

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2013-002652

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**RECEIVED**

MAR 11 2015

**S.C. Supreme Court**

Marlon Rivera, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

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**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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**TABLE OF CONTENTS**

QUESTION PRESENTED.....2

STATEMENT OF THE CASE.....3

STANDARD OF REVIEW .....4

ARGUMENT

    The PCR judge did not err in finding Petitioner failed to  
    meet his burden of proving appellate counsel was ineffective. ....4

CONCLUSION.....11

## QUESTION PRESENTED

1. Following the Supreme Court's reversal of the Court of Appeals' opinion on direct appeal, was appellate counsel ineffective in failing to petition the Supreme Court to remand the matter for consideration of the remaining issues on appeal?

## STATEMENT OF THE CASE

The Greenville County Grand Jury indicted Petitioner at the October 2004 term of General Sessions for murder (2004-GS-23-7693). (App.pp.827-28). Susannah C. Ross, Esquire represented Petitioner.

After the State called the case to trial, Petitioner was found guilty. On October 13, 2005, the Honorable C. Victor Pyle, Jr. sentenced Petitioner to thirty years imprisonment. (App.p.585; p.829).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense represented Petitioner on appeal. (App.pp.673-707). The Court of Appeals reversed and remanded the conviction. State v. Rivera, Op. No. 2008-UP-187 (S.C. Ct. App. filed March 18, 2008). (App.pp.660-65). Respondent filed a petition for writ of certiorari at the South Carolina Supreme Court. (App.pp.790-807). The Supreme Court granted the petition and the parties briefed the issues. (App.pp.753-74; pp.775-89). On September 7, 2010, the Supreme Court reversed the Court of Appeals. State v. Rivera, 389 S.C. 399, 699 S.E.2d 157 (2010). (App.pp.666-72).

Petitioner filed an application for post-conviction relief (PCR) on February 17, 2011 (2011-CP-23-1209). (App.pp.636-55). A hearing was held at the Greenville County Courthouse on August 27, 2013. (App.pp.588-635). Petitioner was present and represented by Jeffrey Falkner Wilkes, Esquire. Karen C. Ratigan, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Robin B. Stilwell denied relief in an order filed November 8, 2013. (App.pp.A1-A10).

## STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

## ARGUMENT

**The PCR judge did not err in finding Petitioner failed to meet his burden of proving appellate counsel was ineffective.**

Petitioner argues appellate counsel erred in not petitioning the South Carolina Supreme Court to remand the direct appeal back to the South Carolina Court of Appeals for rulings upon all of Petitioner’s direct appeal issues. This allegation is without merit.

### A.

On direct appeal, appellate counsel raised five issues (that were actually treated as four issues) in his final brief at the South Carolina Court of Appeals. (App.pp.673-707). The Court of Appeals addressed the consolidated issue (listed as issues 4 and 5 in Petitioner’s brief) and reversed Petitioner’s conviction and sentence. The Court of Appeals noted that “in light of our disposition of the issue pertaining to the trial judge’s refusal to charge the jury on involuntary manslaughter, the remaining issues on appeal are not dispositive and need not be addressed.” (App.p.665). The State filed a petition for writ of certiorari – and subsequent brief of Petitioner – concerning this issue. (App.pp.753-74; pp.790-807). The South Carolina Supreme Court subsequently reversed

the Court of Appeals, thus reinstating Petitioner's conviction and sentence. (App.pp.666-72).

**B.**

Petitioner did not testify at the PCR hearing. Appellate counsel, however, did testify. Appellate counsel stated that

in retrospect . . . what I should have done is after I lost in the Supreme Court, when they reversed the Court of Appeals, I should have asked the Supreme Court to remand the case back to the Court of Appeals to make findings and address issues one through four that the Court did not address.

(App.p.594). Appellate counsel stated he believed another attorney in his office had done this once before. (App.p.594).

In denying Petitioner's application for post-conviction relief, the PCR judge found Petitioner "failed to meet his burden of proving appellate counsel was ineffective." The PCR judge noted Petitioner failed to present any "case law or precedent" that would have allowed appellate counsel to file a motion to remand the case to the Court of Appeals after the Supreme Court had issued its opinion. The PCR judge found appellate counsel was not deficient and the unaddressed direct appeal issues were not meritorious and "were unlikely to have been resolved in favor of [Petitioner]." The PCR judge also found Petitioner could not demonstrate any prejudice because the State presented overwhelming evidence of his guilt. (App.pp.A8-A9).

**C.**

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance.

under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). In analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009).

**D.**

The PCR judge did not err in finding Petitioner failed to meet his burden of proving appellate counsel was ineffective. Appellate counsel was not deficient in not filing a motion to remand and Petitioner was not prejudiced from the lack of said motion.

Deficiency

Petitioner's argument is that, after the Supreme Court granted the State's petition for a writ of certiorari and subsequently issued an opinion reversing the Court of Appeals, appellate counsel should have filed a motion to remand the matter to the Court of Appeals so that court could address his remaining issues. Initially, the State would note appellate counsel couched his entire testimony in terms of actions he wished he had taken "in retrospect." (App.p.593; p.594). The United States Supreme Court has specifically warned against looking at a post-conviction relief case through the lens of retrospection.

The Strickland court noted:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065. Appellate counsel's deficiency cannot be presumed merely from his testimony three years after he handled this appeal. See, e.g., McAfee v. Thurmer, 589 F.3d 353, 356 (7th Cir. 2009) (noting attorney "reflection after the fact is irrelevant to the question of ineffective assistance of counsel"); Wright v. Hooper, 169 F.3d 695, 707 (11th Cir. 1999) (noting that ineffectiveness is an issue decided by the courts and that "admissions of deficient performance by attorneys are not decisive").

Regardless, appellate counsel cannot be deemed deficient for failing to make a motion to remand in this case. A petition for a writ of certiorari to the Court of Appeals is a discretionary appeal, not an appeal to which a petitioner is entitled as a matter of right. Rule 242(b), SCACR. Furthermore, "an individual has no constitutional right to the effective assistance of counsel when seeking discretionary appellate review, and counsel is not required to seek a writ of certiorari after a criminal appeal is decided by the Court of Appeals." State v. Lyles, 381 S.C. 442, 444, 673 S.E.2d 811, 812 (2009) (citing Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006)). As such, it cannot be incumbent upon appellate counsel to have filed a motion to remand after the conclusion of a discretionary appeal. In addition, Petitioner has failed to cite case law that mandates such

action upon appellate counsel in this situation. Rather, remand such as that contemplated by Petitioner can be ordered sua sponte by the Supreme Court, if deemed appropriate by that Court. See State v. Pinckney, 339 S.C. 346, 529 S.E.2d 526 (2000); State v. Grovenstein, 335 S.C. 347, 517 S.E.2d 216 (1999).

#### Prejudice

Moreover, Petitioner cannot demonstrate he was prejudiced by the lack of a motion to remand in his case because the State produced overwhelming evidence of his guilt at trial. Officers responded to reports of a gunshot victim at 1124 Cedar Lane Road. (App.pp.41-43). Petitioner was later apprehended at a bar called the Mexicali at 1302 Cedar Lane Road. (App.p.73; pp.81-83). Alvaro Fernandez – an eyewitness to the shooting – had notified police of Petitioner’s location at the Mexicali and subsequently positively identified Petitioner as the shooter. (App.p.81). Carlos Estrado, co-owner of the Mexicali, told police he was the bouncer that evening and would not let Petitioner enter because he felt a weapon on his person. Estrado said Petitioner left and returned without a weapon. (App.p.68; pp.70-71). Police subsequently found the murder weapon in a tree near the Mexicali. (App.pp.87-89).<sup>1</sup> A gunshot residue test indicated Petitioner had a lead particle on the back of one of his hands. (App.pp.104-11; p.178). Petitioner’s cousin, Nelson Castro, testified Petitioner said he had killed someone when he pulled out his pistol and it went off. (App.pp.52-55; pp.60-61). Petitioner gave a statement to police. (App.pp.269-73; pp.294-97; pp.298-99). In Petitioner’s statement, he said he was

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<sup>1</sup> A ballistics expert testified the bullet recovered from the victim was fired from this pistol. (App.p.144).

in a fight with someone, became mad, pointed his gun at this person, and shot twice. (App.p.299).<sup>2</sup> Petitioner never told the officers that anyone else was involved and specifically said no one else shot his weapon. (App.p.300; pp.351-52).<sup>3</sup>

The weakness of Petitioner's unaddressed appellate issues – when coupled with the State's presentation of overwhelming evidence of Petitioner's guilt – clearly demonstrate Petitioner cannot prove he was prejudiced by appellate counsel's failure to file a motion to remand after the Supreme Court reversed the Court of Appeals on a writ of certiorari. See, e.g., Rosemond v. Catoe, 383 S.C. 320, 325, 680 S.E.2d 5, 8 (2009) (holding no prejudice occurs, even if trial counsel was deficient, where there is otherwise overwhelming evidence of the defendant's guilt); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

#### Conclusion

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that appellate counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by appellate counsel's performance. As Petitioner failed to meet his burden of proving ineffective assistance of appellate counsel, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389,

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<sup>2</sup> Petitioner also admitted he put this weapon in a tree outside the Mexicali. (App.p.299; p.467).

<sup>3</sup> At trial, however, Petitioner changed his story. Petitioner testified he: (1) got into a fight with someone (who he did not believe was going to kill him), (2) another person named "El Flaco" took his gun and shot the victim, and (3) Petitioner took the gun back and fired it into the ground twice. (App.pp.458-61; p.489).

570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”). There is ample probative evidence to support the PCR judge’s ruling. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626; see also McCray v. State, 317 S.C. 557, 559, 455 S.E.2d 686, 687–88 (1995) (citation omitted) (holding the rulings of the PCR judge must be affirmed if there is any evidence to support the decision).

## CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

ALAN WILSON  
Attorney General

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By:   
ATTORNEYS FOR RESPONDENT

March 11, 2015

STATE OF SOUTH CAROLINA  
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APPEAL FROM GREENVILLE COUNTY  
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The Honorable Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2013-002652

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Marlon Rivera, ..... Petitioner,

v.

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**CERTIFICATE OF SERVICE**

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I, Karen C. Ratigan, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

J. Falkner Wilkes, Esquire  
114 Whitsett Street  
Greenville, South Carolina 29601

I further certify that all parties required by Rule to be served have been served.  
This 11th day of March, 2015.

  
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ATTORNEY FOR RESPONDENT



ALAN WILSON  
ATTORNEY GENERAL

March 11, 2015

RECEIVED

MAR 11 2015

S.C. Supreme Court

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re: Marlon Rivera v. State of South Carolina**  
**Appellate Case No: 2013-002652**  
**Lower Court Case No: 2011-CP-23-1209**

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case. If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan  
Senior Assistant Deputy Attorney General  
SC Bar #68331

KCR/jacc  
Enclosures

cc: J. Falkner Wilkes, Esquire  
Trisha Allen, Victim Services Counselor