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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Aiken County
The Honorable Doyet A. Early, III., Trial Judge
The Honorable Courtney Clyburn-Pope, Post-Conviction Relief Judge

Appellate Case No. 2016-001979

WILLIAM MCCLADDIE,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO SECOND PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUES PRESENTED FOR CERTIORARI

Petitioner's Statement of Issues

I. The PCR court correctly granted Petitioner a belated direct appeal pursuant to *White v. State*, 236 S.C. 110, 208 S.E.2d 35 (1974), where the state consented to the request and the undisputed evidence showed that although trial counsel filed and served a notice of appeal, he failed to do so in a timely manner as required by Rule 203(b)(2), SCACR.

II. Trial counsel provided ineffective assistance by failing to object to hearsay from a police officer and by eliciting hearsay from the same police officer where the testimony involved prior consistent statements by a critical witness despite no express or implied charge against the witness of recent fabrication or improper influence or motive.

Respondent's Counterstatement of Issues

I. Did the PCR court correctly grant Petitioner belated appellate review pursuant to *White v. State*, 236 S.C. 110, 208 S.E.2d 35 (1974), when uncontroverted evidence established Petitioner did not knowingly, voluntarily, and intelligently waive his right to appellate review?

II. Did the PCR court properly find Trial Counsel constitutionally effective where portions of the challenged testimony do not constitute hearsay, and where, even if the testimony did constitute hearsay, Petitioner has not met his burden as to prejudice because the alleged deficiency is substantially outweighed by the compelling evidence against Petitioner, and because the testimony was merely cumulative to information provided by other non-objectionable evidence?

STATEMENT OF THE CASE

William McCladdie (Petitioner) was indicted during the July 2015 term of the Aiken County Grand Jury for first-degree burglary (2015-GS-02-01103), possession of tools capable of being used in crime (2015-GS-02-0104), and possession of a stolen vehicle (2015-GS-02-01105). Then-Assistant Public Defender Michael B. McMillian (Trial Counsel) represented Petitioner. On July 8, 2015, Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III. Petitioner was found guilty as indicted and Judge Early sentenced Petitioner to a fifteen year term of imprisonment for first-degree burglary, a five year term of imprisonment for possession of tools capable of being used in a crime, and a ten year term of imprisonment for possession of a stolen vehicle, with all sentences running concurrently.

Petitioner subsequently filed a notice of appeal. On August 19, 2015, the South Carolina Court of Appeals dismissed the notice of appeal for untimely service. The remittitur was returned to the circuit court on September 28, 2015.

On October 19, 2015, Petitioner filed an application for post-conviction relief alleging the following grounds:

1. Ineffective assistance of counsel
 - a. Failed to file appeal in time.
2. Subject matter jurisdiction
 - a. Sham indictments
3. Illegal sentence
 - a. Sentence exceeds and or does not coincide with charge.

Respondent made its return on December 18, 2015, and requested that an evidentiary hearing be held.

Respondent subsequently consented to Petitioner's request for a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and an order granting

Petitioner a White review and dismissing all other grounds with prejudice was signed by Judge Early, acting in his capacity as Chief Administrative Judge of the Second Judicial Circuit, and filed on August 22, 2016. No hearing was held.

Petitioner subsequently filed a notice of appeal. Petitioner then filed a Brief of Petitioner pursuant to White and a petition for writ of certiorari. Respondent made its return to the petition of writ of certiorari and a Brief of Respondent pursuant to White on July 26, 2017. The case was transferred to the South Carolina Court of Appeals pursuant to Rule 243(j) SCACR. The South Carolina Court of Appeals granted certiorari on September 24, 2018, and Petitioner timely filed a brief on October 5, 2018.

On January 17, 2019, Respondent, in lieu of filing a brief of respondent, filed a motion for remand requesting the matter be remanded back to the circuit court for a hearing to determine if Petitioner knowingly, intelligently and voluntarily waived his other post-conviction relief claims. On March 21, 2019, the South Carolina Court of Appeals issued an Order remanding Petitioner's post-conviction relief case to the Aiken County circuit court in order to conduct a hearing to determine:

- 1) Whether [Petitioner] knowingly, intelligently, and voluntarily waived his post-conviction relief claims other than his request for belated appellate review, and
- 2) Resolve any post-conviction relief claims the court determines were not knowingly, intelligently, and voluntarily waived.

On May 16, 2019, this hearing was convened before the Honorable J. Cordell Maddox, circuit court judge. During that hearing, Petitioner testified he did not intend to waive his post-conviction relief allegations when he signed the consent order granting him belated appellate review. At the conclusion of that hearing, Judge Maddox granted Petitioner a full evidentiary

hearing on his previously filed post-conviction relief application.

On September 21, 2019, Petitioner filed an amended PCR application asserting the following claims:

(1) Ineffective Assistance of Counsel

- a. “In his preliminary jury instructions (Tr. P. 50) and in his final jury instructions (TR. P. 250) the trial judge emphasized the truth-seeking function of the jury. Trial counsel failed to object to these instructions, and the error in giving these instructions was not preserved for appellate review....”
- b. Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer that alerted the officer’s suspicions.”
- c. Trial Counsel failed to object to hearsay testimony from a police officer regarding what a witness told the officer concerning the ownership of property.”
- d. Trial Counsel actually elicited testimony concerning missing property.
- e. Trial Counsel failed to object to hearsay from a witness regarding what another witness told her.”
- f. Trial counsel did not object to a police officer testifying that the pry marks found on a door were “lining up” with a pry bar recovered from the scene where the officer was not qualified as an expert to give such testimony.”
- g. “Trial Counsel did not request an instruction on direct and circumstantial evidence and did not join in the state’s request.”

Respondent subsequently filed an Amended Return. An evidentiary hearing into the matter was convened on Tuesday, January 21, 2020, at the Aiken County Courthouse. Petitioner was present at the hearing and represented by Arthur Aiken, Esquire (PCR Counsel). Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General’s Office appeared on behalf of Respondent. At the hearing, Petitioner testified on his own behalf. Trial Counsel also testified. After a review of the record and all evidence presented, the Honorable Courtney Clyburn Pope denied and dismissed Petitioner’s PCR application with prejudice. Petitioner filed a timely notice of appeal. This appeal follows.

Statement of Facts Presented at Trial

Six weeks before the crime occurred, Margaret McDaniel (McDaniel) passed away. (App. 165, l. 9-11). In her will, McDaniel passed the title to her home to her sister, Evelyn Clark (Ms. Clark). (App. 195-196.) The water and electricity were transferred into Evelyn Clark's name. (App. 170). The electricity and water remained on and running at the house, and the yard continued to be cut and maintained after Evelyn Clark took possession of the home. (App. 165-166.) Although Evelyn Clark had not yet moved into the home, Clark stayed overnight at the house at least once before the crime. (App. 166-167; 170; 196.)

On February 20, 2015 at 11:55 p.m., Officer James Michael Hess (Officer Hess) of the Jackson Police Department responded to a call about an unauthorized vehicle parked at Evelyn Clark's house. (App. 99.) Upon arrival to the residence, Officer Hess noticed a vehicle parked in the driveway of the home with a warm engine, as if it had been freshly parked. (App. 100, l. 10-14). He checked around the house for signs of forced entry and noticed a window that had been forced open. (App. 100-101.) After calling for backup, Officer Hess parked his patrol car across the driveway so that the vehicle could not leave. (App. 102, l. 3-14.) When backup arrived, another officer spotted Petitioner, who was found hiding in the bushes in the backyard of the home. (App. 103-104.) When officers handcuffed Petitioner and stood him up, and beneath his body they found a crowbar. (App. 104.) Officer Hess testified the house had been burglarized and the crowbar lined up to the markings of the door that had been pried open. (App. 106.)

In the pat-down and search incident to arrest of Petitioner, the officers found in his pockets a flashlight, a pocketknife, and a key to the vehicle that was parked in the driveway of the house.

(App. 106-107.)¹ Upon an inventory search of the vehicle, officers found a wallet containing Petitioner's driver's license, Social Security card, and credit card, as well as a butcher knife taken from the kitchen of the home, mail sent to the address of the burglarized home, and a checkbook that came from inside the home with the same address. (App. 113.)

¹ The evidence showed the vehicle parked in the driveway was stolen from another property. Petitioner was convicted at the conclusion of this trial to possession of a stolen vehicle.

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the PCR 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). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner asserts the PCR court correctly granted Petitioner belated appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974), and that the PCR court later erred in finding Trial Counsel constitutionally effective when Trial Counsel did not object to certain alleged hearsay statements. Respondent agrees that Petitioner was properly granted a belated appellate review. However, the PCR court was also correct in finding Trial Counsel constitutionally effective where portions of the challenged testimony did not constitute hearsay, and where, even if the testimony did constitute hearsay, Petitioner has not met his burden as to prejudice because the compelling evidence against Petitioner substantially outweighs the alleged deficiency and because the alleged hearsay statements are cumulative to non-objectionable testimony. Therefore, this Court should deny certiorari.

I. The PCR court properly granted Petitioner a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974).

The PCR court properly granted Petitioner a belated appellate review pursuant to White v. State. “To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal.” Clark v. State, 396 S.C. 164, 168, 719 S.E.2d 708, 710 (2011). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal if requested or comply with the procedure required by Anders v. California, 386 U.S. 738 (1967). White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Where the post-conviction relief judge determines that the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of direct appeal issues pursuant to White v. State, See Rule 227(g) (1), SCACR; Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Respondent agrees the record reflects that Petitioner did not knowingly and intelligently waive his right to a direct

appeal. Accordingly, Respondent believes the PCR court properly granted him belated appellate review.

II. Did the PCR court properly find Trial Counsel constitutionally effective where portions of the challenged testimony do not constitute hearsay, and where, even if the testimony did constitute hearsay, Petitioner has not met his burden as to prejudice because the alleged deficiency is substantially outweighed by the compelling evidence against Petitioner, and because the testimony was merely cumulative to information provided by other non-objectionable evidence?

Petitioner argues the PCR court erred in denying him relief because Trial Counsel was ineffective for not objecting to alleged hearsay testimony. However, certain portions of the testimony do not constitute hearsay testimony, and even assuming the testimony did constitute hearsay, Petitioner has not proven and cannot prove prejudice because any alleged deficiency is substantially outweighed by the compelling evidence against Petitioner, and because the alleged hearsay statements are merely cumulative to non-objectionable evidence. Accordingly, this Court should deny certiorari.

Petitioner, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Petitioner has the burden of proving the allegations in his PCR action, and when alleging counsel was constitutionally ineffective, he must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686. In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Petitioner must prove counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C.

115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). Petitioner must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. 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. 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.

Moreover, Strickland does not require a finding of ineffectiveness merely for deviation from a rigid rule of representation. Rather, Strickland requires the applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. The function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance" required of a criminal defense attorney." Id. at 690.

Although courts may not indulge “post hoc rationalization” for counsel’s decision-making that contradicts the available evidence of counsel’s actions, Wiggins v. Smith, 539 U.S. 510, 526-527 (2003), neither may they insist counsel confirm every aspect of the strategic basis for actions. There is a “strong presumption” that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect.” Yarborough v. Gentry, 540 U. S. 1, 8 (2003). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind. Strickland at 688; Harrington v. Richter, 562 U.S. 86 (2011).

With respect to prejudice, an applicant must demonstrate “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.” Strickland, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect on the outcome of the proceeding.” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687. Harrington, 562 U.S. 86.

“Surmounting Strickland’s high bar is never an easy task.” Padilla v. Kentucky, 559 U.S. 356, 371 (2010). An ineffective assistance of counsel claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest “intrusive post-trial inquiry” threaten the integrity of the very adversarial process the right to counsel is meant to serve. Strickland, 466 U.S. at 689–690. Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one.

Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, opposing counsel, and the judge. It is “all too tempting” to “second-guess counsel’s assistance after conviction or adverse sentence.” Id. at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney’s representation amounted to incompetence under “prevailing professional norms,” not whether it deviated from best practices or most common custom. Strickland, 466 U.S at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009); Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Id. at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693; Harrington, 562 U.S. 86.

“In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Jones v. State,

332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) (“In deciding whether Jones was prejudiced, we must bear in mind the strength of the government’s case . . . ,” and “we must consider the totality of the evidence before the jury.”)). “In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (citing Strickland, 466 U.S. at 696 (stating “a verdict . . . only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support”). However, while the strength of the State case is one significant factor the PCR court must consider when determining whether an applicant can establish prejudice, it is generally not a categorical bar that precludes a finding of prejudice. Smalls, 422 S.C. at 188, 810 S.E.2d at 843. However, this Court has reiterated that there are rare cases where overwhelming evidence of an applicant’s guilt precludes a finding of prejudice; in those cases, “the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the Strickland standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’” cannot possibly be met.” Smalls, 422 S.C. at 191, 810 S.E.2d at 845.

Rule 801(c) of the South Carolina Rules of Evidence defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” A statement is “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Rule 801(a), SCRE. A court may admit evidence, however, including statements made by someone other than the declarant if it is not offered for the truth of the matter asserted and is otherwise relevant. See, e.g., Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 173 n.18 (1988); *cf.* State v. Alexander, 303 S.C. 377, 380,

401 S.E.2d 146, 148 (1991) (“Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears.”).

It appears Petitioner takes issue with the following testimony:

- (1) When asked how he became involved in Petitioner’s case, Officer Hess explained that Doug Clark pulled up to him while he was running radar along Highway 125. App. 99, 11. 10-15. Thereafter, Officer Hess testified: “[Doug Clark] comes to me and says, Officer Hess, I’ve got a vehicle at my deceased aunt’s house that’s backed up to the door, and it’s not supposed to be there.” App. 99, 11. 15-18.
- (2) When questioned about photographs taken by law enforcement, Officer Hess testified regarding a clock: “This is the clock that Mr. Clark advised me that belonged to his grandmother and it was inside the residence. We found this in the trunk of the vehicle.” App. 129, 11. 16-20. Officer Hess testified that Doug Clark, identified the clock as “in the house before the burglary.” App. 130, 11. 9-16.
- (3) During Trial Counsel’s cross-examination of Officer Hess, the following exchange occurred:

Trial Counsel: Okay. Now as you went through and took the pictures, did you note any other property missing from inside the house?

Hess: Not me, no, sir.

Trial Counsel: Did you notice the missing washer?

Hess: I didn’t no, sir, not until prior.

Trial Counsel: I’m sorry?

Hess: Not until prior.

Trial Counsel: Not until prior to.....

Hess: Ms. Clark coming and telling me other things that were missing.

Trial Counsel: Okay. So there was a missing washer and a missing drying?

Hess: According to Ms. Clark, yes, sir.

(App. 146, l. 4-17).

Prejudice

The PCR court properly found Petitioner failed to meet his burden as to prejudice in this case. As an initial matter, the alleged hearsay testimony was cumulative to other non-objectionable testimony, and therefore, Petitioner has not and cannot show but for counsel's unprofessional errors, the result of the proceeding would have been different. United States v. Brooks, 82 F.3d 50, 53 (2d Cir. 1996) (finding counsel did not provide ineffective assistance by failing to object to witness' hearsay testimony on out-of-court statements to police; because out-of-court statements covered same facts that witness had already testified to in admissible form, there was no reasonable probability that result of proceeding would have been different had counsel objected); See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (noting the admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence).

Here, as Trial Counsel was aware, the State was undoubtedly going to call Doug Clark as a witness as Doug Clark was not only the individual who first became aware of the incident, but also was familiar with the burglarized property. (Supp. App. 55-56). Doug Clark did in fact testify that a vehicle was sitting at his family's property, which was the subject of testimony number one referenced above. (App. 161-162). Doug Clark also testified to the clock being present in the home prior to the burglary, which was the subject of testimony number two listed above. (App. 167, l. 20-24). Moreover, both Evelyn Clark and Doug Clark also testified that the washer and dryer were taken from the home and had not been recovered, which was the subject of testimony number three listed above. (App. 166; 193). Petitioner clearly was not convicted based upon the

statements made by the officer, but rather based upon, in part, the non-objectionable testimony from Evelyn Clark and Doug Clark.

The compelling evidence against Petitioner substantially outweighs the alleged deficiency in Petitioner's case. See Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing Strickland, 466 U.S. at 695-96 (explaining the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). Even assuming *arguendo* all of the testimony was inadmissible hearsay, any effect of Trial Counsel's alleged failure to object to this testimony would be heavily outweighed by the substantial, compelling evidence against Petitioner. Law enforcement found Petitioner hiding in the bushes of the burglarized home immediately after the incident, lying on top of the crowbar used to burglarize the home. (App. 103-106). Law enforcement found a car key on Petitioner's person that belonged to the vehicle parked in the driveway of the burglarized home. (App. 106, l. 19 107, l. 5). This vehicle contained several items taken from the burglarized home as well as Petitioner's wallet, which contained his driver's license. (App. 113, l. 4 – 114, l. 7). The testimony challenged in this post-conviction relief action was otherwise testified to by way of non-objectionable testimony from other witnesses such as Doug Clark and Evelyn Clark. Accordingly, the PCR court did not err in finding Petitioner failed to meet his burden as to prejudice in this case.

Deficiency

Moreover, certain portions of the challenged testimony do not constitute hearsay and, therefore, Trial Counsel cannot be deemed deficient as to those portions of testimony. Trial Counsel cannot be deficient for not objecting to proper testimony. Regarding the first testimony described above, in which Officer Hess testified, “[Doug Clark] comes to me and says, Officer

Hess, I've got a vehicle at my deceased aunt's house that's backed up to the door, and it's not supposed to be there," does not constitute hearsay as it was not offered to prove the truth of the matter asserted. Officer Hess made the statement in response to the State's inquiry as to how he became involved in the case, and why he began his investigation. See State v. Brown, 451 S.E.2d 888, 893-94, 317 S.C. 55, 63 (1994) (finding statements of police officers were not hearsay because statements were not entered for their truth but rather to explain why the officers began their surveillance), 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).

Moreover, with respect to testimony number two, in which the officer testified in part, "we found [the clock] in the vehicle," this portion of the testimony is not hearsay as it is not an out of court statement offered for the truth of the matter asserted but rather a first-hand indication from Officer Hess indicating that law enforcement found the clock in the vehicle stolen by Petitioner. Because these portions of the testimony challenged by Petitioner do not constitute hearsay testimony, Trial Counsel cannot be deficient for failing to object to these portions. In any event, as discussed above, Petitioner has not and cannot prove he was prejudiced by any alleged deficiency. Accordingly, this Court should deny certiorari.

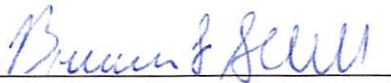
CONCLUSION

Because the PCR court properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. However, should this Court grant Petitioner's Petition, Respondent would request permission to fully brief the issues discussed herein.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA,

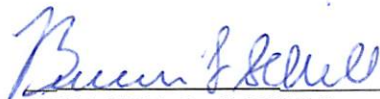
RESPONDENT.

PROOF OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Return to Second Petition for Writ of Certiorari has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Susan B. Hackett, Esquire
shackett@scid.sc.gov

This 5th day of April, 2021.



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SC Court of Appeals

ALAN WILSON
ATTORNEY GENERAL

April 5, 2021

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
(By Electronic Filing Only)

Re: William H. McCladdie v. State of South Carolina
Appellate Case No. 2016-001979

Dear Ms. Kitchings:

Enclosed please find a copy of the Return to Second Petition for Writ of Certiorari for filing in the above-referenced post-conviction relief appeal. By copy of this letter, I am serving opposing counsel with this Return.

Sincerely,

Brianna L. Schill
Assistant Attorney General
SC Bar No. 103380

BLS/ks
Enclosures

cc: Susan B. Hackett, Esquire (By Email Only)