THE STATE OF SOUTH CAROLINA
In the Supreme Court



---

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Ralph K. Anderson, III, Special Circuit Court Judge

---

Appellate Case No. 2017-002102

---

Jermaine Mayweathers, Petitioner,

v.

State of South Carolina, Respondent.

---

**PETITION FOR A WRIT OF CERTIORARI PURSUANT TO AUSTIN v. STATE**

---

Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234
Attorney for Petitioner

Other Counsel of Record:
Lindsey A. McCallister
Assistant Attorney General
1000 Assembly Street, Room 519
Columbia, SC 29201
(803) 734-3970
Attorney for Respondent

# INDEX

## QUESTIONS PRESENTED

I. Did the PCR Court err in finding that trial counsel provided effective assistance of counsel in failing to prepare for trial by not conducting a reasonable investigation?

II. Did the PCR Court err in finding that trial counsel provided effective assistance of counsel in failing to articulate an objectively reasonable trial strategy for not properly objecting to prejudicial evidence, not calling character witnesses to testify on Petitioner's behalf, and not asking the jury in the jury in her opening statement or closing argument to find Petitioner not guilty?

III. Did the PCR Court err in finding that trial counsel provided effective assistance of counsel for failing to subject the prosecution's case to meaningful adversarial testing?

## STATEMENT OF THE CASE

### Background

On July 25, 2008, Petitioner and his father, William Jerido, were living with his father's girlfriend, Deborah Williams, and her two sons. App. 75, ll. 5-25. Petitioner was fifteen years old, and Ms. Williams' sons were seven-years-old ("K.P.") and five-years-old ("Child"). The minors were regularly left in the home with Petitioner as the caretaker. App. 121, ll. 5-23. That day, however, Petitioner called 911 after the five-year-old Child vomited and became non-responsive. EMS brought the Child to the emergency room at McLeod Regional Medical Center in Florence. After having surgery, the five-year-old Child ultimately died because of a traumatic brain injury. App. 135, ll. 19-22; App. 258, l. 1 – 262, l. 15; App. 271, l. 2 – 273, l. 5.

Three days later, Petitioner provided a statement to Investigator Renae Lowder Jenco of the Florence County Sheriff's Department. App 217, l. 19 – 218, l. 2; App. 226, l. 25 – 228, l. 21; App. 407, 1. 1 – 414, 1. 9. Petitioner admitted that he was alone with seven-year-old K.P. and the five-year-old Child but denied beating the Child. Dr. Susan Erin Presnell, a forensic pathologist, performed an autopsy on the Child and found the cause of death as "blunt force trauma to the head sustained in a beating." App. 135, ll. 20-22.

On July 30, 2008, the Twelfth Circuit Solicitor's Office filed a Juvenile Petition in the Florence County Family Court, charging Petitioner with Homicide by Child Abuse. App. 5, ll. 13-14. The Solicitor's Office then requested a waiver hearing to transfer jurisdiction of this charge from Family Court to General Sessions Court.

### Juvenile Waiver Hearing (2008-JU-21-108)

On March 18–19, 2009, Petitioner proceeded to a juvenile waiver hearing before the Honorable Jerry D. Vinson in the Florence County Family Court. App. 1 – 342. Carrington

Wingard represented Petitioner, and Assistant Solicitors David A. Richardson, Jr. and John C. Jepertinger appeared on behalf of the State. The Family Court Judge ruled "that jurisdiction be waived in this matter; and that the juvenile [Petitioner] be presented [transferred] to the Court of General Sessions for prosecution." App 341, lines 2-5.

**Indictment**

On July 16, 2009, the Florence County Grand Jury indicted Petitioner Jermaine Mayweathers for Homicide By Child Abuse. App. 935 – 937.

**Trial**

On September 21, 2009, Petitioner proceeded to trial before the Honorable Ralph King Anderson, Jr. and a jury. App. 344 – 789. Carrington Wingard represented Petitioner, and Assistant Solicitors David A. Richardson, Jr., and John C. Jepertinger prosecuted the case on behalf of the State. The jury found Petitioner guilty as charged. App. 779. The Trial Court sentenced Petitioner to thirty years (30) imprisonment, stating "[t]hankful is the word that I use from my heart in that this 5 year old occupies the position of an angel in heaven, and on behalf of this angel I pass the sentence today." App. 788; App. 938.

**Direct Appeal**

On December 30, 2010, Appellate Defender Wanda H. Carter filed the Final Brief of Appellant, and Assistant Attorney General David Spencer filed the Final Brief of Respondent on December 21, 2010. App. 790 – 824. Petitioner argued only one issue on direct appeal: Whether the "Family Court Judge erred in transferring [Petitioner's] case to General Sessions Court because although the crime charged against [Petitioner] (homicide by child abuse) involved a serious offense against another person; nonetheless, [Petitioner] had no prior serious criminal record, and he was an excellent rehabilitation candidate who was no threat to the public." App. 793.

On December 9, 2011, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Mayweathers*, Op. No. 2011-UP-549 (S.C. Ct. App. filed December 9, 2011). App. 825 – 826.

**First PCR Application and Evidentiary Hearing**

On November 9, 2012, Petitioner filed an application requesting Post-Conviction Relief (PCR), alleging ineffective assistance of trial counsel. App. 828 – 836. The State filed a Return to the PCR application on February 28, 2013. App. 837 – 842. Petitioner appeared before the Honorable William H. Seals on October 7, 2013, for an evidentiary hearing on the matter. App. 843 – 888. Henry M. Anderson, Jr., represented Petitioner, and Assistant Attorney General Joshua Thomas represented the Respondent. Petitioner, Diane Jerido (Petitioner's Grandmother), and Carrington Wingard (Trial Counsel) testified at the evidentiary hearing.

**Petitioner Jermaine Mayweathers**

At the evidentiary hearing, Petitioner testified that he met with Trial Counsel "a couple times" prior to the waiver hearing. App. 847, l. 25 – 848, l. 2. Specifically, Petitioner testified that he met with Trial Counsel "twice" prior to trial after the waiver hearing and only once told Trial Counsel his version of what occurred. App. 848, ll. 3-12. Petitioner also testified that he met with two expert witnesses prior to trial. One defense expert witness on the Friday before trial, presumably Dr. Elizabeth Baker, and one Court ordered expert witness, Dr. Joel Heffler, who is a licensed clinical psychologist for the Department of Juvenile Justice (DJJ) and performed a psychological examination on Petitioner for the waiver hearing. App. 848, l. 13 – 849, l. 5.

PCR Counsel then had Petitioner confirm the witnesses who testified at the juvenile waiver hearing: K.P. (Seven-year-old brother of the deceased); Deborah Williams (Mother of the deceased); Dr. Joel Heffler (Clinical psychologist at DJJ); Dr. Susan Erin Presnell (Forensic

Pathologist who performed the autopsy); Renae Lowder Jenco (Investigator at the Florence County Sheriff's Department who took Petitioner's Statement); Dr. Gerald Atwood (Pediatric Critical Care Specialist at McLeod Regional Children's Hospital); Andrea Foster (Intake Supervisor at DJJ); and Nancy Ingram (Petitioner's Aunt). App. 849, l. 16 – 850, l. 15. Petitioner reiterated that during the six-month period between the waiver hearing and his trial, he did not meet with Trial Counsel to prepare for trial until "[t]hat Friday before the trial" and that the only defense expert he met with was "[j]ust the doctor that I talked to that Friday." App. 851, ll. 12-23.

Furthermore, Petitioner testified that Trial Counsel did not review all the evidence with him except for the autopsy photographs. App. 851, l. 24 – 852, l. 4. Petitioner also testified that Trial Counsel never discussed her strategy for suppressing prejudicial photographs. App. 852, ll. 5-7. Petitioner further testified that he did not speak with investigator Ron Smith but did speak "briefly" with investigator Frank White. App. 852, ll. 11-16.

Petitioner then testified that Trial Counsel advised against calling character witnesses to testify in his defense and against Petitioner testifying in his own defense. App. 852, ll. 17-25. Petitioner explained that Trial Counsel's rationale for advising him not to testify was because "she wanted the last word [in closing arguments]." App. 853, ll. 1-5. Notably, Petitioner testified that Trial Counsel never discussed a theme or theory of the case with him and that "[Trial Counsel] asked me that Friday [before trial] . . . how was she going to defend me, what was going to be my defense." App. 852, ll. 6-10.

Petitioner testified that Trial Counsel "tried to get [him] to take a plea" and that the plea offer was for twenty years imprisonment. App. 853, ll. 11-15. Petitioner rejected the plea offer and informed Trial Counsel that he wanted to go to trial. App. 854, ll. 2-3. Petitioner emphasized that Trial Counsel never told the jury during her opening statement or closing argument to find him "not

guilty" and that Trial Counsel did not call any witnesses on his behalf. App. 854, l. 15 – 855, l. 3. Petitioner further testified that Trial Counsel told him that her decision not to call witnesses "was part of her trial strategy" and that Trial Counsel could have objected to more evidence. App. 855, ll. 4-20.

Additionally, Petitioner testified that Trial Counsel never discussed trial strategy with him during the trial and that he had never spoken with Trial Counsel's co-counsel, Michael Bell. App. 855, ll. 12-25. Petitioner also testified that Trial Counsel should have objected to the admissibility of the belt because the State "supposedly tied the belt into [sic] the bruising." App. 856, ll. 1-11. Specifically, Petitioner testified that "[the belt] made it look like – even though [the State] didn't have my fingerprints on [the belt or] my DNA," Petitioner used the belt to injure the deceased child. App. 856, ll. 5-14.

Notably, Petitioner testified, "I really feel like [Trial Counsel] should have let some of my family testify . . . so the jury could have known what type of person I am instead of just going off the picture that the prosecution painted." App. 856, l. 22 – 857, l. 2. Through questioning, PCR Counsel pointed out that Petitioner's aunt, Nancy Ingram, testified at the waiver hearing and that Petitioner believed her testimony would have been helpful for the jury to understand him better as a person. App. 857, ll. 11-16. Petitioner explained in further detail, "So it wouldn't look like . . . I was a monster . . . [the jury] didn't know me . . . [t]here was nobody to testify on my behalf to tell [the jury] what type of person I am, what type of upbringing I had." App. 857, ll. 17-24.

Petitioner reiterated that, "not one time during trial [did Trial Counsel] say[] that I was not guilty" and that, "any smart juror would read through that . . . my lawyer isn't even saying that I'm not guilty . . . I believe any jury is going to see that." App. 857, ll. 6-10.

On cross-examination, Petitioner acknowledged that Trial Counsel reviewed the autopsy photographs with him but maintained that Trial Counsel never reviewed the discovery or discussed possible defenses with him. App. 858, l. 19 – 859, l. 7. Petitioner also indicated that he provided Trial Counsel with the names of his family members as character witnesses but that she never contacted them about testifying at his trial. App. 859, ll. 11-17. Petitioner recognized on cross-examination that he rejected the plea offer and requested a trial. App. 859, ll. 18-22.

**Diane Jerido (Petitioner's Grandmother)**

Petitioner's Grandmother, Diane Jerido, testified that she was present for the waiver hearing and for when Trial Counsel met with Petitioner to prepare for trial. App. 860, l. 11 – 861, l. 15. Ms. Jerido also testified that Trial Counsel met with Petitioner twice before trial and that the second meeting occurred on "the Friday before [Petitioner] went to court [for the General Sessions trial]." App. 861, ll. 16-25. Notably, Ms. Jerido stated that, "[w]hen [Trial Counsel] said that they didn't have . . . any type of defense to raise, I raised the question, well, what's the evidence against him." App. 862, ll. 10-14.

Ms. Jerido explained that Trial Counsel "said that she had testimony from the doctor ... the pediatrician, not the actual doctor that did the surgery, but from the pediatrician[.]" App. 862, ll. 14-17. Ms. Jerido further testified, "my question was where is the doctor that did the surgery...because my concern was that it never came out in the trial about [the deceased child] falling off the bed and nobody made a big issue of that, that he – the [the deceased] child hit his head the night before and he had a knot on his head and he bled through the night." App. 862, ll. 17-22.

Ms. Jerido noted later during her testimony that the neurosurgeon "Dr. [Andrew Rhea] should have known what actually happened, the shape the [the deceased child] was in when he came to the emergency room . . . but Dr. [Rhea] never testified [at Petitioner's trial]." App. 863, ll.

19-22. Ms. Jerido clarified that she believed the swelling depicted in the photographs of the deceased child were caused by the surgery performed by Dr. [Rhea] and not from "a beating". App. 864, ll. 3-12. Ms. Jerido emphasized that the jury "thought [the swelling] was from a beating" and that Petitioner's attorney did not attempt to challenge the causation of the injuries. App. 864, ll. 8-13.

Furthermore, Ms. Jerido testified that she was concerned about why the entire audio recording of the 911 call from Petitioner was not played for the jury and why Petitioner was alone when questioned by the police. App. 862, l. 23 – 863, l. 2. Ms. Jerido further testified that she had concerns with Trial Counsel not objecting to the admission of the belt "that was supposed to have been the weapon" used to injure the deceased child. App. 864, l. 20 – 865, l. 1. Notably, Ms. Jerido stressed that Trial Counsel "didn't bring out that the child had several accidents prior [to that day], and maybe that last fall could have been what it was and not a beating from my grandson...[because] he had three prior accidents to the head." App. 865, ll. 2-5.

Ms. Jerido testified that she told Trial Counsel about her desire to testify on Petitioner's behalf and that Trial Counsel told her "[i]t wasn't a good idea because she needed to have the last closing argument." App. 865, ll. 11-16. Ms. Jerido explained that she would have informed the jury about "[t]he type of child that my grandson was, the way he grew up, and ... I felt like he wouldn't have did anything like that, and the evidence was not there to show that ...he did this." App. 865, ll. 17-22. Ms. Jerido also testified that several other members of Petitioner's family were available and willing to testify as character witnesses. App. 865, l. 23 – 866, l. 1.

Notably, Ms. Jerido testified that her niece worked with one of the jurors and that the juror said "we didn't know anything about the kid [Petitioner] . . . his lawyer [Trial Counsel] did not put anybody to say what type of kid he was... He could have been a street kid." App. 866, ll. 4-11. Ms.

Jerido reiterated her belief that character witnesses were critical to Petitioner's defense: "I felt like that might have had a difference too in the way that [the jurors] see him...the way [Petitioner] called [911], he ran and he called [911]...[Petitioner] got the help [the deceased child] needed...[Petitioner] was at the hospital...[Petitioner] was concerned...None of that came out [at trial]." App. 866, ll. 13-17.

**Carrington Wingard (Trial Counsel)**

Trial Counsel admitted on direct examination that, after reviewing the evidence, she "viewed this as a circumstantial case since [Petitioner] had given law enforcement a statement before I was involved and had said he didn't know how the child had gotten injured." App. 869, ll. 16-18. Trial Counsel maintained that she sent the medical records "to [Dr. Elizabeth Baker] for the defense in Charleston" and later explained that Dr. Baker began as an expert on child sexual abuse and then she started developing into all areas of child abuse. App. 869, ll. 19-20; App. 886, ll. 17-21. Trial Counsel also maintained that Dr. Baker "reviewed those records and did not believe that she would be able to provide any helpful information for the defense[.]" App. 869, ll. 20-22.

Trial Counsel then explained that Dr. Baker met with Petitioner one time prior to trial: "I do know that we [Petitioner, Dr. Baker, Trial Counsel, and Petitioner's family] spent a long time with him as a group...[Dr. Baker] wanted to speak with [Petitioner] privately to see if she could develop anything that would be helpful to our defense, but ultimately, she could not." App. 870, ll. 14-7. Trial Counsel noted she informed Petitioner "that Dr. Baker could not come up with anything helpful for the defense." App. 870, ll. 20-22.

As to the defense investigation, Trial Counsel testified that she reviewed the transcript from the waiver hearing and spoke to Dr. Rhea who performed surgery on the deceased child. App. 871, ll. 21-25. Trial Counsel maintained that "Dr. [Rhea] could not provide anything helpful for the

State – for the Defense" and that "the State didn't feel a need to call him . . . because of Dr. Atwood's expertise." App. 871, l. 25 – 872, l. 2.

When asked about the defense theory, Trial Counsel stated, "it really was a reasonable doubt [argument] . . . because it was a circumstantial [evidence] case." App. 873, ll. 10-11. Trial Counsel also stated, "the other thing was the youth of this child and the situation that he had been put into." App. 873, ll. 12-13. Trial Counsel maintained that she "went over all of the evidence that we [Petitioner and Trial Counsel] expected to have introduced" at trial. App. 873, l. 25 – 874, l. 1.

When asked why she never used the phrase "not guilty" during her opening statement or closing argument, Trial Counsel responded, "I just can't remember whether I did or not...Normally, I would say, we ask you to return a verdict which speaks the truth...In this case, it would be not guilty...But again, I've not read the whole transcript." App. 874, ll. 13-19. Trial Counsel also maintained that she reviewed Petitioner's statement to police with Petitioner and challenged the admission of that statement at trial. App. 874, ll. 20-25.

Additionally, Trial Counsel admitted that she did not remember the admission of the belt when asked whether she objected to that piece of evidence. App. 875, ll. 1-6. Trial Counsel also explained that she "fully discussed the trial strategy of having the last argument" and not calling character witnesses with Petitioner. App. 876, ll. 16-24. Trial Counsel ultimately maintained that it was Petitioner's decision not to present a defense at trial. App. 876, l. 25 – 877, l. 2.

Trial Counsel reiterated on cross-examination, "I did talk to Dr. [Rhea]", that "Dr. [Rhea] was not helpful, and that "[h]e did not want to get involved." App. 877, ll. 10-12. Trial Counsel testified that she "discussed all manner of how these injuries could happen" with Dr. Baker and that "we [Trial Counsel and Dr. Baker] really had started developing some – some pretty good scenarios at the time of the detention hearings, but then as we got all of the medicals (sic) [hospital records], it

[the defenses] just evaporated." App. 878, ll. 10-24.

When asked whether she cross-examined Dr. Presnell or Dr. Atwood if swelling could have been caused during the surgery performed by Dr. Rhea, Trial Counsel testified "I can't recall asking that specifically, but I am certain that I would have asked some distinction between the injury and the medical treatment." App. 878, l. 25 – 879, l. 7.

PCR Counsel then asked Trial Counsel if she recalled specifically what she argued to the jury in support of reasonable doubt. In response, Trial Counsel asserted that it was a circumstantial evidence case and that "[she] was really kind of hoping that [the jury] would feel sorry for [Petitioner] because...the medical evidence was so overwhelming." App. 882, ll. 2-8.

PCR Counsel also asked if Trial Counsel remembered whether she objected to the admissibility of the belt. Trial counsel replied that she could not remember. App. 882, ll. 14-22. PCR Counsel informed Trial Counsel that she never told the jury to find Petitioner not guilty. App. 883, l. 6 – 884, l. 9. PCR Counsel then questioned Trial Counsel about whether she sent Dr. Atwood's testimony to Dr. Baker. Trial Counsel responded, "I think I sent the whole - - everything, the whole waiver [transcript], and then all the medical records, but I may have just sent the doctor's testimony." App. 885, ll. 15-19.

Notably, Trial Counsel admitted that Ms. Ingram's testimony as a character witness at the waiver hearing was helpful to Petitioner and that she told the jury in closing arguments to not make a second tragedy by convicting Petitioner. App. 885, ll. 20-22; App. 887, ll. 8-11.

**Order of Dismissal**

On December 10, 2013, the PCR Court ruled in the Order of Dismissal that Petitioner failed to prove Trial Counsel provided ineffective assistance of counsel and denied Petitioner's PCR application. App. 889 – 898. Specifically, the PCR Court ruled against Petitioner on the following

allegations regarding ineffective assistance of trial counsel: (1) Failure to prepare for trial; (2) Failure to conduct a reasonable investigation; (3) Failure to properly object and argue against the admission of critical evidence; (4) Failure to adequately cross-examine witnesses; (5) Failure to subject the State's case to a thorough and meaningful adversarial testing; (6) Failure to ask the jury in opening statement or closing arguments to find Petitioner not guilty; (7) Failure to object to the admission of the belt into evidence; and (8) Failure to call witnesses on Petitioner's behalf or present a defense. App. 895 – 897.

The PCR Court found that Petitioner "failed to meet his burden of proof regarding his allegation that trial counsel did not properly prepare for trial." App. 895. The PCR Court also found Petitioner's testimony not credible and Trial Counsel's testimony credible. The PCR Court noted Trial Counsel testified that "she thought this was an important case and she devoted a substantial amount of time to it." App. 895. The PCR Court also noted that Trial Counsel "met with [Petitioner] and thoroughly discussed with him the evidence and trial strategy". App. 895.

The PCR Court further noted Trial Counsel "engaged in plea negotiations until directed by [Petitioner] and his family to prepare for trial" and that "trial counsel's investigation involved contacting two doctors to attempt to discredit the State's theory of the case." App. 895. As to these allegations, the PCR Court ruled that "[Petitioner's] allegations trial counsel did not meet with him and prepare for trial are without merit." App. 895.

Additionally, the PCR Court found "that trial counsel raised objections to the introduction of [Petitioner's] statement, the autopsy photographs, and the expert testimony of the EMT." App. 895. The PCR Court also found that Trial Counsel "thoroughly cross-examined each witness and attempted to discredit the medical testimony as best she could." App. 895. The PCR Court further held that "[t]he record reflects . . . trial counsel subjected the State's case to a thorough and

'meaningful adversarial testing.'" App. 895.

The PCR Court "reviewed trial counsel's opening statement and closing argument and [found] no error in failing to ask the jury to find [Petitioner] innocent." App. 895. The PCR Court noted that Trial Counsel "implored the jury to not make a second tragedy of [Petitioner's] life." App. 895. The PCR Court found that, "[w]hen viewed in light of the whole record, the jury clearly understood trial counsel was arguing for a verdict of not guilty." App. 896.

The PCR Court also found that "trial counsel was not deficient for failing to object to the introduction of the belt" based on the following reasons. App. 896. First, "Trial counsel testified the belt was seized as part of the State's investigation, and the record reflects it was properly authenticated at trial." App. 896. Second, "trial counsel would have had no grounds to exclude the belt at trial." App. 896. Third, "[t]he record indicates trial counsel brought out on cross-examination that [Petitioner's] prints were not on the belt" and that "[trial counsel] testified the belt was not related to the brain injuries sustained by victim." App. 896. Ultimately, the PCR Court found that "the admission of the belt was not prejudicial to [Petitioner]." App. 896.

The PCR Court found "no deficiency from failing to call witnesses on [Petitioner's] behalf." App. 896. The PCR Court noted that "Trial counsel testified she reviewed the risks of calling family members as character witnesses" and that "[Petitioner] also understood the benefits of not presenting a defense and having last argument." App. 896. Based on this testimony, the PCR Court further found that "trial counsel articulated a valid reason for not presenting a defense" and that "[Petitioner] made a knowing and voluntary decision to not present a defense." App. 896.

Furthermore, the PCR Court held that "plea (sic) counsel provided competent representation in light of the overwhelming evidence against [Petitioner]." App. 896. In support of this finding, the PCR Court noted that "[Petitioner] gave a statement to police that the victim was awake and

functioning the morning before the 911 call" and that "[t]his statement was supported by the testimony of the victim's brother at trial." App. 896. The PCR Court also noted that the "[m]edical experts testified the victim would have been incapacitated once he sustained the injuries." App. 896 – 897. The PCR Court further noted, "[c]oupled with the testimony that [Petitioner] was the only person in the house capable of inflicting such severe injuries, the jury was presented with a strong circumstantial case." App. 897. The PCR Court further found that "[Petitioner] cannot show any errors by trial counsel that would have changed the result of his trial." App. 897.

**Second PCR Application and Evidentiary Hearing (2014-CP-21-3583)**

On December 10, 2014, Petitioner filed a second application requesting Post-Conviction Relief (PCR), alleging ineffective assistance of PCR Counsel for failing to file a timely Notice of Appeal pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). App. 901 – 907. The State filed a Return and Partial Motion to Dismiss in response to the PCR application on July 20, 2015. App. 908 – 915. Petitioner then appeared before the Honorable Thomas A. Russo on August 28, 2017, for an evidentiary hearing on the matter. App. 916 – 923. Jonathan Waller represented Petitioner, and Assistant Attorney General Lindsay McCallister appeared on behalf of the Respondent.

The Respondent consented to Petitioner's request for a belated PCR appeal and two exhibits were admitted into evidence at the hearing. Specifically, State's exhibit number one is a handwritten letter from Petitioner to PCR Counsel, requesting to appeal the PCR Court's Order of Dismissal. App. 925 – 926. State's exhibit number two is a letter from PCR Counsel, acknowledging that he did not send Petitioner a formal copy of the Order of Dismissal and admitting that this prevented Petitioner from seeking appellate review of his first PCR application. App. 927.

**Consent Order Granting Belated Appeal**

On September 27, 2017, Judge Russo issued a "Consent Order Granting Right to Seek Belated Appellate Review Pursuant to *Austin v. State*." App. 928 – 934. Judge Russo noted in the Order, "[a]fter a review of the facts and circumstances surrounding the waiver of [Petitioner's] right to appeal the denial of allegations in [Petitioner's] post-conviction relief application, the parties below have consented to the granting of an appeal of [Petitioner's] first post-conviction relief application (2012-CP-21-2999) pursuant to Austin v. State." App. 930. Judge Russo found, "[b]ased on the documents submitted from the previous PCR file, it appears to the parties and this Court [Petitioner] did not freely and voluntarily waive the right to appeal his first application for post-conviction relief, and PCR Counsel failed to file a timely Notice of Appeal of the application." App. 930. Judge Russo held that "this Court finds granting [Petitioner's] request to seek belated appellate review of his first PCR (2012-CP-2999) pursuant to Austin v. State is warranted." App. 930.

**Notice of Appeal and Request for Appellate Review**

On October 12, 2017, Petitioner's second PCR Counsel timely filed a Notice of Appeal in this Court and enclosed copies of the Consent Order Granting Belated Appellate Review and the Order of Dismissal from the first PCR application. Petitioner seeks a writ of certiorari to review these Orders pursuant *King v. State*, 308 S.C. 348, 417 S.E.2d 868 (1992) (establishing the procedure when seeking belated appellate review pursuant to *Austin v. State*).

## ARGUMENT

I. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO PREPARE FOR TRIAL BY NOT CONDUCTING A REASONABLE INVESTIGATION.

To establish ineffective assistance of counsel, a petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, a [petitioner] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a 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" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

The Supreme Court of the United States held that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Notably, this Court held that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008); *see also Ard v. Catoe*, 372 S.C.

318, 642 S.E.2d 590 (2007) ("Without a doubt, [a] criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation.") (internal quotation omitted)).

Furthermore, "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597); *see also Sneed v. Smith*, 670 F.2d 1348, 1353 (4th 1982) ("To meet this standard, an attorney must at a minimum, conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial.") (internal quotation omitted))

This duty to investigate extends to exploring the medical and mental health history of the defendant by consulting and possibly presenting expert witnesses. *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61; *see also Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) ("Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder."). Therefore, "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527.

**Deficient Performance**

In this case, Trial Counsel provided deficient performance, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. Trial Counsel had a duty to retain an independent expert to evaluate Petitioner's medical and mental health history prior to the waiver hearing and trial. *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61. The State called Dr. Joel

Barton Heffler, a licensed clinical psychologist at DJJ, as a witness at the waiver hearing because he evaluated Petitioner as required to transfer jurisdiction from Family Court to General Sessions Court. App. 186, l. 4 – 207, l. 4. Trial Counsel failed to have an independent expert review Dr. Heffler's findings, thereby preventing Petitioner from "exploring [his] medical and mental health history." *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61.

It appears that Trial Counsel failed to retain a private investigator to interview many of the witnesses presented by the State at trial. Instead, in preparation for trial, Counsel reviewed the waiver hearing transcript, consulted with Dr. Elizabeth Baker, and spoke with Dr. Andrew Rhea who performed the surgery. App. 869, ll. 19-22; App. 871, l. 21 – 872, l. 2; App. 886, ll. 17-21. It also appears that Trial Counsel never attempted to find the identities of several potential witnesses despite knowing that the autopsy report indicated that Petitioner was seen playing with the deceased Child by neighbors that day. App. 163, l. 13 – 164, l. 6; App. 231, l. 21 – 232, l. 25. It further appears that Trial Counsel failed to interview Tequila Durant, a neighbor who heard a noise at the house "around three (3) a.m.", or LaDonna Smith, who also heard a noise at the house the night before the Child died. App. 216, ll. 2-18; App. 240, l. 7 – 242, l. 25. *See Lounds*, 380 S.C. at 460, 670 S.C. at 649 (finding "at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case") (internal quotations omitted).

Prior to trial, Trial Counsel further failed to obtain Investigator Renae Lowder Jenco's notes, the chain of custody for the toxicology report, or view the physical evidence seized by law enforcement. App. 403, l. 3 – 404, l. 2; App. 417, l. 1 – 418, l. 12; App. 578, ll. 5-25. Despite Katrina Andrews' testimony as Florence County DSS Child Abuse/Neglect Investigator who worked with law enforcement on this case, the State maintained that there were no DSS records

after Trial Counsel noted that she was not in possession of such records. App. 462, ll. 2-18; 617, l. 15 – 642 l. 21. It appears that Trial Counsel never attempted to obtain Ms. Andrew's notes or files. It also appears that Trial Counsel was not prepared for the waiver hearing because she had not obtained a significant amount of evidence. App. 244, l. 24 – 245, l. 17; App. 274, ll. 7-17. Therefore, the PCR court erred in finding that trial counsel conducted a reasonable investigation in preparation for Petitioner's trial because counsel's performance was not reasonable "under prevailing professional norms." App. 895 – 897; *See Strickland*, 466 U.S. at 687-88; *see also Cherry*, 300 S.C. 115, 386 S.E.2d 624.

**Prejudice**

Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Trial Counsel's deficient performance adversely affected Petitioner's right to a fair trial because Counsel's failure to conduct a reasonable investigation prevented Petitioner from having an opportunity "to discover all reasonably available mitigation evidence and reasonably available evidence tending to rebut any aggravating evidence introduced by the State". *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61.

Trial Counsel's failure to conduct a reasonable investigation also significantly limited the scope of cross-examination and prevented Petitioner from presenting complete defense by reviewing the waiver hearing transcript instead of interviewing all the potential witnesses prior to trial. *See Lounds*, 380 S.C. at 460, 670 S.C. at 649. The prejudice to Petitioner is enhanced because Trial Counsel admitted that the State's case was circumstantial, and her trial strategy was to argue reasonable doubt since there was evidence that the deceased Child's mother had recently beat

the Child as punishment and had a huge knot/lump on his head the day before he died. App. 869, ll. 16-18; App. 873, ll. 10-11. Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 895 – 897; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO ARTICULATE AN OBJECTIVELY REASONABLE TRIAL STRATEGY FOR NOT PROPERLY OBJECTING TO PREJUDICIAL EVIDENCE, NOT CALLING CHARACTER WITNESSES TO TESTIFY ON PETITIONER'S BEHALF, AND NOT ASKING THE JURY IN HER OPENING STATEMENT AND CLOSING ARGUMENT TO FIND PETITIONER NOT GUILTY.

In *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), this Court held that "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness". *See Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that "labeling counsel's actions as "trial strategy" does not automatically immunize an attorney's performance from sixth amendment challenges.").

In *State v. Hayden*, 268 S.C. 214, 219, 232 S.E.2d 889, 891 (1977), this Court held:

> Before a physical object connected with the commission of a crime may be properly admitted into evidence there must be a showing that such object is in substantially the same condition as when the crime was committed. This determination is to be made by the trial judge. Factors to be considered in making this determination include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.

(quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir. 1960) (internal quotations omitted); *See Sikes v. State*, 323 S.C. 28, 32, 448 S.E.2d 560, 563 (1994) ("Because counsel's failure to

motion to suppress evidence was based on the fact that he thought the officers' action were justified, we find counsel's decision fell below an objective standard of reasonableness"); *see also Martin v. Maxey*, 98 F.3d 844 (5th Cir. 1996) (Failure to file a motion to suppress could be grounds for ineffectiveness claim).

In *Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008), this Court found that it "was not objectively reasonable given the defense theory of the case" for trial counsel not to call witnesses who would have "added significantly to the credibility of petitioner's case". *See Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had trial counsel introduced relevant and favorable evidence at trial); *But cf. Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992) (finding trial counsel's decision not to call witnesses reasonable where their testimony would have been of no value to the case and had made inconsistent statements in the past).

**Deficient Performance**

In this case, Trial Counsel provided deficient performance, as it fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. First, Trial Counsel failed to properly raise all necessary objections against the admission of the belt (e.g., Rule 403, SCRE) and failed to raise continuous, contemporaneous objections to this evidence throughout the trial. App. 517, l. 16 – 518, l. 4; App. 875, ll. 1-6; 882, ll. 14-22. The belt was found during a second search of the home after a burglary had occurred, the seven-year-old K.P. did not initially identify the belt, and the belt was the only physical evidence allegedly linking Petitioner to the crime. App. 591, l. 14 – 592, l. 14; App. 612, l. 9 – 613, l. 11; *See Hayden*, 268 S.C. 214, 219, 232 S.E.2d 889, 891 (finding "[b]efore a physical object connected with the commission of a crime may be properly

admitted into evidence there must be a showing that such object is in substantially the same condition as when the crime was committed.").

Notably, the Trial Court had to interject when Trial Counsel also failed to object when Dr. Atwood showed a picture of the deceased Child's injuries to the jury (attempting to link the belt as the cause of the bruises) and began a dialogue with a juror. App. 669, l. 13 – 671, l. 9. It is also objectively unreasonable for Trial Counsel to have no theme or theory for defending Petitioner, and ultimately placing the decision not to present a defense on Petitioner. App. 876, 1. 25 – 877, l. 2; *See Roseboro v. State*, 317 S.C. at 294, 454 S.E.2d at 313. Petitioner was fifteen-years-old at the time of his arrest and sixteen-years-old at the time of trial. Other than the decision whether to testify, Trial Counsel had a duty to determine whether to present a defense, not Petitioner.

Trial Counsel admitted that the testimony of Petitioner's Aunt, Nancy Ingram, at the waiver hearing was favorable. App. 316. l. 18 – 320 l. 25; App. 885, ll. 20-22; App. 887, ll. 8-11; *See Lounds*, 380 S.C. at 462, 670 S.E.2d at 650 (finding it "was not objectively reasonable given the defense theory of the case" for trial counsel not to call witnesses who would have "added significantly to the credibility of petitioner's case"). Consequently, it is objectively unreasonable not to call character witnesses on Petitioner's behalf when no other defense was presented to the jury. *See Hicks*, 314 S.C. 280, 443 S.E.2d 907 (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

Despite that Trial Counsel reiterated numerous times that this was a circumstantial evidence case, she failed to ask the jury during her opening statement and closing argument to find Petitioner "not guilty" and instead asked the jury "to return a verdict that speaks the truth." App. 477, l. 17 – 479, l. 24; App. 874, ll. 13-19. *See State v. Beaty*, Opinion No. 27795 (S.C.

Sup. Ct. filed on April 25, 2018) (instructing trial judges to refrain from informing the jury "that its role is to search for the truth, or to find the true facts, or to render a just verdict."); *see also State v. Daniels*, 401 S.C. 251, 737 S.E.2d 473 (2012) (instructing discontinuance of charge that jury's duty is to return a verdict that is just and fair to all parties).

Therefore, the PCR court erred in finding that trial counsel provided effective assistance of counsel because trial counsel's performance was not reasonable "under prevailing professional norms." App. 1007; 1008; 1042; *See Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. 115, 386 S.E.2d 624.

**Prejudice**

Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Specifically, Trial Counsel failed to preserve for direct appellate review all arguments regarding the admissibility of the belt, present favorable character evidence, and ask the jury to find Petitioner not guilty. Trial Counsel's decision to ask the jury to "return a verdict that speaks the truth" further enhanced the prejudiced and highlighted the unreasonableness of Counsel's actions. Therefore, the PCR court erred in finding trial counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 1007; 1008; 1042; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See Strickland*, 466 U.S. 668.

**[Remainder of Page Intentionally Left Blank]**

## III. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO SUBJECT THE PROSECUTION'S CASE TO MEANINGFUL ADVERSARIAL TESTING.

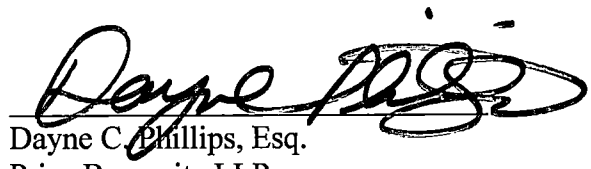
The Supreme Court of the United States has held that "prejudice is presumed" when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984); *See Nance v. Ozmint*, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that "per-se prejudice occurs if there has been a constructive denial of counsel," which arises when defense counsel's deficient performance constitutes "a classic example of a complete breakdown in the adversarial process"); *see also Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an applicant "must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary").

In this case, trial counsel "abandoned [her] role as defense counsel" and "failed to act as an adversary to the prosecution" because trial counsel failed to conduct a reasonable investigation, retain an independent expert witness to review critical evidence, interview potential witnesses prior to trial, object to prejudicial evidence, call favorable character witnesses on Petitioner's behalf, ask the jury to find Petitioner "not guilty", and further erred by asking the jury to return a verdict that speaks the truth. *See Cronic*, 466 U.S. at 659; *Nance*, 367 S.C. at 557-58, 626 S.E.2d at 883; *See Jones v. Barnes*, 463 U.S. 745, 758 (1983) (holding that to satisfy the Constitution, defense counsel must function as an advocate for the defendant, as opposed to a friend of the court). Therefore, the PCR court erred in finding Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." App. 1038 – 1039; *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625; *See Strickland*, 466 U.S. 668.

## CONCLUSION

Based on the foregoing reasons, Petitioner Jermaine Mayweathers respectfully requests that this Court grant the Petition for Writ of Certiorari to allow full briefing on the issues presented.

Respectfully submitted,



Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234
Attorney for Petitioner

June 20, 2018

6/20/18

THE STATE OF SOUTH CAROLINA
In the Supreme Court

---

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

RECEIVED
JUN 20 2018
S.C. SUPREME COURT

Ralph K. Anderson, III, Special Circuit Court Judge

---

Appellate Case No. 2017-002102

---

Jermaine Mayweathers, Petitioner,

v.

State of South Carolina, Respondent.

---

**CERTIFICATE OF SERVICE**

---

The undersigned Counsel certifies that a true copy of the Petition for Writ of Certiorari, Petition for Writ of Certiorari Pursuant to *Austin v. State,* and Appendix (Volumes I and II) in this appeal have been served on Respondent, Assistant Attorney General Lindsey A. McCallister, at 1000 Assembly Street, Room 519, Columbia, SC 29201, on this 20th Day of June 2018.

KENNETH WHITMIRE NOTARY PUBLIC SOUTH CAROLINA

Dayne C. Phillips, Esq.
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, SC 29201
(803) 807-0234
Attorney for Petitioner

June 20, 2018

SWORN TO BEFORE ME this Twentieth Day of June 2018

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: My Commission Expires June 12, 2027.