[I]t is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim, but it is difficult to demonstrate that counsel was incompetent.”); Barnes, 463 U.S. at 751-752 (recognizing the legitimacy and importance of focusing on a single issue on appeal whenever possible); cf. Smith v. Murray, 477 U.S. 527, 536 (1986) (instructing a decision to focus on the arguments most likely to prevail on appeal while winnowing out the weaker ones “is the hallmark of effective

appellate advocacy” and concluding counsel’s decision not to raise a particular issue on appeal “fell well within the ‘wide range of professionally competent assistance’ required under the Sixth Amendment to the Federal Constitution” (citation omitted); Smith v. Comm’r of Correction, 85 A.3d 1199, 1210 (Conn. App. Ct. 2014) (affirming the determination appellate counsel provided effective representation because she “did precisely what the law requires of her” in light of the fact she “reviewed the pleadings and transcript, identified the possible issues and then strategically determined which issues had the best chance of winning”).

Furthermore, even if deficiency could somehow be established based on appellate counsel’s failure not to raise an unpreserved issue on appeal, Green could not have been prejudiced by such a deficiency because the trial judge did not abuse his discretion by declining to dismiss the charges in Green’s case. That is true because, just as the trial judge—and appellate counsel—recognized, the dismissal motion actually raised by trial counsel was based purely on a violation of an order that did *not* specify as a remedy Green’s charges were to be dismissed if its terms were violated. (App’x pp. 41-43; pp. 304-306; p. 315). Instead, the consequence for non-compliance with the order was for Green to be released from pre-trial custody, which did occur in his case once he was not tried by the date specified in the order. (App’x p. 42; p. 293). As a result, the trial judge did not abuse his discretion by refusing to impose the extreme sanction of dismissal of the charges for a violation of the scheduling order. See United States v. Loud Hawk, 474 U.S. 302, 312 (1986) (“[T]he Speedy Trial Clause’s core concern is impairment of liberty[.]”); cf. State v. Campbell, 277 S.C. 408, 409, 288 S.E.2d 395, 395 (1982) (“Appellant argues the indictment should be dismissed because he was not afforded a speedy trial pursuant to South Carolina Code of Laws § 17-23-90 (1976). We find no need to determine the speedy trial issue, as the relief requested is not the relief provided by the statute.

Section 17-23-90 provides for discharge from imprisonment when a person is committed for a felony, demands to be brought to trial, and is not indicted or tried by the second term following his commitment. . . . This phrase merely indicates the prisoner should be released without bail, not discharged from further prosecution.”). Likewise, to the extent Green contends his constitutional speedy trial rights were violated, nothing appearing in the record demonstrates an actual speedy trial violation occurred as—just as Green appears to concede and recognize—there was nothing presented demonstrating the roughly-thirty-one-month period of delays that elapsed between Green’s arrest and subsequent trial resulted from any willfulness or neglect on the part of the State, which was necessary for a viable claim of a constitutional speedy trial violation to exist. See State v. Dukes, 256 S.C. 218, 223, 182 S.E.2d 286, 288 (1971) (“The delay must be attributable to the State before the appellants can complain.”); State v. Smith, 307 S.C. 376, 380, 415 S.E.2d 409, 411 (Ct. App. 1992) (explaining the defendant bears the burden of showing a speedy trial delay was due to the neglect and willfulness of the State’s prosecution); see also State v. Langford, 400 S.C. 421, 445, n. 10, 735 S.E.2d 471, 484, n. 10 (2012) (noting a twenty-three-month period of delay between arrest and trial had not “crossed that threshold” of constituting an “extreme” delay); State v. Pittman, 373 S.C. 527, 549, 647 S.E.2d 144, 155 (2007) (explaining a speedy trial determination “is not based on the passage of a specific period of time” and delay alone is not singularly dispositive); State v. Brazell, 325 S.C. 65, 75, 480 S.E.2d 64, 70 (1997) (recognizing “delay alone is not dispositive” when analyzing a speedy trial issue). Therefore, Green could not have suffered any prejudice as a result of appellate counsel’s decision not to raise an issue related to the denial of trial counsel’s dismissal motion because such an issue would not and could not have led to reversal on appeal. See Anderson, 354 S.C. at 436, 581 S.E.2d at 836 (concluding Anderson could not establish the required prejudice

necessary to establish his ineffective assistance of counsel claim because he could not prove he would have prevailed on appeal to the Supreme Court); see also State v. Reaves, 414 S.C. 118, 132, 777 S.E.2d 213, 220 (2015) (“[A] trial court’s decision as to whether to dismiss an indictment based on speedy trial grounds is reviewed for an abuse of discretion.”); cf. State v. Evans, 386 S.C. 418, 425-426, 688 S.E.2d 583, 587 (Ct. App. 2009) (finding no error in the denial of a motion to dismiss based on an alleged speedy trial violation where the delay prior to trial was approximately twelve years); State v. Cooper, 386 S.C. 210, 217-218, 687 S.E.2d 62, 66-67 (Ct. App. 2009) (affirming the denial of Cooper’s speedy trial motion where the delay in bringing the case to trial was at least forty-four months).

Accordingly, for all those reasons, Green failed to meet his burden of establishing appellate counsel’s representation was constitutionally ineffective, and the PCR judge properly rejected Green’s application for post-conviction relief. See Robbins, 528 U.S. at 288 (recognizing “it is difficult to demonstrate that counsel was incompetent” for failing to raise a particular claim on appeal); cf. Dobbins v. State, 788 N.W.2d 719, 730 (Minn. 2010) (rejecting Dobbins’s claim his appellate counsel’s failure to raise a speedy trial issue on appeal constituted ineffective assistance of counsel because: (1) appellate counsel did not have a duty to raise all possible issues on appeal or to raise meritless claims; and (2) it appeared Dobbins was not denied his right to a speedy trial under the circumstances involved). The PCR judge’s order denying relief to Green should be affirmed.

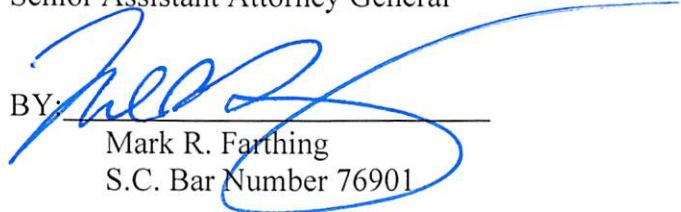
CONCLUSION

For all the foregoing reasons, it is respectfully submitted the judgment of the lower court be affirmed.

Respectfully submitted,

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Attorney General

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Senior Assistant Attorney General

BY: 

Mark R. Farthing
S.C. Bar Number 76901

ATTORNEYS FOR RESPONDENT

December 17, 2021

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

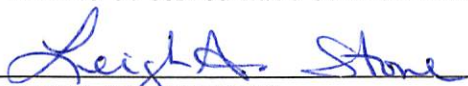
Respondent.

PROOF OF SERVICE

I, Leigh Ann Stone, certify I have served the within Brief of Respondent on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Taylor D. Gilliam, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 17th day of December, 2021.


LEIGH ANN STONE
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Charles Green, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001204

Appeal From Beaufort County
R. Lawton McIntosh, Circuit Court Judge

Unpublished Opinion No. 2023-UP-026
Heard November 16, 2022 – Filed January 25, 2023

REVERSED AND REMANDED

Appellate Defender Taylor Gilliam, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, for Respondent.

PER CURIAM: In this action for post-conviction relief (PCR), Charles Green, Jr. argues the PCR court erred in: 1) relying on Rule 11, SCRCP to limit Green's claims and 2) concluding appellate counsel was not ineffective for failing to raise

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the issue of Green's right to a speedy trial. We reverse and remand for a new PCR hearing.

FACTS/PROCEDURAL HISTORY

A Beaufort County grand jury indicted Green for attempted murder, possession of a weapon during the commission of a violent crime, and possession of a firearm by a person previously convicted of a violent offense. At trial, a jury acquitted Green of murder but convicted him of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN) and both weapon possession charges. The trial court sentenced Green to fifteen years' imprisonment for ABHAN, five years' imprisonment for possession of a weapon during the commission of a violent crime, and two years' imprisonment for possession of a firearm by a person previously convicted of a violent crime. This court affirmed Green's convictions on direct appeal. *See State v. Green*, Op. No. 2015-UP-458 (S.C. Ct. App. filed September 16, 2015).

Green then filed an application for PCR, alleging nineteen errors. While some claims are listed as "impeaching witness" and "miscellaneous," the claims are best summarized in Green's last amended application:

1. Ineffective assistance [of] counsel appellate lawyer for not raising plain reversible error in direct appeals court.
2. Ineffective assistance of counsel trial lawyer [for] failure to make a contemporaneous objection and properly [preserve] such claim for appellate review.
3. Trial counsel performance during the sentencing phase was both unreasonable and prejudicial.
4. Counsel failed to object on all possible grounds to inflammatory and irrelevant evidence [] by Judge and prosecution during trial.
5. Counsel failed to investigate[,] develop[,] and present all available relevant and admissible mitigating evidence to court.
6. Ineffective assistance [of] counsel trial lawyer for not showing that my [] 6,5,4,1,8,14, amendment right[s were] violated to the court.

Green also provided one page of handwritten detail about his motion for a speedy trial.

At the PCR hearing, the PCR court limited Green's ability to present his claims to "a Rule 11 basis."¹ The PCR court and PCR counsel went through Green's claims and the PCR court required PCR counsel to filter them through the lens of Rule 11. The PCR court stated "[P]ursuant to Rule 11 and by other grounds, what are his grounds? And we're going to go forward with that. I'm not going to let him just throw out anything and see if it sticks." PCR counsel noted that Green raised several grounds under the claim of ineffective assistance of counsel, a Fifth Amendment claim concerning speedy trial, prosecutorial misconduct, and a violation of the right to a fair trial. The PCR court then stated "pursuant to my requirements . . . under Rule 11, the only [ground] that we're proceeding on today is counsel failed to object to prejudicial hearsay."

The PCR court denied Green's PCR application, finding Green failed to "carry his burden regarding any of his allegations of ineffective assistance of counsel. . . . Additionally, prior to testimony being taken, [Green] proceeded on only [certain] grounds for relief as additional grounds were disallowed by [the PCR] court over [Green's] objections." Green filed a petition for writ of certiorari, and this court granted certiorari as to Questions 1 and 3.²

ISSUE ON APPEAL

Did the PCR court err in relying on Rule 11, SCRCP to limit Green's PCR claims?

STANDARD OF REVIEW

"Our standard of review in PCR cases depends on the specific issue before us." *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). This court "review[s] questions of law de novo, with no deference to the [PCR] court." *Id.* at 180–181, 810 S.E.2d at 839. "The decision of the PCR judge may be reversed when it is controlled by an error of law." *Hiott v. State*, 381 S.C. 622, 625, 674 S.E.2d 491, 492 (2009).

LAW/ANALYSIS

¹ Rule 11(a) states in relevant part that the signature of an attorney or party on court documents "constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."

² Because Question 1 is dispositive, we do not consider Question 3.

Green argues he was not given the opportunity to prove his claims at the PCR hearing because the PCR court "prejudged his allegations and forced an arbitrary and irrelevant limitation" on his application under Rule 11. He argues he was not allowed to present evidence and testimony concerning multiple claims and therefore, the claims cannot be properly analyzed by this court. We agree.

Our supreme court has stated:

Given the public policy considerations involved, including our recognition . . . that PCR actions are treated differently than traditional civil cases . . . as well as the fact that there are already limitations in place that serve to curb the potential abuse of the PCR process, *we hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.*

Hiott, 381 S.C. at 629, 674 S.E.2d at 494–495 (emphasis added). The supreme court has further noted:

Courts treat PCR differently than traditional civil cases. For example, PCR actions are the only type of case which this Court mandates appellate counsel must brief all arguable issues, despite counsel's belief the appeal is frivolous. A lawyer knowingly filing a frivolous claim in any other civil case violates Rule 11, SCRCP.

Wade v. State, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002) (internal citations omitted).

PCR claims for ineffective assistance of counsel "raise[] a question of fact [that] could only be determined . . . by an evidentiary hearing." *Rogers v. State*, 261 S.C. 288, 291, 199 S.E. 2d 761, 762 (1973). "[S]ummary dismissal of a PCR application . . . without a hearing is appropriate only when it is apparent on the face of the application that (1) there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." *Al-Shabazz v. State*, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000). Moreover, rather than summarily dismiss a PCR application, the PCR court may "grant leave [for the PCR applicant] to file an amended [PCR] application or [may] direct that the proceedings otherwise continue." S.C. Code Ann. § 17-27-70(b) (2014).

Here, the PCR court improperly required Green's counsel to evaluate and effectively discard Green's claims under the limitations of Rule 11 before presenting them to the PCR court. When asked by the PCR court if Green had any other claims besides ineffective assistance of counsel for failing to object to prejudicial hearsay testimony, PCR counsel answered "if we are speaking in terms of Rule 11, I would have to say no." PCR counsel was not allowed to fully present Green's PCR claims. While Green's "miscellaneous" claim would not withstand review on the merits, other claims did not lend themselves to summary dismissal. The PCR court erred in using Rule 11 to justify the refusal to consider the merits of and hear testimony on Green's claims. *See Hiott*, 381 S.C. at 629, 674 S.E.2d at 494–495 (holding Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings); *Wade*, 348 S.C. at 263, 559 S.E.2d at 847 (noting appellate counsel must brief all arguable issues in a PCR action, despite counsel's belief the appeal is frivolous). Therefore, the order of the PCR court is reversed and the case is remanded for a new PCR hearing.

REVERSED AND REMANDED.

WILLIAMS, C.J., THOMAS, J., and LOCKEMY, A.J., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

Respondent.

PETITION FOR REHEARING

On January 25, 2023, this Court issued an unpublished opinion in which it reversed the post-conviction relief judge’s order denying relief to Green and remanded for a “new” evidentiary hearing. Green v. State, Op. No. 2023-UP-026 (S.C. Ct. App. filed Jan. 25, 2023). In reversing the post-conviction relief judge’s order, this Court concluded: (1) the post-conviction relief judge improperly limited Green’s ability to fully present his claims by “requir[ing] Green’s counsel to evaluate and effectively discard Green’s claims under the limitations of Rule 11 before effectively presenting them” to the court; and (2) the appropriate relief was the reversal of the post-conviction relief judge’s order—which presumably included the portions of it addressing the claims Green was fully permitted to litigate—and a remand for an entirely new evidentiary hearing in which Green will be able to attempt to prove his claims anew. Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the State respectfully petitions for rehearing because it believes this Court misapprehended and

overlooked several critical points when reversing and remanding for an entirely new evidentiary hearing in Green's case.

As this Court correctly recognized, Rule 11 of the South Carolina Rules of Civil Procedure has been determined by our Supreme Court to be inapplicable to post-conviction relief proceedings. See Hiott v. State, 381 S.C. 622, 629, 674 S.E.2d 491, 494-495 (2009) (“[W]e hold that Rule 11 of the South Carolina Rules of Civil Procedure does not apply in PCR proceedings.”). Thus, to the extent the post-conviction relief judge relied upon Rule 11 in Green's case, his decision to do so was—just as this Court concluded—incorrect. Id.; but see S.C. Code Ann. § 56-36-10 (authorizing both counsel and pro se litigants to be sanctioned for—amongst other things—“making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts” and including no exception indicating a lack of applicability to post-conviction relief actions).

Nevertheless, the post-conviction relief judge in Green's case did *not* rely solely on Rule 11 in his attempt to determine with clarity and specificity what claims were actually being pursued by Green. Instead, in directing Green's counsel to identify the allegations to be addressed during the evidentiary hearing with specificity, the post-conviction relief judge indicated he was doing so based on “other grounds” as well. Significantly, those other grounds are what really matters in Green's case. And, pursuant to those other grounds, the post-conviction relief judge was not—as this Court's functionally determined—powerless to require specificity as to the claims being raised or to place limitations on what could be presented during the evidentiary hearing. To the contrary, the post-conviction could properly do what he did in Green's case by requiring Green's counsel to identify with specificity any viable, non-frivolous

claims Green wished to pursue before proceeding forward with the evidentiary hearing, and his decision to do so under the circumstances involved was reasonable and proper.

As to those “other grounds” permitting exactly what occurred in Green’s case, the post-conviction relief judge could first properly rely on the Uniform Post-Conviction Procedure Act itself. More specifically, Section 17-27-50 of that Act requires all the grounds for relief being pursued to be “specifically set forth,” which was all the post-conviction relief judge was seeking. Likewise, Section 17-27-70 allows a post-conviction relief judge at any time prior to the issuance of a final judgment to *order* amendment to a post-conviction relief application or any pleading. Through those mechanisms, the post-conviction relief judge was authorized by our legislature to demand clarity and specificity in regard to the allegations being pursued before expending valuable—and limited—court time and resources conducting an evidentiary hearing. Cf. Hiott, 381 S.C. at 629-630, 674 S.E.2d at 494-495 (recognizing other systems exist aside from Rule 11 to prevent the “potential abuse of PCR proceedings” and expressing concern about how allowing Rule 11 sanctions would “create an additional burden on the resources of the court”).

Next, the post-conviction relief judge’s actions in Green’s case were proper in light of several provisions of the South Carolina Rules of Civil Procedure. Specifically, Rule 71.1—in conjunction with Section 17-27-60—affords petitioners like Green a right to the assistance of counsel in post-conviction relief proceedings. See Rule 71.1, SCRPC (“If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent.”). Importantly though, South Carolina does *not* permit hybrid representation in legal proceedings. See Miller v. State, 388 S.C. 347, 347, 697 S.E.2d 527, 527 (2010) (explaining hybrid representation that is partially pro se and partially by counsel is not permitted in South Carolina). Thus, once counsel

has been provided in a post-conviction relief case, that counsel—and not the individual petitioner—is tasked with controlling and presenting the case on the petitioner’s behalf, and, as part of counsel’s responsibilities in doing so, counsel is required to review the case to determine the *available* grounds and amend the application when needed, which necessarily involves clarifying the claims that need to be clarified and winnowing out weak or meritless ones that cannot be established. See Rule 71.1, SCRCPP (“Counsel shall be given a reasonable time to confer with the applicant. Counsel shall insure that all available grounds for relief are included in the application and *shall* amend the application if necessary.” (emphasis added)). In addition to that, Rule 12 permits a post-conviction relief judge to require a more definite statement when the claims raised are too vague or ambiguous to be reasonably understood or addressed. See Rule 12(e), SCRCPP (“If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the Court is not obeyed within 15 days after notice of the order or within such other time as the Court may fix, the Court may strike the pleading to which the motion was directed or make such order as it deems just.”). In light of those provisions, it was not improper for the post-conviction relief judge to require Green’s counsel to carry out his role in the process and identify with specificity all the viable, non-frivolous claims Green wished to pursue before the evidentiary hearing moved forward.

Furthermore, the South Carolina Rules of Evidence provide some support for the post-conviction relief judge’s actions in Green’s case. In particular, Rule 401 and Rule 402 together ensure only relevant evidence is and will be admitted during the proceedings. See Rule 401,

SCRE (“ ‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”); Rule 402, SCRE (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible.”); see also State v. Douglas, 369 S.C. 424, 430, 632 S.E.2d 845, 848 (2006) (explaining only relevant evidence should be admitted). In light of those rules, the post-conviction relief judge had the ability to restrict the testimony and evidence presented during the evidentiary hearing in Green’s case to only matter that was relevant to the case.

Finally, the South Carolina Rules of Professional Conduct also provide justification for the limitations imposed by the post-conviction relief judge in Green’s case. Specifically, Rule 3.1—which must be viewed in conjunction with the assistance of counsel provided in post-conviction relief cases through Rule 71.1 and Section 17-27-60—precludes lawyers from asserting or controverting issues unless a non-frivolous basis in law and fact exists. See Rule 3.1, RPC, Rule 407, SCACR (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”). Based on that provision, Green’s counsel, who had been appointed to provide Green with the assistance and “professional judgment” necessary to seek post-conviction relief in a legally-sound manner, could not properly

advance claims unless he had first determined there was a basis in law and fact for doing so. Id. And, relatedly, he could not be forced to surrender his ethical obligations and pursue frivolous claims without notifying the post-conviction relief judge even if Green had wished him to do so. See Jones v. Barnes, 463 U.S. 745, 751 (1983) (explaining no authority suggests an “indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points”); see also Anders v. California, 386 U.S. 738, 744 (1967) (“Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, *he should so advise the court and request permission to withdraw.*” (emphasis added)); cf. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991) (confirming the Anders process, which requires counsel to brief “arguable issues” while *also* submitting a request to be relieved as counsel, remains applicable to appeals in post-conviction relief cases).

Based on all those different provisions of South Carolina law, the limitations placed by the post-conviction relief judge on the testimony presented and questioning conducted during the evidentiary hearing in Green’s case were entirely proper and prudent. For those reasons coupled with the reasons articulated in the State’s brief and during oral argument before this Court, the post-conviction relief judge’s ruling—contrary to the conclusion reached by this Court—should not have been reversed based purely on his incorrect reliance upon Rule 11 *at the same time* he correctly relied upon “other grounds” to impose the sensible limitations imposed. See Sec. & Exch. Comm’n v. Chenery Corp., 318 U.S. 80, 88 (1943) (“[W]e do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a

decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.” (citations and internal quotations omitted)). Accordingly, the State respectfully requests this Court reconsider this matter pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, vacate its prior opinion, and issue a new opinion affirming the post-conviction relief judge’s order denying relief.¹

Respectfully submitted,

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Attorney General

MARK R. FARTHING
Senior Assistant Attorney General



By: _____
Mark R. Farthing
S.C. Bar Number 76901

February 21, 2023

¹ Alternatively, in light of the nature of the issue this Court found existed in regard to the limitations imposed by the post-conviction relief judge, the State asks the Court to reconsider its decision to reverse the post-conviction relief judge’s order in total and remand for an entirely new evidentiary hearing. Supporting the propriety of such an alternative request, Green was *not*—despite the limitations imposed by the post-conviction relief judge—prevented from presenting all the testimony and evidence he wished to present in support of his claims regarding trial counsel’s failure to object to hearsay testimony, trial counsel’s failure to present the testimony of a particular witness, and appellate counsel’s failure to raise a speedy trial issue on appeal, and all those claims have already been ruled upon by the post-conviction relief judge in a manner entirely unimpacted by the limitations he placed at the outset of the evidentiary hearing. (App’x pp. 317-331). Since those specific claims have already been fully litigated and ruled upon, Green has already received his “one bite at the apple” concerning those claims and is not entitled to—and should not receive—the windfall of a second opportunity to prove those claims after his first full opportunity proved to be unsuccessful for him. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) (“Under the PCR rules, an applicant is entitled to a fully adjudication on the merits of the original petition, or ‘one bite at the apple.’ ”). Accordingly, at a minimum, this Court should reconsider the relief granted and tailor that relief to ensure it fairly addresses the error found while not simultaneously causing unnecessary litigation of issues that have already been fully and fairly litigated. See id. at 261, 523 S.E.2d at 755 (requesting successive post-conviction relief applications are permitted in rare circumstances and can allow for grounds not addressed in an earlier hearing to be addressed).

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Writ of Certiorari to Beaufort County
Honorable R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2018-001204

CHARLES GREEN, JR.,

Petitioner,

vs.

THE STATE,

Respondent.

PROOF OF SERVICE

I, Leigh Ann Stone, certify I have served the within Petition for Rehearing on Petitioner by sending an electronic copy via email to the address listed in AIS for the following individual:

Taylor D. Gilliam, Esq.
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify all parties required by Rule to be served have been served.
This 21st day of February, 2023.


LEIGH ANN STONE
Legal Assistant
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

CHARLES GREEN, JR.

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001204

Appeal from Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2023-UP-026

RETURN TO PETITION FOR REHEARING

Relying in part on authority which it never cited in its Brief of Respondent, and speculating—without evidence—about the PCR judge’s inner thoughts, the state takes umbrage with this Court’s well-reasoned opinion. Despite the fact that the PCR judge limited Green’s allegations at the evidentiary hearing under Rule 11, the state would have this Court dilute the efficacy of State v. Hiott, 381 S.C. 622, 674 S.E.2d 491 (2009). In essence, Respondent contends that although the PCR court impermissibly relied on and outright referenced Rule 11, SCRCP, to restrict Green’s presentation at the PCR hearing, the court *did not mean what it said*. This position is untenable, and this Court should deny the state’s Petition for Rehearing.

In its unpublished opinion, this Court granted limited relief in the form of a new PCR evidentiary hearing, because “the PCR court improperly required Green’s counsel to evaluate and effectively discard Green’s claims under the limitations of Rule 11 before presenting them to the PCR court.” Green v. State, Op. No. 2023-UP-026 (S.C. Ct. App. filed Jan. 25, 2023). Furthermore, this Court noted “PCR counsel was not allowed to fully present Green’s PCR claims.” Id. These are accurate conclusions, supported by the record. As a result, this Court correctly held “the PCR court erred in using Rule 11 to justify the refusal to consider the merits of and hear testimony on Green’s claims.” Id.

In Hiott, supra, our Supreme Court discussed a potential chilling effect and noted how “there are already limitations in place that serve to curb the potential abuse of the PCR process.” 381 S.C. 622, 629, 674 S.E.2d 491, 494 (2009). Instead of conceding the applicability of Hiott, the state now seeks to relitigate established law.

The state now posits that the PCR judge *could have* relied on an alternative theory to limit Green’s allegations. True, the PCR judge could have issued an order for amendment of the application under S.C. Code Ann. § 17-27-70, *but he did not*. Instead, *sua sponte*, the PCR judge limited the claims Green could raise and thereby deprived him of his one bite at the apple. In doing so, the PCR judge stripped himself of his obligation to make findings of fact and conclusions of law in line with the PCR Act.

Additionally, it is practically impossible for a PCR attorney to determine what claims may be frivolous without hearing testimony from witnesses. As is often the case with PCR attorneys who are appointed to represent applicants via the contract system, numerous meetings (if any) do not occur between client and counsel. As a result, many PCR attorneys are unaware of what the testimony of their clients is going to be until the client is called to the stand.

The state maintains that the PCR judge *could have* relied on a handful of authorities when he referred to Rule 11 “and other grounds” at the PCR evidentiary hearing. In doing so, the state acknowledges that there is no evidence in the record that the PCR judge was actually relying on these authorities, only that he might have been.

The state’s first potential “other ground” that the PCR judge *could have* been referring to is S.C. Code Ann. § 17-27-50 which sets out: “The application shall identify the proceedings in which the applicant was convicted, give the date of the entry of the judgment and sentence complained of, specifically set forth the grounds upon which the application is based, and clearly state the relief desired.” Candidly, that is not a provision the PCR judge was referencing, or even likely considering, where the PCR judge never referenced a problem with specificity, only merit:

PCR counsel: He is alleging that he is prejudiced by the fact - -

PCR judge: No. Pursuant to Rule 11 and by other grounds, what are his grounds? And we’re going to go forward with that. I’m not going to let him just throw out anything and see if it sticks. I want to hear what the grounds are and that we’re going to pursue, and not just throw everything out there. Okay, sir?

App. 267 l. 21 – App. 268 l. 3.

Notably, despite the state’s current assertions that the PCR judge relied on other, unnamed and unlisted authorities, the PCR judge reiterated his reliance on Rule 11, SCRCP, seconds after the above exchange:

PCR judge: Any other basis of this claim of ineffective assistance of counsel?

PCR counsel: If we are speaking in terms of Rule 11, I would have to say no.

PCR judge: Okay, sir. Then, prosecutorial misconduct. Is there a viable claim there?

PCR counsel: Again, **if we’re - - under the limitations of Rule 11**, I’d have to say no.

PCR judge: **Well, you are.**

App. 268 ll. 14 – 22 (emphasis added).

The PCR judge noted for the record that counsel raised an objection “to me limiting you to Rule 11 basis.” App. 269 ll. 3 – 6. Furthermore, the PCR court made clear how he limited the allegations that could be raised:

Now, based on your representations to me, Mr. Falk, pursuant to **my requirements that you do so, under Rule 11**, the only ... ground that we’re proceeding on today is counsel failed to object to prejudicial hearsay, which caused some prejudice in this case. Is that correct?

App. 269 ll. 18 – 23.

Following the direct examination of trial counsel Trasi Campbell, the PCR judge made a record of a bench conference:

For the record, we had a bench conference, and counsel is concerned - - counsel for applicant is concerned that the applicant has brought here to these proceedings. I, of my own volition, sua sponte, have excluded the grounds that I’ll articulate on the record earlier as not being relevant or acknowledged, grounds that we can - - what’s the term I’m looking for, I’m drawing a blank. They are - - they’re not meritorious grounds, and therefore, I’m excluding them from the testimony.

And I’m going to tell you, Mr. Green, that your attorney is fighting for you, and he is concerned that you’re not going to be allowed to testify as to these other grounds that you’re claiming. But I’m not going to let you testify as to that. You’re protected on the record that if I make a mistake in saying that they’re not meritorious or recognizable grounds, then somebody will correct me. But I’m not going to let you testify to them, and your attorney is fighting for you on that behalf.

App. 281 l. 22 – App. 282 l. 16.

At the conclusion of the hearing, the PCR judge 1) amended the PCR application to include a failure to call a witness and 2) denied all of Green’s other allegations as specious. App. 310 l. 11 – 18. The above detailed breakdown of what actually transpired at the PCR evidentiary hearing illustrates why the state’s position is inaccurate and unpersuasive.

Based on the remarks by the PCR judge, and the overall sentiment expressed at the hearing, it is obvious the PCR judge was not relying on S.C. Code Ann. § 17-27-50 to limit Green's based on lack of specificity.

The second authority the state contends the PCR judge could have been relying on is S.C. Code Ann. § 17-27-70, "Court procedure on receipt of application."¹ Pet. for Rehearing p. 3. Under that statutory section, the PCR court "may, when appropriate, issue orders for amendment of the application or any pleading or motion, for pleading over, for filing further pleadings or motions, or for extending the time of the filing of any pleading." S.C. Code Ann. § 17-27-70(a). The Appendix before this Court does not contain any "orders for amendment," nor does the PCR judge ever indicate he intended to have Petitioner or PCR counsel modify the application to *exclude* allegations.² As such, it is readily apparent that the PCR judge never intended to rely on this "other ground" to limit Green's presentation at the PCR evidentiary hearing.

Third in the state's litany of potential (yet unarticulated) "other grounds" is Rule 71.1, SCRCP. Under Rule 71.1(d), the circuit court "shall promptly appoint counsel to assist the applicant if he is indigent" and "[c]ounsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary." Curiously, the state suggests this language that requires counsel to "insure that all available grounds for relief are included the application and shall amend the application if necessary" was the basis for the PCR judge—not counsel—to restrict Green's PCR allegations, despite the numerous outright references to Rule 11 at the evidentiary hearing. It is axiomatic that the rule requires counsel to

¹ This section also provides a thirty-day timeframe for the state to file its Return to a PCR application. That deadline was not complied with in this case. It is routinely overlooked in PCR cases.

² The PCR judge did amend the application to include the failure to call a witness. App. 310 ll. 11 – 15.

include “all available grounds” and shall therefore amend the application if necessary to accomplish that purpose. The state’s strained reading of this rule is illogical and was not the basis for the PCR judge’s decision to limit Green’s case under Rule 11, SCRCP.

Similar to the preceding three “other grounds,” the state’s fourth potential reasoning that the PCR judge could have relied on is Rule 12, SCRCP. Pet. for Rehearing p. 4. The state posits that Rule 12 “permits a post-conviction relief judge to require a more definite statement when the claims raised are too vague or ambiguous to be reasonably understood or addressed.” Id. As previously noted, the PCR judge made his ruling based on Rule 11 and perceived frivolity, not ambiguity. Furthermore, Rule 12(e) squarely places the burden on the state to “move for a more definite statement before interposing [its] responsive pleading.” Rule 12(e), SCRCP. The Appendix before this Court does not include a motion to make more definite or certain, as can be seen in other cases.

Either before or during the PCR evidentiary hearing, the state could have made a motion to make more definite or certain, *but it did not*. The state could have made a motion to dismiss under Rule 12, SCRCP, *but it did not*. The state could have filed for summary judgment under Rule 56, SCRCP, *but it did not*.

The state neglected to use the tools at its disposal in order to follow the correct process. Presumably, based on the lack of a motion to make more definite or certain, the state was satisfied with the clarity in Petitioner’s application. Had there been confusion, a motion would have been filed. Regardless, this rule was not on the PCR judge’s radar when improperly employing Rule 11 at the hearing.

The fifth “other ground” the state cites in its Petition for Rehearing entails two Rules of Evidence: Rule 401 and 402. A reference to Rule 401, SCRE, never appeared in the Brief of

Respondent; the state nonetheless contends this Court erred in failing to consider these authorities as possible grounds for the PCR court to have relied upon. For the sake of argument, however, these rules and their references to relevance contain no applicability to the case at bar. The PCR court was not concerned with relevance; it was purely seeking to limit the allegations to those perceived by counsel, without having heard testimony, as having merit. This fifth ground is simply another alternative that the state seeks to use as post-hoc rationalization grounds to affirm, despite the PCR judge's repeated references to Rule 11, in violation of Hiott,

The state's final "other ground" revolves around the Rules of Professional Conduct and is accompanied by a fundamentally flawed argument. Pet. for Rehearing p. 5. The state asserts that because Rule 3.1 of the South Carolina Rules of Professional Conduct suggests that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous," the PCR judge was just assisting PCR counsel with abiding by his ethical duties.

Simply put, an alleged violation of the Rules of Professional Conduct is properly handled by contacting the Office of Disciplinary Counsel, not by limiting the allegations that are leveled at a PCR evidentiary hearing. A violation of the Rules of Professional Conduct should be reported to the Office of Disciplinary Counsel. Under Rule 8.3:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

Rule 8.3(c), SCRPC, Rule 407, SCACR.

Although it is unclear whether opposing counsel, the PCR judge, or the attorney representing the state at the PCR hearing filed a disciplinary complaint against PCR counsel for his representation of Petitioner, the Appendix before this Court contains no complaints or

dispositions from the Office of Disciplinary Counsel. Further, if the PCR judge or opposing counsel believes there has been an ethical violation, they have a duty to report that under Rule 8.3, of our Rules of Professional Conduct. The remedy is not to curtail Green's claims under Rule 11, SCRCP.

The PCR judge's unarticulated "other grounds" are never defined or listed; the state instead substitutes its own belief as to what the judge meant, *without support from the record*. In other words, the state is attempting to read Judge McIntosh's mind and convince this Court that its interpretation is aligned with his. There is no proof that the state has now correctly deduced the PCR judge's true intentions, only an argument that the judge *might* have relied on other, unnamed authorities. There is no indication what those authorities were, and the fact remains that the PCR judge repeatedly referenced Rule 11, SCRCP. Respondent is asking this Court to reject the evidence of your eyes and ears.

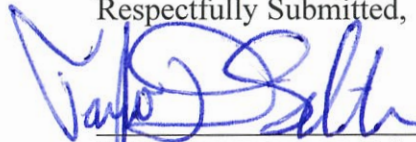
Because the words uttered by the PCR judge—"[p]ursuant to Rule 11"—are clear and unequivocal, a violation of our Supreme Court's precedent under Hiott, supra, occurred. Charles Green is entitled to a new PCR hearing.

In a footnote, the state alternatively requests that if this Court is going to grant a new PCR hearing and allow Green to call witnesses to the stand, that he be limited in his claims because certain claims "have already been fully litigated and ruled upon." Pet. for Rehearing n. 1. A review of the record rebuts this assertion.

PCR counsel did not have the opportunity to question trial counsel on the speedy trial issue, despite Green having included that issue in his PCR application. App. 252. There was no development of the speedy trial factors, and trial counsel was not asked whether she intended to move for dismissal under the 6th Amendment. Stated differently, this issue was not allowed to be

developed based upon the limitations imposed by the PCR judge. This Court's current opinion granting Green a new PCR hearing without limitations should remain in place. The undersigned respectfully requests that this Court deny the state's petition for rehearing.

Respectfully Submitted,



TAYLOR D GILLIAM
Appellate Defender

This 8th day of March, 2023.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Beaufort County

Honorable R. Lawton McIntosh, Circuit Court Judge

CHARLES GREEN, JR.

PETITIONER

V.

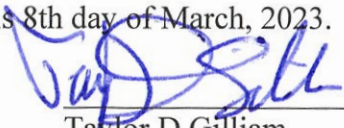
STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2018-001204

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); on and Charles Green, #320693, at Kershaw Correctional Institution, 4848 Gold Mine Highway, Kershaw, SC 29067-8069, this 8th day of March, 2023.



Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

SUPP. APP'X 125

The South Carolina Court of Appeals

Charles Green, Jr., Petitioner,

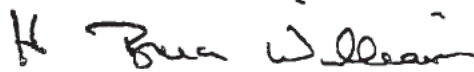
v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001204

ORDER

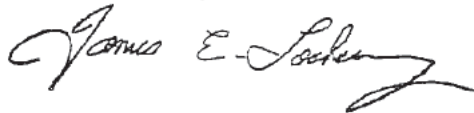
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



C.J.



J.



A.J.

Columbia, South Carolina

cc:

Taylor Davis Gilliam, Esquire
Mark Reynolds Farthing, Esquire
Alan McCrory Wilson, Esquire
The Honorable R. Lawton McIntosh

FILED
Mar 23 2023

SUPP. APP'X 126