THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

George M. McFaddin Jr., Circuit Court Judge

Appellate Case No. 2020-001432

Justin R. Simms, Petitioner,

v.

State of South Carolina, Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the PCR Court erred in finding Trial Counsel provided effective assistance of counsel when Counsel admittedly failed to advise Petitioner prior to trial on the theory of accomplice liability, the State's ability to argue that theory to the jury, and the potential jury charge on the theory of "the hand of one is the hand of all" where Petitioner rejected a plea offer for voluntary manslaughter, and Counsel's strategy conceded Petitioner's presence with the co-defendants before and during the shooting.

II. Whether the PCR Court erred in finding Trial Counsel provided effective assistance of counsel when Counsel failed to conduct an independent examination of the vehicle where the shooting occurred after waiting three years to file a motion to inspect the seized vehicle the week before trial, and the State relied on the critical evidence obtained during its examination of the vehicle at trial.

STATEMENT OF THE CASE

Arrest / Indictments

On January 20, 2010, the Florence County Sheriff's Office arrested Petitioner Justin Simms for murder (Case no. M271272). The Sheriff's Office also arrested co-defendants Curtis Joe and Joshua Carraway.

On September 30, 2010, the Florence County Grand Jury issued indictments against Petitioner for murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime (2010-GS-21-1427). (App. 811 – 813).

Trial

On December 9, 2013, Petitioner proceeded to trial before the Honorable R. Knox McMahon and a jury. (App. 1 – 619). Trial Counsel Cheveron Scott and Co-Counsel Robert Stucks represented Petitioner, and Solicitor E.L. Clements prosecuted the case on behalf of the State. The State sought to prove the following at trial: (1) Petitioner, Co-Defendant Joe, and Co-Defendant Carraway conspired to rob another group of three young men—Marcus Weaver, Shane Graham, and Squan Davis—during an arranged meeting to sell marijuana or under the guise of selling marijuana; (2) Petitioner and his co-defendants drove to the parking lot of a Day's Inn motel to meet the other group of men who arrived in a Ford Focus; (3) a shooting occurred inside the Ford Focus; and (4) Victim Weaver died from gunshot wounds inflicted by Petitioner or one of his co-defendants. (App. 278; App. 339; App. 341; App. 352 – 354; App. 358; App. 388; App. 391; App. 411 – 413).

Pre-trial, the Trial Court addressed a motion to inspect evidence filed by Trial Counsel the week before trial. Specifically, Trial Counsel requested to inspect the Ford Focus seized and examined by the Sheriff's Office. (App. 56). Trial Counsel argued that an independent inspection

of this evidence was critical to Petitioner's defense. (App. 65 – 66). Based on Trial Counsel's delay in waiting three years to file the motion, Counsel was unable to inspect the vehicle because the Sheriff's Office had released the vehicle to the owner on February 4, 2010, who subsequently sold the vehicle. (App. 56; App. App. 374 – 375).

On the night of the shooting, the Sheriff's Office inspected the vehicle and impounded it for further examination. The Sheriff's Office conducted an additional examination of the vehicle utilizing long rods to ascertain the direction of bullet travel through the holes in the front passenger seat. (App. 237; App. 242 – 244). Notably, the Solicitor emphasized the critical nature of this evidence in the State's opening statement and closing argument to the jury. (App. 89 – 90; App. 512).

At trial, the State presented testimony that Petitioner and Co-Defendant Carraway got out of their car, walked to the other vehicle, and then tried to rob the three occupants at gun point while Co-Defendant Joe stayed in his car. (App. 282; App. 341; App. 365—66; App. 395). Specifically, the State presented testimony that Co-Defendant Carraway entered the passenger-side back seat of the Ford Focus and closed the door; and while Co-Defendant Joe was talking with the other three men, Petitioner came to the front passenger door, opened it, and pointed pistol inside. (App. 366 – 367; App. 395). The front passenger, Marcus Weaver (the Decedent), pulled his gun and shot into the back seat; the State alleged Petitioner then shot the Decedent in the back and fled the scene. (App. 293 – 294). However, there was also testimony of prior statements indicating that Co-Defendant Carraway shot the Decedent, and testimony implicating Co-defendant Joe as the person in the back seat who exchanged gunfire with the Decedent. (App. 282; App. 289 – 294; App. 327).

During the State's closing argument, the Solicitor relied upon the theory of accomplice liability, also known as the theory of "the hand of one is the hand of all", to argue proof of

Petitioner's guilt to the jury. (App. 507 – 508; App. 529; App. 533). After the Trial Court charged the jury—which included an instruction on accomplice liability—the jury sent three separate notes regarding "the hand of one is the hand of all" jury charge. (App. 548 – 550; App. 660 – 661; App. 665 – 667). The first jury note asked the Trial Court to explain the charge of "hand of one is the hand of all" again and in its entirety. (App. 660). The second jury note included the following questions: (1) "Does the charge 'A hand of one is a hand of all' apply to the indictment as to murder?"; (2) "Can you reread the charge of "The Hand of One is A Hand of All'?"; and (3) "Can you explain what 'a reasonable doubt' is defined legally?" (App. 660). As requested, the Trial Court subsequently recharged the accomplice liability instruction and answered the jury's questions without objection. (App. 584 – 588).

The jury sent a third note stating, "We have come to a unanimous decision on the charge of attempted armed robbery and to the possession of a weapon during the commission of a violent crime but cannot come to a unanimous decision on the charge of murder." (App. 589; App. 661). Without objection, the Trial Court sua sponte issued the equivalent of an *Allen* charge to the jury. (App. 589 – 591). After receiving a fourth note from the jury the following day, the Trial Court provided the jury with a written copy of jury instructions for murder and "the hand of one is the hand of all" accomplice liability as requested and without objection. (App. 597 – 598; App. 661; App. 665 – 667).

On December 13, 2013, the jury returned a verdict of guilty as indicted on all charges. (App. 601, lines 2-15). The Trial Court imposed concurrent sentences of forty (40) years imprisonment for the murder conviction, twenty (20) years imprisonment for the attempted armed robbery conviction, and five (5) years imprisonment on the possession of a weapon conviction. (App. 617, lines 4-16; App. 814 – 816).

Direct Appeal

On December 23, 2013, Trial Counsel filed a Notice of Appeal in the South Carolina Court of Appeals. (App. 668 – 669). Appellate Counsel David Alexander represented Petitioner and filed an *Anders* Brief of Appellant on April 21, 2015. (App. 670 – 683). Petitioner subsequently filed Appellant's *pro se* Brief on July 23, 2015. (App. 684 – 701).

On June 15, 2016, the South Carolina Court of Appeals dismissed Petitioner's direct appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967) and without oral argument pursuant to Rule 215, SCACR. (App. 702 – 703). *See State v. Simms*, Op. No. 2016-UP-296 (S.C. Ct. App. 2016). The Court of Appeals issued a Remittitur on July 7, 2016. (App. 704).

PCR Application / Return / Hearings

On September 19, 2016, Petitioner filed an application requesting Post-Conviction Relief (PCR) (2016-CP-21-2267). (App. 705 – 711). The South Carolina Attorney General's Office filed a Return in response on February 16, 2017. (App. 712 – 717).

On April 6, 2018, Petitioner appeared before the Honorable George M. McFadden, Jr., for an evidentiary hearing on this PCR action. (App. 718 – 769). PCR Counsel Johnathan Waller represented Petitioner, and Assistant Attorney General Lindsey McCallister appeared on behalf of the State. Petitioner and Trial Counsel Cheveron Scott testified at the first evidentiary hearing. Co-Counsel Robert Stucks testified at the second evidentiary hearing on August 23, 2018.

Petitioner Justin Simms

At the first hearing, Petitioner testified that he had no knowledge of his co-defendant's plan to rob the other group of men and only knew about the arranged drug deal. (App. 727, lines 5-9). Petitioner also testified that he told Trial Counsel to examine the vehicle because it would prove he

was not the shooter. (App. 729). Petitioner further testified "there was a conflict with the investigators . . . and the – the expert witnesses, . . . The expert actually said that the shots came from the outside, but the investigator . . . who was leading the case . . . felt like they came from inside" the vehicle. (App. 730, lines 9-15).

Furthermore, Petitioner testified that he found out that the car had been released during Trial Counsel's cross-examination during the preliminary hearing and requested that Trial Counsel file the motion to inspect the car. (App. 731, lines 8-25). Petitioner also testified that he never met with Trial Counsel to prepare for trial, never discussed any potential defenses, and never discussed the theory of accomplice liability, or the theory of "the hand of one is the hand of all" prior to trial. (App. 734 – 735; App. 744). Notably, the following exchange occurred between Petitioner and PCR Counsel:

> PCR Counsel: [D]id you and [Trial Counsel] ever discuss that a person in South Carolina can be found guilty whether or not they actually pull[ed] the trigger?
>
> Petitioner: No, sir. No, sir.
>
> PCR Counsel: Okay.
>
> Petitioner: No, sir, he didn't. I have no knowledge of that.
>
> PCR Counsel: Did y'all discuss that a person can be found guilty of participating in a crime, even if they weren't the one that committed the crime, if they were actively participating or aiding and abetting that crime? Did y'all discuss that?
>
> Petitioner: No, sir, not at all. No, sir.

(App. 735, line 25 – 736, line 10; App. 744).

Trial Counsel Cheveron Scott

On direct examination, Trial Counsel stated that "[o]ur theory was that [Petitioner] did not

have the specific intent for murder because he did not fire the fatal weapon, nor was he a part of the actual robbery." (App. 749, lines 4-8). Trial Counsel also admitted that he did not discuss the theory of accomplice liability prior to trial but claimed he had "an extensive conversation" with Petitioner about the theory of "the hand of one is the hand of all" *after* the trial started. (App. 749, lines 11–24; App. 754 – 755; App. 762 – 763). Trial Counsel further maintained that he never discussed accomplice liability with Petitioner because he "did not know specifically what all of the testimony was going to be" at trial. (App. 749, lines 15-17).

Trial Counsel attempted to rationalize his failure to advise Petitioner on the theory of accomplice liability prior to trial:

> Once I saw the instructions that [the Trial Court] was going to give, we had a long conversation in order to determine whether or not I was going to in any way object to that. But based on the testimony of all of the parties, then there was no reason to object to the hand of one/hand of all because of all the testimony in regards to this matter.
>
> But that was really not my concern as much as it was whether or not - - because in order for them to get the hand of one is the hand of all [charge], they've got to first establish the specific intent necessary for the murder. And in this particular case, we didn't think that they had established that as a part of it.

(App. 755, lines 3-14). Notably, Trial Counsel conceded, "I don't recall specifically talking to him about each and every element". (App. 760).

Furthermore, Trial Counsel claimed he became aware that the vehicle was returned to the owner "sometime around the preliminary hearing." (App. 750, lines 22-25). Trial Counsel also maintained that he waited until the week prior to trial—three years later—to file his motion to inspect evidence because he "did not want to show [his] hand prior to the trial" and "wanted to try to wait and see whether or not - - what else I could get as far as the extensive discovery in order to determine what I was going to do". (App. 751, lines 14-24).

In other words, Trial Counsel alleged that he strategically waited three years to file the motion to inspect the Ford Focus, so he could see if the State would disclose any additional discovery. (App. 766). Trial Counsel also claimed that he did not obtain the services of an expert to examine either the car or the photographs of the examination because of Petitioner's financial situation and other witness statements would verify Petitioner's version of events. (App. 766, line 22 – 767, line 3).

Co-Counsel Robert Stucks

On August 23, 2018, Petitioner appeared before the PCR Court and Co-Counsel Robert Stucks testified at the second evidentiary hearing. (App. 770 – 788). Co-Counsel acknowledged that Petitioner is his son, and the reason why he did not try the case. (App. 774 – 775). Co-Counsel testified that Trial Counsel never researched or advised Petitioner on the theory of "the hand of one is the hand of all" until after the charge conference when the Trial Court decided to instruct the jury on accomplice liability. (App. 775, lines 21 – 776, line 22). Co-Counsel further testified that he did not know the State had released the Ford Focus from evidence until after jury selection. (App. 777 – 778).

Co-Counsel explained that the defense strategy as follows: "Basically, our defense was - - as I stated earlier, we didn't think that based on the evidence . . . the State presented to us and going through the witness statements . . . , we thought that [the State] couldn't prove it beyond a reasonable doubt that [Petitioner] was the shooter." (App. 779, lines 7-12). Notably, Co-Counsel candidly testified about the discussion Petitioner had with Trial Counsel after the charge conference:

> PCR Counsel: You testified a minute ago that the issue of the hand of one, hand of all -- you talked about that for the first time that you can remember when it came up as a jury charge, correct?
>
> Co-Counsel: Yes.

PCR Counsel: You did then explain the concept of hand of one, hand of all and accomplice liability to Mr. Simms, correct?

Co-Counsel: I don't think we did. We didn't. I remember -- here is what happened. I stayed in the courtroom, and the lawyers go back to discuss the jury charges to the judge.

PCR Counsel: Okay.

Co-Counsel: Mr. Scott comes back out and he says, "The judge is going to charge the hand of one, hand of all." That was it.

(App. 782, lines 3-16). Notably, Co-Counsel confirmed that the Solicitor provided a plea offer for voluntary manslaughter before trial (immediately prior to the State calling its first witness), and Petitioner rejected the offer. (App. 784 – 785).

Order of Dismissal

On October 7, 2020, the PCR Court filed an "Order Denying [Petitioner's] Application for Post-Conviction Relief". (App. 789 – 807). The PCR Court found "Counsel was not deficient in any manner, nor was [Petitioner] prejudiced by his representation." (App. 803). Specifically, the PCR Court denied the following two allegations of ineffective assistance of counsel relevant to this appeal:

(1) "[T]rial [C]ounsel was ineffective in preparing for trial and failed to anticipate the State's theory of the crime. Specifically, . . . [T]rial [C]ounsel was unprepared for the State's hand of one/hand of all argument."

(2) "[T]rial [C]ounsel was ineffective for failing to file a motion to inspect the vehicle before trial."

(App. 802).

As to the allegation of whether Trial Counsel "was unprepared for the State's hand of one/hand of all argument", the PCR Court found Trial Counsel's performance did not prejudice Petitioner since he "adamantly refused to plead guilty because he was not the shooter and did not know anything about the plan to rob [the Decedent's] group." (App. 800). The PCR Court also found that Trial Counsel "Scott credibly testified, once he realized the State was arguing accomplice liability in the alternative to presenting [Petitioner] as the shooter, he and [Petitioner] had an extensive discussion" and "[Petitioner] had the opportunity to stop the trial and plead guilty, but he chose to continue." (App. 800). The PCR Court noted that, "although the jury asked for the instruction regarding hand of one/hand of all in connection with deliberating the murder charge, it is at least equally likely [Petitioner] was ultimately convicted as a principal given the strength of the State's evidence to that point." (App. 800 – 801). The PCR Court further found that Petitioner "failed to prove how he was prejudiced by the hand of one/hand of all argument." (App. 801).

As to allegation of whether Trial Counsel failed to timely file a motion to inspect the vehicle, the PCR Court found Trial Counsel "Scott credibly testified he found out the vehicle had been released around the time of [Petitioner's] preliminary hearing, so he did not pursue it further because he believed any evidence obtained at that point would likely have problems with admissibility at trial." (App. 802). The PCR Court found that Trial Counsel "Scott further credibly testified he filed the motion solely as a precaution to make sure the State did not have any additional discovery regarding the vehicle[.]" (App. 802). The PCR Court also noted that any helpful evidence from the vehicle would be speculative since Petitioner did not produce testimony of an expert witness at the PCR hearing. (App. 802). Consequently, the PCR Court denied Petitioner's application for post-conviction relief. (App. 803 – 804).

This Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). "First, an [Petitioner] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). "The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, a Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result" when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, "[t]he burden of proof is on the Petitioner to prove his allegations by a preponderance of the evidence." *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Strategic "[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, "for the evidence to be 'overwhelming' such that it categorically

precludes a finding of prejudice . . . 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." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

As to appellate review, "this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Thompson v. State*, 423 S.C. 235, 239, 814 S.E.2d 487, 489 (2018), reh'g denied, (June 12, 2018). This Court also reviews questions of law de novo and will reverse if the PCR court's decision is controlled by an error of law. *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018), reh'g denied, (March 29, 2018).

ARGUMENT

I. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Counsel admittedly failed to advise Petitioner prior to trial on the theory of accomplice liability, the State's ability to argue that theory to the jury, and the potential jury charge on the theory of "the hand of one is the hand of all" where Petitioner rejected a plea offer for voluntary manslaughter, and Counsel's strategy conceded Petitioner's presence with the co-defendants before and during the shooting.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, a Petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims).

Deficient Performance

In this case, Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel admittedly failed to advise Petitioner prior to trial on the theory of accomplice liability, the State's ability to argue that theory to the jury, and the potential jury charge on the theory of "the hand of one is the hand of all". *See* (App. 734; App. 735, line 25 – 736, line 10; App. 744; App. 749, lines 11–24; App. 754 – 755; App. 762 – 763; App. 775, lines 21 – 776, line 22; App. 782, lines 3-16). *See generally Berry v. State*, 381 S.C. 630, 635, 675 S.E.2d 425, 427 (2009) (finding "an accused is entitled to counsel's considered and reasonable judgment", and "[i]n fact, uncertainty concerning a potential legal challenge may well provide a defendant a catalyst in plea negotiations with the State.").

Trial Counsel's failure to discuss the critical theory of accomplice liability and its potential affect on a jury's determination with Petitioner prior to trial "cannot be characterized as strategic" when Counsel's strategy was unreasonable and conceded Petitioner's presence with the co-defendants before and during the shooting. *See Weik*, 409 S.C. at 236, 761 S.E.2d at 768. Trial

Counsel stated that "[o]ur theory was that [Petitioner] did not have the specific intent for murder because he did not fire the fatal weapon, nor was he a part of the actual robbery", and further maintained that he never discussed accomplice liability with Petitioner because he "did not know specifically what all of the testimony was going to be" at trial. *See* (App. 749, lines 4-17). *Cf. Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness").

Furthermore, Trial Counsel's failure to explain the theory of "the hand of one is the hand of all" to Petitioner prior to his rejection of the plea offer for voluntary manslaughter is akin to a defense lawyer providing erroneous advice that results in a defendant's detrimental reliance. *See generally Missouri v. Frye*, 566 U.S. 134 (2012) (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); *Lafler v. Cooper*, 566 U.S. 156 (2012) (holding the right to effective assistance of counsel extends to the plea-bargaining process); *Cf. Horton v. State*, 306 S.C. 252, 411 S.E.2d 223 (1991) (finding trial counsel ineffective for advising defendant that, if he testified, he could be cross-examined about prior convictions for simple possession of marijuana (not a crime of moral turpitude) and assault and battery with intent to kill (fifteen years previously and defense counsel failed to get a rule from judge concerning remoteness), resulting in the defendant not testifying because of this advice).

Therefore, Trial Counsel's failure to advise Petitioner regarding the theory of accomplice liability was not within the range of competency demanded of attorneys in criminal cases based on the evidence in this case and Counsel's unreasonable strategy. *See* (App. 800 – 801). *Cf. Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215 (1991) (When a defendant is represented by

counsel during the plea process and enters his plea on the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competency demanded of attorneys in criminal cases).

Prejudice

Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). The critical legal theory of accomplice liability significantly affected the jury's determination of guilt in this case as evidenced by the emphasis in the Solicitor's closing argument and four jury notes inquiring about "the hand of one is the hand of all" charge. *See* (App. 507 – 508; App. 529; App. 533; App. 548 – 550; App. 589; App. 597 – 598; App. 660 – 661; App. 665 – 667). *See State v. Blassingame*, 271 S.C. 44, 46-47, 244 S.E.2d 528, 529-30 (1978) (noting when a jury submits a question to the trial court following a jury charge, "[i]t is reasonable to assume" the jury is "focus[ing] critical attention" on the specific question asked and the information relayed by the trial court to the jury is given "special consideration").

Petitioner's rejection of the plea offer for voluntary manslaughter illustrates the substantial prejudice created by Trial Counsel's failure to advise Petitioner prior to trial on the legal theory of accomplice liability, the State's ability to argue that theory to the jury, and the eventual jury charge on the theory of "the hand of one is the hand of all". *See* (App. 800 – 801). *Cf. Alexander*, 303 S.C. at 542-3, 402 S.E.2d at 485-86 (1991 (finding the petitioner's own testimony that he would have proceeded to trial but for counsel's misadvice as to sentencing was "the only evidence in the record on this point" and was sufficient to satisfy the prejudice prong of the *Strickland* test); *Jackson v. State*, 342 S.C. 95, 97—98, 535 S.E.2d 926, 927 (2000) (citing

Alexander with approval and finding the petitioner satisfied the prejudice prong by simply providing testimony that he would not have pled guilty, but for trial counsel's misadvice).

Based on the plea offer for voluntary manslaughter and Counsel's failure to adequately advise Petitioner regarding a critical legal theory that significantly affected the jury's determination of guilt, there is "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *See generally Frye*, 566 U.S. 134 (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); *Cooper*, 566 U.S. 156.

Therefore, the PCR court erred in finding Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *See* (App. 789 – 807). *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted); *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

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II. The PCR Court erred in finding Trial Counsel provided effective assistance of counsel because Counsel failed to conduct an independent examination of the vehicle where the shooting occurred after waiting three years to file a motion to inspect the seized vehicle the week before trial, and the State relied on the critical evidence obtained during its examination of the vehicle at trial.

The United States Supreme Court has held, "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "In assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Notably, this Court has held that "[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Furthermore, "while the scope of a reasonable investigation depends on a number of issues, *at a minimum*, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597) (emphasis added); *see generally Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had counsel introduced relevant and favorable evidence at trial). The duty to conduct a reasonable investigation also extends to consulting and possibly presenting expert witnesses. *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61.

Deficient Performance

In this case, Trial Counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *See Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel failed to conduct an independent examination of the vehicle where the shooting occurred and waited three years to file a motion to inspect the seized vehicle the week before trial, and the State relied on the critical evidence obtained during its examination of the vehicle at trial. (App. 750, lines 22-25; App. 751, lines 14-24). *See Id.*; *Wiggins*, 539 U.S. at 527; *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360; *Cf. Praylow v. Martin*, 761 F.2d 179 (4th Cir. 1985) (provides that a defendant's stated interest in pleading guilty does not relieve counsel of his duty to investigate possible defenses).

Furthermore, Trial Counsel's failure to conduct an independent inspection of the Ford Focus where the shooting occurred cannot be repackaged and sold as a strategic decision to avoid a finding of deficient performance because of his own detrimental delay to investigate critical evidence known to him. *See* (App. 766). *Cf. Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995) (finding "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness").

Prejudice

Trial Counsel's deficient performance prejudiced Petitioner because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Petitioner's inability to conduct an independent examination of the Ford Focus prevented Trial Counsel from conducting a reasonable investigation and allowing Petitioner to

adequately assess whether to accept or reject the plea offer based on the State's evidence. *See* (App. 802). *See generally Frye*, 566 U.S. 134 (holding the Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected); *Cooper*, 566 U.S. 156 (holding the right to effective assistance of counsel extends to the plea-bargaining process). Based on the plea offer for voluntary manslaughter, there is "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.*

Therefore, the PCR court erred in finding Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *See* (App. 789 – 807). *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted). *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

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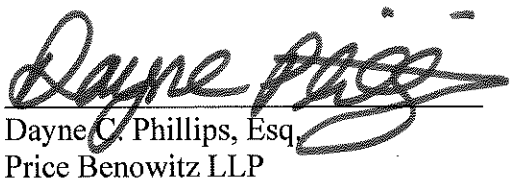
CONCLUSION

Based on the foregoing reasons, Petitioner Justin Simms respectfully requests that this Court grant his Petition for Writ of Certiorari, reverse the PCR Court's Order, and remand this case for a new trial. *See* U.S. Const. amends. VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

Respectfully submitted,



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