

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Daniel F. Pieper, Trial Court Judge
The Honorable Kristi Lea Harrington, Post-Conviction Relief Judge

Appellate Case No. 2008-CP-10-0057

Anthony Mann,.....Petitioner,

v.

State of South Carolina,Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

QUESTIONS PRESENTED.....2
STATEMENT OF THE CASE.....3
STATEMENT OF THE FACTS.....4
ARGUMENT.....8
CONCLUSION.....27

QUESTIONS PRESENTED

1. Did the lower court properly find Petitioner's right to a public trial was not denied through closed hearings?
2. Did the lower court properly find trial counsel was not ineffective for electing not to object to the admission of the shotgun into evidence?
3. Did the lower court properly find trial counsel was not ineffective for not objecting to the presence of prison guards at trial or for choosing not to object to a potential juror's reference to Lieber Correctional Institution?
4. Did the lower court properly find trial counsel was not ineffective for not objecting to alleged improper character evidence?
5. Did the lower court find trial counsel was not ineffective for attempting to suppress Petitioner's statement?
6. Did the lower court properly find trial counsel was not ineffective for not calling an expert witness?
7. Did the lower court properly find trial counsel was not ineffective for not requesting a jury charge on the voluntariness of the statement?
8. Did the lower court properly find trial counsel was not ineffective for entering the crime scene video into evidence?
9. Did the lower court properly find trial counsel was not ineffective for not objecting to various witness statements?
10. Did the lower court properly find trial counsel was not ineffective for not presenting an alibi defense or requesting an alibi charge?
11. Did the lower court properly find trial counsel was not ineffective for not objecting to comments the solicitor made allegedly referencing the Petitioner's right to a jury trial?
12. Did the lower court properly find appellate counsel was not ineffective for not ordering certain transcripts or maintaining contact with Petitioner?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Charleston County. The Petitioner was indicted at the July 2002 term of the Charleston County Grand Jury for armed robbery (2002-GS-10-4413) and two counts of murder (2002-GS-10-4414, -4415). Jennifer K. Shealy, Esquire, and Beattie Butler, Esquire, represented the Petitioner. The Petitioner proceeded to trial on September 15-24, 2003, after which a jury found him guilty as indicted. On September 24, 2003, the Honorable Daniel F. Pieper sentenced the Petitioner to confinement for thirty (30) years for armed robbery and life imprisonment for each count of murder.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. Joseph Savitz, Esquire, of the South Carolina Commission on Indigent Defense, represented Petitioner on appeal. Following full briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Mann, Op. No. 2007-UP-016 (S.C. Ct. App. filed January 11, 2007). The Remittitur was issued February 2, 2007.

Petitioner filed an application for post-conviction relief (PCR) on January 7, 2008. The Respondent made its Return on February 10, 2009. An evidentiary hearing into the matter was convened on November 14 and 18, 2011 at the Charleston County Courthouse. The Applicant was present at the hearing and represented by Wesley Locklair, Esquire and Joshua Kendrick, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Office of the Attorney General represented the Respondent. The Honorable Kristi Lea Harrington denied the Petitioner's application by Order dated January 24, 2012 and filed January 26, 2012. (App. p. 1911-29).

STATEMENT OF THE FACTS

On January 7, 2002, Dante Tobias was shot to death in his home at 36 Magnolia Road in the West Ashley area of Charleston. (App.pp.223-24). Dante Tobias testified the victim appeared have been shot twice in the back. (App.pp.224). Six days later, on January 13, 2002, the body of Beverly Blake (Brownie) was found in the woods near Summerville. (App.pp.755). Brownie was found with three (3) gunshot wounds to her head, two (2) to her chest and back, and one (1) to her arm. (App.pp.988). Her body had semen present in her rectal, oral, and vaginal cavities, but there were no sperm cells present to create a DNA profile. (App.pp.1046). She was seventeen (17) years old at the time of her murder. (App.pp.1135).

When Donna Kann returned home from work at Charleston County EMS on January 7, 2002, she heard a gunshot and a man cry for help as she got out of her car. (App.pp.195-96). She testified at trial that she looked across Magnolia Road and saw a man standing with a gun in his hand. (App.pp.197). She testified because of his mannerisms she was “pretty definite” the shooter was a white male (App.pp.199,215). On cross-examination, she admitted the shooter could have been a female. (App.pp.211). The shooter was wearing a knit cap. (App.pp.209).

On January 7, 2002, prior to the murders, the Petitioner showed up at his co-defendant, Erick Zack’s house driving a white Hyundai. The testimony presented a trial shows Zack followed Petitioner to Player’s Place, where the Petitioner left his car and got into Zack’s car. (App.pp.390). Eric Zack and Petitioner picked up a third co-defendant, Michael Crumb, from his house. (App.pp.273, 393). After the Petitioner spoke on the phone with Brownie and Peter Davies. (App.pp.274, 394), they drove to Peter Davies’ apartment, where they stayed for about five minutes. (App.pp.277, 396). Zack testified at trial that Brownie told Petitioner that the first

victim, Tobias, had a safe filled with money and drugs. (App.pp.395). Crumb testified he heard Petitioner tell Brownie they would “be there in a minute.” (App.pp.278). Petitioner had a gun when they left Davies’ house. (App.pp.398). Petitioner drove behind a Piggly Wiggly in West Ashley, test fired the pistol, and then drove them to Magnolia in West Ashley. (App.pp.278, 280, 398). Petitioner then stated he was “going to help Brownie get out of the house,” and, “if he acts up I’m going to take his crap too.” (App.pp.278). They pulled up in front of the house, and Petitioner went inside. Crumb smoked a cigarette and then followed Petitioner inside to make sure he was alright. (App.pp.280). Zack stayed in the car. (App.pp.400).

Crumb then walked into the living room and saw Petitioner with a gun to Tobias’ head. (App.pp.281). Tobias had his hands in the air. (App.pp.282). Petitioner was accusing him of prostituting Brownie. (App.pp.281). Tobias said Brownie was lying and to take everything. (App.pp.284). Petitioner told Crumb to open the safe, but he could not get it open. (App.pp.297-98). According to Crumb, Petitioner was wearing jeans, a FUBU jersey, and a stocking cap. (App.pp.298). Crumb and Brownie each left the house with a garbage bag full of clothes and got in the car. (App.pp.299-300, 401). After they got in the car, they heard a gunshot and a scream. (App.pp.300, 401). Petitioner ran out of the house, got in the car, and said he just shot the victim in the leg. (App.pp.301, 403). Petitioner was holding a black gun in his hand. (App.pp.301).

Zack drove them back to Peter Davies’ house. (App.pp.302, 403). At Davies’ house, Crumb witnessed Petitioner and Davies counting money and holding a shotgun and the gun with which the Petitioner shot the victim. (App.pp.303-04). Zack testified he saw a big black shotgun. (App.pp.405), which testimony at trial showed came from the trash bag that Brownie carried out of the victim’s home. (App.pp.304). Testimony at trial showed that Peter Davies told Crumb,

Zack, and Brownie if they opened their mouths, he would kill them and their families. (App.pp.305, 406). Davies had a chrome revolver in his hand. (App.pp.407). Petitioner told Zack that he and Davies were going to “get rid of Brownie.” (App.pp.409).

Davies called Terrance Hudson and asked him for a ride. (App.pp.471). When Hudson arrived, they loaded two (2) trash bags in his car. (App.pp.473). Petitioner, Davies, and Brownie left with Hudson. Petitioner told Crumb and Zack to follow them to North Charleston, but once Crumb and Zack got in their car, they went the other way and drove to Johns Island. (App.pp.307-08, 410). Hudson testified he saw something that looked like a gun with a brown handle in Petitioner’s waistband. (App.pp.474). Hudson drove them to Player’s Place. Everyone got out of his car, and Hudson left. (App.pp.475). After Hudson left, he drove past Nicole O’Connell’s house, saw the car Petitioner and the others had gotten into, stopped his car, and went inside. Davies, Brownie, and Petitioner were all there. Hudson stayed for a few minutes and then left. (App.pp.476).

Nicole O’Connell testified that Petitioner came to her house on the night of the shooting with Brownie and Davies. She testified the Petitioner sat by the mirror and wiped off a black sawed-off shotgun and a silver gun with a brown handle. (App.pp.551). She testified the Petitioner posed with the guns and asked O’Connell and her mother, Lisa, how he looked. (App.pp.552). Petitioner was smiling and laughing while he posed. (App.pp.580). Davies took a shower, and Brownie sat on the end of the bed and was very quiet. (App.pp.552). O’Connell testified Terrance Hudson stopped by for a few minutes. (App.pp.553). Petitioner asked Brownie if she had any regrets. (App.pp.554). They stayed for about 45 minutes and then Petitioner said they were leaving to take Brownie home. (App.pp.555). This was the last time anyone admitted

to seeing Brownie alive. Petitioner left the black shotgun at O'Connell's house (App.pp.556) and returned the next day to retrieve it. (App.pp.559).

Kristy Bunch testified the Petitioner showed up at her house around midnight on the night of the murders with Davies. (App.pp.606-607). He looked like he had just taken a shower because his hair was wet. (App.pp.606). They all went to a bar called the Ladson Tackle Shop and stayed until the next morning. (App.pp.609). Bunch and Petitioner left the Tackle Shop together and went to Bunch's house, so she could get her children ready for school. They then slept for the rest of the day. (App.pp.611-12). Petitioner and Bunch were together on and off until Petitioner was arrested on January 15. (App.pp.613-628). While Petitioner was in jail awaiting trial, Bunch and the Petitioner communicated frequently by telephone. She testified that "after a little while of arguing, he [the Petitioner] just fessed up to it. He just said, Yeah, I killed the fucking bitch." (App.pp.701).

Shannon Keyes testified at trial the Petitioner told her that he and Brownie "had to go do something, or they went to go do something and it didn't turn out the way it was supposed to, and he had to do what he had to do and he had to lay low for a while." (App.pp.859).

Dustin James testified that he was in the bathroom of the Old Dorchester Club with Petitioner on the night of January 11, 2002. (Trial pp.852)¹. He asked Petitioner if he had seen Brownie, and Petitioner "motioned across his throat like this, pointed to his chest and held his finger up across his mouth." (Trial pp.853). He testified further the Petitioner "told me he was doing a deal with dude and he had to do him so he dealt with her and put her in the woods." (Trial pp.854). Upon leaving the bathroom, Petitioner got into a fight and yelled, "I'm wanted for two murders now, and I'll kill you too." (Trial pp.855).

¹ Pages 853-56 of Dustin James' testimony were not included in the Appendix provided by Petitioner. The Respondent will move to supplement the record to insure the missing pages are before the Court.

Krystal Lackey lived in a duplex in Hanahan at the time of the murders. (App.pp.1055-56). Petitioner went to her house sometime in January, shortly after the murders to pick someone up. (App.pp.1056). This was the second time she had met the Petitioner. She testified that while at her house, the Petitioner said “that he and some other people ... had gone to do a home invasion ... and they ended up shooting him. And then there was a girl who he said that they found out that she had given some information and supposedly had told the police, and his words were that he had to kill that nigger bitch.” (App.pp.1056-57).

Mervin Menier was Petitioner’s roommate at the Charleston County Detention Center. (App.pp.1097). He testified that Petitioner often talked about his case while in jail. (App.pp.1098). He testified the Petitioner told him, “he robbed him and the guy got shot, the guy died, and he said the other people that were with him, they didn’t see it because they had already gone back down to the car.” (App.pp.1099). Petitioner also told Menier, “they pulled the car over like in a wooded area, and he lured the girl out the car. I don’t know exactly what he told her to get out the car, but he did, and that’s when he shot her. And he said he left her in some woods or something.” (App.pp.1103).

ARGUMENT

The United States Supreme Court has established a two-pronged test to establish ineffective assistance of counsel by which a PCR applicant must show (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). 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, 466 U.S. 668 at 674 (1984). Under the second prong, the PCR applicant "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, 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998).

The proper standard for review for the denial of post-conviction relief 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).

1. There is probative evidence to support the lower court's finding that Petitioner's right to a public trial was not denied through closed hearings.

Petitioner argues the PCR judge erred in denying relief "by not finding Petitioner's right to a public trial was denied through closed meetings including an ex parte meeting between the solicitor and the judge." (Cert. Pet., p.6). The Respondent submits this allegation is without merit as the Petitioner has failed to carry his burden of proving Petitioner's right to a public trial was denied.

In his Petition for Writ of Certiorari, the Petitioner states "four separate in camera hearings" took place during the Petitioner's trial that were completely closed to the public. However, in the Petition, the Petitioner only presents argument about the substance of one of the closed sessions. The Respondent submits this Court should only consider the right of the Petitioner to a public trial in the context of the one hearing referenced by the Petitioner in the

Petition. The Petitioner also submits there is no evidence in the record of the one *ex parte* hearing between the Judge and the solicitor referenced in the Petition other than during the Petitioner's testimony at the evidentiary hearing which the lower court found to be not credible. (App.pp.1865, 1921).

At the PCR hearing, Petitioner testified that there were four (4) hearings that were held outside of the courtroom for which he was not present. (App.pp.1864). The record reflects three (3) hearings taking place, the first of which begins on page 58 of the trial transcript and presumably goes through page 66. (App.pp.142). Pages 58-66 were sealed and subsequently destroyed. This first pre-trial, in-chambers meeting between the Judge, trial counsel, and the Berkeley County Sheriff was requested by trial counsel, not the solicitor. The defense subpoenaed a case file from the Berkeley County Sheriff's Department, and the Sheriff's Department was attempting to quash it. Trial counsel's reason for meeting in chambers was because she did not believe the solicitor had standing to be a party to the Sheriff's Department's motion. (App.pp.135). The Judge explains on the record he is "only going in chambers to only hear how it could implicate your [the defense's] case, then we'll come back in here and argue the law." (App.pp.142).

The second hearing for which the Petitioner alleged at his evidentiary hearing he was not present appears to have been a hearing during the trial concerning the same issue of whether the subpoena should be quashed. While it appears pages 181-202 of the trial transcript are missing, on page 179-80 of the trial transcript, the Judge says, "We'll exclude the State at this point with just the county arguing just the motion to quash since the State doesn't have standing at this point." He further states, "I'm not going to get to the merits of the file. They're going to lay their

foundation about why they need it secured, and then I'll ultimately, I think, have to look at the file myself." (App.pp.256-57). The whole reason for the hearings to be held off the record was so the solicitor would not be privy to the information discussed and gain insight to the defense's trial strategy, so the notion that what was discussed could somehow be prejudicial to the Petitioner is without merit.

The next in-camera hearing for which the Petitioner alleged he was not present is reflected on pages 1402-1453 of the trial transcript. This hearing concerned allegations by the defense that the State was attempting to pressure defense witnesses not to show up for trial. (App.pp.1428-29). On the record, the Judge asks trial counsel, "If the allegation is that the State's trying to tell them not to come, is that the allegation?" Trial counsel responds, "I don't believe that's necessarily the allegation." (App.pp.1429). The Judge additionally states, "Well, either way, if those people aren't going to testify, then it's not going to change the scope of this case. If there is misconduct, that can be addressed separately." (App.pp.1428). The Respondent submits this hearing did not specifically address the substance or merits of the Petitioner's case, therefore, no prejudice resulted.²

The Respondent submits the Petitioner's right to a public trial was not violated. The public was able to observe the key portions of the trial proceeding including witness testimony and jury instruction. The Petitioner has also failed to show how in-camera hearings being held outside of the presence of the public affected the outcome of his trial. There is probative evidence to support the lower court's ruling that the Petitioner was not denied the right to a public trial when the in-camera hearings were on the record in the sealed transcript.

² The record reflects pages 1479-1523 of the trial transcript are unaccounted, however trial counsel testified at the PCR hearing the in-camera hearings referenced by the Petitioner had no effect on his right to a public trial (App.pp.1729).

2. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for electing not to object to the admission of the shotgun into evidence.

Petitioner argues the PCR judge erred by "not finding trial counsel ineffective for failing to object to or move to suppress evidence related to a shotgun." (Cert. Pet., p.8). The Respondent submits this allegation is without merit and the Petitioner failed to carry his burden of proving counsel was ineffective.

The Petitioner heavily relies on Holman v. State, in support of his this allegation. 381 S.C. 491, 674 S.E.2d 171 (2009). The Petitioner asserts Holman is dispositive since no evidence was offered at trial to linking the shotgun to the Petitioner. The Respondent submits and the record reflects this case can be distinguished from Holman. In Holman, the State admitted a handgun seized from the Petitioner's residence that was in no way connected to the shooting incident for which the Petitioner was charged and convicted. Id. at 172, 674 S.E.2d at 492,

Unlike in Holman, multiple witnesses testified at trial to seeing the shotgun in Petitioner's possession the night the murders took place. (App.pp.303-04, 405, 551). Furthermore, Petitioner mentioned the shotgun in his own statement that he gave to the police. (App.pp.1160). The Respondent submits the shotgun entered into evidence was not "random and completely unrelated" as the Petitioner asserts and this Court's ruling in Holman is not dispositive of this issue.

The Respondent submits the Petitioner failed to carry his burden of proving prejudice resulted that affected the outcome of the Petitioner's trial. The introduction of the shotgun at trial did not prejudice the Petitioner considering Robert Walker testified at trial the shotgun entered into evidence was inconsistent with any of the bullets fired in the murders. (App.pp.1126). The

Petitioner has also failed to show the basis of any objections by counsel to the admission of the shotgun at trial and that they would have been successful. The Respondent submits this allegation is without merit and there is probative evidence to support the lower court's ruling that the Petitioner was not prejudiced by the admission of the shotgun.

3. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for not objecting to the presence of prison guards at trial or for choosing not to object to a potential juror's reference to Lieber Correctional Institution.

Petitioner argues the PCR judge erred by "not finding trial counsel ineffective for failing to object to the presence of prison guards at trial and the jury's knowledge of Petitioner's detention in Lieber Correctional Institution at the trial." (Cert. Pet., p.10). The Respondent submits this allegation is without merit and the Petitioner has failed to carry his burden of proving counsel was ineffective.

The Respondent submits trial counsel expressed a strategic reason for failing to object to the juror's reference to the Petitioner being housed at Lieber Correctional Institution. During voir dire and in response to the Judge's preliminary questions, Juror 125 said, "I used to work for SCDC where he's at." (App.pp.111). After this statement was made, the Judge held a bench conference out of the hearing of the jury. (App.pp.111). It was at this bench conference that the juror said, "I used to work for Lieber Correctional Institute." (App.pp.111). Contrary to the Petitioner's assertions in the Petition, the jurors stating the Petitioner was housed at Lieber did not take place before the jury pool. (App.pp.11. lines 6-25, pp.112 lines 1-11). However, during the exchange between this juror and the Court, counsel expressed her desire to avoid bringing this fact to the attention of the jurors. (App.pp.112).

Where counsel articulates valid reasons for employing a certain strategy, counsel's

choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). *See also* Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). The record reflects counsel articulated a valid strategic reason for not objecting to the juror's statement in front of the other potential jurors.

Petitioner in his Petition relies on Estelle v. Williams, 425 U.S. 501 (1976), in support of his assertion that "the failure of counsel to object to these references and conditions and then pile on top of them during her cross-examination is the equivalent of marching Petitioner into the courtroom in prison garb and handcuffs with shackles and leg irons". The Respondent submits the Petitioner's reliance on Estelle is misplaced and no evidence in the record supports the Petitioner's assertion that the Petitioner was forced to wear prison clothes when appearing before the jury. In fact, counsel provided credible testimony that the Petitioner was not wearing prison clothes during his trial and was even given access to hair jail prior to trial. (App.pp.1787).

Petitioner next argues that trial counsel compounded this alleged error by referring to Petitioner being "at Lieber" (App.pp.708) and talking about "before he went to prison," (App.pp.723) during the cross-examination of Kristy Bunch. However, Bunch testified extensively on direct-examination to phone calls and letters between the Petitioner and her while he was incarcerated (App.pp.632-35, 693-701), including the phone call where Petitioner stated, "Yeah, I killed the fucking bitch." (App.pp.701). Respondent submits that no prejudice could have resulted from counsel's statements. By this point in the trial, everyone in the courtroom was fully aware that Petitioner was on trial for two counts of murder and had been in custody at some point.

Petitioner also argues that counsel should have objected to the presence of uniformed prison guards in the courtroom. Respondent submits this argument is without merit. There was ample testimony that Petitioner had been incarcerated, supra. Respondent also submits, it is unreasonable to think that the presence of law enforcement officers in a courtroom during a murder trial was either egregious or objectionable. Further, Petitioner has shown no prejudice resulting from the guards' attire or presence in the courtroom. The Respondent submits there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to references to the Petitioner being housed at Lieber and for allowing prison guards to sit near the Petitioner during trial.

4. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for not objecting to alleged improper character evidence.

Petitioner argues the PCR judge erred by not finding trial counsel ineffective for, "failing to object to or limit improper character evidence." (Cert. Pet., p.12). The Respondent submits this allegation is without merit and the Petitioner failed to carry his burden of proving counsel was ineffective.

Petitioner argues that Kristy Bunch made improper references to the Petitioner being "in trouble and on probation" (Cert. Pet., p.12) at lines 16-18 of page 708 of the Appendix. The Respondent submits this argument is based on a mischaracterization of the testimony reflected in the record, and the testimony referenced was in no way improper. The testimony cited by the Petitioner is as follows:

Q: And then you told us that when he was out at Liber, you all had a conversation and you all were arguing, is that correct?

A: Yes, it's correct. (App.pp.708, lines 16-19)

This testimony does not stand for Petitioner's assertion that he was "in trouble and on probation". The testimony makes no reference to probation. The Respondent submits the Petitioner has failed to show the basis of any objection to this testimony.

Petitioner also argues trial counsel should have objected at lines 12-14 on page 626 of the Appendix where Kristy Bunch testified, "They had gone and done something that they were proud of. They were, like, busted someone's house up or something." The Respondent submits the Petitioner has failed to show how this testimony was objectionable. Any prejudice that resulted was cured by counsel's motion for a mistrial based on this testimony. (App.pp.636-37).

Petitioner argues that trial counsel should have objected to lines 8-11 of page 635 of the Appendix where Bunch testified, "he was wanting to get ahold of people – one of our friends, Dan Casey, his girlfriend knew people that were officers in the system that he would get to help him in any kind of way, the judges." Petitioner asserts that this testimony shows, "Petitioner was attempting to bribe officers and judges." (Cert. Pet., p.13). Respondent submits Petitioner's argument relies on a mischaracterization of the testimony. A plain reading of the testimony and the context in which it was made shows the testimony was clearly in reference to Petitioner attempting to raise money for his defense. The testimony cited by the Petitioner in its complete form is as follows:

Q: How was he going to go about doing that? How was he going to go about calling people to get money, to raise money for a lawyer?

A: I was making three-way calls for him to different girls he knew or whoever he knew that had money in the bank, like Carol had money, Danielle had money. He could get people to take loans for him, or, you know, he was **wanting to get ahold of people—one of our friends, Dan Cavey, his girlfriend new people that were officers in the system that would help him in any kind of way, the judges.** He was just all about getting money up so he could get a lawyer to prove that he was innocent. (App.pp.588)

It is clear from the full record of Bunch's testimony, that her full testimony in context

does not support Petitioner's assertion that Bunch was saying "Petitioner was attempting to bribe officers and judges". The Respondent submits this allegation is wholly without merit and was not objectionable.

Lastly, Petitioner argues that trial counsel failed to timely object to testimony regarding drug activity on lines 15-16 of page 635. The testimony cited by the Petitioner in its complete form is as follows:

Q: Did he want to talk to other people about other things?

A: Yes, he did. He wanted to talk to Dan about getting drugs together to have them..

Ms. Shealy: Objection, your honor. May we approach? (App.pp.635, lines13-18).

The Respondent submits this allegation is wholly without merit as the record reflects that trial counsel objected immediately at the testimony was elicited and moved for a mistrial. (App.pp.635-36). The Respondent submits there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to prior bad acts and properly objected when the acts were referenced.

5. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for attempting to suppress Petitioner's statement.

Petitioner argues the PCR judge erred, "by not finding trial counsel ineffective for failing to properly challenge the admission of Petitioner's statement." (Cert. Pet., p.13). The Respondent submits this allegation is without merit and the Petitioner failed to carry his burden of proving counsel was ineffective.

Petitioner alleges trial counsel held a Jackson v. Denno, hearing but, "allowed it to be more a formality rather than treating it like the extraordinarily important event that it was." (Cert. Pet., 15). The Respondent submits a Jackson v. Denno, 378 U.S. 368 (1964), hearing is a

commonly held proceeding whose sole basis is to determine the voluntariness of a criminal defendant's statement. It is unreasonable to assume that since the Petitioner's statement was found to be admissible that the Jackson v. Denno proceeding was only a mere "formality" and not a substantive evaluation of the voluntariness of the Petitioner's statement.

The Respondent submits and the record reflects trial counsel thoroughly challenged the Petitioner's statement at the hearing. The record of the hearing reflects the Petitioner was advised of his rights, signed three (3) different waivers forms, and the police promptly ended the interrogation once the Petitioner invoked his right to counsel. (App.pp.41-72). Furthermore, the trial judge after assessing the credibility of all the witnesses presented found the Petitioner's statements were given freely, voluntarily, and knowingly and the Petitioner waived his Fifth and Sixth Amendment rights. (App.pp.72).

The Petitioner argues he was tortured, sexually assaulted, and threatened with racially motivated violence by the police when he was initially taken into custody. Petitioner asserts this extreme duress resulted in the statement he gave to Detective Walker. (Cert. Pet., p.14). The Respondent submits this allegation is wholly without merit. The only evidence in the record to corroborate these allegations is Petitioner's testimony at the PCR hearing which the lower court found to be not credible. (App.pp.1826-32, 1921). The Respondent submits counsel adequately challenged the admission of the Petitioner's statement during the Jackson v. Denno hearing. The Respondent also submits there is probative evidence to support the lower court's ruling that

6. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for not calling an expert witness.

Petitioner argues the PCR judge erred, "by not finding trial counsel ineffective for failing to call an expert witness." (Cert. Pet., p.16). The Respondent submits this allegation is without

merit and the Petitioner failed to carry his burden of proving counsel was ineffective.

The Petitioner asserts that trial counsel should have called an expert to refute the testimony of Dr. Presnell, the State's Medical Examiner, regarding the vitreous fluid and fly eggs located in Brownie's eyeballs. Petitioner argues this would have helped refute the State's theory as to Brownie's time of death. The Respondent submits this allegation is wholly without merit in light of the counsel's testimony at the evidentiary hearing. In this case, there is no failure by counsel since she hired two experts to look into the issue. Trial counsel testified she retained two experts regarding entomology and the bugs in the eyes and both experts gave the same response which was that without having the actual eggs themselves to look at they could not testify to date the eggs. (App.pp.1732). After review of their potential testimony, counsel made a reasonable strategic decision not to call them as witnesses at trial.

The Respondent also submits that even if counsel should have called an expert witness at trial, the testimony presented by the Petitioner's expert, Dr. Janice Ross, did not exculpate the Petitioner but merely offered a differing expert opinion as to whether the victim's death could have been reasonably calculated based on the vitreous fluid in her eyes. At the PCR hearing, Dr. Janice Ross testified that vitreous fluid is an unreliable way to determine a postmortem interval. However, she also testified, "you cannot tell the time – the postmortem time interval from the potassium level in the vitreous" which would make the use of her testimony even less valuable to the defense (App.pp.1804). She further testified that Dr. Presnell, the State's witness, enjoyed a good reputation in the medical community. (App.pp.1806). Dr. Ross's testimony in no way served to exculpate the Petitioner and counsel's choice not to present such expert testimony was not prejudicial to the Petitioner. The Respondent submits this allegation is without merit and the

Petitioner failed to carry his burden of proving counsel failed to retain an expert and that the outcome of his trial would have been different had she done so.

7. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for not requesting a jury charge on the voluntariness of the statement.

Petitioner argues the PCR judge erred by not, "finding trial counsel ineffective for failing to request a jury charge on the voluntariness of the statement and for failing to object to no finding that the statement was taken in accordance with Miranda." (Cert. Pet., p.17). The Respondent submits this allegation is without merit.

The Respondent submits the court's finding during the Jackson v. Denno hearing was in accordance with Miranda v. Arizona, 384 U.S. 436 (1966). The trial judge said the following, on the record, at the close of the Jackson v. Denno hearing:

"I find that for purposes of this preliminary determination having considered the totality of the circumstances that the defendant's statements were freely and voluntarily and knowingly made and they were not made under duress, coercion or undue influence. I find that the defendant was given his rights. He freely and voluntarily waived those rights under the Fifth and Sixth Amendments of the Constitution." (App.pp.71-72).

The Respondent also submits the Petitioner has failed to show any valid grounds for an objection to the trial court's ruling.

Petitioner also argues that the voluntariness of the statement was a question of fact, and as such, trial counsel should have requested a jury charge on the voluntariness of a defendant's statement. (Cert. Pet., p.17-18). The Respondent submits the Petitioner has failed to show how counsel's failure to request this jury charge affected the outcome of the Petitioner's trial. There is probative evidence to support the lower court's ruling that the Petitioner was not prejudiced by

counsel's failure to request a jury instruction regarding the jury's duty to determine the voluntariness of the Petitioner's statement.

8. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for entering the crime scene video into evidence.

Petitioner argues the PCR judge erred by not finding trial counsel ineffective, "for failing to object to the introduction of a graphic crime scene video." (Cert. Pet., p.18). The Respondent submits this allegation is wholly without merit.

As an initial matter, the Respondent submits this allegation should be dismissed and considered abandoned by this Court because the Petitioner fails to cite any authority in support of his argument. An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority. Holly Woods Ass'n of Residence Owners v. Hiller, 392 S.C. 172, 708 S.E.2d 787 (Ct. App. 2011). The Respondent submits this allegation was abandoned by the Petitioner.

If this Court is inclined to consider this allegation, the Respondent submits it is wholly without merit. While the Petitioner asserts in the issue presented counsel failed to object to the entering of the crime scene video into evidence, the record reflects trial counsel actually introduced the crime scene video into evidence, not the solicitor. (App.pp.1716). The Respondent submits it was unreasonable for counsel to object to the Petitioner's own evidence.

The Respondent also submits counsel articulated a valid strategic reason for presenting that evidence to the jury. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610

S.E.2d 812 (2005) and McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003). At the evidentiary hearing, trial counsel testified at the PCR hearing, “I was trying to show that she (Brownie) had not been out there long enough to be rained upon.” (App.pp.1790). The Respondent submits the reasoning articulated by counsel was valid considering the timing of the victim’s death was an issue in dispute during the Petitioner’s trial. The Respondent submits there is probative evidence to support the lower court’s ruling that counsel articulated a reasonable trial strategy for introducing the crime scene video.

9. There is probative evidence to support the lower court’s finding that trial counsel was not ineffective for not objecting to various witness statements.

Petitioner argues the PCR judge erred by not finding trial counsel ineffective for, “failing to object to witness’ hearsay statements and corroboration.” (Cert. Pet., p.19). The Respondent submit this allegation is without merit.

Petitioner’s references to alleged hearsay testimony do not raise any issues of ineffective assistance of counsel. Evidence is not hearsay unless it is an out of court statement offered to prove the truth of the matter asserted. State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991), cert. denied, 502 U.S. 1103, 112 S.Ct. 1193, 117 L.Ed.2d 434 (1992).

Petitioner argues trial counsel should have objected to the following testimony from Dustin James: “I heard that her roommate was dead and her and Amp [Petitioner] were on the run.” (App.pp.895). Petitioner next argues trial counsel should have objected when Maria Jacques testified, “Dustin suggested that I stay away from Amp because he told Amp – Amp told Dustin in the bathroom before the fight that he killed both, I don’t know, Brownie and the guy.” (App.pp.911). Jacques then testified, “I heard that she was the one, that no one could really find

her ... I heard Amp and her were missing or whatever, and that she was last seen with him.” (App.pp.911). The Respondent submits the testimony referenced by the Petitioner was not objectionable and is not hearsay because the statements are not offered for the truth of the matter asserted.

Furthermore, even if the statements did constitute hearsay, the Petitioner has failed to prove any prejudice resulting from the testimony due to the overwhelming evidence of his guilt. A reasonable probability of a different result does not exist when there is overwhelming evidence of guilt. Geter v. State, 305 S.C. 365, 367 (1991).

Petitioner also argues trial counsel was ineffective for failing to request a curative instruction after the solicitor told Michael Crumb to look at Tobias’ family and tell them who killed him. (App.pp.1349-50). Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument. Humphries v. State, 351 S.C. 362, 373 (2002). The relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id. It is not enough that the prosecutor’s remarks were undesirable or even universally condemned. Darden v. Wainwright, 477 U.S. 168, 181 (1986). Here, trial counsel did object twice to the solicitor’s comments, and the trial judge sustained both objections. The Petitioner has failed to prove these statements affected the outcome of his trial or infected the trial with such unfairness that the result was a denial of due process. The Respondent submit this allegation is without merit.

10. There is probative evidence to support the lower court's finding that trial counsel was not ineffective for not presenting an alibi defense or requesting an alibi charge.

Petitioner argues the PCR judge erred by not finding trial counsel ineffective for, "failing to present an alibi defense or request an alibi instruction from the court." (Cert. Pet., p.21). The Respondent submits this allegation is without merit.

The Respondent submits this allegation is without merit since the Petitioner has failed to present any witnesses at the evidentiary hearing to support his alleged alibi. In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). When a PCR applicant alleges trial counsel failed to investigate or present an alibi witness, the PCR court must make two findings to determine if counsel's deficient performance constitutes prejudice under *Strickland*. First, the court must find as a matter of law whether the witness's testimony meets the legal definition of an alibi. Second, the court must assess the witness's credibility. In making the first finding, the court must consider the entire record to determine what the testimony would have been if it had been presented at trial. The PCR court must consider the testimony as a whole, take it as true and credible, and view it in the light most favorable to the PCR applicant. Walker v. State, 397 S.C. 226, 238, 723 S.E.2d 610, 616 (Ct. App. 2012). Here, the Petitioner has presented no witnesses at the evidentiary to support his allegation, therefore, counsel could not have been ineffective for failing to call a witness that

does not exist and whose testimony the lower court was never given the opportunity to assess.

The Respondent also submits the alleged alibi of Bunch the Petitioner asserts should have been presented was not a complete alibi and did not warrant presentation by counsel or a jury instruction on alibi. To qualify as an alibi, a witness' testimony must account for the defendant's whereabouts during the time of the crime such that it would have been physically impossible for the defendant to commit the crime. Walker v. State, 397 S.C. 226, 237, 723 S.E.2d 610, 616 (Ct. App. 2012).

At the PCR hearing, trial counsel testified that Kristy Bunch was the only alibi witness Petitioner ever mentioned (App.pp.1792). She testified further, the defense originally thought Bunch was going to be a favorable alibi witness, but she “flipped” on them before trial. (App.pp.1790). Bunch’s testimony ended up being very detrimental to the defense after the State called her as a witness. The Respondent submits that since Bunch’s testimony did nothing to support an alibi, counsel could not have been ineffective for failing to call Bunch as an alibi witness and an alibi instruction was not warranted by the evidence. The Respondent submits there is probative evidence to support the lower court’s ruling that counsel effectively investigated the alleged alibi defense.

11. There is probative evidence to support the lower court’s finding that trial counsel was not ineffective for not objecting to comments the solicitor made allegedly referencing the Petitioner’s right to a jury trial.

Petitioner argues the PCR judge erred by not finding trial counsel ineffective for, “failing to object to the prosecution’s improper comments on Petitioner’s exercise of his right to a jury trial and failure to call certain witnesses.” (Cert. Pet., p.21). This argument is without merit.

“If a Solicitor's closing argument remains within the record evidence and the reasonable

inferences therefrom, no error occurs. Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.” State v. New, 338 S.C. 313, 319 (Ct. App. 1999). Petitioner argues that trial counsel should have objected to the following comments during the solicitor’s closing statements:

“This defendant went to rob Dante Tobias. He went to pick up Beverly Blake. It was a mixed motive, no doubt, but one he felt like he needed a gun for. One that Eric Zack and Michael Crumb have taken responsibility for.” (App.pp.1529).

Petitioner also argues the following statement made by the solicitor was improper:

“The hand of one is the hand of all. If a crime committed by two or more persons, Beverly Blake and Anthony Mann, who are acting together in the commission of that offense, the act of one is the act of all. This is true if there are two people or more than two people involved in the act. Eric Zack, Michael Crumb pleading guilty. The hand of one is the hand of all.” (App.pp.1496).

At the PCR hearing, trial counsel testified she did not consider the solicitor’s comments to be improper. (App.pp.1765). Trial counsel testified, “I think the way I took the statement was they’ve come in here and told you what they did. They’ve taken responsibility for it.” (App.pp.1764). The Respondent submits the solicitor’s statements were clearly within the scope of the testimony at trial, and as such they were not objectionable. Further, the solicitor’s comments did not call into question any constitutional implications pertaining to the right to a jury trial.

12. There is probative evidence to support the lower court’s finding that appellate counsel was not ineffective for not ordering certain transcripts or maintaining contact with Petitioner.

Petitioner argues the PCR judge erred by not finding appellate counsel ineffective for, “failing to order certain transcripts, maintain contact with Petitioner and properly advising him of

his rights and correct procedures.” (Cert. Pet., p.23). This argument is without merit.

At the PCR hearing, Petitioner testified that appellate counsel did not order the sealed portions of the transcript. (App.pp.1867). The Respondent submits the Petitioner has failed to present any evidence that prejudice resulted from appellate counsel’s performance and that the missing portions of the transcript prejudiced the Petitioner’s appeal. Omissions from a trial transcript only warrant a new trial if “the missing portion of the transcript specifically prejudices [a defendant's] appeal.” United States v. Brown, 202 F.3d 691, 696 (4th Cir. 2000), citing United States v. Gillis, 773 F.2d 549, 554 (4th Cir.1985). Here, even assuming *arguendo* he could legally show ineffectiveness of appellate counsel, Petitioner has failed to show any specific prejudice resulting from the missing portions of the transcript.

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny Petition for Writ of Certiorari.

Respectfully submitted,

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By: 

ATTORNEYS FOR RESPONDENT

October 4, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Charleston County
The Honorable Kristi Lea Harrington, Circuit Court Judge

ANTHONY MANN

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

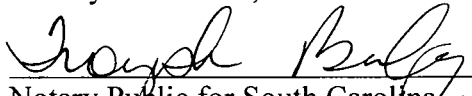
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Return to Petition for Writ of Certiorari and Motion to exceed the page limit has been served upon opposing counsel, Joshua S. Kendrick, and J. Wesley Locklair, III, this 4th day of October, 2013.



Anne R. Henley
Legal Assistant

SWORN to before me this
4th day of October, 2013.

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



ALAN WILSON
ATTORNEY GENERAL

October 4, 2013

Honorable Daniel E. Shearouse
Clerk of the Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Anthony Mann v. State of South Carolina
2008-CP-10-0057
Appellate Case No. 2012-212824

RECEIVED
OCT - 4 2013
S.C. Supreme Court

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari and Motion to Exceed page Limit in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson
Assistant Attorney General

ARW/arh
Enclosures

cc: Joshua Snow Kendrick, Esquire
J. Wesley Locklair III, Esquire