STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Jeffrey Young, Circuit Court Judge

Appellate Case No. 2013-000795

Randall S. Tyler, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

PATRICK L. SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

QUESTION PRESENTED

1. Is there any probative evidence in the record in support of the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to object to purportedly improper comments the solicitor made during the State's closing argument, where the comments were proper and not prejudicial in light of the overwhelming evidence of guilt and the trial judge's correct instructions that the argument of the attorneys was not evidence?

2. Is there any probative evidence in the record to support the PCR Judge's finding that Petitioner did not meet his burden to prove counsel was ineffective for failing to use Donna Hutto's prior statements to law enforcement, where counsel made that decision pursuant to a valid trial strategy and Petitioner suffered no resulting prejudice?

3. Is there any probative evidence in the record to support the PCR Judge's finding Petitioner did not meet his burden to prove counsel was ineffective for failing to object to the solicitor's purported improper pitting of Petitioner against a phantom witness?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Petitioner was indicted at the June 2003 term of the Lexington County Grand Jury for criminal conspiracy (2003-GS-32-2264); burglary, 1st degree (2003-GS-32-2265) and murder (2003-GS-32-226). Dennis Bolt, Esquire, represented him. On June 12, 2003, Petitioner proceeded to trial and was found guilty by a jury. The Honorable Marc. H. Westbrook sentenced him to confinement for life for murder, life for burglary, and five (5) years for criminal conspiracy.

A timely Notice of Appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Tyler, Op. No. 2005-UP-274 (S.C. Ct. App. filed April 19, 2005). Petitioner subsequently field a Petitioner for Rehearing on June 6, 2005. The South Carolina Court of Appeals denied Petitioner's motion by order dated August 29, 2005. Petitioner then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court, which was denied by order dated January 4, 2007.

Petitioner filed an application for post-conviction relief on March 16, 2007. An evidentiary hearing was convened at the Lexington County Courthouse on February 1, 2012, before the Honorable W. Jeffrey Young. Petitioner was present and represented by Adrianne L. Turner, Esquire. Respondent was represented by Kaelon E. May, Esquire, of the South Carolina Attorney General's Office. Petitioner testified on his own behalf. Petitioner also elicited testimony from Vickie Hallman and August Swarat, Esquire. Petitioner's trial counsel also testified. By order dated May 4, 2012, and filed May 17, 2012, Judge Young denied and dismissed Petitioner's application with prejudice.

A timely Notice of Appeal was filed on Petitioner's behalf, and a Petition for Writ of Certiorari was filed in the South Carolina Supreme Court seeking review of Judge Young's order. By Order dated February 16, 2016, the Supreme Court granted Certiorari. Petitioner submitted his Brief of Petitioner on or about March 17, 2016. This Brief of Respondent follows.

STATEMENT OF FACTS

Robert "Corky" Lewis (the victim) was murdered in his home in Lexington County on July 13, 2002. He was shot six times and pistol-whipped.

Petitioner and the victim were drug dealers. App.p.187, l. 17-23. The day of the murder, Petitioner asked his wife's uncle, Jimmy Williams, to give him a ride to Travis Harsey's house. App.p.138, l. 5-18. Petitioner and Harsey were on their way to meet with Corky Lewis. Id.; p.139, l. 11-20. On the way to Harsey's house, Petitioner told Williams that he was upset with Corky Lewis "about money." App.p. 150, l. 18-25.

At Harsey's house, Petitioner and Harsey met in a back bedroom, out of Williams's earshot, and spoke for about ten to fifteen minutes. App.p. 153, l. 5-21. When Williams went back to the bedroom to tell Petitioner he was leaving, he saw a magazine for a semiautomatic pistol, containing what appeared to be at least one bullet, on the bed. App.p. 154, l. 1 - p.155, l. 1; p.163, l. 3-11. One of Harsey's children remarked that Harsey had a gun. App. p. 162, l. 2-6; p.164, l. 9-24.

Late that night, the victim's wife, Donna Hutto, was woken up by arguing outside the her and the victim's home. App.p.172, l. 14-16. Ms. Hutto recognized the voices of her husband and Petitioner. App.p.172, l. 23 - p.173, l. 4. She heard the victim say, "I ain't done no kind of shit like that." App.p.173, l. 7-10. Ms. Hutto looked outside to determine whether Petitioner's car was parked by the house, but she did not see any car other than hers. App.p.174, l. 7-18. Ms. Hutto then went into the kitchen. App.p.174, l. 22-24. When she looked outside, she saw Petitioner, dressed in a baseball cap and jacket and wearing what looked like a mask, walk into

the garage. App.p.174, l. 22-24; p.175, l. 21 - p.175, l. 8. She heard Petitioner tell the victim to go inside the house. App.p.177, l. 5-16. The victim sounded scared. App.p.177, l. 17-23.

Ms. Hutto was also frightened. App.p.178, l. 2-5. She left and went to her brother Johnny's house and told him what she saw. App.p.178, l. 16 - p.179, l. 6. Johnny "got a gun and left the house to go help [the victim]." App.p.784. Ms. Hutto followed shortly thereafter, but when she did not see Johnny's car she returned to his house.[1] App.p.785. Johnny called 911. Id. By the time Ms. Hutto returned to her house, the victim was dead. App.p.188, l. 17-19.

When police arrived at the Lewis home after the murder, there were knuckle marks and bloodstains on the ceiling tiles of the pool room in the victim's home. App.p.100, l. 22 - p.101, l. 9; p.115, l. 4-11. Additionally, the ceiling tiles in the pool room contained indentations that apparently were caused by someone slamming one of the bar stools into them. App.p.115, l. 11-14. Ms. Hutto testified that there was a compartment in the ceiling where Corky sometimes kept money. App. p.182, l. 18-22. In the master bedroom, a dresser drawer was on the bed, which appeared to have been "rummaged through." App.p.104, l. 1-23.

Ms. Hutto immediately identified Petitioner as a suspect in the case. App.p.194, l. 21 - p.195, l 1. She unhesitatingly identified Petitioner out of a photo lineup. App.p.195, l. 2-24. Ms. Hutto was "adamant in her belief that that was [Petitioner] in her home. She was just concrete on that fact." App.p.202, l. 5-7.

The following morning, Petitioner told James Williams to tell law enforcement they had been fishing together at the time of the murder. App.p.141, l. 7-10. Mr. Williams initially gave a statement to that effect. App.p.142, l. 14-18. He later recanted and told police that he "lied

[1] Ms. Hutto did not initially tell law enforcement that her brother left to check on her husband before she did. App.p.778. Apparently her brother was not allowed to possess a firearm at that time. App.p.584, l. 9-19.

when I said we were fishing," and that "[Petitioner] asked me to tell this story to the police. . . ." App.p.144, l. 2-7. In his subsequent statement and at trial, Mr. Williams said that he actually gave Petitioner a ride to his co-defendant's house, and that on the way there Petitioner said he was mad or upset with the victim about money. App.p.150, l. 7-25.

Police spoke Petitioner on July 14. App.p.197, l. 16-21. When told that an eyewitness had placed him at the murder scene, Petitioner told police that they should look for his brother, who was in town and resembled him. App.p.199, 1. 13-25. Petitioner's brother was likely in Michigan at the time of the murder. App.p.203, l. 3-8.

Several days later, Petitioner gave a statement to police. (State Ex. 26). He said that he ran from the murder scene after Harsey hit the victim in the head with a pistol and fired a shot into the couch. App.p.209, l. 21-24. He said he heard several shots as he was running from the house. App.p.209, l. 25. Harsey then picked him up on the road near the house. App.p.128, 1. 1-4.

On July 23, a detective assigned to photograph Petitioner noticed "what appeared . . . to be healing injuries on his knuckles." App.p.124, 1. 5-20. Blood that had been removed from the ceiling tiles – near where the victim sometimes stored money – was identified by DNA testing as belonging to Petitioner. App.p.151, 1. 3-10. The probability that the DNA sample belonged to another individual was approximately "1 in 15 billion." App.p.223, l. 20-24.

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (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, 442, 334 S.E.2d 813, 814 (1985).

Where ineffective assistance of counsel is alleged as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Second, counsel's deficient performance must have prejudiced 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

ARGUMENT

I.

There is probative evidence in support of the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to object to purportedly improper comments the solicitor made during the State's closing argument, where the comments were proper and not prejudicial in light of the overwhelming evidence of guilt and the trial judge's correct instructions that the argument of the attorneys was not evidence.

A.

Petitioner first argues counsel was ineffective for failing to object a purported 'Golden Rule' violation when the solicitor told the jury during his closing statement that it was "putting themselves on the line against those domestic enemies." Counsel testified that he made a "strategic decision" in determining what the impact would have been had he objected. App.p.708, ln.25—p. 709, ln.4. Counsel testified that while he normally does not "shy away from objecting to a closing argument," and that he does it "all the time," he had to consider how it would affect the credibility of the defense, or whether it would "alienate the jury...." App.p.709, ln.4-8. Counsel stated that he had "gotten a conviction reversed before on improper argument," so he is "normally attuned to that." App.p.706.

In denying and dismissing the allegation, the PCR Judge rejected Petitioner's contention that the comments were improper; the PCR Judge further concluded that they nevertheless "did not so infect the trial with unfairness as to make the resulting conviction a denial of due process." App.p.847.

Discussion

There is probative evidence in the record to support the PCR Judge's finding. A Golden

Rule argument is an argument "that suggests to the jurors that they put themselves in the shoes of one of the parties." State v. Harris, 382 S.C. 107, 120, 674 S.E.2d 532, 539 (Ct. App. 2009). A Golden Rule argument asking the jurors to place themselves in the victim's shoes tends to completely destroy all sense of impartiality of the jurors, and its effect is to arouse passion and prejudice. Brown v. State, 383 S.C. 506, 515-16, 680 S.E.2d 909, 914 (2009) (finding counsel ineffective for failing to object to improper argument asking the jury to "speak for" the murdered victim; see also Von Dohlen v. State, 360 S.C. 598, 609, 602 S.E.2d 738, 744 (2004) (improper argument where solicitor asked jurors to "put yourself in [victim's] shoes, size six"); Brown v. State, 383 S.C. 506, 516-17, 680 S.E.2d 909, 915 (2009) (asking jurors to "speak for" the victim). Petitioner stretches to even infer that the comment requested the jurors to place themselves in the shoes of the victim.[2] See Harris at 122, 674 S.E.2d at 540 (finding no Golden Rule Argument where the State did not ask or suggest to the jury that they place themselves in the shoes of the victim). Therefore, PCR Judge's finding here was sound.

There is also probative evidence in the record in support of the PCR Judge's finding that Petitioner failed to meet his burden to prove prejudice. App.p.847. Any alleged impropriety of the solicitor's argument must be viewed in the context of the entire record, including whether the trial judge's instructions adequately cured the improper argument and whether there is

[2] To the extent Petitioner bases his argument on Vasquez, a plurality opinion involving references to "domestic terrorism," that case is not controlling. Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561. In Vasquez, the plurality found that the solicitor "intentionally and unnecessarily injected religious prejudice into [the defendant's] trial." Id. at 464, 698 S.E.2d at 469 (Beatty, J., with one justice concurring and one justice concurring in the result). Specifically, the solicitor referred to the defendant, a Muslim, as a "domestic terrorist," and correlated his conduct to the events of September 11, 2001. Id. at 453, 698 S.E.2d at 564. The plurality took the solicitor's comments to be a thinly veiled implication that the defendant "deserved the death penalty because he was a fanatic terrorist and a practicing Muslim who inspired fear across the county." Id. The plurality in Vasquez did *not* address whether or not a Golden Rule violation occurred. Id. at 468, 698 S.E.2d at 571 (Toal, C.J., and Hearn, J., dissenting). The dissent noted that the references in question did not encourage the jury to depart from neutrality and decide the case on personal interest or bias rather than the evidence presented, and therefore did not constitute an impermissible Golden Rule -type argument. Id. at 468, 698 S.E.2d at 572.

overwhelming evidence of the defendant's guilt. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and Petitioner has the burden of proving he did not receive a fair trial because of the alleged improper argument. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Id.

Even assuming there was improper argument in this case, a review of the entire record precludes a finding of prejudice. First, the solicitor's comments did not infect the trial with unfairness to the extent that Petitioner's conviction was a denial of due process because there was overwhelming evidence of guilt. See Smith at 523, 654 S.E.2d at 532 (*citing* State v. McFadden, 318 S.C. 404, 416, 458 S.E.2d 61, 68 (Ct. App. 1995)). On direct appeal, the Court of Appeals[3] found "overwhelming evidence of [Petitioner's] guilt as to . . . (1) criminal conspiracy, (2) murder, and (3) first degree burglary." State v. Tyler, Op. No. 2005-UP-274 (S.C. Ct. App. filed April 19, 2005). Petitioner lied when questioned by law enforcement about his involvement by pointing them toward his brother. Petitioner also convinced a friend, Mr. Williams, to help him fabricate an alibi. Mr. Williams eventually told law enforcement the truth, which was that Petitioner was on his way to the victim's home the night of the murder and was angry about money. Ms. Hutto's testimony was substantially similar, and indicated that Petitioner was wearing some sort of mask. Petitioner's DNA was matched to a bloody knuckle mark on the victim's ceiling, near where the victim sometimes stored money. A drawer from the victim's bedroom also appeared to have been rummaged through.

[3] The decision was issued Per Curiam by a panel consisting of then Judge Kittredge, then Chief Judge Hearn, and Judge Williams.

Additionally, the trial judge very clearly instructed the jury that they were the finders of fact, and that they were to consider only the evidence that came into the courtroom. App.p.43, l. 24 - p. 44, l. 1; p.45, l. 1-2. The trial judge explained that evidence consisted of "the testimony of the witnesses who take [the] stand, plus any items or exhibits or documents that come in through those witnesses." App.p.45, l. 10-13. Crucially, the trial judge told the jury *multiple times* that the opening and closing statements of the lawyers were not evidence.[4] App.p.45, l. 19 - p.46, l. 7.

In light of the entire record, including the trial judge's proper instruction and the overwhelming evidence of guilt, any alleged improper argument did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. Accordingly, there is probative evidence in the record to support the PCR Judge's finding that Petitioner failed to show prejudice. The order of dismissal should be affirmed.

B.

Petitioner also argues counsel was ineffective for failing to object to comments made by the solicitor during the State's closing argument that purportedly constituted an impermissible burden shift. Petitioner takes issue with the solicitor's comment the jury would have to believe every word that came out of Petitioner's mouth from that witness stand to believe he is not guilty. App.p.357, l. 23-25.

Counsel testified that he made a "strategic decision" in determining what the impact would have been had he objected. App.p.708, l. 25 - p.709, l. 4. Counsel further stated that while

[4] The trial judge repeated this instruction to the jury immediately before closing arguments. App.p.323, l. 19-22.

he normally does not "shy away from objecting to a closing argument," and that he does it "all the time," he had to consider how it would affect the credibility of the defense, or whether it would "alienate the jury...." App.p.709, l. 4-8.

In denying and dismissing the allegation, the PCR Judge found that the trial judge's instruction cured any potential harm.

Discussion

There is probative evidence to support the PCR Judge's ruling. First, counsel offered credible testimony concerning his strategic decision-making process. Petitioner also took the stand and opened himself to comments from the solicitor concerning his credibility, as well as the importance of his testimony in the context of the evidence presented at trial. Additionally, in the context of the entire record these comments – even if improper – did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. As discussed above and by the Court of Appeals, the evidence of Petitioner's guilt was overwhelming. The trial judge also offered a clear and unmistakable instruction directly on point instructing the jury as to the applicable burdens of proof:

> A person charged with committing a criminal offense in South Carolina is never required to prove his innocence. The Defendant **has no burden of proof**. It is a vital and important rule of law in our State that the Defendant in a criminal trial, no matter how serious the offense, must always be presumed innocent until his guilt has been proven beyond a reasonable doubt.
>
> "The presumption of innocence remains with him at all times, from the time of arraignment, all the way through trial and unless and until a jury reaches a verdict of guilty beyond a reasonable doubt.
>
> It is the solemn duty of you as the jury if you are not clearly convinced of his guilt beyond every reasonable doubt to the contrary to find the Defendant not guilty.

App.p.366, l. 20 - p.367, l. 22. Therefore, the PCR Judge correctly denied and dismissed the deficient allegation.

C.

Petitioner also argues counsel was ineffective for failing to object to the solicitor's insertion of a "misleading ambiguity into the minds of the jurors." Petitioner asserted the solicitor improperly told the jury that unexplained "rules" prevented the State from trying the defendant with his co-defendant.

Counsel testified during the evidentiary hearing that he did not object to these comments because Petitioner's defense was to put his absent co-defendant on trial, to establish the gun belonged to the co-defendant, and to rely on the fact that the state would have to explain why the codefendant was not present at the trial. App.p.707, l. 14-25. Counsel stated that, after blasting the State for not calling the codefendant as a witness, he did not think an objection to the solicitor's explanation would have gone very far with the jury. App.p.708, ln.2-8.

In denying the allegation, the PCR Judge articulated that counsel had a rational explanation to support his justification for not objecting here. App.p.847.

Discussion

A solicitor cannot inject material outside of the evidence or the judge's charge, but must confine himself to the record in the case presented to the jury. See Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 620 (1996); State v. McAlister, 133 S.C. 99, 130 S.E. 511 (1925) (holding it is improper in closing argument for the State to refer to and comment about facts of other cases to indicate or suggest the same results). However, where counsel articulates a valid reason for employing a 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). Counsel provided a compelling, strategic reason for not objecting that was central to his defense theory of the case.

Accordingly, there is probative evidence to support the PCR Judge's finding that Petitioner failed to meet his burden to show deficient performance.

Petitioner has also failed to show prejudice. As discussed above, the evidence against Petitioner was overwhelming. Further, whatever rules the solicitor may have been referring to, the trial judge's instructions were clear – he told the jury that it must "accept the law as I give it to you." App.p.46, l. 14 - p.47, l. 1. Following closing arguments, the judge explained to the jury that it was his "duty to instruct you as to the law which applies in this case," App.p.365, l. 22 - p.366, l. 1, and that it "must accept [the law] strictly as I give it to you . . . ." App.p.373, l. 6-7. In light of the overwhelming evidence and correct charge of the law by the trial judge, there is probative evidence to support the PC R Judge's ruling that Petitioner failed to show prejudice with respect to this allegation.

II.

There is probative evidence to support the PCR Judge's finding that Petitioner did not meet his burden to prove counsel was ineffective for failing to use Donna Hutto's prior statements to law enforcement, where counsel made that decision pursuant to a valid trial strategy and Petitioner suffered no resulting prejudice.

Petitioner alleged counsel was ineffective for failing to impeach Donna Hutto, the victim's widow, with prior statements to law enforcement that were inconsistent as to the events that occurred after she witnessed Petitioner arguing angrily with the victim the night of the murder.

The PCR Judge's finding is supported by ample evidence in the record. Where counsel articulates valid reasons for employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance. Whitehead v. State, 308 S.C. 19, 417 S.E.2d 530 (1992).

Counsel articulated a sound strategic basis for the decisions he made with respect to Ms. Hutto's prior statement.

Counsel expressed concern at the evidentiary hearing with the amount of "incriminating stuff" in Donna Hutto's statement. App.p.711, ln.14-15. He said that Ms. Hutto was a very compelling witness, and was "clear in her identification of [Petitioner's] voice and her general description of him." App.p.711, ln.20-22. Counsel opined that where the issue was "the timeline between when they went back and when they called 9-1-1," he did not think that issue had "any material impact on Petitioner's defense." App.p.711, l. 22-25. In any event, counsel said he did not think "beat[ing] up on the victim's widow" would have helped Petitioner. App.p.695, l. 17-19. Counsel did not feel Ms. Hutto's statements had very high impeachment value, and he was afraid that putting them in would bolster her as a witness. App.p.712, l. 1-7.

Counsel's testimony is dispositive, and his strategy was objectively reasonable. This is not a situation where counsel failed to raise a key piece of impeachment evidence to the jury's attention due to an "oversight." Compare Rutland v. State, 415 S.C. 570, 575, 785 S.E.2d 350, 352 (2016). Instead, he made a conscious decision after carefully considering the evidence not to use what he considered to be lousy impeachment evidence to "beat up on" a sympathetic witness.[5] See Strickland at 690-91, 104 S.Ct. at 2066 (strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable). Because counsel acted pursuant to a valid trial strategy, the PCR Judge's finding should be

[5] Tellingly, counsel's argument to the jury did not focus on the veracity of Ms. Hutto's testimony, but instead the *reliability* of her characterization of Petitioner's interactions with her. During closing arguments, counsel said that he did not want to "disparage or discredit Ms. Hutto. She just that night lost her husband. I'm sure all of this was somewhat of a blur. I am sure with a traumatic experience like that, I am sure you can't recall everything with scientific accuracy. I don't fault her for that." App.p.336, l. 25 - p. 337, l. 3.

affirmed.

There is also ample evidence in the record in support of the PCR Judge's finding that Petitioner failed to meet his burden to show prejudice. First, as discussed *supra*, this was a case involving overwhelming evidence of guilt. Further, the impeachment evidence in question is not of such a weight or quality that it otherwise calls into question the outcome of the proceeding, or even Ms. Hutto's credibility. The inconsistency itself is collateral, and the fact that Ms. Hutto left an unimportant detail out of her statement to law enforcement that could potentially get her brother in trouble is understandable. Other than vague assertions as to the effect on her general credibility, Petitioner has not put forward any compelling or even *logical* reason to doubt the credibility of her identification and characterization of him as the person arguing with the victim on the night of the murder. Because there is probative evidence in the record to support the PCR Judge's ruling, it should be affirmed.

III.

There is probative evidence to support the PCR Judge's finding Petitioner did not meet his burden to prove counsel was ineffective for failing to object to the solicitor's purported improper pitting of Petitioner against a phantom witness.

The PCR Judge correctly found that Petitioner's allegation was facially defective. Pitting is only possible where there are two witnesses. See State v. Bryant, 316 S.C. 216, 221, 447 S.E.2d 852, 855 (1994) (it is improper for the solicitor to cross-examine a witness in such a manner as to force him to attack the veracity of **another witness**). Because the testimony that was allegedly being "pitted" here did not come from another "witness," Petitioner's claim fails as a matter of law.

Even assuming that pitting was legally possible under these facts, pitting witnesses is

ground for reversal on direct appeal only if unfair prejudice results. State v. Sapps, 295 S.C. 484 S.E.2d 145, 145-46 (1988); State v. Brown, 297 S.C. 27, 28-29, 374 S.E.2d 669, 670 (1988). Unfair prejudice results if the defendant's credibility is a crucial issue. Brown at 29, 374 S.E.2d at 670. Placing this claim in the context of post-conviction relief, Petitioner has the burden of proving that but for counsel's failure to object to the alleged pitting, there is a reasonable likelihood that the outcome of the proceeding would have been different. Strickland, supra.

In light of the evidence that Petitioner lied to law enforcement in an attempt to evade criminal responsibility, lied to his family in an attempt to manipulate law enforcement, and convinced a third party to lie to law enforcement on his behalf, any effect the purported pitting had on his credibility was negligible. Simply put, Petitioner's credibility had already taken too many blows for it to have made a difference. The evidence against Petitioner was also overwhelming.[6] As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge's ruling should be affirmed.

[6] In fact, the Court of Appeals ruled that the evidence against Petitioner was overwhelming *even without* the statement of Petitioner's co-defendant. State v. Tyler, supra.

CONCLUSION

For the foregoing reasons, the lower court's decision should be **AFFIRMED.**

Respectfully submitted,

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General
S.C. Bar # 102100

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

July 18, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Jeffrey Young, Circuit Court Judge

Appellate Case No. 2013-000795

THE STATE SOUTH CAROLINA, Respondent,

vs.

RANDALL S. TYLER, Petitioner.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

ALAN WILSON
Attorney General

PATRICK SCHMECKPEPER
Assistant Attorney General

By: _____
Patrick Schmeckpeper
SC Bar#102100
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

July 18, 2016

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable Jeffrey Young, Circuit Court Judge

Appellate Case No. 2013-000795

THE STATE SOUTH CAROLINA, Respondent,

vs.

RANDALL S. TYLER, Petitioner.

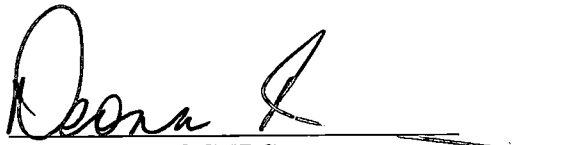
PROOF OF SERVICE

I, Deonna Rogers, certify that I have served the within Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

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

This 18th day of July, 2016.



DEONNA ROGERS
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727