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SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

Robert E. Hood, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2015-002499

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the state's closing argument concerning the state's star witness's motive for testifying against Petitioner and the ability of the state to compel the witness's testimony where the primary evidence against Petitioner was the testimony of that witness?

II. Did trial counsel provide ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial judge's instruction concerning Petitioner's "failure to testify" during the trial because the instruction created an inference that the defendant was obligated to fulfill some duty but had failed to do so?

STATEMENT

On December 26, 1988, the an officer with the Columbia Police Department responded to a call regarding a "mental subject" at the Comfort Inn on the corner of Elmwood and Main Streets. App. 137, l. 8 – App. 138, l. 8. After speaking with the person identified as the "mental subject," the officer contacted the Richland County Sheriff's Department (RCSD). App. 139, ll. 6-17. An officer from the RCSD arrived at 11 p.m. and met with the "mental subject." App. 144, l. 14 – App. 145, l. 4; App. 151, ll. 23-24. The officer decided the information given by the "mental subject" required further investigation. App. 145, ll. 6-7. The officer and the "mental subject," who was identified as Hayes Malloy, drove to Brown A.M.E. Chapel, where Malloy showed the officer a Monte Carlo and described where he had found a dead body. App. 146, ll. 7-21; App. 236, ll. 19-20. The officer walked to the location described by Malloy and found the body of a black male, later identified as Donald Sutton. App. 146, l. 22 – App. 147, l. 2. After Malloy showed the officer the location of the body, the police took him to the station for questioning. App. 237, ll. 12-24. Fearing arrest, Malloy did not tell the police he had allegedly witnessed Sutton's murder. App. 238, ll. 10-21. Instead, he gave the police the impression that Vito McKie, one of Petitioner's associates, had killed Sutton. App. 299, ll. 9-18; App. 307, l. 25 – App. 308, l. 5; App. 325, ll. 1-5. However, the police did check him "for powder from a pistol." App. 239, ll. 5-11. Malloy was not arrested. App. 239, ll. 19-22; App. 956, ll. 19-23.

Sutton died as a result of two gunshot wounds to the head, one of which "was fired at relatively close range." App. 156, l. 10 – App. 157, l. 4; App. 160, ll. 6-13.[1] The pathologist found grass in abrasions on Sutton's thumbs and on his arms, which occurred after death. App. 164, l. 19 – App. 167, l. 13. According to the pathologist, "it appeared as though the body had

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[1] The pathologist removed two bullets during the autopsy. App. 158, ll. 2-6. A firearms expert testified that the bullets were .22 caliber. App. 713, ll. 17-24.

been dragged." App. 167, ll. 17-24; App. 169, ll. 19-23. The police confirmed that Sutton had "scrape marks in the thumb area of both hands." App. 617, ll. 5-9; App. 686, l. 22 – App. 688, l. 11. The officer testified that he "found no indication at the scene that the body was either shot there or dragged there. [He] couldn't rule either way so [he did] not know where the body was shot." App. 689, ll. 8-15.

On December 28, 1988, Malloy was charged with assault and battery with intent to kill for his role in a shooting; the charge was still pending at the time of Petitioner's trial in 1990. App. 260, ll. 20-24; App. 308, ll. 6-14. On the same day, Malloy was released on a personal recognizance bond. App. 261, ll. 14-15. After his arrest, he gave another statement to law enforcement regarding Sutton's death. App. 309, ll. 10-15. In this statement, Malloy remained steadfast, as he had in his initial statement to police, that McKie was involved in Sutton's death. App. 310, ll. 4-7; App. 1959. The following day, on December 29, 1988, Malloy gave a third statement to police. App. 319, ll. 12-16; App. 1960-1961. While this statement continued to indicate that McKie was the shooter, Malloy started to point the finger at Petitioner for some type of involvement. App. 1960-1961.

On January 3, 1989, Malloy gave yet another statement to police; this time implicating Petitioner as the shooter. App. 240, ll. 1-7; App. 334, ll. 2-7; App. 337, ll. 6-9. After this statement, Malloy was charged with the murder of Sutton. App. 211, l. 25 – App. 212, l. 1; App. 262, l. 24 – App. 263, l. 5; App. 963, l. 25 – App. 964, l. 1. The following day he was released on a $7,500 surety bond, which required him to post only $750. App. 335, ll. 1-6. This "low bond" was the result of the assistance of the Richland County Sheriff's Department and the Solicitor's Office. App. 964, ll. 16-21. Additionally, the murder charge was dismissed on

January 12, 1990, five days before Petitioner's trial. App. 212, ll. 14-21. In light of Malloy's statement implicating Petitioner, the police arrested Petitioner. App. 962, ll. 8-9.

On January 4, 1989, the police interrogated Petitioner. App. 456, ll. 3-4; App. 962, ll. 10-11. Petitioner saw Sutton at the party shop where he worked around 5:45 or 6 p.m. App. 457, ll. 17-20. Petitioner gave Sutton $5 for gas, and Sutton left the store at 6 or 6:15 p.m., promising to return at 7 p.m. App. 458, ll. 7-10. Petitioner made plans with some friends to go to the Fountain Bleau later that evening. App. 458, ll. 13-19. Sutton called Petitioner around 7 p.m. from Bridgette's house to explain he was with Vito McKie. App. 458, ll. 21-24. Petitioner arrived home at 7:25 p.m. App. 458, l. 25. At 7:45 p.m., Petitioner called McKie and Bridgette and learned that Sutton had left their home. App. 459, ll. 6-9. At 8:20 p.m., Petitioner called McKie again to say that he was on his way. App. 459, ll. 10-12.

Petitioner arrived at the home of Bridgette and McKie, where he met Lisa. App. 459, ll. 13-15. Petitioner and Vito decided to go to a store owned by Petitioner's family to by snacks and wine, as requested by Bridgette and Lisa. App. 459, ll. 19-23. Petitioner and McKie arrived at the store at 8:45 or 9 p.m. App. 460, ll. 2-3. At the store, Petitioner spoke to his father. App. 460, ll. 7-9. Petitioner and McKie left the store, arriving back at the home of McKie and Bridgette at 9:20 p.m. App. 460, ll. 19-20. Upon their arrival, they realized they had forgotten the snacks. App. 460, ll. 20-21. McKie went out again to get the snacks. App. 460, ll. 21-22. While out, the pair stopped by Fountain Bleau to get their hands stamped. App. 460, ll. 23-24. Although Petitioner was able to get his stamp, McKie was unable to do so because he had forgotten his identification. App. 460, ll. 24-25. McKie and Petitioner returned to the home with the snacks, and made up a story to leave again so that McKie could get his hand stamped. App. 461, ll. 1-3. The pair then went to the Fountain Bleau, arriving at 10:45 p.m. App. 461, ll. 5-6.

Petitioner left at 1:30 a.m., but McKie stayed. App. 461, ll. 6-8. After stopping by a store, Petitioner arrived home at 2 a.m. App. 461, ll. 8-16.

Petitioner emphatically denied shooting Sutton and denied offering anyone money to shoot Sutton. App. 461, ll. 16-20.

Trial

During its February 1989 term, a Richland County grand jury indicated Petitioner for murder (1989-GS-40-0745). App. 2167-2168. The state, represented by Creighton B. Coleman, James M. Morton, and William D. Bilton, called the case to trial before the Honorable Don S. Rushing and a jury on January 15-23, 1990. App. 1. Jack B. Swerling and Jennifer Kneece Shealy represented Petitioner. App. 1.

Hayes Malloy, the state's star witness, met with the prosecutors between twenty and thirty hours during the week prior to trial to prepare his testimony for trial. App. 269, l. 3 – App. 270, l. 6. At trial, Malloy claimed that one day in December of 1988, Petitioner asked if he "knew anybody that would kill Donald Sutton." App. 214, ll. 14-19; App. 214, l. 21 – App. 215, l. 1. Malloy further claimed he responded negatively. App. 214, ll. 1. 20. According to Malloy, Petitioner offered him $5,000 to kill Sutton, a person Malloy did not even know. App. 213, ll. 16-20; App. 215, ll. 2-5. Then, Malloy agreed, but intended "to go straight to the police with it." App. 215, ll. 6-7; App. 215, ll. 23-25. On December 21, 1988, Malloy talked to FBI agents about what Petitioner allegedly said. App. 216, ll. 1-10; App. 217, ll. 2-6.

On December 26, Malloy was "outside drinking with some fellows" when Petitioner approached him and said Sutton was "coming down." App. 218, ll. 3-10. Malloy thought Petitioner "probably wanted to have the boy killed tonight." App. 218, ll. 10-11. Malloy then started calling the FBI and RCSD. App. 218, ll. 11-12. He was unable to contact the FBI. App.

218, ll. 17-24. Later that evening, sometime after 8:30, Malloy got into a 1987 Riviera with Petitioner. App. 221, ll. 7-15; App. 227, ll. 4-5. Malloy claimed Petitioner showed him a pistol, which he received from McKie. App. 221, ll. 18-25. Malloy was unable to say what caliber the pistol was – "small," "[i]t could have been a .32, .38" – but he was able to describe it as black with a pearl handle. App. 222, ll. 1-7.

Shortly after the pair started driving, Sutton appeared behind them in a burgundy car, "flicking his high beam and low beam on and off." App. 223, ll. 1-7; App. 227, ll. 8-11. Petitioner "signal[ed] him to follow" them. App. 227, ll. 23-24. According to Malloy, Petitioner asked if he were going to "take care of him for" Petitioner." App. 223, l. 15. When Malloy declined, Petitioner allegedly offered him $10,000, but Malloy "turned him down." App. 223, ll. 15-17.

According to Malloy, Petitioner drove him to Brown Chapel Church. App. 224, ll. 6-7. At the church, Petitioner and Sutton exited their cars. App. 224, ll. 19-22. The pair met up "face to face" and Petitioner "put his arm around [Sutton] and walked back" to a corner of the building. App. 229, ll. 20-22. Malloy claimed Petitioner "pulled the gun out and shot him" in the head. App. 229, l. 25; App. 231, ll. 5-6. When Sutton "fell down to the ground," Malloy claimed Petitioner "bent over and shot the man again." App. 231, ll. 9-11. Oddly, Malloy had turned his head away when he saw Petitioner "had the gun to his head," but somehow managed to catch "a glimpse of the fire from the pistol." App. 231, l. 19 – App. 232, l. 1. When Petitioner returned to the car, Malloy got out of the car to check on Sutton, and Petitioner left. App. 232, ll. 2-9. Malloy denied moving Sutton's body. App. 232, ll. 14-15; App. 372, ll. 1-4; App. 388, ll. 12-20. All of this took place prior to 9 p.m. App. 255, ll. 11-13.

From the church, Malloy walked to a club where he stayed for "about twenty minutes." App. 232, l. 20 – App. 233, line 6. Next, he walked to his mother's home, but he was only there for "about five minutes." App. 233, ll. 15-21. He then walked to a store where he asked for a right to his girlfriend's house on Bull Street. App. 233, l. 25 – App. 234, l. 16. However, he only stayed there for "about five or ten minutes." App. 234, ll. 21-23. After deciding that he needed to contact the police, Malloy went to a Chinese Restaurant on Main Street and called the City Police Department twice, but no one arrived. App. 1-9. He went to the Comfort Inn, where he called the police two or three times, and then, he had the manager call. App. 235, ll. 10-25. Thereafter, Malloy began his effort to convince the police that he was not the killer, but that Petitioner had committed the fatal act. The following day, despite Malloy's claims that he was terrified of Petitioner, Malloy went to Petitioner's store. App. 240, ll. 8-20.

During the trial, it was revealed that on December 23, 1988, Hayes Malloy was charged with assault with intent to kill when he shot a rifle into the party shop owned by Petitioner's father and where Petitioner worked. App. 259, l. 15 – App. 260, l. 10. Malloy paid for the damages, and the charges were dropped prior to Petitioner's trial. App. 260, ll. 15-19.

In addition to Malloy, the state presented the testimony of jailhouse snitch, Clarence Gabby Wells. Wells entered into an agreement with the state whereby he would testify against Petitioner in exchange for the dismissal of two pending charges and the reduction of an armed robbery to a strong arm robbery with a recommendation of five years' imprisonment. App. 502, ll. 8-22. Wells claimed that in November and December, prior to Sutton's death, Petitioner said he "was gonna kill 'Duck' Sutton." App. 503, ll. 11-12. Conveniently, Wells and Malloy were in the same cell at the Richland County Detention Center from January 3, 1989 until January 4, 1989, when Malloy was released. App. 1053, ll. 2-21.

There was considerable ill will between Petitioner and Wells. On Thanksgiving Day in 1988, Wells pulled a gun on Reuben Eubanks in front of Petitioner. App. 1028, ll. 13-20. Petitioner took the rifle from Wells. App. 1028, l. 20 – App. 1029, l. 5. Another witness saw Petitioner and Wells fighting a couple of months before Sutton's death. App. 1026, l. 19 – App. 1027, l. 12.

James Bynum, a career criminal and admitted "troublemaker," claimed that on some unknown date, Petitioner said, "I want him knocked out," in reference to Sutton. App. 742, ll. 11-17; App. 748, ll. 12-16.[2] Additionally, Petitioner allegedly offered him $1,000 to "do it." App. 743, ll. 1-3; App. 746, ll. 17-22. Bynum declined. App. 743, ll. 2-3. Bynum claimed that the day before Sutton's death, Petitioner arrived at his home asking if he were sure that he would not "do it" and even offered him $3,000. App. 743, ll. 4-11; App. 750, ll. 22-24. The following day, Bynum learned Sutton was dead. App. 743, l. 12. While Bynum was at Petitioner's store that day, Petitioner was crying and informed Bynum of Sutton's death. App. 743, ll. 13-17. When Bynum accused Petitioner of killing Sutton, Petitioner denied it. App. 743, ll. 18-24. Thereafter, Bynum claimed that while he and Petitioner were in jail together, Petitioner told him "yeah, he did it." App. 746, ll. 8-14. He further claimed that Petitioner told him to say "Hayes

[2] When the state initially called Bynum to the stand, he claimed he had no knowledge of the murder and was only aware that Petitioner said he was innocent. App. 584, l. 6 – App. 585, l. 2. During *in camera* testimony, Bynum maintained this position. App. 600, l. 4 - App. 606, l. 20. When the state called Bynum to the stand for the second time, Bynum revealed he had cut a deal with the state in exchange for his testimony. The state had agreed to look into an alibi he claimed for his current conviction, promised to tell the Parole Board that Bynum had testified for the state, and promised not to prosecute him for perjury. App. 741, l. 15 - App. 742, l. 5. Additionally, Isiah Bennett had been in the holding cell with Bynum while Bynum was waiting to testify. He heard Bynum say he was willing to lie, that he knew Petitioner "didn't do it," in order to get his time cut or get cut loose. App. 1040, l. 25 – App. 1041, l. 16.

did it." App. 745, ll. 15-16. In exchange, Petitioner allegedly offered to "look out for [him] when [he] got out." App. 746, ll. 9-10.

The state called yet another jailhouse snitch and career criminal, Kenneth Gardner, to testify against Petitioner. App. 905, l. 17 – App. 906, l. 19. Gardner claimed he was in the cell next to Petitioner at the jail, where the two met. App. 907, ll. 1-8.[3] According to Gardner, Petitioner told him that he had been charged with killing Sutton but the "state would be able to prove it even though he did commit the crime of killing him." App. 909, ll. 19-23. Petitioner informed Gardner that the state's main witness had written "about five different statements" and "kept changing" his story. App. 910, ll. 2-5. Additionally, Petitioner claimed the state would be unable to use "some tire tracks from the church … because there [were] too many tires … like that on the streets." App. 910, ll. 10-13. Gardner, who was awaiting sentencing on a federal bank robbery charge, was candid that he was testifying against Petitioner because the state had agreed to tell the federal authorities that he had provided evidence in Petitioner's case to "ease" his sentencing. App. 911, ll. 13-18. The jury learned that Gardner had been committed several times to mental institutions, had contemplated suicide, and regularly abused drugs. App. 920, l. 17 – App. 945, l. 19.

The *only* physical evidence the state could present against Petitioner was tire tracks.[4] At the scene, the police observed tire tracks that stopped "in view of the body," and photographed those tracks. App. 611, ll. 12-14; App. 627, ll. 6-10; App. 710, ll. 21-22. Of course, there were numerous tire tracks in the area "with it being a church and the previous day being Sunday."

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[3] According to the records of the Richland County Detention Center, Petitioner and Kenneth Gardner were in the same cellblock during December 1989. App. 1054, ll. 5-17.

[4] No gun was ever recovered. App. 969, ll. 6-8.

App. 611, ll. 15-17. An officer took photographs of two tire prints because "they stopped in view of the body. They did not continue on." App. 707, ll. 19-22. The police, however, did not make any plaster casts of the tracks. App. 627, ll. 11-17. According to the officer, there was no need to make plaster casts because the tracks did not show any unusual characteristics or blemishes. App. 705, ll. 12-21; App. 712, ll. 2-6. Additionally, the officer explained that due to the deep sandy soil, the impressions left by the tracks were not reliable. App. 702, ll. 15-19.

Over objection, Bruce Hall, the store manager at Goodyear Tire and Rubber Company on Gervais Street in Columbia was qualified as an expert in "examining tire treads, tire patterns." App. 832, ll. 11-14. Hall looked at photographs of Petitioner's car and opined that the car had Goodyear Vector tires on it. App. 846, l. 9 – App. 848, l. 1. Additionally, Hall looked at the photographs of the tire prints in the sand at the church. He opined those tire prints in the sand were made by a Goodyear Vector tire. App. 843, l. 17 – App. 844, l. 9.

At the trial, Petitioner presented an alibi defense in addition to his statement to police, which had been introduced during the state's case-in-chief. Darlene Hayes confirmed that she had plans to go to Fountain Bleau with Petitioner on the evening of December 26, 1988, but that she cancelled those plans shortly after 7 p.m. when Petitioner returned home from work. App. 985, l. 8 – App. 986, l. 7. Lisa Brisby confirmed meeting Petitioner around 8 p.m. on the night of December 26 at the home of Bridgette and McKie. App. 988, ll. 11-20. She further confirmed that Petitioner and McKie were going back and forth to the store between 8 and 9 to pick up snacks and drinks for Bridget and her. App. 989, l. 14 – App. 990, l. 20. After their second trip to the store, McKie and Petitioner left around 9 p.m. App. 990, l. 21 – App. 991, l. 8. She also confirmed that Sutton had been present at the home of Bridgette and McKie earlier in the evening, but that he had left around 7:15 or 7:30. App. 992, l. 7 – App. 996, l. 18.

McKie recalled seeing Petitioner at his apartment at approximately 7 p.m. on December 26, 1988. App. 1006, ll. 20-24. Bridgette and Lisa were there too. App. 1007, ll. 4-5. McKie confirmed that he and Petitioner left the apartment several times to pick up snacks and drinks. App. 1007, l. 9 – App. 1012, l. 24. While McKie and Petitioner were at the store owned by Petitioner's family, Petitioner and his father spoke for several minutes. App. 1009, ll. 5-17. McKie and Petitioner left the apartment at 8:30 or 8:45 p.m. to go to the Fountain Bleau. App. 1013, ll. 3-21. However, McKie did not have identification so the pair returned to his apartment. App. 1014, ll. 6-23. Getting his identification, the two went back to the Fountain Bleau, arriving around 9:30 p.m. App. 1015, ll. 2-13. McKie recalled Petitioner remaining at the club until approximately 2 a.m.; however, McKie remained at the club. App. 1015, ll. 14-19. In short, McKie testified that from the time Petitioner first arrived at the apartment until he left the Fountain Bleau at 2 a.m., the two of them were together. App. 1015, ll. 20-23.

Finally, Petitioner's father, Thomas Tillman, recalled arriving at his store around 7:30 p.m. on December 26, 1988 to find Petitioner was not there. App. 1046, ll. 8-20. However, Petitioner and McKie arrived shortly thereafter. App. 1047, ll. 1-7. While the two were there, Petitioner and his father spoke. App. 1047, ll. 16-22. The two left after approximately fifteen minutes. App. 1047, l. 23 – App. 1048, l. 7.

During deliberations, the jury requested transcripts of certain testimony, which were not available. App. 1106, l. 21 – App. 1107, l. 19. After the jury received dinner, the jury informed the judge they were hung. App. 1113, ll. 18-23. The judge sequestered the jurors in a hotel room for the evening. App. 1110, l. 25 – App. 1112, l. 23. When the jury returned the following morning, the judge gave a modified Allen[5] charge over Petitioner's objection. App. 1114, l. 1 –

[5] Allen v. United States, 164 U.S. 492 (1896).

App. 1116, l. 12. Shortly thereafter, the jury returned with a guilty verdict. App. 1119, ll. 4-8. Judge Rushing sentenced Petitioner to life imprisonment. App. 1141, ll. 15-18; App. 2169. Prior to the murder trial, Petitioner had been convicted of bank robbery in federal court. App. App. 1123, ll. 23-24. After the murder trial, he was sentenced to twenty-five years' imprisonment in federal court. App. 2124. Thereafter, Petitioner was in federal custody until he completed his federal sentence. App. 1788, l. 21 – App. 1789, l. 1.

Direct appeal

Petitioner filed a notice of appeal, which was perfected by Swerling and Jennifer Kneece Shealy. App. 1143-1185. Petitioner raised four issues on appeal: (1) improper admission of tire tread evidence; (2) improper admission of testimony of a witness concerning misconduct by Petitioner; (3) improper exclusion of impeachment evidence; and (4) improper use of Allen charge. App. 1143-1185. The Court of Appeals affirmed his conviction and sentence on May 28, 1991. App. 1241-1247; State v. Tillman, 304 S.C. 512, 405 S.E.2d 607 (Ct. App. 1991). On June 12, 1991, Petitioner sought rehearing. App. 1248-1250. The Court of Appeals denied rehearing on June 20, 1991. App. 1251. Petitioner then filed a petition for writ of certiorari asking this Court to review the opinion by the Court of Appeals. App. 1252-1292.[6] This Court denied his petition for writ of certiorari on September 5, 1991. App. 1344.[7]

Post-Conviction Relief: 1995-CP-40-2449

On July 17, 1995, Petitioner, while in federal custody, filed an application for post-conviction relief (PCR) while he was in federal prison. App. 1345-1415. This case was

[6] Undersigned counsel has been unable to locate a complete copy of the petition for writ of certiorari despite exhaustive and diligent efforts.

[7] Undersigned counsel has been unable to locate the remittitur following the direct appeal despite exhaustive and diligent efforts.

designated 1995-CP-40-2449. Respondent filed a motion to dismiss on September 22, 1995 arguing the PCR application was untimely. App. 1416-1418. Through counsel, Tara Dawn Shurling, Petitioner filed a reply to the motion to dismiss on October 19, 1995 arguing the statute of limitations cited by the state was not effective until July 1, 1995 and should not apply retroactively. App. 1419-1423. On November 27, 1995, Petitioner filed a supplemental reply citing the Act's savings clause. App. 1424-1457.[8] On September 5, 1996, Respondent filed a supplemental return and motion to dismiss without prejudice because Petitioner was not incarcerated in South Carolina. App. 1457-1458. Thereafter, Petitioner filed a reply to the supplemental return and motion to dismiss without prejudice. App. 1459-1464. By an order filed March 26, 1997, the Honorable L. Casey Manning dismissed the application without prejudice because Petitioner was incarcerated in another jurisdiction. App. 1465-1466. Petitioner filed a motion to reconsider pursuant to Rule 59(e), SCRCP. App. 1467-1469. On May 13, 1998, Petitioner moved for a ruling on the motion. App. 1470-1471. On July 13, 1998, Judge Manning denied the motion. App. 1472-1473.

Petitioner appealed Judge Manning's order of dismissal by filing a petition for writ of certiorari. Melody Brown represented Petitioner. App. 1474-1482. On May 5, 1999, Petitioner moved to supplement the appendix with evidence to show his state conviction was affecting his federal sentence. App. 1491-1549. On July 22, 1999, this Court denied the motion to supplement the appendix. App. 1550-1551. Additionally, this Court denied the petition for writ of certiorari. App. 1550-1551. Specifically, this Court provided that "since petitioner is incarcerated in another jurisdiction, the statute of limitations applicable to post-conviction relief actions, S.C. Code Ann. § 17-27-45 (Supp. 1988), shall not apply to any application for post-

[8] Undersigned counsel has been unable to locate the complete copy of the attachment, the savings clause, despite exhaustive and diligent efforts.

conviction relief filed by petitioner within one year after petitioner is returned to this jurisdiction." App. 1551. Remittitur was sent on August 9, 1999. App. 1552.

Post-Conviction Relief: 2002-CP-40-971

Although still in federal custody, on March 1, 2002, Petitioner filed a PCR application. App. 1553-1584. This case was designated 2002-CP-40-971. On the same date, Petitioner filed a request to amend his application for PCR and affidavit in support of his PCR application. App. 1561-1566. Respondent filed yet another motion to dismiss on June 12, 2002 arguing (1) the application was successive and (2) barred by the statute of limitations. App. 1567-1572. On June 17, 2002, Petitioner filed a reply. App. 1573-1593. Also, on July 17, 2002, Petitioner filed a Request for a Petition for Writ Habeas *ad Testifcandum*. App. 1594-1595. On June 13, 2002, the Honorable G. Thomas Cooper signed a Rule to Show Cause permitting Petitioner twenty days to show why his application should not be dismissed as successive and/or barred by the statute of limitations. App. 1596-1600. Petitioner responded on August 14, 2002. App. 1601-1612.

On May 27, 2004, the Honorable Alison R. Lee presided over a hearing regarding the matter. App. 1614-1615.[9] D. Christopher Shea represented Petitioner, who was not present at the hearing. App. 1614-1615. By an order filed June 14, 2004, Judge Lee dismissed the application with prejudice for failure to prosecute. App. 1614-1615. On January 28, 2005, an amended order of dismissal was filed indicating the application was dismissed without prejudice for failing to prosecute and directing Petitioner to file an application for PCR within one year

[9] Undersigned counsel has been unable to obtain this transcript despite exhaustive and diligent efforts.

from the date of his release from his federal sentence and return to South Carolina. App. 1616-1617.[10]

Post-Conviction Relief: 2011-CP-40-7453

On November 3, 2011, Petitioner, through counsel, Tara Dawn Shurling, filed a PCR application, which was designated 2011-CP-40-7453. App. 1661-1670. Respondent filed a return on November 8, 2011. App. 1672-1682. By consent of the parties, the matter was continued on September 20, 2013. App. 1671. Petitioner amended his application on November 18, 2013. App. 1683-1686.

The matter proceeded to an evidentiary hearing on November 19 and 21, 2013, before the Honorable Robert E. Hood. App. 1687. Megan Harrigan represented the state, and Shurling represented Petitioner. App. 1687. At the beginning of the hearing, the state objected to the amendments filed by Petitioner the previous day. App. 1693, ll. 1-8. The judge overruled the objection and provided that the state could respond to any recently amended issue by way of an affidavit. App. 1693, ll. 9-22. Petitioner called trial counsel as his first witness, but due to scheduling conflicts, the parties had to recess. App. 1695, l. 6 – App. 1779, l. 21.

On November 21, 2013, when the PCR hearing reconvened, Petitioner moved to have Shurling relieved as counsel. App. 1783, ll. 2-21. During the hearing on the motion, the state opposed the request and argued that any concerns Petitioner had regarding the effectiveness of Shurling's representation during PCR could be addressed in federal habeas proceedings pursuant

[10] On January 25, 2006, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Texas concerning parole eligibility. App. 1618-1633. The Honorable Earl S. Hines, United States Magistrate Judge, transferred the case to the United States District Court for the District of South Carolina. App. 1634-1636. The State moved for summary judgment. App. 1641-1651. On March 15, 2007, the Honorable Sol Blatt, Jr., United States Magistrate Judge, dismissed the petition without prejudice to permit Petitioner to exhaust his claims. App. 1652-1660.

to Martinez v. Ryan, 132 S.Ct. 1309 (2012). App. 1843, ll. 4-14. After a hearing on Petitioner's motion, Judge Hood denied his request. App. 1856, ll. 5-6. Although Petitioner requested the opportunity to interview eight individuals, Judge Hood granted Petitioner's request to interview and depose four of those witnesses following the hearing. App. 1858, l. 15 – App. 1860, l. 2. Judge Hood directed counsel to interview the witnesses within ninety days and provided for the opportunity to conduct depositions. App. 1863, ll. 14-16. During the hearing on November 21, Petitioner, his father, Thomas Tillman, trial counsel, and trial counsel's associate, Aleksandra Chauhan, testified. App. 1867, l. 8 –App. 1947, l. 7.

On January 10, 2014, Petitioner filed a motion to relieve counsel and requested a stay or continuance. App. 1980-1982; Supp. App. 11-12. He filed a motion for leave to conduct discovery on February 24, 2014. In March 2014, he filed a Rule to Show Cause regarding Shurling's failure to interview witnesses within the time prescribed. App. 1986. On April, 3, 2014, Judge Hood presided over a hearing concerning the motion. App. 1987. Shurling appeared on Petitioner's behalf. App. 1987. Suzanne White and J. Clayton Mitchell appeared on behalf of the state. App. 1987. During the hearing, the state presented several documents that had been provided by trial counsel in response to allegations from the PCR hearing. App. 2033, ll. 2-6; Supp. App. 1-84. After the hearing, Judge Hood granted the motion to relieve counsel by an order filed May 19, 2014. App. 2038-2039. Additionally, the judge appointed Lance Boozer to represent Petitioner. App. 2038-2039. In the order, Judge Hood directed Boozer to order the transcripts of the PCR hearing and the motion to relieve counsel. App. 2039. He directed Boozer to interview the four witnesses within 120 days of receipt of the transcripts. App. 2039. He further directed Boozer to depose any of those witnesses within 60 days of those interviews.

App. 2039. Finally, he afforded the state 30 days to reply to the depositions. App. 2039. The parties were directed to submit proposed orders within 45 days. App. 2039.

On December 12, 2014, Petitioner, through Counsel Boozer, moved for leave to conduct discovery and objected to the court's previous order by letter. App. 2040-2041. Specifically, the letter objected to the limit placed on the number of witnesses he was allowed to interview and depose. App. 2040. Additionally, he requested to present live testimony of the witnesses to support his claims for relief. App. 2040-2041. On February 6, 2015, Petitioner followed this request with a formal motion. App. 2043-2045. The state filed a return opposing the request. App. 2046 – 2051. It was the state's position that Petitioner had not shown good cause to satisfy the statutory requirement for discovery in non-capital post-conviction relief actions, and therefore, the court should deny the request. App. 2049. Additionally, the state argued that "judicial economy and efficiency" weighed in favor of denial of the request. App. 2050. By form order, the court denied Petitioner's motion for leave to conduct discovery on February 18, 2015. App. 2052.

On May 13, 2015, Petitioner deposed Herman Whaley. App. 2053-2119. Whaley testified at Petitioner's trial and recalled meeting with Petitioner's trial counsel more than once prior to his testimony. App. 2072, ll. 5-23. During his deposition, he explained that when he was called as a witness at trial on behalf of Petitioner, he was asked only a few questions concerning activity on Walcott Street, which was not an area pertinent to the death of Sutton. App. 2070, l. 1 – App. 2072, l. 4. Had Whaley been asked questions pertinent to Sutton's death, he would have testified that on December 26, 1988, he was at Petitioner's party shop around 6 p.m. App. 2073, l. 18 – App. 2075, l. 13. While there, he saw Malloy and Sutton standing beside car across the street from the party shop. App. 2078, l. 16 – App. App. 2079, l. 4; App.

2082, ll. 17-20. When Whaley left the party shop around 6 p.m., Malloy and Sutton were still there. App. 2082, ll. 21-23. According to Whaley, Petitioner was still working the counter at the party shop when Whaley left. App. 2082, l. 24 – App. 2083, l. 1. Whaley did not volunteer any of this information to trial counsel, but he was not asked about it either. App. 2083, l. 24 – App. 2084, l. 7.

In response, Respondent filed an affidavit from trial counsel dated July 1, 2015. App. 2120-2123. According to trial counsel, his investigator, Sam Frierson, attempted to interview Whaley on May 16, 1989, but Whaley did not want to get involved. App. 2120. Trial counsel provided "memo" from "Jim," who was either trial counsel's investigator or law clerk at the time. App. 2123. The memo indicated Petitioner wanted trial counsel to ask Whaley whether he ever told Malloy that he saw Petitioner pick up somebody on Walcott Street. App. 2121; App. 2123. Per the affidavit, trial counsel stated Whaley did speak to the defense team prior to trial, and the team decided to call him as a witness. App. 2121. Trial counsel also claimed that based on his review of the trial transcript, Whaley was called "for the specific purpose of refuting Hayes Malloy's prior statement that Mr. Whaley told Hayes Malloy that he saw Ronald Tillman pick up a 'boy' on Walcott Street." App. 2121. Whaley told the defense he never saw that and never told Malloy that. App. 2121.

Following the taking of the deposition and the submission of a responsive affidavit, the parties submitted proposed orders. Supp. App. 85-110. By an order dated November 13, 2015, Judge Hood denied Petitioner relief from his conviction and sentence. App. 2124-2166. Petitioner filed a timely notice of appeal. This petition for writ of certiorari follows.

ARGUMENT

I. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the state's closing argument concerning the state's star witness's motive for testifying against Petitioner and the ability of the state to compel the witness's testimony where the primary evidence against Petitioner was the testimony of that witness.

Relevant facts

Hayes Malloy admitted he had been charged with assault and battery with intent to kill and that the charge was pending at the time of Petitioner's trial. App. 209, l. 20-23. In fact, Malloy picked up this charge only two days after Sutton's death. App. 210, ll. 1-8. Malloy explained he got into an altercation with another man while gambling in a club. App. 210, l. 9 – App. 211, l. 1. The other man accused Malloy of stealing cocaine, which Malloy denied, and Malloy pulled his pistol. App. 210, l. 9 – App. 211, l. 1.

Additionally, the state charged Malloy with the murder of Sutton in January 1989, but dismissed the charge five days before Petitioner's trial in January 1990. App. 262, l. 24 – App. 266, l. 14.

During his closing argument, the prosecutor told the jury that "Hayes Malloy had no reason whatsoever to come in here and testify to you about Ronald Tillman." App. 1075, ll. 20-21. In fact, according to the prosecutor, "Hayes Malloy could be in Canada right now if he wanted to." App. 1075, ll. 21-22. The prosecutor claimed he was powerless to compel Malloy's attendance and testimony: "Nothing that we could do to Hayes Malloy whatsoever is going to force him to come testify." App. 1075, ll. 22-23. According to the prosecutor, the state "didn't wait and make sure he testified the way we wanted him to like Mr. Swerling is going to have you

believe, that this all some conspiracy on the part of the state that we have dragged all these people in here and rewarded them with all these great things for them to lie is what he's saying. Not only have we rewarded them and have we dismissed all these charges against Hayes Malloy so that he could come in here and lie." App. 1075, l. 24 – App. 1076, l. 6. The prosecutor cautioned the jury that the defense argument was just that, but it was not true. App. 1076, ll. 6-7. Trial counsel did not object to this argument.

Concerning Petitioner's claim for relief that trial counsel was ineffective for failing to object to this portion of the solicitor's closing argument, trial counsel testified he "probably" considered objecting. App. 1715, ll. 1-6. However, he speculated that "he probably determined that it's not - - it wasn't worth objecting to during his closing argument." App. 1715, ll. 6-8. He noted he objected "to other things." App. 1715, l. 8. He explained that he "normally" thinks "those things through when [he is] trying the case on what to object to and what not to objected to." App. 1715, ll. 9-11. He theorized that if he did not object, "there was probably a reason." App. 1715, ll. 11-12.

The PCR judge held Petitioner's claims regarding trial counsel's ineffectiveness in failing to object to the prosecutor's closing argument were "lacking in merit." App. 2149. To support this ruling, the judge explained that "the entire opening and closing arguments were not transcribed in this case, but rather, only portions pertaining to specific objections made during such arguments." App. 2150. The PCR court noted this transcript procedure "was in accordance with standards in place at the time of [Petitioner]'s trial in early 1990, as was noted by both [trial counsel] and the trial court during the evidentiary hearing." App. 2150-2151.[11] Accordingly, the

[11] To the extent the PCR court, and by extension this Court, was unable to review the closing argument as a whole as required by state law and that such an inability resulted in the denial of relief to Petitioner, the lack of a complete record is not Petitioner's fault, but is the result of the

PCR court was "not able to view the entire closing argument as a whole in accordance with the standard" required in South Carolina. App. 2151. Nevertheless, the PCR court found trial counsel was not ineffective for failing to object to the state's closing argument because "both of the excerpts [were] proper and based on facts in evidence or reasonable inference to facts in evidence." App. 2151. Further, the court found "[n]either misleads the jury nor improperly prejudices" Petitioner. App. 2151.

Discussion

To prove ineffective assistance of counsel, Petitioner must establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984). If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). In Stokes, this Court determined trial counsel employed a valid strategy in not calling witnesses that he believed lacked credibility. Id. Similarly, this Court found counsel's trial strategy reasonable in Drayton v. Evatt, 312 S.C. 4, 10-11, 430 S.E.2d 517, 521 (1993) where trial counsel did not present evidence of the defendant's future adaptability because to do so would have allowed the introduction of negative psychiatric and discipline reports. On the other hand, this Court found counsel deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state's vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 275-276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel's reason for not objecting to an officer's hearsay testimony of the

transcription standards in place at the time of his trial. Further, had reconstruction of the record been required to permit review, then PCR counsel failed in her duties to ensure review of Petitioner's claims. See Martinez v. Ryan, 132 S.Ct. 1309 (2012).

alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony.

The closing argument of a prosecutor "must be carefully tailored so as not to appeal to the personal biases of the jury." Smith v. State, 375 S.C. 507, 522, 654 S.E.2d 523, 531 (2007)(citing State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)). The argument "must be confined to evidence in the record and the reasonable inference that may be drawn from the evidence." Id. at 522-523, 654 S.E.2d at 531. Although a prosecutor may argue the credibility of a witness based on the record and its reasonable inferences, a prosecutor may not vouch for the credibility of a prosecution witness based on personal knowledge or other information outside the record. Matthews v. State, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). As explained by this Court, "[v]ouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction." Id. Further, "[i]t is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record." Id. Generally, "[a] prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony." Vaughn v. State, 362 S.C. 163, 169, 607 S.E.2d 72, 75 (2004).

The question for a reviewing court is whether the prosecutor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process. Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). A reviewing court examines the impropriety of the prosecutor's closing argument in the context of the entire record. Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). This review requires determining whether the trial judge

issued a curative instruction, and if so, whether the instruction adequately cured the error. Id. The reviewing court also determines whether the prosecution presented overwhelming evidence of the defendant's guilt. Id.

In Gilchrist v. State, 350 S.C. 221, 227, 565 S.E.2d 281, 285 (2003), this Court held trial counsel provided ineffective assistance of counsel by failing to object to the prosecutor's opening statement in which he informed the jury that the state's key witness had a clean soul. This Court held the statement was a personal assurance of the witness' veracity, and trial counsel should have objected. Id. Further, this Court held trial counsel's error prejudiced Gilchrist because the witness for whom the prosecutor vouched was the prosecution's key witness. Id. at 228, 565 S.E.2d at 285. Hayes Malloy admitted he had been charged with assault and battery with intent to kill and that the charge was pending at the time of Petitioner's trial. App. 209, l. 20-23. In fact, Malloy picked up this charge only two days after Sutton's death. App. 210, ll. 1-8. Malloy explained he got into an altercation with another man while gambling in a club. App. 210, l. 9 – App. 211, l. 1. The other man accused Malloy of stealing cocaine, which Malloy denied, and Malloy pulled his pistol. App. 210, l. 9 – App. 211, l. 1.

Contrary to the PCR judge's conclusions, the prosecutor's closing argument was not proper and was misleading to the jury. As an initial matter, trial counsel offered no sound strategic reason for failing to object to the argument. He simply said he probably had a reason; however, he never provided the reason. The prosecutor argued to the jury that the state had no way to control Malloy and no way to compel his testimony. That was simply false. The state at all times maintained the ability to subpoena witnesses. Further, the prosecutor's argument that Malloy could have been in Canada was false as well because Malloy had a pending charge for which he had received a bond, a condition of which would require he remain in the jurisdiction

of South Carolina. The prosecutor's argument that Malloy could have left the jurisdiction was the very essence of misleading. The state's case against Petitioner depended entirely upon Malloy. Without him, the state had no case. There was no physical evidence directly linking Petitioner to Sutton's death. The police found no forensic evidence connecting Petitioner to Sutton's death – no fingerprints, no blood, no ballistics, and no gunpowder. The only evidence outside of Malloy's testimony was that the tires on Petitioner's car were the same make and model as tire tracks found at the scene of the crime – a church parking lot that was covered in tire tracks following Sunday service the day before Sutton's death, which was also Christmas Day. Trial counsel's failure to object to the solicitor's closing argument undermined his entire defense – that Petitioner was elsewhere and Malloy was not credible. The solicitor's closing argument essentially vouched for Malloy's credibility because it removed any motive to lie, which trial counsel had worked so hard during cross-examination to show existed. In light of the centrality of Malloy's credibility to the state's case, the solicitor's argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. Trial counsel's failure to object was deficient performance prejudicial to Petitioner.

II. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the United States Constitution by failing to object to the trial judge's instruction concerning Petitioner's "failure to testify" during the trial because the instruction created an inference that the defendant was obligated to fulfill some duty but had failed to do so.

Relevant facts

During the charge conference, the judge informed the parties that among other instructions, he intended to charge the jury on "failure of the defendant to testify." App. 1071, ll. 3-4. Trial counsel did not object. App. 1071, l. 5. At the end of the trial, the trial judge instructed the jury as follows concerning Petitioner's "failure to testify":

> I charge you, ladies and gentlemen, and instruct you and I emphasize to you that the failure of a defendant in the trial of a criminal case to testify in his own behalf is not a factor to be considered by you in any way in your deliberations and in your consideration on the question of the guilt or innocence of the accused. It must not be considered by you in any manner whatsoever against the defendant or mitigate against him in any respect whatsoever. A defendant has the constitutional right to remain silent and the assertion of such constitutional right cannot and must not be considered by you in your deliberations. Under your oath then as jurors you are to reach no inference and draw no conclusion whatsoever from the fact that the defendant in this case did not himself testify. The failure of this defendant to testify should not even be discussed in the jury room. The burden of proof as I have stated to you is upon the State of South Carolina. It is not incumbent upon the accused to prove his innocence. The burden of proof remains upon the state to prove guilt beyond a reasonable doubt and the failure of a defendant to testify is not a factor to be considered by you in determining the guilt or innocence of a defendant.

App. 1090, l. 21 – App. 1091, l. 17. After the instructions were read to the jury, trial counsel did not pose an objection to the judge's repeated use of the phrase "failure to testify." App. 1106, l. 1.

The PCR judge found Petitioner had "affirmatively abandoned this allegation" because Petitioner "failed to present any testimony or other evidence pertaining to this allegation at the evidentiary hearings." App. 2162. Nevertheless, the PCR court addressed the merits of the

allegation and held that Petitioner "failed to establish how he was prejudiced by the court's use of the phrase, particularly in light of the trial court's jury charge as a whole." App. 2162. Thus, the PCR court denied Petitioner relief on this claim.[12]

Discussion

Not abandoned

Although the PCR judge found Petitioner had abandoned his allegation that trial counsel was ineffective for failing to object to the trial judge's erroneous instruction, the judge cited no authority for making such a conclusion. App. 2162. The rules provide that a PCR applicant has "the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1(e), SCRCP. However, it was unnecessary for Petitioner to present evidence on this specific issue because it is a legal issue not requiring evidence. Rather, it simply requires legal argument, which Petitioner provided. In fact, during PCR counsel's examination of Petitioner, PCR counsel stated that any issues not covered by the testimony were "legal issues," which PCR counsel would address with the Court by memorandum or proposed order. App. 1876, ll. 10-13.[13] Respondent posed no objection to this procedure.

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[12] In his proposed order granting relief, Petitioner argued he was entitled to relief based upon trial counsel's failure to object to the judge instructing the jury concerning his "failure to testify." Supp. App. 104.

[13] PCR counsel began her examination of Petitioner by stating that "the majority of the issues" raised were "legal issues," which would not require testimony by Petitioner. App. 1867, ll. 17-25. To the extent any issues are deemed abandoned by Petitioner for failing to present evidence, the failing is due to PCR counsel, not Petitioner. In fact, Petitioner moved to relieve PCR counsel more than once due to her failure to present evidence as required. When the PCR court finally granted his motion, the PCR court limited the evidence that second counsel could present. Thus, if any of Petitioner's allegations are abandoned due to PCR counsel's failure to present evidence, then pursuant to <u>Martinez v. Ryan</u>, 132 S.Ct. 1309 (2012), Petitioner is entitled to review on the merits of those issues.

Contrary to the judge's conclusion that Petitioner abandoned this allegation, Petitioner maintained he was entitled to relief based upon trial counsel's failings in his proposed order. Supp. App. 104. The legal argument provided in the amended PCR application and in the proposed order explained that the jury instruction was erroneous because it "implied some shortcoming on the part of [Petitioner] for exercising his choice not to testify in his defense and thereby weakened the language of 'no adverse-inference' instruction given by the trial court." App. 1684; Supp. App. 104.

Ineffective assistance of trial counsel

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. Petitioner must prove that counsel's performance was deficient and fell below reasonable professional norms; and there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). In order to show ineffective assistance of counsel as a ground for relief, Petitioner 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, 686 (1984); see also 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. Strickland, 466 U.S. at 687-688.

Pursuant to the state and federal constitutions, a criminal defendant has the right to remain silent, which includes the right not to testify during his trial. U.S. Const. amend. V; S.C. Const. art. I, § 12. Thus, a trial judge errs in using the phrase "failure to testify" in the jury

charge because "the very use of the phrase 'failure to testify' creates an inference that the defendant did not fulfill an obligation or duty." State v. Adkins, 353 S.C. 312, 321, 577 S.E.2d 460, 465 (Ct. App. 2003). The Court of Appeals expressed disapproval of the use of such language "when explaining to the jury the impact of a defendant choosing not to testify on his behalf during a criminal trial." Id. Nevertheless, the Court of Appeals held Adkins was not entitled to a new trial when the "failure to testify" portion of the instruction was viewed as a whole with the rest of the instruction. Id. The Court concluded the trial court "adequately charged the law regarding the defendant's right to remain silent and not testify during his criminal trial." Id.

Although finding Adkins was not entitled to a new trial based upon the erroneous charge, the Court proposed a jury charge "[f]or the benefit of the Bench and the Bar" to be used when instructing a jury in regard to a defendant's decision not to testify during a criminal trial. Id. at 322, 577 S.E.2d at 465. The proposed instruction provided as follows:

> The defendant in this case has not testified. This is his constitutional right, and it is not a circumstance that you can take into your consideration, or even allow to enter into your discussion in your jury room. Under the Constitution of South Carolina and under the United States Constitution, it is his constitutional right not to testify. The burden of proof is upon the State of South Carolina to establish his guilt by competent testimony beyond a reasonable doubt.
>
> The fact that the defendant did not take the witness stand and testify in his own behalf does not create any inference against him; the jury must not permit that fact to weigh in the slightest degree against this defendant, nor should this fact enter into the discussions or deliberations of the jury in any manner.

Id. at 322, 577 S.E.2d at 465-466.

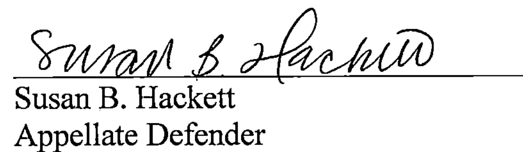
Trial counsel's failure to object to the judge's use of the phrase "failure to testify" when referring to Petitioner's exercise of his constitutional rights was deficient performance prejudicial to Petitioner. The judge referred to Petitioner's exercise of his rights as a failure

numerous times. Thus, the jury could be left with only one conclusion – that Petitioner was required to do something, but had failed to do it. Examining the charge as a whole reveals the damage done by the erroneous charge. While the judge certainly charged the jury that the state had the burden of proof, the judge instructed the jury on Petitioner's "failure to testify" immediately before instructing them on his alibi defense. At this point, the judge was shifting his focus from what the state was required to prove to what had been presented by the defense. Although the judge maintained that the state was required to prove Petitioner was present at the scene of the crime, the jury instructions had shifted at the point when the judge began instructing the jury on Petitioner's "failure to testify." The judge had explained the burden of proof, how to evaluate the evidence, how to determine credibility, and the elements of the offense. When he began instructing the jury on Petitioner's "failure to testify," his instructions shifted from what the state had to prove to what the defense had presented or had failed to present. Thus, when examining the instructions as a whole, as required under South Carolina law, the error becomes clear. Trial counsel's failure to object violated Petitioner's right to the effective assistance of counsel.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari and permit full briefing on the issues presented. In the event this Court grants the writ but dispenses with further briefing, Petitioner respectfully requests this Court reverse the decision of the PCR court and remand for a new trial.

Respectfully submitted,



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 25th day of July, 2016.

STATE OF SOUTH CAROLINA
IN THE Supreme Court

Certiorari to Richland County
Robert E. Hood, Circuit Court Judge

RONALD TILLMAN,

PETITIONER,

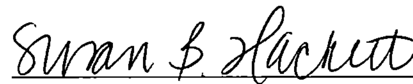
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

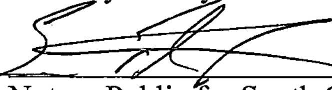
The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix and Supplemental Appendix in this case have been served on Megan Harrigan Jameson, Esquire at the Rembert C. Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Ronald Tillman, #222153, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 25th day of July, 2016.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this
25th day of July, 2016.



______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.