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December 9, 2013

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Post Office Box 711121
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RE: Tiffany Sanders v. The State
Appellate Case No. 2012-212858

Dear Counsel:

I am enclosing two (2) copies of the Return to Petition for Writ of Certiorari, along with proof of service, in the above-referenced case.

Sincerely,

Salley W. Elliot
Senior Assistant Deputy Attorney General

SWE/ab
Enclosures

cc: The Honorable Daniel E. Shearouse
Victim's Services

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



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Appeal from Dorchester County
Deandrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2012-212858

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TIFFANY SANDERS,

Petitioner,

vs.

THE STATE,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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III. **The PCR court correctly ruled that trial counsel's decision to not call Amanda Fender was based on reasonable trial strategy, and its findings were supported by probative evidence and its finding that Fender lacked credibility (Petitioner Issue I.B.)**

IV. **The PCR court correctly ruled that trial counsel's decision not to cross-examine Jessica Hans did not constitute ineffective assistance of counsel because Petitioner failed to present Hans as a witness at the PCR hearing, and when the decision not to engage in cross-examination was based on reasonable trial strategy when all the important testimony was elicited on direct examination. (Petitioner's Issue II)**

## STATEMENT OF THE CASE

Petitioner Tiffany Sanders is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment. The Dorchester County Grand Jury indicted Petitioner for murder (2010-GS-18-0707) and accessory before the fact of murder (2010-GS-18-1206). Michael O'Neal, Esquire (Trial counsel), represented Petitioner at trial. A jury convicted Petitioner of murder and acquitted her of the accessory charge. On August 5, 2010, the Honorable Diane Goodstein sentenced Petitioner to thirty (30) years imprisonment. Petitioner did not appeal.

Petitioner filed an application for post-conviction relief on August 3, 2011, and an amended application on August 24, 2011. In the application, Petitioner alleged her trial counsel was ineffective because he failed to interview and call two witnesses at trial, and failed to cross-examine a State witness. Also, Petitioner alleged that she did not knowingly and voluntarily waive her right to appeal. The State filed a return on November 20, 2011. A hearing was held on May 24, 2012, before the Honorable Deandrea Benjamin. An order was issued on July 27, 2012, denying relief on all claims, except Petitioner's knowing and voluntary waiver of her right to appeal. Petitioner was granted permission to proceed pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974); Rule 243(i), SCACR; and Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986). Petitioner filed two briefs on June 12, 2013: a petition for certiorari appealing the denial of post-conviction relief and a brief of appellant pursuant to Rule 243(i). Petitioner filed an amended brief of appellant on August 7, 2013. This Return to Petition for Writ of Certiorari and a separate Brief of Respondent follows.

## STATEMENT OF FACTS

On June 8, 2007, Tiffany Sanders (Petitioner) lured Jesse Ham through trickery into her car and drove him to a secluded location where her boyfriend, Sean Kammerer, shot Jesse four times with a pistol. 2 App. 358.[1]

Earlier that day, Jesse Ham and three of his friends (Kevin King, David Hughey, and Brandon Frye) were walking down the street. 2 App. 132-33; 157-58; 172. As Petitioner drove by, the group waved her down and asked what she was doing. 2 App. 134; 157-58; 173 - 75. Petitioner retorted "Nothing with y'all," and drove off. Id. Petitioner was accompanied by her sister, Amanda Fender. 2 App. 159. Afterwards, Jesse and the group returned to Brandon's house. 2 App. 172-73. Sean Kammerer, Petitioner's co-defendant, called Petitioner, asked her who she was with, and directed Petitioner to bring Jesse to Publix. 2 App. 223.

Twenty minutes later, the group heard Petitioner honking her horn in front of Brandon's house. 2 App. 134; 160; 175. She specifically asked for Kevin and Jesse but not by name. 2 App. 176. Jesse and Kevin met with Petitioner, who asked them what their names were. 2 App. 135; 160-61. At first Jesse and Kevin lied, telling her their names were Ben and Kyle, but Petitioner insisted she knew a girl who urgently wanted to meet Jesse at a nearby McDonald's. Petitioner pleaded with them for thirty to forty-five minutes to come with her. 2 App. 135-136 161 - 66. Petitioner also answered and talked on her cell phone several times during her interaction with Jesse and Kevin. 2 App. 136. Suspicious, Kevin put his ear to the phone while Petitioner talked and heard a man's voice. Id. However, when Jesse took the cell phone he heard a woman's voice. Id. Jesse was hesitant, but decided to believe Petitioner. 2 App. 137.

[1] The appendix has two separately paginated volumes. Volume 1 is the post-conviction relief proceedings, cited in this brief as 1 App. #. Volume 2 is the trial transcript, cited in this brief as 2 App. #.

Kevin, concerned about his friend, sat in the back right passenger seat behind Jesse as Petitioner started the car. Id.; 150-52; 177. Petitioner's sister rode next to Kevin behind the driver's seat. 2 App. 138.

As Petitioner approached McDonald's, she drove around it once and drove to a nearby Publix/Tire King parking lot. 2 App. 137. She attempted to go in-between buildings, but a delivery truck blocked the alleyway. Id. Petitioner, still on the phone, stated "Oh, there's a delivery truck. I can't get behind there . . . . Okay." Id. Petitioner backed her car into an unlit, wooded area behind Publix. 2 App. 138. The car abutted the woods. 2 App. 137. Petitioner was asked to move the car to a more lighted area but Petitioner refused and turned the car off. 2 App. 138. Petitioner declared "No. We're not moving." 2 App. 139.

Petitioner was described as acting 'shady like." She was acting like everything was fine, but it was obvious she knew something was about to happen. 2 App. 138 – 40. Kevin, now apprehensive, began to exit the car. 2 App. 138 – 140; 153. Kammerer, who had been lying in wait, put a gun up against Kevin's stomach. Id. Kevin knocked the away causing Kammerer to shoot between Kevin's legs. Kevin ran. Id. As he ran between the buildings where the delivery truck was located, Kevin heard three to four shots behind him. 2 App. 139-40. Petitioner drove away after the shots started. 2 App. 139 – 40; 202; 223. Jesse was shot four times, three in the back and one in the neck. He died at the scene. 2 App. 341 (Court's Exh. 1). Kevin explained that Kammerer and Jesse had been fighting for two to three years. 2 App. 144. Kammerer had been loudly telling everyone he was going to kill Jesse. 2 App. 144; 183. It was also common knowledge that Jesse beat Kammerer with a bat. Id. Petitioner was aware Kammerer wanted revenge. 2 App. 224.

In preparation for the murder, Kammerer, who did not have a license, had asked his friend Dejuan Jenkins to drive him. 2 App. 200. Kammerer directed Dejuan to park behind the Tire Kingdom because Kammerer was meeting his girlfriend there. 2 App. 202. Dejuan parked on one side of the Tire Kingdom building. 2 App. 202. They waited for Kammerer's girlfriend to arrive. Kammerer walked over to Petitioner's car when Petitioner arrived. 2 App. 202. After murdering Jesse, Kammerer got back into the car, and Dejuan took him home. 2 App. 204. Dejuan never informed the police about the shooting and later pled guilty to accessory after the fact. 2 App. 205.

Jessica Hans, a Publix employee, testified that she heard several loud pops while in the parking lot. 2 App. 195. When she looked in the direction of the pops, Jessica saw a person on the other side of the parking lot pointing a gun at the ground and eventually firing. Id. Jessica also saw another person running between two buildings. Id. After the shot was fired, Jessica saw the shooter disappear behind the side of the building. Id. Thirty seconds later, a Jeep Cherokee pulled out from the same side of the building and exited the parking lot. 2 App. 196. Jessica did not remember seeing any other vehicles at that end of the parking lot. 2 App. 197. She noted that the delivery truck Petitioner mentioned on her phone had recently pulled in to the parking lot. 2 App. 197.

Next, Petitioner drove back to Brandon's house and told Brandon "something happened." 2 App. 177. Brandon rode in the car with her to the scene. Id. While driving, Petitioner told Brandon that Petitioner, Jesse and Brandon had seen somebody come out of the woods and then Petitioner drove off, leaving the two friends. 2 App. 178. Petitioner drove around the parking lot a few times before dropping Brandon off back at his house. Id. Brandon noted she seemed

fake and had "alligator tears." Id. Concerned, Brandon called and asked David to go with him to the crime scene. Id. He also instructed David to bring a gun. Id. By the time the two of them arrived at the scene the police had cordoned off the area. 2 App. 178-179. The police questioned both of them. 2 App. 179-180. Afterwards, David threw the gun into a ditch. 2 App. 169. Brandon left in the middle of questioning and was chased down. 2 App. 179-180. During a search, the police found marijuana in his pockets, and charged him with simple possession. Afterwards, Brandon went home. 2 App. 180.

The next day, the police brought Petitioner in for questioning. She signed a confession admitting she took Jesse to the scene, but claimed she only took him there because Kammerer wanted to fight. 2 App. 342-44 (Court's Exh. 2). She also disclaimed knowledge that Kammerer had a gun. Id. Kammerer pled guilty to murder before Petitioner's trial. 2 App. 68

The State charged Petitioner with two alternative offenses: accessory before the fact to murder and murder. 2 App. 351-358. If Petitioner had been present at the scene of the murder, she would be guilty of murder, but if she had not been present, she would have been guilty of accessory before the fact of murder. Before trial, the parties stipulated that Kammerer murdered Jesse. 2 App. 341 (Court's Exh. 1).

At trial, the State argued that, under the "hand of one, hand of all" accomplice liability theory, Petitioner was guilty of murder. 2 App. 107. Petitioner and Kammerer formed a common scheme to take Jesse to a secluded location and murder him. 2 App. 107-108. The State presented testimony from Jesse's friends Kevin King, David Hughey and Brandon Frye. Also, the State also presented testimony from Jessica Hans and Dejuan Jenkins as well as testimony from two police officers, photographic evidence of the scene, and Petitioner's written

confession. At the close of the State's case, Petitioner made a motion for directed verdict, arguing that the State had failed to prove malice. 2 App. 225-226. The judge denied the motion. 2 App. 228.

Petitioner did not present a case and renewed the directed verdict motion. 2 App. 235; 237. Also, she objected to the charge on accessory before the fact of murder, arguing the phrase "the crime of murder" should be used instead of "any crime." 2 App. 297-298. The judge denied this objection. 2 App. 299-300.

During deliberations, the jury asked the Court several questions. 2 App. 302-313; 345-348 (Court's Exh. 2-7). After four hours of deliberation, the jury found Petitioner guilty of murder. 2 App. 314. She was sentenced to thirty years in prison. 2 App. 324-325.

## STANDARD OF REVIEW

In a post-conviction relief proceeding, Petitioner bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, Petitioner must prove that "trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

The proper measure of performance is whether trial counsel provided representation within the range of competence required in criminal cases. Strickland, 466 U.S. at 689. It is presumed that trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Petitioner must prove that trial counsel's performance was deficient. Under this prong, trial counsel's performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland, 466 U.S. at 668. "Where trial counsel articulates a valid reason for employing a certain trial strategy, such conduct will not be deemed ineffective assistance of counsel. Watson v. State, 370 S.C. 68, 634 S.E.2d 642 (2006). Second, trial counsel's deficient performance must have prejudiced Petitioner such that "there is a reasonable probability that, but for trial 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. Where trial counsel articulates a valid reason for employing a trial strategy, trial counsel is effective. Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006).

The PCR court's findings will be affirmed when supported by any probative evidence. Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

## ARGUMENTS

### I.

**While the PCR court correctly found that trial counsel informed Petitioner of her right to appeal, the PCR court erred in granting appellate review because Petitioner was aware of and knowingly and intelligently waived her right to appeal.**

A. Petitioner failed present this issue to the Court as required by Rule 243(i), SCACR, and this failure deprives the State of the chance to respond.

First, the review pursuant to White v State should be refused by this Court for Petitioner's failure to follow Rule 243, SCACR. Rule 243(i)(1) requires Petitioner to include a question in the petition for writ of certiorari raising the issue of whether "the right to a direct appeal was not

knowingly and intelligently waived." This Court made the procedure clear in Davis v. State, 288 S.C. 290, 342 S.E.2d 60 (1986); William Phillips, 17 S.C. Jur. Post-Conviction Relief § 27. The rule requires trial counsel to raise this issue to the Court when the PCR judge affirmatively finds an applicant is entitled to White v. State review of direct appeal issues. Petitioner failed to include the question in her petition for a writ of certiorari. (Cert. Pet. 4.) Petitioner's failure to include the question on certiorari deprives the State of the ability to respond to any arguments Petitioner might make.

**A. Petitioner knowingly and voluntarily waived the right to appeal**

Nevertheless, Respondent submits that the PCR court erred in finding Petitioner did not knowingly and voluntarily waive the right to appeal. The record before this Court reflects that trial counsel advised Petitioner of the right to appeal and advised her that he did not believe there were any meritorious grounds to present to the appellate court on appeal. 1 App. 104-105. Petitioner did not ask trial counsel to appeal. 1 App. 114-115.

Either Petitioner or her family immediately contacted Andy Savage, Esquire, to discuss an appeal. 1 App. 63-64, 66. Harrison Bell, the prosecutor, testified that Andy Savage's office contacted him the day after Petitioner's conviction and sentence about a possible appeal. 1 App. 119-120. Also, Petitioner testified that she ordered the transcripts from the trial "as soon as she possibly could." 1 App. 64. This transcript likely cost Petitioner over $1,000.[2] The transcript was completed on December 25, 2010. 2 App. 326. Yet, Petitioner does not appear to have pursued the matter any further, and no notice of appeal was ever filed. 1 App. 114-115.

[2] The transcript presented in volume 2 of the appendix is 326 pages. Under Rule 607(h)(1)(A), SCACR, court transcripts cost $3.25 a page. Thus, 326 x 3.25=$1,059.50.

At the PCR hearing, Petitioner testified:

> PETITIONER: ...So Andy Savage did not want to take on my case without getting the transcripts.
> STATE ATTORNEY: Okay. So you made a decision not to appeal because you would have to pay for the transcripts?
> PETITIONER: No, not because of that, because we placed the order quickly to get them as soon as we could.
> STATE ATTORNEY: Okay. So you knew about the appeal and you had already ordered the transcripts?
> PETITIONER: This was a couple of days after we didn't hear from [trial counsel].
> STATE ATTORNEY: Okay, and a decision was made by Mr. Savage that you didn't have any grounds for appeal in the transcript?
> PETITIONER: That's not his decision. His decision is he felt that he needed to see the transcripts before he took on the case.
> STATE ATTORNEY: Okay. So you knew you had the right to appeal, obviously?
> PETITIONER: After my family got involved.
> STATE ATTORNEY: And did not appeal?
> PETITIONER: Correct.
> STATE ATTORNEY: You consulted other trial counsel and did not appeal?
> PETITIONER: Yes ma'am.

1 App. 64 (Cross-examination).

She also testified that she knew she had the right to appeal and did not appeal. 1 App. 64. She further testified that the trial judge advised her of the right to appeal. 1 App. 43. The record also includes trial counsel's testimony that he advised Petitioner of the right to appeal and advised her that he did not believe there were meritorious grounds for appeal. Petitioner was aware that a second attorney was also consulted about the possibility of appeal. The second attorney contacted the prosecutor about an appeal the day after Petitioner was sentenced.

It is ineffective assistance of counsel to fail to advise a client of the right to appeal after trial. Roe v. Flores-Ortega, 528 U.S. 470 (2000). "To waive a direct appeal, a defendant must make a knowing and intelligent decision not to pursue the appeal." Shepperd v. State, 357 S.C.

646, 651, 594 S.E.2d 462, 465 (2004). A defendant who does not knowingly and voluntarily waive his right to appeal must be granted appellate review pursuant to White v. State, 262 S.C. 110, 208 S.E.2d 35 (1974).

The State does not challenge the Court's finding that Petitioner was informed of her right to appeal. 1 App. 27. But the PCR court also stated "there is no showing that Petitioner did knowingly and voluntarily [waive] her right to appeal." 1 App. 27. This was error, because Petitioner clearly understood her right to appeal, was advised by trial counsel that she did not have any meritorious grounds for appeal, consulted with other counsel about an appeal and thereafter never informed counsel she wished to appeal. Petitioner then knowingly and voluntarily waived her right to appeal. Petitioner's actions show that she knew of and waived her right to appeal. See Peguero v. United States, 526 U.S. 23 (1999) (trial court's failure to inform defendant of right to appeal is harmless when defendant demonstrates full knowledge of the right to appeal).

This is not a situation where a defendant asked for an appeal but did so outside the time for taking an appeal because counsel failed to communicate the time frame for appeal. Also, this is not a situation where a defendant asked counsel to appeal but discovered after the time for appealing that counsel failed to file and serve a timely notice of appeal as requested. In this instance Petitioner never asked trial counsel or anyone else to take the necessary steps to secure appellate review on her behalf. The failure of Petitioner to request appeal, by itself, constitutes a knowing and intelligent waiver.

But Petitioner did more than fail to request an appeal. Petitioner received advice from her trial attorney about whether she should pursue an appeal and thereafter immediately

contacted a well-known law firm to discuss an appeal and ordered the transcript. It appears that Petitioner diligently sought advice respecting the viability of taking an appeal.

Respondent submits that Petitioner knowingly and voluntarily elected not to pursue an appeal. If she had not abandoned her claim, Petitioner would have testified that the notice of appeal had not been filed after she asked for an appeal. This lack of testimony cannot be interpreted any other way. Under the facts of this case, it is clear that Petitioner made a knowing and voluntary waiver of her right to appeal. As such, it was error for the lower court to hold that "there is no showing that Petitioner did knowingly and voluntarily waive her right to appeal." 1 App. 27. Accordingly, the State respectfully asks this court to reverse the finding that Petitioner is entitled to an appeal pursuant to White v. State.

II.

**The PCR court correctly ruled that Petitioner failed to prove prejudice because Petitioner did not bring the witness she claims her counsel failed to call or interview to the PCR hearing; and even if she had, trial counsel engaged in a valid trial strategy by choosing not to call a witness that could be highly damaging to Petitioner on the witness stand (Petitioner's Issue I.A.)**

Petitioner claims trial counsel was ineffective because he failed to investigate, interview, or call her co-defendant, Sean Kammerer, as a witness at her trial. The PCR Court found that Petitioner failed to show prejudice by not presenting Kammerer at the PCR hearing. 1 App. 21-23. Respondent submits the findings are supported by probative evidence.

At the hearing, Petitioner testified that she discussed both Kammerer and the statement he gave to law enforcement authorities with trial counsel. 1 App. 41. She stated that Kammerer had entered a guilty plea by the time her case proceeded to trial and that trial counsel should have called Kammerer as a witness to verify her version of the facts. Id. However, Petitioner

admitted that she and trial counsel discussed whether to use Kammerer as a witness and both agreed it would be best not to call him. 1 App. 59. Petitioner also admitted that she did not know what Kammerer's testimony would have been and that her allegation was speculative. 1 App. 60.

Trial counsel testified that Kammerer was represented by an attorney for the majority of the time trial counsel was preparing for Petitioner's trial. 1 App. 106-107. Trial counsel did not interview Kammerer but reviewed the statement Kammerer gave to law enforcement officers. 1 App. 95. Also, trial counsel testified that he discussed with Petitioner whether to call Kammerer as a defense witness at trial. Counsel made a strategic decision not to call Kammerer as a witness at trial and Petitioner agreed with counsel at the time. 1 App. 116. They made the decision because of the uncertainty about what Kammerer would say on the witness stand. Id. Counsel admitted that, even had trial counsel interviewed Kammerer, it would have still been uncertain what he would actually say if called as a defense witness. Id. Counsel acknowledged awareness that Kammerer was untruthful during his guilty plea proceedings and that Kammerer admitted the untruthfulness on the plea record. 1 App. 115-116. Ultimately, trial counsel agreed that he and Petitioner made a strategic decision not to call Kammerer as a witness. 1 App. 99. Instead, trial counsel was able to secure the last jury argument and used Kammerer's absence to Petitioner's advantage during the trial by contending to the jury that the State's failure to present Kammerer as a witness against Petitioner indicates Kammerer would not have testified favorably for the State. 1 App.95 - 96; 115. He also acknowledged that any regret in failing to interview and call Kammerer as a witness is based upon hindsight and the fact that his original trial strategy was unsuccessful. 1 App. 96 – 97; 118. Hindsight and speculation do not support a

claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. at 668.

**A. Petitioner cannot prove prejudice when she fails to bring the witness to the PCR hearing**

Petitioner alleges that trial counsel's failure to interview or summon Kammerer to trial prejudiced her. However, Petitioner also failed to present Kammerer as a witness at the PCR hearing. The PCR court determined, first, that Petitioner's failure to present Kammerer's testimony at the PCR hearing precluded it from making a determination as to any prejudice suffered by Petitioner. 1 App. 21-22. The court's ruling is correct and the issue must be denied.

Petitioner cannot show prejudice from trial counsel's failure to interview or call a witness if the witness does not testify at the PCR hearing. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Petitioner's mere speculation as to what a witness' testimony would have been cannot, by itself, satisfy the burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at a post-conviction relief hearing in order to establish prejudice from counsel's failure to call said witness at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

The case law is clear: failure to bring a witness to a PCR hearing means a failure to prove prejudice, as any prejudice resulting will be speculative. Petitioner cites no rule or case law to justify Kammerer's absence in this civil action and there is no showing that Petitioner ever attempted to secure Kammerer's presence. Petitioner failed to establish that Kammerer was an unavailable witness. See Rule 804, SCRE; see also State v. Doctor, 306 S.C. 527, 413 S.E.2d 36

(1992). Because the case law clearly states that Petitioner may not prove prejudice through speculation, the State asks this Court to deny certiorari.

**B. Trial counsel engaged in a valid trial strategy by not calling a witness that could be highly damaging to Petitioner on the witness stand**

Petitioner also alleges trial counsel did not make a valid strategic decision in choosing not to interview or call Kammerer. But the PCR court found that trial counsel articulated a valid strategic reason for not calling Kammerer as a defense witness based upon the uncertainty of what he might ultimately say when actually placed under oath on the witness stand. 1 App. 23. The PCR court's finding was supported by probative evidence.

Where trial counsel articulates valid reasons for employing a certain strategy, trial 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).

Trial counsel fully discussed this strategy with Petitioner before trial and Petitioner concurred. 1 App. 59, 99. There was a legitimate concern that counsel did not know what Petitioner would say once he took the witness stand. The concern was shared at the time by Petitioner. The concern should be highlighted by the fact Kammerer admitted to being untruthful in earlier court proceedings and was subject to examination by the State on that point. It is only now after conviction and the lack of success of the original trial strategy respecting Kammerer that Petitioner and trial counsel are second-guessing the strategy employed.

Moreover, no prejudice was shown because counsel was able to use other evidence in an effort to show Petitioner had no prior knowledge of Kammerer's intent to kill the victim without using Kammerer as a witness and the risk that might pose. 1 App. 101 – 102. Counsel also used

Kammerer's absence from trial to Petitioner's advantage in his closing argument references.

The PCR court correctly ruled that trial counsel articulated valid strategic reasons for not calling Kammerer as a defense witness and used other sources at trial to highlight the testimony he hoped Kammerer would offer and used Kammerer's absence from trial to Petitioner's advantage. Because Petitioner failed to show trial counsel was deficient in that choice of tactic or that she suffered the requisite prejudice, probative evidence supports the PCR court's findings.

As a separate matter, the State notes that Petitioner raises a separate issue in this section: Petitioner's alleged failure to object to a statement by Detective James Sturkie. (Pet. Cert. 14-15). To clarify, the testimony Petitioner complains of is on 2 App. 216:

> SOLICITOR: And why were you talking to her [Petitioner]?
> DETECTIVE: Because she had been brought in because she was said to have been the driver of the car where the victim was – and also **Sean Kammerer's girlfriend.**

(Emphasis added.) This issue has never been raised or ruled upon by either the trial or PCR courts before Petitioner's brief. Thus, this issue is procedurally barred from consideration. See Plyer v. State, 309 S.C. 408, 424 S.E.2d 477 (1992) (issue which was neither raised at the PCR hearing nor ruled upon by the PCR court is procedurally barred). Moreover, other testimony was offered from Dejuan Jenkins establishing that Petitioner was Kammerer's girlfriend.

III.

**The PCR court correctly ruled that trial counsel's decision to not call Amanda Fender was based on reasonable trial strategy, and its findings were supported by probative evidence and its finding that Fender lacked credibility (Petitioner's Issue I.B.)**

Petitioner also contends that trial counsel should have investigated, interviewed and called her sister, Amanda Sue Fender, as a defense witness at trial to corroborate Petitioner's

claim that she was not involved in a pre-arranged plot to bring the victim to a location to allow co-defendant Kammerer to murder the victim. She also contends that Fender could establish that Petitioner was over one mile from the scene when gunshots were fired. The PCR court found that Fender was not a credible witness, and supported its findings with probative evidence. 1 App. 23 – 24.

Petitioner testified that Fender, while thirty-three at the time of the hearing, functions as a sixteen-year-old. 1 App. 57. Petitioner acknowledged that she spoke with trial counsel before trial about the possibility of using Fender as a defense witness but ultimately decided not to do so after speaking with her family and based upon Fender's mental limitations or special needs. 1 App. 57-58. Petitioner stated that later during trial, she changed her mind and asked trial counsel about using Fender as a witness but was told by trial counsel that calling Fender would be too risky. 1 App. 42.

Trial counsel testified that he spoke with Petitioner's family and accepted the family's assessment of Fender's mental limitations and likely inability to help Petitioner's defense at trial. 1 App. 98. He fully discussed this strategy with Petitioner and she agreed. Trial counsel stated that Petitioner's family did not want him to call Fender as a witness. 1 App. 111. Fender's mother testified at the post-conviction relief hearing and acknowledged this decision. 1 App. 86-87. During trial, when Petitioner asked about using Fender as a witness, trial counsel advised Petitioner that it would be too risky to use Fender and the information Fender could provide was available from other sources. 1 App. 42. Petitioner's statement establishing the matters about which Fender would have corroborated was admitted as evidence at trial. 2 App. 342-344 (Court's Exh. 2). Counsel expressed concern that Fender would not favorably withstand

examination in court and acknowledged at the evidentiary hearing that the trial prosecutor would "eat her up." 1 App. 98; 115. Counsel stated that he secured the strategic benefit of the final closing argument to the jury by not offering Fender or other witnesses to testify and explained that advantage to Petitioner. 1 App. 115.

The PCR court agreed and noted that, based upon the initial discussions with Petitioner and her family about Fender, trial counsel informed the jury that Fender would not testify at trial and acknowledged Fender's mental impairment. 1 App. 24-25

**A. Trial counsel's strategic decision not to call Fender was based on a request from the family, concerns about Fender's mental limitations and her lack of credibility**

Where trial counsel articulates valid reasons for employing a certain strategy, trial 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 PCR court found that trial counsel's decision not to call Fender as a witness was based upon a reasonable, valid, trial strategy that respected familial concerns about Fender's abilities as a witness. 1 App. 24-25. Petitioner herself initially dictated this strategy. Counsel also shared these concerns and, after observing Fender at the post-conviction relief hearing, acknowledged that the trial prosecutor would "eat [Fender]up" had she been presented as a witness at trial. Moreover, evidence that Petitioner did not know Kammerer had a gun and planned to use it on the victim was presented to the jury through Petitioner's statement to law enforcement officers, and the testimony of Mr. Jenkins.

Moreover, Petitioner failed to show that trial counsel was deficient in the decision not to call Fender. After hearing Fender's testimony at the post-conviction relief hearing, the PCR

court found that Fender offered little to alter the outcome of the trial in view of her relationship to Petitioner and lacked credibility. Id. Fender conceded at the post-conviction relief hearing that she did not know what was said between Petitioner and Kammerer in the car, 1 App. 76-77, and the PCR court found that Fender's testimony about Petitioner's location when gunshots were fired was not credible. 1 App. 24-25. The PCR court's decision is based upon probative evidence and its finding respecting Fender's credibility must be accorded great deference. Goins v. State, 397 S.C. 568, 726 S.E. 2d 1(2012). This Court should deny certiorari as to this issue.

IV.

**The PCR court correctly ruled that trial counsel's decision not to cross-examine Jessica Hans did not constitute ineffective assistance of counsel because Petitioner failed to present Hans as a witness at the PCR hearing, and when the decision not to engage in cross-examination was based on reasonable trial strategy when all the important testimony was elicited on direct examination. (Petitioner's Issue II)**

Petitioner also alleges trial counsel was ineffective for failing to cross-examine State's witness Jessica Hans to establish that Hans did not see Petitioner after she heard gunshots being fired at the scene. Again, Petitioner did not present Hans at the post-conviction relief hearing. Without a justification for her failure to call Hans at the hearing, Petitioner cannot prove prejudice, as her argument only speculates about the effects of cross-examination.

At trial, Hans testified that she heard several loud pops while in the parking lot. 2 App. 195. When she looked in the direction of the pops, Jessica saw a person (presumably Kammerer) pointing a gun at the ground and firing. Id. Hans saw another person (presumably Kevin) running between two buildings. Id. After the shots, Jessica saw Kammerer disappear behind the side of the building. Id. Thirty seconds later, a Jeep Cherokee pulled out from the same side of the building and exited the parking lot. 2 App. 196. Jessica also noted that the delivery truck

Petitioner mentioned on her phone had recently pulled in to the parking lot. 2 App. 197. She did not recall seeing any other vehicles. Id.

Trial counsel testified that Hans did not have anything to offer on cross-examination because the information that was beneficial to Petitioner was elicited on direct examination. 1 App. 103-104.

**A. Petitioner cannot prove prejudice when she fails to call Hans to the PCR hearing**

Petitioner cannot show prejudice from trial counsel's failure to interview or call a witness if the witness does not testify at the PCR hearing. Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), cert. denied, 499 U.S. 982 (1991). Petitioner's mere speculation as to what a witness' testimony would have been cannot, by itself, satisfy the burden of showing prejudice. Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Petitioner must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at a post-conviction relief hearing in order to establish prejudice from counsel's failure to call said witness at trial. Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

Petitioner failed to bring Jessica Hans to the PCR hearing, and has offered no reason. Accordingly, Petitioner cannot prove prejudice from mere speculation.

**B. Trial counsel was effective when cross-examination would only bolster testimony already elicited on direct appeal**

The nature and scope of cross-examination is inherently a matter of trial tactics. United States v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987). "[A] defendant has a 'burden of supplying sufficiently precise information,' of the evidence that would have been obtained had

his trial counsel undertaken the desired investigation and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995).

The PCR court found trial counsel engaged a valid and reasonable trial strategy in choosing not to cross-examine Hans when the information favorable to Petitioner was elicited from Hans on direct examination. 1 App. 26. Petitioner failed to establish that Hans could have offered any information favorable to the defense other than what was established in her direct examination. Based upon the evidence presented at trial and the danger cross-examination can sometimes pose, conducting cross-examination of Hans to have her repeat previously-established testimony would serve no purpose and could have resulted in unfavorable testimony. The PCR court found that trial counsel's strategy respecting further examination of Hans was reasonable and did not constitute ineffective assistance. 1 App. 26. Petitioner failed to establish a reasonable probability that the outcome of the trial would have been different had trial counsel cross-examined Hans. Instead, Petitioner merely speculates about the effect. Such speculation cannot prove prejudice.

## CONCLUSION

Based upon the arguments presented herein, Respondent submits the PCR court erred in granting Petitioner appellate review pursuant to White v. State but properly denied all other claims.

Respectfully submitted,

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Attorney General

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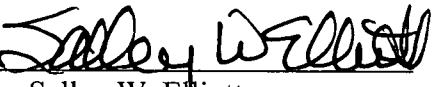
Senior Assistant Deputy Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

December 9, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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On Writ of Certiorari to the Court of Appeals
Appeal from Dorchester County
Deandrea G. Benjamin, Circuit Court Judge
Appellate Case No. 2012-212858

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TIFFANY SANDERS,

Petitioner,

vs.

THE STATE,

Respondent.

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**PROOF OF SERVICE**

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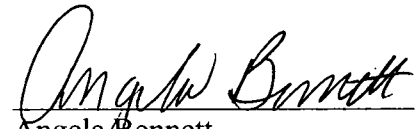
I, Angela Bennett, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Dale T. Cobb, Esquire
Thomas R. Goldstein, Esquire
Belk, Cobb, Infinger & Goldstein, P.A.
Post Office Box 711121
N. Charleston, SC 29415-1121

I further certify that all parties required by Rule to be served have been served.
This 9th day of December, 2013.



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