

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

 ORIGINAL

\_\_\_\_\_  
Certiorari to Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge

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DAVID DWIGHT SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-000262

\_\_\_\_\_  
BRIEF OF PETITIONER  
\_\_\_\_\_

RECEIVED

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SC Court of Appeals

LAURA R. BAER  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1330

ATTORNEY FOR PETITIONER

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## ISSUES PRESENTED

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's 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?

## STATEMENT OF THE CASE

### *Indictment, Trial, and Reversal of Convictions*

On April 7, 1997, the Spartanburg County grand jury returned indictments against Petitioner David Smith for one count of murder and one count possession of a firearm during the commission of a violent crime. App. 725.

On December 4, 1997, Smith proceeded to trial before the Honorable J. Derham Cole and a jury. He was convicted as indicted and sentenced to life for murder and five years for the weapons offense. Supp. App. 2.

Following dismissal of his direct appeal, Smith filed an application for post-conviction relief (“PCR”) on June 7, 2000. Supp. App. 1 – 2. An evidentiary hearing was held before the Honorable Donald W. Beatty on November 6, 2002 and January 27, 2003. Smith was represented by E.P. “Bill” Godfrey and the State was represented by assistant attorney general Douglas Leadbitter. On May 23, 2003, now Chief Justice Beatty filed an order granting Smith’s application for post-conviction relief and remanded his case for a new trial. Supp. App. 1. The state filed a petition for writ of certiorari, to which Smith filed a Return. Supp App. 12; Supp. App. 27. An order denying certiorari was filed on December 1, 2004. Supp. App. 37.

### *Re-Trial*

On October 31, 2005, Smith was retried before the Honorable Doyet A. Early, III. App. 1. Smith was represented by his prior PCR attorney, Bill Godfrey, and the State was represented by assistant solicitors Robert Coler and Sara Ganns. App. 1. The jury found Smith guilty of both offenses. App. 314, ll. 1-23. Judge Early sentenced Smith to concurrent terms of thirty-five years and five years. App. 320, ll. 7-12.

### ***Direct Appeal***

On direct appeal, Smith was represented by former Chief Appellate Defender Joseph Savitz. In the brief of appellant filed on May 8, 2007, Smith argued that the trial court erred in failing to instruct the jury on the law regarding voluntary manslaughter, involuntary manslaughter, and accident. App. 322 – 336. The State filed its brief of respondent on April 20, 2007. App. 337 – 351. Oral argument was held on November 6, 2007. App. 352.

On March 20, 2008, the Court of Appeals filed an unpublished opinion reversing and remanding Smith's case for a new trial based on the trial judge's refusal to instruct the jury on voluntary manslaughter. Because the Court of Appeals granted relief on that issue, it did not reach the other issues raised by Smith. App. 352 – 355. The State filed a petition for rehearing and petition for rehearing en banc, which were denied. App. 356 - 365; App. 366 – 369.

The State filed a petition for writ of certiorari on August 19, 2008, to which Savitz filed a return on December 18, 2008. App. 370 – 390; App. 391 – 403. The Supreme Court granted certiorari on April 10, 2009, and ordered further briefing. App. 404. The briefs of petitioner and respondent were filed on May 12, 2009 and August 11, 2009, respectively. App. 405 – 426; App. 427 – 439. Following oral argument held on January 21, 2010, the Supreme Court filed its opinion on February 7, 2011, reversing the Court of Appeals' opinion and reinstating Smith's convictions and sentences. App. 440 – 445. The remittitur was issued on February 24, 2011.

### ***Post-Conviction Relief Proceedings***

On March 17, 2011, Smith filed his application for post-conviction relief ("PCR"). App. 447 – 452. On March 18, 2015, Smith filed an amended PCR application through his PCR attorney, Tara Shurling. App. 454 – 461. The State filed its return on May 1, 2012. App. 462 –

469. On June 11, 2015, Smith filed a superseding amended PCR application through PCR counsel. App. 471 – 479.

On June 11, 2015, an evidentiary hearing was held before the Honorable R. Scott Sprouse. Smith was represented by Tara Shurling, and the State was represented by assistant attorney general Suzanne White. App. 480. On December 8, 2015, PCR counsel filed a Memorandum in Support of PCR in the form of a proposed order. App. 660 – 696.

On December 14, 2018, Judge Sprouse filed an Order of Dismissal, denying Smith's application for post-conviction relief. App. 697 – 713. On January 4, 2016, PCR counsel filed a Rule 59(e) motion to alter or amend. App. 714 – 723. Judge Sprouse filed an Order denying the motion, which he termed a motion for reconsideration, on January 13, 2016. App. 724.

***Petition for Writ of Certiorari***

Smith filed his petition for writ of certiorari, seeking review of the PCR court's order denying post-conviction relief, in the South Carolina Supreme Court on October 26, 2016. The State filed its return on March 20, 2017. On October 30, 2017, this case was transferred to this Court pursuant to Rule 243(1), SCACR. On August 13, 2018, this Court filed an order granting certiorari as to questions one and two and ordering further briefing, and denying certiorari as to question three.

This brief of petitioner follows.

## STANDARD OF REVIEW

This Court defers to a PCR court's findings of fact and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

## **STATEMENT OF RELEVANT FACTS**

### ***Original Grant of Post-Conviction Relief***

The 2003 order granting post-conviction relief and ordering Petitioner David Smith's retrial, which resulted in the underlying convictions that are the subject of these proceedings, was based upon several deficiencies in the representation provided at his original trial. Supp. App. 1. The State's theory at trial was that Smith shot the Decedent, Robert Finley, over a drug debt. Supp. App. 4. The defense theorized that Smith's gun was being used in self-defense when Finley tried to rob him and gain control of Smith's weapon, but the discharge of the gun was accidental. Supp. App. 4. Now Chief Justice Beatty, who presided over the original PCR proceedings, found that original trial counsel "was not diligent in his representation of the Applicant, did not perform well within the range of competence demanded of attorneys in criminal matters and did not perform within the range of reasonable professional assistance." Supp. App. 2 – 3.

Specifically, original trial counsel failed to file a Brady<sup>1</sup> motion when he took over Smith's representation. Supp. App. 4. Applicant's Exhibit 2 was a set of notes from the solicitor's file regarding an interview someone in their office conducted with Otis Hyder, who resided in the trailer where the incident took place. They contained the following: "That's when Finley (deceased) reached for Smith, he intended to take drugs from him." Supp. App. 4. The PCR court found: "Exhibit number 2 would clearly have aided the defense in establishing that the Applicant was robbed and attacked by the deceased. This evidence goes directly to the lack of malice on the part of Applicant and helps to establish both his claim of self-defense and accident." Supp. App. 4. The court further found that the exhibit "corroborated, to some degree,

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<sup>1</sup> Brady v. Maryland, 373 U.S. 83 (1963).

the testimony of Morgan Ortez, who indicated in a statement to the police and testified that the deceased had attempted to rob a drug dealer earlier the day of the incident.” Supp. App. 5. Counsel also failed to investigate information in Investigator Mike Kitts’ supplemental report that Finley told someone that he was going to rob a crack dealer for some crack. Supp. App. 5. The court again referenced the relevance of this evidence to Smith’s lack of malice and to establishing self-defense and accident. Supp. App. 5. Counsel further failed to consult experts to investigate and present evidence regarding the likelihood of an accidental discharge from the gun and signs of a struggle at the scene. Supp. App. 6 – 7. The crime scene expert who testified at the PCR hearing noted photographs showing a piece of molding missing from the doorway where the incident took place and the locations of Finley’s hat as evidence of a struggle. Additionally, he found that the trajectory of the bullet and lack of gunshot residue on Finley’s hands supported Smith’s contention that Finley was attacking him when the gun fired. Supp. App. 6 – 7. The expert further testified that the types of guns that SLED determined would have fired the bullet are “generally not safe,” supporting the defense of accident. Supp. App. 7. Thus, Chief Justice Beatty granted post-conviction relief and remanded for a new trial. Supp. App. 10 – 11.

### ***Theories of the Case and Evidence at Retrial***

The same attorney, Bill Godfrey, who won Smith’s PCR, also represented Smith at the retrial. The State’s theory of the case and the defense’s theory of the case at retrial were much the same as they were at the original trial. The defense argued that Smith accidentally shot Finley while in midst of acting in self-defense. App 279, l. 8 – 280, l. 22; App. 271, ll. 9-18. Smith was a licensed aircraft mechanic but began selling drugs when he was out of work. App. 203, l. 1 – 204, l. 3. Smith drove to the house of Angie Smith (no relation) (hereinafter “Angie”)

after she paged him in the early morning hours of January 12, 1997. App. 204, l. 14 – 205, l. 11. Angie directed Smith to drive to the trailer of Otis Hyder, Sr., where there was supposed to be a customer to buy cocaine. When they got there, Angie went inside to “see what was going on.” She returned to the car and told Smith that the person wanted to deal with Smith, not her. Smith asked Angie who she was talking about, at which point she finally disclosed that it was Finley. App. 205, l. 12 – 207, l. 1.

Smith was hesitant to deal with Finley because he knew that Finley owed Rodney Smith, Angie’s brother, forty dollars for drugs he “fronted” him.<sup>2</sup> He went inside anyway because it was 2:30 a.m., they had driven all of the way there, and Angie told him that Finley had the money. App. 207, ll. 2-23. Smith put the drugs on the table and Finley “checked them out.” App. 208, l. 2 – 209, l. 4. Finley said that he did not have the money but could pay Smith tomorrow. When Smith indicated that was not okay, Finley said “well, I’m taking this” and started to come towards Smith with “a real serious demeanor.” App. 209, l. – 210, l. 11. Smith pulled his gun from his pocket and held it by his side in the hopes that Finley, who was 6’2” and “looked like he was on something,” would back off. App. 210, l. 22 – 211, l. 15; App. 214, ll. 14-21; App. 232, l. 1 – 233, l. 12. Finley said: “Oh, you got a gun, what are you gonna do, shoot me, give me the gun, I’ll shoot myself.” App. 211, ll. 17-19. Smith told him: “No, that’s not what I’m trying to do. Just give me my stuff back and let me leave.” App. 211, ll. 19-21. As Smith tried to put his hands in his pocket and head for door, Finley came at him and tried to knock the gun out of his hand. App. 212, ll. 4-20; App. 239, ll. 14-18. It was then that Smith hit Finley with the butt of the gun as they struggled, eventually falling out of the trailer door. App. 212, l. 14 – 213, l. 18. Smith did not pull the trigger, but the gun went off. App. 213, l. 19 –

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<sup>2</sup> The drugs that Rodney sold to Finley were supplied to him by Petitioner Smith. App. 207, ll. 2-18.

214, l. 6. Smith explained that his only intention was to get Finley off of him and opined that if Finley had been successful in getting Smith's gun "it could of been me [who died]." App. 214, ll. 3-25. Finley died from a single gunshot wound to the head. App. 170, ll. 18-24.

The State's theory of the case was that Smith was upset over the forty-dollar debt that Finley owed because it made Rodney "short" on what he owed Smith. The solicitor argued that Smith went to the trailer door on the night of the incident with the intention of shooting Finley such that he was guilty of murder. App. 293, ll. 1-24. The solicitor presented testimony from Rodney, who claimed that Smith wanted the forty dollars that Finley owed. He said that Smith "wasn't happy" but that he was not using a "mad tone" either. App. 108, l. 3 – 110, l. 7. Rodney denied that the forty-dollar debt related to drugs that Rodney fronted to Finley. App. 117, ll. 18-21. The solicitor also presented testimony from Angie, who claimed that she told Smith early on that the customer they were driving to see was Finley. App. 88, ll. 9-14. However, Angie first learned of the drug debt owed by Finley when Finley told her, after she went inside of the trailer. App. 95, l. 15 – 96, l. 1; App. 96, ll. 16-21; but see App. 70, ll. 7-17. Angie agreed that she went inside of the trailer alone to get money for the drugs Smith was selling that night, evidencing that Smith initially had no intention of going inside. App. 72, ll. 10-19.

The trial court only charged the jury on murder and self-defense. App. 271, ll. 1-5. On direct appeal, the Court of Appeals reversed Smith's conviction, finding that the trial court should have also charged the law on voluntary manslaughter. App. 352. The Supreme Court reversed the Court of Appeals, finding that Smith was not entitled to charges on voluntary manslaughter, involuntary manslaughter, accident, or self-defense. App. 440.

### ***Admission and Content of Otis Hyder's Prior Testimony***

At Smith's retrial, 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, ll. 12-24; see also App. 12, ll. 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, l. 25 – 26, l. 8. When discussed at the end of the first day of trial, Godfrey 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 deceased*. App. 157, l. 17 – 158, l. 16.

The next morning, the trial judge said: "As 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 was present to explain that Hyder was "home bound and not well." App. 160, ll. 8-14. However, the solicitor advised the court that the point was moot because the defense agreed to the admission of the prior trial's testimony. App. 160, ll. 14-19. Godfrey confirmed that he was withdrawing his objection to the testimony and had discussed the matter briefly with Smith. App. 161, ll. 5-14. Smith advised the court that he

did not have any questions about it. App. 161, ll. 15-17. 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 (Applicant's Ex. 13, Transcript excerpt of Otis Hyder testimony).

Hyder's testimony was that Finley came to Hyder's trailer to use the telephone in the early morning hours of January 12, 1997. 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, ll. 5-25; see also App. 647, ll. 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, l. 4 – 644, l. 3; see also App. 647, ll. 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, l. 10 – 646, l. 4; see also App. 648, ll. 7-16. After they were in the doorway, Hyder saw Finley's right shoulder move and heard a gunshot. App. 646, ll. 5-13. According to Hyder, there was no fighting or scuffling between the men inside of the trailer. App. 646, ll. 18-22. On cross-examination, Hyder was confronted with his prior statement to police that "Robert [Finley] grabbed something from the man [Smith]." App. 648, ll. 4-12; App. 654, ll. 18. Hyder's statement to police also said that Smith "backed out of the trailer." App. 654, ll. 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, l. 18 – 658, l. 20.

Neither Hyder nor any other witness was confronted with the notes from Hyder's interview with the solicitor's investigator, which were determined to be Brady material during

the first PCR proceedings. See Supp. App. 4 – 5. Additionally, unlike the first trial, the State did not call Morgan Simmons Ortez, Finley’s girlfriend at the time of his death, to testify at the retrial. App. 531, ll. 12-15. Her handwritten statement reflected that Finley told her earlier on the evening of his death that he had tried to rob a drug dealer. App. 531, l. 12 – 533, l. 20; App. 633; Supp. App. 5 ¶ 2.

### ***Underlying Post-Conviction Relief Proceedings***

At the PCR hearing, Godfrey testified that he came into possession of the solicitor’s investigator’s notes on Hyder when he reviewed the solicitor’s file for purposes of Smith’s first PCR. The solicitor was never able to confirm who wrote them, but the important part was that Hyder said: “That’s when Finley reached for Smith. He intended to take drugs from him.” App. 499, l. 24 – 503, l. 12; App. 605 (Applicant’s Ex. 3, handwritten notes). Godfrey acknowledged that he initially objected to the admission of Hyder’s transcript testimony at the retrial. When asked why he withdrew his objection after Hyder was found alive, Godfrey testified: “I just did not object” and “I don’t remember.” App. 505, l. 14 – 507, l. 21; App. 518, ll. 3-23. As PCR counsel continued to question Godfrey about the decision to waive his prior objection, the Attorney General interrupted, saying: “I think he said several times that he cannot recall why he withdrew the objection.” App. 534, l. 21 – 536, l. 24. The PCR judge told PCR counsel that she needed to move on. App. 536, l. 25 – 537, l. 7.

PCR counsel was also asked why he failed to call Finley’s girlfriend, Morgan Simmons Ortez, as a witness for the defense at the retrial. App. 531, l. 12 – 533, l. 10. Godfrey responded: “I really don’t know.” App. 532, ll. 15-22. Ortez’s handwritten statement for police was made an exhibit at the PCR hearing. In that statement, she wrote that Finley told her earlier on the evening of his death that he had tried to rob a drug dealer. Also, just before he left again on the

night of the incident, Finley told Ortez that “[h]e was going to Pops to get him a hit.” App. 531, l. 16 – 533, l. 17; App. 633 (Applicant’s Ex. 9, statement of Morgan Simmons Ortez).<sup>3</sup> Godfrey agreed that Ortez’s testimony was relevant because his theory of the case was that Finley attempted to rob Smith later that same night in order to get drugs. App. 532, l. 23 – 533, l. 20.

Smith also testified at the PCR hearing. When they agreed to the admission of the transcript of Hyder’s testimony at the retrial, Smith was under the impression that the notes regarding Hyder’s statement to the solicitor’s investigator would also be admitted into evidence. Had Smith understood that the notes would not be admitted, he would not have agreed to the admission of the transcript testimony. 569, l. 12 – 571, l. 3.

The PCR court ruled that Smith failed to meet his burden of proof regarding error and prejudice as to his allegations that Godfrey was deficient in failing to object to the admission of Hyder’s transcript testimony. App. 706 – 708; App. 710. Specifically, the PCR court found that the trial judge had rejected Godfrey’s argument that the testimony was inadmissible because Hyder was not cross-examined on the notes found in the solicitor’s file after Smith’s first trial. App. 706. The PCR court further ruled that Godfrey was not questioned regarding why he advised Smith to withdraw the objection to Hyder’s testimony once the solicitors discovered that Hyder was alive. App. 707 – 708. Lastly, the PCR Court found that Godfrey’s failure to object under 804(a)(4) was somehow explained by Godfrey’s reference to portions of Hyder’s testimony in his closing argument, Angie and Smith’s testimony that Smith and Finley fought, and the fact that the solicitor presented Hyder’s son, who told the judge that Hyder was “alive but ill.” App. 710; but see App. 160, l. 8 – 161, l. 4.

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<sup>3</sup> Applicant’s Exhibit 9 is also on file with this Court due to the inability to reproduce a clear copy of all of the pages within the Appendix.

Regarding the allegation that Godfrey was ineffective in failing to present testimony from Morgan Simmons Ortez, the PCR court acknowledged that Godfrey “did not know why he did not present Simmons [Ortez] as a witness.” App. 709. The court noted: “Counsel also testified he employed an investigator who was responsible for interviewing any potential witnesses, including those who had given statements.” App. 709. With no further analysis, the court found that Smith “failed to satisfy his burden of proving error or prejudice as to this allegation.” App. 709. Notably, Godfrey’s testimony about having employed a private investigator to investigate the potential witnesses related to another witness, Terry Bradley, who was not called to testify at Smith’s retrial. App. 525, l. 6 – 527, l. 19. Godfrey also averred that his investigator “was supposed to investigate each witness that we had a statement from and anybody else that may have been around the scene,” but he had no recollection or notes regarding the results of any such investigation. App. 527, ll. 8-19.

## ARGUMENT

### I.

**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's 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.**

#### Introduction

Smith's trial attorney, Bill Godfrey, failed to utilize evidence that would have undermined the State's theory of malice, an essential element of murder. What makes this case most egregious is that Godfrey represented Smith at his prior PCR hearing, which resulted in the grant of new trial because of original trial counsel's failure to discover and present evidence that would have supported the defense's theory of the case. Among that evidence was notes from Otis Hyder's interview with the solicitor's investigator. Despite the solicitor's failure to prove Hyder's unavailability to testify at Smith's retrial, Godfrey withdrew his objection and Smith's trial again proceeded without any reference to Hyder's statements to the solicitor's investigator. Additionally, Morgan Simmons Ortez, who testified at the first trial, was not called to testify at the retrial despite corroboration that her prior statement would have provided for Smith's version of events. Counsel's failures could not be excused as trial strategy where he provided no reasoning or defense for his conduct. The first post-conviction relief court noted the relevance of the subject matter of Hyder and Ortez's prior statements to establishing that Smith was robbed and attacked by Finley, which would have evidenced Smith's lack of malice and helped establish Smith's claims of self defense and accident. Supp App. 4-5. In other words, there is a reasonable probability that Smith would have been found not guilty of murder had Godfrey properly defended the case.

### **Right to Effective Assistance of Counsel**

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984). A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRPC). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. at 687. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must 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.” Id. at 694.

### **Discussion**

#### **Deficiency of Counsel**

The PCR court erred in finding that Smith did not meet his burden of proof as to trial counsel Godfrey’s deficient performance and prejudice related to the admission of Hyder’s testimony. See App. 706. At the PCR hearing, Godfrey acknowledged that he was the PCR attorney who handled Smith’s 2002 PCR hearing, which resulted in his retrial. During his

representation of Smith as PCR counsel, Godfrey discovered handwritten notes in the solicitor's file regarding an interview conducted with Otis Hyder, Sr., at whose trailer the shooting occurred. The notes included: "That's when Finley reached for Smith, he intended to take drugs from him." App. 605. The notes were not disclosed to the defense during Smith's first trial, which was part of the basis for the original reversal of Smith's convictions. Supp. App. 4 – 5. Godfrey initially objected to the solicitor's attempt to admit the transcript of Hyder's testimony at Smith's retrial because the solicitor had not shown that Hyder was unavailable, but he withdrew his objection even after the solicitor discovered that Hyder was not deceased. App. 149, l. 10 – 158, l. 16; App. 160, l. 1 – 161, l. 17.

At the PCR hearing, Godfrey testified that he could not recall why he withdrew his objection to the use of Hyder's prior testimony, stating "I just did not object" and "I don't remember." App. 505, l. 14 – 509, l. 6. Later he expounded:

Right now I have - - I do not remember why I did that. There's parts of that trial, as I told you from the beginning, I don't remember a lot about it at all, and I don't know why because my memory used to be much better. I have no clue what's happened to me.

App. 518, ll. 3-22; see also App. 534, l. 21 – 537, l. 3. In Castro v. State, 417 S.C. 77, 84, 789 S.E.2d 44, 47 (2016), our Supreme Court found that there was no evidence to support the PCR judge's finding that trial counsel articulated a "valid strategic reason" for failing to object to the trial judge's improper consideration of petitioner's decision to proceed to trial in sentencing petitioner. Rather, the attorney's testimony at the PCR hearing "reveal[ed] no strategic discretion was employed by counsel on this matter at all." Castro, 417 S.C. at 84, 789 S.E.2d at 47. In Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999), the Court similarly found that trial counsel's PCR testimony that he did not consider the possibility of petitioner testifying after his father's damaging testimony evidenced counsel's failure to use his discretion in employing an

appropriate trial strategy in light of the unexpected testimony. Here, it is notable that the Order of Dismissal makes no mention of trial counsel's testimony that he did not recall what reasoning, if any, he employed in withdrawing his objection to Hyder's testimony. If the PCR court had addressed this testimony, it could have only found that Godrey failed to articulate a strategic reason for his consent to the use of the transcript of Hyder's testimony. See Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (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." (emphasis in original)); see also Briggs v. State, 421 S.C. 316, 329, 806 S.E.2d 713, 720 (2017) ("If Singleton did not consider objecting, he could not have decided not to object as a matter of strategy.").

Instead, the PCR court searched the record to find what it thought may have been the strategy, noting that trial counsel "used favorable points from Hyder's prior testimony in his closing argument." App. 710. The court further found that Angie and Smith both testified regarding a scuffle that occurred between Finley and Smith, and photographs of the scene were admitted into evidence. App. 710. Regarding Hyder's unavailability, the court found: "[T]he 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." App. 710. It was based upon this "analysis," that the court found that Smith "failed to satisfy his burden of showing error or prejudice" as to the allegation that counsel was ineffective in failing to object to the admission of Hyder's testimony. App. 710.

Remarkably absent from the PCR court's order is the trial judge's ruling that, regardless of whether Hyder had been cross-examined regarding the notes that indicated that Finley was trying to take drugs from Smith, the solicitor was required to prove that Hyder was deceased.

App. 151, ll. 4-14; App. 158, ll. 6-12. The trial judge conditioned his preliminary ruling by saying the testimony would be admissible “provided they satisfy me that the, Pops is dead.” App. 158, ll. 8-9. Thus, had Godfrey not withdrawn his objection to the admission of the transcript, the solicitor would surely not have been able to satisfy the “unavailability” requirement of Rule 804(a)(4), SCRE, once it was discovered that Hyder was alive.

“The party offering the statement bears the burden of establishing unavailability.” Dodd v. Berlinsky, 344 S.C. 172, 177, 543 S.E.2d 237, 240 (Ct. App. 2001) (citing State v. Kinloch, 338 S.C. 385, 391 n. 6, 526 S.E.2d 705, 708 n. 6 (2000)). “The mere absence of the declarant from the hearing does not establish unavailability.” Id. While the solicitor represented that Hyder was “home bound and not well,” those statements did not show that he was “unable to be present or to testify at the hearing because of . . . then existing physical or mental illness or infirmity.” Rule 804(a)(4), SCRE. The solicitor’s representations regarding Hyder’s health were no more reliable than his representations that Hyder was deceased, which was ultimately inaccurate. Hyder’s son did not say anything to the court other than his father was living and that he would pass on the court’s regards. App. 161, ll. 1-4. There was also no evidence presented related to any of the other exceptions under Rule 804(a), SCRE, that Hyder had any legal privilege, refused to testify despite a court order, lacked memory regarding the subject matter, or was unable to be served with process.

Godfrey’s inexplicable acceptance of the solicitor’s representations was deficient in light of the content of Hyder’s testimony at Smith’s first trial. Hyder testified that after Angie went outside, Smith came into the trailer. He claimed to overhear Finley tell Smith “he didn’t have his \$40, his money yet. But said as soon as he got a job he would pay him.” App. 641, l. 18 – 642, l. 24. Hyder said that Smith appeared agitated. Even though they were not yelling, pushing, or

shoving, Hyder told them to go outside. Smith walked out and Finley followed him and stood in the doorway. App. 643, l. 1 – 644, l. 3; App. 645, ll. 5-17; App. 646, ll. 18-22. He could not hear what was said once Smith walked out of the door, but that just before they went through the doorway he heard Finley say “Was you gonna shoot me?” and “Well, if you will give me the gun I’ll [help] you.” App. 645, l. 13 – 646, l. 9. Hyder claimed that he saw Finley’s shoulder move and immediately heard a gunshot. App. 646, ll. 10-13.

On cross-examination, Hyder denied that Smith ever laid any drugs on the table. He further denied the portion of his written statement, which was transcribed by police, that said “Robert grabbed something from the man” or that Smith backed up out of the trailer. Hyder excused the errors because his statement was given at 4:22 a.m. and he was upset because Finley had just died. App. 647, l. 23 – 650, l. 14; App. 654, l. 16 – 657, l. 19. Because the other notes were not disclosed to the defense prior to Smith’s first trial, Hyder was never confronted with the fact that he had also told the solicitor’s investigator that “Smith backed off – Finley reached for him” and “That’s when Finley reached for Smith, he intended to take drugs from him.” App. 605. Godfrey obviously recognized that Hyder was never cross-examined regarding the solicitor’s notes because he informed the trial court of that when the solicitor first announced his belief that Hyder was deceased. App. 151, l. 15 – 157, l. 16. The fact that trial counsel referenced Hyder’s testimony during his closing argument does not reveal that the withdrawal of his objection to the use of the transcript testimony was a reasonable trial strategy, especially in light of the damaging and incomplete testimony that Hyder gave at the first trial. App. 277, l. 21 – 279, l. 10; App. 282, ll. 8-12.

### *Prejudice to Petitioner*

Smith was prejudiced by the admission of Hyder's testimony from the first trial because he was not cross-examined regarding the notes from the solicitor's file. As the original PCR court found, "This evidence goes directly to the lack of malice on the part of Applicant and helps establish both his claim of self defense and accident." Supp App. 4. Had Hyder been brought to the courthouse to testify, or even appeared via video conference were his illness actually confirmed, the transcript of his prior testimony could have been used to refresh Hyder's recollection or impeach him. Hyder could have additionally been confronted with his statements to the solicitor's investigator, which would have belied his prior testimony that he misspoke as a result of the late hour and his grief. See Rule 612, SCRE; Rule 607, SCRE; State v. Johnson, 422 S.C. 439, 453, 812 S.E.2d 739, 746 (Ct. App. 2018), *cert. denied* (Aug. 3, 2018) (noting approval of two-way closed circuit testimony where necessitated by witness' health).

"It is elementary that an accused is presumed innocent until proven guilty and that the burden is upon the State to prove that the accused committed the crime charged." State v. Posey, 269 S.C. 500, 503, 238 S.E.2d 176, 177 (1997). "An accused has the right to rely entirely upon this presumption of innocence and the weakness in the State's case against him." Id. Here, the jury was instructed, in part, that malice "is the *intentional* doing of a wrongful act without just cause or excuse and with an *intent* to inflict an injury or under circumstances that the law will infer an evil intent." App. 303, ll. 8-12 (emphasis added). The solicitor's theory of malice was that Smith went into the trailer with no intention to "make a drug deal," but instead intent on shooting Finley over a forty-dollar drug debt. App. 293, ll. 12-24. The jury did not hear about Hyder's prior statement to the solicitor's investigator that "Smith backed off – Finley reached for him" and "That's when Finley reached for Smith, he intended to take drugs from him." 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. Thus, the evidence that was not presented to the jury due to trial counsel's deficiency undermined the State's theory of the case. If believed, it would have supported a finding that Smith did not shoot Finley with malice.

Further, Petitioner is cognizant of the Supreme Court's ruling on direct appeal that Smith was not entitled to instructions on voluntary manslaughter, involuntary manslaughter, accident, or self-defense.<sup>4</sup> App. 443 – 445. However, it is notable that the jury in this case asked: “[I]f

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<sup>4</sup> Respectfully, the Supreme Court took a very narrow view of Smith's trial testimony, summarizing Smith's testimony regarding his encounter with Finley inside the trailer as:

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.”

App. 442. Smith specifically denied pointing the gun at Finley. He pulled it out of his pocket and held it to his side in the hopes that Finley would calm down and give him back the drugs. Smith further noted that Finley was 6'2” tall and appeared to be high. Thereafter, Smith attempted to put his hands, and consequently the gun, back in his pocket and leave the trailer. It was then, as Smith was attempting to retreat, that Finley lunged at him and tried to get the gun. These additional facts, all contained within Smith's trial testimony, were essential to the analysis of Smith's entitlement to charges on the lesser-included offenses. See Brightman v. State, 336 S.C. 348, 350-351, 520 S.E.2d 614, 615 (1999) (A trial judge **must** charge a lesser included offense if there is **any evidence** from which the jury could infer the defendant committed the lesser rather than the greater offense.” (emphasis added)); State v. Knoten, 347 S.C. 296, 308-09, 555 S.E.2d 391, 398 (2001) (“In determining the issues to be submitted to the jury ... all of the testimony, both for the State and the defense, must be considered... The fact that the defendant interposed the defense of alibi did not deprive him of the benefit of the reasonable inferences to be drawn from the testimony relative to the degree of the offense committed, for the burden of establishing the offense charged rested upon the State.” (quoting State v. Moore, 245 S.C. 416, 420-21, 140 S.E.2d 779, 781 (1965))). Moreover, the Court's analysis may have been different had Hyder's statements to the solicitor's investigator been presented at trial.

there is no self-defense, can he still be guilty of a lesser crime?" App. 312, ll. 4-12. This reflects at least some consideration on their part that the elements of murder were not proven beyond a reasonable doubt. With the credibility of each witness called into question, their prior inconsistent statements were of paramount importance in determining what to believe and which "memories" were most accurate.

There was no probative evidence to support the PCR court's finding that Smith failed to meet his burden of proof that Godfrey was ineffective in withdrawing the objection to Hyder's transcript testimony. Smith is accordingly entitled to a new trial.

## II.

**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.**

Trial counsel also failed to call Morgan Simmons Ortez, who was dating Finley at the time of his death, to testify at the retrial. Ortez was a witness for the State at the first trial, where she testified that Finley attempted to rob another drug dealer on the same day of as the incident. Supp. App. 5. Ortez also gave a statement to police in which she said that Finley told her that he tried to rob a drug dealer earlier on the same night that he died. Ortez's handwritten statement was admitted as an exhibit at the PCR hearing and could have been used to impeach her had she denied it at trial. App 629 - 633. Godfrey could not recall why he did not call Ortez as a witness, saying "I really don't know." App. 531, l. 12 - 532, l. 22.

The PCR court's findings and ruling on this matter were contained in one brief paragraph:

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. The court's "findings" do not support its conclusion that Smith failed to meet his burden of proof. Rather, the court's findings reflect that Godrey failed to provide any strategic reason for failing to call Ortez. See, e.g., Castro v. State, 417 S.C. 77, 84, 789 S.E.2d 44, 47 (2016) (finding no evidence to support the PCR judge's finding that trial counsel articulated a "valid strategic reason" for failing to object to the trial judge's improper consideration of

petitioner's decision to proceed to trial in sentencing petitioner where attorney's testimony at the PCR hearing "reveal[ed] no strategic discretion was employed by counsel on this matter at all.")).

The failure of defense counsel to call a witness at trial can constitute deficient performance. See, e.g., Lounds v. State, 380 S.C. 454, 460-63 670 S.E.2d 646, 649-51 (2008) (holding counsel ineffective where there was no strategic reason not to call corroborating witness and petitioner was "clearly" prejudiced by failure to subpoena and call witnesses who would have supported petitioner's own testimony at trial); Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (holding counsel ineffective where triage nurse's notes would have provided substantive evidence that a sexual battery did not occur and impeached the victim's credibility); Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991) (holding counsel ineffective where he admitted that witness testimony may have made the difference in obtaining an acquittal). "In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing *or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence.*" Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) (emphasis added).

In the present case, Ortez's statement to police was admitted into evidence at the PCR hearing. App. 531, ll. 16-24; App. 629 – 633; see also App. 494, ll. 2-25. Had Ortez been called as a witness at Smith's retrial, counsel could have presented her with a copy of her handwritten statement, which included "He came back about [indecipherable] minutes later and said that he had tried to rob a drug dealer." App. 633. Had Ortez not been able to recall or denied including that in her statement, counsel could have used the handwritten statement to refresh her recollection or impeach here. See Rule 612, SCRE; Rule 607, SCRE; Rutland v. State, 415 S.C. 570, 577-78, 785 S.E.2d 350, 353-54 (2016) (finding that had the witness denied her prior

statements, trial counsel could have impeached her with the written statement or news article in which she was quoted as saying the victim was armed, which would have affected her credibility).

Smith was prejudiced because Ortez's testimony would have also supported Smith's theory of the case, that he was being robbed by Finley at the time of the incident. As discussed *supra* in Issue II, if Finley was attempting to rob Smith, then it would not be unreasonable to believe that Finley was attempting to gain control of Smith's weapon, as Smith said. See App. 214, ll. 3-25. In turn, this evidence would have undermined the State's theory of malice, which is an essential element of murder. If the jury found that the State failed to prove the element of malice beyond a reasonable doubt, it would have found Smith not guilty of murder. Thus, Smith was prejudiced by Godfrey's failure to call Ortez as a witness at his retrial.

There was no probative evidence to support the PCR court's finding that Smith failed to meet his burden of proof that Godfrey was ineffective in failing to present testimony from Morgan Simmons Ortez at Smith's retrial. Smith is accordingly entitled to a new trial.

**CONCLUSION**

Based on the foregoing, Petitioner David Dwight Smith respectfully requests that this Court reverse the PCR court's denial of post-conviction relief and remand to the court of general sessions for a new trial.

A handwritten signature in cursive script, reading "Laura R. Baer", is written over a horizontal line.

Laura R. Baer  
Appellate Defender

ATTORNEY FOR PETITIONER

This 8<sup>th</sup> day of October, 2018.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

\_\_\_\_\_  
Certiorari from Spartanburg County

Honorable R. Scott Sprouse, Circuit Court Judge  
\_\_\_\_\_

DAVID DWIGHT SMITH,

PETITIONER,


V.

STATE OF SOUTH CAROLINA,


RESPONDENT

\_\_\_\_\_  
CERTIFICATE OF SERVICE  
\_\_\_\_\_

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Jordan Cox, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Petitioner have been served on David Dwight Smith, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 8<sup>th</sup> day of October, 2018.

  
\_\_\_\_\_  
Laura R. Baer  
Appellate Defender  
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me  
this 8<sup>th</sup> day of October, 2018.

 (L.S)

Notary Public for South Carolina

My Commission Expires: July 3, 2023

**RECEIVED**  
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SC Court of Appeals