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ISSUES PRESENTED

I. Whether sufficient evidence of probative value exists to support the PCR court's ruling that the Petitioner was not prejudiced by Counsel's failure to file a motion to suppress drug evidence where there was probable cause to stop and search the Petitioner's vehicle.

II. Whether the issue regarding Counsel's failure to object to the curative instruction is preserved for review or, alternatively, whether it would have been proper for the PCR court to deny relief on this ground where Counsel's objection would have been overruled because the curative instruction was sufficient.

III. Whether the issue regarding Counsel's failure to renew his motion for a mistrial is preserved for review or, alternatively, whether it would have been proper for the PCR court to deny relief on this ground where counsel was not ineffective in failing to renew his motion for a mistrial and where the Petitioner can prove no prejudice because the trial court would have properly denied Counsel's renewed motion for a mistrial.

IV. Whether the issue regarding Counsel's failure to subpoena an out-of-state notary is preserved for review or, alternatively, whether it would have been proper for the PCR court to deny relief on this ground where the record clearly supports a finding that the Petitioner failed to prove how he was prejudiced by Counsel's failure to call this witness at trial because the Petitioner did not present this witness for testimony at the evidentiary hearing.

STATEMENT OF THE CASE

Respondent agrees with Petitioner's statement of the case.

STANDARD OF REVIEW

In a PCR proceeding, the Petitioner bears the burden of establishing that he is entitled to relief. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The reviewing Court "gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). A PCR court's findings will be upheld on appeal if there is "any evidence of probative value sufficient to support them." Id. The appellate court must reverse where there is no probative evidence to support the findings. Pierce v. State, 338 S.C. 139, 144, 526 S.E.2d 222, 225 (2000).

The Petitioner must prove that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). First, a Petitioner must prove that counsel's performance was deficient as measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989), *citing* Strickland. Second, the Petitioner must prove counsel's deficient performance prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENTS

I. Sufficient evidence of probative value exists to support the PCR court's ruling that Petitioner was not prejudiced by counsel's failure to file a motion to suppress drug evidence where the trial court would have properly denied counsel's motion because there was probable cause to stop and search Petitioner's vehicle.

Sufficient evidence of probative value exists to support the PCR court's findings that Petitioner failed to meet his burden of proving he was prejudiced by Counsel's alleged deficient performance in failing to move to suppress the drug evidence. Additionally, the PCR court properly found the Fourth Amendment claim was not meritorious where the stop and search of the Petitioner's vehicle was valid based upon information police received from a known confidential informant that the Petitioner was in the process of committing a crime, in addition to the Petitioner's traffic violation, giving rise to a lawful stop and probable cause for the warrantless search of the Petitioner's vehicle.

To establish a claim of ineffective assistance of counsel, a petitioner must show counsel's representation fell below an objective standard of reasonableness and that defendant was prejudiced by such deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). When a petitioner claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, the petitioner must show that such claim is meritorious and that the verdict would have been different absent the evidence that he contends should have been excluded. Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574 (1986); Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994). Here, the PCR court properly found the Petitioner failed to prove prejudice where, had Counsel made a motion to suppress, the trial court would have properly denied Counsel's motion and the evidence would still have been admitted against him at trial.

At the PCR hearing, Counsel contended that in the Petitioner's case, although he should have made a motion to suppress out of an abundance of caution, he did not believe the motion would be

granted where the officers made a lawful traffic stop for an illegal u-turn such that the automobile exception would have applied to the subsequent warrantless search of the Petitioner's vehicle. (App. p. 481, line 24-p. 482, line 2; p. 488, line 17-p. 489, line 9).

In general, a warrantless search of a vehicle is valid per the automobile exception to the warrant requirement if 1) there is probable cause to believe the vehicle contains evidence of a crime and 2) there are exigent circumstances arising out of the mobility of the vehicle. Carroll v. U.S., 267 U.S. 132, 149, 45 S.Ct. 280, 283-284 (1925); California v. Carney, 471 U.S. 386, 105 S.Ct. 2066 (1985); State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007); See also State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986) (the exception is based on the ready mobility of vehicles and the potential that evidence may be lost before a warrant is obtained, and the reduced expectation of privacy in motor vehicles).

The automobile exception to the warrant requirement is based on 1) the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained; and 2) the lessened expectation of privacy in motor vehicles which are subject to governmental regulation. Carney; Cox, 290 S.C. at 490, 351 S.E.2d at 570. Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970) (the opportunity to search an automobile is fleeting since a car is readily movable). The mobility of automobiles creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible. South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092 (1976); State v. Brannon, 347 S.C. 85, 552 S.E.2d 773 (Ct. App. 2001).

Further, the automobile exception allows law enforcement officials to conduct a search of an automobile based on probable cause alone. Brannon, supra. In Cox, the Supreme Court examined the principle of "probable cause" as it relates to the automobile exception as follows:

> The [Carney] Court makes clear that under the automobile exception, probable cause alone is sufficient to justify a warrantless search. As the Court stated, "the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of vehicles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met." That is, the inherent mobility of automobiles provides the requisite exigency.

Cox, 351 S.E.2d at 571-72. Additionally, in Wyoming v. Houghton, the United States Supreme Court reasoned that, under the automobile exception, if probable cause exists to justify the warrantless search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and every container within a vehicle and its contents. Houghton, 526 U.S. 295, 301-02, 119 S.Ct. 1297, 1301 (1999); See also Brannon, 552 S.E.2d at 777; State v. Bultron, 318 S.C. 323, 457 S.E.2d 616 (Ct. App. 1995).

Probable cause requires that the facts available to the officer or agent involved would indicate to a reasonable person that an offense had been, or was being, committed and that the accused had committed it. Bultron, 457 S.E.2d at 621; State v. Peters, 271 S.C. 498, 248 S.E.2d 475 (1978). Probable cause "does not demand any showing that such a belief be correct or more likely true than false." Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543 (1983). Probable cause analysis includes a realistic assessment of the situation from a law enforcement officer's perspective. State v. Moultrie, 316 S.C. 547, 451 S.E.2d 34 (Ct. App. 1994). A determination of probable cause depends on the totality of the circumstances. State v. Adams, 291 S.C. 132, 352 S.E.2d 483 (1987).

Under the automobile exception to the warrant requirement, police may search a vehicle where there is probable cause to believe the vehicle contains evidence of criminal activity, and the police may lawfully search any area of the vehicle in which the evidence might be found. Colorado v. Bannister, 449 U.S. 1, 101 S.Ct. 42 (1980); Carroll, 267 U.S. at 132. Where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be occurring, the officer may briefly stop the suspicious person and make reasonable inquiries aimed at

confirming or dispelling his suspicions. State v. Woodruff, 344 S.C. 537, 544 S.E.2d 290 (Ct. App. 2001). Furthermore, circumstances of a defendant's flight from police after an attempted traffic stop allows for a reasonable inference of guilty conduct that, when coupled with another pre-existing reasonable and articulable suspicion, supports a finding of probable cause. Davis, 354 S.C. 348, 358, 580 S.E.2d 778, 783 (Ct. App. 2003); U.S. v. Sharpe, 470 U.S. 675, 105 S.Ct. 1568 (1985).

Probable cause to conduct a warrantless search of a vehicle may also exist where police stop a vehicle after receiving information from an informant that the defendant was driving a vehicle containing contraband. Peters, 271 S.C. at 501, 248 S.E.2d at 477 (noting that the court's decision was not solely dependent upon the language of the telephone conversation with the informant); See also, State v. Hayden, 268 S.C. 214, 218, 232 S.E.2d 889, 891 (1977) (holding probable cause and exigent circumstances justified warrantless search of automobile where officers received information from an informant that defendants would be traveling in a vehicle containing illegal drugs).

In considering whether probable cause exists to justify a warrantless search based on an informant's tip, a court must consider the totality of the circumstances. State v. Driggers, 322 S.C. 506, 473 S.E.2d 57 (Ct.App.1996); Peters, supra. An officer's knowledge of general trends in criminal behavior is a relevant consideration in determining probable cause for search. Davis, 354 S.C. at 357, 580 S.E.2d at 782. An informant's tip provides probable cause where the informant identifies herself and has personally observed the attempted sale of drugs. Moultrie, 316 S.C. at 552. A warrantless search or arrest based on an informant's tip may also be upheld where the corroboration consists of nothing more than observing the predictions supplied by the informant's tip. Moultrie, 316 S.C. at 551, 451 S.E.2d at 37 (an officer can rely on an informant's tip if the totality of the circumstances appears to verify the accuracy of the information.); Draper v. United States, 358 U.S. 307, 79 S.Ct. 329 (1959) (overruled on other grounds by United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476 (1977)); see also;

Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317 (1983) (an officer can rely on an informant's tip if the totality of the circumstances appears to verify the accuracy of the information).

While the statements of a reliable, confidential informant are themselves sufficient to support probable cause for a search warrant, information provided by an informant without a track record may need to be corroborated by the police officer's independent observations. Id.; State v. Bellamy, 323 S.C. 199, 473 S.E.2d 838 (Ct.App.1996); An informant's reliability may be otherwise established if the informant possesses a special relationship or capacity to gain knowledge that should prompt belief in the veracity of his information. Driggers, 322 S.C. at 512.

In State v. Willard, an informant told the police that he was related to the defendant, that he had purchased drugs from defendant in the past, and that he intended to purchase drugs from the defendant that day. Willard, 374 S.C. at 131, 647 S.E.2d at 254 (Ct. App. 2007). The informant agreed with law enforcement to set up a drug buy meeting with the defendant at a movie theater. Id. In a recorded conversation, the informant called the defendant from an officer's mobile phone and told the defendant that he's been "shooting smooth" and that he wanted to meet defendant at the movie theater. Id. at 132. Defendant agreed. Id. When the defendant pulled into the parking lot, five officers surrounded the defendant's car, and directed the defendant and another occupant to exit the vehicle. Id. After denying any knowledge of the drugs, the defendant was confronted with the phone calls to and from the officer's phone and consented to the search of his vehicle where officers found drugs, scales, and a large amount of cash. Id.

The officer that worked with the informant had no previous experience with this informant but testified as to accurate information the informant gave as corroborated by his own observations and testified the defendant had previous dealings in drug transactions with informants in the past. Id. The officer also testified that even though there was a magistrate on duty at the same time and place the

informant called the defendant, he believed he had reasonable suspicion to search the defendant's car and question him without a warrant from the magistrate. Id. at 133. The trial court denied the defendant's motion to suppress the drugs obtained from the warrantless search of his vehicle. Id.

The Court of Appeals upheld the trial court's ruling, apart from the defendant's consent to seach, finding that the informant's tip that defendant was involved in drug activity provided law enforcement officers with reasonable suspicion to stop the defendant in his vehicle where the informant correctly identified the defendant's vehicle, knew the defendant's telephone number, and mentioned drugs during his telephone conversation with the defendant. Id. The Court further held that law enforcement's search of the vehicle was valid under the automobile exception. Id. In Willard, the Court specifically addressed the argument put forth by the Petitioner, that when the officers stopped the defendant's vehicle in the parking lot it was not "mobile" under Carney. The Court rejected this argument, finding that temporary immobility may still be considered readily mobile so as to qualify for the automobile exception. Id. at 135.

In the present case, law enforcement clearly had probable cause to stop and search the Petitioner's vehicle under the automobile exception to the warrant requirement. First, the confidential informant here was more than a mere anonymous tipster. Prior to this investigation, the informant made drug buys for law enforcement in other cases. (App. p. 102, lines 19-22; p. 135, line 11-p. 138, line 11; p. 186, lines 10- 17;). In this investigation, the informant notified law enforcement she could buy drugs from Charles Horne, the Petitioner's co-defendant, and she knew the Horne's drugs always came from his supplier, the Petitioner. (App. p. 191, line 7- p. 195, line 11). The informant had a close relationship with Horne. The informant knew his telephone number, address, and family history, and the informant knew the Petitioner from seeing him with Horne. The informant had also witnessed Horne sell drugs before. (App. p. 102, lines 19-22; p. 131, lines 8-18; p. 169, lines 21-23; p. 187, line

16-p. 191, line 21; p. 202, lines 7-22).

The informant agreed with law enforcement to set up a drug buy with Horne and the Petitioner. In a recorded conversation with Horne made in the presence of law enforcement, the informant asked Horne if she could purchase "two onions" from him, clarifying at trial "two onions" meant two ounces of cocaine. (App. p. 174, line 19 – p. 175, line 9). Horne said he had to check with his supplier first. The supplier was the Petitioner. He then immediately called the informant back, and agreed to arrange the drug buy with the Petitioner that night. He requested for the informant to arrive at his house within 25-30 minutes. (App. p. 101, line 16 - p. 102, line 19-22; p. 169, lines 18-23; p. 189, lines 21-25). The police were notified the Petitioner would probably be arriving from Charlotte, North Carolina. (App. p. 54, lines 4-6).

Subsequently, police conducted surveillance at Horne's house and observed an occupied vehicle with North Carolina plates idling in Horne's driveway. (App. p. 54, line 4; p. 77, lines 13-16; p. 103, line 19 – p. 104, line 2; p. 120, lines 9-17). The vehicle had its lights on, and the police observed a person in the driver's seat using their cell phone. (App. p. 53, line 22-p. 54, line 2). At that point, the police directed the informant to call Horne to see if his supplier was there yet. (Tr. p. 56, lines 1-3). As a result of that conversation, the informant told Horne to come pick up the drug-buy money from where her car was located. (App. p. 55, lines 23-p. 56, line 12; p. 105, lines 2-19); p. 165, line 22-p. 166, line 4). The police next observed Horne entering the Petitioner's vehicle and driving toward the drug-buy money's location. (App. p. 56, lines 14-17; p. 105, lines 2-19).

When the police tried to initiate a traffic stop with the Petitioner, the Petitioner unsuccessfully attempted to evade the police. (App. p. 65, lines 12-15). The police then searched the Petitioner's vehicle where they found two ounces of cocaine, and the Petitioner and Horne were arrested for trafficking cocaine. (App. p. 112, lines 1-3; p. 290, lines 1-12; App. 563). Thus, the police had

probable cause to stop the Petitioner's vehicle based upon information received from the known, confidential informant and their independent corroboration. Accordingly, there is more than enough evidence to support the PCR ruling that the Petitioner was not prejudiced by counsel's failure to file a motion to suppress drug evidence where the trial court would have properly denied counsel's motion because there was probable cause to stop and search the Petitioner's vehicle.

Furthermore, the Petitioner's reliance on Arizona v. Gant, 556 U.S. 332, 129 S.Ct. 1710 (2009) is unfounded, as that case not decided until April 21, 2009 – almost six months after the Petitioner's criminal case was finally decided when the Court of Appeals affirmed his conviction and remitted the case back to the lower court. Counsel specifically testified that the Supreme Court's recent decision in Gant was not available to him at the time of the Petitioner's trial so he did not pursue that line of argument, but that he would have pursued that argument had the case been available to him at that time. (App. p. 489, line 24-p. 490, line 4). Counsel also specifically testified that filing a motion to suppress is not a "standard operating procedure for a criminal defense attorney" in a drug case and that he generally does not file motions with no validity that would only serve to aggravate the trial court. (App. p. 481, lines 21-25). Moreover, the record is clear that the PCR court properly denied relief in determining that law arising from Gant did not exist at the time of the Petitioner's trial. The Petitioner was convicted on May 6, 2006. The Gant decision was issued on April 21, 2009, nearly three years after the Petitioner's conviction and almost six months after his direct appeal was remitted back to the lower court. Therefore, the PCR court properly held counsel was not ineffective for failing to rely on case law that was non-existent at that time of trial (or on direct appeal). Gilmore v. State, 314 S.C. 453, 445 S.E.2d 454 (1994) (noting that the Court has never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial), *overruled on other grounds by* Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999).

The Petitioner's reliance on Gant is further unfounded, as the decision in Gant does not undermine the disposition of the search issue in the Petitioner's case. Gant, 129 S.Ct. at 1713. The Court specifically distinguished this case from New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981) and Thornton v. United States, 541 U.S. 615, 124 S.Ct. 2127 (2004) where the defendants in those cases were arrested for drug offenses, while Gant was arrested for driving with a suspended license – an offense for which police could not reasonably expect to find evidence of in Gant's car. Id. It is worth nothing the Court's analysis in Gant centered around a warrantless search of a vehicle pursuant to the search incident to arrest exception – not the automobile exception, and the Court's decision in Gant did not overrule or abandon well established legal authority regarding the validity of a warrantless search pursuant to the automobile exception. On the contrary, the Court specifically noted that where there is probable cause to believe a vehicle contains evidence of criminal activity, law enforcement officers are authorized to search of any area of the vehicle in which the evidence might be found. Id. at 1721; *citing* United States v. Ross, 456 U.S. 798 (1982).

Therefore, PCR court also properly concluded that, even if the law arising from the Court's decision in Gant existed at the time, Gant was clearly distinguishable from the facts presented here where information from the confidential informant and independent corroborating evidence suggesting that the Petitioner was in the process of selling drugs provided ample probable cause for the warrantless search of the Petitioner's vehicle per the automobile exception to the warrant requirement.

In conclusion, sufficient evidence of probative value exists to support the PCR court's findings that the Petitioner was not prejudiced by counsel's failure to file a motion to suppress drug evidence, where the trial court would properly deny counsel's motion, where law arising from the Court's decision in Gant did not exist at the time of the Petitioner's trial, and where, regardless, even under Gant, the search conducted in the Petitioner's case was still valid, and the evidence would have still been admitted

at trial. Accordingly, this Court should affirm the PCR court's Order.

II. It would have been proper for the PCR court to deny relief upon the allegation that counsel's objection to the sufficiency of the curative instruction would have been overruled because the curative instruction was sufficient. Furthermore, the issue of whether counsel should have objected to the court's curative instruction is not preserved for appeal and not properly before this Court.

The Petitioner contends the PCR court erred in finding Counsel was not ineffective for failing to object to the sufficiency of the curative instruction. This issue is not preserved for appellate review, as discussed below. However, it would have been proper for the PCR court to deny relief on this ground where Counsel's objection would have been overruled because the curative instruction was sufficient.

At trial, Chantell Griffin testified she was a passenger in the Petitioner's car when the stop occurred. Ms. Griffin was charged with trafficking cocaine also and agreed to testify in exchange for her trafficking charge being dismissed. (App. p. 233, line 18 – p.234, line 9). At the beginning of her testimony, the solicitor questioned Ms. Griffin about how long she had known the Petitioner. The solicitor asked, "Did you know he was married?" She responded, "No." Counsel objected. (App. p. 232, line 25-p. 233, line 9). The trial judge sustained Counsel's objection and gave the following curative instruction: "disregard any testimony about whether she did or did not know whether he is or is not married. Stay away from that." (App. p.232, line 14 – p.233, line 9). Counsel did not object to the sufficiency of that curative instruction or move for a mistrial at that time.

Counsel objected again when the solicitor asked Ms. Griffin if the Petitioner told her he was going to do a drug deal. (App. p. 534, lines 21-24). Immediately following, Counsel moved for a mistrial based on both questions asked by the solicitor.[1] (App. p.234, line 21-p. 235, line 15). At that point, the judge excused the jury and heard arguments. The judge sustained both of Counsel's objections and denied Counsel's motion for a mistrial as to both grounds. (App. p. 234, line 25-p. 238,

1 Only the solicitor's question to Griffin regarding Petitioner's marital status was challenged on appeal.

line 24). In discussing the proper curative instruction, Counsel specifically requested the trial court instruct the jury to "disregard the statement by Mr. Springs 'did you know he was married' because there is no evidence before you that he was married." (App. p. 238, line 25 – p. 239, line 6). The trial court offered curative instructions upon the jury's return with regard to both the marital status question and the drug deal question. (App. p.239, lines 8-25). With regard to the marital status question, the only one of the two comments at issue on direct appeal and in the PCR proceeding, the judge instructed the jury as follows:

> Members of the jury panel, I'm going to ask you to disregard two questions from the solicitor. One was a question, was a statement couched as a question and asked in essence whether this witness knew that the defendant Mr. El was married, disregard that question, there is no evidence in the record involving Mr. El's marital status. There is no evidence in the record that he's married, so just disregard that.

(App. p.239, lines 10-25). The curative instruction given is the exact curative instruction Counsel requested; necessarily, then, he did not object to it. On Appeal, the Petitioner raised the following issue:

> The judge committed reversible error by refusing to grant a mistrial when the Assistant Solicitor asked Chantell Griffin on direct if she knew El was married- and served only to place El's character in issue by suggesting that he was not guilty of drug dealing, but adultery as well.

(App. p. 528). Subsequently, the South Carolina Court of Appeals ruled that the Petitioner's conviction was affirmed on the basis of:

> We affirm pursuant to Rule 220(b), SCACR, and the following authorities: State v. George, 323 S.C. 496, 510, 476 S.E.2d 903, 912 (1996) ("No issue is preserved for appellate review if the objecting party accepts the [court's] ruling and does not contemporaneously make an additional objection to the sufficiency of the curative charge or move for a mistrial."); State v. Patterson, 337 S.C. 215, 226, 522 S.E.2d 845, 850 (Ct. App. 1999) ("[A] trial court's curative instruction is considered to cure any error regarding improper testimony, a party must contemporaneously object to a curative instruction as insufficient or move for a mistrial to preserve an issue for review.") (emphasis in original); State v. Johnson, 334 S.C. 78, 89-90, 512 S.E.2d 795, 801 (1999) (holding unless the accused is prejudiced, a curative instruction to

> disregard objectionable evidence is usually deemed to cure the error and admission of inadmissible testimony can be harmless error where the trial court properly admonished the jury to disregard the testimony); State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (Ct. App. 2006) (recognizing a mistrial should only be granted in cases of manifest necessity and with the greatest caution for very plain and obvious reasons and should not be ordered in every case where incompetent evidence is received).

(App. p. 552).

At the PCR hearing, the Petitioner argued that Counsel failed to properly preserve for appellate review the issue concerning the solicitor's suggestion that the Petitioner was married. (App. p.509, line 1-7). The PCR judge then responded that the issued had already been dealt with on appeal. (App. p. 509, lines 8-9). In its Order of Dismissal, the PCR court found that the issue was raised on direct appeal and denied. (App. p.522). The PCR court also found that the Petitioner was not prejudiced because the issue was properly cured by the trial judge's curative instruction. (App. p.522).

While maintaining this issue is not preserved for appellate review, the Respondent contends that, to the extent the PCR court concluded that the Petitioner was not entitled to relief on this ground where the issue was raised on direct appeal and denied, the PCR court's finding was proper. On direct appeal, the Petitioner argued that the trial court erred by refusing to grant a mistrial in regards to the solicitor's questioning of Ms. Griffin concerning the Petitioner's marital status. (App. p. 531). The Court of Appeals affirmed the Petitioner's conviction, not only because the issue of the sufficiency of the curative instruction was not preserved, but also because the trial court's curative instruction cured the improper testimony pursuant to State v. Johnson, 334 S.C. 78, 89-90, 512 S.E.2d 795, 801 (1999) and because no "manifest necessity" existed to grant a mistrial pursuant to State v. White, 371 S.C. 439, 444, 639 S.E.2d 160, 162 (2006). (App. p.552). Therefore, the Court of Appeals clearly determined the trial judge's curative instruction cured the improper testimony. (App. p. 552). Nevertheless, Counsel was not ineffective in failing to object to the sufficiency of the curative instruction specifically given as

he requested. The instruction cured any prejudice resulting from the solicitor's question. State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (Ct. App.2005).

Additionally, the record clearly supports the PCR court's finding that the Petitioner was not prejudiced where the misstatement by the solicitor did not rise to the level required for a mistrial and the improper testimony was properly cured by trial judge's curative instruction. (App. 522). If the trial judge sustains a timely objection to evidence and gives the jury a curative instruction that it be disregarded, the error is deemed to have been cured by the instruction. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). Moreover, the decision to grant or deny a mistrial is with in the sound discretion amounting to an error of law. . See Stanley, supra.

Appellate courts will not generally set aside convictions due to insubstantial errors which don't affect the result. State v. Douglas, 369 S.C. 424, 632 S.E.2d 845 (2006). An insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. White, 372 S.C. 364, 386, 642 S.E.2d 607, 168 (Ct.App. 2007).

Further, the Petitioner was not prejudiced regarding questioning on his marital status where a review of the entire record demonstrates that the purportedly erroneous instruction error did not affect the verdict in light of the Petitioner's own testimony at trial that he was not in fact married and the conclusive evidence of the Petitioner's guilt. State v. Douglas, supra; State v. White, supra. Thus, the record would clearly support a finding by the PCR court that Counsel was not ineffective in failing to object to the sufficiency of the curative instruction and that, regardless, the Petitioner was not prejudiced by the alleged deficiency.

Moreover, the record is void of any testimony or evidence regarding the Petitioner's allegation that Counsel was ineffective in failing to object to the curative instruction given after counsel moved for

a mistrial based on the solicitor's comments. The PCR court's Order of Dismissal did not include or address any issue related to counsel's purported failure to object to the curative instruction. (App. p. 517-524). There is nothing in the record to indicate that the Petitioner filed any Rule 59(e), SCRCP motion.

Despite the facts that the Petitioner effectively waived this issue during the PCR hearing in never raising it or presenting any evidence in support, that the PCR court never addressed this issue in the Order of Dismissal, and that the Petitioner never filed a Rule 59(e) motion, the Petitioner now raises the issue on appeal. A "party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." Al- Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (S.C.1992) (issue must be raised and ruled on by the PCR judge in order to be preserved for review).

Therefore, the Petitioner should be barred from further state collateral review. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review." [emphasis added]); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862, 865 (2001); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477, 478-480 (1992) (issue must be both raised to and ruled upon by PCR judge to be preserved for appellate review); see Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend a judgment if they believe necessary matters were not addressed in original order); Brown v. State, 307 S.C. 465, 415 S.E.2d 811 (1992) (review of post-conviction relief matters is limited to determination of whether there is any evidence to support post-conviction judge's findings of fact). Accordingly, this Court should affirm the PCR court's Order because the Petitioner did not pursue this issue, the PCR court never ruled on this issue, and the Petitioner never filed a Rule 59(e) motion to ensure that the PCR court ruled on the issue to enable this

Court to review that ruling.

III. Sufficient evidence of probative value exists to support that counsel was not ineffective in failing to renew the motion and where Petitioner could prove no prejudice because the trial court would have properly denied counsel's motion. Furthermore, the issue regarding counsel's failure to renew his motion for a mistrial is not preserved for review and is not properly before this Court.

The Petitioner claims Counsel was ineffective for failing to renew his motion for mistrial in response to the solicitor's misstatement of fact. Sufficient evidence of probative value exists to support a finding by the PCR court that Counsel was not ineffective in failing to renew the motion and where the Petitioner could prove no prejudice because the trial court would have properly denied Counsel's motion. This issue again concerns the solicitor's misstatement of fact regarding Petitioner's marital status. The record is clear that Counsel objected and moved for a mistrial, that the trial court denied Counsel's motion for a mistrial, and that the trial court offered a curative instruction that sufficiently cured any prejudice resulting from the solicitor's comment.

In affirming the Petitioner's conviction, the Court of Appeals relied on several authorities including State v. White, 371 S.C. 439, 444, 639 S.E.2d 160 (Ct. App. 2006). The Court in White specifically held that a mistrial should only be granted in cases of manifest necessity and with the greatest of caution for very plain and obvious reasons and should not be ordered in every case where incompetent evidence is received. Id.; See also State v. Kirby, 269 S.C. 25, 28, 236 S.E.2d 33, 34 (1977) (the power of a court to declare a mistrial ought to be used with the greatest caution under urgent circumstances, and for very plain and obvious causes."). The granting of a motion for mistrial is an extreme measure that should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999). A mistrial should not be granted unless absolutely necessary; to receive mistrial, a defendant must show error and

resulting prejudice. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999).

Here, with regard to Counsel's initial motion for a mistrial, the PCR court found that the Petitioner could prove no prejudice because the misstatement by the solicitor did not rise to the level required for a mistrial and was properly cured by the trial judge's curative instruction. If Counsel had renewed his motion for a mistrial again, the trial court clearly would have denied the motion again where no additional facts or grounds existed to grant Counsel's motion. The record clearly supports the PCR court's finding that the solicitor's misstatement of fact, particularly when addressed by Counsel's objection, first motion for a mistrial, and curative instruction, was not so grievous that the prejudicial effect could only be removed by granting the mistrial. Thus, had Counsel renewed his motion for a mistrial, the Court of Appeals certainly would not have found that the trial court abused its discretion in denying it such that the Petitioner would have been granted a new trial on this issue. Simply put, there is sufficient evidence of probative value that would support a finding by the PCR court that Counsel was not ineffective in failing to make an inane renewed motion for a mistrial.

The Petitioner's allegation that the PCR court erred in finding that Counsel was not ineffective in failing to renew his motion for a mistrial is not properly before this court - the PCR court made no such finding. This issue was not addressed in the Order of Dismissal, particularly not in the manner presented by the Petitioner. (App. p. 517-524). The elaborate argument put forth in the Brief of Petitioner on this issue was not preserved at the circuit level, and there is no basis to claim the PCR court erred regarding this issue.[2]

A "party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." Al- Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742, 747 (2000)

2 To the extent Petitioner contends Counsel failed to make the motion for a mistrial, the record is clear that Counsel did in fact make the motion, and it was denied by the trial court. To the extent Petitioner contends Counsel failed to ensure the issue was preserved for appeal, Respondent interprets Petitioner's issue to be one that Counsel was ineffective in failing to renew his motion for a mistrial after the trial court denied his original motion and gave a curative instruction.

(citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (S.C.1992) (issue must be raised and ruled on by the PCR judge in order to be preserved for review). Therefore, since the issue presented to this Court was never ruled on by the PCR court in his order, the Petitioner should be barred from further state collateral review. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review...." (emphasis added)); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862, 865 (2001); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477, 478-480 (1992) (issue must be both raised to and ruled upon by PCR judge to be preserved for appellate review); see Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend a judgment if they believe necessary matters were not addressed in original order). Accordingly, this Court should not reverse the PCR court regarding an issue it never addressed in the Order of Dismissal particularly where Petitioner never filed a Rule 59(e) motion to ensure that the PCR court ruled on the issue to enable this Court to review that ruling.

IV. It would have been proper for the PCR court to deny relief upon the allegation that Counsel was ineffective for failure to subpoena the notary for trial where the record clearly supports a finding that the Petitioner failed to prove how he was prejudiced because the Petitioner did not present this witness for testimony at the evidentiary hearing. Furthermore, this issue is not preserved for review and is not properly before this Court.

The Petitioner alleges the PCR court erred in finding Counsel not ineffective for failure to secure the notary's presence at the trial. The Petitioner's claim lacks merit because Counsel successfully admitted the affidavit into evidence, and the Petitioner failed to establish that he was prejudiced by Counsel's failure to call the notary. Prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witnesses do not testify at the post-conviction relief hearing. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert.

denied, 499 U.S. 982 (1991). An applicant's mere speculation as to what a witnesses' testimony would have been or the impact if any the testimony may have had cannot, by itself, satisfy his burden of showing prejudice. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). An applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998). Here, the notary did not testify at the PCR hearing. Therefore, the Petitioner's mere speculation as to what the notary would have testified about concerning Horne's demeanor cannot satisfy his burden of showing prejudice where there was no evidence before the PCR court that, if counsel had subpoenaed the notary, the result at trial would have been different so as to support Petitioner's claim of ineffective assistance.

Moreover, Counsel successfully admitted the affidavit into evidence. At trial, the Petitioner testified that he understood his right to testify. (App. p. 257, lines 3-24). Subsequently, the Petitioner testified and Horne's statement was admitted into evidence. (App. p. 294, lines 17-18). Horne also testified at trial, and admitted that he signed the statement taking responsibility for the drugs and swore before a notary public that the statement was true. (App. p. 350, line 25 – p. 351, line 13). Horne also conceded that the Petitioner did not intimidate him to sign the statement. (App. p. 346, lines 9-19). However, at one point during trial, Horne admitted that he was untruthful in the statement concerning his responsibility for the drugs. (App. p. 339, lines 2-6). Because counsel successfully admitted Horne's exculpatory affidavit, the affidavit and Horne's admission that he was not intimidated by the Petitioner was presented to the jury for consideration. Thus, the notary's testimony would have been merely cumulative. As a result, probative evidence exists establishing that the Petitioner failed to show that Counsel was ineffective and that he was prejudiced by Counsel's alleged deficiency in failing to

subpoena the notary.

Further, the Petitioner's allegation that the PCR court erred in finding that Counsel was not ineffective in failing to secure the notary public's presence at trial is not addressed in the Order of Dismissal and is not preserved for appellate review. (App. p. 517-524).

A "party must timely file a Rule 59(e), SCRCP, motion to preserve for review any issues not ruled upon by the court in its order." Al- Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742, 747 (2000) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127, 128 n. 2 (S.C.1992) (issue must be raised and ruled on by the PCR judge in order to be preserved for review). Therefore, since the issue presented to this Court was never ruled on by the PCR court in his order, the Petitioner should be barred from further state collateral review. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review...." (emphasis added)); Humbert v. State, 345 S.C. 332, 548 S.E.2d 862, 865 (2001); Plyler v. State, 309 S.C. 408, 424 S.E.2d 477, 478-480 (1992) (issue must be both raised to and ruled upon by PCR judge to be preserved for appellate review); see Rule 59(e), SCRCP (providing avenue for any party to move to alter or amend a judgment if they believe necessary matters were not addressed in original order). Accordingly, this Court should not reverse the PCR court regarding an issue it never addressed in the Order of Dismissal particularly where Petitioner never filed a Rule 59(e) motion to ensure that the PCR court ruled on the issue to enable this Court to review that ruling.

CONCLUSION

For the reasons stated above, the Respondent requests this Court to affirm the PCR Court's Order.

Respectfully submitted,

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April 23, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to York County

The Honorable Lee S. Alford, Circuit Court Judge

JAMUL RATUB EL,

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Brief of Respondent on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Susan Barber Hackett, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 23RD day of April, 2012.

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