

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO FLORENCE COUNTY  
Court of Common Pleas

The Honorable Michael G. Nettles, Post-Conviction Relief Judge  
The Honorable D. Craig Brown, Trial Judge

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Appellate Case No. 2019-000111

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**RECEIVED**

**Apr 16 2020**

**S.C. SUPREME COURT**

Tyrone Joseph Whatley, #208735,

Petitioner,

v.

State of South Carolina,

Respondent,

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

ALAN WILSON  
Attorney General

LINDSEY A. MCCALLISTER  
Assistant Attorney General  
SC Bar #79054

P.O. Box 11549  
Columbia, S.C. 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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## **ISSUES PRESENTED ON CERTIORARI**

### **PETITIONER'S QUESTION PRESENTED**

Did the PCR court err in refusing to find trial counsel ineffective for failing to move for a mistrial based on the State's failure to timely disclose an inconsistent statement given by a co-defendant?

### **RESPONDENT'S COUNTERSTATEMENT OF QUESTION PRESENTED**

Did the PCR court correctly find trial counsel was not constitutionally ineffective for failing to object to the admission or move for suppression of a second statement given by a testifying witness where Counsel was provided time to review the statement before continuing his cross-examination of the witness; the witness admitted she lied in her first statement and therefore her credibility was already impeached; and neither statement was admitted into evidence at trial or at the PCR hearing, so Petitioner cannot prove either deficiency or prejudice?

## STATEMENT OF THE CASE

Tyrone Joseph Whatley (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Florence County Clerk of Court. During its July 2010 term, the Florence County Grand Jury indicted Petitioner for one count of first-degree burglary, two counts of armed robbery, and one count of conspiracy (2010-GS-21-1008). Petitioner was represented by Scott P. Floyd (Counsel), Esquire. Fitzlee H. McEachin, Esquire, prosecuted the case. On January 31 - February 2, 2011, Petitioner proceeded to trial before the Honorable D. Craig Brown, and he was convicted as indicted on all four charges. Judge Brown sentenced Petitioner to life imprisonment without parole for first-degree burglary and both counts of armed robbery, plus five years' imprisonment for conspiracy. The sentences are to be served concurrently.

Petitioner filed a timely Notice of Appeal. An appeal was perfected by Susan B. Hackett, Esquire. On January 31, 2012, Petitioner's counsel filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), raising the following issue: "Did the trial court erred in refusing to permit Petitioner to question [Jessica] Ussery, an alleged co-conspirator, regarding the sentencing range for her pending charges where the [S]tate dismissed two counts of armed robbery after she cooperated with law enforcement?" On September 7, 2012, Petitioner's counsel provided to the Court of Appeals the case of State v. Gracely, 399 S.C. 363, 731 S.E. 2d 880 (2012). On December 20, 2012, the Court denied Petitioner's counsel's petition to be relieved and directed the parties to brief the following issue: "Did the circuit court improperly limit the scope of Petitioner's cross-examination of the State's witness, Jessica Ussery, regarding the mandatory minimum sentences she avoided by testifying against Petitioner?"

On March 19, 2014, the South Carolina Court of Appeals affirmed Petitioner's conviction in a published opinion. State v. Whatley, 407 S.C. 460, 756 S.E.2d 393 (Ct. App. 2014).

Petitioner's request for rehearing was denied on April 25, 2014. On March 4, 2016, the Supreme Court denied Petitioner's Petition for Writ of Certiorari. The remittitur returned to the circuit court on March 16, 2016.

Petitioner filed an application for post-conviction relief on May 20, 2016. Respondent made its Return on January 30, 2017. On January 25, 2018, Petitioner, through PCR counsel, amended his application. An evidentiary hearing into the matter convened on January 30, 2018, at the Florence County Courthouse before the Honorable Michael G. Nettles. Petitioner was present at the hearing and represented by Jonathan Waller, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. By written order filed January 18, 2019, Judge Nettles denied Petitioner's request for relief and dismissed his application with prejudice.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief. On November 7, 2019, Petitioner, through counsel, filed a petition for writ of certiorari in this Court.

## STATEMENT OF THE FACTS

On July 21, 2009, Brandon Cross and Ciera Davis were asleep in their motel room when Davis heard a knock on the door. App. pp. 59, 76-78. She looked through the peephole and saw a woman. App. p. 78. As she opened the door, two men burst through. App. pp. 78-79. One man was carrying a gun and both demanded money. App. p. 63- 65, 79- 80. Cross was able to get out of the motel room, and he ran downstairs and asked a man in an Explorer to call the police. App. pp. 66-67. Cross saw the men come downstairs with bags and a gun and jump into a small, burgundy, two-door car and drive away. App. pp. 67- 68.

As Sergeant John F. McLaurin of the Florence County Sheriff's Office was responding to the 911 call, he saw the burgundy car pull out right in front of him. App. p. 92. He activated his blue lights and initiated a traffic stop. App. p. 93. After initially failing to stop, Jessica Ussery, the driver, eventually stopped, and Petitioner and John Barfield ran from the stopped car. App. pp. 93-94, 97. Ussery was arrested at the scene, and Barfield and Petitioner were arrested later in the investigation. App. pp. 123, 142, 171-72, 174.

At trial, the State called Ussery to the stand. App. p. 109. She testified she drove her boyfriend, Barfield, to a trailer park to pick up Barfield's friend, Rom, also known as Jamal Bryant, who Ussery identified at trial as Petitioner.<sup>1</sup> App. pp. 114-17. Ussery testified when they picked Petitioner up, he had a shotgun with him, which he put in the trunk of Ussery's car. App. pp. 115-17. She testified Barfield told her he needed to stop at the Days Inn to pick up some money from someone who owed him. App. p. 118. She recounted that when they arrived at the motel room, Barfield told her to knock on the door and then Barfield pushed his way into the room, and

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<sup>1</sup> Ussery admitted she did not know Petitioner as Tyrone at the time of the robbery. App. p. 125. However, she identified Petitioner at trial as the person she knew as Jamal Bryant a.k.a. Rom. App. p. 125.

Petitioner followed him. App. pp. 119-20. She explained that after they arrived at the motel, Barfield had the gun. App. p. 119. Ussery testified both Barfield and Petitioner were carrying bags, pocketbooks, and clothes when they came out of the motel room. App. pp. 121-22. She drove them away from the motel and saw blue lights behind her. App. pp. 121-22. She turned into the Merita Bread parking lot and both men told her not to say anything, jumped out of the car, and ran. App. p. 121.

On cross-examination, Counsel asked Ussery about her original charges, and she explained she was charged with two counts of armed robbery with a deadly weapon, failure to stop for a blue light, and falsification of information to the police. App. pp. 129-30. Ussery further testified her two armed robbery charges were dropped to accessory before the fact and accessory after the fact. App. p. 130. Ussery admitted she gave several statements to the police, and she lied in her first statement. App. pp. 123-24. Ussery stated at the scene of the traffic stop, she told police two men named John Anderson and Jamal Bryant had forced her participate in the robbery at gunpoint. App. pp. 124, 130-31. However, Ussery testified her subsequent statement to police was “the truth as I said today.” App. pp. 124-25. No records of Ussery’s pre-trial statements were admitted into evidence. App. p. 4.

The State then called Barfield. App. p. 143. Barfield testified he and Petitioner talked about committing a robbery, and Petitioner brought a gun with him when Barfield and Ussery picked him up. App. pp. 148-49. He testified he put the gun in his pants when he got out of the car at the motel room. App. p. 151. He testified he and Petitioner entered the motel room and asked the victims, “Where is the dope and the money?” App. pp. 151-52. Barfield testified when they left the motel in Ussery’s car, law enforcement got behind them. App. p. 155. When they reached a Merita Bread store, he and Petitioner jumped out of the car and ran. App. p. 155.

On cross-examination, Counsel asked Barfield about his original charges and what charges had been disposed of. App. pp. 158-59. Barfield explained he was originally charged with conspiracy, possession of a weapon, first-degree burglary, and two counts of armed robbery. App. p. 158. He further testified all of those charges were dismissed, and he pleaded guilty to two counts of attempted armed robbery, receiving a seven-year sentence. App. pp. 158-59. Counsel then asked Barfield, “Did you know what you were facing for arm[ed] robbery?” App. p. 159. At that point, the State objected to his questioning him regarding the amount of time he was subjected to, and the trial court sustained the objection after an off-the-record bench conference. App. pp. 159-60. Counsel continued with his cross-examination by asking Barfield if he was aware he could receive substantially more time for the armed robbery and burglary charges that were dismissed than what he received for attempted armed robbery, and Barfield confirmed he was aware. App. p. 160.

Next, the State called Investigator Alvin Powell of the Florence County Sheriff’s Office. App. pp. 166-67. He testified he interviewed Ussery and Barfield, and Barfield gave him Petitioner’s nickname, “Rom,” and approximate address. App. pp. 173-74. Powell testified the female victim, Davis, confirmed Barfield’s identity through a photo lineup; eventually, Barfield then confirmed Petitioner’s identity through a photo identification. App. p. 174. Investigator Powell testified he was the officer who arrested Petitioner and collected evidence in the case. App. p. 174.

After Investigator Powell’s testimony, the trial judge met with the attorneys in chambers. App. p. 184. The trial judge then announced on the record that he had determined, based on State v. Gillian, 360 S.C. 433, 602 S.E.2d 62 (Ct. App. 2004), aff’d as modified on other grounds, 373 S.C. 601, 646 S.E.2d 872 (2007), Counsel should have been allowed to ask about the amount of

time Barfield faced. App. p. 184. Specifically, the trial judge found questioning of that nature could go to the bias or prejudice of the witness, and he decided to allow Counsel to question Barfield regarding the amount of time he was facing. App. pp. 184-85.

Counsel then recalled Barfield and asked whether he understood he was facing “from minimum ten to maximum thirty years on those two counts,” and Barfield answered he did after speaking to his lawyer.<sup>2</sup> App. p. 189. Counsel also asked if Barfield understood he was facing fifteen years to life imprisonment for the first-degree burglary charge, and Barfield stated he did. App. pp. 190-91. Counsel did not recall Ussery to the stand.

Ultimately, the jury found Petitioner guilty on all counts, and the trial judge sentenced him to concurrent terms of life without parole for burglary and both counts of armed robbery, plus five years’ imprisonment for conspiracy. App. pp. 249-50.

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<sup>2</sup> Counsel pursued a similar line of questioning with Ussery, to which the State also objected. App. pp. 141-42. However, Counsel did not recall Ussery after the trial court reversed its decision sustaining the State’s objections. Counsel explained at the PCR hearing he felt he had sufficiently covered the issue with Barfield, and there was no need to repeat the testimony with Ussery. App. pp. 297-98.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRPC; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

## ARGUMENT

**The PCR court correctly found trial counsel was not constitutionally ineffective for failing to object to the admission or move for suppression of a second statement given by a testifying witness where Counsel was provided time to review the statement before continuing his cross-examination of the witness; the witness admitted she lied in her first statement and therefore her credibility was already impeached; and neither statement was admitted into evidence at trial or at the PCR hearing, so Petitioner cannot prove either deficiency or prejudice.**

Petitioner contends the PCR court erred in finding Counsel was not constitutionally ineffective for failing to move for a mistrial based on the State's purportedly untimely disclosure of a prior inconsistent statement given by a co-defendant. PWC p. 1. However, Counsel was given time to review the statement before continuing to cross-examine the witness; the witness admitted her first statement was untrue, and therefore, her credibility was already impeached; and the statement at issue was not introduced at trial or during the evidentiary hearing. Petitioner has therefore failed to meet his burden of proving either deficiency or prejudice as to this issue.

As an initial matter, this issue is not properly before this Court because Petitioner now characterizes the failure to turn over the statement prior to trial was a Brady<sup>3</sup> violation. PWC pp. 7-9. However, the allegation was never pleaded below as a Brady issue – in fact PCR counsel stated to the PCR court he was *not* arguing it was a Brady violation because the material was turned over during trial. App. p. 311. Instead, the issue was framed as Counsel's failure to "secure discovery" in time to properly prepare for trial, and Counsel's failure to "object to and move to suppress statements of witnesses that were turned over during trial." App. pp. 269, 275-76.

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<sup>3</sup> Brady v. Maryland, 373 U.S. 83 (1963) (requiring the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment). Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999).

Moreover, the PCR court only addressed this allegation in relation to a Rule 5, SCCrimP, violation in both its oral ruling and its written order. Petitioner did not make a motion pursuant to Rule 59(e), SCRCPC, asking the PCR court to make findings relating to a Brady violation. Therefore, this issue is not preserved as presented in Petitioner's petition, and this Court should deny certiorari.<sup>4</sup> See I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review."); State v. Gee, 262 S.C. 373, 204 S.E.2d 727 (1974) ("It is well settled that an issue that has not been presented to or passed upon by trial judge will not be considered on appeal."); State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) ("To be preserved for appellate review, an issue must be both presented to and passed upon by the trial court. If the issue is raised but not ruled on, it is not preserved for appeal.").

In any event, notwithstanding the lack of preservation, this Court should deny certiorari because the PCR court correctly found Counsel was not constitutionally ineffective in his handling of the statement produced at trial. App. pp. 332-33. At trial, Ussery testified she gave an initial statement the night of the incident and then sometime later, after she was in jail awaiting disposition of her charges, she gave an additional statement or statements to law enforcement.<sup>5</sup> App. pp. 126-27. Petitioner repeatedly characterizes Ussery's second statement as an

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<sup>4</sup> Analyzing this issue as a Brady violation for the first time on appeal would significantly prejudice Respondent as such a claim generally requires the testimony of the prosecuting solicitor to refute because it is a claim of prosecutorial misconduct, not ineffective assistance of trial counsel. The solicitor was not called as a witness at Petitioner's evidentiary hearing because Respondent was not on notice of a claim against him. App. pp. 258-64, 269-70.

<sup>5</sup> Ussery testified one statement was written and one was recorded, although it appears from the record this refers to the same statement. App. pp. 128, 170-71.

“inconsistent” statement and asserts Ussery named the second robber as “Rom” in that statement.<sup>6</sup> PWC pp. 3, 5. Ussery freely admitted at trial that her first statement and subsequent statements were different, and she asserted her first statement – that two men named John Anderson and Jamal Bryant, whom she did not know, forced her to participate in the robbery at gun point, and thus she herself was less culpable – was the untrue statement. App. pp. 123-24. Ussery also testified she did not know Petitioner well; she had only met him briefly two to three times prior to the day of the crime; and she did not know him as Tyrone. App. pp. 124-25, 131. However, it was Petitioner’s other co-defendant, Barfield, not Ussery who identified Petitioner to the investigating officer as “Rom” and picked Petitioner’s photo out of a lineup as the person he knew by that name. App. pp. 173-74.

After Ussery’s direct examination, Counsel asked a series of questions attempting to clarify the circumstances around Ussery’s second statement. App. pp. 126-33. Counsel then asked to approach the bench and a recess was taken, wherein the State produced a seven-page written statement, which the trial court gave Counsel time to review. App. pp. 133-34. At the end of the break, Counsel asserted to the trial court the statement was “very brief;” he had “ample” time to read the statement; he did not need any further time; and he did not have any motions to make regarding the disclosure of the statement. App. pp. 134-35. Counsel then resumed his cross-

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<sup>6</sup> Petitioner asserts “it appears that in [Ussery’s] second statement, that she named the second male robber as Rom, Jamal Bryant’s nickname.” PWC p. 5. However, this assertion is without any citation to the record. Ussery never testified in detail about the contents of her second statement other than that it was essentially the same as her trial testimony. App. p. 125. The investigating officer testified it was Barfield who gave him the name “Rom” and identified Petitioner as Rom from a photo lineup, and they did not know the identity of the second robber before that time. App. pp. 172-73. Ussery testified at trial she knew Jamal Bryant and Rom to be the same person, and identified that person as Petitioner for the first time. App. p. 125.

examination of Ussery. App. pp. 140-44. Ussery's second, written statement was never entered into evidence at trial. App. p. 4.

Crucially, Petitioner also did not introduce the statement at the evidentiary hearing. Although Petitioner repeatedly asserts Ussery's second statement identified the second robber as Rom, there is no evidence in the record to support this assertion because the statement was not introduced into evidence at trial, nor did Petitioner introduce it at the PCR hearing. App. pp. 4, 273. Thus, Petitioner's contention that the second statement was impeaching, exculpatory, or in any way constituted a Brady violation, or that Counsel should have objected to Ussery's testimony or moved for a mistrial because of the second statement is wholly without evidentiary support. See Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999) (finding trial counsel was not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . ."); Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (denying relief where PCR applicant failed to present witnesses or specific testimony establishing he would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 217, 481 S.E.2d 129, 133 (1997) (finding PCR applicant was not entitled to relief where no evidence was presented at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial). See also Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)) (holding there is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect); State v. Bryant, 307 S.C. 458, 415 S.E.2d 806 (1992) (holding a trial judge should not make a

determination as to whether evidence is exculpatory or impeaching without first inspecting the evidence); Prince v. State, 279 S.C. 30, 33, 301 S.E.2d 471, 472 (1983) (explaining a mistrial should be granted only when “dictated by manifest necessity or the end of public justice”).

Additionally, Counsel testified his understanding of the rules is that the State does not have to turn over witness statements until the witness actually testifies. App. pp. 299-300. Rule 5(a)(2), SCCrimP, states:

[T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by the attorney for the prosecution or other prosecution agents in connection with the investigation or prosecution of the case, or of statements made by prosecution witnesses or prospective prosecution witnesses provided that after a prosecution witness has testified on direct examination, the court shall, *on motion of the defendant*, order the prosecution to produce any statement of the witness in the possession of the prosecution which relates to the subject matter as to which the witness has testified. . . .

(emphasis added). In this case, as soon as Counsel realized during cross-examination that Ussery had given a second statement he had not seen, he asked to approach the bench on a matter of law, and the State produced the statement. App. pp. 133-34. Counsel repeatedly testified that if he felt he needed more time to review the second statement or prepare further for cross-examination of Ussery, he would have asked for it. App. pp. 300-01, 305. Additionally, Counsel testified at the evidentiary hearing he was able to cross-examine both Ussery and Barfield on the fact that they received a significant reduction in their charges in exchange for their testimony. App. p. 304. Thus, Ussery’s credibility, and specifically the accuracy of her identification of Petitioner as the second robber, was already impeached on the basis of potential bias and from her testimony she did not know Petitioner well and only knew him by other names, as the Court of Appeals noted on direct appeal. See State v. Whatley, 407 S.C. 460, 470, 756 S.E.2d 393, 398 (Ct. App. 2014) (“He availed himself of extensive opportunities to delve into Ussery’s bias and poor credibility, capitalizing on her inconsistent statements to the police.”).

Moreover, Petitioner's other co-defendant, Barfield, identified Petitioner to the investigating officer as "Rom" and picked Petitioner's photo out of a lineup as the person he knew by that name. App. pp. 173-74. Barfield's statement and testimony was lynchpin connecting the name Rom with Petitioner's legal name and identity. App. pp. 172-74. It is undisputed that Ussery never physically identified Petitioner as Rom until she testified at trial, and Petitioner has never asserted Counsel had a meritorious basis to exclude Barfield's testimony. Therefore, even if Counsel had objected to Ussery's testimony or moved for a mistrial on the basis of the late disclosure of the second statement, there is no reasonable probability such a motion would have been granted because Ussery's statement was merely cumulative to Barfield's. See Whatley, 407 S.C. at 470, 756 S.E.2d at 397-98 ("[O]nly Ussery and Barfield identified Whatley as one of the robbers. However, Barfield's testimony established the same material facts as Ussery's, and more."); Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993) (holding impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different).

Because Petitioner cannot prove either deficiency or prejudice without the statement at issue in the record, regardless of how the issue is framed to the Court, this Court should deny certiorari.

**CONCLUSION**

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON  
Attorney General

LINDSEY A. MCCALLISTER  
Assistant Attorney General

s/ Lindsey A. McCallister

BY: \_\_\_\_\_  
Lindsey A. McCallister

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

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ATTORNEYS FOR RESPONDENT