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Nov 17 2025
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO SPARTANBURG COUNTY
Honorable Heath P. Taylor,
Circuit Court Judge

Appellate Case No. 2025-000361

KESHAWN M. RICE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

PETITIONER'S STATEMENT OF QUESTIONS

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.

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS

I. Whether a remand is unwarranted since the issues raised in Petitioner's PCR were ruled on by the PCR court in its Order of Dismissal, and the PCR court did not abuse its discretion in denying Petitioner's Rule 59 motion?

II. Whether the PCR court correctly found Counsel was not ineffective in his handling of "matters related to Cesar Mendez" where Petitioner failed to prove a reasonable

probability that the result of trial would have been different but for (1) Counsel failing to object to Deputy Bowen's testimony regarding statements made by Cesar Mendez since Mendez's statements were admissible under the excited utterance hearsay exception and the alleged Confrontation Clause violation did not prejudice Petitioner under *State v. Sierra*; (2) Counsel not calling Mendez as a witness at trial since Petitioner did not call Mendez as a witness in the PCR hearing; and (3) Counsel's performance in handling the State's motion in limine since Counsel was not deficient?

III. Whether the PCR court correctly found Counsel was not ineffective in his handling of "matters related to co-defendant Carnellious D. Stringer" and not obtaining a copy of the transcript from Stringer's guilty plea where Petitioner failed to prove a reasonable probability that the result of trial or sentencing would have been different due to the overwhelming evidence of Petitioner's guilt?

IV. Whether the PCR court correctly found Counsel was not ineffective in not preparing for the State's evidence of flight in Petitioner's second trial where Petitioner failed to prove a reasonable probability that the result of trial would have been different due to the overwhelming evidence of Petitioner's guilt?

V. Whether the PCR court correctly found Counsel was not ineffective in not objecting to Kameron Wilson's testimony referencing Petitioner's first trial in his testimony where Petitioner failed to prove a reasonable probability the result of trial would have been different due to the overwhelming evidence of Petitioner's guilt?

VI. Whether the PCR court correctly found Counsel was not ineffective in utilizing witness testimony in Petitioner's first trial to cross-examine and impeach witnesses in the second trial where the witnesses' testimonies were substantially the same in both trials and any inconsistencies were minor and inconsequential to the State's theory of the case?

STATEMENT OF THE CASE

In March 2017, the Spartanburg County Grand Jury indicted Keshawn M. Rice ("Petitioner") for murder (2017-GS-42-1795) and armed robbery (-1795). In March 2018, Petitioner was indicted for burglary – first degree (2018-GS-42-0649). Between February 5-7, 2018, Petitioner proceeded to a jury trial before the Honorable J. Derham Cole, which resulted in a mistrial. Between November 13-15, 2018, Petitioner proceeded to a second jury trial before the Honorable J. Derham Cole. Deputy Solicitor Derrick Bulsa prosecuted the case. Richard Warder, Esq. ("Counsel") represented Petitioner. The jury convicted Petitioner of the lesser included offense of voluntary manslaughter; burglary – first degree; and armed robbery. Judge Cole sentenced Petitioner to a concurrent sentence of thirty (30) years for each charge.

A notice of appeal was filed. On appeal, Petitioner was represented by Appellate Defender Katherine Hudgins, who filed an *Anders*[1] brief raising the following issue:

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

Following *Anders* review, the Court of Appeals dismissed the appeal. *State v. Rice*, Op. No. 2021-UP-064 (S.C. Ct. App. filed March 10, 2021). The Remittitur was sent on March 31, 2021.

On April 19, 2021, Petitioner filed an application for post-conviction relief ("PCR"). On May 21, 2021, the State ("Respondent" or "the State") filed its Return. On May 23, 2024, an evidentiary hearing convened before the Honorable Heath P. Taylor. Petitioner was present and represented by Tricia Blanchette, Esq. Assistant Attorney General Bryan T. Hall represented the State. Judge Taylor denied Petitioner's PCR application. This petition follows.

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[1] *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF THE FACTS

On the night of October 8, 2016, Petitioner asked Kameron Wilson (co-defendant) to pick up him and Carnellious Stringer (co-defendant). (App. 143-46). Wilson testified that Petitioner and Stringer had guns, and Wilson did not know at the time but found out later that Petitioner and Stringer were planning a robbery. (App. 146-47). Wilson testified that Petitioner told him to go to Elian Nava's house to pick up Nava, and Wilson understood that the group was looking for someone with marijuana. (App. 147-48). Nava directed them to Cesar Mendez, whom he had marijuana. (App. 149-50). Wilson testified that he knew the group was planning to rob Mendez but continued to drive them. (App. 150). When the group arrived at Mendez's house, Mendez indicated that he did not have marijuana but knew someone that did and directed them to the home of Thompson Demas ("Victim"). (App. 150-51). Mendez was not a part of the robbery plot. (App. 151).

When the group arrived at Victim's house, Wilson stayed in the car while the other men (Petitioner, Stringer, Nava, and Mendez) went to Victim's garage. (App. 153-54). Wilson testified that he only saw Petitioner and Stringer with guns. (App. 154). Wilson testified he heard three (3) gunshots, then started his car and was about to leave when he saw Petitioner, Stringer, and Nava running towards the car. (App. 157). The group got in the car carrying a bookbag and told Wilson to drive away. (App. 156).

Elian Nava (co-defendant) testified that when they arrived at Victim's house, Nava was unsure whether the plot was still a robbery since the group did not discuss what would happen at Victim's house. (App. 206). Nava testified that he warned the others not to try anything because Mendez had a gun and might shoot. (App. 207). Cesar Mendez told the group that only he and Nava could go into Victim's house since Victim did not know the others. (App. 205). Nava testified

that while inside of Victim's garage with Mendez, Petitioner and Stringer rushed in aiming guns. (App. 208). In response, Victim "freaked out" and threw a jar at them. (App. 208). Petitioner and Stringer started shooting. (App. 208). Victim started fighting Petitioner, and Nava heard three (3) to four (4) gunshots. (App. 208). Nava admitted that he did not see Victim get shot but heard Victim in pain. (App. 208). Nava testified that Petitioner and Stringer had guns inside of the garage. (App. 208). Nava further testified that while Victim was on the ground, holding onto Petitioner's leg, Stringer shot Victim three (3) times in the back. (App. 209-10). Nava testified that in response, Mendez pulled out a gun and started shooting [at Nava, Petitioner, and Stringer]. (App. 210). The group got in Wilson's car and fled.

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings 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, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight.". *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

I. A remand is unwarranted since the issues raised in Petitioner's PCR were ruled on by the PCR court in its Order of Dismissal, and the PCR court did not abuse its discretion in denying Petitioner's Rule 59 motion.

Petitioner argues his case should be remanded to the PCR court so the court can address matters raised in his Rule 59 motion. However, a remand is unwarranted since the PCR court adequately addressed and ruled on all the issues raised by Petitioner in its Order of Dismissal, and the PCR court did not abuse its discretion in denying the motion after review where it found Petitioner's PCR was properly denied.

The PCR court shall make specific findings of fact and conclusions of law relating to each issue in an order, which is a final judgment. S.C. Code Ann. § 17-27-80 (2014). If a PCR order fails to set forth the findings of fact and reasons for those findings, counsel must file a motion to alter or amend the order under Rule 59. *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (holding a PCR judge erred by making general denial of all claims and not specifically addressing the issues in its order and should be remanded). The grant or denial of a Rule 59 motion rests within the discretion of the trial court and will not be disturbed on appeal unless it is unwholly unsupported by the evidence, or the conclusions reached are in error of law. *Brinkley v. South Carolina Dept. of Corrections*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009); *see also* Rule 59(a), SCRCP (stating a court "may" open the judgment to amend its finding of fact or conclusions of law, make new findings and conclusions, or enter a new judgment).

Here, the PCR court issued a final Order of Dismissal, which specifically and adequately addressed all of the issues raised by Petitioner in his PCR. (App. 1076-1103). Petitioner filed a Rule 59(e) motion asking the court to alter or amend its judgment. (App. 1104-10). Following review, the PCR court denied the motion, finding Petitioner's PCR was properly dismissed. (App. 1111). The PCR court properly acted within its discretion to deny the Rule 59 motion, and

Petitioner failed to show a specific issue that was not addressed by the PCR court. Additionally, Petitioner failed to show an error of law or fact by the PCR court in denying his motion. Therefore, a remand unwarranted.

II. The PCR court correctly found Counsel was not ineffective in his handling of "matters related to Cesar Mendez" where Petitioner failed to prove a reasonable probability that the result of trial would have been different but for (1) Counsel failing to object to Deputy Bowen's testimony regarding statements made by Cesar Mendez since Mendez's statements were admissible under the excited utterance hearsay exception and the alleged Confrontation Clause violation did not prejudice Petitioner under *State v. Sierra*; (2) Counsel not calling Mendez as a witness at trial since Petitioner did not call Mendez as a witness in the PCR hearing; and (3) Counsel's performance in handling the State's motion in limine since Counsel was not deficient.

The PCR Court correctly found Counsel was not ineffective in his handling of "matters related to Cesar Mendez."[2] Petitioner failed to prove prejudice for each of the sub-issues raised since Petitioner failed to prove a reasonable probability that the result of trial would have been different but for Counsel's actions. A PCR applicant must prove (1) counsel's performance was deficient, and (2) the applicant was prejudiced such that there's 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, 386 S.E.2d at 625. "A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *Strickland*, 466 U.S. at 670.

Cesar Mendez was present in Victim's garage when Petitioner's co-defendant, Stringer, shot and killed Victim. (App. 205-10). Mendez was not involved in Petitioner and Stringer's plot to rob Victim. (App. 203). Mendez did not testify at trial.

[2] Petitioner raised several issues regarding Counsel's "handling of matters related to Cesar Mendez." For clarity and analysis, the State addresses and analyzes each matter separately.

At trial, Deputy Kevin Bowen testified that he arrived at the scene and met a male identified as Cesar Mendez. (App. 115). Bowen testified that he spoke to Mendez and got his name, information, personal information, and asked him what he saw happened. (App. 115:18-22). Bowen testified that Mendez gave one name: Nava. (App. 115:24-116:3). Counsel objected to the statements for hearsay, which was sustained by the trial court initially. (App. 116:12-14). When questioned by the solicitor about Mendez's emotional state, Bowen described Mendez as "distraught" and "shocked" about what took place. (App. 116:15-17). Bowen testified that he arrived on the scene at approximately 3:41 am, right after the murder. (App. 116:18-20). The solicitor then offered Mendez's statements under the excited utterance exception to the hearsay rule, which the trial court allowed. (App. 117:4-5). Bowen testified that Mendez said there were three (3) to four (4) men in Victim's garage: Nava and three (3) others whom he did not identify. (App. 117:19). Bowen testified that Mendez said he knew Nava, and Nava did not fire a shot. (App. 117:21-118:4). Bowen testified that Mendez did not know the names of the other men, but they were two (2) Black males. (App. 118:14-15).

A. Petitioner failed to prove prejudice from Counsel not objecting to Bowen's testimony regarding Mendez's statements for a violation of the Confrontation Clause since Mendez's statements were unimportant to the prosecution's case, were merely cumulative to and corroborated the testimonies of Nava and Wilson, and the prosecution's overall case against Petitioner was strong without the statements.

Petitioner failed to prove prejudice from Counsel not objecting to a Confrontation Clause violation. The Sixth Amendment's Confrontation Clause guarantees the accused right to confront witnesses against him. U.S. Const. amend VI. The Confrontation Clause bars a testimonial out-of-court statement by a witness unless the witness is subject to cross-examination by the defendant. *Davis v. Washington*, 547 U.S. 813 (2006); *Crawford v. Washington*, 541 U.S. 36 (2004). A violation of the Sixth Amendment right to confront witnesses is not a per se reversible error, but

depends upon a host of factors such as (1) the importance of the witnesses' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of corroborating or contradicting testimony by the witness; (4) the extent of cross-examination otherwise permitted; and (5) the overall strength of the prosecution's case. *State v. Sierra*, 337 S.C. 368, 379, 523 S.E.2d 187, 193 (1999).

The PCR court applied the *Sierra* factors and correctly found that Petitioner failed to prove prejudice from Counsel not objecting to a Confrontation Clause violation. (App. 1090). Applying the *Sierra* factors, Mendez's statements were unimportant to the prosecution's overall case. Mendez's statements merely established that three (3) to four (4) men were present in Victim's garage: Elian Nava and two (2) unidentified Black men who fired shots. The prosecution established those same facts through the testimonies of Nava and Wilson, who both testified that four (4) men went to Victim's house in robbery plot: Petitioner, Wilson, Nava, and Stringer. (App. 153). Nava testified and placed himself, Mendez, Petitioner, and Stringer in Victim's garage at the time of the shooting. (App. 209-10). Nava identified Petitioner and Stringer as having guns and testified that Stringer shot Victim. (App. 208-10). Even if Mendez's statements were excluded, the prosecution could establish the same facts. As a result, Mendez's statements were not important to the prosecution's case and were merely corroborating and cumulative to the testimonies of Nava and Wilson.

Further, the prosecution's case was strong without Mendez's statements since two (2) eye-witness co-conspirators, Nava and Wilson, identified Petitioner and Stringer as being armed with guns. Nava identified Stringer as the shooter. At the PCR hearing, Counsel testified that he believed if he objected for a Confrontation Clause violation, and Bowen's testimony of Mendez's

statements was excluded, it would not have changed the outcome of trial. Therefore, Petitioner failed to prove prejudice.

B. Petitioner failed to prove prejudice from Counsel not calling Mendez to testify at trial since Petitioner failed to produce Mendez at the PCR hearing to prove a reasonable probability that the result of trial would have been different based on Mendez's testimony, and Counsel credibly testified that he did not believe Mendez's testimony would have been favorable to Petitioner.

Petitioner failed to call Mendez at the PCR hearing and thus failed to prove prejudice from Counsel's decision not to call Mendez to testify at trial. To prevail on a claim that counsel failed to interview or call witnesses, an applicant must prove counsel's inaction resulted in prejudice by producing witnesses at the PCR hearing to show a reasonable probability the result of the trial would have been different based on the witness's testimony. *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("applicant's mere speculation to what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice"). By failing to call Mendez at the PCR hearing, Petitioner failed to meet his burden of proving prejudice, and this Court need not address deficiency.

However, addressing deficiency, Counsel credibly testified that although he did not recall why Cesar Mendez was not called as a witness at trial, Counsel believed there was danger in calling Mendez to testify and believed Mendez's testimony could hurt Petitioner's case. (App. 974; 1088). Counsel credibly testified that Mendez was present at the scene during the shooting and could have identified the shooters if called to testify at trial. (App. 974-75; 1088). It is a reasonable and valid strategy for a criminal defense attorney not to call a witness at trial that could have identified their client as the shooter in a murder case. *See Washington v. State*, 440 S.C. 550, 573, 891 S.E.2d 668, 681 (Ct. App. 2023) ("Generally, trial counsel will not be deemed ineffective when he or she has

expressed a valid reason for using a particular trial strategy." (citation omitted)). Therefore, Petitioner failed to prove deficiency and prejudice.

C. Petitioner failed to prove prejudice from Counsel's performance in the State's motion in limine to exclude the defense from asking Victim's mother whether she told Mendez to move or hide marijuana since Petitioner failed to prove a reasonable probability that the trial court would have reversed its ruling excluding the question.

Petitioner failed to prove prejudice from Counsel's performance in the State's motion in limine. At trial, the State moved to exclude the defense from asking Mary Ann Kotlarich, Victim's mother, whether she told Cesar Mendez to move or hide marijuana. (App. 14-15). Counsel informed the Court that Kotlarich testified in Petitioner's first trial and denied telling Mendez to move or remove marijuana. (App. 16). When asked by the court whether Counsel had a witness that could contradict Kotlarich's testimony if she denied the allegation, Counsel replied that Mendez can contradict it. (App. 16). The judge told Counsel that the court would [only] permit questioning of Kotlarich regarding the marijuana if Counsel had a witness that could contradict and impeach Kotlarich if she denied. (App. 18).

The PCR court found Counsel's testimony credible that while he did not recall why he did not call Mendez to testify at trial, he believed Mendez's testimony would have been hurtful since Mendez was present and could have identified Petitioner as a shooter. (App. 947-75; 1088). It would have been unreasonable for Counsel to call Mendez to testify simply to impeach Kotlarich on a collateral fact. The benefits of such impeachment would have been substantially outweighed by the risk of Mendez testifying and potentially identifying Petitioner as a shooter.

Additionally, Petitioner failed to show some argument or legal authority that Counsel could have presented to the trial court that would have resulted in the court reversing its ruling on the State's motion in limine. Further, due to the evidence of Petitioner's guilt, Petitioner failed to prove a reasonable probability that the result of trial would have been different even if the trial court

allowed Counsel to question Kotlarich about the marijuana. Therefore, Petitioner failed to prove a reasonable probability of a different result in the motion hearing.

This Court need not address deficiency where Petitioner failed to prove prejudice. However, addressing deficiency, Counsel's representation in the hearing on the State's motion in limine was reasonable under prevailing professional norms and thus, was not deficient.

III. The PCR court correctly found Counsel was not ineffective in his handling of "matters related to co-defendant Carnellious D. Stringer" and not obtaining a copy of the transcript from Stringer's guilty plea to use during sentencing where Petitioner failed to prove a reasonable probability that the result of trial or sentencing would have been different due to the overwhelming evidence of Petitioner's guilt.

Petitioner failed to prove prejudice from Counsel failing to obtain a copy of Carnellious Stringer's guilty plea transcript and utilize it during Petitioner's sentencing. Stringer (co-defendant) pled guilty. At his guilty plea hearing, Stringer denied knowing the names of the others that were present and admitted to shooting his firearm once. (PCR Appl.'s Ex. 7, pg. 24-25). At Petitioner's sentencing following trial, the judge asked for his memory to be refreshed regarding the admissions Stringer made at his guilty plea. (App. 367). Petitioner alleges Counsel should have had a transcript from Stringer's guilty plea and should have utilized it to show the trial judge that Stringer admitted to shooting his firearm. However, even if Counsel had done so, it would not have changed the outcome of Petitioner's sentencing.

Following Petitioner's trial, the trial court had already heard testimony that Petitioner and Stringer acted together in robbing Victim and were both armed with guns. During the course of the robbery, Stringer shot Victim – a fact that he admitted to at his guilty plea hearing. Obtaining an utilizing a transcript from Stringer's guilty plea would not have changed the outcome of sentencing. At the PCR hearing, Counsel testified that he did not believe using the transcript from

Stringer's guilty plea hearing to refresh the judge regarding Stringer's omissions would have mattered in Petitioner's case. (App. 990).

Further, Petitioner failed to prove a reasonable probability of a more favorable sentence since he and Stringer acted together in the robbery plot resulting in Victim's death and both received sentences of thirty (30) years. *Harris v. State*, 377 S.C. 66, 77, 659 S.E.2d 140, 146 (2008) (holding that even if the applicant showed counsel was deficient for failing to obtain a transcript, the applicant failed to prove prejudice from the alleged deficiency*), abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Therefore, Petitioner failed to prove prejudice.

IV. The PCR court correctly found Counsel was not ineffective in not preparing for the State's evidence of flight in Petitioner's second trial where Petitioner failed to prove a reasonable probability that the result of trial would have been different due to the overwhelming evidence of Petitioner's guilt.

Petitioner failed to prove prejudice from Counsel not preparing for the State's evidence of flight. Where an applicant alleges counsel was ineffective for failing to prepare, the applicant must prove prejudice by demonstrating how additional preparation would have resulted in a different outcome. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). In analyzing whether an applicant suffered prejudice, the court must evaluate the evidence and the strength of the state's case: "the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland*, 466 U.S. at 696 (stating "a verdict ... only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support")). The court may find that overwhelming evidence of guilt precludes a finding of prejudice. *Smalls*, 422 S.C. at 190-91, 810 S.E.2d at 944-45 (stating "overwhelming evidence" must include something conclusive such as a confession, DNA evidence demonstrating guilt, or a combination of physical

or corroborating evidence so strong that *Strickland's* standard of a reasonable probability of a different outcome cannot be met).

The evidence in Petitioner's case was overwhelming. There were two (2) eye-witness co-conspirators (Nava and Wilson) that saw Petitioner and Stringer take guns into Victim's garage in a robbery plot. Nava testified that while Petitioner and Stringer were acting together in robbing Victim, Stringer shot and killed Victim. The evidence presented from two (2) eye-witness accounts of Petitioner's involvement in the robbery that led to Victim's death is so strong that *Strickland's* standard of reasonable probability of a different outcome cannot be met. *See Brown v. State*, 383 S.C. 506, 518, 680 S.E.2d 909, 916 (2009) (finding there was overwhelming evidence of the applicant's guilt where the state presented four (4) eyewitnesses who testified to seeing the applicant commit sexual misconduct against a child); *see also Darden v. Wainwright*, 477 U.S. 168, 182 (1986) (finding the weight of the evidence against the applicant was "heavy" due to the "overwhelming eyewitness and circumstantial evidence"). Additionally, Nava's testimony regarding what occurred in Victim's garage is corroborated by testimony from Chad Smith, firearms expert, that the shell casings found at the scene which showed multiple shots were fired from two (2) guns. (App. 256).

The prosecution presented evidence of flight in Petitioner's trial as follows. Petitioner's mother, LaKeisha Price, testified that she could not get in contact with him after the police came to her house looking for Petitioner. (App. 230). Price testified that she spoke to Petitioner sometime that day, went to pick him up, and Petitioner was gone. (App. 230). Price testified that Petitioner did not come home, and Price did not know where he was. (App. 229). The State also presented testimony from Officer Richie Foster, who testified that police went to Petitioner's home and other locations to search for him but could not find him. (App. 239).

Attempting to impeach Price, the State called Investigator Kim Parnell to testify that she spoke to Price who told Parnell that she had contact with Petitioner and tried to get him to turn himself in. (App. 236-37). Parnell testified that Price told her that she went looking for Petitioner and he fled. (App. 236-37).

A. Petitioner failed to prove prejudice from Counsel failing to prepare and challenge the State's evidence of flight since if the evidence was excluded, it would not have changed the outcome of trial.

Petitioner argues Counsel should have prepared for the flight evidence presented. Counsel testified that each trial is different and there are some things in a subsequent trial that weren't raised in a previous trial. (App. 970; 984). Counsel testified however that he was prepared to defend Petitioner. (App. 972). Counsel testified that he approached Petitioner's second trial by adapting[3] to and offering the best argument to the evidence presented. (App. 984). Counsel testified that he did not believe flight was an issue in Petitioner's case. (App. 987). Counsel further testified even if there was no evidence of flight presented in Petitioner's trial at all, he did not believe it would have changed the outcome in Petitioner's case. (App. 987). The PCR Court gave deference to Counsel's reasonable judgment. (App. 1095). *Strickland*, 466 U.S. at 689 (stating judicial scrutiny of counsel's performance must be "highly deferential"). In light of the overwhelming evidence of guilt presented, Petitioner failed to prove a reasonable probability that his trial would have been different if Counsel had more thoroughly prepared for or challenged the State's evidence of flight.

B. Petitioner failed to prove prejudice from Counsel failure to object to hearsay testimony from Investigator Kim Parnell regarding what Petitioner's mother told her because Petitioner failed to show a reasonable probability of a different outcome.

[3] The question posed was whether Counsel agreed that he tried his best to "adapt" to the evidence; the transcript incorrectly states "adopt." (App. 984:16).

Petitioner further argues that Counsel should have objected to Investigator Kim Parnell's testimony regarding what Petitioner's mother told her. Counsel testified that even if he had objected and Parnell's testimony were excluded, he did not believe it would have changed the outcome in Petitioner's case at all. (App. 986-87). In light of the overwhelming evidence of his guilt, Petitioner failed to prove there's a reasonable probability that the result of trial would have been different if Counsel had objected. (App. 1092-93). Therefore, Petitioner failed to prove prejudice from Counsel's performance in preparing for and challenging the State's evidence of flight.

C. Petitioner failed to prove prejudice from Counsel failing to object to the solicitor's line of questioning of Zaria Owens since the questioning did not violate the Confrontation Clause.

Petitioner also argues Counsel should have objected to the solicitor's line of questioning of Zaria Owens. In Petitioner's second trial, Zaria Owens, Petitioner's ex-girlfriend, testified that she spoke to Petitioner after the crime happened and told him that he needed to turn himself in. (App. 233-34). Owens testified that she did not remain in contact with Petitioner, did not know where he was hiding, and did not try to find him. (App. 234). When Owens denied telling the solicitor and an investigator that Petitioner told her the incident was a robbery and nobody was supposed to get hurt, the solicitor called Investigator Thomas Smith, who was present at the meeting, to testify to Owens' statements. (App. 233; 247-48). Counsel objected for hearsay, and the trial court overruled the objection as impeachment under Rule 613(b). (App. 248). *See* Rule 613(b), SCRE (stating extrinsic evidence of a prior inconsistent statement by a witness is admissible where the witness denies making the statement after being advised of the substance, time and place, and person to whom the statement was made).

However, distinguishing Petitioner's case from *State v. Sierra*, the PCR court correctly found that the solicitor's questioning of Owens regarding statements she made to the solicitor and an investigator did not violate the Confrontation Clause. (App. 1095). The solicitor impeached Owens regarding the statements by calling Investigator Smith to testify and provide independent evidence of Owens' statements. Investigator Smith was subject to Petitioner's cross-examination for the statements made. *Compare with Sierra*, 337 S.C. at 376, 523 S.E.2d at 191 (finding a Confrontation Clause violation where the solicitor questioned a witness about statements the witness made to the solicitor, and the solicitor presented no independent evidence to establish the witness' statement).

V. The PCR court correctly found Counsel was not ineffective in not objecting to Kameron Wilson's testimony referencing Petitioner's first trial in his testimony where Petitioner failed to prove a reasonable probability the result of trial would have been different due to the overwhelming evidence of Petitioner's guilt.

Petitioner failed to prove prejudice from Counsel not objecting to Kameron Wilson referring to Petitioner's first trial. At trial, Wilson testified that he stayed in contact with Petitioner when he got out of jail, but Wilson stopped talking to Petitioner after "the first trial." (App. 162). Petitioner alleges Counsel should have objected to the statement. However, Petitioner failed to show a reasonable probability that the result of trial would have been different if Counsel had objected.

If Counsel had objected, the trial court's remedy would have been to give a curative instruction for the jury to disregard Wilson's statement. *See State v. Vasquez*, 364 S.C. 293, 299-00, 613 S.E.2d 359, 362-63 (2005) (finding the trial court's curative instruction cured any prejudice the defendant may have suffered and afforded him a fair trial). However, a curative instruction would have only drawn the jury's attention to the comment. *See Washington v. State*, 440 S.C. 550, 573-74, 891 S.E.2d 668, 680-81 (Ct. App. 2023) (acknowledging the Supreme Court

has found that a trial lawyer articulated a valid trial strategy when he refused a curative instruction "because they tend to bring into focus precisely the item the objector has kept out" (citation omitted)); *see also United States v. Harris*, 14 F. App'x 144 (4th Cir. 2001) (finding it would have been a reasonable strategy for counsel to forego an instruction that would have reminded the jurors of the prosecutor's improper display of firearms to the jury during trial).

An alternative remedy would have been for Counsel to move for a mistrial. However, Petitioner failed to prove a reasonable probability that the trial court would have granted a mistrial since Petitioner failed to show prejudice from the comment and failed to show that a mistrial as "absolutely necessary." *State v. McEachern*, 399 S.C. 125, 146, 731 S.E.2d 604, 614 (Ct. App. 2012) ("A mistrial should be granted only when *absolutely necessary*...before a defendant may receive a mistrial, he or she must show both error and resulting prejudice." (emphasis added) (citation omitted)). Further, due to the overwhelming evidence of Petitioner's guilt, he failed to show a reasonable probability that the result of trial would have been different if Counsel had objected to Wilson's comment.

VI. The PCR court correctly found Counsel was not ineffective in utilizing witness testimony in Petitioner's first trial to cross-examine and impeach witnesses in the second trial where the witnesses' testimonies were substantially the same in both trials and any inconsistencies were minor and inconsequential to the State's theory of the case.

Petitioner failed to prove prejudice from Counsel not utilizing witness testimony in Petitioner's first trial to cross-examine and impeach witnesses in the second trial where the witnesses' testimonies were substantially the same in both trials. Petitioner alleges Counsel was deficient in his cross-examination of the following witnesses: Jonathan Lawson, Kevin Bowen, Wendy Thomas, Mary Ann Kotlarich, Kameron Wilson, Elian Nava, and Dr. Wren. Following review and comparison of the witnesses' testimonies in Petitioner's first and second trials, the PCR

court found Counsel's performance in cross-examining the witnesses was not deficient and found that any inconsistencies in the witnesses' testimonies were minor and inconsequential to the State's case. (App. 1100). A summary of the witnesses' testimonies is as follows.

Deputy Kevin Bowen

1st Trial: testified that he arrived and noticed a male and female. (App. 474). The male was a dark-skinned Hispanic who had knowledge of someone involved, and the name provided was a Hispanic name. (App. 475-76).

2nd Trial: testified that he arrived and noticed a male and female. (App. 515). The male was identified as Cesar Mendez. (App. 516). Mendez identified Elian Nava as the only person he knew. Mendez indicated that two (2) Black men fired shots. (App. 516-19).

Officer Wendy Thomas

1st Trial: testified that she arrived to assist and saw Bowen speaking to a male and female. (App. 480). Thomas took the female, who was identified as the victim's mother. (App. 480-81). The victim's mother's demeanor was distraught, and Thomas stayed with her for approximately one (1) hour until a victim's advocate and an investigator arrived. (App. 480-81).

2nd Trial: testified that she spoke to a female, who was identified as the victim's mother. (App. 114-15). The victim's mother was distraught, confused, and crying. (App. 121). Thomas stayed with her for approximately thirty (30) minutes. (App. 121).

Investigator Jonathan Lawson

1st Trial: testified that based on the location, it appeared the shooter(s) were moving around. Based on observation, it appeared that a struggled had ensued. (App. 498).

2nd Trial: testified that he could tell from the scene that some type of gunfight had occurred, and if a struggle ensued, things could have been kicked around. (App. 93).

Mary Ann Kotlarich

1st Trial: testified that she woke up to a noise around 3:34 am, got out of bed and went looking for the victim. (App. 513-14). She went to the garage and does not remember if the main garage door was open or closed, but if opened, the victim would have been the one to open it. (App. 512). She went to the front door, heard a man screaming and went back to the garage, where she saw a man

standing. (App. 512-13). She asked the man who he was, what was going on, and where was the victim. (App. 513). The man responded and pointed, and she saw the victim lying on the ground. (App. 513-14).

2nd Trial: testified that she heard noises around 3:30 am and went looking for the victim. (App. 124-25). She looked around the garage but did not see anything. (App. 125). She does not recall whether the garage door was open or closed but if open when police arrived, she would have been the one to open it. (App. 126). She went to the front door, heard yelling, and went back to the garage where she saw a man standing. (App. 126-27). She did not know who the man was. (App. 127). She asked the man what was going on and where was the victim. The man pointed, and she saw the victim lying on the ground. (App. 127).

Kameron Wilson

1st Trial: testified that he understood from Applicant that they were going to pick up Elian Nava to rob him and talk of the robbery came up when Nava got into the car. (App. 535). There was no talk of a robbery before Nava got in. (App. 535). Applicant was involved in the robbery talk. (App. 536). Wilson gave the group a ride and was just the driver; Wilson was not going to rob anyone. (App. 536). Wilson understood that he was to stay in the car while the others committed the robbery. (App. 536-37). Applicant and Stringer had guns. (App. 542-43). While waiting in the car, Wilson heard gunshots and saw people, Applicant, Stringer, and Nava running back to the car. (App. 544-45)

2nd Trial: testified that he was going to Elian Nava's house to pick him up to find someone with weed. (App. 148). Applicant used the words "money mission" when he texted Wilson on Snap Chat and asked Wilson to pick him up. (App. 148). Wilson believed he was on a "money mission" when Applicant picked him up, and "money mission" could mean a lot of things. (App. 149). The group picked up Nava then went to Cesar Mendez because Nava believed Mendez had weed. (App. 149). Talk of the robbery started on the way to Mendez. (App. 149). Wilson did not talk about the robbery but was driving. (App. 149-50). Wilson knew the group was going to rob someone but continued to drive them. (App. 149-50). Wilson stayed in the car while the others went up to the house. (App. 153-54). Applicant and Stringer had guns that night. (App. 154). Wilson heard three (3) gunshots and saw Applicant, Stringer, and Nava running back to his car. (App. 156-57).

Elian Nava

1st Trial: testified that he did not really know the victim, met the victim one (1) time, and the victim sold bud to one of Nava's friends. (App. 178). Applicant, Nava, Stringer, and Wilson were going to rob someone; the group did not include Mendez in the robbery plan. (App. 581). Applicant and Stringer (A.KA. "Neal" for Carnellious) came into the garage with guns. (App. 583). Applicant and Stringer started shooting. (App. 583). Applicant and the victim started wrestling; Stringer pointed a gun at Nava and Mendez. (App. 583 Nava heard gunshots bud did not know if the victim was hit. (App. 584). After hearing shots, Stringer came back in and shot the victim in the back two (2) to three (3) times while the victim was holding onto Applicant's leg. (App. 584-86). Mendez pulled out his gun and started shooting at them. (App. 585). Nava ran back to the car with Applicant and Stringer. (App. 588).

2nd Trial: testified that he met the victim one (1) time but did not really know him. (App. 204). Nava hit up Mendez. (App. 202) If Mendez had marijuana, he would have been the target of the robbery. (App. 203). Mendez said he did not have marijuana but knew who did. (App. 203). Mendez was not in the robbery scheme. (App. 203-04). When they arrived at the victim's house, Nava was unsure whether it was still a robbery because the group did not discuss what would happen at the victim's house. (App. 206). When Applicant handed Nava money, Nava thought the group just wanted to buy weed. (App. 206). Applicant and Stringer entered the garage with guns pointed at Nava and the victim. (App. 208). The victim started fighting Applicant, then Nava heard gunshots. (App. 208). Stringer came back into the garage. (App. 209). While the victim was holding onto Applicant's leg, Stringer shot the victim three (3) times in the back. (App. 209-10). Mendez pulled out a gun and started shooting at Nava. (App. 210). Nava ran to the car with Applicant and Stringer. (App. 210).

Dr. John Wren

1st Trial: regarding the victim's position, testified that two (2) shots in the back came from the same general direction. (App. 653). The person that inflicted those wounds was firing down toward him in some manner. (App. 653). The victim had a close-range gunshot. (App. 653). The victim had an abraded area over his right eye and forehead with blood draining, a superficial minor laceration to his posterior and superior right ear, and contusions of the upper mid abdomen. (App. 654).

2nd Trial: testified that the victim's gunshot wound to the leg did not hit anything of vital importance but was potentially fatal if it had not been treated. (App. 270). The victim's two (2) gunshot wounds

> to the back were immediately fatal. (App. 270). [No testimony about the victim's position or abrasions.]

Petitioner cites *Harris v. State*. In *Harris*, the Supreme Court held trial counsel was not ineffective for failing to prepare for a defendant's first and second trial by not obtaining the transcript from first trial and not impeaching witnesses in the second trial for statements made in the first trial where the witnesses' statements were essentially the same. *Harris*, 377 S.C. at 76, 659 S.E.2d at 146-47, *abrogated on other grounds by Smalls*, 422 S.C. 174, 810 S.E.2d 836. The applicant alleged trial counsel was ineffective for failing to prepare for the second trial by failing to obtain a transcript from the first trial and failing to cross-examine the State's witnesses for statements made in the first trial. *Id.* Trial counsel testified at the PCR hearing that he reviewed the discovery materials; there were no additions to discovery between the first and second trials; the facts were fresh on his mind for the second trial; and he had mastered the applicant's defense and was prepared for the applicant's case. *Id.* at 74, 659 S.E.2d at 144-45. Trial counsel acknowledged there were differences in officer testimony from the first and second trials. *Id.* at 78, 659 S.E.2d at 147. In the applicant's first trial, an officer who arrested the applicant testified that the applicant stated "you got me;" however, in the second trial, a different officer, who assisted in the arrest, testified that the applicant said "you got me. I did it. You got me[.]" *Id.* The Court determined that the testimonies from both officers in the separate trials were "essentially the same," and the fact that trial counsel did not obtain a transcript to impeach the officer in the second trial was "inconsequential." *Id.* The Court also held the applicant failed to prove he was prejudiced by trial counsel's preparation and failure to obtain a transcript from the first trial to impeach the witnesses for prior inconsistent statements because there was overwhelming evidence of the applicant's guilt. *Id.*

The PCR court reviewed Counsel's cross-examination of the witnesses' testimonies and found Counsel's performance was not deficient. (App. 1100). The PCR court also found credible Counsel's testimony that he reviewed the discovery in Petitioner's case, was prepared for the second trial, and the State's theory of the case remained constant between both trials. (App. 1100). The PCR court further found credible Counsel's testimony that there were no substantial differences in the witnesses' testimonies between Petitioner's trials. *Id.* The PCR court also correctly found Petitioner failed to show a reasonable probability that the result of trial would have been different but for Counsel's cross-examination of the witnesses. *Id.* Petitioner failed to show some line of questioning on a material fact that Counsel should have employed that would have resulted in a different outcome. Therefore, Petitioner failed to prove prejudice.

CONCLUSION

Based on the foregoing argument, the PCR court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests that this Court affirm the PCR court's rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,

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November 17, 2025