ALAN WILSON
ATTORNEY GENERAL

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S.C. Supreme Court

September 4, 2013

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RE: Juan Tyree Smith a/k/a Jwan Tyree Smith v. State
Appellate Case No. 2013-000018

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Petition for Writ of Certiorari** in the above-captioned case. The Appendix was served and filed with the Court on August 7, 2013.

If there are any questions or comments, please do not hesitate to contact me at any time.

Sincerely,

Karen C. Ratigan
Assistant Deputy Attorney General
S.C. Bar # 68331

Enc

cc: David Alexander, Esquire
Rame L. Campbell, Esquire
Trisha Allen

RECEIVED
SEP - 4 2013
S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Trial Judge
The Honorable Clifton Newman, Post-Conviction Relief Judge

Appellate Case No. 2013-000018

Juan Tyree Smith a/k/a Jwan Tyree Smith, ...Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the PCR judge err in finding trial counsel should have presented the argument of defense of others at trial because such an argument is not supported by the evidence in this case?

2. Did the PCR judge err in finding trial counsel was ineffective for failing to object to hearsay or bad character evidence because most of the statements were not, in fact, hearsay or bad character evidence, and no prejudice resulted from these statements?

3. Did the PCR judge err in finding trial counsel failed to adequately meet with Respondent and investigate the case because, as Respondent told counsel he was innocent of the crime, there was little counsel could have done to further investigate the case?

STATEMENT OF THE CASE

Respondent was indicted at the May 2006 term of the Anderson County Grand Jury for murder (2006-GS-04-1746, count 1) and possession of a weapon during commission of a violent crime (2006-GS-04-1746, count 2). (App.pp.652-53). He was represented by Robert A. Gamble, Esquire.

After the State called the case to trial, Respondent was found guilty. On May 9, 2007, Respondent was sentenced by the Honorable Alexander S. Macaulay to concurrent terms of thirty years for murder and five years for possession of a weapon during commission of a violent crime. (App.p.400; pp.654-55).

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Dudek, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders[1] brief. (App.pp.403-15). The Court of Appeals dismissed the appeal. State v. Smith, Op. No. 2010-UP-009 (S.C. Ct. App. filed Jan. 21, 2010). (App.p.416).

Respondent filed an application for post-conviction relief (PCR) on May 21, 2010 and an amended application dated September 26, 2013. (App.pp.417-22; pp.427-33). An evidentiary hearing was held on October 3, 2012 at the Anderson County Courthouse. (App.pp.434-628). Respondent was present and represented by Druanne White, Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the State. The Honorable Clifton Newman granted relief in an order filed December 10, 2012. (App.pp.630-51).

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[1] Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. The PCR judge erred in finding trial counsel should have presented the argument of defense of others at trial because such an argument is not supported by the evidence in this case.

The PCR judge found trial counsel erred in not presenting the argument of defense of others at Respondent's trial. (App.pp.643-50). This finding was erroneous because neither the discovery material nor the subsequent PCR testimony support an argument of defense of others.

A.

At trial, the State presented substantial evidence that Respondent shot and killed the victim without provocation and in cold blood. Angela Brownlee – also known as Sally – testified she and the victim had been dating for eleven months at the time of the victim's murder. (App.p.54). Brownlee testified she and the victim went to the Old School Lounge and that, shortly after they arrived, the victim decided he wanted to go back home, so they left. (App.pp.55-56). After Brownlee took the victim home, she drove back to the Old School Lounge by herself. (App.p.57). Brownlee arrived back at the club around 10:00 – 10:30 p.m., ordered a beer, and sat down next to an acquaintance

named Michael Vance, who went by the nickname "Shoes." (App.pp.57-58). After a period of time, the victim returned to the club, and appeared upset because Brownlee was sitting with Vance. The victim grabbed Brownlee's necklace and it fell off. Brownlee testified, "[h]e ain't hit me or nothing. He just grabbed me by the necklace, and when it fell off, he just picked them up for me and went out. He went to his car and I went to mine, but I couldn't get mine to crank." (App.pp.57-58). Brownlee testified she looked under the hood of her car, and while she was bent over, she heard gunshots. When she looked up, the victim was lying on the ground. (App.pp.58-59). Brownlee testified she did not see the shooter and that the victim did not have an argument or exchange words that night with anyone but her. (App.pp.59-61).

Vance testified the victim and Brownlee had "a little altercation" when he came back to the Old School Lounge. (App.pp.66-67). Vance testified he went outside shortly after Brownlee and the victim and saw the two were "carrying on, fussing." (App.p.68). Vance testified the victim and the shooter did not have words before the shooting. (App.p.71).

Fred Chiles testified he was standing outside the Old School Lounge and saw Brownlee and the victim exit the building. (App.pp.82-85). He said the victim was making statements to Brownlee, saying "I told you I'd catch you," but, "[h]e wasn't physically fighting her or nothing." (App.p.85). Chiles testified the victim pulled his car alongside Brownlee's vehicle. (App.pp.86-87). When asked how the victim was acting towards Brownlee at that point, Chiles testified the victim was "[j]ust trying to get her car started" and that they were not fighting. (App.p.87; p.93). Chiles testified he saw

Respondent shoot the victim but that the two men had not exchanged words (other than Respondent saying "pssst, pssst, pssst" right before he shot the victim). (App.pp.87-90; p.93). Chiles testified he told police that night that Respondent was the shooter and later identified him from a photographic lineup. (App.p.92; pp.101-02).

Bassen Hailey said he saw a male and a female outside the Old School Lounge that night. He testified, "I don't know if you can call it an argument. I seen a little commotion." (App.p.115). Bassen Hailey said "[i]t looked like they was having a few words. I can't say they were arguing because I couldn't hear what was said from where I was at." (App.p.115). Bassen Hailey testified he did not get a good look at the shooter but that Respondent asked him for a gun that night. (App.p.116; pp.120-22). Bassen Hailey testified the victim and the shooter did not exchange words before the shooting. (App.p.121).

LaTorrey Pearson was also standing outside the Old School Lounge and testified a male and female "were arguing." (App.pp.164-65). When trial counsel asked him if he saw blows exchanged, Pearson answered "[n]o" and that "they was fussing." (App.p.181). Pearson admitted he lied in his statement to the police, which said he saw "the black man hit the black woman a couple of times." (App.p.181). Pearson testified, "I didn't see that. . . . I didn't see him swinging at her." (App.pp.181-82). Upon further questioning, he testified "[h]e might have swung at her a couple times." (App.p.182). Pearson testified he gave Respondent a gun that night but initially denied identifying Respondent as the shooter. (App.pp.165-67). Pearson was impeached with his three prior statements – the third of which contained an identification of Respondent as the

shooter. (App.pp.169-78). Pearson testified Respondent and the victim did not exchange words before the shooting. (App.p.171).

James Pickens was also outside the Old School Lounge that night. He testified the victim "and his girlfriend had a little, little fight or something," and "[h]e hit her." (App.pp.200-01). He testified that after the female's car would not start, "I seen somebody came from out of the back and shot three times." (App.p.203). When asked if Respondent "jump[ed] in to help Ms. Brownlee or anything," Pickens said no. (App.pp.219-20).

Alphonso Hailey was standing outside the Old School Lounge and testified, "I seen this man and woman, they had got into an argument." (App.p.237). Alphonso Hailey testified no one tried to stop the argument between the man and woman. (App.p.250). Alphonso Hailey testified Respondent got a gun from Pearson that night. (App.pp.236-37). Alphonso Hailey was able to identify Respondent as the shooter when the hood of his coat fell to the back. (App.p.242; p.263). Alphonso Hailey testified Respondent told him the next day that he shot the victim. (App.p.249).

B.

At the PCR hearing, trial counsel testified to the following on cross-examination by the State:

> Q: Did [Respondent] ever tell you his version of what had happened at the club that night?
> A: He denied shooting [the victim].
> Q: So he never told you that he shot the victim in order to protect Sally?
> A: No.

(App.p.503). Trial counsel further testified to the following:

Q: And part of your practice would have been to review the discrepancies in these identifications with your client?
A: Yes. That was the general practice. But again, he denied any involvement, so I was left with nothing else.
Q: So your strategy at trial was just to prove he was innocent?
A: Yes.

(App.p.504). Trial counsel testified "when your client denies that this actually happened, that's what you've got to run with. And you've got nothing else to play with." (App.p.508). Trial counsel stated there was no dispute the victim and his girlfriend were arguing before the shooting but that he did not see a viable defense of others argument in this case especially "since [Respondent] denied shooting, then you have no defense." (App.p.507). Trial counsel testified there was no way – based upon the witness statements – he could have proven Brownlee was in imminent danger of death or great bodily harm, had no way to avoid the confrontation, and could not have retreated. (App.pp.507-08).

Respondent stated that, on the night in question, he witnessed the victim acting "real hostile" towards his girlfriend. (App.pp.582-83). Respondent stated the victim eventually blocked Brownlee's car with his own. (App.p.583). Respondent admitted Brownlee did not ask anyone for help. (App.p.595). However, Respondent stated the following during his direct examination:

Q: Okay. Were you at all concerned for Sally?
A: Yes, ma'am.
Q: And what do you think would happen to Sally?
A: He could have put her in the car, took her to his house and continued his assault.
Q: Okay. And so what did you decide to do?
A: I decided to try and break it up.
Q: And so what did you do? What did you get?

A: I went and got a firearm.

(App.p.584). Respondent stated he then went to the victim and told him to "leave the female alone" but that the victim took a step towards him, so he fired three times. (App.pp.586-88).[2] Respondent stated he told trial counsel he did not murder the victim but never said that he shot the victim to protect Brownlee. (App.p.593). Respondent stated he and trial counsel never discussed an argument of defense of others. (App.pp.576-77).

Many of the eyewitnesses who testified at Respondent's trial also testified at the PCR hearing. James Pickens confirmed he gave three statements to police then testified at trial that he did not know anything about the shooting. (App.p.524). Pickens stated the victim was "violent" towards a woman and "calling her names" but later explained on cross-examination that when he said the victim was violent, he meant the victim was pulling on the woman's clothes. (App.p.521; p.525).

LaTorrey Pearson confirmed he gave three different statements to police. (App.p.534). Pearson stated the victim was "jumping" on a woman. (App.p.531). Pearson stated on cross-examination that he "would say they were fussing or whatever" but did not recall anything specific. (App.p.535). Pearson stated he did not recall Respondent having words with either the victim or the woman. (App.pp.535-36).

Michael "Shoes" Vance stated the victim was "acting violent" with Brownlee outside. (App.p.539). Vance clarified on cross-examination that "acting violent" meant

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[2] On cross-examination, Respondent changed his story. Respondent stated he told the victim to stop bothering Brownlee and that the victim lunged at him <u>after</u> he fired the first shot. (App.pp.597-98).

the victim was "pushing and shoving" the victim while they were yelling at each other. (App.p.539).

Alphonso Hailey stated the victim was "battling with [Brownlee}" and that "[i]t was really on an equal balance with the both of them." (App.p.546). Alphonso Hailey stated on cross-examination that, when he said the two were fighting, he meant the victim "was calling [Brownlee] all kinds of names" and slapped her. (App.p.549). Alphonso Hailey admitted it appeared the victim was "mostly" just yelling at Brownlee. (App.p.549). Alphonso Hailey stated he did not recall seeing the victim or Brownlee having words with Respondent before the shooting. (App.p.549). Alphonso Hailey stated he heard Respondent ask Pearson for a gun because he "got into it" with someone. (App.p.548).

Bassen Hailey stated the victim was acting "very violent" with the woman. (App.p.554). Bassen Hailey clarified on cross-examination that this meant he saw the victim "shove" the woman while they were yelling at each other. (App.pp.556-57). Bassen Hailey stated he did not see Respondent have words with either the victim or the woman. (App.pp.557-58).

Cammy Dennis stated the victim and the woman were arguing outside, that the victim called her names, and that the victim "smacked the woman in the face and jerked her chain off her neck." (App.pp.560-62). Dennis stated on cross-examination that the victim struck the woman one time. (App.p.564). Dennis stated she did not see anyone having words with either the victim or the woman. (App.pp.564-65).

Sheila Lomax stated she did not give a statement to police. (App.p.565). Lomax

stated she saw the victim was "acting aggressive" with her cousin – Brownlee – outside. (App.p.570). Lomax clarified on cross-examination that this meant the victim was yelling, swearing, and grabbing at Brownlee. (App.p.573). Lomax admitted the victim did not strike Brownlee. (App.p.573). Lomax stated she did not see anyone have words with the victim or Brownlee while they were outside. (App.p.574). Lomax stated there were a lot of people in the parking lot that night and Brownlee was a "couple feet" from the door of the bar while she was arguing with the victim. (App.p.574).

C.

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

D.

The PCR judge erred in finding Respondent met his burden of proving trial counsel erred in not arguing defense of others at trial. Based upon both the evidence in

the case and his conversations with Respondent, there was no reason for trial counsel to argue defense of others in this case. Trial counsel and Respondent both testified that Respondent said he did not shoot or murder the victim. (App.p.503; p.593). Neither trial counsel nor Respondent testified that Respondent ever said he killed the victim in order to protect Brownlee. (App.p.503; p.593). Trial counsel testified Respondent never gave him the names of witnesses to contact. (App.pp.504-05). Based upon his conversations with Respondent, trial counsel was left to argue the defense of actual innocence at trial. The eyewitnesses' trial testimony – based in large part on the statements that had been given to police – also did not support a theory of defense of others. None of the eyewitnesses testified the shooter exchanged words or had a conversation with the victim before the shooting. None of the eyewitnesses testified Brownlee asked for help or looked to be in fear for her life. Trial counsel testified that, based upon the evidence, there was no viable argument for defense of others. As such, trial counsel's only decision from a trial strategy standpoint at that time was to argue that Respondent was innocent of the crimes. Trial counsel's strategy is corroborated by the statement at the beginning of trial that trial counsel had recently been made aware of an alibi witness. (App.pp.35-36). Trial counsel would not have made such a comment on the record if Respondent had admitted shooting the victim or the evidence revealed a valid argument for defense of others in this case.

Where trial counsel articulates a valid reason for employing a certain strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995); Stokes v. State, 308 S.C. 546, 548, 419

S.E.2d 778, 779 (1992). "Counsel's strategy will be reviewed under 'an objective standard of reasonableness.'" Huggler v. State, 360 S.C. 627, 633, 602 S.E.2d 753, 756 (2004) (citing Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). "Courts must be wary of second-guessing counsel's trial tactics." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). It is clear that, based upon both the evidence in this case and assertions by his client, trial counsel made a strategic decision to argue Respondent's innocence at trial. Respondent even admitted at the PCR hearing that he told trial counsel that he did not murder the victim. Based upon all of the information known to trial counsel at the time, it was reasonable for him to have pursued a trial strategy of actual innocence. Even assuming arguendo that Respondent never denied the shooting, a defense of others was never a viable defense argument or trial strategy in this case and will be discussed more fully infra.

E.

The PCR judge erred in finding Respondent met his burden of proving he was prejudiced because trial counsel did not present an argument of defense of others. Several witnesses from the trial also testified at the PCR hearing. Neither their testimony – nor Respondent's – supported a legal argument of defense of others.

Under the theory of defense of others, one is not guilty of taking the life of an assailant who assaults a friend, relative, or bystander if that friend, relative, or bystander would likewise have the right to take the life of the assailant in self-defense. State v. Starnes, 340 S.C. 312, 322-23, 531 S.E.2d 907, 913 (2000). One is justified to use deadly force in self-defense when:

(1) The defendant was without fault in bringing on the difficulty;
(2) The defendant . . . actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger;
(3) If the defense is based upon the defendant's actual belief of imminent danger, a reasonable prudent man of ordinary firmness and courage would have entertained the same belief . . . ; and
(4) The defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance.

State v. Dickey, 394 S.C. 491, 499, 716 S.E.2d 97, 101 (2011) (citation omitted) (emphasis added).

Respondent essentially argued he was entitled to step into Brownlee's shoes and use the force she could have used to potentially defend herself from the victim. Brownlee, however, would not have been able prevail on a self-defense argument. Brownlee would not have believed she was in imminent danger of death or great bodily injury. See id. The witnesses at the PCR hearing testified they observed the victim yelling and cursing at Brownlee and slapping, grabbing, shoving, or pulling on her clothes. These actions do not rise to the level of a threat of imminent death or great bodily injury. A reasonably prudent person in the same position would not have believed they were in imminent danger of death or great bodily injury. See id. A reasonable person would not perceive an altercation involving yelling, cursing, shoving, and slapping with one's boyfriend in a crowded parking lot would have potentially fatal consequences. Brownlee also had a duty to retreat from the victim before she would have been justified in using force. See id. Sheila Lomax stated Brownlee was only "a couple feet" from the door of the Old School Lounge during her argument with the victim. Clearly, Brownlee

was in a position to remove herself from the situation rather than use deadly force against the victim. Under these facts, the trial judge could not have charged defense of others to the jury. See Douglas v. State, 332 S.C. 67, 73, 504 S.E.2d 307, 310 (1998) ("[I]n order for the trial court to give a defense of others charge, there must be some evidence adduced at trial that the defendant was indeed lawfully defending others."). As such, Respondent failed to prove defense of others was a valid argument that trial counsel should have explored (notwithstanding his assertion to counsel that he did not shoot the victim) and would have been successful at trial.

F.

Accordingly, the PCR judge erred in granting relief on this issue because Respondent failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Respondent also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. There is no probative evidence in the record to support the PCR judge's decision to grant relief on this issue. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626. As Respondent failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

II. The PCR judge erred in finding trial counsel ineffective for failing to object to hearsay or bad character evidence because most of the statements were not, in fact, hearsay or bad character evidence, and no prejudice resulted from these statements.

The PCR judge found trial counsel erred in failing to object to testimony that was either hearsay or bad character evidence. (App.pp.636-42). This finding was erroneous, as the instances of alleged hearsay or "bad character" testimony were not objectionable and the State presented overwhelming evidence of Respondent's guilt.

A.

At the PCR hearing, counsel for Respondent submitted Exhibit 3, which was a list of citations from the trial transcript of purported instances of hearsay and "bad character" evidence. The PCR judge addressed these citations to the record in the final order. (App.pp.636-42). The majority of the alleged hearsay is contained in Detective Steve Reeves' testimony.[3] These referenced comments, however, are statements regarding the progression of the police investigation of the crime. As such, they were not offered for the truth of the matter asserted and not hearsay testimony. See Rule 801(c), SCRE; Caprood v. State, 338 S.C. 103, 111, 525 S.E.2d 514, 518 (2000) (finding an out of court statement is not considered to be hearsay if it is offered to explain "why a government investigation was undertaken.") (citing State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994)). As these comments were not entered for their truth but rather to explain the framework of the police investigation and reasons for focusing on Respondent as the

[3] App.p.290, lines 7-21; p.293, lines 13-23; p.295, lines 10-17; p.295, line 23 – p.296, line 9; p.297, lines 12-16; p.299, line 5 – p.300, line 10; p.301, line 9 – p.302, line 3; p.302, line 7 – p.303, line 12; p.307, lines 3-12; p.308, lines 3-11; p.309, lines 14-23; p.315, lines 10-19; p.316, lines 2-8; p.321, lines 3-9; p.321, line 20 – p.322, line 19; p.323, line 6 – p.324, line 4.

shooter, they were not hearsay and thus not objectionable. See Caprood v. State, 338 S.C. at 111, 525 S.E.2d at 518; see also State v. Thompson, 352 S.C. 552, 559, 575 S.E.2d 77, 81 (Ct. App. 2003).

The other two instances of alleged hearsay are in the assistant solicitor's closing argument. (App.p.355, lines 5-12; p.357, lines 14-16). These comments, however, are not hearsay but references to portions of the aforementioned testimony from Detective Reeves. As discussed supra, Detective Reeves' testimony was not hearsay but an explanation of how the police investigation progressed in this case. Thus, there was no error in the assistant solicitor referring to this testimony during his closing argument. See State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (finding a solicitor's argument must stay within the record and its reasonable inferences); see also State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) (noting a solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony). In addition, it is axiomatic that counsel's arguments to the jury do not constitute evidence. See Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006) ("It is well established that counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence."); South Carolina Dep't of Transp. v. Thompson, 357 S.C. 101, 105, 590, S.E.2d 511, 513 (Ct. App. 2003) ("Arguments made by counsel are not evidence."). As the referenced comments were neither hearsay nor objectionable, it was not incumbent upon trial counsel to object.

As to the alleged references to Respondent's "bad character," they are chiefly contained in testimony from both Bassen Hailey (about Respondent asking him for

marijuana)[4] and LaTorrey Pearson (who sold marijuana to Respondent before the shooting).[5] This testimony was admissible because it was part of the res gestae of the crime, as it established the chain of events that led to Respondent obtaining the murder weapon. See Rule 404(b), SCRE; State v. Preslar, 364 S.C. 466, 473-74, 613 S.E.2d 381, 385 (Ct. App. 2005) ("The res gestae theory recognizes that evidence of other bad acts may be an integral part of the crime with which the defendant is charged or may be needed to aid the fact finder in understanding the context in which the crime occurred.") (citations omitted). Further, trial counsel used this very testimony to his advantage, as he questioned whether someone would sell Respondent $10 worth of marijuana but then just give him a gun. (Trial transcript, p.180; pp.368-70). Respondent also alleged these references to marijuana should not have been mentioned in the assistant solicitor's or trial counsel's closing arguments. (App.p.363, lines 1-2; p.368, lines 17-20; p.369, line 25 – p.370, line 2). Attorneys, however, are allowed to refer to testimony during their closing arguments. See State v. Huggins, 325 S.C. at 107, 481 S.E.2d at 116; State v. Cooper, 334 S.C. at 553, 514 S.E.2d at 591. There was no error in the assistant solicitor and trial counsel doing so in this case.

B.

Regardless, the PCR judge erred in finding Respondent met his burden of proving he was prejudiced by the lack of objection to alleged hearsay and bad character evidence because the State presented overwhelming evidence of his guilt at trial. Bassen Hailey,

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[4] App.p.113, lines 18-19; p.114, lines 14-19; p.135, line 4.

[5] App.p.162, line 25 – p.163, line 25; p.165, lines 16-18; p.179, lines 16-18; p.180, line 6 – p.181, line 4; p.184, lines 18-21.

LaTorrey Pearson, and Alphonso Hailey testified Respondent obtained a gun from Pearson outside the Old School Lounge. (App.p.116; pp.165-67; pp.236-37). Fred Chiles, LaTorrey Pearson, and Alphonso Hailey identified Respondent as the shooter. (App.pp.87-90; pp.169-78; p.242; p.263). Alphonso Hailey testified that, the day after the shooting, Respondent admitted to shooting the victim. (App.p.249). Detective Steve Reeves testified that no other suspects emerged during the investigation of the case. (App.p.308). Respondent cannot prove he suffered any prejudice as to the lack of objections to alleged hearsay and "bad character" evidence because the State's case was so strong, there was no reasonable probability the outcome of the trial would have been different even if those objections had been made. See Harris v. State, 377 S.C. 66, 79-80, 659 S.E.2d 140, 147 (2008) (holding overwhelming evidence of defendant's guilt invalidated any argument that trial counsel should have had the first trial transcript available to potentially impeach a witness); Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt).

C.

Accordingly, the PCR judge erred in granting relief on this issue because Respondent failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly,

Respondent also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance. There is no probative evidence in the record to support the PCR judge's decision to grant relief on this issue. See Cherry v. State, 300 S.C. at 119, 386 S.E.2d at 626. As Respondent failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge erred in granting Respondent's application for post-conviction relief. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

III. The PCR judge erred in finding trial counsel failed to adequately meet with Respondent and investigate the case because, as Respondent told counsel he was innocent of the crime, there was little counsel could have done to further investigate the case.

The PCR judge found trial counsel failed to adequately meet with Respondent before the trial and investigate the case. (App.pp.642-43). This finding was erroneous because, as Respondent told trial counsel he was not guilty of the crime, there was little for trial counsel to investigate and the State presented overwhelming evidence of Respondent's guilt.

A.

At the PCR hearing, trial counsel testified he filed discovery motions in this case and received full discovery from the State. (App.pp.502-03). Trial counsel testified he could not specifically recall whether he reviewed the discovery materials with Respondent but that his general practice would have been to do so and also send a copy to his client at the jail. (App.p.503). Trial counsel testified he reviewed the statements and polygraph examinations of witnesses who were outside the Old School Lounge. Trial

counsel also reviewed several photographic lineups identifying Respondent as the shooter. (App.p.445). Trial counsel testified he had meetings with Respondent but did not make notations as to dates or times of these meetings. (App.pp.448-49; p.504). Trial counsel testified he did not have notes in his file of witness interviews but that this did not mean he did not conduct such interviews because he did not "like to put down too much notation and especially if they're adverse to me." (App.pp.450-51). As noted supra, trial counsel testified Respondent denied shooting the victim. (App.p.503). Trial counsel testified he would not discuss possible defenses if a client "specifically denied it, just flat denied it." (App.pp.509-10). Trial counsel testified Respondent never gave him the names of any witnesses to be contacted but that he was eventually made aware of a possible alibi witness. (App.pp.504-05). Trial counsel testified many of the eyewitnesses gave multiple statements and that he attempted to impeach those witnesses with inconsistent statements and trial testimony. (App.p.505). Trial counsel testified there was nothing else he could have done in order to prepare this case for trial. (App.p.508).

B.

The PCR judge erred in finding Respondent met his burden of proving trial counsel did not spend adequate time preparing and investigating this case. Trial counsel testified he did not recall how many meetings he had with Respondent in order to prepare the case. Even assuming arguendo they only had two meetings – a position the State does not accept – that would not automatically indicate trial counsel was deficient or not properly prepared for trial. "The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation." Smith v. State, 404 S.C. 493, ___,

745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris v. State, 377 S.C. at 75, 659 S.E.2d at 145). Trial counsel testified he received discovery materials and reviewed them with Respondent. Trial counsel testified this included witness statements, polygraph examinations, and photographic lineups. Trial counsel testified he did not specifically recall interviewing State witnesses but that this did not mean these interviews did not take place. Trial counsel testified Respondent denied shooting the victim. Respondent's flat denial of his participation in the crime effectively limited trial counsel's ability to mount a defense at trial – other than the actual innocence defense that he did argue to the jury. Trial counsel's ability to present another defense was also limited because – as trial counsel testified – the discovery materials did not indicate a viable argument of defense of others. (App.pp.507-08). Regardless, it is clear from an examination of the trial record that trial counsel was prepared for trial. Trial counsel aggressively cross-examined State witnesses regarding discrepancies and inconsistences between their statements (and often these individuals gave multiple statements to police) and trial testimony. Trial counsel, for example, had James Pickens admit during cross-examination that he actually did not know what happened on the night in question and only told police what they wanted to hear. (App.pp.220-27). The PCR judge erred in finding Respondent met his burden of proving trial counsel's investigation and preparation were deficient.

Further, the PCR judge erred in finding Respondent met his burden of proving any resulting prejudice because the evidence presented at the PCR hearing failed to demonstrate that the outcome of the trial would have been different if trial counsel had interviewed several State witnesses. As discussed more fully supra, the witnesses who

testified at the PCR hearing about the argument between the victim and Brownlee did not provide any evidence that would have supported an alternate defense theory at trial. Simply put, even if trial counsel had engaged in an in-depth conversation with each of these witnesses and then elicited testimony on cross-examination consistent with their PCR testimony, it still would not have justified a jury charge of defense of others in this case and would not have changed the outcome of Respondent's trial. As such, Respondent cannot prove prejudice. See Davis v. State, 326 S.C. 283, 288, 486 S.E.2d 747, 749 (1997) (holding record did not support PCR judge's conclusion that counsel's deficient performance was prejudicial to respondent given respondent did not show how additional preparation would have resulted in a different outcome); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (holding applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). In addition, Respondent cannot prove he suffered any prejudice as a result of how trial counsel prepared and investigated the case because – as discussed more fully supra – the State presented overwhelming evidence at trial that he was guilty of murder. See Harris v. State, 377 S.C. at 79-80, 659 S.E.2d at 147; Franklin v. Catoe, 346 S.C. at 570 n. 3, 552 S.E.2d at 722 n. 3; Geter v. State, 305 S.C. at 367, 409 S.E.2d at 346.

C.

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CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling. If this Court grants certiorari, the State asks permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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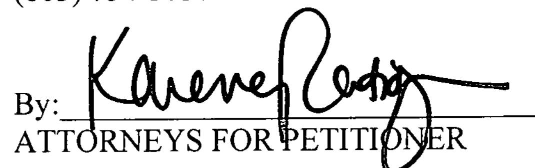

By:____________________
ATTORNEYS FOR PETITIONER

September 4, 2013

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Trial Judge
The Honorable Clifton Newman, Post-Conviction Relief Judge

Appellate Case No. 2013-000018

Juan Tyree Smith a/k/a Jwan Tyree Smith, ...Respondent,

v.

State of South Carolina, ... Petitioner.

CERTIFICATE OF SERVICE

I, Karen C. Ratigan, certify that I have today served the within Petition for Writ of Certiorari upon Respondent by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

I further certify all parties required by Rule to be served have been served. This 4th day of September, 2013.

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