STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from York County
Honorable Edgar Dickson, Judge

Appellate Case No. 2014-000281

BERRY S. BOLIN,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED ON APPEAL

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May Petitioner present on appeal an issue of ineffective assistance of counsel for counsel's failure to request a new jury or a curative instruction when the PCR court denied Petitioner's request to amend his application to include this allegation and when the PCR court did not rule on the issue?

STATEMENT OF THE CASE

Petitioner Berry S. Bolin was indicted at the May 2006 term of the Grand Jury for York County for murder (2006-GS-46-1595), discharging a firearm into an occupied vehicle (2006-GS-46-1600), two counts of assault with intent to kill (2006-GS-46-1598 and 1599), assault and battery with intent to kill (2006-GS-46-1596), possession of a weapon during the commission of a crime of violence (2006-GS-46-1597), and possession of a pistol by a person under the age of twenty-one (2006-GS-46-1601). He was represented by Leland Greeley, Esquire. Petitioner proceeded to trial on August 28, 2006, before the Honorable John C. Hayes, and a jury. Judge Hayes granted Petitioner's motion to quash as to the charge of possession of a pistol by a person under the age of twenty-one and denied Petitioner's motion to quash the remaining indictments pursuant to the Protection of Persons and Property Act. Petitioner was acquitted of possession of a weapon during the commission of a crime of violence and was found guilty of voluntary manslaughter as the lesser offense of murder, guilty of two counts of assault of a high and aggravated nature as lesser offenses of assault with intent to kill, assault and battery of a high and aggravated nature as the lesser-included offense of assault and battery with intent to kill, and discharge of a firearm into a vehicle. He was sentenced to confinement for thirty (30) years for voluntary manslaughter, ten (10) years for the remaining charges, concurrent, and restitution of $31.000.00.

A timely notice of appeal was filed on Petitioner's behalf and an appeal was perfected. The State also appealed the trial court's decision quashing the indictment for the charge of possession of a pistol while under the age of twenty-one. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences, State v. Bolin, 381 S.C. 557, 673 S.E.2d 885 (Ct. App. 2009). The South Carolina Supreme Court affirmed the trial court's decision to quash

the indictment for possession of a pistol while under the age of twenty-one. State v. Bolin, 378 S.C. 96, 662 S.E.2d 38 (2008).

Petitioner thereafter filed an application for post-conviction relief on February 1, 2010, and First Amended Application on December 29, 2011. The State made Return to the application on June 30, 2010. By motion dated December 15, 2011, Petitioner requested leave to conduct discovery and, on February 8, 2012, requested permission to conduct limited discovery, both pursuant to S.C. Code Ann. section 17-27-150 (2003). The State made Return on January 3, 2012 and March 9, 2012. A hearing respecting the discovery request was held on July 13, 2012, before the Honorable Lee S. Alford, and the matters were ruled on at the hearing.

A PCR hearing into the merits of the PCR allegations was convened before the Honorable Edgar W. Dickson on October 11, 2012. Petitioner was present at the hearing and was represented by retained counsel T. Micah Leddy, Esquire. Salley W. Elliott, Esquire, of the South Carolina Attorney General's Office represented the State. Judge Dickson denied post-conviction relief by Order dated December 27, 2013. Petitioner submitted a motion to alter or amend pursuant to Rule 59(e), SCRCP. By Order dated February 6, 2014, Judge Dickson denied the motion.

Thereafter, Petitioner filed and served Notice of Appeal and a Petition for Writ of Certiorari. This Return to Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

In a post-conviction relief (PCR) proceeding, the applicant bears the burden of proving the allegations in the application for post-conviction relief. 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, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland 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 the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

For an applicant to be granted relief as a result of ineffective assistance of counsel, he or she must show both: (1) that counsel was deficient in that counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he or she was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984). In order to prove prejudice, an applicant must show that but for counsel's errors, there is a reasonable probability the result at trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Our Supreme Court has determined that counsel has a duty to conduct a reasonable investigation, which includes interviewing potential witnesses. Edwards v State, 392 S.C. 449, 710 S.E.2d 60 (2011). However, there is a strong presumption that counsel exercised

reasonable professional judgment in making decisions in the case. Id. Where trial counsel articulates a valid reason for employing certain trial strategy, such conduct should not be deemed ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). "The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Id at 457, 710 S.E.2d at 64.

When reviewing the decision of the PCR court, the appellate court is concerned with whether there is probative evidence to support the decision. Edwards v. State, 392 S.C. 449, 710 S.E.2d 60 (2011), citing Kolle v. State, 386 S.C. 578, 690 S.E.2d 73 (2010). Our appellate courts will reverse the PCR court only where there is no probative evidence to support the findings or where the court's decision is controlled by an error of law. Id.

ARGUMENTS

I.

The PCR court correctly found Petitioner failed to establish ineffective assistance of counsel for counsel's failure to call a witness at trial when the decision was a matter of reasonable trial strategy.

Petitioner asserts the post-conviction relief (PCR) judge erred in finding that he failed to establish ineffective assistance of counsel for trial counsel's failure to call Eric Brown as a witness at trial. The PCR court concluded that trial counsel employed a reasonable trial strategy of eliciting evidence that shots were fired from the victims' car through the testimony of Bradley Deal, law enforcement officer testimony and other evidence rather than using what the PCR court concluded was the ever-shifting, recanted, and unreliable testimony of Eric Brown. (Appendix [hereinafter App.] pp. 19-21). The PCR court noted that Eric Brown's version of the facts was inconsistent, that his testimony regarding a "second car" would have conflicted with Petitioner's theory of the case, and Brown's testimony that Petitioner shot the wrong car would have been harmful to the defense. (App. 20-21). Respondent submits that the finding that

counsel articulated a reasonable trial strategy is supported by the record and that Petitioner's request for grant of certiorari must be denied.

Eric Brown testified at the PCR hearing that he was close to Petitioner and his family. (App. p. 462; 470 – 71). Brown testified that he observed the victims' car as well as a second car at the scene and saw gunfire coming from the second car. He stated that Petitioner and co-defendant Lee Owens began shooting. (App. 463-64; 472). Brown testified that gunfire came from the second car and the gunman looked like Jeff Buck. Brown admitted that he did not provide this information in his first statement to officers because he was uncertain that the person he saw was Jeff Buck. He also admitted that Jeff Buck is deceased and that he would like to see Petitioner get a new trial. (App. 464-65; 475). He further admitted that he was a "fighting" person and had prior convictions for writing fraudulent checks and failure to stop for a blue light. (App. 471; 474). Brown acknowledged that he was interviewed by the prosecutor and Petitioner's investigator before trial and told them he saw gunfire from a car before anyone from the house began shooting. (App. pp. 465-66; 470).

Brown also admitted that he submitted to a polygraph examination after appearing for trial and was not called as a witness. (App. 467). He denied telling the polygraph examiner during the pre-test interview that he was uncertain that he saw a gun in the second car but might only have seen reflections. (App. 467-68). He admitted he did not see anything coming from the victims' car. (App. 468 – 69). Brown testified that Petitioner shot at the wrong car. (App. pp. 471; 475).

Deputy Solicitor Willy Thompson testified at the PCR hearing that he was provided with the statements given by witnesses and produced those statements along with other discovery material to trial counsel on an on-going basis as information became available, including

conflicts in statements. (App.571-76; 1831 – 1839). Thompson testified that the information provided in statements by some witnesses changed as time passed. Thompson called the witnesses at trial and examined them on the inconsistencies between trial testimony and the earlier statements. Thompson testified that Eric Brown agreed to take a polygraph on the first day of trial after failing to appear for an earlier polygraph and several interviews. Thompson stated that information provided by Brown during the pre-polygraph interview was inconsistent with his earlier statement, including equivocation about seeing a gun and gunfire from the second car as opposed to reflections in the window. In the pre-polygraph interview, Brown said Petitioner shot at the wrong car when Petitioner fired upon the victims' car and rather than a second car present at the scene. (App. 579 – 581; 596). Thompson testified that he provided the results of the polygraph and Brown's statements during the pre-polygraph interview, including the comment that Petitioner shot the wrong car, to counsel. Thompson did not call Brown as a witness because he wanted to cross-examine Brown about his inconsistent statements, difficulty interviewing him and bias arising from the relationship with Petitioner. (App. 581-82; 585-86; 600-01). Thompson testified that Bradley Deal and Robert Beverly indicated they saw gunfire coming out of a car but that Beverly later recanted. Nevertheless, the jury was presented with the evidence that more than one person said they saw gunfire coming from a car. (App. 571-586; 597-99).

Trial counsel testified that he was retained to represent Petitioner shortly after the incident and initially conferred with Petitioner about the facts, Petitioner's statements, and potential witnesses. Counsel discussed the pending charges, the State's burden of proof, and possible defenses. Counsel reviewed discovery material with Petitioner, including statements, photographs, the 911 recordings, diagrams, the autopsy, ballistics and gunshot residue reports,

and recorded telephone admissions from Petitioner. Counsel conducted an investigation of the ballistics evidence and hired a private investigator who interviewed witnesses. Counsel informed Petitioner about the results of the investigation, including the inconsistent versions of events provided by potential witnesses and the evidence the State would present at trial. The defense presented at trial consisted of attacking the State's case and presenting the defense of others. Petitioner admitted he fired the gun and never told counsel that he saw a second car. (App. 478-536; 500).

Counsel interviewed the individuals identified by Petitioner as well as those found in discovery material. Counsel found that potential witnesses provided conflicting and inconsistent statements. As the trial approached, potential witnesses began to equivocate and became less credible. (App. 529 – 31). Counsel identified Bradley Deal as a defense witness but Deal was called as a State's witness enabling counsel to question Deal without calling him as a witness. (App. 528 – 31).

Counsel explained that he made a strategic decision not to call Eric Brown as a witness because the shooter Brown identified in the second car died shortly after the incident and counsel found no credible evidence to support the existence of a second vehicle at the scene. For strategic reasons, counsel also did not call Brown because counsel did not want to show that gunshots were fired from a second car if he could not establish gunfire coming from the victims' car. Further, counsel did not want to expose the jury to Brown's statement that Petitioner shot the wrong car, Brown's bias, Brown's equivocation about actually seeing gunfire from the second car as opposed to reflections, and the fact that Brown was not credible. Counsel testified that his strategic decision respecting Brown was based upon the facts of the case, counsel's investigation and experience, the detrimental manner in which Brown would come across to the jury, the

testimony Brown would offer, Brown's lack of credibility, and the fact that counsel thought that Brown would cast a negative reflection on Petitioner. Counsel stated that the other testimony Brown could offer was cumulative to evidence presented at trial. (App. 501-07; 546-47; 558).

The trial transcript establishes that Bradley Deal saw an arm extend out of the front passenger side of the victims' car followed by three muzzle flashes. (App.508-09; 928; 934) Also during trial, other witnesses admitted giving prior statements establishing that shots were fired from the victims' car. (App. 504-05). In addition to the testimony offered by Bradley Deal, other circumstantial evidence was presented to support the defense theory that gunfire came from the victims' car, including the examination of Travis Falls, forensic evidence respecting the bullet holes, and Holly McCarter's testimony that, despite reporting that she changed drivers at American Auto, she was still driving when the victims arrived at the Clover Police Department. (App. 508 – 512). It was counsel's defense theory that the victims stopped at American Auto to dispose of the gun. Additionally, the fact that Holly drove the car to the police department and the fact that the victims were uncooperative was developed through the prosecutor's direct examination of Sergeant Trabue but was also emphasized in counsel's cross-examination of Sergeant Trabue. Moreover, three law enforcement officers testified that individuals present at the scene reported that shots were fired from the victims' car. (App.509-512; 986-88; 1027; 1058-59; 859-870).

Although Petitioner is contending now on appeal that the victims' vehicle and the purported second car were linked as "assailants," there was never any testimony or other evidence presented at trial or at the PCR hearing linking a second car to the victims or their vehicle. In fact, the testimony reflects how and why the victims traveled to the scene and it never included other participants in a second car. The "second car" theory supports Brown's

conclusion that Petitioner shot the wrong car and was adverse to Petitioner.

The record supports the PCR court's finding that the decision not to present Eric Brown's unpersuasive, inadequate and potentially harmful testimony was the exercise of reasonable professional judgment. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002); Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995).

II.

The post-conviction relief court properly concluded Petitioner did not show that counsel's failure to obtain a surveillance videotape resulted in the requisite prejudice when Petitioner never established that a videotape depicting the victims was available and relied upon speculation to support the allegation of ineffective assistance.

Petitioner contends that the PCR court erred in finding that he failed to show that trial counsel's action respecting a videotape from surveillance cameras at American Auto constituted ineffective assistance of counsel. Respondent submits that the PCR court correctly concluded that Petitioner failed to establish that the surveillance equipment was in working condition, that it produced a recording that could have been obtained by counsel, that the video captured anything related to the victims, or contained information that was favorable to Petitioner. (App. 21-27). Instead, Petitioner engages in pure speculation which is sufficient to support a finding of prejudice for PCR. Smith v. State, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012); Dempsey v. State, 363 S.C. 365, 610 S.E.2d 812 (2005); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995). Moreover, counsel was able to use other evidence and inferences to suggest the victims disposed of a gun at that location which

negates prejudice to Petitioner. The allegation is without merit and the PCR court's ruling is supported by the record.

The owner of American Auto testified at the PCR hearing that he had a surveillance system at the time of the incident but was not asked to produce a videotape. He described the layout of the American Auto property as having a long drive-way leading down to a sales lot and that surveillance cameras were focused on that lot. He never reviewed the videos from the surveillance camera and does not know whether the equipment was functioning or recorded anything on the night of the incident. He explained that Petitioner's co-defendant Lee Owens worked for American Auto at the time and would have been aware of the surveillance equipment but never requested a videotape from the surveillance equipment. He also did not recall speaking with the prosecutor's investigator about a videotape and believed the system automatically recycled every thirty (30) days. The surveillance system was discarded in 2010. (App. 453 – 61).

Rodney Nivens, the manager and son of the owner of American Auto, testified that the business had one video camera recording the parking lot in front of the building, two other cameras facing the car lot, and another camera inside the building at the time of the incident. He reviewed the recordings only when a matter relating to the property or a car arose. He vaguely recalled officers visiting American Auto and did not disclose the existence of the surveillance equipment. He conceded that there were areas of the property that would not be captured by the surveillance equipment and acknowledged that recordings from the surveillance equipment recycled every 28 or 29 days. He also acknowledged that Petitioner's co-defendant worked at American Auto at the time of the incident, was charged in the incident, was aware of the surveillance equipment, and did ask for access to surveillance recordings. (App. 563-70).

Deputy Solicitor Willy Thompson testified that the initial information received about the

American Auto location was from the statement of Holly McCarter who was driving the victims' car when the victims fled the scene and who said that she stopped there on the way to the police department. Thompson testified that later the sheriff's department received a call from Petitioner's investigator about the possibility of a gun being discarded by the victims at American Auto. An unsuccessful search of the area was conducted several months after the incident. He also directed a detective to inquire about surveillance equipment but learned that a recording was not available. Thompson testified that he viewed the area and understood from the victims that they stopped on the edge of the property just barely off of the road. (App. 589 – 91; 602 - 03). Shortly before the PCR hearing, Thompson again inquired about video surveillance of the victims' car and the information provided to Thompson by the owner's son differed from the son's testimony at the PCR hearing.(App. 601- 02).

Trial counsel testified that he received information the victims stopped at American Auto on the way to the police department but a surveillance video was not mentioned. Counsel testified that he asked his investigator to search for a gun, his investigator contacted the sheriff's office, and a subsequent search was unsuccessful. Counsel explored the possibility of securing a videotape from the surveillance equipment but was not successful. Thereafter, counsel developed a trial strategy that would allow the jury to conclude the victims had a gun through cross-examination of officers, testimony about Travis Falls' wound, evidence indicating the victims were aware guns were present at the scene, Holly McCarter's statement indicating that she traded drivers at American Auto when other evidence revealed she was driving when she arrived at the police department, the failure of officers to test the victims for gunshot residue, and the absence of a large stick in the victims' possession. (App. 511-14; 543 -46; 561).

Respondent submits that Petitioner failed to show prejudice, except by pure speculation,

that the victims' car was located such that the surveillance equipment would have recorded it and, if so, that the victims disposed of a gun. Petitioner also did not establish the requisite prejudice to support ineffective assistance of counsel because counsel developed an alternate strategy using other evidence to establish the possibility the victims disposed of a gun at American Auto to his advantage at trial. Had counsel obtained the video, it might have precluded that favorable use at trial if it did not depict the victims disposing of a gun.

Moreover, Petitioner did not and cannot establish that the existence of the videotape would not have impacted the verdict based upon the State's evidence. The ballistics evidence at trial established that the shots fired into the victims' car occurred as the car was pulling away from the scene and refuted the defense theory that a gun was being fired by the victims. Thompson testified that the front passenger window was closed when the car was fired upon; otherwise, it would have broken when bullets entered the middle of the passenger door. The window in question was found upright and undamaged and with blood stains on the interior side which lined up with stains on a portion of the window that could not be rolled down. Also, the configuration of the back seat and window would make it difficult for anyone to fire from the victims' car as claimed. No shell casings were found in the car and no bullets were imbedded in the homes or cars parked in the line of fire. Additionally, Thompson noted that Petitioner, in his statement to officers, admitted he never saw gunfire from the victims' car and admitted in a telephone conversation with his father that he did not see a second car and did not recall anyone shooting except himself and his co-defendant, Lee Owens. (App. pp. 591- 96; 603-04).Petitioner failed to establish a reasonable probability the result of the trial would have been different but for counsel's failure to obtain the surveillance video. The PCR court's finding must be affirmed.

III.

Petitioner may not assert that the PCR court erred in denying his request to conduct an in-camera inspection of material claimed as work product when the Petitioner equivocated when asked whether he wanted the PCR court or the appellate court to conduct the review and when the PCR never denied the request.

There were two issues at play in this case respecting access to the solicitor's prosecution file.The first was Petitioner's request for wholesale access and discovery of everything in the solicitor's file. This issue was pursued by discovery motion and motion hearing prior to the hearing on the merits of the PCR allegations. The second is Petitioner's request at the PCR evidentiary hearing to admit the entire solicitor's file as evidence at the PCR hearing and to examine two folders of notes in the solicitor's file which were designated by the prosecutor as work product. Petitioner indicated he needed the notes to determine whether all Brady/Rule 5 material was disclosed to Petitioner prior to trial. Respondent notes for this Court that Petitioner did not assert prosecutorial misconduct or a Brady/Rule 5 violaton as a ground for PCR and was attempting to use a subpoena issued for requiring appearance at a hearing as a discovery production subpoena at a point when the time for discovery had expired and a hearing on the merits had been convened and in contravention to the earlier PCR discovery directives of Judge Alford. Petitioner contends on appeal that the PCR court erred in denying his request conduct an in-camera review of the prosecution file. Respondent submits that the record before this Court shows that, when directly asked whether Petitioner was requesting the PCR court to conduct an in-camera inspection of the prosecutor's entire file, Petitioner responded that he wanted the file made a part of the record so that the content can be reviewed by a judicial body. When the PCR court asked if Petitioner meant by an appellate court, Petitioner conceded the review could be conducted by an appellate court rather than the PCR court. (App. 442). Moreover, neither the order of dismissal nor any other order of the PCR court denies the request for in-camera review. Because Petitioner conceded that the PCR court need not conduct an in-camera review of the file

and because there is no ruling denying the request which Petitioner can raise as error, he has not preserved the matter for appellate review. State v. Whippel, 324 S.C. 43, 476 S.C.2d 683 (1996); State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984); see also Ligon v. Norris, 371 S.C. 625, 640 S.E.2d 469 (Ct.App. 2006); Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998).

Nevertheless, the PCR court properly ruled the notes of the prosecutor and his investigator were work produce and were not relevant to the issues in litigation. As backgrourd information, Petitioner moved for leave to conduct discovery pursuant to S.C. Code Ann. Section 17-27-150 which requires a showing of good cause before discovery is permitted in a noncapital post-conviction relief case. Petitioner requested access to all files and documents in the possession of the solicitor relating to Petitioner.He also moved for a privilege log of any material not made available. Respondent made Return to the motion and a hearing was held. (App. 301-09; 374-421). Deputy Solicitor Thompson appeared on behalf of the Solicitor's Office and opposed Petitioner's request for unfettered access to the prosecutor's files, asserting work product privilege and Petitioner's failure to show "good cause" for the entire prosecution file. The Honorable Lee S. Alford presided and ruled that absent a showing of good cause for some specific document or set of documents, Petitioner would not be granted unfettered access to the entire prosecution file unless or until Petitioner was able to point to something specific and had a good cause to believe he was entitled to access. (App. 415). Judge Alford further held, "But I simply am not going to set the precedent of requiring the solicitor to open their file in every single case when there is absolutely no good cause shown and simply just [let Petitioner] explore their files." Id. However, Judge Alford permitted discovery of all notes and information relating to a possible video from American Auto and anything else relating to the other grounds presented in the Application for Post-Conviction Relief and First Amended Application for Post-

Conviction Relief. Judge Alford ruled that Petitioner would be permitted access to other portions of the prosecution files if Petiitoner identified the specific documents and supported the request with specific reasons.The reasons advanced by Petitioner earlier was that access to the file in discovery will avoid delay at the hearing and speculation that Brady or Rule 5 material might be found. (App.412-421).

Petitioner did not revisit discovery in the manner directed by Judge Alford. Instead, Petitioner issued a subpoena for the prosecutor and the entire prosecution file for the hearing on the merits of the PCR action. The prosecutor produced four large boxes of materials. (App. 430-31). The contents of one box had been voluntarily disclosed to Petitioner and counsel for the Respondent. (App. 431). Petitioner offered the contents of all of the boxes as evidence at the PCR hearing. Respondent opposed wholesale admission of the entire content of the four boxes on the ground Petitioner failed to show that every item in all of the boxes was material and relevant to the allegations as contained in the pleadings before the court.Respondent also opposed admission of the contents of the boxes into evidence on the ground Petitioner was attempting to circumvent Judge Alford's earlier ruling on the discovery request without following the directions outlined by Judge Alford at the motion hearing for obtaining discovery access to the material.

After the hearing and pursuant to Petitioner's letter dated October 24, 2012, in response to a privilege log submitted by the prosecutor, Petitioner moved to have the post-conviction relief court conduct an in-camera review of the polygraph report of Eric Brown and the content of two folders in the prosecutor's file containing handwritten notes of the prosecutor and his investigator on the ground the notes might contain Rule 5 or Brady material. The prosecutor listed the two folders of notes as privileged work product. Petitioner also asked that all of the

remaining material in the solicitor's boxes be filed with the court for examination, if necessary. (App. 314-15). By letter dated November 21, 2012, Respondent did not oppose admission of the polygraph report into evidence but opposed the wholesale admission of the solicitor's entire file respecting the underlying prosecution as well as Petitioner's request that this Court conduct an in-camera review of the contents of the two folders based purely upon Petitioner's speculation the items may contain Rule 5, SCRCrimP, and Brady material. (App. 316-18). Respondent objected on the grounds Petitioner failed to show the entire prosecution file was relevant to any of issues identified by Petitioner in the pleadings, access to the material in the file was previously denied to Petitioner, and Petitioner made an insufficient showing allowing for in-camera review. The prosecutor also responded to Petitioner's request by letter dated December 11, 2012, agreeing to release the contents of the folder relating to Eric Brown's polygraph and indicating the contents were made known to counsel for Petitioner at the time the original trial. As to the handwritten notes, the prosecutor indicated the notes were taken in preparation for trial, were work product not subject to discovery, did not relate to any issues alleged by Petitioner in his pleadings, access had been ruled upon by Judge Alford, and that all impeachable or exculpatory information was disclosed to Petitioner at the time of the original trial. (App. 319-20). Petitioner responded by letter dated December 18, 2012 contending the prosecutor failed to establish that the notes are work product. (App. p 321).

Respondent submits that the PCR court properly ruled that discovery of the folders sought by Petitioner containing notes taken by the prosecutor and the prosecutor's investigator during interviews with potential witnesses in preparation for trial constituted attorney work product and, because the notes were not shown to be relevant to any of the issues in the pleadings being litigated at the hearing, an in-camera review of irrelevant files was not

appropriate. See Rule 26(b)(1), SCRCP ("Parties may obtain discovery regarding any matter, *not privileged....*") (emphasis added). Pursuant to the Rules of Civil Procedure, a party seeking protected work product must show a substantial need for the materials and that he cannot obtain the material sought, or a substantial equivalent thereof, without undue hardship. Rule 26(b)(3), SCRCP.

Petitioner merely wished to engage in a proverbial fishing expedition during the PCR hearing. See Mahaffey v. Southern Ry.Co., 175 S.C. 198, 178 S.E. 838 (1945)(stating neither party is permitted to engage in a fishing expedition but must be confined to the facts which assist the plaintiff in establishing a cause of action.) Petitioner did not identify any specific material that he contended should have been provided before trial. He simply wanted the PCRor an appellate court to survey trial preparation notes made by the prosecutor and the prosecutor's investigator for a determination whether anything contained in the notes might be subject to Brady or Rule 5 despite the fact that none of the issues in the pleadings or being litigated related to such a claim. The showing was not sufficient and a similar argument has already been rejected in this case by Judge Alford. See State v. Hughes, 336 S.C. 585, 521 S.E.2d 500 (1999) (stating that Rule 5 exempts internal prosecution documents made in connection with an investigation and Brady only requires disclosure of impeachment or exculpatory evidence); State v. Myers, 359 S.C. 40, 596 S.E. 2d 488 (2004) (stating Rule 5 exempts work product and internal prosecution documents made by an attorney for prosecution.). Contrary to Petitoiner's contention, Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) and Gibson v. State, 334 S.C. 515, 514 S.E.2d 320 (1999), do not require the prosecution to provide any and all notes of witness interviews taken for or during trial preparation. Disclosure is only required as to facts and information learned that are exculpatory or impeaching. Deputy Solicitor Thompson

testified at the evidentiary hearing that anything of that nature was provided to trial counsel orally or by email and that the notes in question pertain to internal prosecution documents made in preparation for trial, including personal recollections, mental impressions, potential cross-examination questions and matters respecting case theory and strategy. See Hickman v. Taylor, 329 U.S. 495 (1947).

IV.

Petitioner failed to preserve the error he claims is related to the plea offer, nevertheless, the PCR Court properly concluded that Petitioner failed to meet his burden of establishing ineffective assistance of counsel relating to the plea offer when counsel fully disclosed to Petitioner that the Castle Doctrine might not apply and advised Petitioner to accept the plea offer?

On appeal, Petitioner asserts that counsel was ineffective for failing to use the rules of statutory construction to ascertain that the Protection of Persons and Property Act ("the Act") would not be applied retroactively to his case and that counsel was "too hopeful that the Act would work to the benefit of Petitioner at trial." (Petition, p. 19). Although he did not testify at the PCR hearing and failed to present any evidence as support, Petitioner now contends on appeal that he made his decision to reject the guilty plea offer by relying on "bad legal advice" of counsel and that he was prejudiced because he received a greater sentence than had he accepted the plea offer. (Petition p.19). The State submits that the specific issue Petitioner presents on appeal respecting incorrect advice, what led him to reject the plea offer, and the prejudice suffered should not be considered by this Court because the allegations were not presented to or specifically ruled upon by the PCR court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998); State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005). The issue as presented to the PCR court was that counsel was deficient in failing to convince Petitioner to accept the plea offer and in failing to have the offer reinstated after the trial court ruled the Act did not apply. (App. 11). There is probative evidence to support the PCR court's finding that Petitioner failed to establish

that counsel provided ineffective assistance in connection with Petitioner's rejection of the guilty plea offer or in failing to revisit the matter with the prosecutor after the trial court's ruling. (App. 27-29).

The record reflects that trial counsel engaged plea negotiations before trial but did not receive an offer Petitioner found acceptable. (App. 537). Pre-trial matters were heard the first day of trial at the conclusion of which the trial court denied Petitioner's motion to bar his prosecution based upon the Act but indicated it would revisit the matter as it might relate to directed verdict and or other issues during trial. (App. 538). The trial court reiterated that the facts did not appear to fall within the provisions of the Act but would review the issue further. (App. 539). The record reflects that Petitioner was present in court when these statements were made by the trial court. (App. 480; 537-39).

Counsel testified that he hoped the Act might be applied retroactively to Petitioner's case but knew that the savings clause of the Act was unfavorable for retroactive application. Counsel did not believe he would be successful in using the Act and fully advised Petitioner of his concerns. (App. 481 – 88; 536-37; 541; 554-55). On the second day of trial, the State extended an offer to allow Petitioner to plead to voluntary manslaughter for a negotiated sentence of fifteen (15) years and concurrent sentences on the other charges. (App. 537). Counsel discussed the plea offer and the trial judge's rulings up to that point as well as the trial judge's complaints about the leniency of the negotiated sentence for Owens. Counsel recommended that Petitioner accept the offer and explained the reasons, including the likely sentence if convicted, trial judge's comments during Owens plea, the results of counsel's investigation, the facts of the case, strengths and weaknesses of the State's case and of the defense, problems with application of the Act to the case, counsel's experience in the trial of murder cases and counsel's specific

experience with the trial judge. Counsel arranged for a meeting between Petitioner and his family and informed the family members that he advised Petitioner to accept the plea offer. Despite counsel's discussion, advice, and recommendation, Petitioner rejected the plea offer after discussing his options with family members. Counsel testified that once the plea offer was declined, it was no longer available to Petitioner. (App. 495-500; 538-42; 562)

Deputy Solicitor Thompson confirmed that he engaged in plea discussions with counsel before trial and initially offered to allow Petitioner to plead "straight up" to voluntary manslaughter and some of the companion charges. Later, Thompson offered a cap of twenty (20) years. Both offers were rejected. Thompson also confirmed that, during trial, he extended a plea offer to voluntary manslaughter for a negotiated sentence of fifteen (15) years and concurrent sentences on the other charges. Thompson testified that the trial judge delayed the trial and allowed Petitioner to speak with his attorney and family members after which the offer was declined. Thompson confirmed that the plea offer would not have been entertained later during trial. (App. 586-89).

Respondent submits that Petitioner failed to establish that counsel provided ineffective assistance in connection with Petitioner's rejection of the plea offer or in failing to revisit the matter with the prosecutor later during trial. Counsel conferred with Petitioner extensively about his options and the possible consequences of accepting or rejecting the offer extended on the second morning of trial and recommended that Petitioner accept the offer. The discussion included counsel's advice that the Act would likely not apply. Petitioner was also present in court when the trial court denied counsel's motion to dismiss the charge on that basis and knew trial was proceeding against him. Counsel also conferred with Petitioner's family members about the offer and counsel's recommendation and made arrangements for them to meet with

Petitioner prior to Petitioner's decision to reject the plea offer. The prosecutor confirmed that counsel looked "dejected" about Petitioner's decision to reject the plea offer. (App. 589). The PCR Court properly determined counsel did all he could to convince Petitioner to accept the plea offer and correctly determined that, once declined, the plea offer was not available and efforts to revisit the plea would have been futile. Petitioner's complaints respecting counsel and the guilty plea offer are without merit and were correctly denied.

V.

The PCR court correctly denied Petitioner's request to amend his PCR application to add new allegations after the evidentiary hearing when the allegations were not litigated by the State, expressly or tacitly, and when the State would be greatly prejudiced by the amendments.

Three months after the PCR hearing and the PCR court's communication to counsel for both parties that it intended to deny relief, Petitioner moved for leave to amend his PCR application to allow for consideration of four new allegations as set forth in a Second Amended Application for Post-Conviction Relief. (App.321-332). The amendments were based on testimony elicited by Petitioner's direct examination of his trial counsel about the existence of a video alleged to show that Holly McCarter was driving the car when the victims arrived at the police department. (App. 351-52; 478; 511). Respondent opposed the request asserting that it had no notice of the new PCR allegations at the time of the hearing, that lack of notice precluded investigation and presentation of evidence to refute the new allegations, and that the new allegations were matters that could have included in the application or amended application through the exercise of due diligence, that permitting the amendments would leave Respondent without the opportunity to defend against the claims and would result in great prejudice to Respondent. (App. 333-335; 344). Respondent argued it did not expressly or tacitly agree to litigate the allegations at the hearing and did not elicit evidence respecting the claims. To the

extent Petitioner suggested that Respondent's position regarding pre-trial discovery or its objection to the wholesale introduction of the prosecutor's entire file as evidence at the PCR hearing can be considered litigation of the new allegations, Respondent asserted that the record does not support Petitioner's position. Counsel for Respondent did not take a position regarding Petitioner's access to the prosecutor's files and its return to the discovery request merely recited the applicable statute requiring a showing of good cause for noncapital PCR discovery requests. (App. 307-09). At the PCR hearing, counsel for Respondent objected to Petitioner's request for the wholesale admission into evidence of the prosecutor's entire file consisting of multiple boxes of material because Petitioner failed to establish that everything in the boxes was relevant to the PCR allegations pending before the court. Respondent further contested that it tacitly agreed to litigate the new allegation respecting the "Castle Doctrine;" rather, the evidence elicited at the PCR hearing pertained to the appellate counsel claim and Respondent limited its evidence to that issue as alleged in applications filed before the hearing. (App. 333-35; 344).

The PCR court's denial of Petitioner's request to amend with the Second Amended Application for Post-Conviction Relief pursuant to Rule 15 (b), SCRCP, must be affirmed. (App. 345-46; 40 – 44). While pleadings may be amended to conform to evidence presented at trial, amendment should be permitted only it does not prejudice the opposing party's effort to maintain his case. See Rule 15(b), SCRCP. Generally, courts seek to ensure the opposing counsel has notice that the new issue is going to be tried and is provided with an opportunity to refute any new claim. Pool v. Pool, 329 S.C. 324, 328-329, 494 S.E.2d 820, 823 (1998). When both sides have thoroughly contested an issue that is not in the original pleadings, courts will generally allow the pleading to be amended to include that issue. Simpson v. Moore, 367 S.C. 587, 599, 627 S.E.2d 701, 708 (2006); see also, Sossamon v. Peeler, 291 S.C. 256, 258, 353

S.E.2d 152, 154(Ct. App. 1987); Lee v. Bunch, 373 S.C. 654, 661-62, 64 S.E.2d 197, 201 2007). However, this Court has specifically determined that prejudice "occurs when the amendment states a [claim or defense] which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Lee v. Bunch, 373 S.C. at 661, 647 S.E.2d at 201.

Respondent submits that the application for post-conviction relief was initially filed on February 1, 2010. (App. 58 - 64). The Second Amended Application for Post-Conviction Relief was filed by retained counsel on December 30, 2011. (App.295-300). The PCR hearing was convened on October 11, 2012, almost ten (10) months after the application was amended and more than two years after the PCR action was initiated. The PCR court devoted an entire day to testimony and other evidence, took the matter under advisement, and issued a preliminary ruling. The issues as alleged in the applications filed before the hearing were fully litigated.

Respondent was not on notice of the four new allegations at the time of the PCR hearing and did not present evidence in response to the claims. Respondent was denied the ability to investigate and develop a record to defend against the allegations. Respondent notes for this Court that when it announced the case, it clarified on the record its understanding of the allegations Petitioner intended to pursue and received verification from Petitioner. (App. 427-29). Respondent submits that this not a situation where both parties fully litigated new issues during the hearing.

The PCR court correctly applied the law governing motions to amend after evidentiary proceedings are over and properly exercised it discretion to deny the amendments. The denial of the motion to amend must be affirmed. See Holland ex rel. Knox v. Morbark, Inc., 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014)(stating that amendment to pleading after the conclusion of

discovery to include new claims would have been prejudicial to Respondent where Plaintiff had already obtained one amendment, had the knowledge necessary to alert him to the relevance of the new claim at the close of discovery and the new theory would require Respondent to hire experts and take additional depositions); Collins Entertainment, Inc. v. White, 33 S.C. 546, 611 S.W.2d 262 (Ct. App. 2005)(stating that prejudice envisioned by the rules of civil procedure sufficient to warrant the denial of a motion to amend is the lack of notice that a new issue is to be tried and the lack of opportunity to refute it); Harvey v. Strickland , 350 S.C. 303, 314, 566 S.E2d 529, 535 (2002) (stating that when the court determines one party requires additional or different evidence to accurately refute a claim that is not in the original pleading, the amendment is not permitted); Continental Radio and Television Corp. v. Furman, 193 S.C. 357, 8 S.E.2d 902, 904 (1940) (court would not permit amendment when plaintiff originally asserted defendant breached contract by advertising, offering for sale and selling radios, and plaintiff sought to amend to assert advertising, offering for sale, and sell of radios by third party without defendant's knowledge and permission); see also White v. Benedict Coll., Inc., 288 S.C. 572, 344 S.E2d 147 (1986) (plaintiff's request to amend complaint at the close of evidence to include a claim of assault and battery when the original complaint alleged sexual harassment was not permitted because it would require additional and different evidence); Lane v. Berry, 288 S.C. 54, 57, 339 S.E2d 521, 523 (Ct. App. 1986) (stating amendment requested at the at the close of plaintiff's case was not permitted because defendant not afforded adequate opportunity to gather additional evidence and prepare additional testimony to counter the new claim.); Ball v. Canadian Amendment Am. Exp., Inc., 314 S.C. 272, 276, 442 S.E.2d 620, 623(Ct. App. 1994) (stating plaintiff may not amend after the trial was concluded to convert a claim of fraud in the

inducement to a claim of fraud in the breach after the trial because the new claim would require presentation of different evidence).

Respondent did not tacitly or expressly agree to litigate the new allegations and the amendments proposed by Petitioner after the hearing would greatly prejudice Respondent. "Prejudice occurs when the amendment states a new claim or defense which would require the opposing party to introduce additional or different evidence to prevail in the amended action." Ball v. Canadian American Express, 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994) (internal citations omitted). The allegations in Petitioner's Second Amended Application would require the State to undertake not only a thorough, unanticipated investigation of evidence it had no prior notice would be at issue when the hearing was convened, but would also likely require the PCR court to reconvene the hearing for testimony from witnesses for both parties. Petitioner's Second Amended Application presents allegations associated with testimony elicited by Petitioner from his own witness and about which Petitioner, upon the exercise of due diligence, should have been aware of before the hearing. Petitioner has been in the possession of trial counsel's file since the conclusion of the direct appeal. (App. 526). There is no valid reason why the new claims were not included in the pleadings filed before the hearing. Respondent is placed in at an unfair disadvantage with allegations about which it had no notice or the opportunity to investigate, prepare a defense, and present evidence. The motion to amend was properly denied. Moreover, Petitioner admits in his petition that he had possession of the pole department video before the PCR hearing and concedes the video does not show who was driving the victims' car when it arrived at the police department.

VI.

Petitioner may not present on appeal an issue of ineffective assistance of counsel for counsel's failure to request a new jury or a curative instruction when the PCR court denied Petitioner's request to amend his application to include this allegation and when the PCR court did not rule on the issue?

The record reflects that after the jury was selected, it was excused from court while pre-trial matters were heard outside of its presence which included the entry of a plea by Petitioner's co-defendant. (App. 495; 515-17). When the jury returned, it was instructed that the case was concluded as to the co-defendant. (App. 516-18). Petitioner complains because trial counsel did not request that the trial court to provide a jury instruction defining what it meant by "concluded" and charging the jury it should not to consider the co-defendant's absence. Alternatively, he contends counsel should have requested a new jury. When trial counsel was questioned about the matter at the PCR hearing, Respondent objected on the ground it had not been given notice of the allegation. (App. 516-18). After the PCR hearing, Petitioner moved for permission to amend to add this allegation. The motion to amend was denied as has been discussed in Respondent's Argument V. The PCR court did not address the issue in its Order of Dismissal (App. 8 – 45). Petitioner submitted a Rule 59 Motion to Alter or Amend renewing his motion to amend and asking the PCR court to address the new allegations in a Second Amended Application submitted after the PCR hearing. Although he specifically argued some of the new claims in his Rule 59 motion, he did not mention this allegation. (App. p. 349-353). The PCR court denied the motion to alter or amend. (App. 3).

Respondent submits that this Court should decline to consider this issue. It was not raised as an allegation prior to the PCR hearing was clearly based on the trial transcript, was not permitted as an amended claim after the hearing, was not ruled upon, and the lack of ruling was not specifically included in the motion to alter or amend. Accordingly the argument is not

preserved for review on appeal. Burgess v. State, 402 S.C. 92, 738 S.E.2d 264 (Ct.App. 2013); Smith v. State, 404 S.C. 493, 745 S.E.2d 378 (Ct.App. 2012); see also Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) (an issue must be presented to and ruled upon by the trial court before it may be considered on appeal).

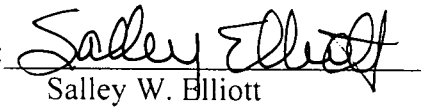
CONCLUSION

Based upon the foregoing, the State requests that this Court deny the petition for writ of certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

BY: 
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January 15, 2015

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 15 2015
S.C. Supreme Court

January 15, 2015

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: Berry Bolin v. The State
Appellate Case No: 2014-000281

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Return to Petition for Writ of Certiorari and Motion to Exceed Page Limits for Return along with proof of service in the above-referenced case.

Sincerely,

Salley W. Elliott
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

SWE/ab
Enclosures

cc: T. Micah Leddy, Esquire
Ms. Trisha Allen