

STATE OF SOUTH CAROLINA
In the Supreme Court

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CERTIORARI TO AIKEN COUNTY
Court of Common Pleas
R. Ferrell Cothran, Jr., Circuit Court Judge

S.C. Supreme Court

Appellate Case No. 2014-000565

RUSTY DUNBAR,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

- I. Is there evidence of probative value to support the post-conviction relief court's ruling that trial counsel was not ineffective for failing to request a jury instruction on alibi?
- II. Is there evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for eliciting prior bad acts testimony from a State's witness, thereby opening the door for the State to elicit testimony regarding Applicant's use of crack cocaine?

STATEMENT OF THE CASE

During its January 2009 term, the Aiken County Grand Jury indicted Petitioner for kidnapping (2009-GS-02-0093), first-degree burglary (2009-GS-02-0092), armed robbery (2009-GS-02-0091), and the possession of a knife during the commission of a violent crime (2009-GS-02-0090). M. Justin Mims, Esquire, represented Petitioner on all charges. Assistant Solicitor Elizabeth Young prosecuted the case on behalf of the State. On December 15-17, 2009, Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III. The jury convicted Petitioner as indicted for each offense. Judge Early sentenced Petitioner to thirty years imprisonment for kidnapping, thirty years imprisonment for first-degree burglary, and thirty years imprisonment for armed robbery, and five years imprisonment for possession of a weapon during the commission of a violent crime, with all sentences to be served concurrently.

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals. Following the submission of an Anders¹ brief on Petitioner's behalf, the Court of Appeals dismissed Petitioner's appeal. State v. Rusty Dunbar, 2012-UP-093 (filed February 22, 2012). The Remittitur was issued on May 12, 2012.

Petitioner filed an application for post-conviction relief on March 29, 2012. (2012-CP-02-0795). Respondent made its Return to the application on June 25, 2012, requesting an evidentiary hearing be held. Thereafter, Petitioner, through his counsel, filed an amended application on June 28, 2013, alleging the following grounds for relief:

1. Ineffective assistance of counsel for counsel's elicitation of prior bad acts testimony from a State's witness after successfully objecting and receiving a curative instruction from the trial court which precluded the jury from considering the prior bad acts, thereby opening the door for the State to go into those bad acts;

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

2. Ineffective assistance of counsel for failing to request an alibi instruction, where applicant's sole defense was that of alibi;
3. Ineffective assistance of counsel for failing to turn over alibi witness statements to the State prior to trial;
4. Ineffective assistance of counsel for failing to object to improper arguments made during the solicitor's closing arguments; and
5. Brady violations for failing to turn over statements that had been made by a state's witness to law enforcement concerning the crimes.

An evidentiary hearing on was held on July 10, 2013, at the Aiken County Courthouse before the Honorable R. Ferrell Cothran, Jr. Petitioner was present at the hearing and represented by Brett H. Lancer, Esquire. Respondent was represented by Assistant Attorney General Megan Harrigan Jameson. Petitioner testified on his own behalf. Respondent presented testimony from trial counsel M. Justin Mims and prosecuting Assistant Solicitor Elizabeth Young. Following his review of all testimony, exhibits, and other materials presented, Judge Cothran issued an Order of Dismissal on March 7, 2014, denying and dismissing Petitioner's action in full. This Order was filed with the Aiken County Clerk of Court on March 12, 2014.

Petitioner filed a Notice of Appeal on March 14, 2014. Thereafter, Petitioner filed a Petition for Writ of Certiorari on January 16, 2015. This Return follows.

STATEMENT OF FACTS

In the early morning hours of October 7, 2008, Daniel Hynes was the victim of a violent home invasion. (App. pp. 47-61). Two assailants broke into his home, held a knife to his throat, ransacked his home, assaulted him, bound him, and then fled in Hynes' car. (App. pp. 51-61). Hynes did not see the face of either perpetrator, as the men physically restrained him with his head down throughout the ordeal. (App. p. 52-61). However, Hynes recognized the voice of one assailant, which he identified as his longtime acquaintance Chris Herndon. (App. pp. 56-57, 73-74, 205-06). After the men fled, Hynes called 911 for assistance. (App. pp. 61-62, 69, 74-77).

Later, law enforcement found Hynes' car abandoned and called a bloodhound tracking team to locate the attackers. (App. pp. 147-54, 155, 157, 171-72). Law enforcement found Herndon hiding in nearby woods. (App. pp. 172-73). Herndon surrendered and gave a confession implicating himself and Petitioner in Hynes' home invasion. (App. pp. 173). Hynes' credit card and other personal items were also located nearby. (App. pp. 150-52, 156, 158).

At trial, Herndon testified that he spent the day of October 6, 2008, and the morning of October 7, 2008, with Petitioner. He testified that he picked up Petitioner and Petitioner's pregnant girlfriend, Laura, around noon from Petitioner's mother's home along with his cousin, Jerry Thornton. (App. pp. 179, 182). He testified that the group decided to sell a rented cement mixer so they could buy crack cocaine. (App. pp. 180-85). The group sold the cement mixer for \$250, purchased alcohol, and then went to a building behind the Aiken County DSS to purchase crack. (App. pp. 185-86, 188). Petitioner, Herndon, and Thornton smoked all of the crack purchased and decided they wanted to smoke more. (App. p. 187).

The group traveled to Clearwater, where they purchased more crack and smoked it. (App. pp. 187-88).

After purchasing the second amount of crack, the foursome went to a convenience store and bought more alcohol. (App. pp. 188-89). The group then went to Smith's father's house, arriving at approximately ten p.m., where they drank alcohol. (App. p. 198). At some point before midnight, Petitioner and Smith left briefly to purchase more alcohol and returned. (App. p. 190).

Around midnight, the group devised a plan to rob Hynes and left Smith's father's home. (App. pp. 190-91). Thornton was driving and Petitioner, Herndon, and Smith were passengers. (App. p. 191). Herndon told Thornton to drop him and Petitioner off down the road from Hynes' house. (App. p. 191). Thornton complied and Petitioner and Herndon made their way to Hynes' house on foot. (App. p. 191-92). As the two approached, Herndon could see Hynes on the couch through a front window. (App. p. 192). Herndon told Petitioner he did not want to continue with the plan and asked to call Thornton to pick them up. (App. pp. 192-93). Petitioner urged Herndon to continue and the two entered the house. (App. p. 193).

Once inside Hynes' home, Petitioner held Hynes in a headlock with a knife to his throat. (App. p. 193). Petitioner dragged Hynes throughout the house, continually threatening him. (App. pp. 193-95). Herndon ransacked the house looking for drugs. (App. pp. 194-95). Petitioner and Herndon brought Hynes into the bedroom and Petitioner continued to hold Hynes in a headlock while threatening him. (App. pp. 195-96). Herndon demanded to know where drugs and money were located. (App. p. 196). Hynes pleaded for Petitioner and Herndon not to kill him. (App. p. 196). Herndon then cut Hynes across the

back with a knife. (App. pp. 196-97). Herndon then demanded Hynes' wallet and car keys and Hynes complied. (App. p. 197). Herndon and Petitioner then threw Hynes to the floor, tied him up with a lamp cord, kicked him repeatedly, and grabbed shoes and Hynes' cellphone before fleeing. (App. pp. 197-99). Petitioner and Herndon got into Petitioner's vehicle and Petitioner stated he needed to kill Hynes. (App. p. 199). Herndon pleaded with him that it was not necessary to kill Hynes, but Petitioner exited the car and went back into the house. (App. p.p. 199-200). Petitioner emerged soon after and returned to the driver's seat. (App. p. 199). He told Herndon he had not killed Hynes and the two left the scene in Hynes' car. (App. p. 199-200).

Petitioner sped towards Aiken on Wire Road. (App. pp. 200-01). Police cruisers began following the car and Herndon threw the shoes and several other items belonging to Hynes out of the window. (App. pp. 200-201). Petitioner continued driving erratically and lost control of the vehicle several times before crashing the vehicle into a guardrail. (App. pp. 200-02). Herndon jumped out of the vehicle and hid in a wooded ravine. (App. pp. 201-02). Herndon did not see where Petitioner went. (App. p. 202). He remained hidden in the ravine until he was located by the bloodhounds. (App. pp. 203-04). Herndon exited the wooded area and initially denied any involvement in the crime. (App. pp. 203-04). He eventually confessed and implicated Petitioner and himself in the home invasion. (App. pp. 203-05).

Thornton also testified at Petitioner's trial. He testified that Herndon and Petitioner worked for him as laborers and he had known Petitioner for more than twenty years. (App. pp. 995-96). He testified that on October 6, 2008, Petitioner and Herndon came over to do work, along with Petitioner's girlfriend. (App. p. 96-99). According to Thornton, no one felt

like working and the three decided to sell various pieces of equipment in order to buy alcohol and crack. (App. pp. 97-104). The group stayed together for the remainder of the day, drinking and smoking crack, until he eventually dropped Herndon and Petitioner off near Hynes' house. (App. pp. 104-05). Thornton testified that he dropped the two off with the understanding that they were going to get drugs. (App. p. 105). He testified that he and Petitioner's girlfriend then drove to a convenience store to wait for Petitioner and Herndon to call to pick them up. (App. pp. 105-06). Petitioner's girlfriend eventually received a call from Petitioner asking to be picked up from a location in Aiken. (App. pp. 106-08). Thornton picked up Petitioner from the side of the road; Petitioner was alone. (App. p. 107-08). He dropped Petitioner and his girlfriend off at a house and went home. (App. p. 109).

Petitioner testified to a starkly different version of events. According to Petitioner, he was at his mother's home with his girlfriend, Laura Smith, when he received a call from Herndon on the morning of October 6, 2008, asking if he could sell a cement mixer they had been using on a job site. (App. pp. 392-93). Petitioner made a few unsuccessful attempts to sell the mixer, which was ultimately sold by Thornton and Herndon. (App. p. 392-94). Petitioner testified that he, Thornton, Herndon, and Smith, went to a convenience store when Petitioner decided they should each contribute money to buy crack. (App. pp. 394-95). The foursome left the store and purchased three grams of crack for eighty dollars, which Petitioner testified was a good deal. (App. p. 395). Petitioner, Thornton, and Herndon smoked all three grams of crack and decided they needed more. (App. p. 396). The group then proceeded to Clearwater, where they purchased more crack. (App. p. 396).

After leaving Clearwater with the additional crack, the four went to Smith's father's house, arriving in the evening. (App. p. 386). The group stayed for a few hours, smoking

marijuana and drinking alcohol. (App. pp. 396-97). Petitioner testified that Thornton and Herndon left to get more crack and beer but eventually returned and continued drinking with him. (App. pp. 397-98). Petitioner testified that the group left and went to Bull's Bar and Grill. (App. pp. 398-99). He testified that they stayed shortly and Thornton then dropped Smith and him off at his brother's house before midnight. (App. pp. 399-402). He testified that Thornton and Herndon left to find more drugs and borrowed his phone but that he and Smith remained at his brother's house for the evening. (App. pp. 402-03, 405). He testified he and Smith watched television on the couch until Smith fell asleep. (App. p. 402-03). At approximately 1:30 a.m., Petitioner then went outside to smoke crack and saw Thornton coming down the driveway to return his phone. (App. pp. 403-05). Petitioner testified that Thornton asked him to provide an alibi for him for the evening. (App. p. 404-05). Petitioner testified that he remained at his brother's house until the next morning. (App. p. 405). He testified that although he has been to Hynes' house before, he did not go to Hynes' house on October 6 or 7, 2008. (App. p. 407).

Petitioner presented two witnesses at his trial to further his alibi defense. First, Petitioner presented his older brother, Thomas Dunbar, who testified that Petitioner and Smith arrived at his home around 11 p.m. on October 6, 2008. (App. p. 361-62). He testified that when he went to bed at approximately 1:30 a.m., Petitioner was still at his house. (App. p. 362-63). Petitioner also presented his girlfriend Laura Smith, with whom he shares a child who was ten months old at the time of his trial, as a witness. (App. pp. 365-66). Smith testified that she spent the day with Petitioner, Thornton, and Herndon trying to sell the cement mixer, then using the proceeds to purchase alcohol and crack. (App. pp. 366-71). She testified that the group then went to her father's home, where they remained for a few hours

until her dad asked them to leave. (App. pp. 371-72). She testified that the four left at 10:30 p.m. and went to Bull's Bar and Grill to get more crack. (App. p. 372-73). She testified that Thornton and Herndon then dropped her and Petitioner off at Petitioner's brother's house. (App. pp. 374-75).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether “*any* evidence of probative value” exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (emphasis added). The reviewing court will affirm if there is any evidence to support the post-conviction relief court's findings. Moore v. State, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). This Court will reverse the post-conviction relief court if it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007) (citing Sheppard v. State, 357 S.C. 646, 651, 594 S.E.2d 462, 465 (2004)).

In a post-conviction relief action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. An applicant must overcome this presumption in order to receive relief. Cherry, 300 S.C. 115, 386 S.E.2d 624.

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel, and both prongs must be established by an applicant to receive relief. Strickland, 466 U.S. 668. First, an applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland, 466 U.S. 668. 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, 300 S.C. at 117-18, 386 S.E.2d at 625.

This Court has held that "when counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. The validity of counsel's strategy is viewed under an 'objective standard of reasonableness.'" Edwards v. State, 392 S.C. 449, 456-57, 710 S.E.2d 60, 64 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)). The United States Supreme Court has cautioned that "every effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Strickland, 466 U.S. at 689. Accordingly, courts must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992)).

ARGUMENT

I. There is evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for failing to request a jury instruction on alibi.

Petitioner alleges that trial counsel was ineffective for failing to request a jury instruction on his alibi defense. Petitioner argues that because he presented two alibi witnesses at trial, he was entitled to an alibi instruction and trial counsel was ineffective for not requesting the charge. Petitioner further asserts that the post-conviction relief court erred in denying his relief, arguing that his case is readily distinguishable from the cases upon which the lower court relied. In its Order of Dismissal, the post-conviction relief court found that “had a jury instruction on alibi been requested, the trial court would have been required to deliver such a charge because it was supported by evidence presented at trial,” citing State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999) (trial court must give requested charge if it is supported by evidence). However, the court found that Petitioner failed to establish that he suffered any resulting prejudice. This ruling is supported by the record and is not an error of law. This Court should affirm the post-conviction relief court's findings.

In Petitioner's case, alibi testimony was presented to the jury through two witnesses: Petitioner's brother, Thomas Dunbar, and his girlfriend and child's mother, Laura Smith. Additionally, trial counsel discussed Petitioner's alibi in his closing argument to the jury. (App. p. 446). In its charge, the trial court instructed the jury that the State had the burden of proof of each and every element of each offense beyond a reasonable doubt and that Petitioner was presumed innocent of each and every offense. The court explicitly charged the jury that the jury should use their common sense when considering all the evidence

presented during the trial, which would include the testimony of Petitioner and his two witnesses in support of his alibi defense.

The post-conviction relief court found this charge “sufficient to inform the jury that the State had to prove beyond a reasonable doubt that Applicant was, in fact, at the scene of the crime and committed the crime.” The court further held that “in this particular case, because the jurors could believe *either* the State’s identification witnesses, *or* they could believe the alibi witnesses, *but not both* . . . the crucial issue in this case was credibility . . . [which was] argued by both sides and was thoroughly charged to the jury.” Therefore, the post-conviction relief court concluded Petitioner failed to establish any resulting prejudice and denied relief.

To establish that he is entitled to relief, an applicant in a post-conviction relief action must show deficiency of counsel as well as resulting prejudice. Strickland, 466 U.S. 668. However, as the Strickland Court noted, “[t]he object of an ineffectiveness is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.” Id., at 697.

In support of its decision, the post-conviction relief court relied on Gibbs v. State, 403 S.C. 484, 744 S.E.2d 170 (2013). In Gibbs, this Court determined that although trial counsel was deficient for failing to request an alibi instruction, the applicant failed to meet his burden of showing prejudice from this deficiency. “In evaluating whether a PCR applicant has suffered prejudice as a result of a jury charge, the jury charge must be viewed “in its entirety and not in isolation.” Id. (citing Battle v. State, 382 S.C. 197, 203, 675 S.E.2d

736, 739 (2009)). Similar to the case at bar, the applicant in Gibbs asserted an alibi defense but trial counsel did not request an alibi charge be given to the jury. The Gibbs post-conviction relief court found that this failure constituted deficient performance, but denied relief finding applicant had “not proven that he suffered prejudice from the lack of an alibi charge” when considering the jury charge given as a whole. Id. This Court affirmed the lower court, holding that “given the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt, the post-conviction relief court's finding of no prejudice must be sustained under the any evidence standard of review.” Id.

Despite the clear similarities between Petitioner’s case and Gibbs, Petitioner attempts to distinguish his case and urges this Court should instead rely on the dissenting opinion in Gibbs to reverse the post-conviction relief court. Petitioner argues that Gibbs is not akin to his case, as “identity was not the issue” in Petitioner’s case. However, this argument completely ignores Hynes’ unchallenged and unequivocal identification of Petitioner’s co-defendant, his co-defendant’s testimony naming Petitioner as his accomplice, and the corroboration of his co-defendant’s testimony by an independent witness who spent the entire day and evening with the two. Petitioner also asserts that his case is distinguishable from Gibbs because the State did not put up its own witnesses to challenge Petitioner’s alibi, as the State did in Gibbs. Again, this argument is without merit, as the State presented two witnesses who directly challenged Petitioner’s alibi by asserting that they were with him during the time he claimed to be at his brother’s house. The post-conviction relief court properly applied Gibbs to Petitioner’s case.

The post-conviction relief court also relied on Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994), in reaching its decision. In Ford, this Court held Petitioner was not entitled to

post-conviction relief for counsel's failure to request an alibi charge because Petitioner could not establish that result of his trial would have been different absent counsel's error. Id. Petitioner argues that Ford is distinguishable from his case because Ford's DNA linked him to the criminal sexual conduct, but here "there is no definite forensic evidence linking [Petitioner] to this incident." This argument fails, as Petitioner was directly linked to the crime through the testimony of his co-defendant and independent witnesses, as well as forensically linked to the victim's stolen car. (App. pp. 341-343).

Petitioner asserts that his case is similar to Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995) and that the post-conviction relief court erred by finding Roseboro distinguishable. The lower court found that Roseboro was distinguishable from Petitioner's case because the evidence in Roseboro was wholly circumstantial and the solicitor implied in his closing argument that the defense bore some burden of proof on the issue of alibi. This Court found that an alibi charge was particularly critical in that case for those reasons. Roseboro, supra, at 295, 454 S.E.2d at 313-14. In the present case, the post-conviction relief court properly found that Roseboro was distinguishable from Petitioner's case and properly denied relief on the more aligned cases of Gibbs and Ford.

Based on the foregoing, under the particular facts of this case, the post-conviction relief court properly discerned that Petitioner failed to establish the requisite prejudice from counsel's error to request an alibi instruction and denied him relief on this ground. The court's findings are supported by the record and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

II. There is evidence of probative value to support the post-conviction relief court's finding that trial counsel was not ineffective for eliciting prior bad acts testimony from a State's witness, thereby opening the door for the State to elicit testimony regarding Applicant's use of crack cocaine.

Petitioner asserts that after successfully objecting to the State presenting evidence of his drug use, trial counsel elicited testimonial evidence regarding his use of crack cocaine, thereby opening the door for the State to present evidence of his extensive drug use. Specifically, Petitioner argues that during cross-examination of State's witness Jerry Thornton, counsel elicited testimony regarding Petitioner's drug use, thereby opening the door and permitting the State to also delve into Petitioner's drug use. See App. p. 113. Petitioner argues that this was deficient, as the trial court had previously ruled that the State could not elicit any testimony regarding Petitioner's drug use based on a lack of relevance. See App. pp. 103-104. Petitioner argues that he was prejudiced by counsel's performance, as it allowed the State to portray him as a drug addict who committed the charged offenses to obtain more drugs.

The post-conviction relief court rejected this argument and denied Petitioner relief, finding that counsel's performance was not deficient because the trial court overruled his same objection shortly thereafter, indicating that it would allow the State to explore Petitioner's drug use. See App. p. 105. The court further determined that Petitioner could not establish any requisite prejudice, as he repeatedly and vividly testified as to his extensive drug throughout trial. The court also noted that it observed Petitioner at the evidentiary hearing and found his claim that he would not have mentioned his crack use if it had not already been introduced into evidence to be without credibility.

The post-conviction relief court properly denied Petitioner relief as to this allegation. The record supports the post-conviction relief court's finding that counsel was not deficient,

as the trial court overruled his objection and indicated that it would allow the State to introduce testimony of Petitioner and his cohorts drug use:

Q: Did you know what you were supposed to do after that if you were supposed to do anything?

A: They was going -- they said they were going to go buy drugs, get drugs.

MR. MIMS: Objection, Your Honor.

THE COURT: Overruled.

App. p. 105. As the lower court properly ruled, it was clear from this point forward that the court was allowing the State to delve into the drug use of Petitioner, Thornton, and Herndon on the day leading up to the home invasion.

Additionally, the record supports the post-conviction relief court's findings as to Petitioner's inability to establish prejudice. Petitioner repeatedly and boastfully testified as to his use of crack in front of the jury. For example, Petitioner responded to counsel's question regarding fighting between Petitioner, Thornton, and Herndon by launching into an unresponsive and explicit account of his drug use:

Chris and Jerry was fussing. I asked them, I said, well, what are y'all fussing about? Man, I am tired of every time we get money you get paid. I don't get paid. I was like, man, I don't have nothing to do with that, but you know, why don't we throw -- I knew, you know, we smoked dope before together. You know, it wasn't the first time and I knew what he was fussing about. Jerry. I done give him like \$20 or \$30 to smooth him over, and, so, I was like, well, why don't we just all throw in together. I'll throw in 40 bucks. Y'all throw in 30 apiece and we get \$100 and we can smoke some dope.

Well, we left there. I called a guy that I buy dope from in Aiken on Timberlane. We went and acquired the dope -- Jerry, me, Chris, and Laura. We went -- We left from there. We did ride around. Chris wanted to go get some more crack, but I didn't have to get no more crack because when I went there I had -- I paid \$80 for 3 grams of crack which is a good deal. I don't know if y'all know; anything about crack or not, but, you know, I paid \$80 for 3 grams of crack which I was

supposed to have paid \$100. When I came out I was going to divide the dope up. I give Chris a piece, give Jerry a piece on the little console of the truck. They were mad about it because they felt like they should split the bag a little more because I had two bags and I pulled out the wrong bag. I had -- You know, I was going -- I was going to jew them out of a little dope, you know. I paid the most, so, anyway. He -- They was fussing about that. So, I told him, I was like, well, you know, that's what you get for \$30, you know what I mean? I done hooked them up and it was plenty worth \$30.

Anyway, we went to the store, got some stuff to get some stems true enough. We rode around. We was smokin'. Chris was steady fussing. Man, I want some more crack. I want some more crack. I want some more crack. I was like, man, you know, hey, you know, I got dope; I'm like, well, you know, go do what you want to do this, that, and the fifth. Well, we all soon went to Clearwater, got the dope, came back to -- we rode around. On the way back they smoked their dope. I had quit smoking by now because I had -- I was like, well, I don't got no more dope. Good. I had money. I didn't spend nothing. Well, actually I spent \$20 out of my hundred because I told them I was going to spend \$40. I didn't really pay but \$80. So I still had \$80.

App. p. 394-96. Petitioner repeatedly paraded his drug use before the jury, even when the information was nonresponsive to questioning from counsel. Petitioner cannot establish any prejudice from testimony regarding his drug use when he so flagrantly and repeatedly brought it up in his own testimony.

Based on the foregoing, it is clear that trial counsel's performance was not deficient and no prejudice resulted for any purported deficiency. The findings of the post-conviction relief court are supported by more than ample evidence of probative value and should be affirmed. See Cherry, 300 S.C. at 119, 386 S.E.2d at 626.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition. Should this Court grant the Petition for Writ of Certiorari, Respondent requests permission to more fully brief the issues herein.

Respectfully submitted,

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SC Bar No. 100108
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June 4, 2015

STATE OF SOUTH CAROLINA
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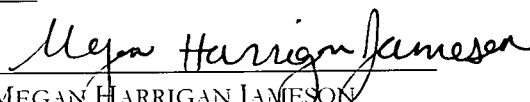
PROOF OF SERVICE

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

LaNelle Durant, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211-1589

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

This 4th day of June, 20 15.


MEGAN HARRIGAN JAMESON
ASSISTANT ATTORNEY GENERAL

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ALAN WILSON
ATTORNEY GENERAL

June 4, 2015

RECEIVED

JUN - 4 2015

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

S.C. Supreme Court

Re: Rusty Dunbar v. State of South Carolina
Appellate Case No. 2014-000565

Dear Mr. Shearouse:

I am enclosing the original and six copies of the Return to Petition for Writ of Certiorari in the above case. Please let me know if you need anything additional.

Sincerely,

Megan Harrigan Jameson
Assistant Attorney General
S.C. Bar No. 100108

Enclosures

cc: LaNelle Durant, Esquire
Trisha Allen, Victim Services