ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

Opinion No.2015-UP-191 (S.C. Ct. App. Filed April 8, 2015)

09-CP-40-00234

CARMEN LATRICE RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INDEX

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on May 19, 2015.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding unpreserved the issue of whether the PCR judge erred in finding Arletta Frierson's testimony that Iris Bryant, the co-defendant and the State's main witness at trial, told her that the petitioner had nothing to do with the murder of Bernard Brennan was inadmissible hearsay?

2. Did the Court of Appeals err in finding that the PCR judge's decision that trial counsel was not ineffective for failing to call Arletta Frierson as a witness at trial was supported by the evidence when the PCR judge did not rule on the merits of this ineffective assistance of counsel claim, finding Frierson's testimony inadmissible at the PCR hearing?

3. Did the Court of Appeals err in finding that if trial counsel was deficient for failing to call Frierson as a witness, petitioner failed to show prejudice because the testimony was merely cumulative when the PCR judge did not rule on the merits of the ineffective assistance of counsel claim and did not find the testimony merely cumulative?

STATEMENT OF THE CASE

In March of 2004, the Richland County Grand Jury indicted Carmen Rice for murder and armed robbery, indictments #04-GS-40-8754, 8755. On April 4, 2005, Rice proceeded to jury trial before the Honorable Reginald I. Lloyd. Attorneys John T. Mobley and Christopher Hart represented Rice at trial. Attorneys John P. Meadors and Theodore N. Lupton prosecuted the case. The jury returned verdicts of guilty and Judge Lloyd sentenced Rice to life imprisonment for murder and 30 years concurrent for armed robbery. A timely notice of intent to appeal was filed and the direct appeal perfected on Rice's behalf. Attorney Robert M. Dudek represented Rice for the direct appeal The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct.App. 2007) (cert. denied December 4, 2008) (overruled by State v. Byers, 392 S.C. 438, 445, 710 S.E.2d 55, 58 (2011)) (To the extent State v. Rice stands for the proposition that preservation of an error in admitting evidence can only be accomplished if trial counsel follows the precise procedure of making an objection followed by a motion to strike, we overrule that proposition).

On January 14, 2009, Rice filed an application for post conviction relief. The State filed a return on July 7, 2009, and an amended return on March 11, 2010. On June 6, 2011, an evidentiary hearing was held before the Honorable James R. Barber, III. Attorney Mark Schnee represented Rice at the PCR hearing. Attorney Brian T. Petrano was present for the South Carolina Attorney General's Office. In a written order signed August 17, 2011, Judge Barber denied relief and dismissed the application. A timely notice of intent to appeal was filed on September 15, 2011, and on September 21, 2012, a petition for writ of certiorari was filed. The State filed a return on January 22, 2013. On July 29, 2013, this case was transferred from the

South Carolina Supreme Court to the South Carolina Court of Appeals. On May 21, 2014, the Court of Appeals granted the petition for writ of certiorari.

The brief of petitioner was filed on June 25, 2014. The brief of respondent was filed on November 24, 2014. On February 26, 2015, the Court of Appeals scheduled oral argument for April 14, 2015. On March 18, 2015, the Court of Appeals cancelled the previously scheduled oral argument and notified the parties that the case was being decided based on the briefs and without oral argument. On April 8, 2015, the Court of Appeals issued an unpublished opinion affirming the PCR judge's denial of relief. State v. Rice, Op. No. 2015-UP-191 (S.C.Ct.App. Filed April 9, 2015). A timely petition for rehearing was filed on April 16, 2015. On May 19, 2015, the petition for rehearing was denied. This petition for writ of certiorari follows.

STATEMENT OF FACTS

The jury found Petitioner Carmen Rice guilty of the murder and robbery of Bernard Brennan on October 25, 2001. Rice had no prior criminal history. (App. p. 1155, lines 13-20). Officers with the Richland County Sheriff's Department quickly determined that on the night of his death Brennan had been at the Varsity shooting pool with his friend Alton Page where he was joined by two females. (App. p. 768, lines 19 – p. 769, lines 1-20). Brennan and the two females left the Varsity and went to Calloway's to eat. (App. p. 767, lines 3-25). In February of 2002, law enforcement received information that a woman named Iris may have been involved in the murder of Brennan. (App. p. 781, lines 18-25). Law enforcement was unable to determine a last name for Iris and the case was turned over to the cold case unit. (App. p. 782, lines 1-14; p. 784, lines 5-16).

In July of 2003, officers interviewed Nathaniel Hallman. (App. p. 784, lines 17 – p. 785, lines 1-6). Based on the interview with Hallman, officers developed Iris Bryant as a possible suspect and arrested her on July 25, 2003. (App. p. 786, lines 11-21). Bryant gave numerous conflicting statements to the police in regard to the death of Brennan. Bryant admitted being with Brennan at the Varsity and Calloway's on October 25, 2001. (App. pp. 513-515). According to Bryant, Rice was with them. Bryant admitted that they planned to rob Brennan that evening. Bryant claimed Rice unexpectedly shot the decedent – from the back seat -- when they got him alone in the desolate area off of I-20 where his body was found. (App. pp. 516-526).

Bryant admitted that on August 25, 2003, she told Investigator Stan Smith that "Nikki" was with her at the time of the shooting. Bryant's "original" story was that there were three people involved. (App. pp. 526-528). Bryant testified she was scared at the time, and admitted she had repeatedly lied to the police about what happened. (App. pp. 526-552).

Bryant admitted on cross-examination that she only came up with her current "version" of what happened "last week" when she met with her lawyer, the solicitor and "Lieutenant Stan Smith." (App. p. 551, lines 9 – 20). Bryant also admitted that her current version which involved Rice throwing the decedent's wallet down a drain as they ran from the crime scene was only told to the solicitor on "Tuesday" -- the week of the trial. (App. p. 554, lines 21 – p. 555, lines 1- 18). Bryant admitted that before that week, she had not told anyone of her current version of what happened that night. (App. p. 556, lines 25 – p. 557, lines 1- 5).

Bryant also acknowledged that while she was incarcerated at the Alvin S. Glenn Detention Center in Columbia that she met Alana Quattlebaum. The following colloquy occurred between defense counsel and Bryant:

> Q. Isn't it true that you told Alana Quattlebaum that Carmen Rice was not there and was not involved when you robbed Bernard Brennan and that it was you and your cousin who shot Bernard Brennan?
>
> A. No, sir.
>
> Q. And didn't you tell the exact same thing to Arletta Frierson when she was also at the detention center with you that you - - that Carmen Rice was not involved in that robbery, that you and your cousin shot Bernard Brennan?
>
> A. Who is Frierson? Sir, these people don't even - - I know Quattlebaum, like I said, she's Carmen's friend. Me and this girl has a separation code at the jailhouse. We cannot be, just like me and Carmen has a separation code, we cannot be nowhere around each other. We don't get along because of Carmen. Three weeks ago I was jumped on by this same girl because of Carmen. I pressed charges on her. Me and Alana Quattlebaum don't have any words to each other.

(App. p. 561, lines 20 – p. 562, lines 1- 14).

Alana Quattlebaum testified at trial that she and Arletta Frierson, Bryant's first cousin, were roommates at the Alvin S. Glenn Detention Center at the same time Bryant was housed at the detention center. (App. p. 964, lines 4 – p. 965, lines 1-13). Quattlebaum testified, "I was doing Iris Bryant's hair in braids. And her cousin, we call her Lee-Lee, her name is Arletta Frierson, she asked Iris what happened. And Iris said she did not want to talk about it. And then Arletta asked her again. She said, Well, what Carmen - - what did Carmen do? She said she was going to tell the truth that Carmen had nothing to do with it." (App. p. 965, lines 14-21). It appears that Arletta Frierson was transported to court but not called a witness by trial counsel. (App. p. 974, lines 1-12).

During the evidentiary hearing PCR counsel asked Petitioner Rice if Bryant ever said she was going to lie in exchange for a plea bargain from the State. (App. p. 1186, lines 20 – 22). Rice answered, "Yes." (App. p. 1186, line 22). The State objected on hearsay grounds and the PCR judge sustained the objection. (App. p. 1186, lines 23-25). PCR counsel argued that the statement met a hearsay exception as it was a statement against interest. (App. p.1187, lines 1-3). The State argued that the statement against interest exception only applied when the declarant was unavailable and there had been no showing that Bryant was unavailable. (App. p. 1187, lines 4-7). Rule 804(b)(3) provides that a statement against interest is not excluded by the hearsay rule if the declarant is unavailable as a witness. In response PCR counsel stated, "Well, I have no idea where Ms. Bryant is. I have no way of subpoenaing her." (App. p. 1187, lines 8-9). When the judge asked if PCR counsel had attempted to locate Bryant, PCR counsel responded, "I have – I have tried contacting her last known address. There has been no answer anywhere that I know of." (App. p. 1187, lines 11-13). The judge sustained the State's objection to the hearsay testimony elicited from Rice. (App. p. 1187, line 14). This evidentiary ruling is not challenged on certiorari.

Instead, Petitioner on certiorari challenges the PCR judge's evidentiary ruling that the testimony and statements of Arletta Frierson were inadmissible hearsay. Additionally, Petitioner on certiarari challenges the PCR judge's failure to find that trial counsel was ineffective in failing to call Arletta Frierson as a witness at trial to impeach the testimony of Bryant.

ARGUMENTS

1. The Court of Appeals erred in finding unpreserved the issue of whether the PCR judge erred in finding Arletta Frierson's testimony that Iris Bryant, the co-defendant and the State's main witness at trial, told her that the petitioner had nothing to do with the murder of Bernard Brennan was inadmissible hearsay.

The first issue presented below involved the PCR judge's erroneous evidentiary finding in regard to the admissibility of the testimony and statements of Arletta Frierson. As a result of the PCR judge's erroneous finding that the testimony and statements were inadmissible hearsay, the PCR judge failed to consider the substance of Frierson's statement and how trial counsel was ineffective in failing to call Frierson as a witness at trial. The failure to address the merits of the ineffective assistance of counsel claim is addressed in issues two and three.

After the PCR judge ruled Petitioner's testimony that Bryant said she was going to lie in exchange for a plea bargain from the State was inadmissible hearsay and not an exception as a statement against interest because PCR counsel failed to show that Bryant was unavailable pursuant to Rule 804(b)(3), PCR counsel then sought to introduce the testimony of Arletta Frierson indicating that Bryant admitted that Rice had nothing to do with the murder of Bernard Brennan. (App. p. 1192, lines 18 – p. 1193, lines 1-9). PCR counsel stated:

> We call Arletta Frierson, and I understand Your Honor's ruling on the hearsay exception in that regard. I would like to argue that it would be – fall under rule 801 as an admission by a party opponent. If Your Honor is going to maintain the same ruling, I would like the Court's indulgence to proffer this testimony.

(App. p. 1192, lines 18-24). The State objected to the testimony arguing that Bryant was not a party opponent. (App. p. 1193, lines 10-18). The trial judge asked PCR counsel ifhe wished to proffer testimony. (App. p. 1194, line 1). PCR counsel responded, "Well, if Your Honor isnot going to consider it substantive evidence, I would like to proffer it in case I have to appeal this

decision." (App. p. 1194, lines 2-4). The PCR judge allowed PCR counsel to proffer Frierson's testimony. Frierson testified:

> Well, I mean, I was at Alvin S. Glenn, and that's when we first started talking about it. When her and Carmen used to have their little altercations, she just basically said that – she did say that Carmen had nothing to do with it and she stated a couple of times that if Carmen kept on with her nonsense that she said she held – she said she held Carmen's life in her hand. She said the only thing she had to do was to tell the truth and Carmen could be set free.

(App. p. 1196, lines 9-16). Frierson's statement that Bryant told her that Petitioner Rice had nothing to do with the death of Bernard Brennan was admissible as impeachment testimony and was not hearsay pursuant to Rule 801(d)(1). The PCR judge erred in excluding Frierson's statement.

Rule 801(d)(1)(A) provides that a statement is not hearsay if the declarant testifies at the trial and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony. At trial, declarant Bryant testified against Petitioner and trial counsel cross examined Bryant about making the statement to Frierson. Bryant denied making the statement. Frierson's statement is inconsistent with declarant Bryant's testimony at trial. While Rule 804(b)(3) SCRE, is an exception to the hearsay rule and requires the decalarant to be unavailable, Rule 801(d) defines what does not constitute hearsay and the availability of the declarant is not an issue. Frierson's statement is not hearsay and the judge erred in not admitting the statement.

At trial the following occurred between defense counsel and Bryant:

> R. Isn't it true that you told Alana Quattlebaum that Carmen Rice was not there and was not involved when you robbed Bernard Brennan and that it was you and your cousin who shot Bernard Brennan?
>
> B. No, sir.

R. And didn't you tell the exact same thing to Arletta Frierson when she was also at the detention center with you that you - - that Carmen Rice was not involved in that robbery, that you and your cousin shot Bernard Brennan?

B. Who is Frierson? Sir, these people don't even - - I know Quattlebaum, like I said, she's Carmen's friend. Me and this girl has a separation code at the jailhouse. We cannot be, just like me and Carmen has a separation code, we cannot be nowhere around each other. We don't get along because of Carmen. Three weeks ago I was jumped on by this same girl because of Carmen. I pressed charges on her. Me and Alana Quattlebaum don't have any words to each other.

(App. p. 561, lines 20 – p. 562, lines 1- 14).

Frierson's testimony about Bryant's prior statement was not hearsay pursuant to Rule 801(d)(1)(A). While PCR counsel argued that the statement was not hearsay and admissible pursuant to Rule 801(d)(2) rather than (d)(1)(A), it is clear that PCR counsel was arguing that the statement was admissible because it was not hearsay pursuant to 801(d). The PCR court should have found the testimony admissible pursuant to Rule 801(d)(1)(A) and then ruled on the merits of the claim. Instead, the PCR court simply ruled that Frierson's testimony was inadmissible. The statement was admissible at the PCR hearing to show that trial counsel was deficient in failing to call Frierson as a witness at trial to impeach Bryan's prior inconsistent statement pursuant to Rule 801(d)(1)(A). The PCR judge erred in refusing to consider Frierson's testimony as substantive evidence of trial counsel's deficient performance.

The State argued that Frierson's statement was not proper impeachment testimony because Bryant "never admitted, nor denied, making the statement Frierson set forth." (Brief of Respondent pp. 11-12). According to Alana Quattlebaum's testimony at trial, Bryant and Frierson are first cousins. (App. p. 965, lines 1-13). The fact that Bryant denied knowing her

first cousin implies that she also denied making any statement to her. Additionally, the State argued, "Further, Bryant was not available at the PCR evidentiary hearing to testify on the matter and was not subject to cross-examination by the state." (Brief of Respondent p. 12). First, as discussed above, Bryant's unavailability at the PCR hearing is immaterial. Bryant testified at trial as a State's witness and was subject to cross examination as required for Rule 804(d)(1). Second, if Bryant is unavailable, as argued by the State in the brief of respondent, then **Petitioner's** testimony that Bryant said she was going to lie in exchange for a plea bargain from the State would be admissible as a statement against interest. The PCR judge erred in not admitting Frierson's testimony.

During the evidentiary hearing, PCR counsel also moved to admit two written statements made by Frierson in April of 2006, after Petitioner's April 2005, trial but before the June 2011, evidentiary hearing. (App. p. 1194, line 22 – p. 1195, lines 1-9). The State objected stating "Your Honor, same objection. It's hearsay within hearsay." (App. p. 1195, lines 10-11). The statements were marked as Court's exhibits #1 and #2 for identification. (App. p. 1195, lines 17-25). The statements can be found on pages 1242 and 1243 of the Appendix. The statements are consistent with Frierson's testimony at the PCR hearing that Bryant stated that Petitioner Rice had nothing to do with the charge she was now convicted of but Bryant would do whatever it took to clear herself so she could get back home to her three children. For the same reasons discussed above in regard to Frierson's testimony, the PCR judge erred in not admitting Frierson's statements.

The Court of Appeals found the issue of whether Frierson's testimony was admissible pursuant to Rule 801(d)(1)(A) unpreserved. The Court of Appeals wrote:

> We find unpreserved the issue of (1) whether Frierson's testimony was admissible at the PCR hearing under Rule 801(d)(1)(A), SCRE, as a prior inconsistent statement and (2) whether the PCR court erred by not making findings of fact and conclusions

> of law as to the allegation that Roberts' testimony constituted newly discovered evidence. See Burgess v. State, 402 S.C. 92, 95,738 S.E.2d 264, 265 (Ct.App. 2013) ("The [South Carolina] [S]upreme [C]ourt emphasized that to properly preserve an issue for appellate review, it is incumbent upon a party in a PCR action to file a Rule 59(e), [, SCRCP,] motion in the event the PCR court fails to make specific findings of fact and conclusions of law regarding an issue.").

State v. Rice, Op. No. 2015-UP-191 (S.C.Ct.App. Filed April 9, 2015).

The Court of Appeals erred. First, the issue of whether Frierson's testimony was admissible pursuant to Rule 801(d) was raised to and ruled upon by the PCR judge. PCR counsel clearly argued that the statement was not hearsay, although pursuant to Rule 801(d)(2) rather than (d)(1)(A). The judge ruled that the testimony constituted inadmissible hearsay. The issue is preserved for appellate review. Second, in the order of dismissal the PCR judge stated that both the statement of Frierson and the statement of another witness, LaShawn Roberts, were hearsay. The PCR judge wrote, "After the Applicant testified, she proffered the testimony of LaShawn D. Roberts, #00262970 and Arlette R. Frierson, #00248140. Their testimony was related to one or more supposed hearsay statement(s) against interest from the codefendant [Bryant] (who testified at trial)." (App .p. 1251)(footnote omitted). The "supposed" in this sentence refers to the credibility of the statement, as noted in footnote 5 of the order of dismissal, rather than to whether or not the statement is hearsay. While the order of dismissal could have been drafted more clearly, PCR counsel in the present case was not required to file a Rule 59(e) motion as the order reflects the PCR judge's erroneous ruling that Frierson's testimony was inadmissible hearsay.

In State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010), the South Carolina Supreme Court wrote, "An objection must be made on a specific ground. State v. Nichols, 325 S.C. 111, 120, 481 S.E.2d 118, 123 (1997). For an issue to be properly preserved it has to be raised to and ruled on by the trial court. State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475,

478 (2004). A party need not use the exact name of a legal doctrine in order for the issue to be preserved, but it must be clear the argument has been presented on that ground. State v. Russell, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct.App.2001)." Petitioner argued that Frierson's testimony was not hearsay pursuant to Rule 801(d). The PCR found the testimony was hearsay and failed to consider the substance of the testimony in determining deficient performance. The PCR judge erred and the issue is preserved for appellate review.

2. The Court of Appeals erred in finding that the PCR judge's decision that trial counsel was not ineffective for failing to call Arletta Frierson as a witness at trial to testify as to statements made by Iris Bryant when the PCR judge did not rule on the merits of this ineffective assistance of counsel claim, finding Frierson's testimony inadmissible at the PCR hearing.

The PCR judge found that Arletta Frierson's testimony and statements were inadmissible hearsay. As a result of the PCR judge's erroneous evidentiary ruling, the PCR judge did not consider the merits of the ineffective assistance of counsel claim for failing to call Frierson as a witness at trial. Trial counsel was ineffective in failing to call Arletta Frierson as a witness at trial to impeach the critically damaging testimony of Bryant. (App. pp. 1244-1256). The case should be remanded to the PCR court to make findings of fact and conclusions of law, after considering the properly admitted testimony and statements of Frierson, in regard to the allegation that trial counsel was ineffective in failing to call Arletta Frierson as a witness at trial.

Alana Quattlebaum testified at trial that Frierson was present when Bryant admitted that Rice had nothing to do with the murder of Bernard Brennan. (App. p. 965, lines 14-21). As discussed above, during the proffer at the PCR hearing Frierson testified:

> Well, I mean, I was at Alvin S. Glenn, and that's when we first started talking about it. When her and Carmen used to have their

> little altercations, she just basically said that – she did say that Carmen had nothing to do with it and she stated a couple of times that if Carmen kept on with her nonsense that she said she held – she said she held Carmen's life in her hand. She said the only thing she had to do was to tell the truth and Carmen could be set free.

(App. p. 1196, lines 9-16). Frierson testified that Bryant told her she testified against Petitioner to get a deal. (App. p. 1197, lines 6-8). Frierson testified, "I just think that she was trying to go home to her kids, so she was trying to do what she needed to do for herself." (App. p. 1197, lines 10-12).

Two written statements by Arletta Frierson, dated April 3, 2006, and April 17, 2006, were marked as Court's exhibits and introduced in evidence. (App. pp. 1242, 1243). Both written statements discuss Bryant's statements that Rice had nothing to do with the murder of Bernard Brennan. Trial counsel was ineffective in failing to call Arletta Frierson as a witness at trial to impeach the very damaging testimony of Bryant.[1] Trial counsel offered no strategic reason for not calling Frierson as a witness at trial. Petitioner was prejudiced by trial counsel's deficient performance.

Because the PCR judge found the statements and testimony of Frierson inadmissible at the PCR hearing, the PCR judge did not make findings of fact and conclusions of law in regard to the claim that counsel was ineffective in failing to call Frierson as a witness. Footnote 5 of the order of dismissal simply states:

> To be clear, the proffered testimony suggested that the co-defendant made statements to other inmates (both before and after the Applicant's trial) that the Applicant had nothing to do with this crime, and that she (the co-defendant) admitted she was lying when she testified that the Applicant was the murderer. This Court notes for the purposes of the record that the proffered witnesses were not credible. On a final note, it appears that one of the witnesses the Applicant proffered at the PCR hearing was listed as a potential witness at the trial, but did not testify. (Trial transcript, p. 21, L. 7 –

[1] It appears that Frierson was transported to Court at the time of trial but not called as a witness. (App. p. 974, lines 6-7).

> 8, p. 974, L. 6). In addition, the appellate court addressed some of the issue(s) with the co-defendant's statements: . . .

The only issue raised on direct appeal involving the co-defendant Bryant's statements involved the trial judge ruling that Quattlebaum's testimony that Bryant said that Nikki or Tiki killed Brennan was inadmissible as improper third party guilt evidence,. The statement at issue here, made by Bryan to Frierson, does not implicate third party guilt but simply indicates that Rice had nothing to with the murder. The bare assertion contained in the footnote that the proffered witnesses were not credible does not constitute a finding of fact or conclusion of law. The case should be remanded for a new evidentiary hearing where the PCR judge can properly consider the statements and testimony of Frierson, her credibility and make findings of fact and conclusions of law in regard to trial counsel's failure to call Frierson as a witness at trial.

Pursuant to S.C.Code Ann. § 17-27-80 (2003), the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. In Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007), the South Carolina Supreme Court wrote:

> We take this opportunity to reiterate our admonition that "[c]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP." Pruitt v. State, 310 S.C. at 256, 423 S.E.2d at 128.

PCR counsel did not file a Rule 59(e) motion asking the judge to make findings of fact and conclusions of law in regard to the allegation that counsel was ineffective in failing to call Frierson as a witness at trial to impeach the Bryant's critical and damaging testimony because

the PCR judge had erroneously found Frierson's testimony and statements inadmissible. There would be no reason to ask the PCR judge, in a Rule 59(e) motion, to consider evidence he had ruled inadmissible.

Although the PCR judge did not make findings of fact and conclusions of law in regard to the merits of whether counsel was deficient in failing to call Frierson as a witness at trial the Court of Appeals wrote, "We find the PCR court's decision that trial counsel was not ineffective for failing to call Frierson as a witness at trial is supported by the evidence." Rice v. State, 2015-UP-191 (S.C.Ct.App. filed April 8, 2015). The PCR court never decided if trial counsel was ineffective for failing to call Frierson as a witness at trial because the PCR court incorrectly found the Frierson's testimony inadmissible. This Court should remand the case to allow the PCR court to rule on the ineffective assistance of counsel claim.

3. The Court of Appeals erred in finding that if trial counsel was deficient for failing to call Frierson as a witness, petitioner failed to show prejudice because the testimony was merely cumulative when the PCR judge did not rule on the merits of the ineffective assistance of counsel claim and did not find the testimony merely cumulative.

The Court of Appeals, citing Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011), additionally ruled that even if counsel was deficient in failing to call Frierson as a witness at trial, Petitioner failed to prove prejudice as Frierson's testimony was cumulative to the testimony of another witness, Alana Quattlebaum. The PCR judge did not make such a finding in regard to prejudice because, as discussed above, the PCR did not decide the merits of the ineffective assistance of trial counsel claim because the PCR judge erroneously found Frierson's testimony inadmissible. The PCR judge did not make a finding as to prejudice and did not find the testimony

merely cumulative. A finding as to prejudice should be made by the PCR judge on remand to determine the merits of the PCR claim.

Frierson's testimony was not merely cumulative to the testimony of Quattlebaum. As admitted by Iris Bryant at trial, she and Quattlebaum did not get along. According to Bryant, Quattlebaum and Petitioner Rice were friends. (App. p. 561, lines 20 – p. 562, lines 1- 14). At trial Quattlebaum admitted that Bryant had sworn out a warrant against her for simple assault. (App. p. 968, lines 9-16). In cross examination of Quattlebaum, in the closing on the law as well as the closing argument the State referenced Quattlebaum's bias. (App. p. 968, lines 1009, lines 12-14; p. 1093, line 13 – p. 1094, lines 1-10). Frierson, however, according to Quattlebaum, is Bryant's first cousin. (App. p. 965, lines 1-13). Unlike Quattlebaum, Frierson had no bias against Bryant. Frierson's testimony was not merely cumulative.

Frierson's testimony is distinguished from the testimony found to be merely cumulative in Edwards. First, trial counsel in Edwards provided a strategic reason for not calling the witness to testify. In Edwards v. State, 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) the South Carolina Supreme court wrote:

> Although Petitioner's attorney admittedly did not interview Marshall, he did observe Marshall at the plea hearing. Based on this observation, counsel concluded as a strategic matter that he was not going to call Marshall as a witness. Chief among the reasons for that decision were Marshall's ability to withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony. Additionally, Petitioner's attorney knew entirely consistent evidence would be presented through Petitioner's statement to the police. A witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions, even if that witness is a co-defendant. (internal citations omitted).

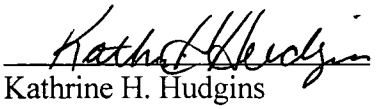
Trial counsel in the present case offered no strategic reason for his failure to call Frierson as a witness at trial. (App. pp. 1213 – 1214).

Second, Frierson's testimony went to the credibility of the co-defendant and the State's main witness against Petitioner, rather than the witness testimony in Edwards that was simply consistent with Edwards' statement to police. Third, in Edwards the Court noted that prejudice was not shown based on the strong evidence of guilt. "While Marshall's statements may have served to corroborate Petitioner's testimony concerning the degree of his involvement in the crime, this benefit must be evaluated against the legitimate concerns regarding Marshall's credibility and the strong evidence of Petitioner's guilt." Edwards v. State, 392 S.C. 449, 460, 710 S.E.2d 60, 66 (2011). The State's evidence against Petitioner was not overwhelming. The strongest evidence against Petitioner came from the testimony of Iris Bryant, rendering Arletta Frierson's testimony in regard to Bryant's prior inconsistent statement critical to the defense.

CONCLUSION

Based on the above arguments, the petition for writ of certiorari should be granted to allow further briefing on the issues.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 18th day of June, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

Opinion No. (S.C. Ct. App. filed)
09-CP-40-00234

CARMEN LATRICE RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on J. Clayton Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 18th day of June, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 18th day
of June, 2015.

Bailey Wolfe (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021