STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Charleston County
Honorable Luke N. Brown, Trial Judge
Honorable R. Markley Dennis, Post-Conviction Relief Judge

Lower Court Case No. 2005-CP-10-3313
Appellate Case No. 2012-213419

WESLEY MAX MYERS,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the lower court err by finding the Respondent was deprived of his constitutional right to be present during a critical stage of his criminal trial when the Respondent failed to show how his absence affected his ability to present a defense and no prejudice or unfairness resulted from his absence?

II. Did the lower court err by finding counsel was ineffective for failing to obtain a waiver of the Respondent's right to be present when the Respondent failed to carry his burden of proving that counsel's performance was deficient and that prejudice resulted from counsel's performance?

III. Did the lower court err by finding newly discovered evidence exists that warrants the vacation of the Respondent's convictions and the granting of a new trial when the Respondent failed to meet each prong of newly discovered evidence as outlined in Hayden v. State?

STATEMENT OF THE CASE

The Respondent is presently confined at Kirkland Correctional Institution pursuant to orders of commitment from the Charleston County Clerk of Court. The Charleston County Grand Jury indicted the Respondent at the June 1997 term of court for murder and arson- third degree (1997-GS-10-0419, -0420). Between August 7, 1997 and May 23, 2000, a number of different motion hearings were held before various Circuit Court judges. Timothy C. Kulp, Esquire, represented the Respondent. Senior Assistant Solicitor D. Bruce DuRant, Esquire, represented the State.

The Respondent proceeded to trial on February 26- March 6, 2001, before the Honorable Luke N. Brown. The jury found the Respondent guilty as charged. On March 7, 2001, the Respondent was sentenced to imprisonment for thirty (30) years for murder and ten (10) years for arson. The sentences are to be served concurrently.

A timely Notice of Appeal was filed on the Respondent's behalf. Robert M. Dudek, Esquire, Appellate Defender, perfected the appeal. Senior Assistant Attorney General Edgar Salter, III, Esquire, represented the State. The South Carolina Supreme Court filed a published opinion affirming the Respondent's convictions and sentences. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004)

The Remittitur was sent to the Charleston County Clerk of Court on June 9, 2004. On September 2, 2004, the Respondent through counsel filed a Petition for Writ of Certiorari to the United States Supreme Court. The United States Supreme Court denied certiorari on November 8, 2004. Myers v. South Carolina, 543 U.S. 980 (2004).

The Respondent filed an application for post-conviction relief on August 1, 2005. He was represented by John Blume, III, Esquire. The State was represented by Matthew Friedman,

Esquire. An evidentiary hearing into the matter was convened on January 12-13, 2012 at the Charleston County Courthouse before the Honorable R. Markley Dennis. By Order dated September 18, 2012, Judge Dennis granted the Respondent's application for post-conviction relief. The State filed a Motion to Alter and Amend pursuant to SCRCP 59(e) on September 28, 2012. The Respondent filed a Return dated October 1, 2012. Judge Dennis denied the State's motion by Order dated November 16, 2012. The Petitioner filed a timely Notice of Appeal. This Petition follows.

ARGUMENT

The March 13, 1997 at approximately 3 a.m. the fire department responded to an emergency call and found the Mill Inn Tavern on fire. (App. 1100). The fire was extinguished and the body of Teresa Haught, the Respondent's girlfriend and manager of the bar, was found inside. (App. 1101). It appeared the victim had been hit over the head with a blunt object. (App. 2263). At the scene, several hairs were found in the victim's hand and a blood stained dollar bill was found in her pocket. (App. 1268, 1276).

Shortly after the fire was extinguished, the Respondent arrived on the scene and gave a statement to police. (App. 1456). Over the course of the next few days, the Respondent was developed as a suspect and voluntarily gave DNA and hair samples to police. (App. 1464). A few weeks before the fire, the Respondent was heard saying he would burn down the Mill Inn. (App. 2184). The Respondent was also seen with the victim at the bar shortly before the fire. (App. 2217). The Saturday following the fire and murder, the police told the Respondent that his hair matched the hair found in the victim's hand. (App. 1629). After the Respondent was confronted with this information, he gave both an oral and written confessions to police which included details of the murder which were either known only to police or unknown to the police. (App. 1632, 1739, 1752, 1858, 2021). The Respondent also accompanied the police to the scene of the murder and explained what occurred. (App. 1636). Shortly after arrest, the Respondent also confessed and apologized to his mother, the victim's mother, and to the media. (App. 1205, 1757, 1866, 2037, 2133).

I. There is no probative evidence to support the lower court's ruling that newly discovered evidence exists to warrant the vacation of the Respondent's convictions when the Respondent failed to carry his burden of proving all five prongs of newly discovered evidence as outlined in Hayden v. State.

The Petitioner asserts the lower erred by finding the testimony of Dr. Keri Colabroy constituted newly discovered evidence when the Respondent failed to show all the elements of newly discovered evidence as outlined in Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983). At the Respondent's post-conviction relief hearing, Dr. Colabroy testified that the DNA profile from hairs found in the victim's hand and the DNA profile from a blood stain found on a dollar bill found in the victim's pocket did not match the DNA profile of the Respondent.

In Hayden, this Court held a party requesting a new trial on after-discovered evidence must show that (1) the evidence is such that would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered prior to trial; (4) is material to guilt or innocence; and (5) is not merely cumulative or impeaching. Id. The Respondent has the burden of proving all five elements outlined in Hayden in order to succeed on a claim of newly discovered evidence.

A.

The Petitioner submits the Respondent failed to carry his burden of proving that the alleged new evidence is not merely cumulative or impeaching. Cumulative evidence has been tersely defined as additional evidence of the same kind to the same point. McCabe v. Sloan, 184 S.C. 158, 191 S.E.2d 905 (1937). Newly discovered evidence, to be cumulative, must not only tend to prove facts which were in evidence at the trial, but must be of the same kind of evidence as that produced at the trial to prove those facts. Id.

At evidentiary hearing, Dr. Colabroy testified she was asked to review the DNA evidence presented at the trial. (App. 3365:16-20). She testified she was unable to retest the hair that was found in the victim's hand because it was consumed by the original testing done prior to trial. (App. 3366:17-22). Dr. Colabroy testified she reviewed the underlying data that was generated after the initial testing and it was her opinion that the hair found in the victim's hand was not the Respondent's hair. (App. 3373:1-10).

At trial, the defense presented the results of DNA testing done on the hair found in the victim's hand through Dr. Terri Melton.[1] Dr. Melton testified some contamination occurred during the testing of the hair. (App. 2618:19-24). She further testified that after the DNA profile from the contaminant was removed, the DNA profile that remained did not appear to be the Respondent's. (App. 2620:6-17). She testified further that her report was considered inconclusive because she did not have the two places required in the profile of the mixture to have a clear exclusion of the Respondent. (App. 2621:12-21). Dr. Melton then testified it was her opinion based on her experience that the hair found in the victim's hand did not appear to have the same profile as that of the Respondent. (App. 2623:3-7).

The Petitioner submits the testimony presented by Dr. Colabroy at the evidentiary hearing is identical to the testimony presented by Dr. Melton at trial. Both Dr. Colabroy and Dr. Melton concluded the hair found in the victim's hand did not match the DNA profile of the Respondent. Dr. Colabroy's testimony was not only cumulative to Dr. Melton's testimony at trial, it was also based on the same DNA testing. Dr. Colabroy stated at the evidentiary hearing that she did not re-test the hair found in the victim's hand and was merely giving her opinion

[1] Dr. Melton's testimony was presented at trial by the defense to rebut testimony from Joe Powell, SLED trace evidence lab supervisor. Powell testified at trial that the characteristics of the unknown hair found in the victim's hand are consistent with the characteristics of the Respondent's hair. He testified that microscopically the hairs matched, but he could not say to the exclusion of all others that the hair came from the Respondent. (App.1418)

after reviewing the underlying data generated from the original DNA testing done prior to trial. (App. 3373). The Petitioner submits Dr. Colabroy's testimony was not newly discovered evidence, but rather a second opinion interpreting evidence already presented at trial. The Respondent failed to carry his burden of proving Dr. Colabroy's testimony about the hair found in the victim's hand was not cumulative to that presented by Dr. Melton at trial.

At the evidentiary hearing, Dr. Colabroy testified the dollar bill found in the victim's pocket was re-tested by Orchid Cellmark. (App. 3366:13-16, 3367:1-2). Dr. Colabroy testified that the testing determined the red substance on the dollar bill was blood. (App. 3368:2-11). She also testified a DNA profile was obtained from the blood spot and a Y-STR analysis was done on the profile to determine the profile of the male contributor. (App. 3368:12-23). Dr. Colabroy then concluded that the male contributor to the DNA profile obtained from the blood spot on the dollar bill was not the Respondent. (App. 3370:16-19).

At trial, Dr. Michael DeGuglielmo testified that a mixture of DNA was found on the dollar bill found in the victim's pocket. (App. 1975:17-24). He testified that the DNA profile of the victim is contained in the mixture of DNA found on the dollar bill. (App. 1975:18-24). He testified the remaining profile was from someone who is male. (App. 1976:1-12). Dr. DeGuglielmo then concluded the male contributor in the mixture was not the Respondent. (App. 1976:13-17).

The Petitioner submits the testimony presented by Dr. Colabroy at the post-conviction relief hearing and the testimony presented by Dr. DeGuglielmo at trial are identical, both experts concluded that the male DNA contributor of the mixture found on the dollar bill was not the Respondent. Both the DNA testing done prior to after trial resulted in the development of a DNA profile based on the red substance found on the dollar bill. The Petitioner submits Dr. Colabroy's

testimony that the DNA profile of the red substance on the dollar bill did not match the DNA profile of the Respondent clearly mirrors the testimony presented at trial through Dr. DeGuglielmo. The Respondent failed to carry his burden of proving Dr. Colabroy's testimony was not cumulative to that presented at trial.

B.

The Petitioner also asserts the Respondent failed to carry his burden of proving that Dr. Colabroy's testimony with regard to the hair found in the victim's hand and the dollar bill would probably change the result if a new trial was had. In light of the overwhelming evidence presented against the Respondent at trial, the Petitioner submits it is unlikely the result would change at a new trial. Concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991); *see also* Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), *cert. denied,* 535 U.S. 1114 (2002); Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994); Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008).

At trial, the State presented extensive evidence of the Respondent's guilt. First, the State presented evidence that the victim's badly beaten body was found after a fire that was the result of arson and to which firefighters responded sometime after 3:15 a.m. (App. 1099-1101, 1107-115, 1902-1906, 2009-2022). Also, Laurie Villalobos testified that she took a taxi to the Mill Inn sometime between 1:30 a.m. and 2:30 a.m. on March 13, 1997, to collect some money the victim owed her. She testified the Respondent was present and let her into the bar. The victim was "clearly distraught" and Villalobos could tell that the victim had been crying. Villalobos got her money and left the bar. (App. 2215-2219). Villalobos left the victim and the Respondent at the Mills Inns well after co-workers left the victim locked inside of the bar, asleep on a pool table.

(App. 1139-1147, 1177-1184). Thus, the Respondent was the last person seen with the victim while she was alive.

Joseph D. Perry, the Vice President of Midland Mechanical Millwright, employed the Respondent in March 1997. The Respondent called Perry's cellular phone at roughly 6:20 a.m. on March 14, 1997. The Respondent, who sounded upset, told Perry that there had been a fire at the Mill Inn and that he thought the victim might have been inside but he was not sure. The Respondent then asked Perry to "go by there and find out." Perry testified he thought this was an odd request because the Respondent did not go check himself, since he was supposedly worried about his girlfriend. Perry went to the scene about ten minutes later and gave a statement to police. (App. 1224-1229). This evidence implicated the Respondent in the murder because the call to Perry occurred approximately fifteen minutes or longer before the Respondent went to the scene and supposedly learned for the first time that the victim had died in the fire. (App. 1455-1458, 1602-1604).

The State also presented testimony of Respondent's various oral and written admissions of guilt. The Respondent orally admitted his guilt to police on Saturday, March 15, 1997. (App. 1632-1634, 1739-1743, 1858-1861, 2027-2029). The Respondent also gave a written statement to the police admitting his guilt. (App. 1749-1750). The statements contained information known only to the police and information unknown to the police, such as the cause of the fire (App. 2031) and the fact that Alan White had left a pink note for the victim on the bar. (App. 1744, 1861-1862).

The jury also heard evidence that the Respondent apologized and admitted his guilt to both the victim's mother and his own mother (App. 1205, 1757-1758, 1866, 2037, 2119). Shortly after arrest, the Respondent also admitted his guilt to the media. (App.1641-1642, 1866-1867,

2133-2134). The jury also heard from Billy King who testified two to three weeks prior to the fire and murder, the Respondent said to him "if he ever snapped, that he was going to take out four people and burn, and burn the Mill Inn down." (App. 2184). The State also presented to the jury testimony about the Respondent's jealousy and tumultuous relationship with the victim. (App. 1623, 1734, 2114, 2181, 2191). The Petitioner submits that in light of the overwhelming evidence presented against the Respondent including his multiple admissions of guilt, it is unlikely that Dr. Colabroy's testimony would have persuaded the jury to reach a different conclusion as to the Respondent's guilt. See State v. Tucker, 324 S.C. 155, 478 S.E.2d 260 (1996) (holding since there was overwhelming evidence of the defendant's guilt no prejudice could possibly have resulted).

C.

The Petitioner asserts the Respondent failed to carry his burden of proving that Dr. Colabroy's testimony was material to guilt or innocence. While police placed some significance on the hair found in the victim's hand during their investigation and interview of the Respondent, the State did not argue the DNA found on the hair and on the dollar bill would point to the killer. In fact, the State argued in both opening and closing statements that the identity of the hair and blood stain did not prove or disprove the Respondent's guilt. (App. 1064:3-17, 2738:11-2740:12). The State also argued the dollar bill could have been bloodied at any time. (App. 2743:25-2744:12).

The Petitioner submits because the victim was found face down on the floor of a bar there are many reasonable conclusions that could be reached as to how the hair got into the victim's hand and why the stained dollar was found in the victim pocket. However, Dr. Colabroy's testimony was not material to the Respondent's guilt or innocence. The insignificance of the hair

and the stained dollar bill to the Respondent's guilt is further supported by the fact that testimony was presented at trial that DNA profiles found on the hair and stain on the dollar bill did not match the Respondent and the jury still returned a verdict of guilty. The Respondent failed to carry his burden of proving Dr. Colabroy's testimony was material to his guilt or innocence at trial.

D.

The Petitioner asserts the Respondent failed to carry his burden of proving Dr. Colabroy's testimony could not have been discovered prior to trial. Dr. Colabroy's testimony with regard to the hair found in the victim's hand could have been discovered prior to trial and was discovered prior to trial. Dr. Colabroy did not re-test the hair and simply interpreted the data produced prior to trial by Dr. Melton. Dr. Colabroy's interpretation of the test data was identical to that presented by Dr. Melton at trial and could have been provided prior to trial.

Dr. Colabroy's testimony with regard to the red substance on the dollar bill could also have been discovered prior to trial. Dr. Colabroy tested the dollar bill to determine the identity of the red substance and Y-STR analysis was done on the substance to develop a DNA profile. (App. 3368:2-23). While the Respondent presented some evidence that the serology and Y-STR testing completed by Dr. Colabroy was not in use at the time of the Respondent's trial, the record reflects Dr. DeGuglielmo testified at trial about serological testing not being done on the dollar bill. (App. 1983:18-1985:23). This testimony indicates the type of testing was likely available to the Respondent before trial. The Respondent failed to carry his burden of proving Dr. Colabroy's testimony could not have been discovered prior to trial when her testimony about the hair was based on data produced prior to trial and little evidence was presented to show the type of testing

done on the dollar bill was not available prior to trial. The Petitioner submits Dr. Colabroy's testimony could have been discovered prior to trial.

E.

Lastly, the Respondent represented at the evidentiary hearing that Dr. Colabroy's testimony has been discovered since trial. The Petitioner submits even if this true, the Respondent has failed to carry his burden of proving the remaining prongs of newly discovered evidence as outlined in Hayden v. State. In order for a new trial to be warranted, the Respondent must present evidence to support all five prongs. The Respondent failed to carry his burden of proving all five prongs required to show newly discovered evidence. The Petitioner submits there is no probative evidence to support the lower court's finding that newly discovered evidence exists to warrant the granting of post-conviction relief. Therefore, the Petitioner asks this Court to grant this Petition for Writ of Certiorari and reverse the lower court's granting of the Respondent's application for post-conviction relief.

II. There is no probative evidence to support the lower court's ruling that counsel was ineffective for failing to obtain a waiver of the Respondent right to be present when the Respondent failed to carry his burden of proving counsel's performance was deficient and prejudice resulted.

The lower court also erred by finding trial counsel was ineffective for failing to advise the Respondent of his right to be present and for failing to ask the court to advise the Respondent of his right to be present. The lower court held counsel's performance was unreasonable and prejudicial. The Petitioner submits the Respondent failed to carry his burden of proving counsel's performance was deficient and resulted in prejudice to the Respondent.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 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.

Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 742, 748 (1970). While the criminal rule governing a defendant's presence at trial permits knowing and intelligent waiver of the right to be present, such waiver is permitted only in limited circumstances. City of Aiken v. David Michael Koontz, 368 S.C. 542, 547, 629 S.E.2d 686, 689 (Ct. App. 2006) (citing Rule 16, SCRCrimP.). The waiver of a defendant's right to be present usually is applied in the context of the State's desire to proceed with trial in the defendant's absence. State v. Patterson, 367 S.C.

219, 625 S.E.2d 239 (2006) ("In some circumstances, a defendant may be presumed to waive or forfeit his right to be present by misbehaving in the courtroom or by voluntarily remaining away from trial.").

Counsel's performance was not unreasonable when it is unlikely the reasonable criminal defense attorney would have advised his client of his right to be present when his client was present during the entire trial proceeding. It is even more unlikely that the reasonable criminal defense attorney would have advised his client on waiving the right to be present during off the record discussions. Looking at counsel's performance in light of professional norms, the Petitioner submits the Respondent failed to carry his burden of proving counsel was deficient.

Even if counsel's performance was deficient for failing to advise the Respondent of his right to be present, the Respondent failed to carry his burden of proving prejudice resulted. To prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Id. at 668, 693 (1984). Virtually every act or omission of counsel would meet that test and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Id.

For the same reasons stated previously, the Respondent was not prejudiced by his absence during discussions with jurors or by counsel's failure to advise him of his right to be present. The Respondent has presented no evidence of any unique knowledge he possessed which could have contributed to the juror discussions and changed the outcome of his trial. The

Petitioner there is no probative evidence to support the lower court's finding that counsel was ineffective for failing to advise the Respondent of his right to be present and failing to obtain a waiver from the Respondent.

III. There is no probative evidence to support the lower court's ruling that the Respondent was deprived of his constitutional right to be present during off the record discussions with jurors when the Respondent failed to carry his burden of proving that his absence precluding his ability to present a defense and unfairness or prejudice resulted from his absence.

The Petitioner submits the lower court erred by finding the Respondent was deprived of his constitutional rights to be present during trial. The court ruled that the Respondent's absence during off the record discussions between the judge, jurors, and the parties' attorneys was a violation of his constitutional right to be present at trial.

Juror Patricia White testified at the evidentiary hearing she got the judge's attention during trial and was called into chamber to tell the judge she thought she knew the Respondent. (App. 3386:19-3387:-17). She testified both the judge and the parties' attorneys were present and concluded she could continue to be an unbiased juror. (App. 3388:1-8).

Juror Sarah Doctor testified she spoke with the judge during trial about forgetting her heart medication. (App. 3214:2-22). She testified she spoke with the judge in the courtroom with others present. (App. 3214:23-3215:12).

Juror Jawana Stephens testified she asked to speak to the judge during trial because she did not feel comfortable serving as a juror at the trial. (App. 3217:18-23). She testified she spoke with the judge in chambers and was excused. (App. 3218:1-11). She testified further she was not alone with the judge in chambers, but could not recall if the attorneys were present. (App. 3219:10-21).

Lastly, Juror Elizabeth Meeks (formerly Babcock) testified she, as the jury foreperson, contacted the judge when the jury believed it was unable to reach a verdict. (App. 3320:18-24). She testified she spoke with the judge and the parties' attorneys in chambers. (App. 3321:18-24). She testified she was told to tell the jury to continue deliberating. (App. 3323:1). All of the jurors testified the Respondent was not present during their discussions with the judge and the parties' attorneys. (App. 3387:10-11, 21-22; 3215:3-7; 3218:12-16: 3321:25-3322:1).

While the court's discussions with these jurors occurred at varying times throughout trial, the Petitioner submits the Respondent has failed to show that his presence was necessary at these discussions and that his due process rights were violated due to his absence. A criminal defendant's constitutional right to be present is rooted to a large extent to the confrontation clause of the Sixth Amendment. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). The United States Supreme Court has recognized that this right is also protected by the due process clause in some situations where the defendant is not actually confronting witnesses or evidence against him. Id. (citing Snyder v. Massachusetts, 291 U.S. 97 (1934), *overruled in part on other grounds* by Malloy v. Hogan, 378 U.S. 1 (1964)). In Snyder, the Court explained that a defendant has a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." Caldwell at 449, 388 S.E.2d at 819. The test adopted by the Court to determine whether a defendant's presence is necessary to ensure a fair and just hearing is whether his presence "bears or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend." Id. The Court further clarified that the due process right to be present is not guaranteed where the defendant's presence does not add anything to the proceeding. Id. The exclusion of a

defendant from a trial proceeding should be considered in light of the whole record. Synder, 291 U.S. at 106.

The Petitioner submits the Respondent has failed to carry his burden of proving his presence during discussions with the jurors was substantially related to his opportunity to defend against the charges he was facing and was necessary. The Petitioner submits it is unlikely the Respondent's absence affected his ability to defend himself at trial. With regard to the conference held with Juror Doctor, it is especially unlikely the Respondent's absence affected ability to defend himself at trial when the matter discussed- the juror's missing heart medication- had nothing to do with the substance of the Respondent's trial.

With regard to the remaining juror discussions, the Respondent also failed to show how his presence would have contributed anything to the proceeding. The record is void of any testimony from the Respondent which tends to show that he had any knowledge of relevant facts that were not reflected in the record or unknown to his attorney. The Respondent has provided no evidence of what his presence would have contributed to the Court's determinations: that Juror White could continue to serve, Juror Stephens should be excused, and the jury should continue deliberating. The Respondent's presence at these hearings would not have contributed to the fairness of his trial.

Even if this Court is inclined to consider the juror discussions in which the Respondent was absent critical stages in which he had a right to be present, the Respondent has failed to show how his absence resulted in any prejudice. Prejudice is to be determined in light of the whole record. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

The lower court relied heavily on State v. James, to support its view that the Respondent's absence warrants reversal of his convictions. 116 S.C. 243, 107 S.E. 907 (1921).

While James stands for the proposition that counsel has the right to be present at every part of the trial proper, the lower court failed to consider whether any alleged violation of the Respondent's right to be present resulted in prejudice. The Respondent failed to show that his absence during any of the juror discussions resulted in prejudice.

This Court should look to its decision in State v. Smart for guidance. 278 S.C. 515, 299 S.E.2d 686 (1982). In Smart, this Court held James did not establish a presumption of prejudice from the absence of the accused and subsequent holdings also do not give rise to a presumption of prejudice. Id. This Court opined that it is proper to require some evidence of prejudice rather than grant reversal based on a presumption that is far from universally held. Id.

The Petitioner submits no prejudice resulted from counsel's absence during the juror discussions. It is unlikely that prejudice resulted from the Respondent's absence when Bruce DuRant, the solicitor prosecuting the case, provided credible testimony he did not recall any irregularities with jurors being excused in the case. (App. 3300:5-7). He testified judges did not bring defendants into chambers and it was routine during that time for the judge to bring the lawyers back in chambers to discuss something rather than to do it on the record. (App. 3300:8-17). Tim Kulp, trial counsel for the Respondent, also provided testimony that he accompanied DuRant to any meeting in the judge's chambers and always advised the Respondent of the substance of the in-chambers meetings. (App. 3350:15-19).

The Respondent has also failed to show his absence from any of the juror discussions affected the outcome of his trial. The likelihood that prejudice resulted from counsel's performance was also lessened by counsel's presence at the juror discussions. Overwhelming evidence of the Respondent's guilt was presented at trial and it is unlikely the Respondent's presence during these discussions would have given the jury a reason to reconsider his guilt.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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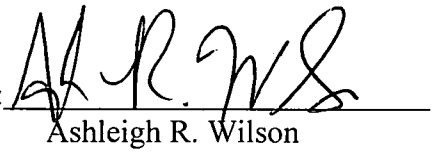
BY: 
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ATTORNEYS FOR RESPONDENT

August 16, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
In The Court of Common Pleas

The Honorable Luke N. Brown, Circuit Court Judge

Case No. 2005-CP-10-3313

MARK VAIL, Respondent,

v.

STATE OF SOUTH CAROLINA, Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari has been served upon opposing counsel, John H. Blume, by mailing two (2) copies in an envelope properly addressed with postage prepaid this 16th day of August, 2013.

Anne R. Henley
Legal Assistant for Petitioner

SWORN to before me this
16th day of August, 2013.

Notary Public for South Carolina (L.S.)
My Commission Expires: 8/22/2022