STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-002529

ERIC WRIGHT, Petitioner,

vs.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENT'S ISSUE PRESENTED

Did the PCR court properly find Petitioner failed to satisfy his burden of proving ineffective assistance of counsel where the testimony at issue was not hearsay but rather a mere colloquialism by the eyewitness explaining how she came to know Petitioner as "Bo," and where, as the Court of Appeals already observed, there was no prejudice from this cumulative testimony in light of the trial court's curative instruction and where the testimony at issue was not consequential given the other proper identifications of Petitioner as the shooter?

STATEMENT OF THE CASE

Procedural History

In July 2009, the Beaufort County Grand Jury indicted Petitioner for assault and battery with intent to kill ("ABWIK") (2009-GS-07-1405) and possession of a weapon during a violent crime (2009-GS-07-1406). On October 24, 2011, Petitioner proceeded to a jury trial before the Honorable Carmen T. Mullen. Ian C. Deysach, Esquire ("Trial Counsel") and Gene G. Hood, Esquire, represented Petitioner at trial. Assistant Solicitors Dawn S. Burke and James J. Bannon prosecuted the case. Petitioner was found guilty as indicted. On October 27, 2011, Judge Mullen sentenced Petitioner to imprisonment for eighteen years for ABWIK and five years for possession of a weapon during the commission of a violent crime, to be served concurrently.

Petitioner filed a timely notice of appeal. Appellate Defender David Alexander perfected the appeal on behalf of Petitioner. On appeal, Petitioner argued the trial court erred by denying his motion for a mistrial after the State introduced what Petitioner alleges to be hearsay testimony identifying Petitioner as the suspect when the testimony had been ruled inadmissible prior to trial. Petitioner also raised two issues on appeal relating to the jury. On March 5, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Wright, Op. No. 2014-UP-091 (Ct. App. 2014). On March 14, 2014, Petitioner petitioned for rehearing. The South Carolina Court of Appeals denied the petition for rehearing on April 11, 2014. Petitioner subsequently filed a petition for writ of certiorari on July 11, 2014, raising the same arguments he raised to the Court of Appeals. On November 20, 2014, the South Carolina Supreme Court denied certiorari. The remittitur was returned on June 2, 2015.

On August 17, 2015, Petitioner filed an application for post-conviction relief. An evidentiary hearing into the matter was convened on October 12, 2017, before the Honorable

Thomas A. Russo. Petitioner was present at the hearing and represented by James K. Falk, Esquire ("PCR Counsel"). Assistant Attorney General Ruston W. Neely represented the State. At the conclusion of the hearing, Judge Russo denied and dismissed the application with prejudice and subsequently issued an order of dismissal filed December 6, 2017.

Petitioner filed a timely notice of appeal on December 11, 2017. Petitioner then filed a petition for writ of certiorari on July 2, 2018. This return follows.

STATEMENT OF THE FACTS

Petitioner's charges arose from a July 28, 2008, incident in which Petitioner fired two shots at Troy Jinks ("Victim"), striking Victim once through both of his legs. App. p. 156, l. 16; p. 214, l. 13; p. 261, l. 15; p. 328, ll. 1-13.

Testimony and evidence presented at trial revealed Victim was visiting family in the Pinckney Hill area of Beaufort County on the day of the incident. App. p. 206, ll. 13-23. Victim was on foot when he was approached by a burgundy vehicle containing four individuals. App. p. 154, l. 24 – p. 155, l. 4; p. 207, l. 1. First, the vehicle approached, and an argument ensued between Victim and the vehicle's driver, Monique Johnson. App. p. 148, l. 21 – p. 149, l. 1; p. 207, ll. 1-18; p. 322, l. 18. The vehicle then pulled away only to return shortly thereafter. App. p. 207, l. 7; p. 210, l. 5; p. 324, ll. 7-25. When the vehicle returned, Petitioner exited the vehicle, shouted at Victim, and fired the two shots, striking Petitioner once through both his legs. App. p. 149, ll. 2-7; p. 207, l. 8; p. 222, l. 18; p. 316, ll. 6-10; p. 328, l. 12. Two 9mm shell casings were found at the location of the incident. App. p. 306, l. 7. It was deduced these were fired by the same handgun. App. p. 306, l. 15. There was no testimony that Victim was at any time violent or threatening, nor was there any testimony he was armed. In fact, testimony indicated Victim was unarmed, and gunshot residue testing performed on Victim about two and a half hours after the

shooting revealed no gunshot residue on Victim. App. p. 292, l. 11; p. 333, l. 22 – p. 334, l. 6; p. 388, ll. 2-4.

Victim already knew Petitioner and two of the other occupants of the vehicle personally before the incident. Victim had known passenger Octavia Scott ("Octavia") since middle school, and Victim knew Petitioner because Petitioner was Octavia's boyfriend. App. p. 218, l. 8; p. 219, ll. 1-14; p. 248, l. 25 – p. 249, l. 3; p. 317, l. 18. At the hospital, Victim informed Detective Heany that "Bo" shot him and identified Petitioner as the shooter when presented with a photo lineup. App. p. 222, l. 18 – p. 223, l. 10. Victim referred to Petitioner as both "Eric" and his middle name "Bo" in various instances. App. p. 210, l. 17; p. 216, ll. 16-23. In court, Victim pointed out "Eric" as the man who shot him. App. p. 216, l. 16. Victim further asserted there was no doubt in his mind Petitioner shot him. App. p. 250, l. 10. Furthermore, when Octavia was asked to identify the shooter in court, she testified, "Bo. Bo Wright," and pointed to Petitioner. App. p. 316, ll. 6-14. Another witness, Alexus Green ("Green"), testified she saw Bo get out of the car and shoot twice.[1] App. p. 149, ll. 1-7. When asked whether she knew the name of the person she saw shoot Victim, Green testified, "I don't know his real name, but I know they call him Bo." App. p. 158, l. 25 – p. 159, l. 3.

Trial Counsel moved pretrial to prohibit what he argued to be hearsay testimony from possible witnesses to the shooting that they "don't know the guy, but they call him Bo," Petitioner's middle name. App. pp. 92-93. Trial Counsel clarified his argument:

> And I want to make sure my position is put on the record is clear, to say I don't know who the guy is, but they call him Bo is inadmissible, to say I don't know who the guy is, but they call him Bo is inadmissible hearsay... App. p. 93, ll. 5-7.

The trial judge subsequently ruled:

[1] At the PCR hearing, there was a comment that Green was eleven years old when she testified. This was incorrect, as Green was eighteen years old when she testified, approximately three years after the incident. App. p. 147, l. 15.

> I would agree that's hearsay other than if they actually with their own eyes saw it, if they were a witness standing there, they can identify him by his picture, let alone – even though by the name – I understand what you're saying. That could be two different things, I don't know him but they call him Bo. I don't know if the question was asked – even though you may not personally know him, have you seen him around and do you know that by his reputation, that that is him and that is Bo. App. p. 93, ll. 12-21.
>
> If they can ID him at the scene, and I don't know where these people were, then they can ID him through his photograph, they can ID him and say this is him. I would agree that if they don't know his name is Bo and they can't look at him and say, that's Bo, by their acknowledgement, they can't say it. App. p. 93, l. 22 – p. 94, l. 2.

As observed by the PCR court, the trial court's ruling seemed to merely require that witnesses only testify from personal knowledge, which is always the requirement. Respondent submits it does not appear the trial judge ruled that a person testifying that he or she knows someone by their nickname instead of their real name was impermissible.

At trial, Green, an eyewitness to the shooting, testified she saw Bo exit the vehicle and shoot twice at Victim, striking Victim once in the leg. App. 149, ll. 1-7. Green's testimony was replayed for the jury pursuant to their request after the close of the case, with, according to Trial Counsel, the objection and curative instruction also being replayed. App. p. 695, l. 2. Green was also able to see there were four people in the vehicle, name two of them, and saw the vehicle's license plate. App. pp. 149-155. Green was asked by the Solicitor if she knew "the name" of the shooter, to which she replied, "I don't know his real name, but I know they call him Bo." App. p. 158, l. 25 – p. 159, l. 3. At that point, Trial Counsel objected and explained, "That's the hearsay that came out." App. p. 159, l. 4. The trial judge sustained the objection and explained:

> Your objection is sustained. Ma'am, you can only say what you do know, what you know by your own independent knowledge. App. p. 159, ll. 6-9.

The trial judge also issued a curative instruction for the jury:

> Ladies and gentlemen, that last question you are to strike and also her answer wasn't appropriate. She can only testify as to what she knows. App. p. 159, ll. 9-12.

At that point, Trial Counsel objected, a bench conference was held, and Trial Counsel announced he had a motion to make at a later time. App. p. 159. Trial Counsel later moved for a mistrial, arguing "they call him Bo" was not appropriate testimony and a curative instruction was not sufficient. App. p. 167, l. 5 – p. 168, l. 17. The Solicitor noted this could have been "flushed out" further on cross-examination had Green been given the opportunity to further explain what she meant. App. p. 169, ll. 5-13. The trial judge denied the motion for a mistrial and ruled:

> I gave the jury its instruction. I told the jury to disregard the question and the answer if there was any prejudice – I don't believe there was. If there was, it was cured. Let's move on. App. p. 170, ll. 8-12.

Of course, Victim as well as Petitioner's then-girlfriend, who both personally knew Petitioner, also identified Petitioner "Bo" Wright as the shooter. App. p. 216, l. 23; p. 316, l. 10.

RELEVANT PCR HEARING PROCEEDINGS

At the PCR hearing convened on October 12, 2017, the court heard testimony from Petitioner and Trial Counsel. The court found Trial Counsel's testimony to be credible and Petitioner's testimony to lack credibility.

Petitioner

At the PCR hearing, Petitioner testified he spoke with Trial Counsel two or three times prior to trial. App. p. 700, l. 16. Petitioner testified he told Trial Counsel he was not present during the shooting. App. p. 701, l. 9. As to Green's testimony being replayed pursuant to the jury's request, Petitioner testified the replay only featured Green's testimony and not Trial

Counsel's objection and the trial judge's curative instruction. App. p. 701, l. 20 – p. 702, l. 2. Petitioner denied going by the nickname "Bo." App. p. 702, l. 12.

Trial Counsel

In contrast to Petitioner's testimony that he did not go by "Bo," Trial Counsel testified Petitioner was referred to as "Bo," and acknowledged "Bo" was also part of Petitioner's full name as listed on the indictments. App. p. 689, ll. 9-13. Trial Counsel recounted his objection to Green's testimony as well as his motion for a mistrial. App. p. 690, l. 23; p. 691, l. 4. Trial Counsel did consider Green's testimony to be harmful to the defense and felt it was inadmissible hearsay, which is why he objected. App. p. 692, ll. 19-23. Trial Counsel testified the judge agreed it was hearsay. App. p. 692, l. 22.

Trial Counsel acknowledged he did not object or do anything to keep the alleged hearsay statement from being excluded when Green's testimony was replayed for the jury. App. p. 691, ll. 8-15. However, in contrast to Petitioner's testimony that only Green's testimony was replayed, it was Trial Counsel's recollection that Green's testimony as well as the objection and curative instruction were replayed for the jury. App. p. 694, l. 24 – p. 695, l. 3.

PCR Court Ruling

After hearing all the testimony and arguments from each side, the PCR judge ruled from the bench he agreed with the State that the testimony by Green was actually not hearsay because (1) it was not being offered to prove the truth of the matter asserted, and (2) Green was merely testifying she has personally heard his name to be Bo and not that was his actual name. App. p. 713, l. 25 – p. 714, l. 5. The PCR judge also noted that had Trial Counsel further explored this issue for clarification on cross-examination and observed, "if you don't know the answer to that

question and you go to explore it, you could very well shove a knife right in your client's back." App. p. 717, ll. 2-5.

The PCR judge also observed the replay of Green's testimony for the jury would have included the curative instruction, and therefore would also have been cured, and found regardless, the testimony from Green would not have affected the outcome of the trial even without a curative instruction. App. p. 718, ll. 2-24.

STANDARD OF REVIEW

This Court gives great deference to the PCR court's findings of fact and will uphold them if there is evidence in the record to support them. Smalls v. State, 422 S.C. 174, 179, 810 S.E.2d 836 (2018). Pure questions of law are reviewed de novo and will reverse the PCR court decision only if its decision is controlled by an error of law. Id.; Frierson v. State, 423 S.C. 257, 262, 815 S.E.2d 433 (2018). The standard of review set forth by the Supreme Court of South Carolina is that "any evidence" of probative value to support the PCR court's findings is sufficient to uphold those findings on appeal. Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839 (1984).

In a PCR action, the applicant bears the burden of proving the allegations in his application. Rule 71.1I, SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove that counsel's performance was deficient. Under this prong,

the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). An applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. At 117-18, 386 S.E.2d at 625.

ARGUMENT

The PCR court properly found Petitioner failed to satisfy his burden of proving ineffective assistance of counsel where the testimony at issue was not hearsay but rather a mere colloquialism by the eyewitness explaining how she came to know Petitioner as "Bo," and where, as the Court of Appeals already observed, there was no prejudice from this cumulative testimony in light of the trial court's curative instruction and where the testimony at issue was not consequential given the other proper identifications of Petitioner as the shooter

Petitioner argues Trial Counsel was ineffective for failing to timely object to Green's testimony that "Bo" was the shooter, as Petitioner alleges Green did not know Petitioner as "Bo" and had only heard others say "Bo" was the name of the man who shot Victim, rendering her testimony naming "Bo" as the shooter inadmissible hearsay. However, there is ample probative evidence throughout the record, including the trial testimony and the Court of Appeals opinion from Petitioner's direct appeal, that not only was the testimony not hearsay, but the outcome of the proceedings would not have been different had Trial Counsel timely objected to Green's

statement. The testimony was merely cumulative to testimony from the witnesses who actually knew Petitioner as Bo. Therefore, the PCR court correctly found Petitioner failed to carry his burden of proving Counsel was deficient or that he was prejudiced by any alleged deficiency, and certiorari should be denied.

i. The testimony at issue was not hearsay.

The PCR court properly found Green's testimony, "I don't know his real name, but I know they call him 'Bo,'" was not inadmissible hearsay to because it was based on Green's personal knowledge and not offered to prove the truth of the matter asserted. When Petitioner appealed from his conviction and argued the trial court erred in not granting a mistrial based on the testimony, even the South Carolina Court of Appeals found:

> We are not convinced this testimony at issue was inadmissible hearsay. The context in which [Green] testified, "I don't know his real name, but I know they call him Bo" is unclear. Although the trial court initially agreed with defense counsel's characterization of such testimony as hearsay, it underpinned that ruling based on a foundation issue, i.e., whether the witness had an independent knowledge that the person was known as "Bo." Here, how [Green] came to understand the shooter's name was "Bo" was never explored at trial. App. p. 608.

Respondent observes Petitioner is now alleging Trial Counsel was ineffective for not objecting to the statement "Bo got out the car ... He pointed the gun at [Victim] and show twice." This is presumably because the record reflects Trial Counsel indeed objected to the statement, "I don't know his real name, I know they call him Bo," and subsequently moved for a mistrial. Now, Petitioner alleges Trial Counsel was ineffective for not also objecting to the statement "Bo got out the car ... He pointed the gun at [Victim] and show twice," on the basis that Green's knowledge of Bo as the shooter ("I know they call him Bo") came from inadmissible previously alleged hearsay. However, the observation made by the Court of Appeals in regard to the first

statement applies equally well to the testimony now complained about on PCR. Also, there was no exploration at the evidentiary hearing as to how she came to know Petitioner as "Bo." Again, the comment by Green that she did not know Petitioner's *real* name, but knew "they" call him Bo was not demonstrable hearsay, and accordingly neither was her comment about "Bo" firing two shots at Victim.

"Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. Green's testimony, "I don't know his real name, but they call him Bo," was not entered to prove the truth of the matter asserted. The statement was not entered to prove that "they" or anyone at the scene of the incident called the shooter "Bo." This was merely another way of saying she did not know Petitioner's real name, but knew him as his nickname or middle name, "Bo." The excerpt, "They call him" was a mere colloquialism, and the statement was not entered to prove "*they*" or anyone else actually identified the shooter as "Bo," but rather another way of saying Petitioner goes by "Bo," and therefore Green knew him as Bo. Despite Petitioner's testimony at the PCR hearing that he did not go by "Bo," Trial Counsel, whose testimony was found to be credible, testified Petitioner did go as "Bo." App. p. 689, l. 18. Additionally, other witnesses called him Bo at trial. This did not constitute hearsay, and the strained argument that the statement, "Bo got out the car ... He pointed the gun at [Victim] and show twice," also constituted hearsay as a product of the other statement is without merit. Green testified to this information based on her personal knowledge. She was an eyewitness to the incident, was able to see the number of people in the car, identify Monique and Octavia, hear the yelling between Victim and Petitioner, and see the license plate of the vehicle. App. pp. 149-156. Her personal perception of Petitioner firing two shots at Victim was not predicated on hearsay, nor was her

recollection of her perception hearsay. The use of "Bo" to describe her observations was appropriate.

The Supreme Court of Rhode Island addressed a similar situation in which two individuals testified to the nickname used by a defendant. The court found:

> However, a multitude of courts have held that evidence about a person's nickname, in this context, does not constitute hearsay because the use of such a name does not rise to the level of an assertion. See United States v. Allen, 960 F.2d 1055, 1059 (C.A.D.C.1992) ("One virtually always learns a name—even one's own—by being told what it is. * * * Nevertheless, evidence as to names is commonly regarded as either not hearsay because it is not introduced to prove the truth of the matter asserted, * * * or so imbued with reliability because of the name's common usage as to make any objection frivolous."); United States v. Weeks, 919 F.2d 248, 251 (5th Cir.1990) (holding that a prison warden's testimony that guards and inmates used a nickname to refer to the defendant was merely a report of "non-assertive oral conduct and was therefore not hearsay"); Commonwealth v. Gabbidon, 398 Mass. 1, 494 N.E.2d 1317, 1320 (1986) (determining that witness's testimony about observing others call the defendant several nicknames did not constitute hearsay because it "was not admitted for the truth of any fact asserted outside of court"). We are persuaded by the logic of these holdings and concur with it.

State v. Johnson, 13 A.3d 1064, 1066 (R.I. 2011) (emphasis added).

Likewise, in this case Green's statement was made merely for the purpose of explaining she did not know Petitioner's real name but knew him as "Bo," because that was his nickname. Furthermore, Green's eyewitness testimony that Petitioner exited the vehicle and shot twice at Victim, which was corroborated by the other two eyewitnesses who testified at trial, was based on her personal perception of the events and in no way constituted inadmissible hearsay. Trial Counsel was not deficient for failing to object to a statement which did not constitute inadmissible hearsay. Therefore, the PCR court properly found Petitioner failed to satisfy his burden of proving ineffective assistance of counsel, and certiorari should be denied.

ii. The trial judge's curative instruction cured any imaginable prejudice from Green's allegedly improper testimony.

Notwithstanding the fact Green's testimony was admissible and did not constitute hearsay, any conceivable prejudice from the testimony at issue was cured by the trial judge's curative instruction, "Ladies and gentlemen, that last question you are to strike and also that answer wasn't appropriate. She can only testify as to what she knows." App. p. 159, ll. 6-12. A curative instruction to disregard the testimony is usually deemed to have cured any alleged error. See State v. Herring, 387 S.C. 201, 692 S.E.2d 490, 498 (2009). Assuming for the sake of argument the testimony, "I don't know his real name, but I know they call him Bo," was inadmissible hearsay, Trial Counsel contemporaneously objected and received an immediate curative instruction, which cured any potential prejudice.

At the PCR hearing, Petitioner testified Green's testimony, without objection, was replayed for the jury without the recorded objection and the curative instruction. App. p. 700, l. 20 – p. 701, l. 2. By contrast, Trial Counsel's recollection was the testimony as well as the objection and curative instruction were replayed for the jury. App. p. 694, l. 24 – p. 695, l. 3. The PCR court found Trial Counsel's testimony to be credible and Petitioner's testimony to lack credibility. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993). Therefore, as the PCR court and the Court of Appeals have properly observed, any imaginable prejudice from the comment "I don't know his real name, but I know they call him Bo," was cured by the trial court's curative instruction, and the curative effect was repeated when Green's testimony was replayed for the jury.

The trial judge's instruction, "She can only testify as to what she knows," supports the

Court of Appeals' assessment that the trial court underpinned the ruling as a matter of independent knowledge rather than hearsay. Regardless, the record reveals Green had ample independent knowledge to support her testimony that "Bo" exited the vehicle and fired two shots at Victim, striking him once. Green was an eyewitness to the incident. Green was able to personally see the argument between Petitioner and Victim, the vehicle's license plate, the passengers in the car, and where Victim had been shot. App. p. 148, l. 21 – p. 149, l. 7. Clearly, Green was in a position to testify to her observation accordingly.

Therefore, the curative instruction by the trial judge not only cured any conceivable prejudice from the alleged hearsay testimony, but also evidences the nature of ruling the testimony inadmissible at that time was based on a lack of independent knowledge of the witness rather than hearsay. Notwithstanding, as Green's testimony actually did not constitute hearsay and the testimony was based on her perception of events, the testimony as not improper and Petitioner cannot establish prejudice therefrom. Accordingly, the PCR court properly denied relief and certiorari should be denied.

iii. Petitioner was not prejudiced by the testimony at issue as Green's statements were not consequential in light of additional proper identifications of Petitioner as the shooter.

As the PCR court properly found, Petitioner has failed to satisfy his burden of proving he was prejudiced by the alleged improper testimony. Notwithstanding the fact the statements at issue did not constitute inadmissible hearsay, the testimony from Green was merely cumulative to proper identifications of Petitioner as the shooter. He was identified by both Victim and Octavia, Petitioner's girlfriend. The admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence. See State v. Herring, 387 S.C. 201, 692 S.E.2d 490, 498 (2009).

Victim identified Petitioner at various times referring to him as "Eric" or "Bo," from the very first time he spoke with law enforcement at the hospital. App. p. 222, ll. 10-18; p. 384, ll. 12-17. Victim also identified Petitioner as the shooter in court. App. p. 216, ll. 7-23. Furthermore, Victim identified Petitioner as the shooter in a photo lineup provided to him at the hospital and indicated he was "200 percent sure" of his choice. App. p. 66, ll. 13-23; p. 223, l. 3; p. 402, l. 1.

Octavia, who knew Petitioner for having been his girlfriend or partner for over three years and was in the vehicle with Petitioner, also identified Petitioner as the shooter. App. p. 316, ll. 6-10; p. 317, ll. 15-25. Octavia also pointed out Petitioner as the shooter in court. App. p. 316, l. 12. She, like Victim, referred to Petitioner as both Eric Wright and Bo. App. p. 317, ll. 6-14. While Petitioner has noted in his petition for writ of certiorari that Octavia had changed her original story to law enforcement, she was always consistent in her identification of Petitioner as the person who shot Victim. App. p. 317, ll. 1-5.

Green's testimony she saw Bo exit the vehicle and fire two shots was no substantively different than the testimony from Victim and Octavia where they also referred to Petitioner as Bo. Green witnessed the same event as Octavia and Victim, saw four occupants in the vehicle, was able to identify Monique and Octavia as two other occupants of the vehicle, and was able to see where Petitioner was shot. App. p. 148, l. 21 – p. 149, l. 10; 155, ll. 1-19. The same information was elicited from both Octavia and Victim at trial, including the fact that Petitioner went by "Bo." Therefore, Green's testimony at issue was merely cumulative to the testimony from Victim and Octavia and was not prejudicial.

Respectfully, Petitioner's reliance on State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001) to show that this sort of testimony is not harmless is misplaced. In Saltz, this Court addressed the

issue of the admissibility of a prior consistent statement by a witness Sydney Johnston pursuant to Rule 801(d)(1)(B) that the defendant had told them, "I killed Joseph Barefoot," the victim in the case. Id. at 122. The Court found Johnston's testimony was already weak and not very credible, and the prior consistent statement was used as corroborative evidence to improperly rehabilitate and bolster Johnston's testimony. Id. at 124. The present case is not analogous to Saltz as the present case does not involve a prior consistent statement, but rather Green's actual testimony based on her eyewitness perception of the event. Moreover, the alleged hearsay testimony by Green was not used to rehabilitate any witnesses, including Green, and was not offered to bolster anyone's testimony or make reference to anyone else's testimony, or for that matter, out of court statements like the one in Saltz.

Even without the testimony at issue, the jury had ample basis to conclude Petitioner was the shooter based on the valid and consistent in-court identifications of Petitioner as the shooter by both Victim and Octavia as well as Victim's identification of Petitioner as the shooter in the photo lineup. The testimony from the witnesses that Petitioner was the individual who fired two shots at Victim was corroborated by the two shell casings found at the scene which were fired by the same gun. Accordingly, notwithstanding the aforementioned admissibility of the testimony at issue, the jury would have heard the same information from multiple eyewitnesses and, as the PCR court properly observed, there is no reasonable probability the result of the proceedings would have been different had the jury not heard the testimony at issue. Green's testimony that she did not know the shooter's real name but knew they called him Bo was harmless and non-prejudicial. There is ample probative evidence to support the PCR court's finding that Petitioner has not met his burden of proving ineffective assistance of counsel, and therefore certiorari should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's petition for writ of certiorari. However, if this Court grants certiorari, Respondent respectfully requests the opportunity to more fully brief the issues discussed herein.

Respectfully submitted,

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11/16, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO BEAUFORT COUNTY
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Appellate Case No. 2017-002529

RECEIVED
NOV 16 2018
S.C. SUPREME COURT

ERIC WRIGHT, Petitioner,

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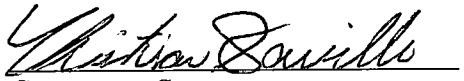
PROOF OF SERVICE

I, Christian Saville, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Joanna K. Delany
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 16 day of November, 2018.



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RECEIVED
NOV 16 2018
S.C. SUPREME COURT

November 16, 2018

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

Re: **Eric Wright v. State of South Carolina**
Appellate Case No. 2017-002529
Lower Court Case No. 2015-CP-07-1982

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Christian Saville
Assistant Attorney General
SC Bar No. 103272

JHG/cc
Enclosures

cc: Joanna K. Delany, Esquire (2 copies)