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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Barnwell County
The Honorable Courtney Clyburn Pope, Circuit Court Judge
Honorable William P. Keesley, Circuit Court Judge

DEXTER B. BROWN, II, #330278,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2022-000920

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO *AUSTIN*

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PETITIONER'S QUESTIONS PRESENTED

1. Whether the lower court (Honorable William P. Keesley) erred for failing to find that counsel was deficient and prejudice resulted when counsel failed to fully impeach the trial testimony of Roger Benjamin.

2. Whether the lower court (Honorable William P. Keesley) erred by failing to find that counsel was deficient and prejudice resulted when counsel failed to properly investigate prior to trial and utilize Brandon Parker as a witness at trial.

STATEMENT OF THE CASE

Petitioner Dexter Brown ("Brown") was indicted in 2011 by the Barnwell County Grand Jury for 2 counts of attempted murder and possession of a weapon during a violent crime (Ind. #s 2011-GS-06-10; -11; & -12). Nicholas R. McCarley and De Grant Gibbons represented him. Brown was tried by a jury on May 11-12, 2011, before the Honorable Edgar W. Dickson. On May 12, 2011, Brown was found guilty as indicted. On November 9, 2011, Brown was sentenced to 30 years concurrent on each attempted murder charge and 5 years consecutive on the gun charge. Petitioner directly appealed to the Court of Appeals raising 2 issues not relevant to this current appeal. The Court of Appeals affirmed. State v. Dexter Brown, Unpublished Opinion No. 2014-UP-303 (Ct. App. filed July 30, 2014). The Remittitur was issued on August 15, 2014.

Brown then filed a post-conviction relief (PCR) action on October 2, 2014 (C.A. # 2014-CP-06-369). A PCR hearing was held January 25, 2018, before the Honorable William P. Keesley. Petitioner alleged among other things the 2 issues he raises in this appeal. After the hearing and credibility determinations, in an Order of Dismissal filed June 4th, 2018, Judge Keesley denied relief on all claims including the 2 raised here. Brown did not appeal from the denial of PCR.

Brown then filed a 2nd PCR action alleging he was entitled to an Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) review of the denial of his 1st PCR action by Judge Keesley. The State conceded he was entitled to petition for Austin review of the denial of his 1st PCR because 1st PCR counsel did not appeal from the denial of the 1st PCR action. The 2nd PCR Court entered a Consent Order granting Petitioner the right to file an Austin petition to this Court.

Petitioner then filed in this Court his Austin Petition and a Petition for Writ of Certiorari pursuant to Austin raising 2 issues from the denial of his 1st PCR application by Judge Keesley. This is Respondent's Return to the Petition for Writ of Certiorari.

RESPONDENT'S STATEMENT OF FACTS

On the afternoon of October 15, 2010, the victims Roger Benjamin ("Benjamin") and Brandon Parker ("Parker") were returning from Barnwell and stopped at a store called *Harry's*. They were driving a burgundy Blazer owned by Parker's mother Leslie Morrisey. While at *Harry's*, the victims ran into a man known as "T," who asked for a ride. The victims agreed to give "T" a ride to a business down the road from Benjamin's grandmother's home. (R. 85-86; 91; 97). While at *Harry's*, the victims noticed an older model light blue Mercury pass by and pull in a parking lot. Petitioner Dexter Brown ("Brown") was driving the light blue Mercury and Kendrick Jacobs ("Jacobs) was in the passenger seat. [1] The light blue Mercury was owned by Brown's girlfriend's father, John Ingram. Brown's girlfriend, Adrian Ingram, regularly drove her father's car but as police would later discover, on the afternoon of October 15, 2010, Adrian was driving Brown's white car, and Brown was driving the light blue Mercury. (R. 87; 104; 116; 130). After noticing the Mercury pass by and park nearby, the victims talked amongst themselves and others and decided to take a different route home. Parker was driving the burgundy Blazer belonging to his mother; Benjamin was in the passenger seat, and "T" was in the back seat. After the victims pulled out of the store, the victims again noticed the light blue Mercury and now it was behind them and following them. The victims tried to take the alternate route home to avoid the Mercury, and Parker accelerated the Blazer. (R. 86, ll. 3-8). However, Brown and Jacobs, in the Mercury, were able to follow the victims, and a "high-speed chase" ensued. (R. 86; 99, ll. 21-22).

Brown and Jacobs then began shooting at the victims with semi-automatic weapons from the light blue Mercury as soon as Parker turned the Blazer off Patterson Mill Rd. into Benjamin's grandmother's driveway and yard. (R. 86, ll. 9-10). Benjamin's grandmother, Alice Thompson,

[1] After Brown's convictions, Jacobs pled guilty and received a sentence of 15 years.

lives in Barnwell County and was home at the time of the shooting. Inside her home were Alice's elderly mother, and her grandchild. Benjamin, Parker, and "T" jumped out of the Blazer and ran after the first burst of gunfire. Parker ran behind a home next door; "T" ran into the woods behind Alice's home, and Benjamin ran and hid behind Alice Thompson's home and then turned around to see who was shooting at them. (R. 86, ll. 12-13). Brown and Jacobs had proceeded down the road with Jacobs shooting over the hood of the car from the passenger window of the Mercury. Brown and Jacobs turned the car around just down the road and headed back to Alice's home. When Brown and Jacobs reached Alice's driveway, they pulled the light blue Mercury into the driveway, and both Brown and Jacobs began shooting at the Blazer again. (R. 88-89; 135-38; 143-44). Although the occupants of the Blazer had already fled, Brown and Jacobs continued to shoot. (R. 135-37; 150). At that point, Benjamin saw that the men who had been shooting at them were Brown and Jacobs, and both Brown and Jacobs were shooting automatic weapons witnesses described as "machine guns" [possibly Tech 9s or Mac 10s] (R. 59-64; 86, ll. 15-17; 99-100; 135-37). Benjamin had known Brown since he was 11 or 12 years old, and Jacobs was Benjamin's cousin. (R. 90). Benjamin observed Jacobs was sitting in the passenger-side window, shooting across the roof of the car, while Brown was shooting out the driver's window. (R. 88).

Meanwhile, Alice Thompson, Benjamin's grandmother, observed part of the incident from her front porch. (R. 134-47). Alice heard what sounded like firecrackers and came out onto her porch as Brown and Jacobs were coming by her home and heading up to the business to turn around and come back. (R. 147, ll. 21-23). She saw Brown driving a light blue car and Jacobs sitting in a window shooting in the direction of her yard over the hood of the car. She saw Brown and Jacobs turn around and come back to her home with Brown shooting out the driver's window. Both men had what appeared to be machine guns they were shooting. Brown and Jacobs pulled into the end

of her driveway. She immediately recognized Brown and Jacobs as the shooters, and she cried out, asking what they were doing. Brown and Jacobs continued shooting at the Blazer and then left when Alice told them she was calling the police. (R. 134-35; 144; 149, ll). Alice called 911 at 4:43 p.m. and told the dispatcher what has happening and specifically mentioned Brown as 1 of the shooters. (R. 138-43). Alice had known Brown since he was a child and cared for Brown as a child when Brown's "father" was in prison.[2] (App. 90, 135). Alice was relieved that none of the neighborhood children, including her granddaughter, had been playing outside at the time of the shooting, because if they had, "there'd a been a lot of dead peoples out there." (R. 138, ll. 20-25).

Officer John Trottie arrived on the scene at 4:48 p.m., and he encountered Parker, who kept repeating "somebody tried to kill me." (R. 47-48).[3] Investigator Chavis arrived shortly thereafter and collected the numerous fired shell casings, 14, located in the road and in Alice's yard. (R. 57-66). A fired bullet was also found in the yard and driveway area, and an unfired bullet in the road. Inv. Chavis determined several bullets hit the victim's Blazer, including the rear bumper, the side window, and 1 bullet hit the driver's side headrest. (R. 62-66). Two (2) tires on the Blazer were also flattened. Chavis also determined that automatic weapons were used by the shooters. (See R. 59-64). Chavis found no indication that a gun had been fired out of the victims' Blazer.[4] (R. 74).

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[2] Brown's *stepfather* was convicted of Voluntary Manslaughter several years earlier, when Brown was 8 years old, in relation to the death of Brown's mother in a suspicious automobile accident. (App. 227-28). Alice told the 911 operator on the day of this crime that "Little Dexter" and Kendrick Jacobs did the shooting. She had to ask her grandson Benjamin what Brown's last name was because Brown had gone by different names in the past, apparently because of his relation to his biological father and to his stepfather. (App. 142; 227-28). Benjamin can be heard in the background of the 911 call telling Alice that petitioner's last name is Brown. (State's Ex. 26; App. 142). Benjamin also confirmed at trial that his grandmother had taken care of Brown when Brown's father went to prison. (App. 90).

[3] "T" returned to Alice's yard briefly after the shooting as reflected in the 911 call, but then left the scene and could not be located by either side before trial. (State's Ex. 26; App. 146-47).

[4] In fact, a gunshot residue test was performed on Parker and the results were negative. (R. 69; 77-81). Chavis was not able to perform a similar test on Benjamin because the only test he had left

When the 911 call went out about 4:43 p.m., 1 investigator stationed himself near where Brown *and* Jacobs "hung out." He saw Brown's own white car pass by and stopped the vehicle. Upon approaching the white car registered to Brown, the investigator found Brown's girlfriend, Adrian driving Brown's white car. Upon interviewing her, he determined Brown was driving her father's light blue Mercury. (R. 111-115). Police eventually located the light blue Mercury that Brown had been driving at the time of the crime, 2 days later, at Adrian's father's home. (App. 129-30). The car was registered to her father. (App. 115-116; 126-127). The Mercury had been cleaned and vacuumed out, so no forensic evidence was recoverable. (R. 126-27; 129-30).

Brown was not located until September 18th and after the police received anonymous tips. (R. 119-20). After receiving 1 tip about Brown's location, police drove by the location and saw Brown on the back porch. Police stopped at that location and were permitted entry to search for Brown. (R. 119-23). Police found Kendrick Jacobs in the kitchen *and* Brown hiding in the closet of a bedroom. (R. 122-23). Police were never able to locate the weapons used by Brown and Jacobs in the shooting. However, police were able to recover fired bullets and fired shell casings at the crime scene. There were both 9mm and .380 caliber shell casings recovered indicating 2 guns were used in the crime consistent with Alice's testimony. (R. 128, ll. 6-7).

Standard of Review

In a PCR appeal, great deference is given the lower court's findings of fact but deference is not given to the conclusions of law. Smalls v. State, 422 S.C. 174; 810 S.E.2d 836 (2018). The existence of "any evidence" of probative value is sufficient to uphold the lower court's ruling on

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was unusable because the necessary fluid had evaporated. (R. 72-73). However, Benjamin testified that he did not have a gun on the day of the incident. (R. 97, ll. 20-24). Parker also testified after trial that no one in the Blazer had a firearm. (App. 419-47). Additionally, no fired shell casings or unfired bullets were found in the Blazer. (App. 74).

findings of fact. Webb v. State, 281 S.C. 237, 314 S.E.2d 839 (1983). Questions of law are reviewed *de novo*, and the appellate court "will reverse the decision of the PCR court when it is controlled by an error of law." Goins v. State, 397 S.C. 568, 6573, 726 S.E.2d 1, 3 (2012).

Question Presented No. 1

> Whether Judge Keesley erred for failing to find that counsel was deficient and prejudice resulted when counsel failed to further impeach the trial testimony of Roger Benjamin?

There is no factual or legal merit to this claim. Judge Keesley addressed this claim of ineffective assistance of counsel (IAC) and found it to be without merit. (App. 456-65). That determination is supported by the record. Judge Keesley also found counsels' testimony was credible and Petitioner's testimony, claims, and assertions were not credible. (Id.). That determination is also entitled to deference by this Court. It is fully supported by the record.

Roger Benjamin is the grandson of Alice Thompson and 1 of the victims. Benjamin testified at trial and identified Brown and Jacobs as the shooters but was impeached by counsel with his prior written statement to Officer John Trottie that was written by Parker's mother, Morrisey, and adopted and signed by Benjamin the day of the crime and witnessed by Trottie. **(App. 90-98).** At trial, Benjamin testified he saw who was shooting at him after he fled from the Blazer and went behind his grandmother's home and looked back. At trial Benjamin was impeached with his prior statement to Trottie, in which he stated he did not know who was shooting at him, but "T" yelled out "Dexter, Dexter" when the shooting first took place. **(App. 90-98).**

Brown alleged below that counsel should have introduced into evidence Trottie's incident report and/or the written statement of Benjamin to further impeach Benjamin. Brown also alleged counsel should have recalled Trottie and Morrisey as witnesses in the defense case, and elicited from them impeaching information about Benjamin's prior statement. However, Brown did not

call Trottie or Morrisey as witnesses at the PCR hearing. As will be shown, this ground has no merit because counsel did impeach Benjamin with his prior statement to Trottie, and counsel chose not to introduce the statement itself, or the incident report, or recall Trottie or Morrisey in his case in chief, because Brown would have lost the right to last closing argument, which Brown made. (App. 385-386). Finally, it is entirely speculative what Trottie or Morrisey would have testified to, or whether it would have been helpful or harmful, as they did not testify at PCR. (App. 298-411).

Trial counsel McCarley credibly testified at the PCR hearing he was aware of Benjamin's prior statement to Trottie and the incident report; he had received those in discovery and reviewed them, and he investigated the same, including interviewing Benjamin and Alice Thompson at the crime scene and interviewing Benjamin several times in the months and weeks leading up to trial. (App. 303-04; 90-98; 309-12; 325-27; 356-57). Counsel also participated in an interview with Morrisey before trial. (App. 309). Counsel also reviewed the 911 call pre-trial and was prepared to cross-examine either Benjamin or Alice Thompson regarding the same. (App. 142-74; 365-66; 396-97). Both Benjamin and Thompson can be heard on the 911 call identifying Brown as 1 of the shooters. (State's Ex. 26; App. 142-47; 352; 365-66; 396-97).

Counsel testified as a result of his pre-trial investigation and interviews with both Benjamin and Thompson, counsel knew when he tried to impeach Benjamin at trial with his prior statement to Trottie, Benjamin was going to explain to the jury the prior statement was not inconsistent with his testimony because Benjamin's statement to Trottie that he did not see who was shooting at him was referring to during *the car chase, not after he fled from the car*. (App. 309-12; 325-27; 356). Counsel testified it wasn't that he believed Benjamin, but based on his investigation he anticipated Benjamin was going to testify at trial that he did not see who was shooting at him until he got out of the Blazer, ran around his grandmother's home, and looked back and saw Brown and Jacobs

shooting. (App. 309-12; 325-30; 356-57). Counsel stated Benjamin's trial testimony on direct was consistent with this explanation. (App. 322-24). This is supported by the record. (App. 85-102). On cross-examination, counsel impeached Benjamin's identification testimony with Benjamin's prior statement to Trottie. (App. 90-98; 328-29; 358-59; 385-87).

Although counsel did not introduce the actual written statement in evidence, in order to save his client's right to last closing argument, **counsel cross-examined Benjamin at trial about the content of the statement to Trottie and impeached him with it.** (App. 90-98; 328-29; 358-59; 385-87). This is supported by the record. (App. 90-98). Both counsels credibly testified at the PCR hearing they believed Benjamin had impeached himself enough already during his testimony, so they did not need to introduce the statement itself or the testimony of Trottie or Morrisey, in their case in chief to impeach him. (App. 358-59; 385-87). If they did, they would have lost their client's right to last closing argument, which they believed was more important. (App. 358-59; 370-72 385-87). Both counsels testified, and the record shows, Benjamin admitted during trial on cross-examination that his adopted written statement to Trottie, given the day of the crime, did not contain any reference to Brown or identify Brown as the shooter. (App. 90-98; 358-59; 385-87). Counsel credibly testified, the problem was Benjamin did not write the statement, Morrisey did. (App. 332, 334-35; 337-40; 370). So, this somewhat complicated the cross-examination. (App. 339-40; 370). Both counsels testified they consulted over this issue and decided not to introduce any evidence on this issue, other than the cross-examination of Brown about the statement which impeached him **(App. 90-98)**, because they would lose the right to last closing argument, and they believed last closing argument was more important than calling a witness to testify again to what was in the statement which the jury had already heard. (App. 358-59; 370-72; 385-87; See App. 339 & 90-98). Counsel did make the last closing argument. (App. 367). As will be explained

below, and as Judge Keesley properly found, counsel was not deficient, and Brown has not shown prejudice in this regard. Strickland v. Washington, 466 U.S. 668, (1984)

Counsel McCarley testified he discussed all his strategic decisions with Chief Public Defender De Grant Gibbons, who sat 2nd chair on this trial with him. (App. 349). Gibbons testified to the same thing. (App. 385-86). Counsel McCarley testified the most important evidence against Brown was the testimony of Alice Thompson, Benjamin's grandmother. (App. 351-52). Counsel testified he met with her at the crime scene as part of his investigation. (App. 351-52). Counsel testified Alice Thompson's 911 call was introduced at trial, and he cross-examined her on the flaws in her statements on the call as compared to her trial testimony. (App. 351-53; 397-98). Counsel testified she was a very good witness for the State, and very credible even though he tried to impeach her. (App. 351-53). Alice Thompson was a grandmother type figure to Brown and knew Brown and identified him on the 911 tape and at trial as 1 of the shooters. (App. 351-53). Counsel testified with her as a witness the case was strong against Brown. (App. 355).

Counsel testified 1 of his trial strategies was to bifurcate the trial from co-defendant, Jacobs, to separate Brown from the event. (App. 354). The co-defendants were severed, and Brown's trial took place before Jacobs' guilty plea and 15-year sentence. Counsel stated he could not prove the shooting did not happen, because of the shell casings, fired bullets, and damage to the burgundy Blazer, but there was no physical evidence tying Brown to the crime, so his strategy was to convince the jury that Brown was not there and did not take part in it. (App. 354-55). He stated the State's evidence included 14 fired shell casings on the road that came from 2 different guns, as well as bullets found in the headrest of the victim's vehicle, which was 1 of the factors forming the basis of the attempted murder charges. (App. 350-51; 354).

De Grant Gibbons testified he has been the Circuit Public Defender since 2008 and had been practicing law since 1991. (App. 385-86). He sat 2nd chair in this case and discussed strategic decisions with counsel McCarley before and during the trial. (App. 385-86). Gibbons testified the statement of Benjamin **was basically in evidence already through the witnesses' testimony,** *and* **it was more important for Brown to have the last closing argument than to introduce Benjamin's statement.** (App. 386-87). Gibbons testified Alice Thompson was a very strong witness for the State and very believable because she was a friend, almost family, of Brown, so she had no motive to make up a name to blame the shooting on. (App. 388-89). Gibbon's testimony is fully supported by the record as Alice Thompson was a very credible and strong witness at trial and helped raise Brown as a child and stated Brown's name on the 911 call as 1 of the shooters. (App. 134-50; State's Ex. 26). At the Solicitor's repeated urging in her closing argument, the jury asked to rehear the 911 tape of Alice Thompson before finding Brown guilty. (App. 178; 202).

As Judge Keesley correctly noted in his Order, in a PCR action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where IAC is alleged as a ground for relief, the applicant must prove "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." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance was whether the attorney provided representation within the range of competence required in criminal cases. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813. And the applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). Courts use a two-pronged test in allegations of IAC. First, the applicant must

prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (*citing* Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Judge Keesley noted he reviewed the record in its entirety and heard the testimony at the PCR hearing. He had also observed the witnesses at the hearing, closely passed upon their credibility, and weighed their testimony accordingly. Judge Keesley found Brown's testimony and assertions to be not credible and counsel's testimony to be credible and persuasive. These credibility findings were applied to his findings and conclusions set forth below. Judge Keesley determined Brown had failed to meet his burden of proof.

In the Order of Dismissal, Judge Keesley noted Petitioner alleged IAC for failing to impeach victim Benjamin with his prior written statement given to Trottie on the day of the crime. Judge Keesley correctly found this allegation was meritless. Judge Keesley found Brown had failed to prove counsel failed to explore inconsistencies between the written statement given to Trottie and Benjamin's trial testimony. Judge Keesley correctly found counsel **thoroughly cross-examined Benjamin at trial on the inconsistencies of his trial testimony and his prior statement to Trottie and the fact he did not tell Trottie that he saw Brown shooting at him.** This is fully supported by the trial record. **(R. 90-98). On cross-examination,** Benjamin admitted his statement to Trottie given on the day of the crime about the shooting did not reflect he identified or mentioned Brown at all. As counsel expected, the witness told the jury on direct he did not see who was shooting at him until after he got out of the car and went around his grandmother's home and looked back and saw Brown and his cousin Jacobs shooting. While Benjamin tried to explain

the statement away because Morrisey wrote the statement for him, counsel forced Brown to admit he signed the statement, swore that it was the truth, and Trottie witnessed it. **(App. 90-98).**

Judge Keesley correctly found the record clearly showed **counsel impeached Benjamin with the content of the statement in the exact manner Brown now alleges he should have. (R. 90-98).** Counsel impeached and cross-examined Benjamin about inconsistencies in the prior statement for approximately *8 pages of transcript*, including the fact the witness did not identify Brown in that statement. **(R. 90-98).** The record shows this cross-examination was further highlighted by the fact the jury was sent to the jury room so Benjamin could read over his statement carefully before being questioned further about it. The jury was then brought back into the courtroom, and Benjamin was cross-examined about the statement itself. **(R. 90-98).** Judge Keesley correctly found counsel's impeachment of the witness was proper and reasonable under the circumstances, and therefore not deficient. (R. 90-98). Benjamin admitted before the jury his written statement did not mention nor did he identify Brown on the day of the crime. (R. 90-98).

Judge Keesley further correctly found counsel offered a valid strategic reason for choosing *not to introduce the prior statement*, including the police report, during trial or in not offering any testimony from Trottie or Morrisey regarding the statement in Brown's case in chief. Both counsel McCarley and DeGibbons testified they did not want to lose the chance to argue the last closing argument, which at the time was the law. (App. 348-59; 379; 384-87). As a result, Judge Keesley correctly found counsel could not be deficient. Strickland, 466 U.S. at 689 (reasonable trial strategy is not a basis for ineffective assistance of counsel); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998)(tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991)(tactical decision sustainable unless it is both incompetent and prejudicial.); Bell v. Evatt, 72 F.3d 421(4th Cir. 1995)(standing alone,

unsuccessful trial tactics neither constitute prejudice nor definitively prove IAC, and petitioner must overcome presumption the challenged action was an appropriate and necessary trial strategy). **At the time of Petitioner's trial**, April of 2011, under South Carolina precedent, if the defendant introduced any evidence at all during the trial, whether an exhibit or through a witness called in his case in chief, he lost the right to last closing argument. State v. Crowe, 258 S.C. 258, 188 S.E.2d 379 (1972); State v. Gellis, 158 S.E. 849 (1930); State v. Mouzon, 321 SC. 27, 467 S.E.2d 122 (Ct. App. 1995). This did not change until recently. State v. Beatty, 423 S.C. 26, 513 S.E.2d 50 (2018); State v. Shands, 424 S.C. 106, 817 S.E.2d 524 (2018). Judge Keesley correctly pointed out where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992).

Brown argues in his brief counsel should have impeached Benjamin at trial using a State's witness Trottie. First, Brown did not call Trottie at PCR to establish what Trottie's responses would have been if he had been questioned at trial or called as a defense witness and asked questions about Brown's prior statement. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). *See also* Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002)(speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued). Based on counsel's investigation of the case, Trottie could have given the same answer at trial that Benjamin gave at trial, that in his written statement Benjamin was referring to not seeing who was shooting at him when they were being chased by the Mercury. It must be remembered, in the 911 call seconds after the crime **(State's Ex. 26)**, Benjamin can be heard telling his grandmother that it was Dexter *Brown* [petitioner] who was shooting at them. **(App. 142-43)**. A BOLO was put out for the light blue

Mercury and the officer who stopped Brown's girlfriend shortly after the crime was looking for Brown and Jacobs. **(App. 113, ll. 1-25).** Police also interviewed Benjamin again the day after the crime. **(App. 90; 100-102; 116-118).** The police report written by Trottie lists Brown and Jacobs **as the suspects. (App. 448-51).** Counsel credibly testified based on his investigation, he knew the timing of when the identification was made. (App. 372, ll. 2-3). It is entirely speculative what Trottie would have said regarding Benjamin's statement and what point in time Benjamin was actually referring to in his statement, and as a result, Petitioner has failed to establish deficient performance or prejudice in this regard. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998)(state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of burden of producing admissible testimony in accordance with the rules of evidence); Moss v. Hoffbauer, 286 F.2d at 864-865 (speculation as to cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued).

Second, the record shows Trottie was the 1st witness called in the case. (App. 46-54). At the time he testified, Trottie's testimony as to what Benjamin told him on the day of the crime, whether live testimony or in a police report, would have been hearsay. (App. 46-54; 357-58). Trottie was called before Benjamin testified. (App. 85-102). The defense would have had to recall Trottie after Benjamin testified and after the State rested, in the defense case, to establish a prior inconsistent statement, and that would have voided Brown's right to last closing argument, which would have defeated counsel's strategy. Crowe; Gellis; Mouzon.

The record shows counsel did make the last closing argument to the jury and pointed out deficiencies in the State's case. (App. 178-85; 358-59). As 2nd chair counsel Gibbons credibly testified at PCR (App. 385-387), what Benjamin had stated in his original written statement the

day of the crime **was thoroughly covered before the jury on the record by counsel during cross-examination** and **counsel made an objectively reasonable strategic decision under the circumstances not to introduce the written statement and lose last closing argument where nothing additional would be gained.** (See App. 90-98; App. 387-389). As a result, Brown had failed to prove counsel was deficient in this manner, or that any deficiency changed the outcome of the trial. Strickland v. Washington. Accordingly, this allegation was appropriately denied and dismissed by Judge Keesley with prejudice. Id.

Further, as previously discussed, the record shows witness Benjamin can be heard in the background on the 911 call shortly after the crime stating it was Dexter Brown who was shooting at him trying to kill him. (State's Ex. 26; 142-43). Further, as counsel credibly testified, and as witness Benjamin testified at trial, Benjamin did not write the statement, neither did Trottie, but Parker's mother, Morrisey, and Benjamin conceded to the jury there were false things in the statement because Morrisey did not take down correctly what he said. As a result of all of the above, the impeachment value of the written statement to Trottie, if it had been introduced, is lessened, which influenced counsel's strategic decision not to call Trottie. (App. 370, ll. 13-25). Strickland (defendant must prove prejudice by a preponderance of the evidence, i.e. the result of the trial would have been different if counsel had acted the way defendant alleges he should have).

Brown further argues IAC for failing to impeach Benjamin with the testimony of Leslie Morrisey. (IBOR). Brown argues Benjamin testified that his statement he signed the day of the shooting, which failed to mention Brown as the shooter, was inaccurate because Morrisey, who wrote the statement, failed to record his statement accurately. Ms. Morrisey was called as a witness at trial; however, counsel did not question her on this point.

This ground has no merit. It was waived and abandoned at PCR. This particular claim was not addressed in the Order of Dismissal (App. 456-72) and is not preserved for appeal where Brown did not file a Rule 59 Motion to have this issue addressed by the PCR Court in its Order. Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)(failure to file Rule 59, SCRCP, Motion to have unaddressed issue addressed in the Order of Dismissal, results in issue not being preserved for review on appeal from PCR); Bostick v. Stevenson, 589 F.3d 160 (4th Cir. 2009)(same). As a result, this portion of appellate ground one is not preserved for appellate review. Id.

Regardless, there is no factual or legal merit to this portion of appellate ground one. Brown alleges counsel should have impeached Benjamin with the testimony of Morrisey; however, Brown failed to call Morrisey at the PCR hearing and elicit what her testimony would have been had she been cross-examined on this point. Because of the failure to call Morrisey, it is entirely speculative what Morrisey would have testified to. As a result, Petitioner has failed to prove deficient performance *or* resulting prejudice. Moss v. Hofbauer, 286 F.3d at 864-65 (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991(applicant cannot rely on some unspecified and speculative testimony might have established his defense"; rather, facts must be presented); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(allegation of IAC does not support relief absent proffer of the supposed witness's favorable testimony); Fuller v. State, 347 S.C. 630, 557 S.E.2d 664 (2001)(similar); Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)(In order to support an IAC claim for failing to interview or call potential witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules

of evidence. Mere speculation about what the witnesses' testimony would have been cannot, by itself, satisfy applicant's burden of showing prejudice).[5]

Additionally, a reviewing court must consider the potential risk cross-examination would have led to damaging testimony being repeated. Moss, 286 F.2d at 865. The record shows the witness Benjamin can be heard in the background of the 911 call just moments after the crimes stating that it was Dexter Brown [petitioner] who was shooting at him. If counsel had cross-examined this witness as Brown argues he should have, counsel may have received a devastating response damaging to Brown's defense. Id. As a result, the impeachment value of Morrisey's testimony, even if it had been proffered, and even if it was favorable, is lessened.

Finally, as both counsels credibly testified, it was Alice Thompson's testimony that was the most damaging to Brown. (App. 351-52; 388-89). She actually witnessed Brown and Jacobs shooting at the victims as they drove by her house, when they turned around, and when they returned and pulled in her drive-way they shot up the Blazer. Ms. Thompson had known Brown since he was a child and helped care for him when his father [or step-father] was incarcerated. (Id.). She identified both Brown and Jacobs in the 911 call. The car used in the shooting, as described by witnesses, a light blue Mercury, belonged to Brown's girlfriend's father. Brown's girlfriend regularly drove the light blue Mercury but was not in the same at the time of the crime but was driving Brown's white car. Police stopped Adrian in Brown's white car shortly after

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[5] *See also* Putnam v. State, 417 S.C. 252, 789 S.E.2d 594 (Ct. App. 2016)(where PCR attorney did not call witnesses at PCR hearing, any testimony that witnesses may have testified to at trial was mere speculation; a PCR applicant cannot show he was prejudiced by the failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence; mere speculation what the witness' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice; defendant failed to demonstrate how counsel's performance prejudiced her trial, where no witnesses testified at PCR hearing, such that any testimony that witnesses may have testified to at trial was mere speculation).

crimes, and determined from her that Brown had the Mercury. Brown was arrested hiding from police in a closet. His co-defendant Jacobs, who later pled guilty, was arrested in the kitchen of the same house. The Mercury was recovered at Adrian's father's house. As a result, given all of the evidence in this case, Brown cannot establish prejudice under this ground. Strickland. As a result of all of the above, this ground has no merit. Id. The petition for certiorari should be denied.

Question presented II.

> Whether Judge Keesley erred by failing to find counsel was deficient and prejudice resulted when counsel failed to properly investigate prior to trial and utilize Brandon Parker as a witness at trial?

There is no merit to this ground. Judge Keesley addressed this issue in his Order of Dismissal and found it had no merit. (App. 457-64; 467-69). That determination is fully supported by the record including Judge Keesley's credibility determination that Brandon Parker's deposition testimony was not credible in several respects. (App. 467-69). That determination is also supported by counsel's interview with his own client [Brown] who told counsel not to call Parker as a witness as he would be damaging to their case. (App. 308-310; 317-18; 321-22; 349; 387). Brandon Parker, who was driving the burgundy Blazer, when Brown and Jacobs attempted to murder Parker and Benjamin **did not testify at trial** as he was in prison in North Carolina. Parker was interviewed after the incident and gave police a statement that he did not see who was shooting at them, but he did see it was a light blue Mercury pursuing them from *Harry's* store; they got involved in a high speed chase in an attempt to get away from the Mercury, and when he pulled into Alice Thompson's driveway, the individuals in the Mercury shot at them trying to kill them and "T" started yelling out "Dexter, Dexter".

Parker was deposed before the PCR hearing. He still testified all 3 men in the Blazer were driving down the road after leaving *Harry's* and a light blue Mercury began following them. The

men in the light blue Mercury then began to shoot at them as they pulled in Thompson's yard. But this time, Parker stated as they were driving down the road, when the Mercury kept gaining on them, "T" kept looking back saying "it looks like Dexter and them." (App. 417-46). Parker's statement only changed slightly. (App. 417-46). Parker admitted the only difference between his statement and deposition is from "T" saying "Dexter, Dexter" when the first shots were fired, to "it looks like Dexter and them" when the Mercury was gaining on the Blazer. (App. 441-42).

While counsel did not travel to North Carolina and interview Parker in prison, counsel was aware of Parker's statement, had a copy of it through discovery, and did investigate Parker's statement to police and whether to call Parker as a witness, and the decision was made in consultation with Brown **and** co-counsel not to call Parker if the State did not call Parker and that decision was made for several reasons, including what Brown specifically told counsel **and** counsel's other investigation of Parker. (App. 307-22; 349; 359-64; 387). As a result of not calling Parker, 1 of the victims of the crimes was not at the trial or called by the State, and there was no additional testimony to Benjamin and his grandmother that a light blue Mercury was the shooting vehicle and the shooter was named "Dexter." (App. 359-62).

In the Order of Dismissal, Judge Keesley noted Brown asserted IAC for failing to investigate Parker as a potential witness. Again, Judge Keesley found counsels' PCR testimony was credible and Petitioner's testimony and assertions were not credible. In the Order, Judge Keesley noted Parker was 1 of the 3 victims in this shooting. Parker was driving the vehicle Brown rode behind and at which he was shooting, and bullets were found in the headrest behind Parker's head. Judge Keesley also noted Parker did not testify for the State at trial because he was incarcerated in North Carolina. And, importantly, counsel credibly testified that based on an interview with Brown, Parker knew Brown **because they had been involved in illegal drug**

activity together or against each other. (App. 318, ll. 1-12). Judge Keesley noted Brown now alleged counsel should have called Parker as a witness at trial to testify he did not see who was shooting at him from inside his car, and he does not think any of the other victims would be able to see who was shooting because the windows of the Blazer were so darkly tinted they were impossible to see out of. At his deposition, Parker made clear he was referring to his mother's Blazer not the light blue Mercury. (App. 438).

In his Order, Judge Keesley noted Brown introduced Parker's deposition and Judge Keesley reviewed it and found many of the statements made by Parker were not credible. Judge Keesley found in Parker's written statement immediately after the crimes, he told Officer Trottie about how he was driving the Blazer and an unknown man named "T" was riding in the backseat. As Brown began shooting at their car, Parker told Officer Trottie, "The guy 'T' that caught a ride kept yelling 'Dexter, Dexter." However, when asked about this at the deposition, Parker recanted this statement and said his mother, who wrote it for him, wrote it down incorrectly:

Q: Sure. Now, when your mom wrote your statement, did she write it exactly as you told her to?

A: Like I say, the only part that – I don't – I said that the guy that caught a ride kept yelling – he didn't kept [sic] yelling "Dexter". He said that looked like Dexter. He didn't directly say that was Dexter, but that's what she put right there, which wasn't right.

(Order, *citing* Depo. Tr. 19, ln 19 – 20, ln 1).[6] Judge Keesley found this section of Parker's deposition testimony was not credible, as he was recanting his prior statement.[7] Judge Keesley

[6] Parker also testified in his deposition that "T" was stating it looked like "Dexter and them" repeatedly as the light blue Mercury was gaining on the Blazer before the shooting even occurred.
[7] Judge Keesley pointed out; "Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011)(quoting State v. Mayfield, 235 S.C. 11, 34–35, 109 S.E.2d 716, 729 (1959)). (Order of Dismissal).

further found Parker's testimony it was impossible to see who was in the car behind them because of the tint *of the Blazer's windows* was not credible. (Order *referencing* Depo Tr. 22-23; 438-39).

Judge Keesley correctly found that failing to call 1 of the victims of the crimes, Parker, as a witness for the defense was not deficient because it was reasonable under the circumstances. The Court further found the decision not to call Parker as a witness could not be deficient because counsel articulated a reasonable, valid trial strategy in choosing not to call him. Judge Keesley pointed out where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. (Order *citing* Roseboro, *supra*; Underwood, *supra*; Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)). Judge Keesley found counsel credibly testified he investigated whether to call Parker as a witness and **Brown**, the Solicitor's Office, and the co-defendant's attorney, and Morrisey all told him Parker would be an adverse or hostile witness against the defense and would not help his case. This is supported by the credible testimony of both counsels at PCR. (App. 307-18; 349; 385-87). This is all supported by the record. Counsel testified he interviewed the Solicitor, Parker's mother, Brown, and Jacob's attorney about Parker and whether Parker would be a favorable witness to Brown or not. (App. 307-18; 321-22; 349; 385-87). All, including Brown, told counsel Parker would be an adverse witness. (App. 307-19; 321-22; 349; 385-87). Brown always told counsel this. (App. 309).

Counsel McCarley and 2nd chair Gibbons further explained that making the State present their case without 1 of their attempted murder victims present to testify was a good strategy, rather than calling the victim [Parker] to tell the jury that he was being shot at. (App. 385-87). Counsel credibly testified he did not think calling another witness to say the shooting "went down" exactly the way the State claimed was a good idea. (App. 361-62). Finally, counsel testified Parker was actively incarcerated in North Carolina and had a criminal record.

Counsel credibly testified that he interviewed Brown specifically about Parker and whether they should call Parker as a witness. (App. 318; 321; 359-362; see also 387 [co-counsel]). Counsel credibly testified he had trouble getting Brown to tell him the truth when he interviewed Brown about the case and why the shooting occurred, but on 1 occasion, Brown came clean and told the truth to counsel. (App. 318; 321-22; 359-62). Brown told counsel he had no animus against Benjamin, but Parker would not be a good witness for the defense because of 1 of the other men in the Blazer **and** Brown had prior drug run-ins, which would provide a motive for the attempted murders where there was not one without Parker testifying. (App. 318; 321-22; 359-62; 387). Based on this candid conversation with Brown and what he said, counsel believed Parker was the one who had previous drug run-ins with Petitioner. (App. 318; 321-22; 359-62; 387). Both trial counsels and Brown decided Parker would not be a good witness for Brown so they chose not to call him. (App. 318; 321-22; 359-62; 387). Based on his entire investigation described above, counsel McCarley testified even though he could have brought Parker to trial to testify, both he and Brown determined this was not in Brown's best interest. (App. 318; 322; 359-62; 387).

DeGrant Gibbons, 2nd chair counsel, testified similarly. (App. 387). Gibbons testified counsel McCarley had investigated whether to call Parker as a witness and learned Parker would be a hostile witness at worst and neutral at best. (App. 387). Counsel McCarley had interviewed Brown about Parker, and McCarley relayed to 2nd chair counsel that Brown and Parker had prior drug run-ins and that was going to be what the motive for the shooting was that the State would use, if that came ever came out during the trial. (App. 537). McCarley and Gibbons decided calling Parker was more of a risk than a benefit and decided not to call Parker as a witness. (App. 537).

Further, Parker had a criminal record, which counsel brought out through Parker's mother, Morrisey, for felon in possession of a weapon, and as Judge Keesley found, Parker was not a

credible witness. (App. 360-62).[8] Counsel also credibly testified he did not believe Parker would be a credible witness for either side. (App. 362). This is supported by the record including Parker's claim that the tinting of the windows on his mother's car, *the Blazer,* not the Mercury, kept he and the others from identifying who was in the Mercury. (App. 438-39). Further, if Parker had been called as a witness, he would have been impeached with more of his criminal record [for drug dealing] brought out *in his deposition* (App. 419-47), his attempted recantation of his police statement which Judge Keesley found was not credible; and the drug dealing animosity between Brown and Parker, the motive for the shooting; and, Brown would have lost the right to last closing argument. Wong v. Belmontes, 558 U.S. 15 (2009) (counsel can make a strategic decision not to call a witness from whom bad things about the client can be brought out on cross-examination). Judge Keesley properly found these strategic decisions articulated by counsel to be valid, and counsels' decision not to investigate Parker further or call him as a witness was not deficient. Strickland (objectively reasonable trial strategy decisions, including those based on what the client tells counsel, are not subject to claims of IAC).

Secondly, Judge Keesley correctly found there was no prejudice from not calling Parker as a witness because the State's strongest witness, Alice Thompson, observed the shooting from the front porch of her home and independently identified Brown as the shooter. Judge Keesley agreed with counsels' opinion Thompson's testimony was very credible because she was closely connected to Brown and had no motive to make up his identity. She testified at trial she had known Brown for years and had helped raise him. The jury heard the 911 call of Alice identifying "Little

[8] Judge Keesley also pointed out in his Order that in Edwards v. State, this Court held that "[a] witness's credibility and demeanor is crucial to an attorney's trial strategy, and an attorney cannot be said to be deficient if there is evidence to support his decision to not call a witness with serious credibility questions." Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011).

Dexter" Brown and Jacobs as the shooters immediately after the crimes. She later picked Brown out of a photo lineup and made an in-court identification of Brown as a shooter. Accordingly, because Alice Thompson was such a strong witness who identified Brown as the shooter independently of Parker or Benjamin's testimony, Judge Keesley found counsel's choice not to call Parker as a witness had no effect on the outcome of the trial. This is supported by the record. Parker did not testify at trial and identify anyone. As a result, 2 victims [Parker and "T"] were not called by the State where it had the burden of proof. Again, Parker, if called as a witness, would have provided an additional victim's testimony that the victims were being pursued by a light blue Mercury which started shooting at them as they pulled into Thompson's driveway and those individuals in the Mercury tried to kill them. (App. 359-62). Further, Parker would have testified that as the shooting occurred "T" yelled out "Dexter, Dexter" or as they were driving from *Harry's* being chased by the light blue Mercury, "T" was yelling it looks like "Dexter" and them. As a result, Petitioner has failed to show prejudice. Strickland. Certiorari should be denied.

CONCLUSION

For the above stated reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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