STATE OF SOUTH CAROLINA

IN THE 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

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Carmen Latrice Rice, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-199412

Appeal From Richland County
James R. Barber III, Circuit Court Judge

Unpublished Opinion No. 2015-UP-191
Submitted March 18, 2015 – Filed April 8, 2015

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Petitioner.

Attorney General Alan McCrory Wilson and Assistant Attorney General James Clayton Mitchell III, both of Columbia, for Respondent.

PER CURIAM: Carmen Rice was convicted of murder and armed robbery. The trial court sentenced Rice to concurrent sentences of life imprisonment for murder and thirty years' imprisonment for armed robbery. Following her conviction, Rice filed an application for post-conviction relief (PCR). The PCR court denied relief,

and this court granted Rice's petition for writ of certiorari. Rice appeals the PCR court's denial of her PCR application, arguing the PCR court erred by (1) ruling that Arletta Frierson's statement constituted inadmissible hearsay, (2) not making findings of fact and conclusions of law as to the allegation that La Shawn Roberts' testimony constituted newly discovered evidence, and (3) not making findings of fact and conclusions of law regarding whether trial counsel was ineffective for failing to call Frierson as a witness. We affirm.

1. We find unpreserved the issues 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."). Additionally, we find Rice's reliance on *Martinez*[1] unpersuasive because "the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state [PCR] actions." *See Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013).

2. 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. *See Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013) ("On appeal in a PCR action, this [c]ourt applies an 'any evidence' standard of review."); *Shumpert v. State*, 378 S.C. 62, 66, 661 S.E.2d 369, 371 (2008) ("A PCR court's findings will be upheld on review if there is any evidence of probative value supporting them."). During Rice's trial, Iris Bryant testified regarding Rice's involvement in a murder. Bryant testified she and Rice were with Bernard Brennan (Victim) on the night Victim was murdered. According to Bryant, Victim drove her and Rice to a secluded road, and Rice shot Victim from the back seat of the vehicle. Alana Quattlebaum testified at trial that she was incarcerated with Frierson and Bryant. Quattlebaum claimed Bryant told her and Frierson that Rice did not have anything to do with the crime. Trial counsel did not call Frierson to testify at trial. At the

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[1] *Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

PCR hearing, Frierson proffered testimony that Bryant told her that Rice "had nothing to do with" Victim's murder.

Even assuming trial counsel was deficient for failing to call Frierson, Rice failed to show prejudice. *See Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (stating in order to obtain PCR relief for ineffective assistance of counsel, "[f]irst, the burden of proof is upon petitioner to show that counsel's performance was deficient as measured by the standard of reasonableness under prevailing professional norms. Second, the petitioner must prove that he or she was prejudiced by such deficiency to the extent of there being a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (emphasis omitted)).

Through Quattlebaum's testimony, the jury was informed that Bryant admitted Rice did not have anything to do with the crime. Accordingly, Frierson's testimony would have been merely cumulative, and trial counsel was not ineffective. *See Edwards v. State*, 392 S.C. 449, 459, 710 S.E.2d 60, 66 (2011) ("We previously have held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward.").

AFFIRMED.[2]

THOMAS, KONDUROS, and GEATHERS, JJ., concur.

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[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

CARMEN LATRICE RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

Opinion No. 2015-UP-191

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for Carmen Latrice Rice petitions the Court for rehearing. First, counsel respectfully submits that the issue of whether Arletta Frierson's testimony was admissible pursuant to Rule 801(d) SCRE, is preserved for appellate review. Counsel argued the testimony was admissible pursuant to Rule 801(d)(2) rather than Rule 801(d)(1)(A). Both sections of Rule 801(d), however, deal with statements which do not constitute hearsay. PCR counsel argued that the testimony was not hearsay and admissible. The PCR judge, over objection, ruled that the testimony constituted inadmissible hearsay. The issue is preserved.

Second, counsel respectfully submits that this Court overlooked the fact that the PCR judge never ruled on the issue of whether trial counsel was ineffective for failing to call Arletta Frierson as a witness at trial because the PCR judge incorrectly ruled that her testimony was hearsay and inadmissible. As discussed above, Frierson's testimony was not hearsay and was admissible. Because the PCR judge failed to rule on the merits of the ineffective assistance of counsel claim, this Court should remand to the PCR court for a ruling on whether trial counsel was ineffective in failing to call Frierson as a witness at trial.

Third, counsel submits that this Court overlooked the fact that the PCR judge did not find that Frierson's testimony was merely cumulative to the testimony of Alana Quattlebaum. This is a determination to be made by the PCR judge upon remand. Counsel submits that Frierson's testimony is not merely cumulative to Quattlebaum's testimony. At trial the State argued that Quattlebaum was biased against Bryant and had reason to discredit her testimony. (App. p. 968, lines 1009, lines 12-14; p. 1093, line 13 – p. 1094, lines 1-10). Frierson, on the other hand, is Bryant's cousin and had no bias against Bryant or reason to discredit her testimony. Counsel seeks rehearing on the above three grounds.

During the evidentiary hearing PCR counsel sought to introduce the testimony of Arletta Frierson that Iris Bryant, the co-defendant and the State's main witness against Petitioner, admitted that Petitioner 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 PCR judge sustained the State's hearsay objection. (App. p. 1194, lines 1-6). The PCR judge erred.

After erroneously ruling that Frierson's testimony constituted inadmissible hearsay, 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 [Bryant] 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).

Bryant's prior statement to Frierson was inconsistent with her testimony at trial. At trial the following 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).

Contrary to the State's argument at the PCR hearing, 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.

This Court found the issue of whether Frierson's testimony was admissible pursuant to Rule 801(d)(1)(A) unpreserved. 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)."

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 did **not** constitute inadmissible hearsay. The judge ruled that the testimony constituted inadmissible hearsay. The issue is preserved for appellate review.

By ruling that Frierson's testimony was inadmissible hearsay, the PCR judge never reached the merits of the issue of whether trial counsel was ineffective for failing to call Frierson as a witness at trial. Although the PCR court never ruled on the merits of the ineffective assistance of

counsel claim, in affirming the denial of relief this Court 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 testimony inadmissible. This Court should remand the case to allow the PCR court to rule on the ineffective assistance of counsel claim.

This Court, 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. A finding as to prejudice should be made by the PCR judge on remand to determine the merits of the PCR claim.

Upon remand the PCR judge should find that 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.

Based on the above three grounds, Petitioner respectfully seeks rehearing.

Respectfully submitted,

Kathrine H. Hudgins
Appellate Defender

This 16th day of April, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

CARMEN LATRICE RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon J. Clayton Mitchell, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Carmen Rice # 308637, at Leath Correctional Institution this 16th day of April, 2015.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 16th day
of April, 2015.

(L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.

The South Carolina Court of Appeals

Carmen Latrice Rice, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-199412

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul D. Thomas J.

J.

J.

Columbia, South Carolina

cc:
Robert Daniel Corney, Esquire
Kathrine Haggard Hudgins, Esquire
Alan McCrory Wilson, Esquire
Salley W. Elliott, Esquire

James Clayton Mitchell, III, Esquire
Carmen Latrice Rice, 00308637

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

CARMEN LATRICE RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases

Rules

ISSUES PRESENTED

1.) Did the PCR judge erroneously find that the statement of Arletta Frierson 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 when the statement of Frierson was admissible as impeachment testimony and not hearsay pursuant to Rule 801(d)(1)?

2.) In finding that the statement of Arletta Frierson was inadmissible, did the PCR judge err in failing to make findings of fact and conclusion of law as to the allegation that trial counsel was ineffective for failing to call Arletta Frierson as a witness at trial to testify that the co-defendant and the State's main witness, Iris Bryant, admitted that petitioner had nothing to do with the murder of Bernard Brennan?

3.) Did the PCR judge err in refusing to make findings of fact and conclusions of law as to the allegation that the testimony of La Shawn Roberts that the co-defendant and the State's main witness, Iris Bryant, admitted that petitioner had nothing to do with the murder of Bernard Brennan constituted newly discovered evidence?

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. This Court granted the petition for writ of certiorari on May 21, 2014. This brief of petitioner 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 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 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 appeal.

Instead, Petitioner on appeal challenges the PCR judge's evidentiary ruling that the testimony and statements of Arletta Frierson were inadmissible hearsay. Additionally, Petitioner on appeal 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. Finally, Petitioner challenges the PCR judge's failure to find that La Shawn Roberts' testimony constituted newly discovered evidence requiring a new trial.

ARGUMENTS

1. The PCR judge erroneously found that the statement of Arletta Frierson 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 when the statement of Frierson was admissible as impeachment testimony and was not hearsay pursuant to Rule 801(d)(1).

The first issue involves 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 ineffective assistance of counsel claim is addressed in issue two. Issue three addresses the PCR judge's failure to find that La Shawn Robert's testimony that the co-defendant and state's main witness Bryant admitted that Petitioner had nothing to do with the murder constituted newly discovered evidence requiring a new trial.

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 judge sustained the State's objection without

specifically ruling that the statement was hearsay. The PCR judge, however, 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).[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

[1] PCR counsel did not argue that Frierson's statement was admissible pursuant to 801(d)(1). While Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) holds that a successive application for post conviction relief is not allowed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel, this Court has not yet had the opportunity to address the continued validity of Aice in light of the recently decided United States Supreme Court opinion in Martinez v. Ryan, 566 U.S. ___ , 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Counsel submits that PCR counsel's failure to properly admit Frierson's statement precluded the PCR court from considering a substantial ineffective assistance of trial counsel claim in regard to failing to call Frierson for impeachment purposes. Pursuant to Martinez v. Ryan, Rice would not be procedurally barred from raising the ineffective assistance of PCR counsel in a federal habeas proceeding.

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).

The statement was admissible at the PCR hearing as a prior inconsistent statement to be used for impeachment pursuant to Rule 801(d)(1)(A). The PCR judge erred in refusing to admit Frierson's testimony.

In the return to the petition for writ of certiorari the State argues that Frierson's statement is not proper impeachment testimony because Bryant "never admitted, nor denied, making the statement Frierson set forth." (Return p. 9). According to Alana Quattlebaum's testimony at trial, Bryant and Frierson are first cousins. (App. p. 965, lines 1-13). Bryant's denying knowing her first cousin implies that she also denies making any statement to her. Additionally, the State

argues, "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." (Return p. 9). 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, 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. (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.

2. In finding that the statement of Arletta Frierson was inadmissible, the PCR judge erred in failing to make findings of fact and conclusions of law as to the allegation that trial counsel was ineffective for failing to call Arletta Frierson as a witness at trial to testify that the co-defendant and the State's main witness, Iris Bryant, admitted that petitioner had nothing to do with the murder of Bernard Brennan.

As discussed in issue one, the PCR judge found that Arletta Frierson's testimony and statements were inadmissible. As a result of the PCR judge's erroneous evidentiary ruling, the PCR judge did not consider the ineffective assistance of counsel claim for failing to call Frierson as a witness at trial. Although the PCR judge allowed PCR counsel to proffer the testimony of Arletta Frierson, the order of dismissal fails to make findings of fact and conclusions of law as to the allegation that 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.

Although Petitioner submits that a remand is proper for specific findings of fact and conclusions of law based on correct evidentiary rulings, the proffered testimony and statements that were not considered by the PCR judge demonstrate that trial counsel was ineffective in failing to call Arletta Frieson 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.[2] 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 – 8, p. 974, L. 6). In addition, the appellate court addressed some of the issue(s) with the co-defendant's statements: . . .

[2] 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).

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 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. If PCR counsel was required to file a Rule 59(e) motion, PCR counsel was ineffective in failing to file the motion. While Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) holds that a successive application for post conviction relief is not allowed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel, this Court has not yet had the opportunity to address the continued validity of Aice in light of the recently decided United States Supreme Court opinion in Martinez v. Ryan, 566 U.S. ___ , 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Counsel submits that PCR counsel's failure to file a Rule 59(e) motion and the PCR judge's erroneous evidentiary ruling in regard to Frierson's testimony and statements, precluded the PCR court from considering a substantial ineffective assistance of trial counsel claim in regard to failing to call Frierson for impeachment purposes. Pursuant to Martinez v. Ryan, Rice would not be procedurally barred from raising the ineffective assistance of PCR counsel in a federal habeas proceeding. In light of Martinez v. Ryan and the very specific facts of this case, involving proffered testimony that should have been admitted as substantive evidence, combined with PCR counsel's failure to file a Rule 59(e) motion, counsel submits that the interests of justice are best served by a remand to the PCR court, appointment of qualified PCR counsel and a new evidentiary hearing to be followed by a proper order containing specific findings of fact and conclusions of law in regard to counsel's failure to call Frierson as a witness to impeach the testimony of Bryant and the resulting prejudice.

3. The PCR judge erred in refusing to make findings of fact and conclusions of law as to the allegation that the testimony of La Shawn Roberts that the co-defendant and the State's main witness, Iris Bryant, admitted that petitioner had nothing to do with the murder of Bernard Brennan constituted newly discovered evidence.

The last witness called by Petitioner at the evidentiary hearing was La Shawn Roberts. Although the PCR judge did not specifically rule that Roberts' testimony was inadmissible, PCR counsel offered Roberts' testimony as a "similar proffer" and the State once again objected. (App. p. 1200, lines 16-20). Roberts testified that she met Bryant in the Department of Corrections in 2004, after the murder of Bernard Brennan in 2001, but before the trial of Petitioner in 2005. Roberts testified that she initially did not believe Bryant when she bragged about having a murder charge and said Petitioner had nothing to do with the murder. (App. pp. 1202-1203). Later, however, in 2006, when Roberts met Petitioner in the Department of Corrections after her conviction, she realized Bryant was telling the truth. (App. pp. 1203-1204).

During the proffer at the PCR hearing Roberts testified:

> When Iris Bryant came on our unit, she was bragging that she had a murder charge. So we were like – everybody is like, "Whatever, whatever," because Iris is a big booster kid. She likes to lie. So when we started hanging around and talking, she started telling me how that night happened, that Carmen had nothing to do with it, and at this point I never knew who Carmen was. She would just say, "Carmen had nothing to do with it, but I had to do what I had to do."

(App. p. 1202, lines 11-19).

Roberts' testimony constitutes newly discovered evidence requiring a new trial. In Clark v. State, 315 S.C. 385, 387-388, 434 S.E.2d 266, 267 (1993), the South Carolina Supreme Court wrote, "To obtain a new trial based on after discovered evidence, the party must show that the evidence: (1) would probably change the result if a new trial is had; (2) has been discovered

since the trial; (3) could not have been discovered before trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching. See e.g., Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)."

At the evidentiary hearing the State argued that the proffered testimony did not constitute newly-discovered evidence. The State argued, "Your Honor, if what was proffered is being put forth as newly-discovered evidence, the State submits that it is not newly-discovered. It was obviously known all along. If you look at the cross examination of Ms. Bryant, that's the whole strategy is to try and bring in her different statements. She made somewhat inconsistent statements throughout the investigation. She is cross examined in detail on those." (App. p. 1233, lines 4-11). Roberts' testimony would not have been known at the time of trial because at that time Roberts did not believe Bryant. Roberts only realized that Bryant was not just bragging when she met Petitioner, after her conviction. The cross examination of Bryant involved the multiple statements she made to law enforcement as well as statements she made to Alana Quattlebaum and Arletta Frierson. Bryant was never cross examined about statements made to La Shawn Roberts.

The order of dismissal fails to make findings of fact and conclusions of law in regard to Roberts' testimony constituting newly discovered evidence. PCR counsel failed to file a Rule 59(e) motion asking the PCR judge to rule on the newly discovered evidence claim. PCR counsel was ineffective in failing to file a Rule 59(e) asking the judge to address the claim that Roberts' testimony constitutes newly discovered evidence requiring a new trial. Again, while Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) holds that a successive application for post conviction relief is not allowed on the ground that the first complete PCR application was insufficient due to ineffective PCR counsel, this Court has not yet had the opportunity to address

the continued validity of Aice in light of the recently decided United States Supreme Court opinion in Martinez v. Ryan, 566 U.S. ___ , 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). Counsel submits that PCR counsel's failure to file a Rule 59((e) motion precluded the PCR court from considering a substantial a substantial claim in regard to newly discovered evidence. Pursuant to Martinez v. Ryan, Rice would not be procedurally barred from raising the ineffective assistance of PCR counsel in a federal habeas proceeding. In light of Martinez v. Ryan and the very specific facts of this case, involving proffered testimony that should have been admitted as substantive evidence, combined with PCR counsel's failure to file a Rule 59(e) motion, counsel submits that the interests of justice are best served by a remand to the PCR court, appointment of qualified PCR counsel and a new evidentiary hearing to be followed by a proper order containing specific findings of fact and conclusions of law.

The present case involves multiple errors including trial counsel's failure to call Arletta Frierson as a witness to impeach the damaging testimony of Iris Bryant, the PCR judge's erroneous evidentiary ruling in regard to the admissibility of Frierson's testimony, PCR counsel's failure to argue that Frierson's testimony was admissible as impeachment evidence pursuant to Rule 801(d)(1), PCR counsel's failure to file a Rule 59(e) motion in regard to the newly discovered evidence claim as to Robertson's testimony and, if deemed necessary, a rule 59(e) motion in regard to Frierson's testimony.

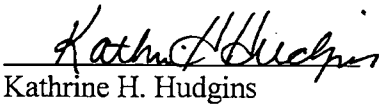
In Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 325 (2002), the Court wrote, "While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors." In Green the Court found that multiple errors did not exist to support cumulative prejudice. The multiple errors in the present case

warrant a remand for a new evidentiary hearing to decide the issues after the proper submission of evidence.

CONCLUSION

Based on the above arguments the case should be remanded for a new evidentiary hearing.

Respectfully submitted,



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER.

This 25th day of June, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

CARMEN LATRICE RICE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the brief of petitioner, in this case has been served on Robert D. Corney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 25th day of June, 2014.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 24th day
of June, 2014.

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

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

The Honorable Reginald I. Lloyd., Trial Judge
The Honorable James R. Barber, III, Post- Conviction Relief Judge

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Appellate Case No. 2011-199412

CARMEN L. RICE #308637,

PETITIONER,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S STATEMENT OF ISSUES ON APPEAL

1. Did the PCR judge erroneously find that the statement of Arletta Frierson that Irson 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 when the statement of Frierson was admissible as impeachment testimony not hearsay pursuant to Rule 801(d)(1)?
2. In finding that the statement of Arletta Frierson was inadmissible, did the PCR judge err in failing to make findings of fact and conclusion of law as to allegation that trial counsel was ineffective for failing to call Arletta Frierson as a witness at trial to testify that the co-defendant and the State's main witness, Iris Byrant, admitted that petitioner had nothing to do with murder of Bernard Brennan?
3. Did the PCR judge err in refusing to make findings of fact and conclusions of law as to the allegations that the testimony of La Shawn Roberts that the co-defendant and the State's main witness, Iris Bryant, admitted that petitioner had nothing to do with the murder of Bernard Brennan constituted newly discovered evidence?

RESPONDENT'S RESTATEMENT OF ISSUES ON APPEAL

1. Whether the statement of Arletta Frierson is admissible as impeachment testimony under Rule 801(d)(1)(A), SCRE, rather than inadmissible hearsay properly preserved for appeal where PCR counsel did make this argument and where the PCR Court did not make a specific ruling on its admissibility for that purpose.

2. Whether the allegation that trial counsel was ineffective in not calling Arletta Frierson as a defense witness at trial is preserved for appellate review where the PCR Court did not make a specific ruling on the issue and where PCR counsel failed to file a Rule 59(e), SCRCP, motion.

3. Whether the allegation that trial counsel was ineffective in not calling Arletta Frierson as a defense witnesses at trial is preserved for appellate review where the PCR Court did not make a specific ruling on the issue and where PCR counsel failed to file a Rule 59(e), SCRCP, motion.

STATEMENT OF THE CASE

Petitioner is currently incarcerated in the South Carolina Department of Correction pursuant to orders of commitment from the Richland County Clerk of Court. Petitioner was indicted at the March 2004 term of the Richland County Grand Jury for Murder and Armed Robbery (2004-GS-40-8754, --8755). (App. p. 1159-61). John T. Mobley, Esquire, and Chris Hart, Esquire, represented Petitioner on the charges. On April 4, 2005, Petitioner proceeded to a jury trial before the Honorable Reginald I. Lloyd, where he was found guilty of both charges as indicted. Judge Lloyd sentenced Petitioner to life imprisonment for Murder and thirty (30) years imprisonment for Armed Robbery to run concurrently. (App. p. 1162-63).

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. Then Deputy Chief Appellate Defender Robert M. Dudek of the South Carolina Office of Appellate Defense represented Petitioner on appeal. By opinion filed October 5, 2007, the South Carolina Court of Appeals affirmed the convictions and sentences. State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) (cert. denied December 4, 2008).[1] The remittitur was issued on December 8, 2008.

Thereafter, Petitioner filed an application for post-conviction relief (PCR) on January 14, 2009 (2009-CP-40-00234). (App. p. 1164-71). The State made its Return on July 7, 2009. (App. p. 1172-79). An evidentiary hearing was held on June 6, 2011 before the Honorable James R. Barber, III. Petitioner was present and represented by counsel, Mark Schnee, Esquire. The State was represented by Brian T. Petrano of the South Carolina Attorney General's Office. By Order filed August 22, 2011, Judge Barber denied Petitioner's request for relief and dismissed the PCR application with prejudice. (App. p. 1244-56).

[1] This case was overruled by State v. Byars, 710 S.E.2d 55 (S.C. 2011), regarding only a method of error preservation which the PCR Court found immaterial to the action.

STATEMENT OF FACTS

On October 25, 2001, Bernard Brennan (Victim) and his friend, Alton Page, were playing pool at The Varsity in Columbia, SC. While there, Brennan received a call from Petitioner. Victim invited Petitioner and her friend, Iris Bryant, to join him. Victim was flashing a wad of cash that night. (App. p. 282-91, 512, 524). Victim, Petitioner, and Bryant left to go eat. (App. p. 512). Victim and Bryant had planned beforehand to rob him of his money. Bryant thought the plan was to lure Victim to a hotel room, spike a drink, and take his money while he slept. (App. p. 523-25). Petitioner had another plan.

The three drove to an isolated section of Richland County. Petitioner, who was issued a .357 Magnum as part of her job as a security guard, pulled a gun out and demanded that Victim stop the car. Petitioner and Bryant exited the vehicle and Petitioner shot Victim five (5) times in the back. Petitioner wiped the car down and took Victim's wallet. (App. p. 516-21, 676-77, 698, 902-12).

Soon after the murder, Petitioner left for Florida and lived with a friend for weeks. At a later point, Petitioner wrote a friend, Sarah Dennis, a letter asking Dennis to falsely provide an alibi for the date of the murder. (App. p. 713-21).

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

I. The PCR Court did not specifically rule on the admissibility of Arletta Frierson's statement at the PCR hearing as non-hearsay impeachment testimony as such argument was not raised by PCR counsel; therefore, the issue is not preserved for appellate review.

Petitioner contends the PCR Court erroneously found Arletta Frierson's statement to be inadmissible hearsay when PCR counsel moved to introduce the statement into the record. Respondent submits the PCR Court properly found the statement to be inadmissible hearsay not within the Rule 804(b)(3), SCRE, exception to hearsay as a statement against interests as argued by PCR counsel. PCR counsel did not present an argument that the statement was admissible under Rule 801(d)(1), SCRE, as non-hearsay impeachment testimony, so this issue was never ruled upon by the PCR Court and is, therefore, not preserved for appellate review.

How the Issue was Raised at the PCR Hearing

At Petitioner's April 2005 trial for the murder and armed robbery of Bernard Brennan (Victim), Iris Bryant testified as a state's witness in its case-in-chief. Bryant testified she first met Petitioner at Allen Benedict Court apartment complex off of Oak Street in Columbia sometime after September 11, 2001. (App. p. 509, ln. 5-22). Bryant said on October 25, 2001, Petitioner and another friend picked her up to meet Victim for dinner at The Varsity. (App. p. 512, ln 8-21). After leaving The Varsity, Bryant said, the three went to Calloways Restaurant for a while before leaving in Victim's Mercedes. (App. p. 515, ln. 2-17). Bryant went on to testify that at about 9:00 or 9:30pm, they pulled onto Crawford Road off of Interstate 20, where Petitioner pulled a gun out and told Bryant to get out of the car. (App. p. 516, ln. 11-20). Bryant testified that after getting out of the car, she heard several gun shots in the car, after which Petitioner got out of the car and fire two more shots at Victim. (App. p. 517, ln. 1-3). According to Bryant, the two fled the scene and got a ride from one of Petitioner's friends. (App. p. 518, ln.

7 – p. 521, ln. 25). On cross-examination, Bryant said she did not know "right offhand" who Arletta Frierson was. (App. p. 560, ln. 1-5). Thereafter, trial counsel asked the following series of questions of Bryant:

> Q: "Isn't it true that you told Alana Quattlebaum that [Petitioner] was not there and was not involved when you robbed [Victim] that that it was you and your cousin who shot [victim]?
> 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 [Petitioner] was not involved in that robbery, that you and your cousin shot [Victim]?"
> A: "Who is Frierson? Sir, these people don't even – I know Quattlebaum, like I said, she's [Petitioner's] friend . . ."

(App. p. 561, ln. 20 – p. 562, ln. 7). Frierson was subpoenaed to trial by Petitioner's trial counsel but not called as a witness before being released from that subpoena and returned to the South Carolina Department of Corrections. (App. p. 974, ln, 6-8).

At the June 2011 PCR hearing, Petitioner attempted to offer her own testimony as to statements made by Bryant to Frierson while at the Alvin S. Glenn Detention Center indicating Petitioner was not involved in the murder and robbery of Victim. (App. p. 1186, ln. 17-22). Respondent objected to the testimony as hearsay, which PCR counsel contested was erroneous as it fell with the "statement against interest" exception to the hearsay rule. (App. p. 1186, ln. 23 – p. 1887, ln. 3). Respondent noted the Rule 804(b)(3), SCRE, exception for "statements against interest" only applies to situations where the declarant is unavailable and Petitioner had not made a showing that Bryant was unavailable at the PCR hearing. (App. p. 1187, ln. 4-7). PCR counsel stated he had "no idea where Ms. Bryant [was]," but had tried contacting her last known address. (App. p. 1887, ln. 8-14). The PCR Court maintained its ruling that Petitioner's testimony on Bryant's comments to Frierson at the Alvin S. Glenn Detention Center set forth inadmissible hearsay. (App. p. 1187, ln. 14).

Thereafter, PCR counsel called Arletta Frierson as a witness to provide testimony regarding the same statements allegedly made by Bryant while at the detention center prior to Petitioner's trial. Upon calling Frierson, PCR counsel noted the court's previous ruling on the hearsay statement, but argued Frierson's purported testimony in the matter was non-hearsay under Rule 801(d)(2), SCRE, as an admission by a party opponent. (App. p. 1192, ln. 18-22). Respondent objected to the introduction of Frierson's testimony on those alleged comments, noting Bryant was not a party opponent but rather a codefendant brought in to provide testimony for the State. (App. p. 1193, ln. 10-25). The PCR Court ruled the testimony was inadmissible hearsay, but allowed Petitioner to proffer Frierson's testimony. (App. p. 1194, ln. 1-7).

Relevant Law

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); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). 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 reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

The decision to admit affidavits, depositions, oral testimony, or other evidence at a PCR hearing is within the PCR Court's discretion and will not be reversed absent an **abuse of discretion** resulting in prejudice to a party. Simpson v. Moore, 367 S.C. 587, 607-08, 627 S.E.2d 701, 712 (2006)(emphasis added).

A. The issue is not preserved for this Court's review.

At no point during the course of the PCR hearing did PCR counsel argue Bryant's alleged statements were admissible under Rule 801(d)(1)(A), SCRE, as a prior inconsistent statement to be used for impeachment. In fact, Petitioner concedes this point. (Brief of Petitioner p. 10). It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal. State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974). If an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). Only a matter that has been ruled on below can be reviewed, otherwise, the appellate court would be exercising original jurisdiction. Gee, 262 S.C. 373, 204 S.E.2d 727.

The record before this Court is entirely void of any argument by PCR counsel that Frierson's statement and/or testimony was admissible as non-hearsay under Rule 801(d)(1), SCRE, nor did the PCR Court make a finding upon such an argument. Therefore, this is the first time this issue has been raised and, it is not properly preserved for this Court's review.

B. The PCR Court did not abuse its discretion in ruling that Arletta Frierson's alleged statement was inadmissible hearsay.

Assuming *arguendo* that this Court finds the issue preserved, it is wholly without merit. Petitioner argues Arletta Frierson's testimony would be admissible under Rule 801(d)(1)(A), SCRE, if PCR counsel had argued such. Under Rule 801(d)(1)(A), SCRE, a statement is not hearsay if the declarant testifies at trial or a hearing and is subject to cross examination concerning the statement, and the statement is inconsistent with the declarant's testimony. While Bryant did testify at Petitioner's trial and was subject to defense counsel's cross-examination, she did not testify at the PCR hearing. Petitioner erroneously asserts "Bryant denied making the statements," at trial during trial counsel's cross-examination, thereby rendering Frierson's testimony of Bryant's statements at Alvin S. Glenn "inconsistent" with Bryant's trial testimony.

In fact, when asked during cross-examination whether she ever told Frierson Petitioner had nothing to do with Victim's death, Bryant testified, "[w]ho is Frierson?". (App. p. 562, ln. 5). Bryant never commented any further on the alleged statements as they relate to Frierson. Therefore, Bryant never admitted, nor denied, making the statement Frierson set forth. Accordingly, Frierson's statement was *not* proper impeachment testimony. Further, Bryant was *not* available at the PCR evidentiary hearing to testify on the matter and was not subjected to cross-examination by the State. Respondent submits Petitioner cannot show prejudice from the PCR Court's ruling that the evidence was not admissible since Petitioner was allowed to proffer the testimony to ensure a complete record. The PCR Court also made credibility findings of the proffered witnesses finding that they were both not credible. (App. p. 1251, fn. 5). Therefore, even if this Court were to find the issue preserved and examined it under Rule 801(d)(1)(A), the PCR Court's exclusion of Frierson's testimony as inadmissible hearsay was proper and was not an abuse of discretion.

C. Martinez is not applicable to state PCR actions.

Petitioner concedes this issue is not preserved for this Court's review and then urges this Court to examine the validity of "Aice in light of the recently decided United States Supreme Court opinion in Martinez v. Ryan, 566 U.S. __, 132 S. Ct. 1309, 182 L.Ed.2d (2012)." (Brief of Petitioner p. 10, 16, 18-19). Petitioner argues she received ineffective assistance of post-conviction relief counsel and should be granted relief. The South Carolina Supreme Court has found – in a published order – that "the holding in Martinez is limited to federal habeas corpus review and is **not applicable to state post-conviction relief actions.**" Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013) (emphasis added). Martinez's interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina's interpretation and

application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to –160. This is not the proper forum to raise the issue of ineffective assistance of PCR counsel. Therefore, the South Carolina Supreme Court's opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice, 305 S.C. at 451, 409 S.E.2d at 394 ("The contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under 17-27-90."). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Clearly, the Austin exception does not apply in the case at hand, as the appeal was properly and timely filed.

Therefore, Petitioner's argument is clearly not preserved but also lacks merit under a thorough analysis. The PCR Court's ruling should be upheld.

II. The PCR Court did not specifically rule on counsel's effectiveness as it related to not calling Arletta Frierson as a witness at trial; therefore, the issue is not preserved for appellate review. However, even if reviewed on the merits, the court properly denied relief based upon the credibility findings associated with Frierson's testimony.

A. The issue is not preserved for this Court's review.

Petitioner next alleges the PCR Court erred in failing to make specific findings of fact and conclusions of law on counsel's effectiveness in not calling Arletta Frierson as a defense witness at trial to rebut the testimony of Iris Bryant. Respondent submits this contention, too, is not properly preserved for this Court's review as it was neither specifically raised at the PCR hearing, nor was it ruled upon by the PCR Court in the order of dismissal. "Our Supreme Court

has made it abundantly clear that, where a PCR Court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR Court make specific findings of fact and conclusions of law on the allegations." Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012) *citing* Marlar v. State, 375 S.C. 407, 408 – 410, 653 S.E.2d 266-67 (2007). No Rule 59(e), SCRCP, motion to alter or amend the PCR Court's order was filed urging the PCR Court to address this issue. Petitioner again concedes this issue is not preserved. (Brief of Respondent p. 15). Accordingly, this Court must find the issue is not preserved for appellate review.

B. Merits

Further, even if reviewed on the merits, the testimony presented at the PCR hearing by Frierson was clearly insufficient to meet the burden in proving counsel was ineffective pursuant to the two-prong test of Strickland v. Washington, *supra*. The PCR Court specifically noted Frierson was not a credible witness in proffering the testimony set forth at the evidentiary hearing. (App. p. 1251, fn. 5)("This Court notes for the purposes of the record that the proffered witnesses were not credible."). "We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). It is apparent the PCR Court found Frierson not credible because of her multiple forgery convictions and because she is codefendant Bryant's cousin. Therefore, even assuming *arguendo* the issue was properly preserved for this Court's review, the PCR Court made a proper determination in denying/dismissing the allegation.

C. Ineffective assistance of PCR counsel.

After conceding this issue is not preserved for appellate review because PCR counsel

failed to file a Rule 59(e), SCRCP, Petitioner then argues that PCR counsel was ineffective in failing to file said motion. Respondent relies on the analysis set forth above in Issue 1, section (C) to address this additional

III. The PCR Court did not specifically rule on counsel's effectiveness as it related to not calling LaShawn Roberts as a witness at trial; therefore, the issue is not preserved for appellate review. However, even if reviewed on the merits, the court properly denied relief based upon the credibility findings associated with Frierson's testimony.

A. This issue is not preserved for this Court's review.

Petitioner finally argues the PCR Court erred in failing to make specific findings of facts and conclusions of law on counsel's effectiveness in not calling LaShawn Roberts as a defense witness at trial to rebut the testimony of Iris Bryant. Respondent submits this contention, like the above, is not properly preserved for appellate review as it was not ruled upon by the PCR Court in the order of dismissal. "Our Supreme Court has made it abundantly clear that, where a PCR Court fails to set forth findings and the reasons for those findings, the issue is not preserved for appellate review if the petitioner fails to make a Rule 59(e) motion requesting the PCR Court make specific findings of fact and conclusions of law on the allegations." Smith v. State, 404 S.C. 493, 505, 745 S.E.2d 378, 384 (Ct. App. 2012) *citing* Marlar v. State, 375 S.C. 407, 408 – 410, 653 S.E.2d 266-67 (2007). No Rule 59(e), SCRCP, motion to alter or amend the PCR Court's order was filed urging the PCR Court to address this issue. Petitioner again concedes this issue is not preserved. (Brief of Respondent p. 15). Accordingly, this Court must find the issue is not preserved for appellate review.

B. Merits

Further, even if reviewed on the merits, the testimony presented at the PCR hearing by Frierson was clearly insufficient to meet the burden in proving counsel was ineffective pursuant

to the two-prong test of Strickland v. Washington, *supra*. The PCR Court specifically noted Frierson was not a credible witness in proffering the testimony set forth at the evidentiary hearing. (App. p. 1251, fn. 5)("This Court notes for the purposes of the record that the proffered witnesses were not credible."). "We give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 443 S.E.2d 540, 542 (1994). The PCR Court found Roberts's testimony to be not credible as a result of her murder conviction. (App. p. 1236). Therefore, even assuming *arguendo* the issue was properly preserved for this Court's review, the PCR Court made a proper determination in denying/dismissing the allegation.

Petitioner also makes the inconsistent argument that LaShawn Roberts's testimony constitutes newly discovered evidence. Even if reviewed on the merits, the testimony presented at the PCR hearing by Roberts was clearly insufficient to meet the burden to prove Petitioner is entitled to relief based on newly discovered evidence. The South Carolina Supreme Court has held that, for an applicant to be granted post-conviction relief based on after-discovered evidence, he must show the alleged evidence:

> (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983) (citation omitted) (emphasis added). Therefore, even assuming *arguendo* Roberts's testimony was newly-discovered evidence, Petitioner failed to demonstrate this purported evidence satisfies the five-part Hayden test. The testimony would not have changed the result of the trial and is not material to guilt or innocence. On one hand, Petitioner argues the proffered testimony should have been admitted as impeachment evidence, and then argues the testimony constitutes newly discovered evidence that

is not merely impeaching. Respondent submits Petitioner cannot have it both ways. More importantly, this evidence was available to Petitioner at the time of trial. Petitioner failed to demonstrate relief based on newly-discovered evidence would be appropriate.

C. Ineffective assistance of PCR counsel.

After conceding this issue is not preserved for appellate review because PCR counsel failed to file a Rule 59(e), SCRCP, Petitioner then argues that PCR counsel was ineffective in failing to file said motion. Respondent relies on the analysis set forth above in Issue I, section (C).

CONCLUSION

For the reasons stated above, this Court should affirm the lower court's ruling and deny the requested relief.

Respectfully submitted,

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November 24, 2014

STATE OF SOUTH CAROLINA
In Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Reginald I. Lloyd, Trial Judge
The Honorable James R. Barber, III, Post-Conviction Relief Judge

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Appellate Case No. 2011-199412

Carmen Latrice Rice,.....Petitioner,

v.

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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the **Brief of Respondent** has been served upon the applicant by mailing two (2) copy in the United States mail, postage prepaid, addressed to Petitioner's counsel:

Kathrine H. Hudgins, Esquire
Post Office Box 11589
Columbia, South Carolina 29211

This 24th day of November, 2014.

J. CLAYTON MITCHELL, #101443
ATTORNEY FOR RESPONDENT

SWORN to before me this 24th day of November, 2014.

Notary Public for South Carolina.
My Commission Expires: 3-18-2023