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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Jennifer B. McCoy, Circuit Court Judge

Case No. 2018-CP-1000494
Appellate Case 2023-000741

King Chevais Conyers, Petitioner,

vs.

The State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to object to the State's closing argument.

Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to communicate with Petitioner and review evidence.

Whether the PCR court erred in concluding that Petitioner is not entitled to relief based on newly discovered evidence.

STATEMENT OF THE CASE

Petitioner was indicted for murder, first-degree burglary, and possession of a weapon during the commission of a violent crime. App. 2702. Petitioner proceeded to trial, along with his co-defendant, Jeremiah Belton, and was represented by Christopher Murphy. App. 2702. The jury found him guilty as indicted. He was sentenced to concurrent terms of life imprisonment for murder and first-degree burglary and five years' imprisonment for the weapon charge. App. 2702-2703. Petitioner filed a timely notice of appeal. App. 2703. Appellate Defender David Alexander submitted a brief and motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967). App. 2703. The South Carolina Court of Appeals dismissed the appeal. App. 2703. The remittitur was sent January 26, 2018. Petition filed a *pro se* application for post-conviction relief (PCR) on February 1, 2018 and prior to the evidentiary hearing, Petitioner amended the application. App. 1236-1270. The evidentiary hearing was held on December 8, 2021 and September 16, 2022 before the Honorable Jennifer B. McCoy, who ultimately denied and dismissed the application with prejudice by order dated April 17, 2023. *See* App. 2702-2728. Petitioner now submits this petition for writ of certiorari for the Court's consideration.

ARGUMENT

The PCR court erred in finding that trial counsel was not ineffective by failing to investigate, prepare, and present Petitioner's alibi witness.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington*, 466 U.S. 668 (1984). "The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." *State v. Sterling*, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief." *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). "Where counsel articulates a **valid** reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (emphasis added).

"Our standard of review in PCR cases depends on the specific issue before us. We defer to a PCR court's findings of fact and will uphold them if there is evidence in the record to support them. We review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839–40 (2018) (citations omitted). "The Court will reverse the PCR court's decision when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

This Court held in *Walker v. State* that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Walker v. State*, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (2014). Further, "one component of that duty is to investigate alibi witnesses identified by a defendant, and the failure

to make some effort to contact them to ascertain whether their testimony would aid the defense is unreasonable." *Id*.

In the case of *Weldon v. State*, the South Carolina Court of Appeals held that trial counsel's failure to call an alibi witness was ineffective assistance of counsel. *Weldon v. State*, 436 S.C. 69, 870 S.E.2d 183 (Ct. App. 2021). In that case, the defendant's mother and sister were present at trial and trial counsel had asked them to testify as alibi witnesses. *Id*. at 77. Trial counsel never actually called them as witnesses, however. *Id*. at 77. Trial counsel testified he had filed a notice of an alibi defense but ultimately did not present one. *Id*. at 78. Trial counsel testified at PCR that he "may have declined to call the witnesses because the State might have then called rebuttal witnesses to challenge the alibi testimony and because he wanted to have the last closing argument." *Id*. at 83. The Court found this reasoning insufficient.

Here, Petitioner repeatedly asked trial counsel to interview his alibi witness, Vondayna Brown. App. 2630. Brown would have testified that Petitioner was with her at her niece's birthday party the night of the murder. App. 2637-2638. Trial counsel testified that he talked to Brown and filed a notice of alibi defense with the State, intending to call Brown as a witness, similarly to counsel in the *Weldon* case. App. 2599, 2606. Also, just like counsel in *Weldon*, trial counsel failed to call Brown as an alibi witness even though he had discussed her testifying in this case and filed a notice of alibi defense. Trial counsel testified that Brown had car trouble on the day she was intended to testify and trial counsel failed to subpoena her to ensure her appearance at court claiming that he expected her to appear voluntarily. App. 2599, 2606. However, she did not appear and trial counsel failed to move for a continuance to ensure this essential witness was present to testify on Petitioner's behalf. App. 2606.

When asked about his failure to move for a continuance, trial counsel testified he was not concerned about her not appearing and not testifying because he thought the State would present a rebuttal witness who would contradict her alibi testimony. App. 2607. However, in *Weldon*, counsel in that case also stated he believed the State would present rebuttal testimony which would contradict the alibi witnesses he failed to call as well. The Court still ruled that his failure to call the alibi witnesses was ineffective assistance of counsel. Similarly, here, trial counsel's failure to call Petitioner's alibi witness was ineffective assistance of counsel. It is for the jury to decide which witnesses' testimonies to believe and what weight to give testimony presented. Counsel's failure to subpoena Brown to testify and move for a continuance when she did not appear at court to testify prejudiced Petitioner because he was not able to present his alibi witness to the jury.

It should also be noted that Petitioner's co-defendant, Jeremiah Belton was granted PCR on this very issue. App. 2733. His trial attorney also did not call his alibi witness to testify on his behalf at trial. App. 2732. After his PCR evidentiary hearing, the PCR Court ruled that Belton's trial counsel's performance was ineffective on this issue and Belton was entitled to a new trial. App. 2733.

Trial counsel was ineffective for not preparing and presenting Petitioner's alibi witness and the PCR court erred in ruling otherwise. Petitioner's Sixth Amendment right to counsel was violated by trial counsel's ineffective assistance.

Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to investigate and prepare for trial regarding the telephone evidence presented at trial, specifically, failing to present evidence that Petitioner was not the owner or user of the phone alleged at trial.

"A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation." *Thompson v. Wainwright*, 787 F.2d 1447, 1450 (11th Cir.1986); *see also Strickland v. Washington*, 466 U.S. at 691, 104 S.Ct. 2052 (1984). When evaluating the reasonableness of counsel's conduct, "the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. 2052 (1984). While the scope of the investigation will depend on the trial and the issues involved, "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007) (citations omitted). "Where counsel articulates a **valid** reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (emphasis added).

At trial, the State presented evidence alleging Petitioner was the owner or user of a phone number ending in 9516. App. 432-448. The State presented this evidence through Constance Manigault. She testified that she was Delaney's girlfriend at the time, one of the co-defendant's who was shot and killed during this burglary and murder. App. 430-431. She further testified she had previously met Petitioner through Delaney and she identified Petitioner in court. App. 432-433. She testified that after she met Petitioner, she saved his number in her phone which ended in 9516. App. 433. Finally, she testified Delaney called her from that number on the night of the crimes and she returned the call the next morning looking for Delaney. App. 436-448. This was relevant because the State presented evidence that this cellphone was tracked going from North Charleston, to Columbia, to Charlotte, and back to where the murder occurred. App. 2596. The

State used the evidence to place Petitioner with the other co-defendants when they drove all over North and South Carolina and ended up at the victim's home. App. 2596. This evidence was important because Petitioner maintained that he was not present at all during the co-defendants' excursions and ultimately at the home where the burglary and murder occurred.

Brown testified at PCR that she and Petitioner shared a phone at that time and it was not the number of the cellphone in question at trial. App. 2581. She further testified that Petitioner did not have any other cellphone than the one they shared. App. 2581. Brown did not testify at trial, however, as mentioned above.

At PCR, trial counsel testified predominantly in generalities about his usual practice and not with any specificity about many aspects related to Petitioner's trial. He testified the State had scant evidence that this cellphone actually belonged to Petitioner but that the issue was whether he used the phone, not whether he owned the phone. App. 2597. The PCR Court agreed with trial counsel that was the issue, usage not ownership, and that trial counsel's performance was sufficient with cross-examination of Manigault. App. 2713-2714.

However, trial counsel's testimony at PCR does not demonstrate that trial counsel did any investigation or preparation for trial regarding this issue. When asked whether he discussed with any witnesses or tried to present any evidence that this phone did not belong to Petitioner he responded, "I think I tried to figure that out." App. 2608. He went on to explain that the issue was not who owned the phone but who used it and then he just never answered the question about what efforts he made to question anyone or present any evidence regarding whether this phone was owned or used by Petitioner. App. 2608-2609. He continued by stating "[i]t was very scant testimony, whatever it was." App. 2609. At no point during his testimony did counsel

remember what the evidence was against Petitioner regarding the phone or make any mention to how he addressed the issue in preparation for trial or at trial, with exception of challenging the "ping technology" testimony. App. 2597. He did not articulate any strategic reason as to why he did not do any preparation or present any evidence at trial to refute the State's evidence that the phone was used by Petitioner.

This evidence placed Petitioner at the crime scene. It was essential to the State's case and extremely important for trial counsel to focus on and discredit. Trial counsel failed to do the bare minimum required by criminal defense counsel in at least investigating this issue. Furthermore, he did not articulate any valid, strategic reason as to why he did not do so and Petitioner was prejudiced as a result. Petitioner's right to counsel was violated by trial counsel's ineffective assistance.

Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to object to the State's closing argument.

When trial counsel fails to object to improper comments made by the solicitor in closing argument and the comments prejudice the defendant, this Court has found that failure to object is ineffective assistance of trial counsel. *Vasquez v. State*, 388 S.C. 447, 459, 698 S.E.2d 561, 566-567 (2010)(finding trial counsel's failure to object to the solicitor's improper comments in closing argument where he drew a correlation between the events of September 11, 2001 and the acts for which Petitioner was standing trial constituted deficient performance which prejudiced the Petitioner); *see also Tappeiner v. State*, 416 S.C. 239, 785 S.E.2d 471 (2016) (finding that trial counsel was ineffective for failing to object to State's closing argument comments vouching for the victim's credibility and comments appealing to the juror's emotions).

"A closing argument must stay contained to the evidence within the record or any reasonable inferences that can be drawn therefrom." *Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010). "A solicitor is allowed to argue his or her version of the evidence and to comment on how much weight to give such evidence." *Vasquez*, 388 S.C. at 458, 698 S.E.2d at 566. "However, a solicitor's duty is to see justice done, not to convict a defendant." *Id*.

When counsel makes an improper argument, opposing counsel should "immediately object and ... have a record made of the statements or language complained of and ... ask the court for a distinct ruling thereon." *State v. Black*, 319 S.C. 515, 521, 462 S.E.2d 311, 315 (Ct. App. 1995). "The trial court has broad discretion when dealing with the propriety of the solicitor's argument, including the question of whether to grant a defendant's mistrial motion." *State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). In evaluating these types of comments, this Court first decides whether the comment at issue was improper, then "the question becomes whether trial counsel's failure to object to these comments prejudiced Petitioner and, in turn, denied him effective assistance of counsel." *Vasquez v. State*, 388 S.C.447, 460, 698 S.E.2d 561, 567 (2010).

This Court has stated:

> Improper comments do not automatically require reversal if they are not prejudicial to the defendant. On appeal, the appellate court will view the alleged impropriety of the solicitor's argument in the context of the entire record .... The appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.
>
> *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166-67 (1998) (citations omitted)

This Court went into great detail about the danger of improper comments by solicitors in closing arguments in *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019). In *Fortune*, the solicitor

made comments to the jury suggesting "he had already determined Fortune was guilty" *Id*. at 551. In deciding these comments made to the jury were improper and violated Fortune's right to Due Process, this Court relied on the Supreme Court of the United States previous case where the Court admonished prosecutors stating:

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, (1935); *see* also *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007) ("Solicitors are bound to rules of fairness in their closing arguments ...."); *State v. Linder*, 276 S.C. 304, 312, 278 S.E.2d 335, 339 (1981) ("While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done.").

The Supreme Court of the United States has condemned a prosecutor's closing argument in which he suggests to the jury his "personal impression[ ]" the defendant is guilty.

> [S]uch comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

United States v. Young, 470 U.S. 1, 18-19, 105 S. Ct. 1038, 1048, (1985).

While these cases' procedural postures differ from Petitioner's, they are still instructive to demonstrate the comments made by the solicitor in the closing argument were improper.

Here, the Solicitor's comments during closing argument fall into this category condemned by both the Supreme Court of the United States and this Court: comments suggesting to the jury the solicitor's personal impression that the Defendant is guilty. During the closing argument, the solicitor told the jury, "[l]et's talk a minute about the culture of these guys. They're criminals. But we don't understand it. But they do. You don't ask questions. You don't talk to the police. There's a code. You don't snitch. You don't trust anybody. You don't flinch, or think it's odd when you're at a woman's house and everybody has a loaded weapon. Ecstasy, cocaine, marijuana. And you protect your associate. That's their culture." App. 1137. At PCR, Petitioner's trial counsel testified that he does not object in trials because objections can "bring more attention and more focus to whatever issue it is." App. 2614. The PCR Court ruled that the solicitor's comments were not improper because they did not "appeal to the personal biases of the jury" and "were not calculated to arouse the jurors' passions or prejudices." App. 2722.

However, comments that appeal to the personal biases of the jury or are calculated to arouse the jurors' passions or prejudices are not the only type of improper comments that can be made by a solicitor in closing argument. Solicitors should also refrain from suggesting to the jury their personal impression that the defendant is guilty. This improper comment "carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." The comments made here did just that. The solicitor suggested to the jury that he had decided Petitioner was guilty and not only was he guilty in this case, he was a criminal and he had his own criminal culture and criminal rules to abide by.

When questioned about trial counsel's failure to object to this comment, trial counsel testified he did not object because he did not want to draw attention to the comment and he

only objects when he knows the judge will sustain the objection. App. 2613-2614. However, this Court has stated in *Stone v. State*, 419 S.C. 370, 386, 798 S.E.2d 561, 570 (2017), how important it is to object: "Without an objection, however, there can be no debate[,] and the trial court has no opportunity to exercise its discretion." Further, "[t]he fact the trial court has such wide discretion does not justify the decision not to object. Rather, the debate that precedes the exercise of that discretion is part of the adversarial process" trial counsel is required to test. *Id*.; *see also Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) ("When evaluating the reasonableness of counsel's conduct, 'the court should keep in mind that counsel's function ... is to make the adversarial testing process work in the particular case.'" (quoting *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052)).

Choosing not to object to objectionable comments in closing argument is not a valid trial strategy. There is no valid trial strategy to allowing a solicitor to tell the jury your client is a criminal, this is the way he behaves, the language he uses, and the rules he follows that the jury cannot understand. Not objecting to that language to the jury regarding your client in a murder trial is not a valid legal strategy. This improper suggestion to the jury unfairly prejudiced Petitioner to the jury and trial counsel's failure to object to the comment deprived Petitioner of his right to counsel.

Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to communicate with Petitioner and review evidence.

Rule 5 of the South Carolina Rules of Criminal Procedure provides for the disclosure of evidence the defendant is entitled to in a criminal prosecution. When addressing claims of ineffective assistance of trial counsel in failing to review discovery or evidence with clients, or

provide a copy of that discovery or evidence to clients, this Court looks at whether trial counsel's review of discovery with the client was a deficient performance and whether that deficient performance prejudiced the defendant. In addressing the prejudice prong, this Court requires Petitioner to offer "evidence of how additional preparation or communication would have resulted in a different outcome" *Smith v. State*, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012). Thus, the analysis of this claim is similar to a claim of ineffective assistance of counsel for counsel's lack of preparation or communication with a client before trial. *See Harris v. State* (finding that the outcome of trial would not have been different had counsel spent more time with the defendant or given him a copy of the discovery materials when counsel testified at PCR that he treated this case like a death penalty case and put everything down to prepare for this trial and testified he went over all the discovery with the client prior to trial). *Harris v. State*, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)(abrogated by *Smalls v. State* 422 S.C. 174, 810 S.E.2d 836 (2018) on the issue of reviewing questions of law *de novo*).

The PCR Court ruled that trial counsel's testimony at the evidentiary hearing was that he "communicated with Applicant through phone calls and mail about the State's evidence and provided Applicant the most pertinent discovery." App. 2715. However, that is not what trial counsel testified to specifically. When asked about his communication with Petitioner and reviewing evidence with Petitioner prior to trial, once again trial counsel testified in generalities about what his typical practice included. He did not testify to any specific details about what he remembered doing in Petitioner's case or reference any notes he kept from his representation of Petitioner. He merely stated his typical practice was to communicate with clients through

phone calls and letters, not typically through many jail visits. App. 2600-2601. He even stated, "I mean, I couldn't say with any specificity -- specifics. I couldn't give any specifics." App. 2600.

He further testified his typical practice was to send as much discovery as he could to the jail but again did not remember what he sent to Petitioner or reference any notes from his representation of Petitioner to know with any specificity what he did in Petitioner's case. The only thing he remembered specifically about Petitioner's discovery was that it contained boxes of material, "[a] lot of it was just cellphone records from all those folks who didn't have anything to do with it, so I wouldn't have given them those." App. 2601.

Petitioner testified that he never received his discovery and trial counsel told him two of his co-defendants would testify against him and the State had "some cellphone numbers, none linking to [Petitioner]." App. 2632. Petitioner further testified that he met with counsel "at least three or four times" for "ten, fifteen minutes, maximum." App. 2629.

Our law in South Carolina requires a showing that more time meeting with trial counsel and discussing the discovery would have changed the outcome of the trial. Petitioner testified at PCR that he did not know the State was going to introduce evidence that the number ending in 9516 was used by him. Trial counsel did know this. App. 2608. Trial counsel also did not testify with any specificity as to his efforts to refute this evidence at trial as mentioned above. App. 2608. Had trial counsel disclosed this discovery to Petitioner and spent more time discussing it with Petitioner, they could have planned how to present evidence proving this number was not used by Petitioner and changed the outcome of Petitioner's trial as this evidence placed Petitioner with all the co-defendants, at the scene of the crime.

Whether the PCR court erred in concluding that Petitioner is not entitled to relief based on newly discovered evidence.

This Court ruled in *Hayden v. State* that when a party seeks a new trial based on after-discovered evidence, the party must show that the evidence:

> (1) Is such as would probably change the result if a new trial was had;
> (2) Has been discovered since the trial;
> (3) Could not by the exercise of due diligence have been discovered before the trial;
> (4) Is material to the issue of guilt or innocence; and,
> (5) Is not merely cumulative or impeaching.
>
> *Hayden v. State*, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983).

Petitioner argued he was entitled to post-conviction relief based on newly discovered evidence in the form of testimony from co-defendants Jeremiah Belton and Troy Mason. App. 2725. The evidence was not available to Petitioner at the time of trial because Belton was not available to testify at trial and because Mason recanted his trial testimony. App. 2725. The PCR Court ruled that Belton's testimony was not material to Petitioner's guilt or innocence and that Mason's testimony from Belton's PCR hearing was not admissible. App. 2725-2727. The PCR Court erred.

Jeremiah Belton testified at Petitioner's PCR hearing. App. 2588. He and Petitioner were the only two of the defendants who went to trial. App. 2589. At the time Belton testified at PCR for Petitioner, Belton had completed his PCR hearing but was awaiting a decision. App. 2589-2590. Since then, his application was granted on the issue of his trial counsel failing to call his alibi witness to testify. App. 2729-2741. Belton did not testify during his and Petitioner's jury trial, invoking his Fifth Amendment right against self-incrimination. App. 2591. At PCR, he testified he was with the individuals who committed this crime prior to them going to the crime scene but he himself never went to the crime scene. App. 2591-2592. He further testified that Petitioner was

not with the group at any point in time that he was with the group. App. 2592. The PCR Court ruled this testimony was not material to Petitioner's guilt or innocence because Belton testified he was not at the crime scene and not with Petitioner but could not testify Petitioner was never at the crime scene. App. 2725-2726.

This testimony from Belton, however, was crucial and in direct contradiction with the State's version of events. The evidence presented to the jury was that Petitioner was partying with a group of people from Charleston, to Columbia, to Charlotte, and to the crime scene and that Petitioner was one of that group. Specifically, the State's version of events was that Belton was the driver, he drove to West Columbia and picked up Petitioner with all the other co-defendants already in the car. App. 1129. However, this testimony from Belton contradicts that because Belton himself testified that he was there with these people leading up to them going to the crime scene and Petitioner was not with them. Further, Belton's testimony was ultimately believed and his PCR was granted. App. 2729-2741.

This testimony would probably change the result in a new trial because it would create reasonable doubt in the mind of the jury. There was no physical evidence such as DNA, blood, or fingerprints, linking Petitioner to the crime. The two surviving victims of the home invasion testified that there were two or three people in the home during the invasion, not five people as co-defendants Mason and Caldwell testified to the jury in order to get themselves a plea deal by implicating people who were not involved in their crimes. The evidence suggests that Mason, Caldwell, and Delaney were the ones who entered the home and no one else. Delaney was shot and killed and Mason and Caldwell's DNA was found at the scene. That coupled with this testimony from Belton that he was with this group driving around but did not go to the crime

scene and that Petitioner was not with them is extremely important to Petitioner's defense. This evidence was discovered since the trial and could not have been discovered before the trial by exercise of due diligence because Belton and Petitioner were co-defendants in the same jury trial and Belton exercised his Fifth Amendment right not to testify at trial. It was only after trial and after his PCR hearing that Belton chose to testify. Finally, this testimony is material to the issue of guilt or innocence and it is not merely cumulative or impeaching. As such, the PCR Court erred in ruling Petitioner was not entitled to a new trial on this ground.

As it relates to Mason's testimony, Mason testified at Belton's PCR hearing. During that hearing he recanted his trial testimony. At trial he identified Belton and Petitioner as co-conspirators in the home invasion and murder. At the PCR hearing for Belton, he recanted that testimony. When PCR counsel for Petitioner called Mason as a witness at his PCR hearing, Mason exercised his right to counsel and, after speaking with counsel, he invoked his Fifth Amendment right not to testify. PCR counsel sought to admit his testimony in evidence and the PCR Court ruled it was inadmissible because it did not fit the hearsay exception Rule 804(b)(1) and that the testimony, if admitted, was not material to Petitioner's guilt or innocence. App. 2727-2728.

Rule 804 provides a hearsay exception in circumstances where the declarant is unavailable to testify. Rule 804(b)(1) provides an exception for "testimony given as a witness at another hearing of the same or a different proceeding…if the party against whom the testimony is now offered…had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." In *State v. Sanders*, the Court of Appeals ruled that a transcript from a previous trial with different counsel was admissible under Rule 804 when the co-defendant was unavailable to testify in the second trial. *State v. Sanders*, 356 S.C. 214, 588 S.E.2d 142 (Ct. App.

2003). Sanders' co-defendant testified against him at trial and he was convicted. *Id*. at 216. His conviction was later reversed and he went to trial again and that co-defendant could not be found. *Id*. at 216. The State moved to admit his testimony from the previous trial and Sanders' new attorney for the second trial objected on the basis that previous counsel did not adequately cross examine the co-defendant about the benefit he would receive for his testimony. *Id*. The Court of Appeals ruled the prior attorney had ample opportunity to question the co-defendant about his credibility and the benefit he expected to receive and the transcript was admissible. *Id*. at 219.

Also, in *State v. Nance*, this Court ruled a transcript from a previous trial of a now deceased witness who testified at the first trial could be admitted in evidence at the second trial when trial counsel strategically chose not to cross examine the witness in the first trial. *State v. Nance*, 393 S.C. 289, 297-298, 712 S.E.2d 446, 451 (2011). This Court ruled it was admissible because defense counsel had the prior opportunity to cross examine the witness and the fact that counsel did not make the most of that opportunity is not relevant for purposes of admissibility under Rule 804. *Id*.

Here, Mason was clearly unavailable as he invoked his right against self-incrimination during Petitioner's PCR evidentiary hearing. His previous testimony was given as a witness at another proceeding of a PCR regarding the same jury trial of Petitioner where he was a co-defendant. During said testimony, the State had the opportunity to cross examine him about his trial testimony and his recantation of said trial testimony. The PCR Court ruled the State did not have the same motive in cross examining Mason at that PCR hearing as it did at this PCR hearing and that was why Petitioner was not entitled to relief on this ground. App. 2727. However, the

rule states that the State must have a *similar* motive to cross examine, not an identical one. Proving the witness's recantation is false is the State's purpose in both PCR hearings. This is sufficient to meet the requirements of Rule 804(b)(1). The PCR court erred in ruling this testimony was not admissible to show the newly discovered evidence of Troy Mason's recantation of his trial testimony against Petitioner. Troy Mason's recantation of his trial testimony meets the requirements to grant a new trial as well. The testimony would probably change the result in a new trial, it was discovered since the trial, it could not by the exercise of due diligence have been discovered before the trial, it is material to the issue of guilt or innocence, and it is not merely cumulative or impeaching.

CONCLUSION

Petitioner therefore requests the Court grant the writ of certiorari and allow appellate review of the order of dismissal signed by the Honorable Jennifer B. McCoy.

Respectfully submitted,

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