

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Petition for Writ of Certiorari to Edgefield County

The Honorable William P. Keesley, Trial Judge
The Honorable J. Cordell Maddox, Jr., PCR Judge

Appellate Case No. 2020-000568

BRYAN J. PHILLIPS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

ISSUES ON CERTIORARI.....ii

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS.....4

STANDARD OF REVIEW.....5

ARGUMENT.....6

 I. The PCR court erred in finding trial counsel was constitutionally ineffective for not objecting to the trial court’s qualification of the interpreter under the interpreter qualification statute used in civil cases because Ming Louie was qualified to be a court interpreter under either qualification scheme and Phillips did not prove there is a reasonable probability the outcome of trial would have been different had trial counsel raised that particular objection.....6

 II. The PCR court erred in finding trial counsel was constitutionally ineffective for failing to hire a defense interpreter because trial counsel conducted a reasonable search for a court interpreter but was unsuccessful due to the scarcity of Chinese interpreters and because Phillips did not prove there is a reasonable probability the outcome of trial have been different had trial counsel hired a defense interpreter10

 III. The PCR court erred in finding trial counsel was constitutionally ineffective for calling Investigator Young as a witness because the witness’s testimony confirmed the person who pointed out Phillips to law enforcement was motivated by a hope for personal gain and because Phillips did not prove there is a reasonable probability the outcome of trial would have been different had Young not testified14

CONCLUSION.....19

ISSUES ON CERTIORARI

- I. Did the PCR court err in finding trial counsel was constitutionally ineffective for not objecting to the trial court's qualification of the court interpreter under the interpreter qualification statute used in criminal cases when the interpreter was qualified to interpret under either qualification scheme and when Phillips did not prove there is a reasonable probability the outcome of trial would have been different had trial counsel raised that particular objection?

- II. Did the PCR court err in finding trial counsel was constitutionally ineffective for failing to hire a defense interpreter when trial counsel conducted a reasonable search for a court interpreter but was unsuccessful due to the scarcity of Chinese interpreters and when Phillips did not prove there is a reasonable probability the outcome of trial have been different had trial counsel hired a defense interpreter?

- III. Did the PCR court err in finding trial counsel was constitutionally ineffective for calling Investigator Young as a witness when the witness's testimony confirmed the person who pointed out Phillips to law enforcement was motivated by a hope for personal gain and when Phillips did not prove there is a reasonable probability the outcome of trial would have been different had Young not testified?

STATEMENT OF THE CASE

Respondent Bryan J. Phillips is presently incarcerated in the South Carolina Department of Corrections. During its September of 2008 term, the Edgefield County Grand Jury indicted Phillips for criminal conspiracy (2008-GS-19-541). During its December of 2008 term, the Grand Jury indicted Phillips for armed robbery (2008-GS-19-723). During its May of 2010 term, the Grand Jury indicted Phillips for first-degree burglary (2010-GS-19-274) and kidnapping (2010-GS-19-277). Phillips was represented by Randall D. Williams (“trial counsel”), Esquire, and Assistant Solicitor Ervin J. Maye of the Eleventh Circuit Solicitor’s Office prosecuted the case. Before the case was called to trial, trial counsel filed a motion for a speedy trial, arguing the charges against Phillips should be dismissed since he had been in detention for about twenty months or else that Phillips be released on bond pending trial. At On May 17, 2010, Phillips and Langford appeared before the Honorable William P. Keesley for a hearing on their motions. The assistant solicitor argued he had been planning to begin the trial for Langford and Phillips on that date, but was not prepared to do so because a witness for the State had just recanted his earlier statements implicating Langford and Phillips under pressure from them and because the State had been unable to locate a court interpreter in South Carolina who could interpret English and Chinese. App. 658. Judge Keesley later denied Phillip’s motion to dismiss the charges due to a violation of his right to a speedy trial, granted his motion for a speedy trial, and denied his motion for bond with leave for review if he were not tried promptly. On January 23, 2011, Phillips and K. C. Langford, III, proceeded to a jury trial with Judge Keesley presiding. The jury convicted Phillips as indicted.¹ The trial court sentenced Phillips to imprisonment for twenty

¹ The jury also found Langford guilty of the same offenses as Phillips. App. 601-02.

years for kidnapping, for armed robbery, and for first-degree burglary, and for five years for conspiracy, with all sentences running concurrently, with credit for time served, and found that Phillips was not required to register as a sex offender.

Trial counsel filed a timely notice of appeal. Applicant was represented on appeal by Appellate Defender LaNelle Cantey Durant (“appellate counsel”) of the South Carolina Commission on Indigent Defense. In an order issued on November 3, 2011, the Supreme Court of South Carolina granted Phillips’ motions to have his appeal certified to the Court, to have his appeal consolidated with Langford’s, and to have an amicus curiae brief of the South Carolina Public Defender Association (“Public Defender Association”) incorporated into his appeal. Appellate counsel argued the trial court erred (1) in denying Phillips’ motion for a mistrial after the assistant solicitor commented on Phillips’ not taking the stand in his own defense, (2) in qualifying in Chinese and Mandarin Chinese the interpreter, and (3) in denying Phillips’ motion to dismiss the case due to the State’s violation of Phillips’ speedy trial rights. The Public Defender Association argued the trial court erred in denying Langford’s motion to dismiss because Langford’s right to a speedy trial was violated. The South Carolina Solicitor’s Association also filed an amicus curiae brief arguing the statute vesting the circuit solicitors with the obligation to prepare dockets for general sessions terms of court does not violate the separation of powers or the due process provisions of the South Carolina and United States Constitutions. The South Carolina Supreme Court affirmed Phillips’ convictions and sentences in an unpublished memorandum opinion. State v. Phillips, Op. No. 2012-MO-049 (S.C. Sup. Ct. filed November 21, 2012) (per curiam). The Supreme Court found the trial court did not err in qualifying the interpreter and that the assistant solicitor’s comment at trial was not actually a

comment upon Phillips' failure to testify. Id. The Supreme Court also incorporated by reference findings in its opinion in Langford's appeal that the statute vesting in the circuit solicitors the exclusive obligation to prepare general sessions dockets was unconstitutional, that there was no evidence Langford's due process were violated even if the State was able to pick the judge who would preside over trial, that the trial court did not abuse its discretion in finding Langford "was not denied a speedy trial in the constitutional sense." Id. (citing State v. Langford, 400 S.C. 421-46, 432, 735 S.E.2d 471, 477-84 (2012), cert. denied, Langford v. South Carolina, 571 U.S. 831, 134 S.Ct. 60 (Mem) (2013)). In an order issued on December 20, 2012, the South Carolina Supreme Court denied Phillips' petition for rehearing. The remittitur was issued on December 20, 2012.

Phillips then petitioned the United States Supreme Court for a writ of certiorari, arguing the South Carolina Supreme Court erred in finding Phillips' due process right to a speedy trial was not violated. The United States Supreme Court denied Phillips' petition on October 7, 2013.

On December 19, 2013, Phillips filed an application for post-conviction relief, and filed multiple amendments over the subsequent months. Petitioner filed its return on May 4, 2015, requesting the courts convene an evidentiary hearing. On December 13, 2017, an evidentiary hearing was convened before the PCR court. Phillips was physically present and was represented by Arthur K. Aiken, Esquire. Senior Assistant Deputy Attorney General Melody J. Brown and Senior Assistant Attorney General Alphonso Simon, Jr., both of the South Carolina Attorney General's Office, represented Petitioner. On May 25, 2018, the PCR court issued its order granting post-conviction relief to Phillips. On June 19, 2018, Petitioner filed a motion to alter or amend the judgment, pursuant to Rule 59(e), SCRPC, arguing the PCR court erred in all of its

deficiency and prejudice findings. On June 21, 2019, Phillips filed a memorandum in opposition to the motion. On November 18, 2019, the PCR court issued an order denying Petitioner's motion to alter or amend the judgment, and this appeal follows.

STATEMENT OF FACTS

Alvin Phillips and Phillips noticed several people leaving a Chinese restaurant and believed that the people were taking home with them money from the restaurant. App. 242-43. Alvin and Phillips knew where the people lived and watched them take home a black bag, and noticed that the people never made a trip to the bank after leaving the restaurant. App. 243. Alvin and Phillips discussed robbing the people at their home after they left the restaurant. App. 243-44. On August 14, 2008, Phillips called Alvin about their plans. Alvin got his gun and, along with codefendant K. C. Langford, changed into dark clothing. The three men waited at the victims' home for them to arrive from the restaurant. App. 243-47.

When the victims arrived at their home, the father stayed outside while his son and wife went inside. The three robbers jumped out of the bushes near the house and ordered the father to the ground. The robbers demanded money from the father, but could not understand what he was saying; he spoke only Chinese. App. 248-49. Alvin pointed his firearm at the man. App. 203. The son came out of his house to discover the robbers holding his father. App. 203-04, 216, 249. The robbers demanded money from the son, too. He directed them to the black bag, containing approximately \$3,000, which he had placed in the house. App. 215, 217. Langford took the bag out of the house. App. 250-51. The robbers fled and returned to Phillips' house to divvy the money. App. 250-53.

Investigator Roosevelt Young received information from John Stevens indicating Phillips, Alvin, and Langford were the robbers law enforcement officers were looking for. App. 388-89. Alvin voluntarily submitted himself to questioning at law enforcement's request. App. 395-96. Alvin went on to give a statement that implicated himself and his two codefendants Phillips and Langford. While the three codefendants were in the Edgefield County Detention Center, Langford asked Alvin to sign a pre-written statement that Langford and Phillips were not guilty, which contradicted Alvin's earlier statement. App. 294-95.

Langford and Phillips were called to trial on September 7, 2010. Because the victims were Chinese and did not speak English, the parties and Judge Keesley extensively questioned an interpreter named Ming Louie. Judge Keesley qualified Louie over Phillips' objection to the Louie's qualifications. The victims testified about the events of the robbery, and Alvin testified about his, Langford's, and Phillips' involvement in the crimes. He explained his later statements by testifying Langford pressured him into recanting his earlier statement. App. 280-81.

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, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, at 180-81, 810 S.E.2d at 839-40 (citations omitted). However, pure questions of law will be reviewed de novo without deference to the lower court. Id. 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).

ARGUMENT

- I. The PCR court erred in finding trial counsel was constitutionally ineffective for not objecting to the trial court’s qualification of the interpreter under the interpreter qualification statute used in civil cases because Ming Louie was qualified to be a court interpreter under either qualification scheme and Phillips did not prove there is a reasonable probability the outcome of trial would have been different had trial counsel raised that particular objection.**

The PCR court found trial counsel’s performance was deficient because he did not preserve for appellate review an objection to the trial court’s use of the civil statute in qualifying the interpreter, objecting only to the qualifications of the interpreter in general. App. 1515. Without providing any analysis, the PCR court found there is a reasonable probability the outcome of the proceedings would have been different had trial counsel raised the specific objection. App. 1517. The PCR court erred because Phillips did not prove that trial counsel’s performance was deficient when he clearly objected to the qualification of Louie as an interpreter despite not specifically referring to the qualification statute for use in criminal cases. Phillips did not prove that there would be any difference in the outcome of trial if trial counsel had objected to the use of the civil statute over the criminal one because Louie was qualified even under the criminal statute and because Phillips has offered no evidence that Louie’s interpretation during trial fell short of the criminal statute’s requirements or that the interpretation was erroneous in any way. Phillips’ claim and the PCR court’s grant of post-conviction relief are purely and wildly speculative.

When a witness or victim in a criminal trial does not understand or speak English sufficiently to comprehend the proceeding or testify, “the court must appoint a certified or

otherwise qualified interpreter to interpret the proceedings to the . . . victim or to interpret the testimony of the witness.” S.C. Code Ann. § 17-1-50(B)(1). A “qualified interpreter” is one who is at least eighteen years of age, is not a family member to a party or witness, is not confined to an institution, and:

[H]as education, training, or experience that enables him to speak English and a foreign language fluently, and is readily able to interpret simultaneously and consecutively and to sight-translate documents from English into the language of a non-English-speaking person, or from the language of that person into spoken English.

S.C. Code Ann. § 17-1-50(A)(4). In this case, Ming Louie was duly sworn and questioned about his qualifications as an interpreter. App. 134. He was sixty-one years of age at the time of Phillips’ trial. App. 139. He was not related to the victims in any way, did not have any interest in the outcome of the trial, and did not know either Phillips or Langford. App. 132-33, 145. Louie was not confined to an institution. App. 148. Louie did not have a certification as a Mandarin or Cantonese Chinese interpretation in any state or in the federal courts. App. 135-37. Louie did not believe that South Carolina Court Administration offered a certification for an interpreter in Mandarin or Cantonese Chinese, and neither did the clerk of court. App. 136, 149. Louie had, however, served as an interpreter in court on more than fifty occasions in the state courts of North Carolina, Maryland, and Delaware. App. 137-38, 141, 146. Louie had earned a master’s degree in chemistry from Penn State University and had been living in the United States for approximately forty years. App. 139-40. He was born in Canton, China; as he lived there for about twenty years, he learned Cantonese Chinese, the regional dialect, and Mandarin Chinese, the national dialect. App. 139-40. He had been serving as a Chinese-English interpreter in American courts since 1996. App. 140. He had always been found qualified as a court interpreter by whatever court he was before. App. 141. Louie felt he was fluent in Chinese and English.

App. 145. He had the ability to translate a document into English from Chinese. App. 147. Louie recognized the victims' dialect as that of Mandarin Chinese, and he did not have any difficulty in communicating with them. App. 138, 142. Louie affirmed that he would not have any difficulty interpreting the victims' testimony into English and the questions from English back into Chinese for them, and affirmed he would translate accurately and truthfully. App. 138-39. Louie affirmed that the victims did not have difficulty in communicating with him. App. 142.

After the parties and the trial court questioned Louie extensively, the trial court found Louie qualified as a Chinese-English interpreter over Phillips' objection. App. 154. The trial court noted Louie was "highly qualified," had advanced degrees earned in the United States indicating his fluency in English, spoke two dialects of Chinese as his native tongue, and was able to communicate fluently with the parties and the court. App. 155-56. The trial court referred to the interpreter qualification statute for civil cases, which defines an "interpreter" as one who:

- (1) is eight years of age or older;
- (2) is not a family member of the party or witness;
- (3) is an instructor of foreign language at an institution of education; or
- (4) has educational training or experience that enables him or her to fluently speak a foreign language and interpret the language of another person.

S.C. Code Ann. § 15-27-155(B). The qualification requirements of the two statutes are quite similar. The South Carolina Supreme Court found the trial court did not abuse its discretion in qualifying Louie as an interpreter while noting that the trial court and parties referenced the civil statute, not the criminal statute. App. 1308.

The PCR court erred in finding trial counsel performed deficiently by not objecting to the qualification of Louie on the basis that the trial court had cited the statute for qualifying interpreters in civil cases. Louie was of the requisite age; was not related to the victims, witnesses, or parties; was not confined to an institution; and had the education and experience to

allow him to speak English and Chinese fluently, to be readily able to interpret simultaneously and consecutively and to sight-translate documents from English into Chinese or from Chinese into spoken English. By all indications, Louie met the statutory qualifications to be an interpreter for Phillips' trial. No matter which interpreter qualification statute the trial court had used, Louie should have been qualified.

The PCR court erred in finding there is a reasonable likelihood the outcome of the proceedings would have been different had trial counsel objected to the trial court's use of the statute for interpreter qualification in civil cases. Phillips did not prove Louie would have been unqualified if the trial court had cited the criminal statute instead of the civil. Phillips did not offer any evidence Louie lacked the education and experience required for him to speak English and Chinese fluently, simultaneously, and consecutively, or to translate documents from one language to the other. Phillips did not offer any evidence Louie's interpretation at trial was inaccurate. Instead, Phillips merely speculated that he would have been found not guilty had the criminal qualification statute been cited. An applicant for post-conviction relief who provides only speculation as to what may have happened if his defense attorney had done something differently has failed to meet his burden. Briggs v. State, 421 S.C. 316, 333, 806 S.E.2d 713, 722 (2017) (instructing that an applicant for post-conviction relief "must demonstrate a 'reasonable probability' the result of the trial would have been different if [trial counsel] had not committed the errors A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial."); Strickland v. Washington, 466 U.S. 668, 695-96 (1984) (requiring a court conducting a prejudice inquiry to ask "if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."); see

Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998) (A defense attorney’s “[f]ailure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result.”) (citing Kibler v. State, 267 S.C. 250, 227 S.E.2d 199 (1976)). The PCR court’s adoption of Phillips’ pure speculation is an error of law.

This Court should grant the petition for a writ of certiorari in order to review the PCR court’s finding trial counsel was constitutionally ineffective for not objecting to the qualification of the interpreter on the basis that the trial court was citing the statute for qualifying interpreters in civil cases instead of the statute for qualifying interpreters in criminal cases. This Court should review the PCR court’s grant of relief to Phillips because Phillips has failed to prove that Judge Keesley’s interpretation affected the outcome of trial in any respect.

II. The PCR court erred in finding trial counsel was constitutionally ineffective for failing to hire a defense interpreter because trial counsel conducted a reasonable search for a court interpreter but was unsuccessful due to the scarcity of Chinese interpreters and because Phillips did not prove there is a reasonable probability the outcome of trial would have been different with a defense interpreter.

The PCR court found trial counsel was constitutionally ineffective for failing to hire an interpreter for the defense. The court found trial counsel’s not hiring a defense interpreter constituted deficient performance because trial counsel knew the State had not secured an interpreter certified by South Carolina Court Administration and knew only the testimony of the victims could establish the corpus delicti of the crimes. The PCR court’s finding of deficiency in trial counsel’s performance is in error because the court ignored trial counsel’s legitimate reason for not believing it necessary that the defense hire an interpreter and overstates the significance of the victims’ testimonies at trial. The PCR court’s finding of prejudice to Phillips is in error

because Phillips introduced no evidence that the lack of an interpreter for the defense affected the outcome of trial in any way, but merely speculated that the lack of a defense interpreter was to his detriment. As discussed above, mere speculation as to how trial counsel's acts or omissions could have affected the outcome of Phillips' trial are insufficient to meet the required burden and the PCR court erred as a matter of law in granting relief based upon such unsupported speculation.

The PCR court found trial counsel's not hiring a defense interpreter constituted deficient performance because trial counsel knew the State had not secured an interpreter certified by South Carolina Court Administration and knew the testimony of the victims alone could establish the corpus delicti of the crimes. Trial counsel was aware that the victims spoke little English and unsuccessfully tried to find a certified court interpreter. App. 1464. The trial court elaborated for the record that the clerk of court likewise made a diligent search for a Chinese interpreter, which led to Louie, a highly qualified interpreter in a field occupied by few. App. 154-55. This confirms the difficulty trial counsel would have faced in locating an interpreter. "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Bagwell v. State, 410 S.C. 259, 265, 763 S.E.2d 630, 633-34 (S.C. Ct. App. 2014) (citing Strickland, at 690). Though Phillips presented a webpage allegedly advertising Chinese interpreter services, he has not proven that those interpreters would have been available for Phillips' trial at the time of trial. Regardless, in light of trial counsel's testimony and the trial court's and clerk of court's statements about the difficulty in finding an interpreter, it is not surprising that trial counsel's reasonably diligent search for an interpreter did not bear fruit.

Moreover, Phillips' presentation of a webpage listing one or more people who could function as Chinese-English does not satisfy Phillips' burden of proving trial counsel's not having a defense interpreter at trial deviated from the reasonable, "prevailing professional norms" of criminal defense attorneys and the range of competence required of them. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The PCR court's finding of prejudice to Phillips is in error because Phillips introduced no evidence that the lack of an interpreter for the defense affected the outcome of trial in any way, but merely speculated that the lack of a defense interpreter was to his detriment. Phillips did not offer any evidence Louie's interpretation was inaccurate. The PCR court found prejudice based in part upon the fact that the defense had no independent ability to understand what the interpreter said to the victims. App. 1517-18. The PCR court's finding, taken to its logical conclusion, would always require defense attorneys to have their own interpreters whenever interpretive services are needed for a party, witness, or victim at trial. The very fact justifying the need for an interpreter—that someone at trial lacks the ability to communicate effectively in English—means that those present who do not understand the other language cannot themselves verify absolute accuracy of the interpretation. While under oath, Louie affirmed that he would abide by all of the ethical rules for court interpreters published by this Court. App. 147-50. Louie affirmed to the trial court that he would interpret verbatim without going "off on some tangent." App. 150. The oath Louie took was the reasonable safeguard in place to ensure a fair and accurate interpretation between the English-speaking questioners and the Chinese-speaking victims.

The PCR court identified three instances in which the trial court instructed the interpreter to provide a verbatim translation without unnecessary conversation with the victims, but Phillips has not proven that the instances were anything other than the interpreter's innocent attempt to understand what the victims were saying for the purpose of interpretation. During the first instance the PCR court identified, the interpreter informed the parties that he was trying to understand a victim's answer to a question from the State. App. 202. The trial court instructed the interpreter to keep the interpretation verbatim and the assistant solicitor repeated the conversation. App. 202. In the second instance identified by the PCR court, the trial court instructed the interpreter to stick to verbatim translation at trial counsel's request, and Louie apparently interpreted the answer verbatim once trial counsel repeated the question. App. 223. The third instance identified by the PCR court involved Langford's request that the trial court instruct the interpreter to interpret only what a victim said because Langford did not see the victim respond to the oath in the affirmative. App. 228-29. The interpreter answered that the victim had answered, but repeated the oath with the victim at the trial court's instruction. App. 229. These examples given by the PCR court do not establish the present of any interpretive error on Louie's part or that these instances changed the outcome of Phillips trial.

Ultimately, the victims were unable to identify Phillips as one of the robbers. App. 1468. Trial counsel believed that Alvin Phillips was "the true hinge pin of the case," referred to Alvin as the State's "linchpin witness," and wanted to discredit Alvin at trial. App. 1463, 1468, 1470. Such was required because Alvin had given statements to law enforcement officers incriminating himself, Langford, and Phillips. App. 1469. The primacy of Alvin's confession to the State's case was shown when the assistant solicitor argued in closing the defense had been trying "to

obscure the simple fact of this young man [Alvin] implicating himself and told on himself. There's no more inherently truthful statement at all. He told on himself." App. 501. Contrary to the PCR court's findings, Alvin provided evidence of Phillips' guilt as to each element of the charged offenses. That evidence was not affected by the lack of a defense interpreter. It was the PCR court's responsibility, in determining whether Phillips proved that he was prejudiced, to consider "the specific impact counsel's error had on the outcome of the trial" and to "consider the strength of the State's case in light of all the evidence presented to the jury." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citations omitted). Even if we assume for the sake of argument that Louie's interpretation was somehow faulty, Phillips' arguments do not entitle him to post-conviction relief in light of the strength of the State's case.

This Court should grant this petition for a writ of certiorari to review the PCR court's finding trial counsel was constitutionally ineffective for not hiring an interpreter for the defense.

III. The PCR court erred in finding trial counsel was constitutionally ineffective for calling Investigator Young as a witness because the witness's testimony confirmed the person who pointed out Phillips to law enforcement was motivated by a hope for personal gain and because Phillips did not prove there is a reasonable probability the outcome of trial would have been different had the Investigator not testified.

The PCR court found trial counsel was constitutionally ineffective for calling a law enforcement officer as a witness in the defense's case-in-chief. App. 1516, 1518. The PCR court found trial counsel's decision to call the officer as a witness deficient because trial counsel's questioning of the witness allowed into evidence testimony that strengthened the State's case and would not have been admissible otherwise. App. 1516. The PCR court found there is a reasonable probability the admission of the officer's testimony affected the outcome of trial because the harm of the testimony could not have been inflicted by the State without trial

counsel's help and because the officer's testimony was a prominent subject of the State's closing argument. App. 1518.

The PCR court found trial counsel's decision to call Investigator Young as a witness in the defense's case-in-chief constituted deficient performance because trial counsel did not speak with Young beforehand to ensure that his testimony would not be harmful to the defense. Trial counsel called Young as a witness as part of a valid strategy to attack the credibility of John Patrick Stevens, whose tip to Young led to the investigation into Phillips, by showing that Stevens was motivated to provide names to law enforcement. Young denied at trial that Stevens was working as his informant, testifying he did not have "charges on him or anything at the time." App. 387. Trial counsel elicited testimony from Young indicating Stevens had had his own past brush with the law, with Young agreeing that Stevens had "been in [the] courthouse" App. 388. Young testified Stevens passed along information about Phillips because Stevens was the subject of a Family Court bench warrant. App. 388-89. Young confirmed Stevens was later arrested. App. 391. Young agreed that he could most effectively do his job by finding someone with a pending charge and enlisting that person's help or by making use of that person's information when he or she finds Young. App. 392. Young affirmed that his practice was to seek the help of such a person by promising to let the solicitor know that the person cooperated with a law enforcement investigation. App. 393. Trial counsel testified at the PCR hearing he had had information indicating Stevens was experiencing legal issues that may have been criminal in nature because Stevens was involved with a client of trial counsel's who sold illicit drugs. App. 1471-72. Trial counsel wanted to show at trial that Stevens was making assertions to law enforcement officers about the alleged criminal activity of others out of a

motivation for “self-help” or “self-interest.” App. 1472. He believed the State’s case against Phillips would appear less credible to the jury if he were able to show that Stevens, who first brought Phillips to the attention of police, was motivated by self-interest. App. 1473. For this reason, he had Stevens under subpoena to testify at trial, but decided to call Young as a witness instead when Stevens did not show up for trial. App. 1472-73. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Strickland, 466 U.S. at 690). The PCR court gave no consideration to this presumption and erred by not recognizing the strategic value in trial counsel’s strategy. This constitutes an error of law requiring this Court to grant certiorari and, ultimately, to reverse the grant of post-conviction relief.

The PCR court erred by finding trial counsel’s questioning of Young elicited double hearsay that introduced further evidence of Phillips’ guilt that would not have been admissible otherwise. Young’s testimony about what Stevens told him was not double hearsay because it was not offered to prove the truth of the matter asserted. To the contrary, it was offered to explain why law enforcement contacted Alvin as part of their investigation, which ultimately led to Alvin’s confession and his implicating Phillips. As such, Young’s testimony about Steven’s information was not hearsay. State v. Thompson, 352 S.C. 552, 558, 575 S.E.2d 77, 81 (S.C. Ct. App. 2003) (“[A]n out of court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken.”) (citing United States v. Love, 767 F.2d 1052 (1985), cert. denied, 474 U.S. 1081, 106 S.Ct. 848, 849, 88 L.Ed.2d 890 (1986)).

The PCR court found there is a reasonable probability the admission of the officer’s

testimony affected the outcome of trial because the harm of the testimony could not have been inflicted by the State without trial counsel's help. App. 1518. Young's testimony did not undermine Phillips' defense. Trial counsel set out to show Stevens pointed law enforcement officers in Phillips' direction out of a hope for the officers' assistance with his own legal troubles. As noted earlier in this petition, trial counsel's questioning of Young achieved that goal, despite the fact that Young did not agree with every aspect of trial counsel's assertions about Young and his relationship with Stevens. While Young may have testified he did not reward Stevens for the information given, it was clear from his testimony that Stevens wanted some benefit.

The PCR court found there is a reasonable probability the admission of the Young's testimony affected the outcome of trial because his testimony was a prominent subject of the State's closing argument. App. 1518. The PCR court erred because it overstated the State's emphasis on Young's testimony. While discussing the reasons law enforcement officers were not able to advance their investigation based off of the victims' statements and the evidence available at the crime scene, the assistant solicitor stated that there was nothing the officers could do until Stevens called Young with the information. App. 491. He argued the fact that Stevens likely gave his information to Young in order to get some personal benefit with his own legal troubles was irrelevant because Stevens gave accurate information, which was corroborated by Alvin as soon as the officers confronted him. App. 491-92. Alvin's confession, as the assistant solicitor noted, was significant because it implicated himself rather than shifting the blame to someone else. App. 492-94. Alvin's statements and testimony were believable because they implicated his family and friends. App. 493-94. Emphasizing the import of Alvin's statement,

the assistant solicitor argued the defense teams had been trying “to obscure the simple fact of this young man implicating himself and told on himself. There’s no more inherently truthful statement at all. He told on himself.” App. 501. The State did not base its closing argument on Young’s testimony about Stevens’ information; the State’s closing argument was about the power of Alvin’s confession that he and Langford and Phillips committed the crimes. The PCR court did not consider the State’s closing argument as a whole and wrongly mischaracterized it in its prejudice analysis.

This Court should grant the petition for a writ of certiorari in order to review the PCR court’s finding trial counsel was constitutionally ineffective for calling Investigator Young as a witness in the defense’s case-in-chief.

CONCLUSION

For all of the foregoing reasons, this Court should grant a writ of certiorari and reverse the PCR court's erroneous findings.

Respectfully submitted,

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