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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Heath P. Taylor, Circuit Court Judge

App. Case No.: 2025-000361

Keshawn M. Rice, Petitioner,

vs.

State of South Carolina, Respondent.

Petition for Writ of Certiorari

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STATEMENT OF THE ISSUES

I. The lower court erred by failing to properly address the matters raised in the Rule 59, SCRCP, Motion; therefore, a remand is necessary to ensure that specific findings of fact and conclusions of law were entered on each issue raised and that the record before the court and testimony of each witness was properly addressed.

II. The lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel that was prejudicial to Petitioner when counsel failed to properly investigate, prepare and effectively represent Petitioner prior to and at his second trial.

A. The lower court erred in failing to find prejudicial ineffective assistance due to counsel's handling of matters related to Cesar Mendez; specifically, counsel's handling of the State's Motion in *Limine*, counsel's failure to proffer testimony and counsel's failure to properly object to hearsay when law enforcement testified regarding the information provided by Cesar Mendez.

B. The lower court erred in failing to find prejudicial ineffective assistance due to counsel's handling of matters related to co-defendant Carnellious D. Stringer; specifically, counsel's failure to utilize and/or obtain the transcript of Mr. Stringer's plea and failure to provide the accurate information from the plea proceeding to the trial court during sentencing.

C. The lower court erred in not finding prejudicial ineffective assistance of counsel when counsel failed to properly prepare for the State's evidence of flight that was not presented at the first trial and failed to object to the line of questioning and to hearsay evidence offered regarding flight.

D. The lower court erred in not finding prejudicial ineffective assistance of counsel when counsel failed to object and/or move for a mistrial when Kameron Wilson referenced the first trial during his direct testimony.

E. The lower court erred in not finding prejudicial ineffective assistance when counsel failed to utilize information contained in discovery and testimony offered at the first trial to cross-examine and/or impeach witnesses at the second trial.

STANDARD OF REVIEW

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

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. App. p. 379. During the March 2017 term of the Spartanburg County Grand Jury, Petitioner was indicted for murder (2017-GS-42-1795) and armed robbery (2017-GS-42-1796). App. p. 370. On February 5, 2018, Petitioner was called to trial in Spartanburg County in front of the Honorable J. Derham Cole. App. p. 405. Petitioner was represented by Richard Warder, Esquire, and the State was represented by Deputy Solicitor Derrick Bulsa.[1] On February 7, 2019, the trial resulted in a hung jury and mistrial. App. pp. 727-728.

During the March 2018 term of the Spartanburg County Grand Jury, Petitioner was indicted for burglary, 1st degree (2018-GS-42-0649). App. p. 374. On November 13, 2018, Petitioner was called to trial in Spartanburg County in front of the Honorable J. Derham Cole on the indictments for murder, armed robbery and burglary, 1st degree. App. p. 12. Petitioner was represented by Richard Warder, Esquire, and the State was represented by Deputy Solicitor Derrick Bulsa. On November 15, 2018, the jury found

[1] Attorney Bulsa is now in private practice.

Petitioner guilty of armed robbery, burglary, 1st degree, and the lesser included charge of voluntary manslaughter. App. p. 361. Judge Cole sentenced Petitioner to concurrent terms of 30 years. App. p. 371.

A direct appeal was filed and perfected via *Anders* Brief filed by Katherine Hudgins, Appellate Defender. App. pp. 384, 386. The following issue was raised in the *Anders* Brief:

> Did the trial court err in allowing an officer to speculate that Appellant could have left the county during the ten days between the time of the shooting and the time Appellant turned himself in to the police when there was no evidence that Appellant left the county?

App. p. 389. On March 10, 2021, the appeal was dismissed via *Anders* review, and the Remittitur was issued on March 31, 2021. App. pp. 401-403.

On April 19, 2021, an Application for Post Conviction Relief was filed. App. p. 815. Respondent submitted a Return and Motion for More Definite Statement on May 18, 2021, and an Amended Return and Motion for a More Definite Statement on June 9, 2021. App. pp. 823, 836.

On December 21, 2021, Petitioner, through counsel, filed a Motion for Discovery. App. p. 848. The Honorable R. Keith Kelly issued an Order Authorizing Discovery on March 28, 2022. App. p. 853.

On March 14, 2023, Petitioner, through counsel, filed an Amendment to Application for Post Conviction Relief. The Amendment alleged as follows:

> As a result of discovery received and the investigation conducted, Applicant would move to amend his original Application for Post Conviction Relief. In general, Applicant would allege that his rights pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, as well as pursuant to Article I, Section 14 of the South Carolina Constitution, were violated prior to and during his trial. Applicant would further amend his Application for Post Conviction Relief to

contain the following specific allegations of ineffective assistance of trial and appellate counsel:

1. Trial counsel rendered ineffective assistance that was prejudicial to Applicant when he failed to properly investigate, prepare and effectively represent Applicant prior to and at his second trial. Specifically, Applicant alleges the following deficiencies:

    a. Trial counsel failed to properly advise Applicant and handle matters related to the additional indictment (2018-GS-42-0649).

    b. Trial counsel failed to investigate and/or utilize witnesses for the defense.[2]

    c. Trial counsel failed to effectively handle matters related to Cesar Mendez. Specifically, but not limited to the following:

        1) Failure to prepare to and/or utilize Cesar Mendez as a witness at trial.

        2) Failure to properly handle the State's Motion in Limine regarding matters related to the testimony of Cesar Mendez and/or failure to proffer his testimony.

        3) Failure to object to hearsay that violated the Confrontation Clause when law enforcement testified regarding the information provided by Cesar Mendez.

    d. Trial counsel failed to effectively handle matters related to Applicant's co-defendant Carnellious D. Stringer. Specifically, but not limited to the following:

        1) Failure to utilize and/or obtain the transcript of Mr. Stringer's plea on February 5, 2018.

        2) Failure to address the information provided regarding Mr. Stringer's plea to the court during sentencing.

    e. Trial counsel failed to advise Applicant and prepare for the State's evidence of flight that was not presented in the first trial. Trial counsel failed to object to hearsay evidence offered regarding flight at Applicant's second trial.[3]

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[2] At the evidentiary hearing, Petitioner's counsel informed the court that Petitioner would not be calling any additional witnesses to support the claim that counsel failed to call witnesses. App. pp. 875-876, 1031.

[3] At the evidentiary hearing, this issue was verbally amended as follows: Trial counsel failed to advise Applicant and prepare for the State's evidence of flight that was not presented in the first trial. Trial counsel failed to object to the line of questioning and to hearsay evidence offered regarding flight at Applicant's second trial. App. pp. 875-876, 1031-1032.

f. Trial counsel failed to object and/or move for a mistrial when Kameron Wilson referenced the first trial during his direct testimony. Transcript p. 159, lns. 10-14.

g. Trial counsel failed to make objections and arguments in the first and second trial and prepare in the second trial for the testimony of Zaria Owens and the State's witnesses regarding meeting with her.

h. Trial counsel failed to effectively utilize information contained in discovery and testimony offered at the first trial to cross-examine and/or impeach the following witnesses:

1) Jonathan Lawson
2) Kevin Bowen
3) Wendy Thomas
4) Mary Ann Kotlarich
5) Kameron Wilson
6) Elian Nava
7) Dr. Wren

i. Trial counsel failed to present a reasonable defense through his closing argument and failed to present the theory of the case provided in the first trial.

2. Appellate counsel provided ineffective assistance that was prejudicial to Applicant when she failed to raise any meritorious issues on appeal.

3. Pursuant to Rule 15(b), SCRCP, Applicant would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

App. pp. 856-860.

On May 23, 2024, an evidentiary hearing was convened in Spartanburg County in front of the Honorable Heath P. Taylor. App. p. 867. Petitioner was present and represented by Tricia A. Blanchette, Esquire. Respondent was represented by Bryan T. Hall, Assistant Attorney General. Petitioner called Richard H. Warder, Esquire, and Kathrine H. Hudgins, Esquire, to the stand; Respondent did not call a witness. App. pp. 878, 905.

At the conclusion of the hearing, the Court took the matter under advisement. App. p. 1028. On January 3, 2025, an Order of Dismissal was issued, which was filed on January 13, 2025. App. pp. 1076-1103. Petitioner, through counsel, filed a timely Rule 59, SCRCP, Motion. App. p. 1104. On January 30, 2025, an Order was filed denying Petitioner's Rule 59, SCRCP, Motion, from which this appeal follows. App. p. 1111.

ARGUMENT

I. The lower court erred by failing to properly address the matters raised in the Rule 59, SCRCP, Motion; therefore, a remand is necessary to ensure that specific findings of fact and conclusions of law were entered on each issue raised and that the record before the court and testimony of each witness was properly addressed.

Via Rule 59, SCRCP, Motion, Petitioner asked the court to "ensure that specific findings of fact and conclusions of law are entered on each issue raised in the Amendment and that the record before the Court and testimony of each witness is properly addressed" pursuant to South Carolina Code § 17-27-80 and *Marlar v. State*, 375 S.C. 407, 653 S.E.2d 266 (2007). App. p. 1108. In support of the Motion, Petitioner addressed specific areas of concern and made arguments in support of relief. App. pp. 1108-1109. In conclusion, Petitioner requested that the court "review the full record, alter, amend or reconsider the standing Order of Dismissal, and/or rehear Applicant's case pursuant to Rule 59(a) and (e), SCRCP." App. p. 1109.

As discussed in Petitioner's Rule 59, SCRCP, Motion, *Marlar* and its progeny have resulted from the lower courts' repeated failure to adequately address issues raised at an evidentiary hearing in final orders. *See Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) (Remanding and explaining the Court's concern with PCR orders that fail to address the issues raised at a PCR hearing, which result in depriving parties of rulings on

the issues, make review by the appellate court and the workload of the appellate court more difficult, and require remand for new hearings and/or orders.); *Reese v. State*, 425 S.C. 108, 820 S.E.2d 376 (2018) (Granting the request for remand by both parties as result of the "patent inadequacies" of the PCR court's order.); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (Remanding for the PCR court to make adequate findings of fact and conclusions of law regarding an unaddressed PCR claim despite a Rule 59, SCRCP, motion not being filed.).

Clearly, these cases have resulted from the failure of the lower courts to address issues raised at evidentiary hearings in final orders, which has required the appellate courts to remand and/or rule upon issues not properly addressed in a final order or in a Rule 59, SCRCP, motion. Here, Petitioner filed a Rule 59, SCRCP, Motion, and the court issued a blanket denial without addressing the substance of Petitioner's motion. Petitioner submits that a remand is necessary for the reasons addressed in the Rule 59, SCRCP, Motion, which is included in the record before this Court and incorporated by reference herein. App. pp. 1105-1109. Alternatively, if this Court finds that a remand is not required, Petitioner would ask the Court to review the issues raised via Amendment, at the hearing, contained in the Order of Dismissal and addressed via the Rule 59, SCRCP, Motion.

II. The lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel that was prejudicial to Petitioner when counsel failed to properly investigate, prepare and effectively represent Petitioner prior to and at his second trial.

Petitioner submits that the lower court erred by failing to find that trial counsel rendered ineffective assistance of counsel that was prejudicial to Petitioner when counsel failed to properly investigate, prepare and effectively represent Petitioner prior to and at

his second trial. As a result, Petitioner submits that a reversal of the lower court is required.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). Where an application for post conviction relief alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.* 466 U.S. at 686; *see Butler v. State*, 286 S.C. 441 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 691. The applicant must overcome this presumption in order to receive relief. *Bell v. State*, 321 S.C. 238 (1996); *see also Cherry v. State*, 300 S.C. 238 (1989); Rule 71.1(e), SCRCP.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117 (citing *Strickland*, 466 U.S. at 688). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18.

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

In *Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008), this Court reversed the lower court and granted PCR relief when counsel failed to conduct a reasonable investigation. This Court held that a reasonable investigation includes interviewing witnesses and conducting an independent investigation of the facts of the case. *Lounds*, 380 S.C. at 460, 670 S.E.2d at 649, *See Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590. In *McKnight*, this Court held: "This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (*quoting Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)).

Here, the lower court's reliance upon counsel's "credible" testimony in the Order to find his preparation and investigation was "reasonable under prevailing professional norms" can be directly refuted by the record before this Court and the prejudice can clearly be seen in contrasting the outcomes of the two trials. App. pp. 1085-1086. When counsel was asked at the evidentiary hearing if he could recall what preparation he did between the two trials, he responded: "It was 7 years ago. The answer is: No, I don't

recall what preparation." App. p. 909, lns. 6-10. When asked about Petitioner's request to obtain the first trial transcript and whether he obtained the transcript, he responded that he did not believe he obtained the transcript. App. pp. 909-910. As to whether he conducted an independent investigation, he testified that he has an investigator on staff and he was sure he worked on the case with them. App. pp. 914-915. Petitioner submits that the record clearly does not support the findings in the Order that interestingly do not even cite to the record.

Furthermore, the prejudice Petitioner suffered is evident from the numerous matters of ineffective assistance of counsel addressed below that resulted directly from counsel's failure to properly investigate, prepare and effectively represent Petition prior to and at his second trial. It is apparent from the record before this Court that the State prepared and executed a new strategy at the second trial that resulted in Petitioner's current convictions, and counsel failed to properly prepare and represent Petitioner at his second trial, from which the resulting convictions demonstrate the prejudice suffered.

A. The lower court erred in failing to find prejudicial ineffective assistance due to counsel's handling of matters related to Cesar Mendez; specifically, counsel's handling of the State's Motion in *Limine*, counsel's failure to proffer testimony and counsel's failure to properly object to hearsay when law enforcement testified regarding the information provided by Cesar Mendez.

The lower court erred in failing to find prejudicial ineffective assistance of counsel due to counsel's handling of matters related to Cesar Mendez; specifically, counsel's handling of the State's Motion *in limine*, counsel's failure to proffer testimony and counsel's failure to object to hearsay when law enforcement testified regarding the information provided by Cesar Mendez. Therefore, Petitioner submits that a reversal of the lower court is required.

At the outset of Petitioner's trial, the State moved to preclude the defense from going into a line of questioning with victim's mother about moving drug evidence since it was false and hearsay. App. p. 14, lns. 11-20. In making the argument for precluding this line of questioning, the State argued that Cesar Mendez ("Mendez") was not available as far as the State was concerned, so what he said to law enforcement should not be allowed to be introduced in a roundabout way through victim's mother. App. p. 14, lns. 21-25.

In response, trial counsel argued that the State's argument was crazy, that the defense had a right to fully cross-examine her and that the testimony was relevant. App. pp. 15-17. Specifically, counsel argued that she had committed perjury since she denied moving the marijuana in the first trial and he had reason to believe that her testimony was false. App. pp. 15-16, 520-521. He also argued that Mendez was the one that could contradict her testimony, but he should not have to call Mendez and lose last closing argument. App. p. 16, ln. 17 – p. 17, ln. 11.

The trial court determined that he would allow counsel to ask the victim's mother questions outside the presence of the jury and rule on the admissibility of the testimony. App. p. 18, lns. 7-15. Thereafter, no proffer was conducted nor was the victim's mother questioned as counsel argued was needed. App. pp. 122-138.

Despite making the argument that questions regarding what Mendez said to law enforcement would be hearsay as discussed above, the State called Deputy Kevin Bowen and asked him about his interaction and the information he obtained from Mendez. App. pp. 115-118. Prior to any objections from trial counsel, Deputy Bowen testified that he took Mendez off to the side at the scene, he told him what happened and provided one name "Nava." App. p. 115, ln. 20 – p .116, ln. 5. After trial counsel entered an objection

and a bench conference was conducted off the record, Deputy Bowen went on to testify that Mendez said that there was one (Nava) and three others at the scene.[4] App. pp. 116-117. He further testified that Nava did not fire a shot, and he knew that two black males fired the shots. App. pp. 117-118.

When called to the stand at the evidentiary hearing, Katherine Hudgins, Esquire, recalled that she was appointed Petitioner's case in her capacity as an appellate defender. App. p. 879. She explained her process of reviewing the record and briefing a case on appeal. App. pp. 879-881. She testified that she filed an *Anders* Brief and explained the *Anders* process. App. pp. 880-881. She also addressed issue preservation requirements and the necessity of a contemporaneous objection and a ruling on the record. App. p. 887, ln. 20- p. 888, ln. 6.

After identifying and PCR counsel introducing a letter Ms. Hudgins wrote Petitioner after filing an *Anders* Brief, she explained one of the issues she pointed out for PCR was the testimony of Deputy Bowen regarding what Mendez had told him. App. pp. 882-884, 888, 1035. Since Mendez was not called at trial, she said the testimony presented "a pretty classic 'Confrontation Clause' problem." App. p. 888, lns. 17-20. Following her review of the relevant transcript pages, she recalled that there was an objection to hearsay and a bench conference but no further objections or any form of ruling was made on the record for her to properly address the matter on appeal. App. pp. 888-889, 899-900.

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[4] Due the bench conference being off the record, it is unknown what was discussed or what rulings were made, but after it is held it appears the State asks questions about what Mendez said in his excited state. Therefore, it could be assumed that the court allowed the testimony as an excited utterance exception to hearsay, but counsel did not ensure the record was properly made on this matter to allow review and for it to be contrasted against the court's prior rulings regarding hearsay involving Mendez. App. pp. 117-118.

In *State v. King*, 422 S.C. 47, 810 S.E.2d 18 (2017), this Court addressed the finding of the South Carolina Court of Appeals that an officer's testimony regarding what she learned from witnesses during her investigation amounted to impermissible hearsay. In addressing the State's argument and the Opinion of the Court of Appeals, this Court reasoned and held as follows:

> We find the disposition of this issue involves a straightforward hearsay analysis. "Hearsay is a statement, which may be written, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted." *State v. Brockmeyer* , 406 S.C. 324, 351, 751 S.E.2d 645, 659 (2013) (quoting *In re Care & Treatment of Harvey* , 355 S.C. 53, 61, 584 S.E.2d 893, 897 (2003)); Rule 801(c), SCRE. "Hearsay is not admissible unless there is an applicable exception." *Brockmeyer* , 406 S.C. at 351, 751 S.E.2d at 659 ; Rule 802, SCRE.
>
> Here, as correctly recognized by the Court of Appeals, Officer Butler's testimony was hearsay as it was based exclusively on what the witnesses told her during the neighborhood canvas and was offered to prove that King fired more than one gunshot. Further, we do not discern, nor has the State cited, any exception to the hearsay rule that would provide for the admissibility of the testimony.
>
> Nonetheless, even with this straightforward analysis, we believe it is necessary to caution prosecutors against using "investigative information" as it appears this is an attempt to circumvent the rules against hearsay. *See, e.g.* , *Lewis v. State* , 80 So.3d 442, 444 (Fla. Dist. Ct. App. 2012) (concluding that investigating officer's testimony that he developed a suspect and, in turn, a photographic lineup, after speaking with two non-testifying witnesses constituted inadmissible hearsay; stating, "[w]here the implication from in-court testimony is that a non-testifying witness has made an out-of-court statement offered to prove the defendant's guilt, the testimony is not admissible" (citation omitted)); *State v. Magee* , 143 So.3d 532, 537 (La. Ct. App. 2014) ("The fact that an officer acted on information obtained from an informant may be relevant to explain his conduct, *but may not be used as a passkey to bring before the jury the substance of the out-of-court information that would otherwise be barred by the hearsay rule* ." (emphasis added)).
>
> We are persuaded by the explanation offered by the Supreme Court of Kentucky. *Ruiz v. Commonwealth* , 471 S.W.3d 675 (Ky. 2015). In *Ruiz* , the court attempted to dispel any misconception

that testimony from an investigating officer regarding the content of out-of-court statements was admissible. Specifically, the court explained:

> An out-of-court statement made to a police officer is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative *only* to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. And, as any other statement, if the out-of-court statement made to a police officer has relevance and probative value that is not dependent upon its truthfulness, and it is not offered into evidence as proof of the matter asserted, then by definition the evidence is not hearsay.
>
> In such circumstances, because the out-of-court statement would not be subject to the hearsay rule, its admissibility would be determined by application of other rules of evidence. So-called "investigative hearsay" is still, fundamentally, hearsay. There is no special kind of evidence known as "investigative hearsay;" we have no rule of evidence called the "investigative hearsay rule." Use of the term imparts no meaningful information to the analysis that is not otherwise supplied by the word "hearsay." *Ruiz* , 471 S.W.3d at 680-82 (citations and footnote omitted).
>
> Based on this reasoning, we caution against the use and admission of "investigative information." While it may be couched in terms of explaining an officer's conduct during an investigation, it may not be used to offer the substance of an out-of-court statement that would otherwise violate our state's rules against hearsay.

King, 422 S.C. at 64-68, 810 S.E.2d at 27-29.

Here, the lower court's Order does not address the obvious deficient performance that resulted from counsel's failure to object to the "investigative hearsay" offered in lieu of calling Mendez at trial. App. p. 1091. Pursuant to *King*, Petitioner submits that the record supports a finding that counsel's failure to object to the rank hearsay offered was clearly deficient and meets the first prong of the *Strickland* analysis.

Turning to the second prong, Petitioner also submits that the lower court erred in finding that no prejudice resulted from counsel's failure to object. Without addressing *King*, the lower court applied factors set forth in *State v. Sierra*, 337 S.C. 368, 523 S.E.2d

187 (1999), whereby the South Carolina Court of Appeals addressed whether the State's cross-examination was proper regarding a prior inconsistent statement made to the prosecutor. After applying *Sierra*, the lower court held the testimony at issues was not reversible error. Petitioner submits the lower court's failure to acknowledge *King* and analysis conducted under *Sierra* amounts to reversible error.

In the lower court's analysis under *Sierra*, the court failed to take into account the pre-trial arguments regarding Mendez and risk the State faced in impeaching victim's mother if they called Mendez to the stand. Additionally, the court failed to consider the testimony of highly experienced appellate counsel at the evidentiary hearing. Here, counsel's failure to object was highly prejudicial since counsel's deficiency allowed rank hearsay to be heard by the jury to corroborate the State's witnesses through an uncalled witness and offer testimony that was not otherwise offered to the jury without the defense being afforded the opportunity to cross-examine the witness. Failing to acknowledge the risk the State avoided by offering hearsay in lieu of calling Mendez makes the lower court's analysis clearly erroneous. Additionally, the outcome of the second trial, during which the jury heard this prejudicial hearsay, in contrast to the first trial further demonstrates how the outcome of the second trial was affected and that relief is warranted.

B. The lower court erred in failing to find prejudicial ineffective assistance due to counsel's handling of matters related to co-defendant Carnellious D. Stringer; specifically, counsel's failure to utilize and/or obtain the transcript of Mr. Stringer's plea and failure to provide the accurate information from the plea proceeding to the trial court during sentencing.

The lower court erred in failing to find prejudicial ineffective assistance due to counsel's handling of matters related to co-defendant Carnellious D. Stringer ("Stringer"); specifically, counsel's failure to utilize and/or obtain the transcript of Stringer's plea and failure to provide the accurate information from the plea proceeding to the trial court during sentencing. Therefore, Petitioner submits that reversal of the lower court is required.

At the evidentiary hearing, Petitioner introduced the transcript of Stringer's guilty plea. App. 1041. At the plea hearing for Stringer conducted on February 5, 2018, the Honorable J. Derham Cole accepted the plea of Stringer and sentenced him to a recommended term of 30 years. App. pp. 1043, 1066, 1074. During the plea hearing, the State provided the facts and Stringer's prior record, and Stringer agreed with the information presented by the Solicitor. App. pp. 1058-1062. Then, the court questioned him if he agreed that Petitioner had a gun, and he replied: "I had a gun – I don't know about anyone." App. p. 1062, lns. 11-20. He also explained that he did not know about who else had a gun, he just knew he had a gun, and he used it and struck victim. App. p. 1062, ln. 22 – p. 1063, ln. 9. After a back and forth between the State and the court about the ballistics and evidence of two firearms, Stringer agreed that the discovery shows bullets came from a second gun, but he could not say who the shooter was despite the court's continued questioning. App. pp. 1063-1064. Stringer informed the court that he

fired once and regarding others he stated: "I can't answer for them. I just know what I did." App. p. 1064, lns. 16-17, p. 1065, lns. 14-16.

During Petitioner's sentencing, the Solicitor informed the court that co-defendant Nava and Wilson's cases had not been disposed of but Stringer's case had been. App. 367, lns. 4-6. The court asked the Solicitor to refresh his memory as to Stringer's admissions. App. p. 367, lns. 8-9. The Solicitor stated that he was trying to remember himself and that he was not sure Stringer made much of an admission and denied being the shooter. App. p. 367, lns. 10-24.

The Supreme Court of the United States has found there is a denial of due process when the sentencing court relies upon materially incorrect assumptions. *See Townsend v. Burke*, 334 U.S. 736 (1948) (Making it clear that inaccuracies at sentencing by an absent or ineffective lawyer can violate due process). In *Glover v. United States*, 531 U.S. 198, 203 (2003), the Supreme Court of the United States also held "any amount of [additional] jail time has Sixth Amendment significance." The Supreme Court held that any increase in sentence length due to deficient performance during sentencing satisfies the prejudice prong of *Strickland*. Simply put, there is no minimum threshold of additional time required to show prejudice from counsel's inaction.

Here, the lower court merely parenthetically cited to *State v. Harris*, 377 S.C. 66, 659 S.E.2d 140 (2008) before holding that Petitioner failed to meet his burden. Petitioner submits that counsel was ineffective in his representation during sentencing when he failed to provide and correct the court and State's recollection of Stringer's guilty plea proceeding. App. p. 1091.

In *Harris*, he failed to provide the court with the transcript to review to support his claim that counsel was ineffective for failing to obtain the transcript of his first trial proceeding. 377 S.C. at 76-77, 659 S.E. 2d at 146. Unlike *Harris*, Petitioner provided the transcript of Stringer's guilty plea proceeding to contrast against the information discussed during Petitioner's sentencing hearing. As the record reflects, counsel stood silent and did not provide the sentencing court the accurate record of Stringer's guilty plea, which was inaccurately remembered by the court in a way that was unfavorable to Petitioner. Counsel stood silent because he was not properly prepared to address the court's question during the sentencing proceeding. When asked at the evidentiary hearing about his failure to obtain the transcript, he responded: " I can't give you a reason I didn't have it." App. p. 934, ln. 15. In contrast to *Harris* and counsel at the sentencing hearing, the lower court had the transcript of Stringer's guilty plea, yet he errantly found counsel was not ineffective for failing to obtain and utilize the transcript during Petitioner's sentencing proceeding.

Here, the prejudice Petitioner suffered was evidenced by his resulting thirty-year sentence on his convictions of voluntary manslaughter, armed robbery and burglary, 1st degree, which was same sentence as the admitted shooter. As a result of the lower court's failure to find prejudicially ineffective assistance of counsel, Petitioner submits the lower court must be reversed and relief granted.

C. The lower court erred in not finding prejudicial ineffective assistance of counsel when counsel failed to properly prepare for the State's evidence of flight that was not presented at the first trial and failed to object to the line of questioning and to hearsay evidence offered regarding flight.

The lower court erred in not finding prejudicial ineffective assistance of counsel when counsel failed to properly prepare for the State's evidence of flight that was not presented at the first trial and failed to object to the line of questioning and to hearsay evidence offered regarding flight. Therefore, Petitioner submits that reversal of the lower court is required.

In contrast to Petitioner's first trial where flight was not addressed, the State called Petitioner's grandmother, mother, Kim Parnell, Richie Foster, and Master Deputy Morrow to address testimony of Petitioner's flight at the second trial. App. pp. 224-227, 229-232, 236-244, 249-250. Via *Anders* brief, the following issue was raised: Did the trial court erred in allowing an officer to speculate that Appellant could have left the county during the ten days between the time of the shooting and the time Appellant turned himself in to the police when there was no evidence that Appellant left the county. App. p. 389.

When called to the stand at the evidentiary hearing, Katherine Hudgins, Esquire, recalled that she was appointed Petitioner's case in her capacity as an appellate defender. App. p. 879. She explained her process of reviewing the record and briefing a case on appeal. App. pp. 879-881. She testified that she filed an *Anders* Brief and explained the *Anders* process. App. pp. 880-881. She explained that she raised the issue under *Anders* and not as a meritorious issue because she felt her hands were tied due to counsel's opening the door to the prejudicial testimony. App. pp. 881-882, 889. She identified and

Petitioner admitted a letter she wrote to Petitioner to explain the filing of an *Anders* Brief and the process it invoked. App. pp. 882-884, 1035.

Referring to the letter, she also acknowledged that she informed Petitioner about a potential PCR issue since counsel failed to object on hearsay grounds to Officer Parnell's testimony about what Petitioner's mother allegedly told her. App. pp. 236-237, 890-893, 1035. After reviewing the relevant sections of the transcript, she explained why she found the testimony of Officer Parnell to be objectionable. App. p. 892. When asked if she would have raised the issue on appeal if counsel had properly objected, she responded: "I mean that's stronger than the issue then I ended up raising in the *Anders*, yes." App. p. 892, lns. 19-23. After being asked why, she explained: "It goes to flight. It reflects poorly on Mr. Rice. And I think with some of the other testimony that was brought out without the other objection, I think the two of those would fit together in two nice issues that might have changed my mind to make it from an *Anders* to a Merits." App. p. 892, ln. 24 – p. 893, ln. 5.

Regarding his preparation for the witnesses called on the matter of flight and his handling of the witnesses at the second trial, counsel failed to provide a specific recollection of how he prepared for the issue of flight and why he handled the witnesses in the way he did. App. pp. 934-944. When trial counsel was asked about the testimony of Officer Parnell, he agreed it was "objectionable because of hearsay" and he did not make a record of it for the appellate court to review. App. pp. 939-941. He also did not offer any reason why he failed to object. App. pp. 939-941. In discussing the testimony offered by Richie Foster that was argued on appeal as prejudicial speculation, he

explained that he thought the State had interjected the speculation into the record. App. pp. 941-944.

By way of the Order, the lower court dismissed this claim on account of trial counsel's testimony and overwhelming evidence of guilt. App. pp. 1092-1093. Petitioner submits that the lower court's finding is in error and must be reversed since counsel's preparation for and handling of the testimony regarding flight was riddled with error and he opened the door to the only testimony the appellate attorney thought was prejudicial enough to raise on appeal. Upon review of the Order, Petitioner urges this Court to find that the lower court failed to properly consider the strength of the State's case, along with the specific impact of counsel's errors, which was abundantly clear since the evidence of flight was omitted from the first trial that ended in a hung jury. *See Smalls v. State*, 422 S.C. 174, 190,194, 810 S.E.2d 836, 844,846 (2018) (Holding "[T]he strength of the State's case in the PCR court's analysis of prejudice . . . is one significant factor the court must consider-along with the specific impact of counsel's error and other relevant considerations-in determining whether the applicant has met his burden of proving prejudice."). Here, what is overwhelmingly clear from the record is counsel's ineffective assistance that led to a conviction on the lesser included offense of voluntary manslaughter due to the weakness of the State's case in contrast to the hung jury in the first trial where the evidence of flight was not before the jury. As a result of counsel's ineffective assistance that specifically impacted the outcome of trial, the lower court must be reversed and relief granted.

D. The lower court erred in not finding prejudicial ineffective assistance of counsel when counsel failed to object and/or move for a mistrial when Kameron Wilson referenced the first trial during his direct testimony.

The lower court erred in not finding prejudicial ineffective assistance of counsel when counsel failed to object and/or move for a mistrial when Kameron Wilson referenced the first trial during his direct testimony. Therefore, Petitioner submits that reversal of the lower court is required.

When co-defendant Kameron Wilson was on the stand, the State elecited the following testimony without objection from trial counsel:

Question: Do you still consider Mr. Rice a friend of yours?

Answer: I don't know.

Question: He would call you on occasion?

Answer: Yes, sir.

Question: Several times, right?

Answer: Yes, sir.

Question: When did you stop talking to him?

Answer: After – I think after the first trial.

Question: Why did you stop talking to him?

Answer: Because my attorney told me to stop.

App. pp. 162, lns. 3-15.

At the evidentiary hearing, Kathrine Hudgins testified that she was appointed Petitioner's case in her capacity as an appellate defender. App. p. 879. She identified and Petitioner admitted a letter she wrote to Petitioner to explain the filing of an *Anders* Brief and the process it invoked. App. pp. 882-884, 1035. She testified about issue preservation

requirements and her reasoning for filing an *Anders* Brief. App. pp. 880-881, 887-888. When asked about the testimony of Kameron Wilson referencing the first trial, she responded that he made a reference to the first trial, which should not have been made. App. p. 893, ln. 6 – p. 894, ln. 2. After being asked to explain, she responded: "Well, obviously, the jury should not be aware that there was first trial. That's obvious. That should have been an issue and it was not. Had it been objected to, that may have been another issue that I could have raised on direct appeal in a Merits brief rather than an *Anders*." App. p. 894, ln. 3-10.

When defense counsel was asked about Wilson's testimony, he agreed that it is "generally" not proper for a witness to reference a first trial during a second trial in front of a jury. App. p. 945, lns. 14-18. After being asked further about the testimony, he also agreed he did not object and explained that during a trial a lawyer's focus is on "what's going on" and "focusing mainly on being happy, making that jury happy and getting a verdict." App. p. 945, ln. 21 – p. 946, ln. 11.

Without referencing the testimony of appellate counsel and in a four-sentence paragraph, the lower court found credible trial counsel's testimony that asking for an instruction to disregard the testimony would not have changed the outcome and cited to overwhelming evidence of guilt in denying this allegation. App. p. 1093. Petitioner submits that the lower court has errantly excused counsel's ineffective assistance on an incorrect interpretation of counsel's testimony and on the grounds of overwhelming evidence of guilt as addressed above. Therefore, lower court must be reversed due to counsel's prejudicial failure to object or take any action regarding this impermissible testimony.

E. The lower court erred in not finding prejudicial ineffective assistance when counsel failed to utilize information contained in discovery and testimony offered at the first trial to cross-examine and/or impeach witnesses at the second trial.

The lower court erred in not finding prejudicial ineffective assistance when counsel failed to utilize information contained in discovery and testimony offered at the first trial to cross-examine and/or impeach witnesses at the second trial. Therefore, Petitioner submits that a reversal of the lower court is required.

By way of the Amendment and at the evidentiary hearing, Petitioner addressed counsel's failure to utilize information contained in the discovery and testimony offered at the first trial to impeach and/or cross-examine the following witnesses: Jonathan Lawson, Kevin Bowen, Mary Ann Kotlarich, Kameron Wilson, Elian Nava and Dr. Wren. App. pp. 858-859, 953-964,1032-1033. In the Order, the lower court found counsel's performance was reasonable under prevailing professional norms. App. p. 1100.

As addressed above, in *Harris*, this Court reversed the lower court's granting of relief citing to the failure of Harris to provide the transcript of the first proceeding to review and counsel's testimony that refuted the lower court's findings. 377 S.C. 66, 659 S.E.2d 140. Here, Petitioner provided the court a copy of the first trial transcript to review and questioned counsel about it, and the record establishes that counsel failed to refute the claims that he did not properly represent Petitioner in his preparation and handling of the witnesses at the second trial. Unlike *Harris*, the record in the instant case included counsel moving to be relieved between Petitioner's two trials and an additional indictment being brought by the State prior to the second trial. App. p. 1036. Petitioner submits that the record establishes that counsel was ineffective when he failed to obtain

the first trial transcript to properly impeach and/or cross-examine witnesses at the second trial, and the lower court's findings otherwise must be reversed.

CONCLUSION

Based upon the arguments and record before this Court, Petitioner would respectfully ask that this Court remand to the lower court to enter a proper Order or alternatively grant certiorari, allow briefing of the issues addressed herein, and/or grant relief.

Respectfully submitted,

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