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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

Certiorari to Aiken County
Court of Common Pleas
The Honorable Robert E. Hood, Post-Conviction Relief Court Judge
The Honorable Doyet A. Early, III, Trial Judge
Appellate Case No. 2016-002458

ANTHONY MARQUESE MARTIN, SCDC #345836

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR REHEARING

On July 17, 2019, this Court issued a published opinion reversing the post-conviction relief court's denial of post-conviction relief and remanding Petitioner Anthony Marquese Martin's case back to the court of general sessions for a new trial after finding Martin met his burden of establishing his trial counsel was constitutionally ineffective for failing to elicit testimony from Martin's mother regarding the specific time of his purported alibi. Martin v. State, Op. No. 27900 (S.C. filed July 17, 2019) (Shearouse Adv. Sh. No. 29 at 8). In reversing the post-conviction relief court and granting Martin relief, this Court appears to have found Martin met his burden of establishing he was entitled to relief despite his complete failure to introduce any documentary or witness testimony in a manner consistent with the rules of evidence, although no specific finding or analysis is included in the published opinion. This Court further found Martin established the result of his trial would have been different had trial counsel elicited a specific time frame from Martin's mother to support his purported alibi, noting

the jury asked to rehear the alibi testimony during its deliberations. Pursuant to Rule 221(a), SCACR, Respondent, the State, respectfully petitions for rehearing because the State believes this Court misapprehended and overlooked its argument before this Court and the post-conviction relief court's finding that Martin failed to present competent evidence consistent with the rules of evidence to establish he was entitled to relief. Specifically, this Court misapprehended and overlooked the State's argument and the post-conviction relief court's finding that Martin failed to meet his burden of proof because he neglected to present evidence or witnesses to support his claim in a manner consistent with the rules of evidence, as this Court's opinion is devoid of any specific ruling or analysis explaining exactly how Martin met his requisite burden of proof despite failing to present any witness testimony or otherwise present competent evidence consistent with the rules of evidence.

In seeking rehearing, the State submits that in finding that Martin met his burden of establishing trial counsel was constitutionally ineffective for failing to elicit testimony from Martin's mother regarding the specific timeline of his purported alibi, this Court failed to properly consider the State's argument and the post-conviction relief court's finding that Martin failed to present witness testimony or evidence in accordance with the rules of evidence. In this Court's opinion, this Court appears to recognize the State argued Martin failed to meet his burden of proof by failing to provide sufficient evidence to satisfy his claim. *Id.* ("The State first argues Petitioner failed to meet his burden of proof because he did not provide sufficient evidence—the in-person testimony of the alibi witness—at the PCR hearing."). However, this Court fails to acknowledge the post-conviction relief court explicitly denied and dismissed Martin's claim on this very ground. Moreover, this Court fails to make any specific findings that Martin met his requisite burden of proof or explain how testimony regarding the unsworn note in

counsel's file was offered in accordance with the rules of evidence at the post-conviction relief hearing and met the burden of proof required in post-conviction relief cases—creating an inconsistency with previous case law issued by this Court. This Court's opinion simply states, “[w]e disagree” without any analysis or clarification as to how Martin met his burden of proof despite the post-conviction relief court's finding to the contrary.

Martin, like all post-conviction relief applicants, had the burden of establishing he was entitled to relief based on probative evidence. See Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (“In order to receive relief for ineffective assistance of counsel, a defendant must make two showings. First, he must show that his trial counsel's performance was deficient, meaning that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, he must demonstrate that this deficiency prejudiced him to the point that he was deprived of a fair trial whose result is reliable.”) (internal citations omitted); Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (“In a PCR proceeding, the burden is on the applicant to prove the allegations in his application. This Court will uphold factual findings of the PCR court if there is any evidence of probative value to support them.”) (internal citations omitted); Pauling v. State, 331 S.C. 606, 609, 503 S.E.2d 468, 470 (1998) (“In a post-conviction proceeding, the burden is on the applicant to prove the allegations in his application.”); Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995) (“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different.”). While an applicant need not call a live witness to meet this burden of proof in all cases, his or her evidence must be admissible under the rules of evidence. See

Glover, 318 S.C. at 498–99, 458 S.E.2d at 540 (“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. The applicant’s mere speculation what the witnesses’ testimony would have been cannot, by itself, satisfy the applicant’s burden of showing prejudice.”).

In the present case, Martin fell short of that burden by failing to present any competent evidence to support his allegation—that his mother would have testified he was with her at such a time that it would have been impossible for him to commit the crime but for counsel’s failure to properly question her. Notably, Martin failed to present any competent evidence **in accordance with the rules of evidence as required**, either by way of live testimony at the hearing or affidavit to support his assertion that his mother would have testified as to the specific time he avers but for counsel’s purported errors. Such testimony or other evidence admissible pursuant to the rules of evidence is absolutely essential to establish an applicant is entitled to relief, undo a criminal conviction by a jury of his peers, and remand the matter back to the court of general sessions for a new trial.

Rather than presenting evidence in accordance with the rules of evidence, Martin elicited testimony from counsel, who was shown an unknown—and unadmitted—statement taken at an unknown time by an unknown individual purportedly from Martin’s mother that indicated she dropped him off near a bus stop at “11:15, 11:30 a.m.” This testimony amounts to hearsay within hearsay and Martin failed to establish each part of the combined statement fell within an exception to the hearsay rules. Accordingly, Martin failed to present competent evidence to support his claim in accordance with the rules of evidence as required for relief.

Pursuant to Rule 805, SCRE, “[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.” Rule 805, SCRE; see State v. Hendricks, 408 S.C. 525, 531, 759 S.E.2d 434, 437 (Ct. App. 2014) (“Hearsay within hearsay is admissible if each level of hearsay satisfies an exception to the hearsay rule.”); State v. Burroughs, 328 S.C. 489, 498, 492 S.E.2d 408, 412 (Ct. App. 1997) (finding hearsay within hearsay is only admissible if each level of hearsay qualifies as an exception to the hearsay rule); Wilson v. Childs, 315 S.C. 431, 439, 434 S.E.2d 286, 291 (Ct. App. 1993) (“[H]earsay within hearsay, or ‘double hearsay’ is excluded unless each part of the combined statement falls within an exception to the hearsay rule.”); see also Ruffin v. City of Boston, 146 F. App’x 501, 506 (1st Cir. 2005) (finding, in § 1983 case against police officers for use of excessive force, that plaintiff’s statements to EMT that were incorporated in EMT’s report constituted “double hearsay” but were admissible because they could be identified as statements of a party-opponent); United States v. Filippi, 172 F.3d 864 (4th Cir. 1999) (finding the district court did not abuse its discretion in requiring the redaction of statements contained within a letter that was admitted as an exception to hearsay rules, as the statements within were double hearsay and did not meet any exceptions); Phoenix Mut. Life Ins. Co. v. Adams, 30 F.3d 554, 567 (4th Cir. 1994) (finding hearsay within hearsay found in a letter did not fall within a recognized exception to the hearsay rule, and therefore, should have been excluded).

Here, the out-of-court statement by Martin’s mother as purportedly told to an unidentified investigator is hearsay that does not fall within any exception to the rule barring hearsay. Rule 802, SCRE. Likewise, the unidentified investigator’s note constitutes hearsay, since it is being offered to prove the truth of the matter asserted and it does not fall within any hearsay exception.

As Martin has offered no exception to the hearsay rule under which his mother's statement is admissible, he has simply failed to meet his requisite burden of proof.

Additionally, from a public policy standpoint, it only makes logical sense that the probative evidence required for a finding of constitutional ineffectiveness must be accompanied by some assurance of veracity in accordance with the rules of evidence. Otherwise, family members and friends of defendants could easily provide false statements to a loved one's attorney to be used at a future proceeding, such as a subsequent post-conviction relief hearing, without any fear of perjury charges or other repercussions that accompany lying under oath if he or she testified falsely during trial. In the present case, it is telling that Martin's mother testified at trial, was asked open-ended questions by trial counsel that easily allowed her to provide such detail and specificity as Martin claims should have been elicited, and she simply did not do so while under oath. For unknown reasons, she similarly failed to appear for his post-conviction relief hearing, provide a sworn affidavit, or otherwise provide any testimony or evidence in accordance with the rules of evidence to support Martin's version of events. Without such competent evidence, Martin failed to meet his requisite burden of proof to establish that his mother would have provided him with the testimony he desires but for counsel's alleged deficient performance.

In its opinion, this Court cites to Pauling for the proposition that an applicant can support his post-conviction relief claims based on documentary evidence rather than witness testimony. Pauling, 331 S.C. 606, 503 S.E.2d 468. However, Pauling is readily distinguishable from the present case. In Pauling, the applicant, who was convicted of first-degree criminal sexual conduct following a jury trial, alleged his trial counsel was ineffective for failing to call a triage nurse who treated the victim to support his defense that no sexual battery occurred. Pauling, 331

S.C. 606, 503 S.E.2d 468. Pauling did not present the triage nurse at his evidentiary hearing, but did introduce her triage notes in support of his allegation. Id. The post-conviction relief court denied relief, in part noting he failed to present the nurse as a witness at his hearing. Id. This Court reversed, finding the applicant met his burden of proof by presenting “evidence as to the nature of the nurse’s testimony by introducing her triage notes.” Id. at 611, 503 S.E.2d at 471. However, these triage notes were admissible in accordance with the rules of evidence as the notes themselves were business records and any opinions within those notes were for medical diagnosis. See Rule 803(3) and (6), SCRE; see also Ex parte Dep’t of Health & Env’tl. Control, 350 S.C. 243, 250, 565 S.E.2d 293, 297 (2002) (“Medical records are admitted routinely as business records. The trustworthiness of medical records is presumed, based on the fact that the test is relied on for diagnosis and treatment. DHEC cites opinions from several other jurisdictions that have admitted laboratory test results as business records, including blood tests, based on the same rationale: if it is sufficiently trustworthy to be relied upon for medical treatment, it is sufficiently trustworthy to be admitted as a business record. We find this rationale persuasive and hold Doe’s HIV tests admissible as business records.” (internal citations omitted)).

Crucially, in the present case, unlike Pauling, Martin failed to present “evidence as to the nature of [his mother]’s testimony” in accordance with the rules of evidence. Rather, the only “evidence” presented was inadmissible hearsay within hearsay testimony from trial counsel that it appeared based on a statement shown to him at the evidentiary hearing that at some unknown time, Martin’s mother told an unknown individual that she thought she dropped him off near the bus stop at 11:15 to 11:30 a.m. This “evidence” is not admissible pursuant to the rules of evidence, lacks the indicia of reliability that the triage notes had in Pauling, and is insufficient to

meet Martin's burden of proof.

For those reasons, the post-conviction relief court properly determined Martin failed to meet his requisite burden of proof by failing to provide any competent evidence in accordance with the rules of evidence to support his allegation. Yet, in reaching a contrary conclusion, this Court reversed the post-conviction relief court's determination in that regard without explaining or addressing in what way it was erroneous. Instead, this Court simply stated it "disagree[d]" without further explanation. Based on the conclusory manner in which this Court rejected the sole basis upon which the post-conviction relief court denied relief on Martin's alibi-based claim, this Court's published decision is incomplete, confusing, and leaves it entirely unclear as to how the post-conviction relief court actually erred. Under such circumstances, the State respectfully urges this Court to reconsider this matter for all the foregoing reasons, grant rehearing, provide the State with an opportunity to be heard on this matter, vacate its prior opinion, and issue a new published opinion that directly addresses the post-conviction relief court's finding that Martin failed to present competent evidence to support his allegation in accordance with the rules of evidence.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

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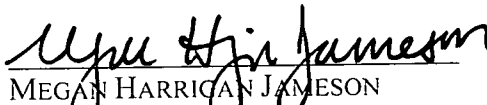
PROOF OF SERVICE

I, Megan Harrigan Jameson, certify that I have served the within **Petition for Rehearing** on Petitioner by depositing two copies of the same in the interagency mail to be delivered to Petitioner at the address below:

Appellate Defender David Alexander
South Carolina Commission on Indigent Defense—Division of Appellate Defense
P.O. Box 11589
Columbia, South Carolina 29211-1589

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

This 30th day of July, 2019.


MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General
S.C. Bar No. 100108

Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737