ALAN WILSON
ATTORNEY GENERAL

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February 20, 2014

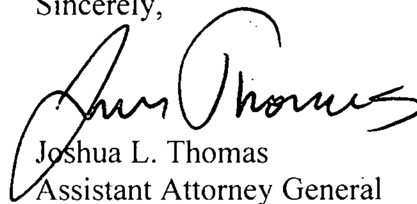
VIA HAND DELIVERY
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Devodus Rouse v. State of South Carolina**
Appellate Case No: 2013-000474

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



Joshua L. Thomas
Assistant Attorney General

JLT/nb
Enclosures

cc: Appellate Defender Susan B. Hackett (2 copies)

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STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2013-000474

Devodus Rouse, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Did the PCR judge properly find trial counsel was not ineffective in failing to object to Judge Anderson submitting a voluntary manslaughter charge for the jury's consideration where trial counsel articulated a valid trial strategy for doing so?

2. Did the PCR judge properly decline to find Petitioner's voluntary manslaughter conviction violated due process where evidence existed to support a voluntary manslaughter conviction and Petitioner did not show he was prejudiced by being convicted of the lesser-included offense?

3. Did the PCR judge properly find trial counsel was not ineffective in failing to request a self-defense charge where trial counsel articulated a valid trial strategy for not doing so?

STATEMENT OF THE CASE

In April 2008, The Florence County Grand Jury indicted Petitioner for murder. (App. pp. 821-22). H. Lee Herron, Esquire, ("trial counsel") represented Petitioner. (App. p. 2). Petitioner proceeded to trial on January 12, 2009, before the Honorable Ralph King Anderson, Jr., and a jury. (App. p. 1). On January 14, 2009, the jury convicted Petitioner of the lesser-included offense of voluntary manslaughter. (App. p. 238). Judge Anderson sentenced Petitioner to twenty-five years imprisonment. (App. p. 263).

Joseph L. Savitz, Esquire, perfected Petitioner's direct appeal with the filing of an Anders[1] brief on February 8, 2010. (App. pp. 676-85). The Court of Appeals dismissed the appeal in an unpublished opinion on June 8, 2011. (App. pp. 686-87). The remittitur was returned to the circuit court on June 28, 2011. (App. p. 688).

Petitioner filed an application for post-conviction relief ("PCR") on June 20, 2011. (App. p. 689). Tristan M. Shaffer, Esquire, ("PCR counsel") represented Petitioner. (App. p. 720). The Honorable Thomas A. Russo ("the PCR judge") convened a hearing on the application at the Florence County Courthouse on October 15, 2012. (App. p. 720). Assistant Attorney General T. Andrew Johnson, Esquire, represented the State. (App. p. 720). The PCR judge denied relief in an order dated October 29, 2012, and filed November 6, 2013. (App. pp. 794-99). Petitioner filed a timely motion to reconsider on November 21, 2012, which the PCR judge denied by written order on February 6, 2013. (App. p. 800-03; p. 819-20)

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

ARGUMENT

I. <u>Probative evidence supports the PCR judge's finding trial counsel was not ineffective in failing to object to Judge Anderson submitting a voluntary manslaughter charge for the jury's consideration.</u>

Petitioner asserts the PCR judge erred in finding trial counsel was not ineffective in failing to object to Judge Anderson allowing the jury to consider voluntary manslaughter as a lesser-included offense. However, the record indicates probative evidence exists to support the PCR judge's finding trial counsel made a strategic decision to allow the jury to consider the lesser-included offense. Therefore, Respondent submits the PCR judge properly denied Petitioner's application.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. <u>Butler v. State</u>, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing <u>Griffin v. Martin</u>, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove "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." <u>Id.</u> at 442, 334 S.E.2d at 814 (citing <u>Strickland v. Washington</u>, 466 U.S. 668 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. <u>Id.</u> The court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. <u>Id.</u> (citing <u>Strickland</u>, 466 U.S. at 668). The applicant must overcome this presumption in order to receive relief. <u>Cherry v. State</u>, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989).

The court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. <u>Id.</u> First, the applicant must prove counsel's performance was

deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

On appeal, this Court gives great deference to the PCR judge's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000)). The Court must affirm the denial of post-conviction relief when there is probative evidence to support the PCR judge's findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry, 300 S.C. at 115, 386 S.E.2d at 624)).

At the PCR hearing, trial counsel testified he believed the solicitor made a mistake in requesting a voluntary manslaughter charge. (App. p. 745). However, he did not believe it was his responsibility to object to the solicitor's mistake when it benefitted Petitioner. (App. p. 745). Trial counsel testified he advised Petitioner he did not "like the way things were going" in the trial. (App. p. 729). As a result, he explained he discussed a plea to anything other than murder in an effort to avoid the mandatory thirty (30) year minimum sentence. (App. p. 730). In that regard, trial counsel explained to Petitioner the only options without the voluntary manslaughter charge were a conviction for murder or an acquittal. (App. p. 746). Trial counsel informed Petitioner the lesser-included offense gave him another "out" to avoid a mandatory sentence. (App. p. 748, 754). Trial counsel admitted the only evidence of legal provocation was Petitioner's

"him or me" statement.[2] (App. p. 746). However, he testified his trial strategy once the solicitor asked for voluntary manslaughter was to not object to the charge in hopes of saving Petitioner from the mandatory minimum for murder. (App. p. 754).

Trial counsel is entitled to a strong presumption he "exercised reasonable professional judgment in making all significant decisions in the case." Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (citing Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). When trial counsel "articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Id. (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). This Court should evaluate trial counsel's decisions at the time they were made and avoid second-guessing his tactics. Id. (citing Strickland, 466 U.S. at 689; Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992)).

Here, trial counsel articulated a valid strategy for failing to object to Judge Anderson's submission of the voluntary manslaughter charge to the jury. Trial counsel felt the inclusion of a lesser-included offense benefitted his client. He testified the trial was not progressing favorably for Petitioner, and the lesser-included offense decreased the likelihood of a conviction for murder. Moreover, the solicitor and trial judge believed there was some evidence to support a voluntary manslaughter charge. (App. pp. 115-17). Although trial counsel may not have believed the evidence existed, he clearly believed

[2] Contrary to Petitioner's contention, trial counsel did not testify there was no evidence to support the charge. (Pet. for Writ of Cert. at 5). Rather, he testified he "didn't see the legal provocation there other than the 'him or me' thing, but that wasn't our theory of the case." (App. p. 746). As will be discussed in Section II, infra, credible evidence existed from which the jury could conclude Petitioner was guilty of voluntary manslaughter.

the possibility of a voluntary manslaughter conviction was advantageous in light of the possibility of a murder conviction.

Trial counsel's strategy is further justified by the fact the jury convicted Petitioner of voluntary manslaughter. Trial counsel was clearly hoping to reduce Petitioner's exposure below the minimum thirty (30) years for murder. The voluntary manslaughter verdict resulted in Judge Anderson sentencing Petitioner to twenty-two (22) years, validating trial counsel's strategy. Therefore, the PCR judge did not err in finding trial counsel was not deficient for not objecting to the voluntary manslaughter charge and Petitioner was not prejudiced by the voluntary manslaughter conviction.

Because the record contains significant probative evidence trial counsel acted reasonably and within professional norms when implementing Petitioner's trial strategy and that no prejudice resulted from trial counsel's actions, the PCR judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

II. Petitioner's due process rights are not violated by his conviction for voluntary manslaughter.

Petitioner argues his conviction violates due process because the record contains no evidence to support a voluntary manslaughter conviction. However, evidence exists to support submitting the lesser-included offense of voluntary manslaughter for the jury's consideration. Therefore, Respondent submits the PCR judge properly denied Petitioner's application.

As an initial matter, Respondent contends post-conviction relief is not the proper venue to challenge Petitioner's conviction on due process grounds. Petitioner's argument is that the facts presented at trial do not support a his conviction. This is the same

argument raised by trial counsel in his post-trial motions. (App. p. 248).[3] Therefore, the argument regarding the insufficiency of the evidence was preserved for review on appeal. Because appellate counsel filed an Anders brief on appeal, the Court of Appeals reviewed this preserved issue before dismissing the direct appeal. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46-47 (2013) ("Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991); State v. Lawrence, 349 S.C. 129, 561 S.E.2d 633 (Ct. App. 2002))). Because PCR is not a substitute for direct appeal, this issue cannot be raised at this juncture of the proceedings. Humbert v. State, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001) (citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)).

Regardless, Petitioner's allegation of a due process violation is without merit. Evidence existed to support a charge on voluntary manslaughter. No witnesses testified to actually seeing Petitioner shoot the victim. However, Farhonda Pompey testified Applicant did not like the victim calling her, indicating there was bad blood between Petitioner and the victim. (App. p. 62). She further testified Petitioner admitted to the victim having a gun and fighting with him. (App. p. 70, 75). Petitioner also told her "it was either me or him."[4] (App. p. 74). A second witness also heard Petitioner make this statement. (App. p. 604).

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[3] "And I don't believe the standard of the State has been met; that there's substantial evidence that was to prove this Defendant guilty beyond a reasonable doubt, Your Honor."

[4] Petitioner incorrectly states the solicitor used this "him or me" statement to support the position Petitioner killed the victim with malice aforethought. (Pet. for Writ of Cert. at 13). Instead, the solicitor argued to the jury that this statement made Petitioner guilty of the lesser-included offense of voluntary manslaughter. (App. pp. 156-57).

It is proper to charge voluntary manslaughter as a lesser-included offense to murder where the defendant and victim had a heated argument prior to the murder. State v. Locklair, 341 S.C. 352, 360, 535 S.E.2d 420, 424 (2000) (citing State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998); State v. Lowry, 315 S.C. 396, 434 S.E.2d 272 (1993); State v. Davis, 278 S.C. 544, 298 S.E.2d 778 (1983). Here, there was some evidence Petitioner and the victim argued in the form of Petitioner's statement it was "him or me." This statement is consistent with the theory Petitioner fought with the victim before the murder.[5] See Wiggins, 330 S.C. at 549, 500 S.E.2d at 495 (charge supported by fear for one's life); Lowry, 315 S.C. at 299, 434 S.E.2d at 274 (charge supported by heated argument and the victim's initiation of a physical encounter); Davis, 278 S.C. at 546, 298 S.E.2d at 779 (charge supported by fighting).[6] Therefore, Petitioner's statement is sufficient to submit a voluntary manslaughter charge to the jury. See Lowry, 315 S.C. at 399, 434 S.E.2d at 274 ("To warrant a court's eliminating the offense of manslaughter, it should very clearly appear that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." (citing State v. Norris, 253 S.C. 31, 168 S.E.2d 564 (1969))). Because the jury was presented evidence of an argument or struggle, the lesser-included offense was proper and due process is not violated.

Furthermore, Petitioner cannot show prejudice from his conviction of the lesser-included offense of manslaughter. The evidence at trial overwhelmingly indicated Petitioner shot the victim. Carolyn Washington, Quandeline Washington, Travis James, and Douglas Washington all testified the victim was outside alone with Petitioner. (App.

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[5] Interestingly, Applicant testified at the PCR hearing that he had prior incidents with the victim, and that they scuffled prior to the murder. (App. pp. 765-66).

[6] Judge Anderson's charge on voluntary manslaughter thoroughly addresses the possibility the jury could convict Petitioner of the lesser-included offense based on provocation by the victim. (App. p. 209).

p. 491; p. 539; p. 588; p. 640). Furthermore, Petitioner admitted the shooting to Travis James and Douglas Washington. (App. p. 604; p. 648). The only logical conclusion from the evidence is Petitioner shot the victim. The jury's guilty verdict on the voluntary manslaughter charge likewise indicated they believed Petitioner shot the victim. Therefore, the only way for Petitioner to avoid a murder conviction was for the jury to believe he did not shoot the victim with malice aforethought. The jury could not have considered a lesser mental state without the instruction on voluntary manslaughter. Because the jury was allowed to consider the lesser-included offense, they chose to believe Petitioner was not guilty of murder. As a result, his twenty-two (22) year sentence for voluntary manslaughter is less than he would have been required to serve had the jury convicted him of murder. Therefore, Petitioner benefitted from the jury's consideration of the lesser-included offense.

If the issue is properly raised, the record contains evidence to support Petitioner's voluntary manslaughter conviction. Accordingly, his conviction and sentence does not violate his due process rights. Therefore, the PCR judge did not err in denying the application for post-conviction relief.

III. <u>Probative evidence supports the PCR judge's finding trial counsel was not ineffective in failing to request a self-defense charge.</u>

Petitioner asserts trial counsel was ineffective in failing to request a charge on self-defense. However, probative evidence supports the PCR judge's finding trial counsel was not ineffective and articulated a reasonable trial strategy.

Trial counsel testified Petitioner's defense was always that he did not shoot the victim. (App. p. 732, 741). He further testified he did not want to ask for a self-defense charge because he argued to the jury Petitioner did not commit the shooting. (App p.

737, 752). He further testified he would have lost credibility if he told the jury two contrasting stories regarding whether Petitioner shot the victim. (App p. 737). Trial counsel also testified he never considered a self-defense theory because Petitioner always maintained he never committed the crime. (App p. 753). Trial counsel stated Petitioner never indicated there was any version of events where he fought with the victim. (App p. 769).

Here, trial counsel articulated a valid strategy for not pursuing a self-defense charge. Edwards, 392 S.C. at 456-57, 710 S.E.2d at 64. Trial counsel hoped the jury would believe Petitioner did not shoot the victim. To argue self-defense, he would have to admit to the jury Petitioner did shoot the victim, but with justification. These are clearly two inconsistent arguments. Trial counsel articulated a valid strategy of trying to convince the jury Petitioner did not shoot the victim.[7] A charge on self-defense would have been inconsistent with this strategy. Trial counsel therefore made a reasonable decision to maintain credibility with the jury. Thus, the PCR judge properly found trial counsel articulated a valid trial strategy in not pursuing a self-defense charge.

Because the record contains significant probative evidence that trial counsel acted reasonably and within professional norms when implementing Petitioner's trial strategy and that no prejudice[8] resulted from trial counsel's actions, the PCR judge did not err in

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[7] Trial counsel's based this decision in great part on Petitioner's denial of any involvement in the shooting. It is axiomatic that trial counsel cannot develop a trial strategy around a defense Petitioner maintains is not valid. See McCray v. State, 317 S.C. 557, 560, 455 S.E.2d 686, 688 (1995) (counsel not ineffective in pursuing a defense where petitioner denied any involvement in the crime).

[8] Contrary to Petitioner's argument, the length of the jury's deliberations is not evidence of prejudice from failure to request the charge. See State v. Hale, 284 S.C. 348, 356, 326 S.E.2d 418, 422 (Ct. App. 1985). As articulated in Sections I and II, supra, Petitioner cannot demonstrate prejudice because the evidence clearly indicated he shot the victim.

denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By:
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Florence County

The Honorable Thomas A. Russo, Circuit Court Judge

Devodus Rouse,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Appellate Defender Susan B. Hackett
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 20th day of February, 2014

NORMA BIGBEE
LEGAL ASSISTANT