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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

ORIGINAL

Case No. 2008-CP-01-0085

Otis James Compton, #262807, Petitioner,

v.

State of South Carolina, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

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2. Even if Petitioner's Sixth Amendment right to counsel had attached, did the PCR Court properly conclude Petitioner failed to establish Smithdeal was ineffective at the time the July 12, 2000 agreement was made for failing to either obtain a definitive immunity agreement or assert Petitioner's Fifth Amendment right to an attorney for all future matters related to the murder investigation? (Petitioner's Questions 1 & 2)

3. Did the post-conviction relief court properly conclude trial counsel was not ineffective for failing to properly object to the State's use of Compton's prior burglary convictions? (Petitioner's Question 3)

4. Did the post-conviction relief court properly conclude Petitioner failed to establish appellate counsel was ineffective for failing to raise on direct appeal the ground Petitioner's Fifth Amendment rights had been violated? (Petitioner's Question 4)

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Abbeville County Clerk. On October 30, 2000, the Abbeville County Grand Jury returned a five count indictment charging Petitioner with Murder, Burglary in the First Degree, Armed Robbery, Malicious Injury to Property, and Possession of a Firearm or Knife during the Commission of a Violent Crime (2000-GS-01-0464). On November 18-23, 2002,[1] he proceeded to trial by jury, and was represented by E. Charles Grose, Jr., Esquire, of the Eighth Circuit Public Defender's Office. A jury found him guilty of all charges as indicted. The Honorable Wyatt T. Saunders, Jr., sentenced Petitioner to life without parole pursuant to S.C. Code Ann. §17-25-45 for the murder, burglary, and armed robbery charges, to thirty (30) days imprisonment for the malicious injury charge, and to five (5) years imprisonment, to be served consecutively, on the weapon charge.

A timely Notice of Appeal was filed on Petitioner's behalf, and an appeal was perfected by Robert M. Dudek, Assistant Appellate Defender, with the South Carolina Office of Appellate Defense,[2] and E. Charles Grose, Jr., Eighth Circuit Public Defender. In a published opinion, the South Carolina Court of Appeals affirmed the Petitioner's convictions and sentences. State v. Compton, 366 S.C. 671, 623 S.E.2d 661 (Ct. App. 2005). On February 2, 2006, Petitioner filed a Petition for Rehearing, which was denied on March 26, 2006. Petitioner then sought certiorari in the Supreme Court of South Carolina, which was also denied. State v. Compton, S.C. Sup. Ct. Order filed August 9, 2007. The Remittitur was sent on August 15, 2007. On November 7,

[1] Pretrial hearings were also held on July 15, 2002, and November 14, 2002. Unless otherwise noted, all references to the transcript will be to the transcript of the actual trial.

[2] Now the South Carolina Commission on Indigent Defense, Division of Appellate Defense.

2007, Petitioner sought certiorari in the United States Supreme Court. That Petition was denied on January 7, 2008. Compton v. South Carolina, 128 S.Ct. 926 (2008).[3]

Petitioner then filed an Application for Post-Conviction Relief with the Abbeville County Clerk of Court on March 27, 2008. The State made its Return and Motion to Dismiss on September 30, 2008. Evidentiary hearings were convened in this case on August 17, 2009, and October 29, 2009. At these hearings, Petitioner presented the testimony of W. Townes Jones, IV, Esquire, Joseph Smithdeal, Esquire, trial counsel Charles Grose, and appellate counsel Robert Dudek. Petitioner did not testify at either hearing. The Honorable D. Garrison Hill denied and dismissed Petitioner's application with prejudice by Order dated February 25, 2010.

Petitioner filed and served a notice of appeal and a petition for writ of certiorari. This return follows.

[3] Attorneys Dudek and Grose also represented the Petitioner on the subsequent appeals.

STATEMENT OF FACTS

On August 6, 1999, the victim, Johnny Hanna, came home to find that his house was in the midst of being burglarized. The burglars, Otis Compton, Shane Rice and Robert Compton, were caught by surprise, and assaulted and murdered the victim by hitting him with a bat, stabbing him twice, and shooting him five times. The final shot to the victim's head was fired while the assailant was standing over him. Otis Compton, Shane Rice and Robert Compton then fled the scene. Although investigators submitted blood samples, hair samples, and fingerprints from the crime scene for analysis, none of that evidence conclusively pointed to any of the suspects.[4] Shortly after, the Petitioner heard that he was a suspect in the burglary and murder of the victim. At the time of the victim's killing, the Petitioner had pending first degree burglary charges from unrelated incidents. Joseph Smithdeal, Esquire, represented the Petitioner on those charges.

On August 13, 1999 – one week after the crimes occurred – the Petitioner called Chief Johnson wanting to talk about the murder. After being read and waiving his right to remain silent, and after speaking with Attorney Smithdeal, the Petitioner gave a voluntary, incriminating statement.[5] (App. 299-302; 563). On November 30, 1999, the Petitioner ultimately pled guilty to the unrelated burglary charges and was sentenced to fifteen years confinement.

On January 18, 2000, the Petitioner, who was in court to plead guilty to another unrelated third degree burglary, spoke with Tracy Black in the holding cell at the Anderson County courthouse. The Petitioner had known Black almost all of his life. (App. 972). According to Black, the Petitioner told him that he pled guilty to the prior burglary charges to cover for his

[4] However, Sheila Hanna Wildes testified that after the murder, she found a black glove in her house that did not belong to anyone who lived there. (App. 265-266). Michelle Dixon explained during her expert testimony that if one is wearing a glove, one does not leave fingerprints on items they touch. (App. 202; 265-266).

[5] According to Chief Johnson and Agent Gambrell, when the subject of hair samples, blood samples, and fingerprints came up, the Petitioner responded "How could it be mine if I stayed in the car?" (App. 302).

wife, Angel, so that she would keep quiet about another burglary he was involved in that "had went bad." Black testified that the Petitioner told him he was a suspect in the victim's murder because the victim came home during the burglary, and that they had to do what they had to do. (App. 407-408). The Petitioner testified at trial that he talked with Black that day, but that all he told him about the murder was that he was a suspect. (App. 972-975).

On March 9, 2000, a SLED officer went to speak with Black, who was incarcerated at McCormick Correctional Institution, about an unrelated matter when he told the SLED officer that he had heard some information about the victim's death and asked to be put in touch with Sheriff Goodwin. (App. 409-410). Later that day, four police officers came to interview Black. Black told the officers about his conversation with the Petitioner at the Anderson County courthouse on January 18th regarding the murder, and that he felt the Petitioner was involved in it. (App. 413). Black told them that he was getting transferred soon, regardless, and that if he were placed at Kershaw he could listen to see if anything else was said. (App. 413-414). The following week, Black was transferred to Kershaw Correctional Institution, where the Petitioner was housed.[6] (App. 416).

On July 12, 2000, the Petitioner was brought back to Abbeville County because his wife was going to court on the unrelated first-degree burglaries. While he was at the courthouse, the Petitioner contacted Abbeville County Sheriff Charles Goodwin and told him that he would tell the police what he knew about the murder in exchange for a sentence reduction. Sheriff Goodwin asked the Petitioner if he wanted an attorney. Per the Petitioner's request, he was then taken to attorney Joseph Smithdeal's office. (App. 640-643). After speaking with Attorney Smithdeal alone for approximately an hour, and after signing a waiver of rights form, the

[6] Black was transferred the north yard, while the Petitioner was housed in the south yard. They were not cellmates until some months later. (App. 417; 979).

Petitioner, Sheriff Goodwin, Solicitor Jones, and Attorney Smithdeal signed a document captioned "plea agreement." (App. 644-645). At the Petitioner's request, the plea agreement provided that he would provide truthful information about the murder of the victim in exchange a reduction in sentence by all reasonable mean on the other burglary charges from fifteen years to seven-and-a-half years imprisonment. (App. 856). The plea agreement did not include any express promise made by the State to not prosecute the Petitioner for the murder of the victim. The so-called "plea agreement" in fact had no provisions relevant to any future plea or any criminal charges other than the prior burglaries to which the Petitioner had already pled guilty.

As part of the plea agreement, the Petitioner gave a statement to the police in which he stated that Shane Rice had confessed to him the details of the crime after he, the Petitioner, and Robert Compton had all gone out drinking together. (App. 976). In particular, Rice told the Petitioner that while he and Robert Compton were robbing the victim's home, the victim came home and surprised them. (App. 977). When they saw the victim, Robert Compton stabbed him and Rice shot him several times. (App. 977). At trial, the Petitioner maintained this statement was true, and that he was not present at the time the crime was committed. (App. 948-998).[7]

After giving his statement, the Petitioner was transported back to Kershaw Correctional Institution. Eventually, the Petitioner and Black became cellmates. Several witnesses, including Black, testified that while they were all incarcerated together, the Petitioner talked about his involvement in the victim's murder. (App. 419-422; 536-544; 555-556). The Petitioner first testified that he knew details about the crime because Black told him, but then later that he knew details from Shane Rice, not Black. (App. 1016; 1021-1033).

[7] The Petitioner presented the testimony of numerous family members who testified that the Petitioner was with them during the robbery and murder. (App. 872-948). The Petitioner also testified that he was at the courthouse on July 12, 2000 for his wife's trial on unrelated burglaries, and that he planned to lie for his wife on the witness stand and say "she wasn't there," or that "she didn't go in the house." (App. 1021).

On October 9, 2000, the Petitioner contacted SLED agent Steve Gambrell and told him that he had something he needed to get off his chest, but that he wanted to be taken to Abbeville. (App. 569-573). The Petitioner also stated that he wanted Black to come with him. (App. 573). Agents Gambrell and Templeton then picked up the Petitioner and Black and took them to Abbeville, where they met up with Sheriff Goodwin and Chief Marion Johnson. (App. 575-577). In the late evening of October 9th, after being advised of his rights and waiving them, the Petitioner gave a statement that he was present at the victim's house when the crimes were committed, but that he did not go inside. (App. 489-492).

The following day, after resting and being advised of his rights again, the Petitioner waived his rights and gave another statement to the police in which he stated that he was riding around with Shane Rice and Robert Compton when Rice suggested that they could rob the victim's home. (App. 582-586; 576). The Petitioner further stated that he remained in Rice's truck while Rice and Robert Compton went into the home to rob it. (App. 586-587). The Petitioner then told the police that he watched as Rice and Robert Compton killed the victim when he came home. (App. 588- 590).

The Petitioner was arrested for the burglary and murder of the victim on October 12, 2000. Attorney Smithdeal testified that he wrote a letter the next day to the police stating that he had formerly represented the Petitioner on other charges, and requested that the police not contact Otis until he has an attorney representing him. Significantly, the letter did not indicate that Attorney Smithdeal represented the Petitioner on the murder charge, or that the police needed his approval before speaking with the Petitioner.

After the October 9-10, 2000 statements, the Petitioner agreed to go back to the scene of the crime with the pathologist and agent Derrick to lay out for them what happened when the

crimes were committed. (App. 494). On October 25, 2000, the Petitioner went back to Abbeville to walk through the victim's home with Dr. Brett Woodward, the pathologist who conducted the victim's autopsy, as well as with SLED agent Steve Derrick, who reconstructed the scene based on his analysis of the blood spatter evidence. The Petitioner was advised of his rights again, waived them, and spoke voluntarily with Dr. Woodward and Agent Derrick. (App. 745). Agent Derrick testified at trial that on August 16, 1999 he formed an initial opinion about how the victim was shot, but that as additional evidence became available, including the autopsy report, his opinion about how the victim was shot became more precise although both were accurate.[8] See p. 760, line 1-p. 762, line 17. Significantly, both Dr. Woodward and Agent Derrick testified at trial that the Petitioner's description of the assault was consistent with their ultimate findings.

In addition, there was evidence that the Petitioner was not being truthful in certain statements he gave during the October 25th meeting. For example, while at the scene, the Petitioner stated that he was waiting in Shane Rice's truck when the burglary was taking place; however, he changed his story to state that he was in a 1980 Monte Carlo after he was informed that Rice's truck could not have made the tracks that were found in the victim's back yard. (App. 714-716).

Prior to trial, defense counsel argued a motion to recuse Solicitor Jones and his office from prosecuting the Petitioner because the Solicitor was a witness defense counsel intended to call at the subsequent suppression hearing. (App. 1184). As a result, Solicitor Jones was subsequently recused. Defense counsel also argued a pre-trial motion to quash the indictment based on an immunity agreement or, in the alternative, to suppress all of the Petitioner's statements made to law enforcement after he entered into the July 12, 2000 plea agreement.

[8] Dr. Woodward did not change opinions. (App. 800-811).

(App. 1264). In support of his motion, defense counsel argued four grounds: that the plea agreement granted the Petitioner immunity, that the Petitioner's incriminating statements were not admissible under Rule 410 of the South Carolina Rules of Evidence, and that the statements were not admissible on both Fifth and Sixth Amendment grounds. (App. 1485-1494). The trial court denied both motions, and specifically ruled that the Petitioner was not deprived of his right to counsel at any time, and was in no way caused to make self-incriminating statements against his will. (App. 1509-1510).

The following day, defense counsel wrote the trial judge stating that "we will need to discuss what is admissible about the prior burglary convictions." After jury selection, defense counsel made several pretrial motions, and specifically addressed what information about the prior burglary convictions would be admissible, although the trial court determined the issue was premature to discuss at that time.[9] See (App. 57-58). The issue was revisited during a discussion, outside the presence of the jury, early in the trial. At that time, both Solicitor McMahon and defense counsel determined that the prior burglaries had to be addressed given the trial court's prior rulings. (App. 307-309). The issue was not revisited again.

On direct appeal to the South Carolina Court of Appeals, appellate counsel raised several issues including immunity, the promise of leniency, Rule 410, SCRE, right to counsel, cross-examination of a witness. However, the Court affirmed the Petitioner's convictions.

[9] Defense counsel motioned to dismiss a juror, offered to stipulate to the contents of the 911 tape so the Petitioner would not be prejudiced by the jury hearing the tape, and objected to the jury being sworn for the reasons previously argued on November 14, 2002. (App. 54-59). All of defense counsel's motions were denied.

STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 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, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Strickland. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's 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." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Sixth Amendment's guarantee of effective assistance of counsel extends to the defendant's first appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). The two-prong test of Strickland v. Washington applies to claims of ineffective assistance of appellate counsel. Bennett v. State, 383 S.C. 303, 680 S.E.2d 273 (2009).

The Applicant must show that appellate counsel's performance was deficient and that he was prejudiced by the deficiency. Thrift v. State, 302 S.C. 535, 537, 539, 397 S.E.2d 523 (1990); Gilchrist v. State, 364 S.C. 173, 612 S.E.2d 702 (2005); Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

ARGUMENT

I. Petitioner is collaterally estopped from asserting his Sixth Amendment right to counsel was violated prior to his indictment on these charges. Even if not precluded, Petitioner's ineffective assistance claims against Smithdeal are without merit as Smithdeal represented Petitioner on unrelated charges before Petitioner's Sixth Amendment right to counsel attached to the charges in this case. (Petitioner's Questions 1 & 2)

Collateral Estoppel

As a threshold matter, collateral estoppel precludes Petitioner from asserting his Sixth Amendment right to counsel was violated prior to his indictment on Oct. 30, 2000. An issue previously litigated at trial and lost on appeal is precluded from being raised in a subsequent PCR action. See Koon v. State, 358 S.C. 359, 364-65, 595 S.E.2d 456, 459 (2004), *overruled on other grounds by* State v. Gentry, 363 S.C. 359, 364-65, 595 S.E.2d 456, 459 (2004).

At trial, Petitioner moved to suppress his pre-indictment statements on the grounds his Sixth Amendment right to counsel attached in this matter when Smithdeal represented him with regards to the July 12, 2000 agreement, and this right was subsequently violated by State initiated contact. (App. 1482-1494). In rejecting this argument, the Court of Appeals found Petitioner's Sixth Amendment right to counsel for the charges stemming from this murder did not attach until 'post-indictment,' and found the events complained of took place prior to that time.[10] Id. at 680-81, 623 S.E.2d at 666. The Court of Appeals further explained the Sixth Amendment right to counsel is "offense-specific"; therefore, the fact Petitioner "was represented on the unrelated burglary charges *and* at the time of the agreement" did not invoke his right to counsel in this unrelated matter. Id. (emphasis added).

Petitioner now alleges his Sixth Amendment right to the effective assistance of counsel in this case was violated by Smithdeal's allegedly deficient representation. The record in this case

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[10] Petitioner acknowledges understanding this issue has already been decided. See Pet. for Writ of Cert. p. 12, n. 6.

is clear that Smithdeal represented Petitioner only on unrelated burglary charges and at the time of the July 12, 2000 statement. Smithdeal never represented Petitioner on charges stemming from Hanna's murder. Petitioner was subsequently indicted for charges in this case on November 27, 2000. (App. 1838). Clearly, this allegation is wholly based on the issue of whether Petitioner's Sixth Amendment right to counsel attached before Petitioner was indicted and during the time period in which Smithdeal represented him – an issue Petitioner is precluded from relitigating.

Attachment of the Sixth Amendment Right to Counsel

Even if Petitioner is not precluded from raising this issue, the same legal analysis applies and Petitioner's assertions as to Smithdeal's representation are without merit because his Sixth Amendment right to counsel had not attached yet. "The Sixth Amendment right to counsel attaches when adversarial judicial proceedings have been initiated and at all critical stages." State v. Register, 323 S.C. 471, 477, 476 S.E.2d 153, 157 (1996). This right "does not attach simply because the defendant has been arrested or because the investigation has focused on him." Id. (citing Hoffa v. United States, 385 U.S. 293, 87 S.Ct. 408 (1966)). "[T]he Sixth Amendment right attaches only 'post-indictment,' at least in the question/statement setting." Id. (citing Michigan v. Harvey, 494 U.S. 344, 110 S.Ct. 1176 (1990)). "Further, the Sixth Amendment right to counsel is offense-specific; the mere fact counsel is appointed in one matter does not invoke the right to counsel in an unrelated matter." State v. Owens, 346 S.C. 637, 661, 552 S.E.2d 745, 758 (2001), *overruled on other grounds by* State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). The fact that the Sixth Amendment right to counsel has attached in one matter does not necessarily extent the right to counsel to "factually related" offenses; however, it would extend to offenses not formally charged if they "would be considered the same offense for

double jeopardy purposes." Id. at 661-62, 552 S.E.2d at 758 (citing Texas v. Cobb, 532 U.S. 162, 121 S.Ct. 1335 (2001)).

The record in this case is clearly establishes Smithdeal's representation of Petitioner with regards to the July 31, 2008 agreement took place prior to the time of Petitioner's indictment on October 30, 2008. Further, Smithdeal represented Petitioner on burglary charges not factually related to the case at hand. Accordingly, Petitioner's Sixth Amendment right to counsel on the charges stemming from the murder was not implicated by, or at the time of, Smithdeal's representation on an unrelated matter. Accordingly, Petitioner's assertion Smithdeal provided ineffective assistance of counsel in violation of the Sixth Amendment right to counsel is without merit.[11]

II. Even if Petitioner's Sixth Amendment right to counsel had attached, the PCR Court properly concluded Petitioner failed to establish Smithdeal was ineffective at the time the July 12, 2000 agreement was made for failing to either obtain a definitive immunity agreement or assert Petitioner's Fifth Amendment right to an attorney for all future matters related to the murder investigation. (Petitioner's Questions 1 & 2)

Petitioner first argues Smithdeal was deficient for failing to obtain or otherwise insist on the inclusion of a specific immunity provision with regards to the murder he would eventually be charged with. Second, Petitioner argues Smithdeal was deficient for failing to assert Petitioner's Fifth Amendment right to remain silent and otherwise establish himself as counsel for all future conversations with Petitioner. Petitioner asserts he was prejudiced because either action by Smithdeal would have prevented the State from prosecuting him, or would have otherwise

[11] Petitioner also attempts to circumvent the issue of attachment, by way of footnote, by asserting Smithdeal was ineffective for purposes of the Fifth Amendment right to counsel. However, the right to *effective assistance* of counsel is specific to the Sixth Amendment. See Strickland, 466 U.S. 668, 104 S.Ct. 2052 (analyzing effectiveness of attorney performance pursuant to Sixth Amendment guarantee of "Assistance of Counsel"). Petitioner offers no binding legal precedent which holds an individual is guaranteed effective assistance of counsel pursuant to the Fifth Amendment's right to counsel.

created a scenario in which he would have been "highly likely" to not give incriminating statements.

Failure to Obtain Immunity Provision

The post-conviction relief court found Petitioner failed to prove that Smithdeal, who represented Petitioner on unrelated charges, was deficient for failing to obtain a specific immunity agreement for any and all charges that might result from information Petitioner voluntarily provided law enforcement about this case. The court found Petitioner could not credibly claim "he was lulled into believing" the agreement granted immunity in exchange for information because "the agreement never uses the word immunity, or any variation thereof." [12] The court found it could not be inferred Petitioner only gave statements in reliance on his belief the agreement granted him immunity because Petitioner voluntarily gave statements before, at the time of, and after the July 12, 2000 agreement, and several were made to persons not in law enforcement. Further, the court found all of Petitioner's statements to law enforcement were voluntarily given "after being advised of his Miranda rights, particularly that anything he said could be used against him in a court of law."

The post-conviction relief court also found Petitioner could not prove he was prejudiced by Smithdeal's allegedly deficient representation because Smithdeal advised Petitioner not to sign the agreement and give a statement, but Petitioner insisted on doing so against the advice of counsel. The court found "[o]ne can infer that this is the same advice Smithdeal would have given [Petitioner] if he had been more formally retained or appointed." The court found the record showed Smithdeal clearly could not prevent Petitioner from waiving his rights, and could

[12] The post-conviction relief court noted the trial court likewise previously determined the agreement could not reasonably be interpreted to provide immunity from any subsequent charges, but instead "directly affects the charges that arose out of the prior indictments." (App. p. 2046, n. 12). The court further noted this conclusion was affirmed by the Court of Appeals.

not protect Petitioner from the consequences of his voluntary statements. Respondent submits there is probative evidence in the record to support these findings, and the petition should be denied.

There is no evidence in the record to suggest any possibility existed of obtaining an immunity agreement through some act on Smithdeal's part. Petitioner had not yet been arrested or charged with anything related to the murder, and the only benefit the agreement contemplated Petitioner receiving was with regards to the burglary charges on which Smithdeal actually represented him. There is no evidence tending to indicate the State ever contemplated the possibility of offering Petitioner *any* leniency with regards to charges stemming from the murder, much less the possibility of immunity.[13] Testimony at trial revealed Petitioner was considered the "prime suspect" for the murder prior to this agreement. (App. 375-376). Further, although the Solicitor could not recall whether immunity was discussed, he testified he "has never offered anybody immunity on any case," and if an immunity provision was discussed he would not have agreed to it. (App. 1871-1872; 1875).

Further, Petitioner's assertion "Smithdeal failed to ensure that the Petitioner could be protected if the State attempted to prosecute the Petitioner for the victim's murder" is entirely without merit. The record clearly establishes Smithdeal attempted to protect Petitioner's rights with sound, reasonable advice; however, Petitioner knowingly and voluntary disregarded that advice. Smithdeal testified he specifically advised Petitioner there were no provisions in the agreement that provided immunity from prosecution for the murder. (App. 1895). He advised Petitioner law enforcement was "fishing, they were looking for something against him," and advised him they would use his statements against him. (App. 1893). He advised Petitioner that

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[13] As the Court of Appeals held in this case, there is no evidence indicating the State offered Petitioner any leniency on the murder charges, nor is there any evidence the parties discussed a plea deal. Compton, 366 S.C at 679-80, 623 S.E.2d at 665-66.

the benefit of cutting his fifteen year burglary sentences in half was not worth subjecting himself to a possible life sentence for murder. (App. 1894-1895). He also advised Petitioner that he may never receive the benefit of the agreement because it allowed the State to call the deal off if he gave any information the State disagreed with or felt did not match up with the evidence. (App. 1895). As the lower court properly noted, Smithdeal clearly could not prevent Petitioner from waiving his rights

Assuming Smithdeal was somehow deficient in his representation, Petitioner cannot prove prejudice resulting from such alleged deficiency. Petitioner asserts, again by footnote, "it is clear that the Petitioner thought he was getting immunity in exchange for his information," and "[i]t can be surmised that the Petitioner would not have given information had he thought he was going to be prosecuted for the information that he gave."[14] These assertions ask the Court to presume prejudice based on assumptions for which there is no evidentiary support. The Petitioner has the burden in this case of proving the allegations in his application. See Butler, 286 S.C. 441, 334 S.E.2d 813. However, Petitioner did not testify in support of his application for post-conviction relief. Nor did he otherwise admit evidence to establish his alleged belief that the agreement provided him immunity, or his assertion would have never given any information had he known otherwise.[15] Further, the testimony that was actually presented at the hearings established Smithdeal advised Petitioner there was no provision for immunity and his statements could be used against him.

However, despite Smithdeal's despite Attorney Smithdeal's advice, the Petitioner entered into the July 12, 2000 plea agreement and gave a statement. That statement was not

[14] See Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008) ("mere speculation and conjecture . . . is insufficient to substantiate allegation that counsel's deficient performance was prejudicial") (citing Glover v. State, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995)).

[15] The only evidence Petitioner cites in support of this string of assumptions is the testimony of trial counsel, Charles Grose. Grose merely testified Petitioner "thought he was not going to be prosecuted for this murder." (App. pp. 1962-63).

incriminating, but was preceded by and followed by several other incriminating statements, all initiated and made voluntarily by the Petitioner after being advised of and waiving his rights.[16] Therefore, the lower court properly found Smithdeal could not prevent Petitioner from waiving his rights, and could not protect him from the consequences of his voluntary statements. Accordingly, the lower court properly held Smithdeal was not deficient in his representation, and Petitioner failed to prove any prejudice resulting from Smithdeal's assistance.

Failure to assert Petitioner's Fifth Amendment Rights

The post-conviction relief court found Smithdeal was not ineffective for failing to assert Petitioner's Fifth Amendment right to counsel for all matters related to the murder investigation because Petitioner's Sixth Amendment right to counsel had yet to attach to the murder charges. The Court did find Petitioner's request for Smithdeal as his attorney on July 12, 2000 "undoubtedly invoked his Fifth Amendment rights." However, the court found Petitioner's Fifth Amendment rights were not violated because Petitioner initiated contact with police and then knowingly, intelligently, and voluntarily waived his Miranda rights.

The post-conviction relief court rejected Petitioner's assertions Smithdeal should have done more to invoke, or to re-invoke, his Fifth Amendment right to counsel. The court found any attempt to more formally invoke "would have been superfluous" because Smithdeal did not represent Petitioner on the murder charges, and because the law does not allow a third party to invoke Fifth Amendment rights on behalf of another. The court further found the assertion Smithdeal should have re-invoked Petitioner's right to counsel to be a "syllogistic argument [which] chases it's own tail, and has no basis in logic or precedent." The court then found "credible evidence" that Petitioner "spurned Smithdeal's advice to remain silent and insisted on

[16] Petitioner made these statements to law enforcement on August 13, 1999, November 30, 1999, July 12, 2000, October 9-10 2000, and October 25, 2000. (App. 284; 299-302; 965-96; 1000; 1007; 974-978; 1003-1004; 1007; 974-978; 1003-1004; 974-978; 1003- 1004; 1024-1036).

talking to police." The court then found Petitioner did not thereafter seek the assistance of Smithdeal, or any attorney, despite numerous Miranda warnings that "reminded him he had the absolute right to counsel and to remain silent."

As discussed fully above in Argument I, the post-conviction relief court properly held Smithdeal could not have been ineffective because the Sixth Amendment right to counsel had not attached. Smithdeal represented Petitioner on unrelated burglary charges and at the time of the July 12, 2008 agreement; however, he testified he was never appointed or retained to represent Petitioner on the murder charges. (App. 1904). Accordingly, because Petitioner did not have a Sixth Amendment right to counsel on charges stemming from the Hanna murder at the time he was represented by Smithdeal, Petitioner's assertions as to Smithdeal's representation are without merit.

Petitioner's argument Smithdeal should have invoked Petitioner's right to remain silent at the July 12, 2000 meeting and asserted his role as counsel for any matters pertaining to the murder charges is without merit because this is a power Smithdeal did not possess. It is a well settled rule that the Fifth Amendment privilege against self-incrimination is personal and may not be invoked by, or on behalf of, a third person. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 89 L.Ed. 2d 410 (1986) ("[T]he privilege against compulsory self-incrimination is, by hypothesis, a personal one that can be only invoked by the individual whose testimony is being compelled"); State v. Hughes, 328 S.C. 146, 493 S.E.2d 821 (1997); U.S. v. Wise, 603 F.2d 1101 (4th Cir. 1979) (Recognizing that Fifth Amendment rights are personal and cannot be vicariously asserted.).

Petitioner references Smithdeal's letter to Sheriff Goodwin, dated October 13, 2000, to support the position that Smithdeal could have asserted the Petitioner's Fifth Amendment right,

that he did so in the contents of this letter, and therefore should have done so sooner. However, Smithdeal's letter clearly states that he formerly represented the Petitioner on charges unrelated to the murder, and that Otis told him he was going to hire an attorney to represent him on the murder charges. (App. 1924-1925). Smithdeal did request in his letter that Sheriff Goodwin not speak with Petitioner until he has an attorney. However, this letter was clearly Smithdeal's best effort at protecting the Petitioner, despite the fact that he did not represent him on the murder charge, and despite the fact that the law does not allow a third party to invoke Fifth Amendment rights on behalf of another.

Furthermore, it is clear Petitioner understood after July 12, 2000 that he had the right to an attorney, but voluntarily waived that right in each instance. Petitioner testified at trial that he knew if he wanted a lawyer present on October 9, 2000 that he could have just asked for one, and that law enforcement informed him of this right. (App. 1024-1025). Petitioner's knowledge of his rights is perhaps most clear in the following statement he made at trial: "I was advised of my rights a lot, yeah." (App. 1024).

III. The post-conviction relief court properly concluded trial counsel was not ineffective for failing to properly object to the State's use of Compton's prior burglary convictions. (Petitioner's Question 3)

The post-conviction relief court concluded the prior burglaries were likely admissible as proof of identity or a common scheme or plan, and found it reasonable for a trial judge, in exercising discretion, to conclude the probative value of such evidence outweighed the danger of prejudice. (App. 2055-2056). The court concluded any objections to the prior burglaries would likely have been overruled; therefore, trial counsel was not deficient for failing to object to such evidence. The court also found trial counsel articulated valid reasons for the strategy he utilized at trial, and rejected Petitioner's argument that competent counsel would have sought a ruling

redacting or otherwise removing any specific references to the prior burglaries from the record. (2054-2057). The court held it was not persuaded the trial judge would have found such specific references to the prior burglaries to be unfairly prejudicial impeachment evidence, and found such evidence otherwise likely admissible for reasons stated above. Furthermore, the court concluded that even if trial counsel was deficient, the Petitioner failed to establish how he was prejudiced by such error. The court found any alleged error by counsel was harmless given the otherwise overwhelming evidence of his guilt, and in light of the trial judge's limiting instruction to the jury to consider the prior convictions only in assessing credibility of a witness, and not as evidence of the Petitioner's guilt. Respondent submits there is probative evidence in the record to support the findings of the post-conviction relief court.

The record before this Court reveals that on November 15, 2002, defense counsel wrote a letter to the trial court indicating that he needed to address what would be admissible about the Petitioner's prior burglaries. On November 18, 2002, the first day of the trial, defense counsel addressed the issue during pretrial motions, arguing the Petitioner's prior burglaries convictions were inadmissible as an element of the burglary first-degree offense because he did not obtain those convictions until after the instant burglary and murder were committed. However, defense counsel acknowledged the prior burglaries were going to come in for other reasons. The court did not rule on the issue because the issue was premature for discussion at that time. (App. 57-58).

Defense counsel addressed the issue again outside the presence of the jury when Solicitor McMahon sought to bring out the Petitioner's prior burglaries through Chief Johnson's testimony. Defense counsel stated that, because the trial court denied his motion to suppress and determined the plea agreement was admissible, testimony about the prior burglaries that were the

subject of the plea agreement would necessarily come in through witness testimony. Therefore, in response to what the State was going to present, and because he lost his earlier motions, defense counsel would eventually bring out the same information anyway in order to effect the Petitioner's confrontation rights and to demonstrate that the statements were involuntarily made based on promises by the State. (App. 307-309). While defense counsel testified before the lower court that he intended to attack the introduction of the prior bad act evidence again in the trial, but did not do so, the admission of these acts was argued pretrial and defense counsel's motion was denied. Regardless, even if defense counsel had objected to the admission of the Petitioner's prior bad acts, the judge would have been well within his discretion to admit this evidence under Rule 404(b).

Evidence of other bad acts is admissible to show motive, identity, common scheme or plan, the absence of mistake or accident, or intent. Rule 404(b), SCRE; State v. Wilson, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001); State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). "The record must support a logical relevance between the prior bad act and the crime for which the defendant is accused." State v. Brooks, 341 S.C. 57, 61, 533 S.E.2d 325, 327 (2000). Evidence of other crimes, even if relevant, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Wilson at 7, 545 S.E.2d at 830; *see also* Rule 403, SCRE. "The determination of the prejudicial effect of the evidence must be based on the entire record and the result will generally turn on the facts of each case." State v. Johnson, 306 S.C. 119, 125, 551 S.E.2d 547, 551 (1991). "If there is any evidence to support the admission of the bad act evidence, the trial judge's ruling will not be disturbed on appeal." Id.

In this case, Petitioner's other burglaries were admissible as tending to establish a common scheme or plan and Petitioner's identity. "A close degree of similarity or connection

between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). Testimony at trial established several of Petitioner's other burglaries were factually similar to the Hanna incident with regards to the manner in which the doors were kicked in and windows were broken, and also as to the unusual nature of the items stolen.[17] (App. 372-374). However, more important is the connection established by the location and time in which Petitioner's other burglaries were committed in relation to the Hanna incident. Testimony established that most of Petitioner's burglaries were committed in close proximity to the Hanna residence.[18] Significantly, Chief Johnson and Sheriff Goodwin both testified that when Petitioner was arrested for prior burglaries in April of 1999, burglaries in that same area nearly stopped. (App. 376; 634). They further testified the number of burglaries in that area had gone back up the week of the Hanna murder. Coincidentally, Petitioner had been released on bond about a week prior, and was ultimately charged with committing another burglary in the same area on the same week as the Hanna murder. (App. 383-384).

Furthermore, Petitioner's own statements linked the crimes in this case to his other burglaries. "[W]here the defendant's own actions link two crimes together, evidence of one crime is admissible as proof of the other under the common scheme or plan exception." State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001). The State admitted evidence of statements Petitioner made to Black indicating he was serving fifteen years for Abbeville County burglary convictions in which he took assumed all responsibility so Angel, his wife, would keep quiet about "a burglary that had gone bad." (App. 313). Petitioner elaborated that in the middle

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[17] Testimony at trial established that while most burglars take televisions, VCRs, camcorders, guns, etc., the items removed from Petitioner's other burglaries included potato bins, irons, and other household items. (App. 376-377). Similarly, the items removed from Hanna's home included, among other things, a makeup kit, children's piggy banks, and family home videos. (App. 256-258; 376-377).

[18] Chief Johnson elaborated: "If you were a crow, you would fly behind the Hanna house, and slightly to the right and that's where the majority of these burglaries occurred." (App. 374-375).

of the burglary a man came home and "I had to do what I had to do." (App. 314; 406-407). These statements alone informed the jury that Petitioner had committed other burglaries. However, in order to establish the identity of Petitioner as the perpetrator in this case, the State was entitled to present additional information and details on Petitioner's other burglaries. To hold otherwise would unduly hinder the State from being able to meet its burden of proof, and leave jurors wondering if the accused's own incriminating statements refer to a different crime for which he is not on trial. Accordingly, Petitioner's other burglaries in this case were admissible as proof of a common scheme or plan and Petitioner's identity, and it is likely objections to such evidence would have been overruled.

Even assuming Petitioner's prior burglary convictions were not admissible in the State's case under an exception to Rule 404(b), they were likely admissible for impeachment purposes under Rule 609(a)(2), SCRE. Pursuant to Rule 609(a)(2), "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." Prior convictions admissible under this rule, in contrast to those admissible under 609(a)(1), are automatically admissible without balancing the probative value of the conviction against its prejudicial effect. State v. Al-Amin, 353 S.C. 405, 426, 578 S.E.2d 32, 43 (Ct. App. 2003). In Al-Amin, the Court of Appeals held armed robbery is a crime of dishonesty for purposes of 609(a)(2). *See also* State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) (finding trial judge's decision to allow impeachment of defendant with prior convictions for housebreaking and larceny as crimes of dishonesty was supported by the evidence). The Court's reasoning was based on its prior holding in State v. Shaw, 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997), that shoplifting is a crime of dishonesty, and the fact that "dishonesty" is defined as a "disposition to lie, cheat, or steal." Al-Amin at 423-25, 578 S.E.2d at 42-43. Although a

burglary conviction may not by itself be probative of truthfulness, State v. Bryant 369 S.C. 511, 633 S.E.2d 152 (2006), Petitioner's prior burglaries involved breaking into people's homes and stealing their belongings to support his crack habit. (App. 1005-1007). Therefore, Petitioner's prior convictions would have been admissible over objection under Rule 609(a)(2).

Even if the impeachment value of Petitioner's prior burglary convictions is analyzed pursuant to Rule 601(a)(1), SCRE, the probative value of such evidence certainly outweighed any prejudicial effect. These convictions were highly probative of Petitioner's credibility in light of the numerous inconsistent statements he made concerning his presence at the scene or involvement in the crime. Petitioner then testified on direct that he was not even present at the scene, and his prior statement indicating Shane Rice confessed to the murder after they smoked crack and drank beer was the *truth*. (App. 976-978). Petitioner also admitted at trial that he actually lied under oath in a previous court proceeding for these burglary charges on behalf of his wife. (App. 1012; 1021). Furthermore, as mentioned above, Petitioner's prior burglaries were motivated by the need to steal items to support his crack habit. Therefore, his prior burglaries were especially probative in this case in light of his prior statements indicating he smoked crack with Robert Compton and Shane Rice on the day of Hanna's murder, and the fact he weighed 112 pounds around the that time as a result of his habit. (App. 584-585).

Furthermore, the post-conviction relief court properly found trial counsel articulated valid reasons for not more aggressively challenging evidence of the prior convictions. "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). Trial counsel testified he knew the State intended to introduce evidence on the prior burglaries at trial. (App.

1981-1982). However, he assumed something about them would come in. (App. 2000). Therefore, his strategy going into trial was to suppress the July 12, 2000 statement; however, when it became clear the statement would be admitted his strategy was to ask the jury not to believe the statement because of the circumstances under which it was obtained. (App. 2001).

Trial counsel clearly articulated a valid defense strategy, particularly in light of the Petitioner's numerous voluntary, yet inconsistent statements, and given the fact that the plea agreement already existed by the time defense counsel was appointed to the Petitioner's case. Furthermore, there has been no evidence presented, other than speculation, to support the Petitioner's position that evidence of his prior bad acts would have been excluded under any of the foregoing rules. The trial court was within its discretion to admit evidence of the Petitioner's prior bad acts under the rules. See Foye v. State, 335 S.C. 586, 592, 518 S.E.2d 265, 268 (1999)(Petitioner's prior convictions probably would have been admissible to impeach his testimony and cast severe doubt on his credibility.).

Petitioner's assertion competent trial counsel would have sought to have the plea agreement redacted to remove any references to the prior burglaries, or would have otherwise sought a ruling sanitizing the entire record of any evidence or testimony revealing the nature of those crimes, is without merit. Even if the circumstances of this case did not warrant the admission of the prior burglaries as described above, the State was entitled to, at a bare minimum, admit the prior burglaries as proof of an element of first degree burglary pursuant to S.C. Code Ann. § 16-11-311(A)(2). Case law supports the conclusion the State is entitled to establish through extrinsic evidence the existence of two prior burglaries as an element of first degree burglary, and the State cannot be forced to even stipulate to the existence of prior burglaries. *See* State v. Cheatham, 349 S.C. 101, 561 S.E.2d 618 (Ct. App. 2002); State v.

Hamilton, 327 S.C. 440, 486 S.E.2d 512 (Ct. App. 1997); State v. James, 355 S.C. 25, 34, 583 S.E.2d 745, 749 (2003). Accordingly, trial counsel was incapable of sterilizing the record of any reference to Petitioner's prior burglary convictions.

Regardless of the State's right to prove the existence of the prior burglaries as an element of the crime, the conclusion the trial judge would have granted such a request is highly speculative. Petitioner cites Bruton v. U.S. to suggest that tiral counsel was ineffective for failing to redact reference the Petitioner's burglary convictions in the plea agreement. 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). In Bruton, the Court addressed the admissibility of a codefendant's confession that implicated the defendant at a joint trial. The Court recognized that some courts require deletion of references to codefendants where practicable. Id. However, the Court further recognized that "Where the confession is offered in evidence by means of oral testimony, redaction is patently impractical." Therefore, to the extent that Bruton even applies to the Petitioner's case, Bruton certainly does not suggest any commonality or reliability in redacting information about convictions in plea agreements, and in fact suggests the opposite. Therefore, even if defense counsel had redacted references to the Petitioner's burglary convictions in the plea agreement, that action would have been impractical in light of all of evidence admitted through oral testimony.

Finally, any error on trial counsel's part with regards to Petitioner's prior convictions was harmless in light of the overwhelming evidence of Petitioner's guilt. "When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result." State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see also Hill v. State, 350 S.C. 465, 472, 567 S.E.2d 847, 851 (2002) (finding trial counsel's deficient performance not

prejudicial in light of overwhelming evidence of applicant's guilt). Trial counsel argued throughout the entire trial that there was no physical evidence tying the Petitioner to the crime, the plausibility of the Petitioner's explanation for how he was "tricked," and the credibility of the "jail house snitches." All of these issues were matters for the jury to determine and were ultimately resolved adversely to the Petitioner. Despite counsel's contentions that the testimony from the "jail house snitches" was "self-serving," the record clearly indicates that every inmate who testified was already incarcerated, and was not being given any deal from State in exchange for his testimony. Furthermore, the substance of their testimony was that the Petitioner confessed to them while they were all in prison together, rather than the fact that the Petitioner had prior burglaries. Any prejudice the Petitioner may have suffered by the introduction of his prior convictions is not sufficient to cast doubt on the jury's verdict, particularly given the relative strength of the case against him.

Above all, the Petitioner has failed to show any prejudice that may have resulted from defense counsel's alleged deficient representation. The Petitioner has presented no evidence that had defense counsel's representation was so deficient that the outcome would have been different had trial counsel objected to the admission of the Petitioner's prior bad acts.

IV. The post-conviction relief court properly concluded appellate counsel was not ineffective for failing to raise on appeal the issue that Petitioner's Fifth Amendment right to counsel had been violated. (Petitioner's Question 4)

In denying this claim, the post-conviction relief court found appellate counsel was not ineffective for failing to raise on appeal the claim that Petitioner's Fifth Amendment rights were violated by law enforcement's placement of Black in his correctional institution because such a claim is "soundly refuted" by case law. The court also concluded Petitioner was not prejudiced by any alleged deficiency on appellate counsel's part because Petitioner confessed his

involvement in the Hanna murder to two other inmates in this case. The court then found no evidence in the record to indicate either of these inmates was a government agent who elicited information from Petitioner in violation of his Fifth Amendment rights. Respondent submits there is probative evidence in the record to support the lower court's findings.

While a defendant is constitutionally entitled to effective assistance of appellate counsel, appellate counsel is not required to raise every non-frivolous issue presented by the record. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

In this case, appellate counsel raised several issues including immunity, the promise of leniency, Rule 410, SCRE, Sixth Amendment right to counsel, and limitations imposed on the cross-examination of a witness. Appellate counsel testified that the central theory of the Petitioner's appeal was whether or not the July 12, 2000 agreement was a plea agreement or included immunity. (App. 1944). He testified the Sixth Amendment violation was raised on appeal because they were trying to argue Petitioner's Sixth Amendment right to counsel attached to the prior burglary charges and continued into these subsequent negotiations. (App. 1945).

Petitioner relies on U.S. v. Henry, 447 U.S. 264, 100 S.Ct. 2183 (1980), to support his argument Black was a government agent who gained his confidences to convince him to confess to police, all in violation of his Fifth Amendment right to counsel. As the lower court properly held, Petitioner's reliance on Henry is misplaced. Henry is expressly based exclusively on a Sixth Amendment right to counsel analysis. Id. at 272, 100 S.Ct. at 2188 ("But the Fourth and Fifth Amendment claims made in those cases are *not relevant* to the inquire under the Sixth

Amendment here—whether the Government has interfered with the right to counsel of the accused by 'deliberately eliciting' incriminating statements") (emphasis added); *see also* Illinois v. Perkins, 496 U.S. 292, 299, 110 S.Ct. 2394, 2398-99 (1990) (finding Henry and other Sixth Amendment precedents not applicable to interrogation of defendant where charges had not been filed yet). All of Petitioner's statements in this case were made before he was charged with any offenses stemming from the Hanna murder. Accordingly, the Sixth Amendment right to counsel had not attached yet.

In Illinois v. Perkins, the U. S. Supreme Court held "an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response." Id., 496 at 300, 110 S.Ct. at 2399. The Court found "conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*" because a police-dominated atmosphere and compulsion "are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate." Id. at 296, 110 S.Ct. at 2397. As quoted by the lower court:

> *Miranda* was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. . . . Respondent viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the Stephenson murder, respondent was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril.

Id. at 298, 110 S.Ct. at 2398. Likewise, the evidence in this case only tended to establish that Petitioner trusted Black and considered him a friend; there was indication he was intimidated or coerced into providing information. Therefore, Petitioner was not subjected to custodial interrogation for purposes of the Fifth Amendment right to counsel, and no violation occurred.

In addition, two other inmates testified at trial that Petitioner bragged to them about a time he shot someone, and that Petitioner went on to confess details of the Hanna murder and

burglary to them. (App. 536-556). As the lower court found, there is no evidence anywhere in the record, nor does the Petitioner allege, that either of these two inmates was a government agent eliciting incriminating information from the Petitioner in violation of his Fifth Amendment rights. As a result, the Petitioner was not prejudiced by the admission at trial of statements he made to Black, given the testimony of the two other inmates, and any error in the admission would have been deemed harmless on appeal.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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Columbia, South Carolina
August 22, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County

The Honorable D. Garrison Hill, Circuit Court Judge

OTIS JAMES COMPTON,

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tara Dawn Shurling
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I further certify that all parties required by Rule to be served have been served.

This 22nd day of August, 2011.

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