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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO NEWBERRY COUNTY
Court of Common Pleas
The Honorable R. Scott Sprouse, Circuit Court Judge

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Appellate Case No. 2023-001998

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Kenny Octavis Ruff, Petitioner,

v.

State of South Carolina, Respondent.

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## PETITIONER'S STATEMENT OF THE ISSUE PRESENTED

Whether the PCR court erred finding defense counsel was not ineffective for his failure to take any additional action where members of the jury continued to sleep during petitioner's trial after the trial court reprimanded the jury for sleeping?

## RESPONDENT'S COUNTERSTATEMENT OF THE ISSUE PRESENTED

The PCR court correctly found Petitioner had not met his burden of proving Counsel was ineffective for failing to take further action regarding some jurors "nodding off" during Petitioner's trial, where the trial court appropriately admonished those jurors to pay attention, the trial court later stated on the record that the jury had been "extremely attentive," Counsel testified that he did not see any jurors sleeping after the trial court's admonishment, and the PCR court found the evidence of Petitioner's guilt was so overwhelming that it precluded a finding of prejudice.

## STATEMENT OF THE CASE

*Factual Summary*

This case arises out of a murder and armed robbery that occurred at Leslie's Salon in Newberry on August 26th, 2015. The salon was owned by Robert Facio Ledesma ("Victim") and his wife. Surveillance cameras at Kunkle Oil, which was located near Leslie's salon, captured Petitioner walking into Leslie's and leaving at 1:41 p.m. (App. pp. 213, 231, 271, 285, 289, 293–95, 484–85, 504). In the video, Petitioner can be seen walking out of Leslie's with a white bag in his hands. (App. pp. 273, 391–93, 504). Victim's niece, Elitania Martinez, was going to bring her uncle lunch that day like she normally did on Wednesdays, but she was running late and arrived at Leslie's at 1:55 p.m. (App. pp. 188–89). Once she got there, she testified at trial that she walked through the salon and couldn't find her uncle. (App. p. 189). She then continued to search the salon and found him on the floor face down with blood coming from his head. (App. p. 189). She called 911, and police were dispatched and arrived at 2:02 p.m. (App. pp. 189, 193, 225, 308–09). Police discovered Victim was unresponsive, and he was declared dead at the scene from a bullet wound to the back of his head. (App. pp. 194, 202, 254). The police conducted a search and found that the register drawers were open and contained no money except for some change. (App. pp. 198, 486–87). Blood located on the wall near Victim's body indicated that Victim was at a low position at the time he was shot. (App. p. 254). Leslie's salon had video camera surveillance, but the hard drive with the recordings was missing. (App. pp. 204, 252).

After investigating the scene, the police then tried to follow the trail that they believed the suspect took along Pike Circle. (App. pp. 209–11). They proceeded down the path and found a faceplate that belonged to the hard drive of the video cameras at Leslie's. (App. pp. 209–11, 388, 390). As they continued to walk, they ended up in Heritage Square where they noticed a security

camera facing a dumpster. (App. pp. 217, 390–91). That camera recorded Petitioner there with a white bag at 1:46 p.m. (App. pp. 214, 391, 395, 655). After obtaining a search warrant, police searched through the dumpster and located a white bag that contained a landline phone that was taken from Leslie's and an IPad that belonged to the victim. (App. pp. 215–17, 396–400). Also in the bag was a black shirt that contained Petitioner's DNA on it and gunshot residue along the smashed hard drive that belonged to Leslie's video surveillance cameras. (App.pp. 215–17, 233, 396–99, 574, 588, 600, 609). A white cord that seemed to belong to the landline phone was located on the trail. (App. pp. 400–01). The hard drive was so badly smashed that the police were worried nothing could be recovered, but they proceeded to send the hard drive to the FBI, who were able to rebuild the system and recover the video from inside the salon. (App. pp. 399, 708–10). In that video, the suspect can be seen walking from Kunkle's Oil to the salon, wearing a black do-rag, black shirt, shoes with white stripes, and jeans with a lanyard hanging out of his left hip pocket and a cloth protruding from his right pocket. (App. pp. 515–19, 654, 710–14). The video depicts the suspect entering the salon with a pistol and aiming it at Victim. (App. p. 516). The suspect can be seen marching the victim into the back and ordering him to unplug the hard drive for the cameras, at which point the video goes black. (App. pp. 515–17, 710–14, 721). The suspect's clothing in the salon video was consistent with the clothing Petitioner was wearing in the Kunkle Oil video and a video from the Brothers BP station taken around 1:32 p.m. (App. pp. 518–19, 714–18).

At trial, Investigator Richard Mercer testified that he collected videos from other stores near Leslie's and was able to positively identify Petitioner in the videos because he had known him for years prior to the crime. (App. pp. 276–77). He also stated that he noticed Petitioner changed his clothes multiple times throughout the different videos, but that he had a do-rag on his

head. (App. pp. 269, 276, 278, 288, 303, 528, 531–33). Walter Bentley testified at trial that he located two pictures on Petitioner's Facebook showing Petitioner wearing a wave cap or do-rag. (App. p. 669). Mercer further testified that he conducted a search of Petitioner's home and found a small caliber shell casing, not an actual bullet, but a bullet that had been fired. (App. pp. 476–80). It was identified as a .22 caliber shell casing. (App. p. 479).

Emmanuel Richardson, nicknamed "Womp", testified at trial that he lives on Turner Street, the same street as Petitioner, and that he's known him ever since he was born. (App. pp. 310–11). Richardson stated that he saw Petitioner going into Leslie's salon on the day the crime occurred. (App. p. 313). On direct-examination, Richardson was asked what Petitioner was wearing when he walking into the store, and he said, "he had a black shirt and a do-rag on his head. (App. p. 315, lines 12–13). The Solicitor then asked him to identify the person he knows as Kenny Ruff, and Richardson identified Petitioner. (App. pp. 317–18).

The only other person in the Kunkle Oil surveillance video who can be seen entering Leslie's after Petitioner leaves, apart from Victim's niece who ultimately discovered the body, was identified as Jose Galvez. (App. pp. 334–40, 504). He recalled August 26th and stated that he left his job to get a haircut at Leslie's. (App. pp. 334–35). He went into the store but saw nobody inside, so he went to La Princesa nearby to buy cards for his family before returning to Leslie's. (App. pp. 334–35). However, no one responded or came to him, so he left. (R. p. 339). A gunshot residue test was conducted on Galvez at 4:55 p.m. on the day of the murder, but no gunshot residue was found. (App. pp. 407–10, p. 569).

Later that same day, the police apprehended Petitioner. (App. pp. 279–84). Petitioner was then interviewed by Captain Goodman, and he admitted to being in Leslie's Salon but said he just wanted to check the place out. (App. pp. 491–95). Petitioner also indicated that he had changed

his clothes the day of the crime. (App. pp. 495, 497). Once he was in jail, he called his sister, and those conversations were recorded. (App. p. 429). Petitioner's sister, Angela Ruff, testified at trial but initially didn't want to answer questions because she didn't want to be involved. (App.pp. 432, 441–42). However, Angela Ruff did confirm the voices heard on the recorded phone conversation belonged to her and Petitioner. (App.pp. 432, 441–42). On the tape, Petitioner said he was in Leslie's on the 26th and that he was with Dale Bailey and Machiavelli. (App. pp. 437–38, 503). Petitioner also said that Dale "snatched" the footage. (App. pp. 443–44). On direct examination, Angela admitted that she was able to look at the videos and see that it was Petitioner. (App. p. 445, lines 6–10). Angela also said Petitioner wears do-rags from time to time and that he indicated to her that Dale shot the man. (App.pp. 445–47). Following hearing this story, Captain Goodman looked at the videos again but did not see three men entering the salon as Petitioner claimed. (App. pp. 513–14).

Aaryon Dowdy, an inmate at Alvin S. Glenn, who was in the Special Housing Unit with Petitioner, also testified at trial. (App. p. 447). Dowdy explained that a mic, similar to an intercom system, is on the wall in the rooms and that it's always on. (App. pp. 449, 460–62). He testified that he used this to communicate with Petitioner while at the detention center. (App. pp. 450–51). While speaking to him, Petitioner told Dowdy his side of the story. (App. p. 452). Dowdy testified that,

> He told me that he entered a hair salon, to, with intentions to rob. And he told me that he took a Spanish guy in the back and the guy was begging for his life. He shot him in the side of his head. He told me that when the police arrived, that he, the guy was blue in the face. He said that the police didn't know how he died until the autopsy because the caliber of the gun, because his hole had closed up on him. He also stated that he left the salon with a white bag. He also told me that took at least $1,200.00 and a black monitor.

(App. p. 452, lines 7–16). Petitioner also told Dowdy he used a .22 revolver and that after the shooting, he went to BP and Wal-mart. (App. pp. 452–53). Police confirmed Petitioner went to Wal-Mart that afternoon through a receipt that was found in his home, surveillance cameras, and Petitioner's own statement to police. (App. pp. 180, 290, 474, 520–22, 526, 530). Video surveillance in BP also confirmed he went there after the shooting. (App. pp. 526–27). Dowdy further testified that Petitioner said he went to the mall to change clothes and that he gave the weapon to his nephew after the murder. (App. pp. 454–55).

*Procedural History*

During its November 2015 term, the Newberry County Grand Jury indicted Petitioner for murder (2015-GS-36-0594), armed robbery (2015-GS-36-0595), and possession of a firearm during the commission of a violent crime (2015-GS-36-0596). Assistant Public Defender Charles V. Verner represented Petitioner at trial. Solicitor David M. Stumbo and Assistant Solicitor Taylor W. Daniel of the Eighth Circuit Solicitor's Office prosecuted the case. On January 9, 2017, Petitioner proceeded to a jury trial before the Honorable Donald B. Hocker. The jury found Petitioner guilty on all three counts. Judge Hocker sentenced Petitioner to imprisonment for life without parole.

Subsequently, Petitioner filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek of the Office of Appellate Defense perfected the appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed Petitioner's appeal. The remittitur was sent on July 13, 2018.

On February 11, 2019, Petitioner filed his initial PCR application, raising the following allegations:

1. Ineffective Assistance of Counsel
    a. Failure to permit Petitioner to attend Petitioner's preliminary hearing

b. Failure to investigate / prepare for trial
    i. Failure to obtain private investigator
    ii. Failure to investigate into incident where Petitioner's "rule five" items were stolen by another inmate
    iii. Failure to adequately communicate and visit client
    iv. Failure to subpoena witnesses
c. Failure to prevent DNA evidence from being introduced the week of Petitioner's trial
d. Failure to object to jurors falling asleep during Petitioner's trial
e. Failure to prevent mother of a Newberry County Detention Center corrections officer from serving on the jury

2. Prosecutorial Misconduct
    a. Prosecutor utilized a witness to obtain information from Petitioner's family

On November 27, 2022, Petitioner amended his application to include the following allegations of ineffective assistance of counsel:

1. "Failure to disclose plea offer to Applicant."
2. "Failure to strike Dorothy Gladney as alternate after she stated Teresa Sanders was related to her family. *See* ROA Vol. I, page 81, lines 16-24; ROA Vol. I, page 96, lines 1-5."
3. "Did not adequately meet with Applicant prior to trial. Applicant tried to fire trial counsel but could not get the motion in front of a judge. Did not get opportunity to talk to Mr. Verner until almost 5 months after arrest."
4. "Did not move for a new trial after the judge admonished several jurors for falling asleep. ROA Vol. II, page 583, line 8 – page 584, line 2."

An evidentiary hearing into the matter was held before the Honorable R. Scott Sprouse on November 28, 2022, at the Abbeville County Courthouse. Petitioner was present at the hearing and represented by Ashley A. McMahan, Esquire. Assistant Attorney General Zachary W. Jones represented Respondent. By order dated December 1, 2023, Judge Sprouse denied and dismissed Petitioner's application with prejudice.

Petitioner thereafter filed a timely notice of appeal. By and through counsel Sarah E. Shipe, Esquire, Petitioner filed a petition for writ of certiorari on July 24, 2024. This Return follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. *Id.*; *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

## ARGUMENT

**The PCR court correctly found Petitioner had not met his burden of proving Counsel was ineffective for failing to take further action regarding some jurors "nodding off" during Petitioner's trial, where the trial court appropriately admonished those jurors to pay attention, the trial court later stated on the record that the jury had been "extremely attentive," Counsel testified that he did not see any jurors sleeping after the trial court's admonishment, and the PCR court found the evidence of Petitioner's guilt was so overwhelming that it precluded a finding of prejudice.**

At one point during Petitioner's trial, the trial court addressed the jury as follows:

> Now, let me mention this to you. It's extremely important. I've noticed that several jurors have been nodding off. While I realize it is difficult to sit and not get tired when you sit for extended periods of time, I understand that's difficult. However, I cannot have any member of this jury nodding off which indicates that they are not being attentive to what is going on. I'm sitting here as you are, even though I can get up and move around, I typically don't while witnesses testify, and I'm not having a problem nodding off, okay? When I excuse you at the end of the day, I always tell you that it's just routine for me to tell juries this, get plenty of rest. So I take it very seriously that if you are nodding off, then you're not performing your duties as jurors. So I will not tolerate any member of the panel or member of the jury nodding off, not being attentive, not listening to what is going on. Now, I'm not going to single you out now, okay, you know who you are. If you need to take a short nap during lunch break, then you better do that, okay?

(App. p.589, line 7–p.590, line 1). In his application for PCR, Petitioner alleged Counsel was ineffective for failing to take further action after the trial court admonished the jury.

The PCR court found Counsel was not ineffective because the trial court itself thoroughly warned the jurors to pay attention. The PCR court also noted that the trial court later commended the jury for being "extremely attentive," which indicated that the jurors' earlier inattention had been relatively minor. The PCR court also found Petitioner could not show any prejudice from Counsel's alleged deficiency because the evidence of Petitioner's guilt was so overwhelming that it precluded a finding of prejudice.

Petitioner now contends the PCR court erred because, had Counsel made a proper objection, the trial court would have been required to conduct an inquiry to ascertain whether those jurors had paid sufficient attention to the proceedings, as required by *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (Ct. App. 1996) and *State v. Smith*, 338 S.C. 66, 525 S.E.2d 263 (Ct. App. 1999). Petitioner also claims that some jurors continued to sleep after the trial court's admonishment, which deprived Petitioner of a fair trial "which includes a jury that is, at the very least, awake during the presentation of the evidence." These contentions are without merit.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee criminal defendants the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Where, as in this case, a PCR applicant 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 [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*: first, the applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Second, Counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117–18, 386 S.E.2d at 625. The applicant bears the burden of proving the allegations in his application by a preponderance of the evidence. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814; Rule 71.1(e), SCRCP.

It is true that the cases Petitioner cites require trial courts to ascertain a juror's state of mind and the degree to which the juror was paying attention to the proceedings whenever defense counsel objects to the juror's apparent inattention or sleepiness. In *State v. Hurd*, where the trial court declined to take any further action after defense counsel pointed out that one juror had fallen asleep during the jury charge, the court of appeals held that the "trial judge committed reversible error by refusing defense counsel's request to question the juror as to whether he heard all of the charge." *Hurd*, 325 S.C. 384, 480 S.E.2d at 97. The court of appeals held that "the trial judge should have either determined whether the juror was in fact asleep, recharged the entire jury, or replaced the juror." *Id.*

In *State v. Smith*, the court of appeals reiterated *Hurd's* holding that the trial judge has a duty to determine whether a juror who appears to be sleeping is actually asleep. *Smith*, 338 S.C. at 72–73, 525 S.E.2d at 266–67. However, the court in *Smith* found the trial judge had satisfied this duty by stating on the record his determination that the juror in question was not asleep; the judge observed the juror "on several occasions . . . picking up her notebook and writing something down," so he determined she was "awake and listening with her eyes closed." *Id.* at 73, 525 S.E.2d at 267. The court of appeals also held that, although the trial court has a duty to make a finding on the record, the *defendant* ultimately "[bears] the burden to show the juror was actually asleep." *Id.* at 75, 525 S.E.2d at 268. In addition, the court of appeals rejected a *per se* reversible error rule

and held that a defendant must prove prejudice from the juror's misconduct. *Id.* at 74–75, 525 S.E.2d at 267–68. Citing a large body of persuasive authority from other jurisdictions, the court of appeals noted this approach was utilized by "the great majority of courts in other states considering the sleeping juror question." *Id.* at 72, 525 S.E.2d at 266.

Petitioner claims "there is no question there were jurors sleeping during trial where the court reprimanded them during trial and where [P]etitioner and [C]ounsel both recall the jury sleeping after the court's warning." This claim is not accurate. Only Petitioner, in his self-serving testimony at the PCR hearing, claimed that jurors were actually falling asleep during the trial. (App. pp.929–30). The trial court merely admonished the jurors for "nodding off, not being attentive, not listening to what's going on." (App. p.589, lines 22–23). Counsel testified at the PCR hearing that the trial court warned the jury at one point to pay attention because "he had seen somebody nodding his head." (App. p.952, lines 1–4). Furthermore, Petitioner's claim that *Counsel* recalled members of the jury continuing to sleep after the court's warning is refuted by Counsel's own testimony. Petitioner testified that he noticed one juror sleeping after the trial court's warning, and he stated that he "nudged" Counsel to do something about it. (App.p.930, lines 6–11). Counsel, however, could not remember any jurors appearing to sleep after the judge's warning:

> Q: Do you recall Mr. Ruff nudging you or pointing out again that there was another juror asleep sometime during the trial?
>
> A: He may have, and I've got kind of a vague memory that maybe he did, but I didn't notice anybody sleeping.

(App.p.966, lines 4–8).

In addition, at the conclusion of the trial, the trial court commended the jury for being attentive and for *not* falling asleep:

> This has been a long trial, typically a week-long trial, some trials actually go longer. But some go shorter than a week, so it is tough to come here early in the morning and work all day, we have worked some long hours a few nights. It is not an easy task serving on the jury. But you have been very attentive, I know we had one little lift as far as some folks kind of being sleepy headed but other than that I have kept my eye on you and you have been extremely attentive and you have performed your service as a juror, all twelve of you, I believe consciously. I thank you for that. Again, I don't thank juries for their verdict because their verdict does not matter to me. But I want someone to be conscious, fair minded in serving on a jury and I believe that you have done that.

(App.p.858, line 19–p.859, line 8). This statement indicates that the court "kept an eye" on the jury and ultimately determined that, although some jurors were "sleepy headed" at one point, they remained "conscious" and were able to do their duties to the court's satisfaction. In other words, as required by *Hurd* and *Smith*, the trial court observed the jurors and made a finding on the record that they were conscious and attentive during the trial. *See Smith*, 338 S.C. at 73, 525 S.E.2d at 267 (holding, where the trial court "stated on the record" his conclusion that the juror in question "was awake and listening" based on his observations of her throughout the trial, the judge had made "the requisite factual finding mandated by *Hurd*, and he needed to take no further action.").

Petitioner has not met his burden of proving that any jurors actually were asleep during his trial. *See id.* at 75, 525 S.E.2d at 268. More importantly, however, he has failed to prove that he suffered any prejudice from the jurors' alleged misconduct. *See id.* at 74–75, 525 S.E.2d at 267–68. Even assuming, for the sake of argument, that some jurors did briefly fall asleep during Petitioner's trial, there is no indication that the result of Petitioner's trial would have been different if Counsel had objected. The PCR court found, based on the record before it, that the incident "appears to have been a relatively minor lapse of attentiveness on the part of a few jurors." (App.p.999). The trial court's thorough admonishment of those jurors appears to have corrected

the alleged misconduct, prompting the trial court to praise the jurors at the conclusion of the trial for being "extremely attentive." (App.p.859, line 2).

The PCR court also found that the overwhelming evidence of Petitioner's guilt precluded a finding of prejudice. (App.p.995). "A reasonable probability of a different result does not exist when there is overwhelming evidence of guilt." *Hillerby v. State*, 431 S.C. 323, 333, 847 S.E.2d 500, 505 (Ct. App. 2020) (citing *Geter v. State*, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991)). For evidence to be "overwhelming," such that it categorically precludes a finding of prejudice, the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of "a reasonable probability . . . the factfinder would have had a reasonable doubt" cannot possibly be met. *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018).

The PCR court's finding of overwhelming evidence was correct: surveillance video from inside the salon shows Petitioner entering, forcing Victim at gunpoint into the back room where Victim's body was discovered a short time later, and ordering Victim to unplug the surveillance cameras' hard drive. (App.pp.515–19, 654, 710–18, 721). Video footage from a nearby business shows Petitioner entering the salon and emerging a few minutes later with a white bag in his hands. (App.pp.213–14, 231, 271, 273, 289, 293–95, 391–93, 484–85, 504). Another video shows an individual discarding a white trash bag in a dumpster; police searched the dumpster and recovered the white bag, which contained items stolen from the salon including the surveillance cameras' hard drive, as well as a dark-colored shirt with Petitioner's DNA and gunshot residue on it. (App.pp.214–17, 233, 391–93, 396–400, 574, 588, 600, 609). Officer Richard Mercer, who knew Petitioner "for many years," identified him as the individual depicted in the surveillance video from inside the salon. (App.pp.276–78). Emmanuel "Womp" Richardson testified he has known

Petitioner all his life, and he saw Petitioner walk into the salon around the time of the murder. (App.pp.315–16). Petitioner's own sister identified him as the individual shown in the videos. (App.pp.444–45). The State introduced a recorded phone call between Petitioner and his sister, in which Petitioner admitted he was present at the salon during the crime but claimed two other individuals, "Dale Bailey and Machiavelli," were with him and were responsible for the crime. (App.pp.435–45). However, the videos of the incident depict nobody but Petitioner going into the salon and participating in the crime. Petitioner was interviewed by police, and he admitted going inside the salon, although he claimed he was merely curious and wanted to check the place out. (App.pp.491–95).

The PCR court found the State's evidence overwhelmingly established Petitioner's guilt, such that it precluded any finding of prejudice. Petitioner claims this finding was error; however, he does not cite any authority or offer any argument as to why the PCR court's appraisal of the strength of the State's case was wrong. This claim of error is purely conclusory.

Instead, Petitioner argues the jurors' momentary inattention deprived him of a fair trial, "which includes a jury that is, at the very least, awake during the presentation of evidence." Petitioner appears to be suggesting that *any* jurors sleeping for *any* amount of time during the presentation of evidence automatically deprives a defendant of a fair trial, constituting prejudice. This is exactly the sort of *per se* prejudice rule rejected by *Smith*. *See Smith*, 338 S.C. at 74–75, 525 S.E.2d at 267–68.

Next, Petitioner argues he was prejudiced because "there were issues at trial regarding inaccurate timestamps on more than one of the recordings the State relied on. Thus, it was tantamount that the jury pay very close attention to the evidence presented at trial." Petitioner does not bother to explain *how* the inaccurate timestamps on some of the videos undermined the

strength of the State's case. Even Counsel admitted that the issue of the timestamps was merely a distraction:

> [T]he timestamp was largely irrelevant, there were multiple videos, they all had different timestamps on them. In practicality it's pointless because you can see the man who killed the person walk into the store. . . . [T]here's constant video surveillance of the store where the man was killed, and the killer walks in the salon and whether it was 12:15 or 12:30 is really irrelevant. . . . [T]he actual person walking in the store is on multiple different store videos. Kenny is clearly on the video at the store across the street, and I think that's probably what the timestamp issue would have been because he would have been there. But there's video of him walking down the street towards the gas station, and of course, there were eyewitnesses who testified they saw him.

(App.p.949, lines 5–15). Petitioner has failed to provide any explanation as to how this "irrelevant" issue could defeat the overwhelming evidence of his guilt.

Because Petitioner has failed to demonstrate any error in the PCR court's decision, Respondent asks this Court to deny the petition for a writ of certiorari.

## CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,


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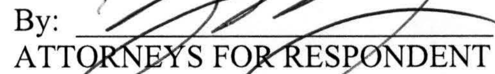

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