STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, PCR Circuit Court Judge
The Honorable Doyet Early, III, 2005 Trial Judge



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Appellate Case No. 2016-000262

DAVID DWIGHT SMITH, ..... Petitioner,

v.

STATE OF SOUTH CAROLINA, ..... Respondent.

# BRIEF OF RESPONDENT ON WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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II. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to present Morgan Simmons Ortez as a witness where her testimony was necessary to establish that the Decedent told her that he had tried to rob another drug dealer earlier on the same evening that he died?

## RESPONDENT'S ISSUES PRESENTED

I. Did Petitioner failed to satisfy his burden of proving counsel was ineffective for withdrawing his objection in the 2005 trial to the admission of Otis Hyder Sr.'s former testimony given in Petitioner's first trial in 1997 where Petitioner failed to show that the witness was available to testify under Rule 804 when he was asserted to be "homebound" and "not well" [rather than dead] and that the prior testimony evidence was admissible under Rule 804(b)(1) and therefore "unable to be present or to testify because of ....then existing physical or mental illness or infirmity" ?

II. Whether Petitioner failed to meet his burden of proof that Counsel was ineffective for not presenting the victim's grieving girlfriend, Morgan Simmons Ortez, as a defense witness to state that the victim had told her earlier that day that he had tried to rob a drug dealer earlier that day who was not the Petitioner when her testimony at the original trial as a state witness undermined the defense theory of the case by showing that the victim did owe a debt to Petitioner and that Petitioner had visited Ms. Ortez in an earlier attempt to collect the debt?

## RESPONDENT'S STATEMENT OF THE CASE

### First Trial in 1997

David Dwight Smith ("Petitioner") is incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. He was indicted at the April 1997 term of the Spartanburg County Grand Jury for murder and possession

of a weapon during the commission of a violent crime (97-GS-42-1639, counts 1 and 2). Petitioner was first tried on these charges in 1997 before the Honorable J. Derham Cole and a jury. T. Louis Cox, Esquire, represented him at that trial. On December 4, 1997, the jury found him guilty of both charges as indicted. Judge Cole sentenced him to imprisonment for concurrent terms of thirty-five years for murder and five years for possession of weapon during the commission of a violent crime.

**First Direct Appeal**

Petitioner appealed his conviction to the South Carolina Supreme Court. The court dismissed the appeal in an Order dated December 2, 1999 and denied the Applicant's Petition for Rehearing in an Order dated April 6, 2000.

**First Post-conviction Relief Proceeding**

Petitioner then filed an application for post-conviction relief ("PCR") on June 7, 2000. An evidentiary hearing was held before the Honorable Donald W. Beatty on November 6, 2002, and January 27, 2003, at the Spartanburg County Courthouse. E. P. "Bill" Godfrey, Esquire represented Petitioner and Douglas E. Leadbitter of the South Carolina Attorney General's Office represented Respondent. Then Circuit Judge, Chief Justice Beatty granted relief by written Order dated May 23, 2003. Respondent filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, which was denied on December 1, 2004. The Remittitur was returned on December 17, 2004.

**Second Trial after Grant of Post-Conviction Relief**

Petitioner then proceeded to trial for a second time on these charges. E. P. "Bill" Godfrey, Esquire ("Counsel"), represented him at his second trial. On November 1, 2005, the jury found Petitioner guilty as indicted. The Honorable Doyet A. Early III sentenced Petitioner

to concurrent terms of thirty-five years for murder and five years for possession of a weapon during the commission of a violent crime.

**Second Direct Appeal**

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. The South Carolina Court of Appeals reversed Petitioner's conviction and sentence and remanded the case for a new trial. State v. Smith, Op. No. 2008-UP-194 (filed March 20, 2008). Respondent filed a Petition for Rehearing and a Petition for Rehearing En Banc, both of which were subsequently denied on May 27, 2008.

Respondent then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court. The Court granted certiorari, reversed the decision of the Court of Appeals and reinstated the Petitioner's convictions and sentence. State v. Smith, Op. No. 26926 (filed February 7, 2011). The Remittitur was returned on February 24, 2011.

**Current PCR Proceedings**

Thereafter, Petitioner filed an application for PCR on March 17, 2011, amended application of March 18, 2015, and a superseding amended application on June 11, 2015, challenging his second conviction. A hearing into the matter was convened on June 11, 2015, before the Honorable R. Scott Sprouse. Judge Sprouse issued an order dismissing Petitioner's PCR application signed December 10, 2015, and filed December 14, 2015. Petitioner filed a Motion to Alter or Amend pursuant to Rule 59(e), SCRCP, on January 4, 2016. By written order signed January 11, 2016, and filed January 13, 2016, Judge Sprouse denied the motion.

**Certiorari**

Petitioner then filed a timely Notice of Appeal. On October 26, 2016, the Petitioner, though Appellate Defender Laura R. Baer, made a petition for writ of certiorari in the South

Carolina Supreme Court. In the petition, Smith raised the following issues:

> I. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel withdrew the objection to the solicitor's admission of witness Otis Hyder, Sr.'s testimony from Petitioner' first trial in 1997, even though (1) Hyder was not unavailable as required by Rule 804 (a)(4), SCRE, and (2) Hyder was never cross-examined at the first trial regarding notes from an investigator that Hyder indicated that the Decedent had reached for Petitioner to take drugs from him?
>
> II. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to present Morgan Simmons Ortez as a witness where her testimony was necessary to establish that the Decedent told her that he had tried to rob another drug dealer earlier on the same evening that he died?
>
> III. Whether the PCR court erred in finding that trial counsel rendered effective assistance of counsel where trial counsel failed to cross-examine Angie Smith regarding whether she had been rewarded for her cooperation with the prosecution by not being charged with any criminal offenses for her role in the incident?

Petition, p. 1. The Respondent, through Assistant Attorney General Alisha A. Olive, made a Return to the petition on March 20, 2017. On October 30, 2017, this case was transferred to the Court of Appeals pursuant to Rule 243(1), SCACR. On August 13, 2018, the Court of Appeals filed an order granting certiorari as to questions one and two and ordering further briefing, and denying certiorari as to question three.

The Brief of Petitioner was filed on October 8, 2019. This Brief of Respondent follows.

## STATE'S VERSION OF THE FACTS

In the earlier opinion by the Supreme Court, it set forth the facts of the incident as follows:

> In the early morning hours of January 12, 1997, Robert Finley (Victim) called Angie Smith's home looking for crack cocaine. Angie contacted David Dwight Smith, a known drug dealer. Angie knew Smith and knew Smith had previously sold crack cocaine to Victim. Victim owed Smith $40 from their most recent drug transaction.

When Smith and Angie arrived at the trailer, Smith sent Angie inside to facilitate the drug deal. Angie returned to the car and informed Smith that Victim wanted to deal directly with Smith. Smith grabbed a gun from under the seat, exited the car, and entered the trailer.

At trial, Angie estimated Smith was inside for approximately two minutes. The trailer door opened, and Angie saw Smith and Victim engaged in a scuffle and "falling out the door." Angie testified she heard a pop and saw Victim's body fall to the ground. Smith then got into the car and told her "you don't know nothing, you don't see nothing," and they drove away.

Smith's testimony regarding the events leading up to his arrival at the trailer mirrored Angie's. Regarding the encounter with Victim inside the trailer, Smith testified as follows: Victim wanted $50 worth of crack cocaine. Smith placed the drugs on the counter for inspection. Victim informed Smith he had no money, but he would pay him the next day. Smith refused to again give Victim drugs on credit. Victim responded that he was taking the drugs anyway and approached Smith with a "real serious demeanor." At this point, Smith pulled his gun and pointed it at Victim, who was unarmed. Victim continued to approach Smith, stating "what are you gonna do, shoot me, give me the gun, I'll shoot myself."

Victim grabbed Smith, trying to knock the gun out of Smith's hand. Smith struck Victim in the face with the gun. As the two men were struggling near the entrance to trailer, the "the gun went off."

State v. Smith, 391 S.C. 408, 411–12, 706 S.E.2d 12, 14 (2011)

## STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

## ARGUMENT

**I. Petitioner failed to satisfy his burden of proving counsel was ineffective for withdrawing his objection in the 2005 trial to the admission of Otis Hyder Sr.'s former testimony given in Petitioner's first trial in 1997 where Petitioner failed to show that the witness was available to testify under Rule 804 when he was asserted to be "homebound" and "not well" [rather than dead] and that the prior testimony evidence was admissible under Rule 804(b)(1) and therefore "unable to be present or to testify because of ...then existing physical or mental illness or infirmity."**

There is a fundamental flaw in the Petitioner's analysis at the outset. He failed to prove that counsel was deficient in 2005 for withdrawing an earlier objection to Otis Hyder Sr. earlier testimony when he learned that Hyder was homebound and not well rather than dead. First, at the PCR hearing, he failed to show that in 2005 Otis Hyder Sr. was not "unavailable" under SCRE Rules 804(a) and 804(b)(1). Throughout the brief, the Petitioner has only assumed that Otis Hyder, Sr. was not "unavailable." However, when the burden of proof was placed upon him at the PCR hearing, the Petitioner never proved that Hyder actually could have testified at the time of the 2005 trial. Smith never met his burden of proof - the condition precedent underlying his claim. Second, his express reliance that counsel Bill Godfrey could not recall the specific reason he withdrew that objection did not satisfy his burden of proof when there is a presumption of effective counsel. This is particularly telling because the PCR testimony on June 11, 2015 was ten years after the October 31, 2015 trial, his file had been destroyed in the interim and counsel acknowledged at the outset that that due to medical treatments he had incurred in the interim he had developed memory problems, not just on this issue but in all matters.

In his brief before this Court, Petitioner argues that Counsel Godfrey was ineffective for withdrawing his prior objection because (1) Hyder was not unavailable to testify at Petitioner's second trial in accordance with Rule 804(a), SCRE, and additionally (2) that Hyder was never specifically cross-examined during Petitioner's first criminal trial about an investigator's notes.

Id. Respondent submits the record contains substantial evidence of probative value to support the PCR judge's finding that Petitioner failed to satisfy his burden of proving this allegation.

Where a PCR applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must show 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." Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Strickland v. Washington, 466 U.S. 668 (1984)). In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). The applicant "must first demonstrate that counsel was deficient and then must also show the deficiency resulted in prejudice." Walker v. State, 407 S.C. 400, 404-05, 756 S.E.2d 144, 146 (2014).

First, the applicant must show that counsel's performance "fell below an objective standard of 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, the applicant must show that 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.

**How the "former testimony" issue was raised below**

Petitioner raised forty-four allegations in his superseding amended application for post-conviction relief. (App. pp. 471-77). Among those, Petitioner asserted several allegations arising from Counsel's conduct with respect to the admission of the former testimony of Otis Hyder, Sr. which was elicited at Petitioner's first trial in 1997. (App. pp. 472-75). Petitioner alleged in his PCR application that Counsel Godfrey was ineffective for withdrawing his objection to the admission of Hyder's testimony at the first trial where Hyder was not cross-examined concerning several matters. (App. p. 472, para. 13).

*How The Issue Was Presented at Trial in 2005*

At trial, Counsel Godfrey raised a challenge to the former testimony of Otis Hyder Sr. at the 2005 trial and couched it as a Crawford[1] issue. Judge Early reviewed defense counsel Cox's 1997 cross-examination of Hyder at the first trial, Hyder's statement (Court Exhibit One), and considered the arguments of Counsel and the State. Judge Early stated that Hyder's statement "pretty much does mirror Court's Exhibit 1." (App. p. 157, lines 9-20). Judge Early further stated he would give counsel the evening to further research the issue but that "unless [they] [came] up with something different, it appears . . . that it falls within all four corners" of Rule 804(b)(1) "provided [the State] satisf[ied] [the Court] that [Hyder] [was] dead." (App. pp. 146-60). The following morning, the solicitor's office brought Hyder's son into the courtroom, and he confirmed Hyder was in fact alive but homebound. (App. p. 160). [2] Counsel informed the Court he had agreed to withdraw his motion. (App. pp. 160-61).

*Counsel Godfrey's PCR testimony*

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[1] Crawford v. Washington, 541 U.S. 36 (2004).

[2] According to Spartanburg County public records, Otis Hyder Sr. died on May 1, 2006. [This fact was not presented at the PCR hearing.

Counsel Bill Godfrey testified at the June 11, 2015 PCR hearing that he initially objected to the introduction of Hyder's testimony under SCRE Rule 804(a)(4), but that he withdrew his objection. (App. p. 505). Counsel testified that both the State and the Petitioner's own investigator told him prior to trial that Hyder was dead. (App. p. 506). When asked whether there was a particular reason he did not object to the testimony coming in, Godfrey testified he did not remember why he withdrew his objection. (App. p. 518, lines 3-15). Counsel testified he did not remember if Hyder "vehemently denied having ever told law enforcement that" Petitioner and the victim had scuffled. (App. p. 508, lines 15-21). Counsel agreed that "Cox did not cross-examine Mr. Hyder's assertion that there had not been a scuffle in his home preceding the shooting based on the crime scene photos that showed part of the doorjamb had been broken off and the shattered pieces were right there," even though he also stated he did not "have any personal knowledge of that now." (App. p. 510).[3]

*The PCR Court's Ruling*

The PCR court found Counsel's decision to withdraw his objection to Hyder's prior testimony to be part of Counsel's trial strategy and within the range or reasonableness for criminal representation. (App. pp. 706-07). In its pertinent part to this issue, the PCR court held:

> **Failure to Advise**
>
> Applicant alleges Counsel was ineffective for failing to advise Applicant against withdrawing his objection to the previous testimony of Hyder. (Application. para. 11). At trial, Counsel told Judge Early that he discussed it with Applicant that morning and had spoken to his family about it the night before. Applicant did not question Counsel about this specifically at the PCR hearing. At the trial, the Court asked Applicant if he had any questions about it and he said no. Applicant testified at the PCR hearing that Counsel did not discuss with him what the State would have to establish to introduce Hyder's testimony.

[3] In the 1997 testimony, Hyder agreed that they were talking about what Finley owed Smith in his home, but told them to go outside, App. 642-643. He said there had been no pushing or shoving up to that point. Id. The incident happened while Finley was standing in the doorway according to Hyder's testimony. App. 646.

> This Court finds Applicant has failed to satisfy his burden of proving either error or prejudice as to this allegation.

App. P. 707-708.

> Applicant alleges Counsel was ineffective for failing to object to the admission of Hyder's testimony under 804(a)(4) because: (1) the State failed to present competent evidence Hyder was unavailable (App. para. 10); (2) Hyder had not been cross-examined about his admission in his prior testimony that he was legally blind (App. para. 30); and (3) Hyder had not been cross-examined about when the damage to the doorjamb occurred (App. para. 14). However, Counsel used favorable points from Hyder's prior testimony in his closing argument. Additionally, both Angie Smith and Applicant testified at trial that there had been a scuffle or fight between Applicant and the victim and that the two of them fell out of the door of the trailer. Photographs of the scene were also introduced as exhibits at trial. Regarding Hyder's unavailability at the second trial, the record shows Counsel and the solicitor made an effort to get Hyder to court. Hyder's son came to court and told the judge and counsel Hyder was alive but ill. This Court finds Applicant has failed to satisfy his burden of showing error or prejudice as to this allegation.

App. 710.

*The PCR Court Properly Applied Constitutional Standards in Denying the Claim.*

"[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 690 (1984). In making a fair assessment of attorney performance, the court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 446 U.S. at 689. Further, Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland v. Washington, 466 U.S. at 681-82.

***The Hyder 1997 Testimony Was Admissible Under Rule 804 in 2005***

Rule 804(b)(1), SCRE, provides that if the declarant is unavailable as a witness, former testimony " given as a witness at another hearing of the same or a different proceeding, . . . if the

party against whom the testimony is now offered. . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination" is not excluded as hearsay. Rule 804(a)(4), SCRE, provides that a witness is unavailable if that witness "is unable to be present or to testify at the hearing because of death *or then existing physical or mental illness or infirmity.*" (*emphasis* added). [4] The Petitioner has failed to prove that Hyder's 1997 testimony was inadmissible in 2005.

**The Fact that Hyder was not dead did not make Hyder's 1997 testimony inadmissible when Hyder was "unavailable" based upon medical conditions of being homebound and "not well" represented to the trial court without challenge.**

At the time of the trial, despite an earlier belief by both the defense and the State that Hyder was dead, the following was presented to the trial court. The solicitor told the trial judge that they intended to offer the transcript of Otis Hyder, Sr.'s prior testimony from the first trial, pursuant to Rule 804(a)(4), SCRE, because Hyder was deceased. App. 25, 11. 12-24; see also App. 12, 11. 2-3. The trial judge instructed the attorneys not to mention Hyder in their opening statements and said he would hear full argument on the matter later. App. 25, 1. 25 - 26, 1. 8. Each counsel complied.

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[4] To be admissible under Rule 804(b)(3), a witness must be "unavailable" as defined by Rule 804(a). The burden of showing unavailability is upon the party offering the witness. See M. Graham, Federal Practice and Procedure–Evidence, Vol. 31, § 6792 at p. 554 (1997). Moreover, according to McCormick on Evidence, mere absence of the declarant from the hearing, standing alone, does not establish unavailability. The proponent of the statement must also show he is unable to procure the declarant's attendance by process or other reasonable means. String, McCormick on Evidence, § 253, p. 134. (4th Ed.1992). Accord State v. Blankenship, 198 W.Va. 290, 480 S.E.2d 178, 184 (1996) (where nothing in record demonstrated defendant had used substantial diligence to obtain presence of witness, he had failed to demonstrate unavailability and court properly refused to permit introduction of declarant's hearsay testimony). See also State v. Brown, 91 N.M. 320, 573 P.2d 675 (1977). Accord, State v. Kinloch, 338 S.C. 385, 391, 526 S.E.2d 705, 708 (2000). However, in a PCR setting, the burden of proof is upon the Petitioner to show that counsel was deficient in failing to continue his objection. The burden is then shifted to him to show that Hyder Sr. was available and not unavailable due to his physical or mental disability. He completely failed to show such availability.

At the conclusion of the first day of the trial, Godfrey initially objected to the admission of Hyder's prior testimony because the State had not provided any proof that Hyder was actually deceased. App. 149, l. 10 - 150, l. 22. The solicitor said that he had not been able to locate a death certificate but was told by one of his other witnesses that Hyder died. App. 150, l. 24 - 151, l. 3. The trial judge instructed the solicitor to either bring a copy of the death certificate or a picture of the tombstone, but said that he would require the solicitor to prove Hyder was dead before he allowed the testimony. App. 151, ll. 4-14. Godfrey argued that even if Hyder were deceased, he was not cross-examined on the investigators notes that the solicitor failed to disclose. App. 151, l. 15 - 157, l. 16; see also Supp. App. 4-5. The trial judge said that he was inclined to allow the testimony in provided that the solicitor provided some proof that Hyder was dead. App. 157, l. 17 - 158, l. 16.

Trial began the next day with Judge Early's declaration "[A]s I understand, the word of the day is 'he's alive.'" App. 160, ll. 1-4. The solicitor admitted that they had some "bad information" and that Hyder was alive. The solicitor said that Hyder's son, Otis Hyder, Jr., was present to explain that Hyder's "medical conditions" and that he was "home bound and not well." App. 160, ll. 8-14. However, the solicitor advised the court that the Rule 804 unavailability issue was moot because he believed "both sides now have agreed to use, simply use his previous testimony from the first trial and just read that into the record." Godfrey confirmed that he was withdrawing his objection to the testimony and had discussed the matter briefly with Smith. App. 161, ll. 5-14.[5] Petitioner Smith advised the court that he did not have any questions about it. App. 161, ll. 15-17.[6]

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[5] See Rule 407(1), SCACR ("A lawyer, being a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice."); Rule 3.3(a)(1)("A lawyer shall not knowingly make a

In particular, the trial record read as follows:

THE COURT: Well, you know, it just goes to show that maybe before we make representations we need to investigate it a little further. But I can certainly understand that. I've been in your shoes before.

And we've resurrected your dad overnight and we had him deceased in the courtroom yesterday. And—

MR. HYDER (Hyder Sr.,'s son): Well, he's, he's living.

THE COURT: Well, tell Pops we said hello. That's what we call him.

WITNESS: All right. I'll do it.

THE COURT: All right. Mr. Godfrey, as I understand, with this latest development, you're going to withdraw your motion, withdraw your objection and allow the testimony, the testimony from the prior proceeding to be introduced into the trial of this case?

MR. GODFREY: Yes, sir, that's correct.

THE COURT: And have you had an opportunity to discuss that with Mr. Smith?

MR. GODFREY: Yes, I spoke with him briefly about that this morning. Spoke to his family about it last night.

THE COURT: Okay. Mr. Smith, you have any questions about that?

DEFENDANT: No, sir.

App. 160, l. 20.

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false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); Rule 4.1(a)("In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person."); Rule 8.4(d)("It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."). Also, USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 651-52, 661 S.E.2d 791, 795-96 (2008) (citing Rule 704(1), SCACR, in presuming counsel was being truthful when she told the circuit court that she filed a motion during the proscribed time period).

[6] The Petitioner's statements in open court carry a presumption of verity. Blackledge v. Allison, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977).

Hyder's testimony from the first trial was subsequently read into the record before the jury. App. 182, l. 13 - 183, l. 12; see App. 640-659 (Applicant's Ex. 13, Transcript excerpt of Otis Hyder testimony). No evidence was presented concerning the existence of other statements the witness made.

***The Impact Of Godfrey's Inability to Recall in 2015 Why He Withdrew the Objection in 2005***

The United States Supreme Court has held that a counsel's failure to remember does not overcome Strickland's strong presumption of reasonable performance. Burt v. Titlow, 571 U.S. at 12, 22-23 (2013) ("We have said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' ... and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant ... . The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that **the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'**"). See also Romine v. Head, 253 F.3d 1349, 1357 (11th Cir. 2001) (trial counsel's "I don't remember" responses will not satisfy a petitioner's burden of proof and overcome the strong presumption of reasonable assistance); Fretwell v. Norris, 133 F.3d 621, 623-24 (8th Cir. 1998) (reversing the district court's grant of the writ based in part on counsel's inability to recall because this is contrary to the presumption of reasonable assistance).

It is not disputed that Counsel Godfrey testified he did not recall why he withdrew the Hyder objection at the trial. App. 505-508, 518.[7] However, that fact of lack of recollection alone

[7] Counsel Godfrey also indicated that it had been 10 years since the trial and that his file had been destroyed. App. 528. He confirmed that although he did not have Alzheimer's, he did have a memory problem arising from three back surgeries and possibly the medication that he was taking. App. 528, l. 13-24.

does not mean Petitioner had satisfied his burden of proof in showing that the prior testimony evidence was inadmissible under Rule 804. First, the trial record reflects that the Judge Early only indicated how he initially planned to rule on the objection, provided the State could satisfy the court that Hyder was dead. The trial court correctly stated the 1997 testimony fell squarely within 804(b)(1) as former testimony. Subsequently, the State located Hyder's son who came to court prepared to explain to the court Hyder's medical conditions, and that he was homebound and not well. (App. p. 160). However, in light of that information, Counsel agreed to withdraw his objection to the testimony. (App. p. 161). [8]

Regardless of whether Counsel withdrew his objection, the Court had already indicated it was inclined to allow the former testimony in under circumstances of the witness had died. Death is not the only conduit to the introduction of former testimony of a witness. Once the parties and the Court learned that Hyder was not dead, the State could have nevertheless shown that he was unavailable if challenged. Rule 804(a)(4), SCRE, provides that a witness is unavailable if he is dead *or then existing physical or mental illness or infirmity*. Hyder's son was present and prepared to inform the trial judge about Hyder's medical condition that he was "homebound" and "not well." The Petitioner has failed to show in this proceeding that those exceptions concerning "unavailability" did not exist in 2005.[9] To the contrary, it is uncontested that Hyder was "homebound" and "not well."

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[8] Counsel's lack of memory was consistent throughout his testimony. He could not "remember what I thought about at that point of time" in response to a leading question about whether he considered before he withdrew the objection that one of the important reasons his client had been granted a new trial was based upon the fact that there had been evidence indicating the victim intended to rob his client. App. 535.

[9] The Petitioner, in his brief, implicitly recognizes that he did not satisfy his burden of proof by suggesting that Hyder could have appeared by video conferencing if he was physically unable to come to court. However, the Court of Appeals has expressed concerns about the use

In the absence of proof otherwise, the reviewing court must assume counsel acted reasonably. See Strickland v. Washington, 466 U.S. 668, 690 (1984); Burt v. Titlow, supra. Nothing was presented at the PCR hearing to suggest that in 2005, that Otis Hyder Sr. was not "homebound and not well" or otherwise able to come to court in 2005 as a competent witness, contrary to the representations made at that time. This failure of proof in this collateral setting was recognized in the PCR Court's order.

In Davis v. State, 753 P.2d 388 (Okla.Crim.App.1988), a terminally ill witness was deemed unavailable when he was bedridden and too weak to travel. In State v. Stafford, 255 Kan. 807, 878 P.2d 820 (1994), a witness was properly deemed unavailable when she was suffering from an untreatable form of cancer and was constantly medicated with drugs that were causing hallucinations and memory loss. Further, courts have found that witnesses were unavailable in cases where the witness has been very elderly and a doctor has advised against the witness' testifying due to physical illness and infirmity. See, e.g., People v. Murry, 106 Mich.App. 257, 307 N.W.2d 464, 466 (1981) (where doctor testified 84-year-old burglary victim was hard of hearing, upset about the possibility of testifying, had hypertension and that testifying would be detrimental to her health, court upheld with little discussion trial court's finding of unavailability); United States v. Campbell, 845 F.2d 1374, 1377-78 (6th Cir.), cert. denied, 488 U.S. 908, 109 S.Ct. 259, 102 L.Ed.2d 248 (1988) (elderly witnesses with "health related

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of two-way video (SKYPE) recently in State v. Johnson, 422 S.C. 439, 450, 812 S.E.2d 739, 745 (Ct. App. 2018), reh'g denied (Apr. 26, 2018), cert. denied (Aug. 3, 2018). Contrary to the claim of the Petitioner, the Court has not yet approved the use of video as of yet under the Confrontation Clause in Johnson. It left that decision for another day. State v. Johnson, 422 S.C. 439, 453, 812 S.E.2d 739, 746 ( "in the absence of an important public policy or at least an exceptional circumstance, modifying a defendant's truest exercise of the Sixth Amendment right via in-person confrontation is inappropriate").

problems" were unavailable); State v. Rich, 395 A.2d 1123, 1129 (Me.1978), cert. denied, 444 U.S. 854, 100 S.Ct. 110, 62 L.Ed.2d 71 (1979) (state pathologist who had been practicing since 1923, had suffered heart attack, and was under doctor's orders not to testify was unavailable).

Counsel's failure to recall why he withdrew the objection—especially under the circumstances related to counsel's own health challenges at the time of the PCR hearing—did not preclude the PCR judge's factual finding that counsel's performance in withdrawing his objection did not fall below an objective standard of reasonableness. See Burt v. Titlow, 571 U.S. at 12, 22-23 (2013).

**Sixth Amendment Prejudice Not Shown**

The Petitioner has failed to show the existence of prejudice under the Sixth Amendment. Strickland v. Washington. Simply put, Petitioner has failed to show how the admission of the former testimony of Hyder, in the setting of the 2005 trial, undermined confidence in the verdict or that counsel's alleged 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."

First, because Hyder, despite his being alive in 2005, was nevertheless unavailable within the meaning of 804(a)(4), and because the trial judge had already indicated how he was inclined to rule to allow its admission if the witness was unavailable, Petitioner failed to demonstrate any prejudice resulting from counsel's withdrawal of his objection and agreeing to the admission of the former testimony. Although the Petitioner would now seek to have asked additional questions of the witness than was done in 1997 to impeach him, Rule 804(b)(1), allows the admission of former testimony, "if the party against whom the testimony is now offered . . had an opportunity or similar motive to develop the testimony by direct, cross, or redirect

examination." See State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003) ( admission of informant's prior testimony at retrial did not violate confrontation clause, despite contention that sister would have cross-examined informant more thoroughly as to alleged deal with State; counsel at first trial asked informant if he expected to receive a deal, and had ample opportunity to inquire further, and defendant unquestionably had motive to develop any weakness in informant's testimony); McWhorter v. State, 117 N.E.3d 614 (Ind. Ct. App. 2018) (Defendant had a similar motive in both his first trial, in which he was charged with murder but convicted of voluntary manslaughter, and in his retrial, in which he was charged and convicted with voluntary manslaughter, to develop the former testimony of witness who testified in defendant's first trial but was unavailable for the second; at defendant's first trial, witness was sole eyewitness testifying, and defendant was highly incentivized to highlight any problem with her perception and recollection and to elicit from her any evidence that tended to negate or lessen his criminal culpability); United States v. Amaya, 533 F.2d 188, 191–92 (5th Cir.1976) (rejected a Sixth Amendment claim premised on "inadequate" cross-examination at a prior proceeding by "different counsel with a different defense theory."). cf. State v. Nance, 393 S.C. 289, 297, 712 S.E.2d 446, 451 (2011) (failure to cross-examine witness in first trial did not preclude its admission where witness was unavailable).

Second, the proffered admission of the former testimony with the impeachment of the notes of the an unnamed investigator was of limited probative value against the plethora of evidence related to the guilt of the Petitioner.

*Summary of Hyder's Testimony from 1997.*

Otis Hyder's testimony was that Robert Finley came to Hyder's trailer to use the telephone in the early morning houses of January 12, 1997. Hyder stated that his own vision was

terrible and that he was completely blind, but that he was able to see images. App.p. 640-641. However, he stated that his hearing was very good.

Approximately fifteen minutes later, a car pulled up and Angie came to the door. Finley told her that he wanted to talk to Smith. App. 641, 11. 5-25; see also App. 647, 11. 3-12. Angie left and Smith came inside. He and Finley started talking at the kitchen table, while Hyder sat in his recliner. He claimed to overhear Finley tell Smith that he did not have his forty dollars but would pay as soon as he got a job. Hyder said Smith sounded "agitated" and Hyder told them to go outside. Smith walked out and Finley followed him but stayed in the doorway. App. 642, 1. 4 - 644, 1. 3; see also App. 647, 11. 13-22.

He could not hear all of their conversation but just before they went out the door, Hyder heard Finley say "Was you gonna shoot me?" and "Well, if you will give me the gun I'll [help] you." App. 645, 1. 10 - 646, 1. 4; see also App. 648, 11. 7-16. After they were in the doorway, Hyder saw Finley's right shoulder move and heard a gunshot. App. 646, 11. 5-13. According to Hyder, there was no fighting or scuffling between the men inside of the trailer. App. 646, 11. 18-22.

On cross-examination, Hyder was confronted with his prior statement to police. Hyder confirmed that he told the police when the lady (Angie) came in, that Robert said that he did not want to deal with her and she went out. App. P. 647. He further confirmed that David Smith then came in and Robert told Smith that he did not have the money and that as soon as he got a job that he would pay him. App. 647. Hyder denied that any drugs were then laid on the table. App. 648. He further denied that he told the police that "Robert [Finley] grabbed something from the man [Smith]." App. 648, 11. 4-12; App. 654, 11. 18.

Hyder's statement was read into the record at the 1997 trial and included that also said that Smith "backed out of the trailer." App. 654, 11. 22. Hyder denied having said that Finley grabbed anything or that Smith backed out of the door. He said he must have been sick or upset when he made his statement. App. 648, 1. 1 8 - 658, 1. 20.

Furthermore, because Hyder was subject to cross-examination by Petitioner at Petitioner's first trial, Hyder's former testimony is not barred by the Confrontation Clause simply because Petitioner contends he could have been more fully cross-examined. See Crawford v. Washington, 541 U.S. 36 (2004).

*Analysis of Sixth Amendment Prejudice*

At the hearing and in the brief, Petitioner contends that counsel should have required that Hyder be called to testify and for him to then be impeached with notes that the victim had tried to seize the drugs from him as substantive evidence. The Petitioner asserts that the prejudice is shown from a note about Hyder by an unidentified investigator in the Solicitor's Office[10] that "Smith backed off - Finley reached for him" and "thinks when Finley reached for Smith, he intended to take drugs from him." App. 605 (Applicant's Exhibit 3). Brief of Petitioner, p. 21-22. During the admitted evidence of Hyder's statement at the 2005 trial, he was confronted with a statement he had given that indicated "Robert grabbed something from the man." However, he recanted that "grabbed" statement and asserted in trial under oath that " I didn't see him grab anything from him." App.p. 648, l. 22. Therefore, the jury received similar impeaching evidence in 2005 that Petitioner is now suggesting.

[10] The source or purpose of this note was not clear. See Supp.App. 17, summarizing former Assistant Solicitor Tommy Wall's PCR testimony. See also App. 155 (Solicitor Coler does not know who took the notes.

In his brief, Petitioner speculates that the note's statements were further prejudicial with this claim asserting "if Finley was attempting to take drugs from Smith, *then it would not be unreasonable to believe that he was also attempting to gain control of Smith's gun.*" *Brief of Petitioner*, p, 21-22. (*emphasis added*). However, this inference is not consistent with the statement itself. The statement allegedly by Hyder is not that Finley was reaching for the gun, it is that the witness was of the opinion that he was intending to take the drugs from him - not the gun. Nevertheless, evidence was presented that there was a scuffle through Angie Smith.

It must be noted that Smith testified in the 2005 trial that that Finley initially snatched the drugs from the table and stated "I'm taking them." App. 210, 230. Petitioner stated that he had already put other drugs back into his pocket. He stated that after Finley stated that he was taking this (the drugs from the table), that Finley started to come towards him. App. 210, 231. At that point, he took is gun out of his pocket, hoping that the victim would cease approaching him. App. 210-211, 231. Petitioner claimed that Finley stated after Petitioner pulled the gun out: "you got a gun, what areyou going to do, shoot me, give me the gun, I'll shoot myself." App. 211. [This is consistent with Hyder's testimony about the victim's statements. App. 645-646]. Petitioner claimed that he responded "that's not what I am trying to do, just give me my stuff back and let me leave." App. 211. Petitioner claimed that when he tried to put the gun back into his pocket, the victim tried to hit it out while they were still in the home. Petitioner claimed in the direct that when he grabbed him that Petitioner hit the victim with the butt of the gun in the face area, while they were moving toward the door. App. 212-213. Petitioner claimed that he hit him two or three more times, but the victim was pushing him and by the time they got near the door, the gun went off. App. 243-244. Petitioner claimed that he did not intend to shoot

Finley, but that the gun went off accidentally. App. 214. It was his intention to just hit him with the gun. App. 214.

The Smith version is not consistent with the Hyder version or trial testimony in any respect. The difference is dramatic. Hyder's testimony was not consistent with Smith because Hyder testified that he did not see the victim grab anything. Even the not only indicates that Finley reached for Smith, albeit intending to take drugs from him which he never got. The Petitioner is not asserting that Hyder's testimony should have been excluded, it is that Hyder should have been forced to testify. Nevertheless, the Petitioner fails to recognize that if he may have asserted that Hyder was, in fact, unavailable, the notes may have been admissible under Rule 613 (b), inasmuch as he had already at the 1997 disputed that the victim ever grabbed anything - assuming the officer who made the notes was available. Possibly, the State may have simply allowed its admission under the discrete circumstances. However, this was never attempted.

However, there was no issue raised at the 2005 trial concerning the admission of the notes in addition to the admission of Hyder's prior testimony. It was not Hyder's 1997 testimony that petitioner argues is prejudicial under the Sixth Amendment, it is the fact that he was never confronted with notes that represented a version inconsistent with Hyder's testimony, as well as inconsistent with Petitioner's version. Perhaps, in hindsight, Petitioner could have alternately sought to introduce it under SCRE Rule 613, since Hyder essentially had in 1997 already had denied the essence of the same information when confronted with the written statement at trial. Nevertheless, the Petitioner seeks to show prejudice from the omission by claiming the jury would have rejected the content of the note wherein it stated the intention was that when Finley reached for Petitioner that he was reaching for the drugs

and instead asset that the jury would have inferred that Hyder was actually stating that Finley was reaching for a gun, when there was no reference that Finley was reaching for the gun at that time. The Petitioner speculation against the plain works of the notes fails to establish Sixth Amendment prejudice.

Further, the probative evidence supports that the admission of the notes through Hyder would not undermine confidence in the verdict. In addition to Hyder, Angie Smith testified about the incident. In her testimony she repudiated Petitioner's claim that the debt from Finley was owed to her brother, when it was owed to Petitioner. App. pp. 70. See App. 220, 227-28. (Petitioner testifies that Finley did not owe him any money, it was owed to Rodney Smith). Petitioner also denied that he had sold drugs to Finley in the past. App. 223. Petitioner claimed that he only knew Finley from dropping of Rodney, not from drug deals. App. 227. Further, Angie confirmed that when she entered the home, even the victim confirmed to her that he owed Smith $40. App. 71. After the victim told Angie that he did not have money for the drugs either, she went back to the car and told Smith that Finley did not have the money, at which point Petitioner reached for something in the car and went into Hyder's trailer. App. 74. Angie then saw Smith and the victim scuffling or tumbling out the open door with Smith outside the door and the victim inside. App. 76, 79, 84. Angie Smith testified that when she heard the "pop" she saw Robert Finley fall and Smith then ran up to the car. When Smith entered the car, he told Angie: "you don't know nothing, you aint't seen nothing" and they left. App. 72. Rodney Smith testified that he was aware that Finely owed Petitioner $40 for drugs and did not want to get involved that night when Finley contacted them since Petitioner had told him that he wanted his money. App. 113. Further, after he has return to the car, Petitioner disposed

of the drugs he had on him and gave them to Angie. App. 216. Petitioner then went and threw the gun over a train trestle bridge. App. 216-217, 244-245.

Further, as noted by the trial judge, the note mirrored the statement of Hyder that he was impeached on at the first trial. App. 157, l. 9-10. See App. 648, 654. It indicated that when he reached for Smith that he intended to take the drugs is similar to the written statement that Hyder was impeached on which included language that that Robert grabbed something from the man. See also App. 156 - 157.

Respondent submit that 6th Amendment prejudice has not been shown by the bifurcated argument of Petitioner concerning prejudice. Accordingly, the record contains evidence of probative value to support the PCR judge's findings, and this Court should deny review.

In conclusion, Respondent submits that the Petitioner has failed in his burden of proof in showing either deficient performance or prejudice. This issue must be dismissed.

**II. Petitioner failed to meet his burden of proof that Counsel was ineffective for not presenting the victim's grieving girlfriend, Morgan Simmons Ortez, as a defense witness to state that the victim had told her earlier that day that he had tried to rob a drug dealer earlier that day who was not the Petitioner when her testimony at the original trial as a state witness undermined the defense theory of the case by showing that the victim did owe a debt to Petitioner and that Petitioner had visited Ms. Ortez in an earlier attempt to collect the debt.**

Petitioner contends that Counsel was ineffective for failing to present former state witness Morgan Simmons Ortez ("Simmons") as a defense witness in the 2005 retrial. The PCR court denied this ground in the following manner:

> Applicant alleges Counsel was ineffective for failing to present Morgan Simmons as a witness at trial because she gave a written statement that the victim had said "he had tried to rob a drug dealer." (App. para. 12). Counsel testified he did not know why he did not present Simmons as a witness. Counsel also testified he employed an investigator who was responsible for interviewing any potential witnesses, including those who had given statements. This Court finds Applicant has failed to satisfy his burden of proving error or prejudice as to this allegation.

App. 709. For the following reasons, Respondent submits that this issue is without merit and the record contains substantial evidence of probative value to support the PCR judge's findings.

Certain salient factors are evident in this ground for relief. First, Morgan Simmons Ortez testified as a state witness in the 1997 trial and gave damning testimony against the Petitioner as well as information about her statement about the victim telling her that he tried to rob a drug deal earlier the day of his death, but that it was not Petitioner.[11] Second, trial counsel Bill

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[11] Respondent requests this Court to take appellate judicial notice of its prior records in the 2000 PCR appeal from the grant of post-conviction relief in *David Dwight Smith, 245760, Respondent v. State of South Carolina, Petitioner*, Case No. 00_CP-42-1649 (cert denied Dec. 1, 2004). See Masters v. Rodgers Dev., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct.App.1984) (citations omitted). "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct.App.1984). "It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case." Id. Accord, Wise v. Wise, 394 S.C. 591, 601; 716 S.E.2d 117, 122 (Ct. App. 2011). A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records. 31 C.J.S., Evidence, Section 50(1), p. 1018-1021. Unlike Goss v. State, 425 S.C. 101, 820 S.E.2d

Godfrey was aware of the testimony Ms. Ortez gave in 1997 because he had handled the PCR hearing that resulted in the retrial and specifically referred to the testimony at the hearing in his examination of former trial counsel Louis Cox.. See 2000 PCR App. 34-36.[12] Third, the record does not show why the state did not recall Ms. Ortez or seek to put her prior testimony into evidence in the state's case in 2005 although she was apparently on the witness list according to the voir dire. App. 12. [13] Fourth, Ms. Ortez did not testify at the underlying PCR hearing, apparently because then PCR counsel Shurling could not locate her. App. 533-534. Fifth, at the time of the 2011 PCR hearing before this Court, counsel Godfrey had suffered memory deficits due to intervening medical matters and his files in the matter had been destroyed which prevented any recollection recorded. App. 527-528.

Petitioner was required to show in the lower court that counsel's performance was deficient and that but for the alleged deficiency, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). In making a fair assessment of attorney performance, a court must make every effort to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time," Strickland v. Washington, 446 U.S. at 689.

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373 (2018). Respondent is not attacking the credibility of the witnesses testimony in PCR hearing addressed in the 2000 PCR proceeding but its existence and knowledge by Bill Godfrey who handled the 2000 PCR hearing as well as the 2005 trial.

[12] In the 2000 PCR Hearing, counsel Bill Godfrey confronted first trial counsel Louis Cox about the testimony of Morgan Ortez, the victim's girlfriend and his cross-examination of her and specifically about the information about the deceased saying that he had robbed a drug dealer. 2000 PCR App. 533-536, 545, 576.

[13] The record of the 2005 trial reflects during the general voir dire of the jurors, the Solicitor mentioned Morgan Simmons Ortez as a witness and noted that she was not present. App.p. 12, l. 4-6. It is interesting to note that when the same inquiry on voir dire was presented about Otis Hyder Sr., Solicitor Coler reported that he was deceased. App. 12, l. 2-3.

Counsel must be given leeway to make reasonable strategic decisions at trial. Strickland, 446 U.S. at 681-82. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported by mere speculation as to the result. Rollinson v. State, 346 S.C. 506, 552 S.E.2d 290 (2001). See also Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) ("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence." (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995))).

The reliance on Castro v. State, 417 S.C. 77, 789 S.E.2d 44 is misplaced. There, the PCR hearing judge found that counsel had indicated a "valid trial strategy" based upon his testimony that " it never struck him that petitioner was going to be punished because we went to trial" as a reason why he did not object to the sentence when the sentencing judge articulated "the State has had to take you to trial on a case where there was overwhelming evidence of your guilt." The Supreme Court concluded that this statement by the defense counsel was not an expression of any valid trial strategy. The Court found that the trial judge's expression was clearly that he improperly considered the decision to exercise his right to a jury trial which the Court concluded was an improper consideration which should have invoked an objection and thus counsel stated strategy was no strategy at all.

In the instant case, counsel Godfrey could not remember why he failed to call the victim's girlfriend. This is not a case where the PCR made a determination of an expressed trial strategy that was not supported by evidence in the record. Nor is this is a case where counsel had affirmatively testified that he had no trial strategy in mind when he failed to object to inadmissible testimony as in Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010)

(The presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was no trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony).

An attorney's "inability to remember his reasons for conducting the trial in the manner that he did [ ] is insufficient evidence to overcome the presumption of constitutionally effective counsel sustained by the record." Greiner v. Wells, 417 F.3d 305, 326 (2d Cir.2005). "Without evidence establishing that counsel's strategy arose from the vagaries of 'ignorance, inattention or ineptitude," [ ] Strickland's strong presumption must stand." Id. (internal citation omitted). Contrary to the implicit assertion within the Petitioner's brief, the burden is not upon counsel to articulate a valid strategy for any alleged deficiency. See Gabaree v. Steele, 792 F.3d 991, 997 n. 5 (8th Cir. 2015) (noting that counsel's inability to recall reasons for decisions made during trial is not a ground for finding trial counsel performed ineffectively).This is a misstatement of the standards set forth in Strickland v. Washington and would turn the burden of proof on its head.[14] See Burt v. Titlow, 571 U.S. at 12, 22-23 (2013) ("We have

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[14] See e.g. Slater v. Warden, State Prison, No. CV094003284, 2013 WL 1800926, at *5 (Conn. Super. Ct. Feb. 22, 2013)

> Counsel asks or argues that because of the appellate counsel's inability to remember, that that should enure some presumption of prejudice or some presumption of deficient performance in his favor. This Court is not aware of any case law or anything otherwise nor was any cited that would support that position. In fact, if anything, the Court's reading of the law and knowledge of habeas, the presumption should be the exact opposite. The petitioner comes here with a conviction. He is no longer veiled in the presumption of innocence. He is convicted, and until otherwise the presumption is that that conviction was validly and legally and constitutionally obtained, and until he proves otherwise by affirmative evidence, that is his burden. So there are no presumptions that he is given simply because counsel indicates, I am unable to remember what I did eight years ago.

Slater v. Warden, State Prison, No. CV094003284, 2013 WL 1800926, at *5 (Conn. Super. Ct. Feb. 22, 2013).

said that counsel should be 'strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' ... and that the burden to 'show that counsel's performance was deficient' rests squarely on the defendant ... . The Sixth Circuit turned that presumption of effectiveness on its head. It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance'"). See also Rickey v. State, 52 S.W.3d 591, 596 (Mo.App. W.D.2001) (noting that counsel's 'inability to remember why he took a specific course of action during trial does not establish lack of competent performance') : Broom v. Denney, No. 090634CVWODS, 2010 WL 1752136, at *3 (W.D. Mo. May 3, 2010), aff'd, 659 F.3d 658 (8th Cir. 2011) (The court correctly determined that Petitioner failed to rebut this presumption; trial counsel's inability to remember why she did not call a witness to testify almost 6 years after the trial occurred did not establish that counsel's decision lacked competence).

In the brief before this Court, the Petitioner now asserts that had counsel called former state witness and the Petitioner's girlfriend as a defense witness it would have presented limited testimony that that the victim earlier that day had allegedly attempted to rob someone else of drugs. Petitioner contends this could have supported the defense that hours later at Otis Hyder's house, the victim tried to rob Petitioner of the drugs which caused the struggle as he now suggests that the victim was then trying to gain control of Smith's weapon when he was shot. He further suggests that this would have undermined the theory of malice. A cautious review of the entirety of the record reveals that confidence in the verdict is not undermined under Strickland and that reasonable counsel under the Sixth Amendment would

not have risked undermining the defense by presenting the grieving girlfriend as a witness in the defense.

***The 1997 Testimony of Morgan Simmons***

In the 1997 trial Morgan Simmons Ortez testified as a state witness. See *David Dwight Smith V. State of South Carolina, 00-CP-42-1649, Appendix to Petition for Writ of Certiorari, Volume One, pages 127-139.* (Hereafter 2000 PCR App._) In her 1997 trial testimony, Ms. Ortez stated that she knew the victim, Robert Finley, because they had lived together for over two years. 2000 PCR App. 127. She also stated that she knew David D. Smith by sight, but did not know his name. Id. She testified that Robert Finley used crack cocaine while she knew him. She confirmed that she had witnessed David Smith sell Finley crack cocaine on one occasion. 2000 PCR App. 127-128.

Ortez testified that prior to Finley's death, around two or three days after Christmas, Smith came to their house looking for Finley and stated to her that Finley owed him $40 for drugs and that he wanted his money. 2000 PCR App. 128. She stated that Smith told her that "he was gonna get his money one way or the other and for him to tell Robert that. 2000 PCR App. 128. Ortez stated that she had already known that Finley owed Smith money because he had been to their home prior to that time. She stated that then Robert's sister and her husband was there. She said on another occasion, Smith had come with Rodney Smith to the store where Ortez worked and asked where Finley was.

Ortez stated that she learned the Robert Finley had been shot when Terry - the man who lived with Otis Hyder - came to her house and was beating on the door which woke her up and told her that Finley had been shot. 2000 PCR 128. Ortez described running to the trailer and finding Finley laying on the ground with his feet still inside the trailer. She stated he

was still alive at that time, but was still breathing. 2000 PCR App. 129. He never said anything to her and only clenched his hands a few times. Id.

Ortez stated that there was no doubt in her mind that Finley owed David Smith $40 for crack cocaine because Finley told her. 2000 PCR App. 129. She confirmed that she had learned that after the shooting that Otis Hyder had picked up the phone to call 911 and sent Terry to get her at the same time. She estimated that she had arrived within two minutes after the incident. 2000 PCR App. 129. She noticed that the jacket on Finley's back had gone all the way up his back and she had pulled it down so Finley would not get cold. She stated that she held his hand, but that she knew not to move him. She reviewed State Exhibit 7 and confirmed that was his location when she found him. 2000 PCR App. 130.

On cross-examination, Ortez testified that she had been living with Finley for a little over two years and had lived in the trailer for about eight months. 2000 PCR App. 130. She stated that she was working at a convenience store at that time. She stated Finley was a construction worker and framed houses. She stated at the time of Finley's death, he had been laid off because they had just finished working a job at Westgate Mall. 2000 PCR App. 131.

Ortez stated that on that Saturday, Finley had been using crack cocaine since that afternoon and drinking Jim Beam. She stated that evening, Finley had come in and fallen asleep on the couch and she fixed him supper. She stated that they were sitting there watching TV and he fell asleep. She thought he would stay there the rest of the night and covered him up. 2000 PCR App. 132. She stated that she later heard him get up real late and asked him where he was going? She recalled him telling her: "I'm just going down to Pops' (Hyder). I'll be right back." 2000 PCR App. 132. She stated to Finley why doesn't he come to bed and Finley said that he was just going to run down there for a few minutes. Id. She denied that he told her that he was

going to get some crack, but just stated he was going to Pops and would be right back. Ortez testified that she had fallen asleep and the next thing she knew was when Terry came and got her.

Ortez denied that she knew that Finley had attempted to rob a drug dealer that night. 2000 PCR App, 132, l. 20-11. At that point, Solicitor Wall objected asserted that there was no evidence of that. Public Defender Cox asserted that it was in her written statement. 2000 PCR App., 1321. l. 23-25.

After a bench conference, Ortez was questioned about a signed statement she made on January 12, 1997 which read :

> " . . .went to the store and got a twelve pack of beer. When we got back he said that he had to go get some crack and left. He came back about 30 to 40 minutes later and said that he had tried to rob a drug dealer"

2000 PCR App. 133, l. 15-20. Ortez immediately declared " That had nothing to do with David Smith." 2000 PCR App. 133, l. 23. When defense counsel Cox tried to have her recognize the difference between her testimony and the statement, Ortez declared that she was not with Finley earlier or aware what he was doing because she was at home. 2000 PCR App. 134, l. 6-7.

Defense counsel Cox sought to correct that he was only talking about what Finley had told her and she responded :

> Maybe he did. Maybe I did say that. I don't know. You realize one thing. That night the man that I had been living with for three years died in my arms.

2000 PCR App. 134, l. 12-14.

> . . . There was a lot of things that I can't remember that happened that night. I was hysterical when I went down to the police station..

2000 PCR App. 134, l. 17-19.

...And I can tell you one thing about Robert. And I don't care what anybody says about him doing drugs. Maybe he did do drugs. But that -- he was a good man. He was a decent man, he was an honest man.

COX: We don't deny ---

ORTEZ: And he was not a violent man. There was not a violent bone in that man's body,

COX: We don't deny that, ma'am.

ORTEZ : He was a good, hard-working, decent person. And that man right there sure isn't because he's the one that shot and killed somebody. Not my husband.

2000 PCR App. 134, l. 23 - 135, l. 8.

When counsel Cox returned to what Finley had told her that night, she responded :

ORTEZ; He may. He probably — maybe he had. I don't know. Robert was — he was really messed up that day. But, like I say, Robert was not a violent person.

COX : But he —

ORTEZ: And I don't care what he did. The man was not armed. He didn't so much as own a pocket knife or a knife or a gun or anything. He was not a violent person. And I don't care what he did. It doesn't give anybody the right to stand there and shoot him in the face in cold blood.

COX: Nobody says that ma'am. But he did try to rob a drug dealer. He did do that didn't he?

ORTEZ: Well, your defendant murdered somebody. Didn't he?

COX: Did he do that ma'am? Did he say that? Did he tell you that?

ORTEZ: I don't remember.

COX: But you remember making this statement; don't you?

ORTEZ: No, to tell you the truth, I don't I told you, I was hysterical.

2000 PCR App. 135, l. 13- 136, l. 6.

On re-direct examination, Solicitor Wall notes that the statement was made at 5:54 am the morning of the murder. 2000 PCR App 136, l. 18-21. He died at 2:30. When asked her state of mind at the time, Ortez declared that she did not even know where she was and was hysterical. She testified that Finley had been taking Valium that day which had caused him to fall asleep and she had figured that he would not get up. She though Finley's mood was fine when he went to bed. She further stated that Finley was using crack and was trying to quit. She testified that the

following Monday he had an appointment with a 30 rehabilitation clinic, "but he got killed Saturday night. He never had the chance to quit doing it. David Smith saw to that" 2000 PCR App. 137, l. 17- p. 138, l. 6. She stated when Finley wanted crack and did not have it that he would sleep a couple of days at a time and eat sweet stuff. She stated that she speculated that if he tried to rob a drug dealer, he probably just tried to grab it and run because she knew he had done that before. 2000 PCR App. 138. She stated that they didn't own a gun, but he did have a pocket knife. 2000 PCR App. 138-139.

On re-cross examination, Cox asked whether Finley had grabbed drugs on more than one occasion and she responded that as far as she knew, it had just been the one time. 2000 PCR App. 139, l. 8-16.

***Godfreys' PCR Testimony***

As with the allegation at issue in question one. Counsel Godfrey was unable to recall why he did not call Morgan Simmons Ortez as a defense witness when the state rested after not calling her as a state witness as it had done in 1997. Godfrey stated that his file had been destroyed and that he had memory issues due to the after-effects of medical procedures. App. 527-528. Counsel testified that Morgan Simmons was the deceased girlfriend. App. 531. Reference at the hearing was made to her typed statement to law enforcement (Applicant's Exhibit 9) where it did not state anything about leaving the trailer they shared and coming back about 30 to 40 minutes later and saying he tried to rob a drug dealer earlier that same evening. App. 532. Counsel was also presented with a handwritten version of the statement where it stated that it included that she said he came back about 30 to 40 minutes later and said he tried to rob a drug dealer. App. 532, l. 7-15. Godfrey was asked why he did not put up Simmons on the witness stand for the defense and Godfrey stated that he could not recall. App. 532. However,

he confirmed in retrospect "sure" as to whether it was something he thought he should have done. App. 532. He acknowledged that their theory art trial was that the shooting of the victim had occurred while the victim was trying to rob the Petitioner. App. 532-533. He further acknowledged that in her statement on page two, that after the victim had come back that he told Simmons that he was "going to Pops to get him a hit." App. 533. It was pointed out to counsel Godfrey that this information was that the victim went to Hyder's place not to use a telephone, but to get some drugs. App. 533. Godfrey confirmed that this is a reason - in hindsight again - that he would have wanted to call Simmons as a witness. App. 533.

## ANALYSIS

### 1. Deficient Performance was not proven.

The Petitioner failed in his burden of proof to show deficient performance in failing to call former state witness Morgan Simmons Ortez as a defense witness. The only thing proven was that counsel Bill Godfrey had no recollection why he did not call this witness one way or the other. This is not proof of deficient performance. It is only proof of his inability to recall as cited above. Review of counsel's performance is highly deferential and should employ a "strong presumption" that the defendant received reasonable professional assistance of counsel. Strickland, supra, 466 U.S. at pp. 689–690. "It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.' " Burt v. Titlow, 571 U.S. 12, 23 (2013)(quoting Strickland, 466 U.S. at 689). The test for deficient performance rest upon whether the Petitioner has proven that counsel acted or omitted to act below the standards of competence

demanded of lawyers practicing criminal law.[15] "Counsel's decision as to 'whether to call specific witnesses-even ones that might offer exculpatory evidence-is ordinarily not viewed as a lapse in professional representation.' " United States v. Best, 219 F.3d 192, 201 (2d Cir.2000) (quoting United States v. Schmidt, 105 F.3d 82, 90 (2d Cir.1997).

Here, the record reveals that Godfrey's involvement in the first PCR action reveals that prior to trial he was aware of Ms. Ortez statements and prior testimony as the victim's girlfriend, which would have included the outburst against the Petitioner, her knowledge of the debt owed by the victim to the Petitioner, the Petitioner coming to her home seeking to claim the debt owed Petitioner which were all inconsistent with the defense theory in the case. Under the contrary defense theory, Finley did not owe any debt to Petitioner and therefore no motive in asserting a basis for the violent attack against Finley. Further, contrary to Ms. Ortez testimony, he had no basis to seek to collect a debt by his visit to Ms. Ortez home. Further, Ms. Ortez had been the grieving girlfriend of the victim at the time of his death and he essentially died in her arms after being shot by the Petitioner. It is difficult to assert that reasonable and competent counsel would have a constitutional duty under the Sixth Amendment to place Ms. Ortez on the witness stand under these discrete and risky circumstances with a limited probative value. The hearing judge correctly concluded that he had failed in his burden of proof. We submit that the PCR court implicitly concluded that deficient performance was not proven. Counsel Godfrey did not fall below an objective standard of reasonableness.

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[15] Where, as here, the claim is based on an alleged omission by counsel and the record does not contain an explanation for the omission, some court have concluded that an appellate court must reject the claim unless there could be " ' "no satisfactory explanation" ' " for counsel's conduct. (People v. Mendoza Tello (1997) 15 Cal.4th 264, 266–267 [reversing a holding of ineffective assistance of counsel where record did not show why counsel failed to move to suppress evidence obtained during a warrantless search because counsel was "perhaps" aware that the officer had a justification for the search].) In other words, if there could be a reasonable explanation for counsel's decision, the claim of ineffective assistance of counsel must fail.

**Prejudice under Strickland Correctly Found not Proven**

Assuming this Court finds counsel was deficient in failing to call the victim's girlfriend, prejudice was not proven. The Petitioner failed to prove that counsel's deficient performance was sufficiently serious to prejudice the defense and deprive the defendant of a fair trial. See Strickland v. Washington, 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)

With regard to the required showing of prejudice to the defendant in a claim of ineffective assistance of counsel, the proper standard requires the defendant to show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Strickland, supra. A defendant's failure to establish either prong precludes a finding of ineffective assistance. If a defendant cannot establish the prejudice prong, then a reviewing court does not need to engage in an analysis of the performance prong. Strickland, 466 U.S. at 697, 104 S.Ct. 2052.

Respondent submits that all the salient features set forth above concerning the deficiency argument are restated within the prejudice argument. In his brief before this Court, the Petitioner limits to only a portion of the victim's girlfriend's testimony, but ignores that it would be proven to have more powerfully undermined the Petitioner's defense of lacking being owed any debt from Finley. The entirety of the record support a rejection of his assertion that prejudice has been proven.

First, assuming the victim's girlfriend would likely testify as she did that Finley reported to her that he had attempted to rob a drug dealer earlier that day, she would also declare that it was not Petitioner according to the proffer made before the Court. However, the

record is clear that even from the State's version that the victim at the incident did not have the money for the drugs and wanted the drugs without paying.

The Petitioner asserted that her potential testimony could have led to impeachment that the victim did not go to Hyder's to make a phone call but to get drugs. This is a distinction without a difference from the trial testimony. It was always consistent with the state's theory in the 2005 case that Finley went to Otis Hyder's trailer to use the telephone to get drugs. The probative value of additional evidence from Ortez is very limited. Angie Smith testified that that Finley called her brother Rodney Smith but Angie took the call and that he wanted some drugs. App. 65-67.[16] Angie then contacted David Dwight Smith on his pager because Petitioner "usually takes him {Finley} crack." App. 67. She stated that when Petitioner arrived, he stated that Finley owed him $40 for drugs. App. 70, 95.[17]

It was uncontested at trial that Finley wanted drugs that night and did not have money. As stated above, Finley called and spoke with Angie and wanted crack cocaine delivered. When Angie went inside the house to get money for the drugs before the delivery of them, she stated that Finley told her that he owed Smith $40 and refused to give her money for the new drugs he wanted. App. 71, 73. Also, Otis Hyder had testified that he heard Robert tell Smith that he did not have his money yet and claimed that as soon as he had a job he would pay him. App. 642, 647.

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[16] Angie Smith further testified that Finley lived across the street from Hyder and would come and use his telephone. App. 73.

[17] Petitioner also told Rodney Smith that Finley owed him $40. App. 108. Specifically Rodney Smith recalled Petitioner telling him that Petitioner was not happy about it and that he wanted his money from him. App. 108-110. Rodney Smith also testified about Petitioner telling him that he had contacted Finley's girlfriend Morgan to try to collect the $40 dollars and that this showed he was serious about collecting it. App. 116.

There was evidence in the record from Otis Hyder's testimony that Finlay had grabbed something from Petitioner. App. 654, l. 17-19. Counsel Godfrey relied upon this in making his directed verdict motion at the conclusion of the state's case. App. 194. He asserted that this showed that Finley was trying to rob [steal] the drugs at the incident. App. 194, l. 10-22. However, a review of Hyder's 1997 testimony shows that Hyder denied that he saw Finley grab anything from the Petitioner, even though it was included in his January 12, 1997 statement. App. 648-650. See, App. 654, l. 18. ("Robert grabbed something from the man."). See also App. 607,608 (statements). In counsel Godfrey's closing argument, he makes comments about Hyder's testimony that Finley grabbed the drugs. App. 278, l. 23; 279, l. 6-10.

During the Petitioner's trial testimony, he testified that Finley told him that "I don't have any money today, I'll pay you tomorrow" which Smith did not agree. App. 209, l. 18-21. Petitioner testified that at that time Finley looked at him and stated "I'm taking this" and he claimed started coming towards him. App. 210, l. 4-11. However, Smith denied that Finley owed him any money and that he was doing his usual business and laid the drugs on the table when he entered Hyder's place. App. 227-228. Petitioner claimed that although Finley owed Rodney that he did not owe him. App. 228. Smith stated that Petitioner snatched the 5 rocks of cocaine that he placed on the table and Smith put that other drugs back into his pocket which were worth about $1800 or $1900. App. 230.

*PCR -Morgan Simmons Ortez*

PCR counsel Shurling confirmed that she was apparently unable to locate Simmons Ortez to testify in the PCR hearing. App. 533-534. Only her statements were introduced as an

exhibit as Applicant's Exhibit 9. (App. p. 531). See App. 629-633 (statements). See App.p. 633 ("He came back about 30 to 40 minutes later and said he had tried to rob a drug dealer …").

The PCR judge found Counsel conducted an adequate investigation for Petitioner's case and his decision not to present Simmons as a witness to be part of Counsel's trial strategy, which was within the range or reasonableness for criminal representation. (App. pp. 708-09). In addition, the PCR judge found that Petitioner failed to show prejudice. Given that Counsel could not recall why he did not call her, but did testify he had an investigator who was employed to interview potential witnesses and this witness was not introduced at the hearing, there is evidence in the record to support the PCR judge's finding that Petitioner failed to show deficiency or prejudice. Accordingly, because the record contains evidence to support the PCR judge's findings, this Court should deny relief.

## CONCLUSION

For the foregoing reasons, Respondent submits the appeal should be denied and judgment of the lower court affirmed.

Respectfully submitted,

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March 29, 2019

**STATE OF SOUTH CAROLINA**
**IN THE COURT OF APPEAL**



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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse, PCR Circuit Court Judge
The Honorable Doyet Early, III, 2005 Trial Judge

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Appellate Case No. 2016-000262

DAVID DWIGHT SMITH.,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

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**PROOF OF SERVICE**

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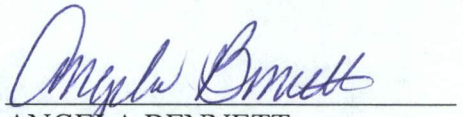
I, Angela Bennett, certify that I have served the *Brief of Respondent on Writ of Certiorari* on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to: Lara M. Caudy, Esquire, Office of Appellate Defense, P.O. Box 11589, Columbia, South Carolina 29211.

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

This 29th day of March, 2019.



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