

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000928
Circuit Court Case No. 2011-CP-32-2954

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S.C. Supreme Court

SAMUEL HARMON, #328335,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI

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INDEX

INDEX.....1

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS5

ARGUMENT.....8

Standard of Review.....8

Issues I and II: Gang References in Testimony and Closing Argument.....8

Issue III: The Solicitor Made Himself a Witness17

CONCLUSION.....24

QUESTIONS PRESENTED

I.

Whether the lower court improperly found that defense counsel was not ineffective for failing to object to testimony that the Petitioner belonged to a violent gang?

II.

Whether the lower court improperly found that defense counsel was not ineffective for failing to object to portions of the Solicitor's closing argument where the Solicitor argued that the Petitioner committed the crimes because he was a gang member?

III.

Whether the lower court improperly found that defense counsel was not ineffective for failing to object to the Solicitor making himself a witness during his cross-examination of a defense witness?

STATEMENT OF THE CASE

The Petitioner, Samuel Harmon, was indicted in Lexington County for murder, assault and battery with intent to kill, assault with intent to kill, and possession of a weapon during the commission of a violent crime. On May 5-7, 2008, the Petitioner proceeded to trial by jury on the charges. He was represented at this proceeding by Wayne Floyd, Esquire. At the conclusion of the trial, the Petitioner was found guilty as charged on all offenses. The Honorable R. Ferrell Cothran, presiding circuit judge, sentenced the Petitioner to concurrent sentences of life imprisonment for the murder conviction, ten years' imprisonment for the AWIK conviction, and five years' imprisonment for the firearm conviction, and to a consecutive fifteen-year sentence for the ABWIK conviction.

The Petitioner timely appealed his convictions and sentences to the South Carolina Court of Appeals. Robert M. Dudek, Chief Appellate Defender with the South Carolina Office of Appellate Defense, represented the Petitioner on appeal. In an unpublished opinion filed February 24, 2011, the Court of Appeals affirmed the Petitioner's convictions and sentences State v. Harmon, Op. No. 2011-UP-080 (S.C.Ct.App. filed Feb. 24, 2011). The Remittitur was issued on May 27, 2011.

On August 4, 2011, the Petitioner filed an Application for Post-Conviction Relief with the Lexington County Clerk of Court, which was subsequently amended. The State served its Return on April 5, 2012. An evidentiary hearing into the matter was convened on January 31, 2013, before the Honorable R. Lawton McIntosh, presiding circuit judge. On March 28, 2013, the PCR court filed an Order of Dismissal which denied relief on all of the Petitioner's claims. On April 29, 2013, the Petitioner timely served a Notice of Appeal indicating his intent to appeal

the order issued by Judge McIntosh in this case. The Notice of Appeal was filed with this Court on April 30, 2013.

Notice of appeal was timely served and filed. The Petitioner now seeks a writ of certiorari.

STATEMENT OF FACTS

On July 15, 2006, two groups of individuals got into a verbal argument while at the U.S. Highway One Flea Market located in Lexington, South Carolina. The first group of individuals included the victim, Denise Boykin, and her friends Jamar Porcher, Richard "Scooter" Geiger, Jonathan Washington, Tasha Jones, and Raymond "Trey" Brown. See App. p. 241, lines 17-24. The second group of individuals included the Petitioner's brother Brandon Harmon ("Brandon"), Sherman Davis, and George Mack, all of whom were co-defendants in this case. See App. p. 49, line 14-p. 50, line 10. This argument eventually dissipated and both groups went their separate ways.

After leaving the U.S. Highway One Flea Market, Brandon, Davis, and Mack decided that they were going to return to fight the other group of individuals. App. p. 52, lines 21-25. They subsequently picked up another co-defendant, James Keitt, at his home, and came back to the U.S. Highway One Flea Market. App. p. 53, lines 7-14. Brandon also called the Petitioner and told him about the argument; the Petitioner responded that he would meet them at the flea market. App. p. 92, line 15-p. 93, line 2. The Petitioner rode to the U.S. Highway One Flea Market with a final co-defendant, Alex Haigler, and met up with Brandon, Davis, Mack, and Keitt. App. p. 445, line 1-p. 446, line 14. However, they were unable to locate the victim's group, so they decided to leave.

As Brandon, Davis, Mack, and Keitt traveled down Highway 1 in Mack's Crown Victoria, Brandon spotted Geiger at a second flea market, the Barnyard Flea Market. App. p. 93, line 15-p. 94, line 6. Mack and Haigler, who was driving a Chevrolet Cavalier, pulled into the Barnyard's parking lot. The argument between the two groups then resumed. According to almost all of the witnesses present, Mack went to the trunk of his vehicle and retrieved an assault

rifle.¹ At this point in time, the victim's group tried to leave the flea market. According to the Petitioner's co-defendants, the Petitioner obtained possession of the assault rifle and fired several times at the vehicles as they left. See App. p. 56, line 24-p. 57, line 15 (Davis); p. 97, lines 4-23 (Brandon); p. 125, lines 4-15 (Haigler); p. 151, line 5-p. 152, line 6 (Keitt); p. 491, lines 10-14 (Mack).² A number of bullets struck the victim's vehicle, killing her and wounding Brown. Her vehicle traveled across Highway 1, went into a gas station, and collided with a vehicle there. App. pp. 225-228. Davis, Brandon, and Keitt testified that the Petitioner put the rifle back into the trunk of Mack's vehicle, and that all six individuals left in the vehicles they arrived in. App. p. 58, lines 3-11; p. 98, lines 8-13; p. 154 lines 3-9.

Marco Harper, an individual who was traveling down Highway 1 during the altercation, heard several shots, turned around, saw a male put something in the trunk of the Crown Victoria, and saw that individual get into the Crown Victoria. App. p. 298, line 19-p. 299, line 2. He then witnessed the Crown Victoria leave the flea market, so he decided to follow the vehicle. App. p. 299, lines 7-17. Although he eventually lost sight of the vehicle, he was able to provide the police with its license tag number. App. pp. 302-304.

After losing Harper, Brandon, Davis, Mack, and Keitt decided to hide the assault rifle, and another gun in Keitt's possession, in the woods near a church somewhere in Lexington. App. p. 154, line 13-p. 155, line 23. They then abandoned their vehicle and the Petitioner, Haigler, and another individual known as "LT" picked them up. App. p. 154, lines 1-22. Keitt and the Petitioner then went to a hotel in Orangeburg; they were there arrested the following morning. App. pp. 160-163.

¹ Brandon testified that Keitt got the assault rifle out of the trunk. App. p. 96, lines 6-24. Mack's statement also identified Keitt as the individual who retrieved the rifle. App. p. 491, lines 1-9.

² As will be explained in greater detail below, Mack did not testify at trial, but his statement was read to the jury by Investigator Eric Russell.

Other than the Petitioner's co-defendants, the only other witness to identify the Petitioner as the shooter was Porcher. See App. pp. 184-186. Porcher, however, initially identified Brandon as the shooter and only changed his identification to the Petitioner when the police told him that they weren't pleased with his identification of Brandon as the shooter. App. p. 197, line 25-p. 198, line 21. Washington and Jones testified that the individual who fired the assault rifle was not present during the first altercation. App. p. 235, lines 10-15; p. 264, lines 7-8. Brown testified that the individual who was holding the gun immediately prior to the shots being fired had braids.³ App. p. 278, lines 6-15. No forensic evidence linked the Petitioner to the crime.

The Petitioner testified that he saw Mack get the assault rifle out of the trunk but that he put it on the ground. App. p. 449, lines 13-20. He then saw Keitt pick it up from the ground. App. p. 450, lines 1-2. As he looked for his brother, he heard several gunshots and went to the ground. App. p. 450, lines 2-8. He then left the scene in Haigler's vehicle. App. p. 450, lines 12-17.

³ The Petitioner was described as having a "low haircut" whereas Mack had braids in his hair. App. p. 107, line 23-p. 108, line 8.

ARGUMENT

Standard of Review

The Sixth and Fourteenth Amendments to the United States Constitution guarantee every criminal defendant the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove a claim of ineffective assistance of trial counsel, the moving party must show that trial counsel (1) failed to provide him with reasonable professional assistance of counsel under the prevailing standards for attorneys representing clients in criminal matters; and (2) that he was prejudiced by the errors and omissions of counsel such that he was deprived of a fair trial. Id. In other words, the Petitioner must show that but for counsel's errors and omissions, there is a reasonable probability that the result at trial would have been different. Id.

On appeal, a PCR court's findings will be upheld if there is any evidence of probative value supporting them. Cherry v. State, 300 S.C. 155, 386 S.E.2d 624 (1989). If no probative evidence is found, the reviewing court will reverse the lower court's findings. Pierce v. State, 338 S.C. 139, 526 S.E.2d 222 (2000).

- I. The PCR court erred in finding that defense counsel was not ineffective for failing to object to irrelevant and prejudicial testimony that the Petitioner belonged to a gang.**
- II. The PCR court erred in finding that defense counsel was not ineffective for failing to object to the portions of the Solicitor's closing argument where the Solicitor argued that the Petitioner was the shooter because he was a gang member.**

A. How the Issues Arose Below

During the Petitioner's trial, several witnesses made references to gangs; specifically, Davis and Geiger testified that Brandon told Geiger that the Petitioner was a gang, identified by

Geiger as “G-Pan.” App. p. 51, lines 5-12; p. 244, lines 3-12; see also p. 178, lines 9-25; p. 491, lines 3-7. The gang references were also a focal point of the prosecutor’s cross-examination of the Petitioner:

Q: And you weren’t the one that shot at the ground and then shot bullets all in Denise’s car?

A: No, ma’am.

Q: That wasn’t you?

A: No, ma’am.

Q: And you weren’t trying to impress your older friends?

A: No, ma’am.

Q: *Or get some kind of rank in your gang?*

A: I’m not in a gang, no, ma’am.

Q: I?

A: I’m not in a gang, no, ma’am.

Q: *You’re not in GPan?*

A: Yes, I’m in Gpan, but it’s not a gang.

Q: Okay. You’re not in Broad River?

A: Broad River is a road, not a gang.

App. p. 460, lines 9-21 (emphasis added). Following this cross-examination, defense counsel introduced evidence that “G-Pan” was a music group, not a gang. App. p. 463, lines 1-8. No gang expert testified at trial, and the State did not argue that the killing was related to an argument between two rival gangs.

Instead, during closing argument, the Solicitor drove home the point that the Petitioner was a member of a gang. See App. p. 520, lines 6-10; p. 532, line 24-p. 533, line 3. He also specifically argued that the Petitioner committed the murder because he was a member of a gang:

I submit to you it's malicious, it's mean, and it's a total disregard for human life because that's what he did. He doesn't care about the law. Not him. He's Gpan.

App. p. 524, lines 2-5.

Defense counsel did not object to any of the gang references—either presented during testimony or during closing argument—at trial. During the PCR hearing, defense counsel unequivocally testified that he did not consider making a motion to exclude the gang references. App. p. 707, lines 18-25. His only explanation for not objecting was his belief that “I thought it was going to come out.” App. p. 708, line 9. He further testified that “if I could have kept it out and I didn't, then I guess that would be ineffective.” App. p. 708, lines 12-13. Finally, he testified that he did not have any strategic reason for not objecting to the testimony or the closing argument. App. p. 710, lines 5-8; p. 711, lines 20-24.

The PCR court denied relief on this issue, finding comprehensively that there was overwhelming evidence of guilt due to the identification of the Petitioner as the shooter by his co-defendants and the identification of an individual who was not present at the first altercation firing the assault rifle by three other State witnesses. App. p. 776. The PCR court further found that

[T]he limited references to gang activity during the trial did not have any effect on the outcome of that trial and thus trial counsel was not deficient in not objecting or seeking a motion in limine. This Court notes there was only one witness who testified the Applicant was in gang. The other references were to general gang activity that occurred during the initial altercation – an altercation where the Applicant was not present. Further, trial counsel stated he made a strategic decision to combat this issue by arguing Gpan

was not a gang and the Applicant was able to explain the nature of Gpan and even identified on re-direct a CD produced by that group. ... This Court finds any references to gang activity did not prejudice the outcome of the trial.

App. pp. 777-778. The Petitioner now contends that these findings were erroneous.

B. Discussion

The PCR court concluded that defense counsel was not deficient for failing to object to the gang references because he made a strategic decision to combat the references through the Petitioner's testimony. The PCR court also concluded that the Petitioner was not prejudiced by defense counsel's failure because the evidence of guilt was overwhelming and the references to the Petitioner's gang activity were "limited." App. p. 777. The Petitioner respectfully contends that there is no probative evidence to support any of these conclusions because: (1) the gang references were clearly objectionable; (2) the record directly contradicts the strategic decision finding as defense counsel testified that he did not make a strategic decision to allow the gang references in; and (3) the Petitioner was unmistakably prejudiced by defense counsel's failure to object to the gang references. Each contention will be addressed in turn.

1. The Gang References Were Objectionable

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Irrelevant evidence is inadmissible. Rule 402, SCRE. However, even relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. Finally, "[e]vidence of other crimes, wrongs, or acts is

not admissible to prove the character of a person in order to show action in conformity therewith.” Rule 404(b), SCRE.

References to an accused’s status as a gang member, without sufficient evidence to tie the crime to the involvement in the gang, have been universally condemned by state and federal courts. See People v. Williams, 16 Cal.4th 153, 193, 940 P.2d 710, 738 (1997) (“[A]dmission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged”); United States v. Ozuna, 674 F.3d 677, 681 (7th Cir. 2012) (“There is no question that evidence of a defendant's gang affiliation is potentially prejudicial and inflammatory, as it poses the risk that the jury will associate gang membership with a propensity for committing crimes and find the defendant guilty by association”); United States v. Street, 548 F.3d 618, 632 (8th Cir. 2008) (finding reversible error in admitting “gang membership ... to show criminal propensity or otherwise paint a defendant guilty through mere association”); Kennedy v. Lockyer, 379 F.3d 1041, 1056 (9th Cir. 2004) (“[T]he use of gang membership evidence to imply ‘guilt by association’ is impermissible and prejudicial”); State v. Barnes, 685 So.2d 1148, 1155 (La.App. 2nd Cir. 1996) (“[T]here is an inherent connotation that a gang member is involved in criminal activity. The fact that the defendant was a gang member could have, and probably did, create an image of a bad person in the eyes of the jury”).

“[W]hile [the prosecutor] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.” Berger v. United States, 295 U.S. 78, 88 (1935). The critical inquiry in evaluating the propriety of a prosecutor’s closing argument is “whether the prosecutors’ comments so infected the trial with unfairness as

to make the resulting a conviction a denial of due process.” Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. Dechristoforo, 416 U.S. 637, 643 (1974)).

The Petitioner contends that evidence that the Petitioner belonged to a gang was irrelevant and extremely prejudicial, and that it would have been excluded had defense counsel made a proper objection to its introduction. Aside from baseless accusations made during cross-examination of the Petitioner and during closing argument, there was no evidence presented that the killing was in any way related to the Petitioner’s membership in a gang which would make the gang evidence relevant. Cf. State v. Liverman, 398 S.C. 130, 135, 727 S.E.2d 422, 424 (2012) (footnote 2) (“The evidence indicates that Petitioner and several other witnesses were members of the Dead Folk Nation gang and that the incidents leading up to and through the shooting were related to an altercation with members of a rival gang, the Bloods”). Consequently, the gang references were unquestionably objectionable, and defense counsel was deficient for failing to object to their introduction. Defense counsel conceded as much during his testimony at the PCR hearing. See App. p. 708, lines 12-13; see also Martinez v. State, 304 S.C. 39, 403 S.E.2d 113 (1991) (finding counsel’s admission of ineffectiveness relevant).

2. Defense Counsel Had no Strategic Reason for Admitting the Gang References

The PCR court does not rely on the admissibility of the gang references to find defense counsel’s performance constitutionally sufficient; instead, the PCR court concluded that defense counsel articulated a valid strategy to combat the gang references by admitting evidence that Gpan referred to a music group, not a gang. App. pp. 777-778. “Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.” Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000). “The presumption of adequate representation based on a valid trial strategy,” however, “disappears

when trial counsel acknowledge[s] there was **no** trial strategy.” Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010) (emphasis in original).

The PCR court’s findings are devoid of any factual support because defense counsel conceded that he made no strategic decision to permit the gang references to be introduced at trial:

Q: And, again, if the record reflects you did not object to those [gang] references, you don’t have any strategic reason for not objecting to that?

A: No.

App. p. 710, lines 5-8. Defense counsel gave the same answer when questioned about the references to gangs during the Solicitor’s closing argument:

Q: ... Did you consider objecting to the Solicitor’s closing argument at [App. p. 524, lines 2-5] and arguing that it’s impermissible to argue that simply because he’s in a gang, he committed this offense?

A: I didn’t object at that time.

Q: And did you consider making any objections – *did you have any strategic reason for not making an objection?*

A: *No.*

App. p. 710, line 22-p. 711, line 4 (emphasis added); see also p. 711, lines 17-24 (articulating no strategic reason for not objecting to other gang references in the closing argument). Given defense counsel’s repeated statements that he had no trial strategy in mind when he did not object to the introduction of the gang references, or to the arguments made by the Solicitor in his closing argument, the PCR court’s conclusion that defense counsel actually articulated a valid trial strategy are clearly erroneous.

Assuming, *arguendo*, that defense counsel did have a strategic reason for allowing the gang references into evidence, such a strategy was not objectively reasonable. See Ingle v. State, 348 S.C. 467, 474, 560 S.E.2d 401, 405 (2002) (“[W]e find counsel’s articulated strategy for eliciting this testimony was objectively unreasonable”). It is important to note the precise strategy as found by the PCR court: defense counsel *permitted* the gang references to be admitted so that he could introduce a CD with Gpan on it during the Petitioner’s testimony to diminish the *harm* of the gang references. Such a strategy, particularly when the alternative is to exclude the references altogether such that the explanation through the CD would not be needed, cannot be objectively reasonable. Accordingly, the PCR court’s conclusion that defense counsel articulated a valid trial strategy, thus preventing a finding of deficient conduct, is unsupported by any probative evidence.

3. *Defense Counsel’s Deficient Conduct Prejudiced the Petitioner*

The Petitioner concedes, as he did below, see App. p. 740, lines 24-25, that there is evidence by which a jury could have concluded that he was guilty. However, there is just as much evidence by which a jury could have concluded that he was not guilty. The five co-defendants, each charged with murder, who identified the Petitioner as the shooter obviously had a vested interest in ensuring that the Petitioner was convicted for the crime. The only other witness to identify the Petitioner as the shooter previously identified Brandon as the shooter before changing his identification because the police didn’t like his identification of Brandon. Trey Brown testified that an individual who had braids—*i.e.*, not the Petitioner—fired the assault rifle. Marco Harper testified that the individual who had the rifle immediately after the shots were fired put the gun into trunk of the Crown Victoria and get into the Crown Victoria—*i.e.*, not the Petitioner—when he left the scene. The Petitioner testified that he was not the shooter. Two

other witnesses—Washington and Jones—only limited the possible shooters to the Petitioner, Keitt, and Haigler. Finally, no forensic evidence connected the Petitioner to the scene or the rifle. Therefore, there were at least three witnesses who identified another individual as the shooter at trial, two witnesses who narrowed the shooter to three possible perpetrators, and another witness who identified Brandon as the shooter before modifying his identification. Under these circumstances, there simply is not overwhelming evidence that the Petitioner was the unquestioned shooter, and the PCR court's conclusions to the contrary are unsupported by the record.

The purpose of the gang references, then, was to overwhelm the jury's rational faculties and inflame their passions such that they would ignore the evidence pointing away from the Petitioner as the shooter. In this case, two witnesses recounted a conversation where Brandon told Geiger that the Petitioner was a member of a gang.⁴ This testimony was seized upon by the State during its cross-examination of the Petitioner to explicitly confront him with an allegation that he committed the homicide to *gain rank in the gang*. Furthermore, the Solicitor unabashedly argued during closing argument that the Petitioner was a member of a gang and that he acted with malice in killing the victim because *he was a gang member*:

I submit to you it's malicious, it's mean, and it's a total disregard for human life because that's what he did. He doesn't care about the law. Not him. He's Gpan.

App. p. 524, lines 2-5. These types of irrelevant, unfair, and prejudicial inferences are precisely what Rules 401 through 404, SCRE, are designed to protect against. Defense counsel's responsibility was to zealously guard the Petitioner from his case being decided on such an improper basis, and his failure to do so clearly prejudiced the Petitioner. See generally Holman

⁴ The PCR court stated that only one witness did so. This finding is factually incorrect, as both Davis and Geiger testified to this conversation. App. p. 51, lines 5-12; p. 244, lines 3-12.

v. State, 381 S.C. 491, 492, 674 S.E.2d 171, 172 (2009) (finding the introduction of “wholly irrelevant and prejudicial evidence” in the form of an unrelated firearm was prejudicial and warranted a new trial); State v. Day, 341 S.C. 410, 423, 535 S.E.2d 431, 438 (2000) (finding repeated references to the defendant by his nickname “outlaw” during the prosecutor’s closing argument, implying that his nickname was “someone who was accustomed to deluding law enforcement, and someone who was proud of his notoriety as an outlaw” warranted a new trial). It is highly likely that the jury found that the Petitioner, more than the other possible suspects, fired the rifle because he was a gang, as the Solicitor implored the jury to do. Accordingly, the Petitioner respectfully asserts that he has met his burden of proof with regard to these issues, and that this Court should grant a new trial.

III. The PCR court erred in finding that defense counsel was not ineffective for failing to object to Solicitor Myers making himself a witness during his cross-examination of Hope Frick.

A. How the Issue Arose Below

George Mack was the only co-defendant who did not testify at trial. Following the testimony of the Petitioner and his employer, who was a character witness, defense counsel sought to introduce evidence that Mack, like his co-defendants, had been permitted to plead guilty to accessory after the fact to murder. App. p. 467, line 10-p. 468, line 10. The State argued that they should be able to admit Mack’s statement into evidence, which defense counsel acceded to in order to admit Mack’s disposition records. See App. pp. 474-477. Mack’s statement accused the Petitioner of taking the gun from Keitt, who had gotten it out of the trunk, and firing it at the victim’s vehicle. App. p. 491, lines 1-14.

To introduce the disposition records into evidence, defense counsel called Hope Frick, supervisor of the criminal records division of the Lexington County Clerk of Court’s Office, as a

witness. App. pp. 478-481. The Solicitor then cross-examined Frick about his powers and duties in relation to Mack and criminal cases in general:

Q: Can *I* try somebody in this court based on a magistrate's warrant?

A: No, sir.

Q: Has to go to the Grand Jury?

A: Yes, sir. The Grand Jury has to act on it for trial.

...

Q: And the Grand Jury indicted George Mack for accessory after the fact of murder, felony?

A: Yes, sir.

Q: And *I* can't try anybody unless the Grand Jury indicts them for a crime; can *I*?

A: Correct. Is has to be true billed by the Grand Jury—

Q: And the Grand Jury never issued a murder indictment for George Mack; did they?

A: No, sir.

Q: Now, on the second page, that sentencing sheet.

A: Yes, sir.

Q: That's got up there that George Mack pled guilty as indicted by the Grand Jury; didn't he?

A: Yes, sir.

Q: And it's got on there *the State didn't make any negotiations or recommendations.*

A: That is correct.

Q: It was solely up to the Judge whether to give him zero to 15 years.

A: Yes, sir.

Q: *So the State didn't make any promises to George Mack.*

A: Not that—nothing negotiated on here.

Q: And this is signed by the Judge.

A: Yes, sir.

Q: *So we didn't have anything to do with the sentencing.*

A: No, sir.

App. p. 481, line 20-p. 484, line 18 (emphasis added). The only objection defense counsel levied to this line of questioning was an objection that Frick was not present during the grand jury proceedings; that objection was overruled. See App. p. 483, lines 6-12.

At the PCR hearing, the Petitioner argued that defense counsel was ineffective for failing to object on the basis that the Solicitor made himself a witness through his cross-examination of Frick. Defense counsel admitted that he did not make an objection and that, after having a chance to review the transcript, that “[i]t’s more apparent looking at it” that the Solicitor made himself a witness during Frick’s cross-examination. App. p. 722, lines 12-14. Defense counsel also acknowledged that the Solicitor was the individual who negotiated the plea deal with Mack, and that it “could have been an effective approach” to argue that the Solicitor needed to be cross-examined about his negotiations with Mack. App. p. 722, line 18-p. 723, line 19; see also App. p. 763 (Mack’s sentencing sheet). Finally, defense counsel testified that the Solicitor’s cross-examination of Frick may have prejudiced the Petitioner:

Q: And the last question is, the kind of back and forth between Solicitor Myers and the Clerk of the Court towards the end of the trial, do you believe that Mr. Myers’ questions of that clerk affected the outcome of the trial?

A: Well, that's hard to say. If the jury believed the questioning, I think they were certainly given the wrong impression of the power of the Solicitor's office and the process, and they may have been given the wrong impression that it was some type of independent, unbiased decision that these other people were not charged with the shooting because they could have been, in any event, you know, even though they didn't pull the trigger.

So, yes, it—I can't say it did affect it, but it may have.

App. p. 729, lines 9-22 (emphasis added).

The PCR court denied relief on this issue, concluding:

Contrary to the Applicant's assertion, this Court does not find the Solicitor effectively made himself a witness during Frick's cross-examination. Rather, as noted supra in Section C of this order, it is clear the parties agreed to have both Mack's sentencing sheet introduced into evidence. Trial counsel stated at the time this was part of his defense strategy. (Trial transcript, p.469; p.471). Again, this Court finds this was a valid strategy. See Roseboro v. State, 317 S.C. at 294, 454 S.E.2d at 313. In any event, this Court finds the Solicitor's comments were not made from a personal angle. Instead the Solicitor was merely asking if the Solicitor's Office – as a whole – do such things as pursue such cases without an indictment or have impact on sentencing in a case without a negotiation or recommendation. As the Solicitor did not make himself a witness in this case, this Court finds the Applicant's reliance on State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) is misplaced. Further, trial counsel was not deficient in not moving for a mistrial during Frick's testimony. Based on the overwhelming evidence of the Applicant's guilt, trial counsel would not have been able to demonstrate any prejudice.

App. pp. 781-782. The Petitioner now contends that these findings were erroneous.

B. Discussion

The PCR court concluded that defense counsel's performance was not deficient because the Solicitor did not make himself a witness during his cross-examination of Frick. The PCR court also concluded that the Petitioner was not prejudiced by defense counsel's conduct because

the evidence against him was overwhelming. The Petitioner contends that each of these findings are unsupported by the record. Each contention will be addressed in turn.

1. The Solicitor Became a Witness Through His Cross-Examination of Frick

The Solicitor in this case was Donald V. Myers, Esquire. His signature appears on Mack's sentencing sheet as the Solicitor who prosecuted the case, and negotiated the plea agreement, for the State. App. p. 763. During his cross-examination of Frick, the Solicitor had Frick testify that he had no power to prosecute Mack for murder and had no involvement in the plea negotiations with Mack. That cross-examination was outright farcical. The Solicitor has the power to control what indictments are presented to the grand jury. See S.C. Code Ann. §14-9-210; Rule 3(c), SCRCrimP. Furthermore, as the prosecuting attorney, and as the Eleventh Circuit Solicitor, Solicitor Myers had the final authority on what plea agreement to reach with Mack. See In re Richland County Magistrate's Court, 389 S.C. 408, 411, 699 S.E.2d 161, 153 (2010) ("In carrying out his duty, the prosecutor independently decides whether to prosecute, decides what evidence to submit to the court, and negotiates the State's position in plea bargaining. ... The South Carolina Constitution, South Carolina statutes and case law place the unfettered discretion to prosecute solely in the prosecutor's hands").

Consequently, the *only* individual who could reasonably answer the following questions, posed to Frick by the Solicitor, was the Solicitor himself:

Q: And I can't try anybody unless the Grand Jury indicts them for a crime; can I?

Q: And the Grand Jury never issued a murder indictment for George Mack; did they?

Q: And it's got on [Mack's sentencing sheet that] the State didn't make any negotiations or recommendations.

Q: So the State didn't make any promises to George Mack.

Q: So we didn't have anything to do with the sentencing.

App. p. 483, lines 20-21; lines 24-25; p. 484, lines 7-8; line 13; line 17. By asking Frick questions about what was quintessentially his prosecuting authority and discretion, the Solicitor made himself a witness in this case. See State v. Sierra, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) (concluding that an assistant solicitor who impeached a witness with a statement made to the solicitor became a witness at the trial). Since the Petitioner was unable to cross-examine Solicitor Myers, his Confrontation Clause rights were violated by the Solicitor's cross-examination of Frick. Accordingly, defense counsel's admitted failure to object to the Solicitor's questioning constitutes deficient conduct. See App. p. 722, line 18-p. 723, line 19.

Finally, the Petitioner respectfully submits that the PCR court's conclusion that the Solicitor did not make himself a witness is unsupported by the record. The PCR court reached its conclusion by finding that the Solicitor "was merely asking if the Solicitor's Office – as a whole – do such things as pursue such cases without an indictment or have impact on sentencing in a case without a negotiation or recommendation." App. p. 782. This is simply inaccurate. The vast majority of the Solicitor's questions to Frick on pages 483 through 484 of the Appendix were not about the general powers of the Solicitor but were specific questions about what specific prosecutorial actions were taken during the prosecution of, and plea negotiations in, Mack's case. It is impossible to reconcile the PCR court's reading of the record with questions like "the State didn't make any promises to Mack" and "we didn't have anything to do with the sentencing." This Court should reverse the PCR court's findings.

2. Defense Counsel's Deficient Conduct Prejudiced the Petitioner

The PCR court concluded that the Petitioner was not prejudiced by defense counsel's deficient performance solely because of the overwhelming evidence of guilt. As was described

above, the evidence against the Petitioner was not overwhelming. All of the Petitioner's co-defendants identified the Petitioner as the shooter, but three other witnesses, including the Petitioner, identified other individuals as the shooter. Moreover, Porcher identified Brandon as the shooter immediately after the incident. Given that no forensic evidence tied the Petitioner to the crime, the evidence cannot reasonably be said to be overwhelming.

Defense counsel's deficient performance clearly prejudiced the Petitioner. All of the Petitioner's other co-defendants were thoroughly cross-examined regarding the deals they had received and the reasons for giving their testimony. Mack's statement identifying the Petitioner as the shooter, however, was admitted after the State had given the jury the impression that the Solicitor was a hapless bystander who merely stood on the sidelines while the grand jury, Mack, and the sentencing judge acted. The Solicitor's cross-examination likely enhanced Mack's statement to the point where the jury favored the State's version of events over the Petitioner's. His cross-examination may have also affected the jury's consideration of the other co-defendants' testimony in a similar fashion. Most importantly, defense counsel admitted that his deficient conduct on this issue may have altered the result of this trial. App. p. 729, lines 21-22. See Martinez v. State, *supra*; Gantt v. State, 354 S.C. 183, 187, 580 S.E.2d 13, 135 (2003) (footnote 2) ("At the hearing, counsel agreed he was ineffective for failing to preserve this issue but he believed the outcome of the trial would not have been different. Counsel's admission is unlike the testimony of counsel in Martinez ... where trial counsel admitted the testimony of a potential witness could have made a difference"). Accordingly, the Petitioner respectfully asserts that he has met his burden of proof with regard to this issue, and that this Court should grant a new trial.

CONCLUSION

For the reasons stated, the Petitioner asks this Court to grant the petition and to allow full briefing on these issues.

Respectfully submitted,



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ATTORNEY FOR PETITIONER.

This 9th day of January, 2014.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-000928
Lower Court Case No. 2011-CP-32-2954

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S.C. Supreme Court

SAMUEL HARMON, #328335,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

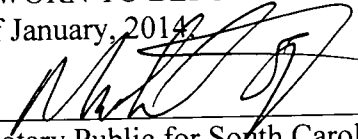
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the Petition for a Writ of Certiorari has been served upon opposing counsel, Karen C. Ratigan, Senior Assistant Deputy Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing in the U.S. mail with proper postage, this 9th day of January, 2014.


JEREMY A. THOMPSON
ATTORNEY FOR THE PETITIONER

SWORN TO BEFORE me this 9th day
of January, 2014.


(L.S.)
Notary Public for South Carolina

My Commission Expires: 7/10/2022