

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
Court of Common Pleas
The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2015 – 002143
Lower Court Case No. 2012-CP-28-0145

RECEIVED
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S.C. SUPREME COURT

ROBERT CANNON, #328347,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT

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TABLE OF CONTENTS

COUNTER ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS2

STANDARD OF REVIEW11

ARGUMENT12

 I. Certiorari is not warranted where the PCR court correctly found Counsel reasonably advised Petitioner an alibi defense would likely not be successful.....12

 II. Certiorari is not warranted where the PCR court correctly found Counsel did not object to the Allen charge where an objection would not have changed the outcome of the case14

 III. Certiorari is not warranted where the PCR court correctly found Petitioner was unable to establish the failure to object to the admission of the photographs resulted in any prejudice where the photographs were more probative than prejudicial and where the evidence of Petitioner’s guilt is overwhelming19

CONCLUSION25

RESPONDENT'S COUNTER ISSUES

- I. Certiorari is not warranted where the PCR court correctly found Counsel reasonably advised Petitioner an alibi defense would likely not be successful.
- II. Certiorari is not warranted where the PCR court correctly found Counsel did not object to the Allen charge where an objection would not have changed the outcome of the case.
- III. Certiorari is not warranted where the PCR court correctly found Petitioner was unable to establish the failure to object to the admission of the photographs resulted in any prejudice where the photographs were more probative than prejudicial and where the evidence of Petitioner's guilt is overwhelming.

STATEMENT OF THE CASE

Petitioner is presently confined within the South Carolina Department of Corrections pursuant to orders of commitment from the Kershaw County Clerk of Court. During its February 2007 term, the Kershaw County Grand Jury indicted Petitioner for murder (2007-GS-28-00018) and burglary in the first degree (2007-GS-28-00017), stemming from the home invasion and fatal assault of Joshua Zoch. (App. p. 2101-2105.) Two co-defendants, Christopher Whitehead and Derrick McDonald, were similarly indicted. Joshua Snow Kendrick, Esquire, represented Petitioner. (App. p. 3.) On May 5, 2008, Petitioner proceeded to a joint trial by jury alongside co-defendants Whitehead and McDonald before the Honorable G. Thomas Cooper, Jr. (Id.) On May 13, 2008, the jury convicted Petitioner as indicted for murder and burglary in the first degree.¹ (App. p. 1696, ll. 10-15.) The trial court sentenced Petitioner to thirty-five years for each offense, with the sentences to be served concurrently. (App. p. 1744, l. 15- p. 1745, l. 3.)

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals. Melissa J. Kimbrough Armstrong, Esquire, represented Petitioner in his appeal. Following briefing and oral argument, the Court of Appeals affirmed Petitioner's convictions and sentences.

¹ The jury similarly convicted co-defendants Whitehead and McDonald for murder and burglary in the first degree. (App. p. 1695, l. 15-p. 1696, l. 9.) The court sentenced Whitehead to life imprisonment and McDonald to thirty-five years imprisonment. (App. p. 1743, l. 5 - p. 1745, l.3.)

State v. Robert Cannon, 2011-UP-267 (Ct. App. filed June 8, 2011). The Remittitur was issued on June 24, 2011.² (App. pp. 1831-1833.)

Petitioner filed a *pro se* application for post-conviction relief on February 9, 2012, (App. p. 1834), which was amended on March 12, 2014, by Tara Dawn Shurling, Esquire, to include twenty-three allegations, (App. p. 1849). Respondent filed a Return and Partial Motion to Dismiss on or about March 2, 2013. (App. p. 1841.)

An evidentiary hearing into the matter was convened March 17, 2014, at the Richland County Courthouse. (App. p. 1855.) Petitioner was present at the hearing and was represented by Tara D. Shurling, Esquire. (Id.) Respondent was represented by Assistant Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. (Id.) After a thorough review of all testimony and evidence presented at the hearing, along with a review of the records from Petitioner's trial and direct appeal, the PCR court found there were no constitutional deprivations or other grounds on which to grant relief and denied and dismissed the application with prejudice. (App. p. 2070.) Petitioner filed a Notice of Appeal, and the Petition for Writ of Certiorari was filed on June 20, 2016. This Return follows.

STATEMENT OF THE FACTS

Petitioner, Christopher Whitehead, Derrick McDonald, and Joshua Zoch worked together at various times at a Sonic fast food restaurant in Columbia, South Carolina. On Tuesday, December 12, 2006, Joshua Zoch, was brutally murdered in his home.

² Co-defendants Whitehead and McDonald also sought direct appellate review of their convictions and sentences. The South Carolina Court of Appeals affirmed both co-defendants' convictions. State v. Whitehead, Op. No. 2012-UP-536 (Ct. App. filed Sept. 12, 2012) and State v. McDonald, 400 S.C. 272, 734 S.E.2d 167 (Ct. App. 2012). Both then petitioned for certiorari to the South Carolina Supreme Court, which granted both petitions. Following full briefing and argument, the Supreme Court affirmed both co-defendants' convictions and sentences, citing overwhelming evidence of guilt implicating each defendant. State v. Whitehead, Mem. Op. No. 2015-MO-033 (filed June 10, 2015) and State v. McDonald, 412 S.C. 133, 771 S.E.2d 840 (2015).

Allen Brown, a manager at the local Sonic, testified that Whitehead, McDonald, Petitioner, and the victim had worked at Sonic. (App. p. 511, l. 17 – p. 512, l. 6; App. p. 518, ll. 7-10.) McDonald, Whitehead, and Petitioner were together the evening of Zoch’s murder. At approximately 10:00 p.m. on the evening of the murder, Whitehead, McDonald, and Petitioner were in the kitchen area of Sonic. (App. p. 514, l. 13 – p. 516, l. 14.) Petitioner was wearing a ski mask and was told to take it off. (Id.) Brown instructed all three to leave. (Id.) Christopher Rust, also an employee at Sonic who was working that same evening, confirmed all three left at the same time. (App. p. 553, ll. 1-25.) Rust also recalled that Whitehead drove a car with “noticeable” muffler noise. (App. p. 563, l. 20 – p. 564, l. 5.)

The evidence at trial established that the burglary and murder occurred at approximately 11:30 p.m. that night. A neighbor to the victim, Cosmo Baccamo, testified that he was outside with his son’s dog at approximately 11:30 p.m., and heard “a lot of knocking noise, loud, like somebody kicking something or slamming doors” and, “about ten minutes later,” he heard “excited” and loud male voices, a door slam, and a car with a loud muffler take off. (App. p. 529, l. 7 – p. 531, l. 17.)

At approximately 5:30 p.m. on December 13, 2006, the victim’s girlfriend and two friends went to the victim’s home. (App. p. 764, l. 9- p. 767, l. 16.) The victim’s girlfriend saw the lights were off and noticed the victim’s car was backed into the garage, which alerted the victim’s girlfriend that something was wrong. (App. p. 765, l. 20-p. 767, l. 3.) She entered the home, saw the victim’s lifeless body, and called 911. (App. p. 767, ll. 3-23.)

Investigating officers who responded to the crime scene found the victim’s home a “complete mess” with the victim’s body “in the middle of it.” (App. p. 884, ll. 13-17.) The back door had been kicked in. (App. p. 867, ll. 13-25.) The investigation began to focus on

Whitehead, McDonald, and Petitioner. Whitehead, McDonald, and Petitioner all denied any direct knowledge or involvement in their initial statements to police. (App. p. 911, l. 18-p. 912, l. 5; p. 915 ll. 21-25; p. 926 ll. 14-25.) However, Petitioner later gave a detailed confession to officers, implicating Whitehead and McDonald, which was redacted for presentation at trial. The statement included not only the grisly facts of the vicious beating—such as the attack on the victim while he slept, dragging him off his couch, using the victim’s bat to strike the victim on his head—but also that victim was selected because he was thought to be a “snitch” and for his drugs. Petitioner’s details included that one person took frozen chicken from the kitchen and placed it on the victim’s head wounds in an attempt to stop the bleeding; that they hit the victim with a glass object; that they first went to the local Walmart for supplies and used the purchased purple latex gloves during the attack and wore ski masks; and, that the attack occurred at victim’s home at approximately 11:30 p.m. (App. p. 942, l. 25-p. 946, l. 15.) Petitioner later supplemented his statement voluntarily with a list of items he recalled taking from the home, including DVDs, a DVD player, presents, hair clippers, and cellphones, and gave an additional statement in which he admitted kicking the victim. (App. p. 1214, l. 16-p. 1215, l. 17.)

McDonald also confessed to the crime in detail. Like Petitioner’s statement, his statement was also redacted before introduction. The statement referenced going to the local Walmart and buying a ski mask and a box of purple gloves; that one of them called the victim to see if someone was home; that all of them kicked in a sturdy back door; that one person “picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch”; that another person dragged victim off the couch; that he repeatedly hit victim with his fists and the victim’s bat; that they were searching for drugs and money; that another person kicked and stomped the victim, and, eventually, someone pulled a

Christmas tree over on him. He also claimed someone else left the house with “plastic bags of stuff” and gave him some “DVD’s and stuff.” (App. p. 967, l. 15-p.969, l. 21.)

Whitehead, though he did not give a confession to officers, was twice overheard by another inmate, Michael Jenkins, at the detention center bragging about the killing, identifying the home where the murder occurred, and calling the victim’s name. (App. p. 1415, ll. 12-20; p. 1420, l. 10-p.1421, l. 7.) This caught Jenkins’ attention as he had known the victim. (App. p. 1416, ll. 9-20.) A detention center officer confirmed that Jenkins had been in the cell next to Whitehead at the time the initial conversation was overheard. (App. p. 1451, ll. 15-20.)

Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified “at least six” and possibly eight “injuries or blows were inflicted to the head that were each capable of causing death,” with wounds inflicted on the top and back of the head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, and abrasions on knees and on the abdomen. (App. p. 1283, l. 15 – p. 1288, l. 8; p. 1290, l. 19-p. 1291, l. 16; p. 1292, l. 21-p.1297, l. 4.) From the wounds and autopsy and from looking at scene photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a “cylindrical and linear” object such as the bat, and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch. (App. p. 1315, l. 17-p. 1317, l. 14.)

Investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask and purple gloves on December 12, 2006 at 10:43 p.m. (App. p. 1250, l. 7- p. 1253, l. 5.) Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim’s head, the broken glass bowl, and the overturned lamp and

Christmas tree. (App. p. 905, l. 3-p.907, l. 2; p. 1298, ll. 1-7.) In sum, the physical evidence supported the detailed confessions of both Petitioner and McDonald.

SUMMARY OF PERTINENT ISSUES FROM THE CRIMINAL TRIAL

This PCR involves a challenge to the admission of photographs without objection at trial and a re-charge to the jury without objection and without moving for a mistrial.

The challenged crime scene photographs were entered during the testimony of the expert in the field of forensic pathology, Dr. Sexton. Exhibit 111³ is a “photograph of the back of the victim’s body as he was found at the scene” (App. p. 1289, ll. 1-2); Exhibits 118 and 119⁴ shows the types of injuries done to the back of the victim’s head (App. p. 1289, ll. 6-25); Exhibit 113⁵ depicts the front of the victim’s face and the injuries to the front of his face (App. p. 1293, ll. 23-25); Exhibit 114 shows the right side of the victim’s face and an abrasion and contusion on the right cheek (App. p. 1294, ll. 15-16)⁶; Exhibits 115 and 116⁷ depict the scrapes on the victim’s knees (App. p. 1296, ll. 3-10); Exhibit 39 shows the location of the body in the middle of the room with a lamp and sofa overturned and the body lying face down (App. p. 1298, ll. 1-7)⁸; Exhibit 92⁹ is a photograph of a close up of the back of the victim as he is lying at the scene, which shows the victim’s shirt pulled up at a right angle, a blood smear, and blood spatters going down to the back (App. p. 1311, l. 20 – p. 1312, l. 13); Exhibit 117¹⁰ shows the top of the victim’s socks at the time of the autopsy, which shows a blood smear on top of the sock (App. p. 1314, ll. 13-22). Extensive motion argument occurred regarding the admission of the photographs (App. pp. 1262-1264; pp. 1274-1276); however, after Dr. Sexton’s proffer and then

³ Admitted “over the defendants’ objection” at App. p. 1288, ll. 18-22.

⁴ Admitted “over the defendants’ objection” at App. p. 1292, ll. 14-20.

⁵ Admitted “over the defendants’ objection” at App. p. 1294, ll. 7-11.

⁶ Admitted at App. p. 1295, l. 23 – p. 1296, l. 2.

⁷ Admitted “over the defendants’ objection” at App. p. 1296, ll. 11-17.

⁸ Admitted “over the defendants’ objection” at App. p. 1298, ll. 21 - p. 1299, l. 4.

⁹ Admitted “over the defendants’ objection” at App. p. 1311, ll. 20-24.

¹⁰ Admitted “over the defendants’ objection” at App. p. 1315, ll. 4-8.

his testimony as to the probative value of the photographs, the Court overruled Defendants' objections¹¹ and allowed these photos into the record. (Infra footnotes 3-10.)

After deliberations following the conclusion of Petitioner and his co-defendants' trial, the jury indicated it had reached a verdict. (App. p. 1688, ll. 10-12.) Upon reviewing the verdict sheets, the Trial Court asked the Forelady if the jury had reached a unanimous verdict on the charge of murder as to Petitioner, and the Forelady responded "no." (App. p. 1689, ll. 1-9.) The Trial Court then asked the Forelady if she believed that after "further consultation the jury would be able to reach a verdict on that indictment," and she said "no." (App. p. 1689, ll. 10-14.) Trial Counsel did not object or move for a mistrial. After a brief bench conference, the Court gave the jury an Allen charge and asked the jury "to retire to your jury room and further deliberate solely on the indictment as to [Petitioner] that you have been unable to reach a verdict on." (App. p. 1689, l. 20-23; p. 1690, l. 1 – p. 1693, l. 25.) Trial Counsel did not object or move for a mistrial. The jury went out at 3:47 p.m., deliberated for over an hour, and returned to the courtroom with a guilty verdict at 4:55 p.m. (App. p. 1693, l. 25 – p. 1695, l. 7.)

SUMMARY OF TESTIMONY PRESENTED AT THE PCR EVIDENTIARY HEARING

At the evidentiary hearing, Petitioner testified on his own behalf and presented testimony from Petitioner's mother, Veronica Davis; trial counsel, Joshua Kendrick; and Petitioner's girlfriend at the time of the murder, Ember Blow.¹²

Petitioner testified Kendrick was appointed to represent him. (App. p. 1864, l. 21-p. 1865, l. 1.) Petitioner testified that he met with Kendrick numerous times and spent a "good deal of time with him"; that Kendrick reviewed his discovery with him and gave him a copy of all

¹¹ Counsel testified at the PCR hearing that he believed he had objected; however, during oral argument, Petitioner's direct appeal appellate counsel conceded the issue had not been preserved. (App. p. 1982, l. 21-p. 1983, l. 17.) The PCR Court found Petitioner deficient for failing to appeal but found Petitioner had not met his burden in establishing prejudice. (App. p. 2098.)

¹² Shelia Ann Rodden also testified.

discovery materials; and that he discussed possible defenses with Kendrick, to include an alibi. (App. p. 1865, l. 5- p. 1866, l. 5; p. 1872, ll. 1-2.) He testified he wanted Kendrick to pursue the alibi defense.

Petitioner elaborated that he was at his neighbor's house from 11 p.m. to 12 a.m., told Kendrick this, and asked Kendrick to call his neighbor and mother as alibi witnesses. (App. p. 1872, l. 1- p. 1875, l.14.) He acknowledged that his mother was not at the party but that he was constantly "in and out" of his mother's house during the party. (App. p. 1874, ll. 2-4.) He testified he also gave Kendrick the names of other individuals who could support his alibi defense. (App. p. 1875, ll. 15-21.) He also testified he was at his girlfriend Ember Blow's house from midnight until the next morning. (App. p. 1878, ll. 2-18.) Petitioner testified Kendrick neither subpoenaed these witnesses nor notified the State of an alibi defense. He testified Kendrick explained to him it would be better not to call any witnesses so he could present the final closing argument. (App. p. 1879, l. 16-p. 1880, l. 4.) He acknowledged that several witnesses testified they saw him at Sonic with his two co-defendants shortly before the murder and that the victim's house was less than ten miles from Sonic. (App. p. 1912, l. 20-p. 1916, l. 18.)

Petitioner also testified that Counsel did not properly preserve objections to the introduction of crime scene photographs into evidence, which he characterized as gruesome. (App. p. 1896, l. 16-p. 1897, l. 6.)

Petitioner testified Kendrick was ineffective for failing to discuss available options with him once the jury announced it was deadlocked. He testified Kendrick failed to object to additional instructions given by the trial court. Additionally, Petitioner testified he wanted Kendrick to move for a mistrial. (App. p. 1898, l. 22-p. 1990, l. 22.)

Petitioner presented his mother, Veronica Davis, as a witness on his behalf. She testified she recalled the murder being discussed shortly after it happened. (App. p. 1938, ll. 15-18.) She testified that on the night of the murder, her son was at her next-door neighbor's house attending a party. (App. p. 1940, ll. 2-10.) She testified her son kept coming back and forth from her house to the party that she eventually told him this was not a "revolving door" and that he either needed to "stay in or stay out." (Id.) She testified Petitioner did not come home that night and stayed at his girlfriend Ember Blow's house. (App. p. 1941, ll. 13-22.) She testified she saw her son again the next day. (Id.) She testified Kendrick came to her house and spoke with her once for approximately twenty minutes. (App. p. 1942, ll. 13-17.) She elaborated that Kendrick did not ask about her son's whereabouts that evening and she did not tell him Petitioner had been home. (App. p. 1942, ll. 18-25.) She testified Kendrick's investigator came to talk to her, and she told him about her son's whereabouts the night of the murder. (App. p. 1948, l. 22-p. 1949, l. 1.) She testified Kendrick subpoenaed her as a witness so she could attend the trial daily without any penalty for missing work. (App. p. 1945, ll. 11-20.) Originally, Petitioner's mother testified she never told Kendrick she could provide an alibi for her son or to call her as an alibi witness (App. p. 1949, l. 2-p. 1950, l. 13; p. 1952, l. 10- p. 1953, l. 10); however, at the end of her testimony, she claimed to have taken a "minute" to tell Kendrick that she could "also say where he was at." (App. p. 1953, l. 11-p. 1955, l. 7.)

Petitioner also presented testimony from his former girlfriend, Ember Blow. Blow testified she and Petitioner were dating at the time of the murder. (App. p. 2026, ll. 20-22.) She testified Petitioner slept at her house the night of the murder, arriving in the early morning hours around 12:30 a.m. (App. p. 2028, ll. 7-23.) She testified she recalled this well because this was the last time she saw him before his arrest. (App. p. 2027, ll. 12-20.) She testified Petitioner slept

at her house and she took him home around 6:00 a.m. the next morning. (App. p. 2029, ll.1-5.) Blow testified she never spoke with anyone about Petitioner's case, including law enforcement or Kendrick. (App. p. 2031, ll. 3-11.) She testified she never contacted Kendrick because she assumed he would contact her if he needed her for anything. (Id.) She testified she would have been willing to testify for Petitioner. (App. p. 2035, ll. 18-21.)

Additionally, Petitioner called trial counsel Joshua Snow Kendrick to testify. Kendrick testified that he worked closely with co-defendants' counsel, Neil Riley and Marcus Whitlark. (App. p. 1958, ll. 16-21.) He testified Petitioner's statement to law enforcement was very detailed, including: leaving Sonic with both co-defendants, going to Wal-Mart to buy gloves and ski masks, going to the victim's home, and a detailed description of the assault, including what the victim was hit with, placing frozen chicken on his head to attempt to stop the bleeding, and pushing a Christmas tree on top of him. (App. p. 2001, l. 14-p. 148, l. 18.) He testified Petitioner denied making this statement and told him he signed multiple blank pages. (App. p. 2003, ll. 3-5.)

As to the Allen charge the trial court gave to the jury, Kendrick testified he has no independent recollection as to why he did not object or move for a mistrial. He recalled his notes indicated the jury was deadlocked on Petitioner's murder charge with a vote of 10-2 in favor of conviction. (App. p. 2022, ll. 5-12.)

In discussing the photograph exhibits, Kendrick testified he did object to numerous crime scene photographs based on undue prejudice, which was overruled by the trial court, but agreed the appellate court found the objections were not preserved. (App. p. 1982, l. 21-p. 1983, l. 17.)

Regarding an alibi defense, Kendrick testified that he was not able to find any witnesses who would have covered the time frame and established that Petitioner was unable to have

committed the crime. (App. p. 1967, ll. 9-23; p. 2006, l. 22 – p. 2007, l. 2.) He elaborated Ember Blow was only able to account for Petitioner’s whereabouts after the time the murder was committed. (App. p. 1967, l. 22- p. 1968, l. 7.) Furthermore, he testified that the location of Sonic, the victim’s home, Petitioner’s mother’s home, and Blow’s home were all close geographically, and Petitioner could have quickly moved between locations. (App. 2007, ll. 20-24.) He testified again he was not able to locate any witnesses establishing an alibi for Petitioner and there would have been no benefit in putting up witnesses that did not conclusively establish an alibi and who would be exposed to cross-examination by the State. (App. p. 2008, ll. 4-13.) He testified he did not inform the State of a potential alibi defense because he knew in advance of trial that he could not establish an alibi. (App. p. 1986, ll. 8-23.)

STANDARD OF REVIEW

The proper standard of review of a post-conviction relief evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a PCR action, “[t]he burden of proof is on the petitioner to prove his allegations by a preponderance of the evidence.” Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged 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, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. at 441, 334 S.E.2d at 813. Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, Petitioner must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland, 466 U.S. at 668, 104 S.Ct. at 2064). Second, counsel's deficient performance must have prejudiced Petitioner 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.

ARGUMENT

I. Certiorari is not warranted where the PCR court correctly found Counsel reasonably advised Petitioner an alibi defense would likely not be successful where the alibi testimony provided did not fully cover the time of the crime.

Petitioner argues Trial Counsel was ineffective for failing to further investigate an alleged alibi defense using Petitioner's mother and his then-girlfriend. He argues that further investigation would have solidified his alibi and helped him present a viable alibi defense at trial. This issue is without merit. Counsel properly investigated the alibi defense by contacting the witnesses provided by Petitioner. Because the witnesses' statements were not concrete and did not make it impossible for Petitioner to have committed the robbery and murder, Counsel's advice that the defense would likely not be successful was reasonable and supported by the evidence.

Counsel adequately investigated Petitioner's alleged alibi and was unable to substantiate

the defense. “Criminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case.” Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal citations omitted). “[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused’s guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.” State v. Robbins, 275 S.C. 373, 377, 271 S.E.2d 319, 321 (1980). Further, an alibi which makes it only **less likely** the accused is the guilty party is no alibi. See Walker v. State, 397 S.C. 226, 723 S.E.2d 610 (Ct. App. 2012). “To establish an alibi defense and thus be entitled to an instruction of alibi, a defendant must present some evidence that he was at another place at the time of the crime and could not therefore have committed the crime.” State v. Diamond, 280 S.C. 296, 297, 312 S.E.2d 550 (1984), quoting State v. Robbins, 275 S.C. 273, 271 S.E.2d 319 (1980). “A simple denial of one’s presence at the scene does not constitute an alibi.” Id.

Here, Petitioner failed to meet his burden of proof, and there is clearly evidence to support the PCR court’s ruling. Petitioner failed to provide the court sufficient evidence to establish a **physical impossibility** that he was not involved in the murder and burglary. The fact that Petitioner confessed in a detailed writing and was implicated in the crimes by his co-defendant’s written confessions as well made it difficult for him to deny his guilt.

Counsel reasonably investigated the alibi defense and spoke to the only witnesses provided to him by Petitioner and his investigator at the time who could corroborate the defense. The information provided by Petitioner’s mother was not helpful because it was limited to a time frame that still allowed Petitioner to get to the crime scene and commit the murder and did not amount to a valid alibi defense. Testimony at trial was that the crime occurred around 11:30 PM.

Petitioner himself confessed to authorities that the crime occurred around 11:30 PM. A witness testified Petitioner was observed at a nearby Sonic location with the co-defendants at approximately 10:00 p.m. As Trial Counsel testified, the Sonic, Petitioner's mother's home, and the victim's home were all within a short distance from one another. Counsel cannot be faulted for failing to substantiate an alibi when Petitioner was unable to provide him—prior to the trial—with any additional witnesses or evidence to cover the time period of the crime. See Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066 (1984) (“The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.”).

The PCR court did not err in finding Trial Counsel committed no error and that Petitioner was unable to meet his burden of establishing any prejudice from the alleged error.

II. Certiorari is not warranted where the PCR court correctly found Counsel did not object to Allen charge where an objection would not have changed the outcome of the case.

In order for the judicial process to properly function, it is important for cases to reach a final resolution at some point. See Nickles v. Seaboard Air Line Ry., 74 S.C. 102, 142, 54 S.E. 255, 268 (1910) (“It is important that the trial of causes should be ended.”). As a result, trial judges have a duty to urge juries to agree upon a verdict. State v. Kelly, 372 S.C. 167, 171, 641 S.E.2d 468, 470 (Ct. App. 2007). However, trial judges are not permitted to coerce juries into doing so. See State v. Ayers, 284 S.C. 266, 269, 325 S.E.2d 579, 581 (Ct. App. 1985) (“The trial judge has a duty to urge the jury to agree on a verdict, so long as he is not coercive.”).

“The typical judicial mechanism for encouraging an indecisive jury is the Allen charge, in which jurors are instructed on, among other things, their duties to approach the evidence with

an open mind and consider the opinions of their fellow jurors.” State v. Robinson, 360 S.C. 187, 193, 600 S.E.2d 100, 103 (Ct. App. 2004). In giving the supplemental charge to the jury, a trial judge is permitted to encourage the jury to reach a verdict in a number of ways, including by advising the jurors in the majority and minority to consider each other views, by asking the jurors to give deference to one another’s opinions, by instructing the jurors to try to reach a decision if they are capable of doing so, and by explaining the high societal costs associated with the retrial of a case to the jury. See Allen v. United States, 164 U.S. 492, 501 (1896) (finding no error in a supplemental charge instructing that absolute certainty cannot be expected, that the verdict must be the verdict of each juror and not mere acquiescence in the views of the others, that they should examine the case with candor and give proper deference and regard to one another’s opinions, that they had a duty to decide the case if they could conscientiously do so, that they should listen to each other with a disposition to be convinced, and that they should consider the position of jurors holding a differing opinion); see also Nickles, 74 S.C. at 141-142, 54 S.E. at 268 (finding a supplemental jury charge was not coercive or erroneous where the jury was instructed the expenses associated with trying the case were a “very strong reason” the jury ought to get together and agree upon a verdict). Significantly, the presentation of such a supplemental charge “has long been sanctioned[,]” and, by providing such an instruction, a trial judge is merely discharging his duty to the public. Lowenfield v. Phelps, 484 U.S. 231, 237 (1988).

In reviewing an Allen charge to determine if the charge was unconstitutionally coercive, the appellate court must judge the charge in the proper context and under the totality of the circumstances. Dawson v. State, 352 S.C. 15, 20, 572 S.E.2d 445, 447 (2002). Factors that may be considered include: (1) whether the charge was specifically directed at minority jurors; (2)

whether the charge included any mandatory language about the necessity to return a verdict; (3) whether the trial judge made any inquiries into the jury's numerical division; and (4) how long the jury's deliberations lasted. Tucker v. Catoe, 346 S.C. 483, 493-494, 552 S.E.2d 712, 717-718 (2001). It is not coercive for the trial judge to instruct the jury that every juror has a right to their own opinion, that no juror needs to surrender their opinion merely to reach an agreement, or that the failure to reach a verdict will result in additional costs. State v. Singleton, 319 S.C. 312, 316, 460 S.E.2d 573, 575-576 (1995); Ayers, 284 S.C. at 269, 325 S.E.2d at 581. Ultimately, reversal is not warranted as long as the trial judge's jury instructions as a whole are substantially correct and are not coercive. See State v. Ezell, 321 S.C. 421, 425, 468 S.E.2d 679, 681 (Ct. App. 1996) ("A jury charge which is substantially correct and covers the law does not require reversal.").

Petitioner first argues that due to the jury indicating further deliberations would not be helpful in reaching a unanimous verdict, the Trial Court violated S.C. Code Section 14-7-1330. Petitioner also argues the Allen charge spoke directly and specifically to the minority jurors and insisted the jurors reach a decision and argues that in light of the "brevity of the deliberations after the Allen charge" and the "fact that the numerical division had been revealed," it was deficient of Trial Counsel not to move for a mistrial.

A. The Allen charge did not violate Section 14-7-1330 as the Trial Court instructed the jury after only the first time the jury indicated it was unable to reach a unanimous verdict.

First, the Trial Court gave the jury the Allen charge after the first time the jury indicated it had not agreed upon a verdict. According to Section 14-7-1330, after the first time "a jury, after due and thorough deliberation upon any cause, returns into court without having agreed upon a verdict, **the court may** state anew the evidence or any part of it and explain to it anew the

law applicable to the case and may **send it out for further deliberation.**” Section 14-7-1330 (emphasis added). It is only where a jury returns a “**second time** without having agreed upon a verdict” that they jury “shall not be sent out again without its own consent unless it shall ask from the court some further explanation of the law.” *Id.* (emphasis added). Because the jury in this case only returned into court without an agreed upon verdict once, the Court was not in violation of Section 14-7-1330 and any objection based upon this statute would have been overruled. Therefore, the PCR Court correctly found Trial Counsel was not ineffective for failing to object pursuant to this statute and Petitioner suffered no prejudice.

B. The Allen charge was not unconstitutionally coercive; therefore, the PCR Court correctly found Trial Counsel was not ineffective for failing to object to the charge and that there was no prejudice to Petitioner.

Furthermore, the trial judge’s Allen charge was not unconstitutionally coercive and Petitioner’s assertions to the contrary are without merit. The trial judge’s Allen charge was an even-handed admonition to both the majority and minority jurors, and no portion of the charge could reasonably be construed as being directed at any particular juror or position. (App. p. 1690, l. 1-p. 1693, l. 25.) See Green v. State, 351 S.C. 184, 195, 569 S.E.2d 318, 323-324 (2002) (finding the charge was neutral in its direction, not impermissibly aimed at the minority, instead suggesting members of each side examine their own position in light of the other view’s position); State v. Hughes, 336 S.C. 585, 598, 521 S.E.2d 500, 507 (1999) (“[T]he charge specifically instructs the majority to give ‘equal consideration to the views of the minority.’ Taken as a whole, this charge is an even-handed admonition to both the minority and majority jurors.”); cf. Workman v. State, 412 S.C. 128, 132, 771 S.E.2d 636, 639 (2015) (finding an Allen charge unconstitutionally coercive where the trial judge instructed that the minority should

consider the views of the majority but did not instruct that the majority should consider the views of the minority).

Second, the charge did not include any mandatory language telling the jurors they were **required** to reach a verdict and instead made clear that “no juror is expected to give up an opinion based on reasoning satisfactory to himself or herself merely for the purpose of being in agreement.” (App. p. 1693, ll. 15-18.).

Third, the judge made **no** inquiry into the jury’s numerical division. That the jurors indicated to the Court—improperly and not in response to any inquiry from the Court—the current count does not render the Court’s charge unconstitutionally coercive. See generally State v. Williams, 344 S.C. 260, 264, 543 S.E.2d 260, 263 (Ct. App. 2001) (an Allen charge is not coercive even where the trial judge does know the numerical division of the jurors before giving the charge).

Fourth and finally, the jurors deliberated for over an hour after the Allen charge was given. See Hale, 284 S.C. at 355, 326 S.E.2d at 422 (finding the judge’s Allen charge as a whole was not coercive even though the jury returned a verdict only three minutes after receiving the charge); State v. Tillman, 304 S.C. 512, 405 S.E.2d 607 (Ct. App. 1991) (rejecting the defendant’s argument that the Allen charge was coercive because the jury returned a verdict one hour and fifteen minutes after the charge was given); State v. Ayers, 284 S.C. 266, 268-69, 325 S.E.2d 579, 580-81 (Ct. App. 1985) (finding the trial judge’s instructions as a whole were not coercive where the jury returned a verdict two hours later); State v. Williams, 344 S.C. 260, 543 S.E.2d 260 (Ct. App. 2001) (holding Allen charge was not coercive where jury returned a verdict two hours and fifteen minutes after receiving the charge, where fifteen of those minutes were spent re-hearing testimony).

These factors, taken together, illustrate the Allen charge given in this case was not unconstitutionally coercive. The trial judge did not err in fulfilling his duty to encourage the jury to reach a verdict in Petitioner's case. Accordingly, the PCR Court did not err in finding Trial Counsel was not ineffective for failing to move for a mistrial and that there was no prejudice to Petitioner.

III. Certiorari is not warranted where the PCR court correctly found Petitioner was unable to establish the failure to object to the admission of the photographs resulted in any prejudice where the photographs were more probative than prejudicial and where the evidence of Petitioner's guilt is overwhelming.

Petitioner claims Trial Counsel was ineffective for failing to object and therefore preserve the issue for appeal regarding the admission of State's Exhibits 39, 92, 111, and 113-119¹³—crime scene photographs—because any probative value they had was substantially outweighed by the danger of unfair prejudice. However, there is no prejudice to Petitioner because the omission of the photographs would not have impacted the trial, particularly in light of the overwhelming evidence of guilt implicating Petitioner.

It is well settled that the relevance, materiality, and admissibility of photographs are left to the sound discretion of the trial court. State v. Collins, 409 S.C. at 534, 763 S.E.2d at 27. "If the offered photograph serves to corroborate testimony, it is not an abuse of discretion to admit it." State v. Nance, 320 S.C. 501, 508, 466 S.E.2d 349, 353 (1996).

Even though relevant, evidence is to be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Rule 403, SCRE. The balance of the danger of unfair prejudice against the probative value must be based on the entire record, and will turn on the facts of each case. State v. Collins, 409 S.C. at 534, 763 S.E.2d at 27-28; State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct. App. 2008). As noted by our Supreme Court in Collins,

¹³ Petitioner concedes any challenge to State's Exhibit #37 based on the record showing Trial Counsel did object to the photo coming in. (Petition for Writ, p. 20 n.5.)

Courts must often grapple with disturbing and unpleasant cases, but that does not justify preventing essential evidence from being considered by the jury, which is charged with the solemn duty of acting as the fact-finder. . . . it is the duty of courts and juries to examine the evidence in even the most unpleasant of circumstance[.]

409 S.C. at 535, 763 S.E.2d at 28. Just because photographs are gruesome—especially where they mirror the “unfortunate reality” of the case—they are not inadmissible. Id. “All evidence is meant to be prejudicial; it is only unfair prejudice which must be scrutinized under Rule 403.” State v. McGee, 408 S.C. 278, 289, 758 S.E.2d 730, 736 (Ct. App. 2014) (internal citations omitted).

Because the challenged photographs had high probative value and limited danger of unfair prejudice, it was clearly within the trial court’s discretion to admit them. See State v. Salley, 398 S.C. 160, 727 S.E.2d 740 (2012) (professional photograph of victim taken when she was alive because it substantiated pathologist’s testimony that her sickle cell trait was not outwardly apparent); State v. Dial, 405 S.C. 247, 746 S.E.2d 495 (Ct. App. 2013) (no error in admission of autopsy photographs which corroborated pathologist’s testimony that victim’s injuries were inconsistent with accidental injury). The admission or exclusion of evidence is an action within the trial court’s sound discretion, and the trial court’s ruling will not be disturbed on appeal absent an abuse of discretion. Salley, 398 S.C. at 169, 727 S.E.2d at 744. The trial court should exclude a photograph if it is calculated to arouse the sympathy or prejudice of the jury, or is irrelevant or unnecessary to substantiate facts, but there is no abuse of discretion if the offered photograph serves to corroborate testimony. Salley, 398 S.C. at 170, 727 S.E.2d at 745; see also State v. Torres, 390 S.C. 618, 703 S.E.2d 226 (2010) (same).

In Torres, the Supreme Court specifically held “autopsy photographs may be presented to the jury in an effort to show the circumstances of the crime and character of the defendant.” 703 S.E.2d at 229. The Court explained:

The doctor who performed the autopsy used the introduced photographs during his testimony to illustrate the number of injuries, location of the injuries, and manner in which the injuries were committed. We do not suggest that these autopsy photographs are mild and easy to view: some of the photographs are close-ups of the victims' injuries and are graphic in nature. However, the purpose of the close-ups was to help identify the nature of each particular injury. The net effect of the photographs was to show what Torres did to the Emervs, which goes straight to circumstances of the crime.

Id.

Petitioner cannot establish prejudice if the photographs at issue were not unduly prejudicial. While the photographs did reflect the gruesome reality of the crime, they were not unduly prejudicial and were relevant to the jury’s understanding of the evidence and issues in the case. After listening to Petitioner’s co-defendants objections and to the proffer and testimony of the state’s witness, the Trial Court overrule the co-defendants’ objections to the photographs at issue. The only exception was Exhibit 114, which came in without objection.

Here, the photographs were probative because they explained the type and extent of the injuries. The challenged photographs were also probative because they corroborated the testimony of the State's expert witness and forensic pathologist regarding the victim’s appearance and visible injuries. It was important for the jury to see the condition of Victim’s body at the time of his death and the nature and location of Victim’s injuries in order to understand the witnesses’ testimony as to his condition and the intentional nature of the infliction of the injuries. The state’s witness also explained why the photos were necessary even when drawings were available, stating the “drawings of the locations . . . are not as detailed as the photographs” (App. p. 1272, ll. 24-25); “it’s much more clear to the jury when you have detailed

photographs” (App. p. 1273, ll. 18-20); and the photographs were necessary to show the wounds were not self-inflicted (App. p. 1273, ll. 21-25), the “type of instrument that might have caused the injury,” and the “position of the body at the time the injury occurred” (App. p. 1274, ll.1-3.).

Exhibit 111 was necessary to show that “blood spatters [that] are directional, indicating the position of the body at the time at least one or more blows was rendered to the back of the head.” (App. p. 1276, ll. 4-8.) Exhibits 115 and 116 were necessary to show the injuries to the victim’s knees. (App. p. 1268, ll. 13-16.) Exhibit 117 showed blood on top of the victim’s socks and aided in “explaining to the jury the nature of these injuries . . . and what occurred at the residence.” (App. p. 1268, ll. 20-25.) Exhibit 118 was necessary to show “all the injuries of the back” versus the individual injuries (App. p. 1269, ll. 16-19), and Exhibits 118 and 119 to help explain the force that was used because the area behind the ear has the thickest bone and “that portion of the bone was broken into multiple little comminuted pieces as opposed to a single linear fracture.” (App. p. 1289, ll. 11-25.) Exhibits 113-114 were necessary to show the extent of the injuries to the victim’s face and whether those injuries were consistent with a “metal and glass potpourri bowl” that was found at the scene. (App. p. 1294, l. 1- p. 1295, ll. 22) Exhibit 39 was used to explain how the room and its furniture corresponded to the victim’s injuries, showing the direction of the spatter (App. p. 1304, ll. 20-25) and providing context for the other photographs that showed close ups of different sections of the scene (App. p. 1308, ll. 11-21). Exhibit 92 was used to show the “blood spatters going down to the back” and link back to the expert’s explanation of how “a head has to generally be fixed to render a fatal blow.” (App. p. 1312, ll. 5-13.)

Overwhelming Evidence

Furthermore, any error in failing to object to the photographs was harmless and, therefore, did not cause Petitioner any prejudice because of the overwhelming evidence presented against him at trial.

Where there is overwhelming evidence of guilt, a trial counsel's representation will not be prejudicial. Ford v. State, 314 S.C. 245, 442 S.E.2d 604 (1994); see also Humbert v. State, 345 S.C. 332, 548 S.E.2d 862 (2001), Geter v. State, 305 S.C. 365, 409 S.E.2d 344 (1991); cf. Vasquez v. State, 388 S.C. 447, 463-64, 698 S.E.2d 561, 569 (2010) (“[T]he sheer weight of the evidence in the instant case does not negate the prejudicial impact of the solicitor's improper comments”). In Ford, trial counsel failed to request an alibi instruction and his representation was found deficient as a result. However, the evidence of the Applicant's guilt in Ford was overwhelming and the South Carolina Supreme Court held that the Applicant failed to prove the second prong of Strickland, which requires that an Applicant show prejudice by the deficient representation.

Here, Petitioner can prove no resulting prejudice. While Petitioner originally denied being involved in the murder of the victim, he later gave a detailed confession to officers, implicating his co-defendants. Petitioner's confession included details about how one person took frozen chicken from the kitchen and placed it on the victim's head wounds in an attempt to stop the bleeding; that they hit the victim with a glass object, that they first went to the local Walmart for supplies and used the purchased purple latex gloves during the attack and wore ski masks; and, that the attack occurred at victim's home at approximately 11:30. Petitioner later supplemented his statement voluntarily with a list of items he recalled taking from the home and gave an additional statement in which he admitted kicking the victim.

Co-defendant McDonald also confessed¹⁴ to the crime in detail. The statement referenced going to the local Walmart and buying a ski mask and a box of purple gloves; that one of them called the victim to see if someone was home; that all of them kicked in a sturdy back door; that one person “picked up a glass bowl with flower petals in it, picked it up over his head and hit Josh in the head with it while Josh was asleep on the couch”; that another person dragged victim off the couch; that he repeatedly hit victim with his fists then hit him in the back of the head using the victim’s bat; that they were searching for drugs and money; that another person kicked and stomped the victim, and, eventually, someone pulled a Christmas tree over on him. Whitehead, though he did not give a confession to officers, was twice overheard by another inmate, Michael Jenkins, at the detention center bragging about the killing.

Forensic pathologist Joel Sexton, M.D., testified that at autopsy, he identified “at least six” and possibly eight “injuries or blows were inflicted to the head that were each capable of causing death,” with wounds inflicted on the top and back of the head and behind the left ear, along with abrasions and cuts to the face, injuries on legs, and abrasions on knees and on the abdomen. From the wounds and autopsy and from looking at scene photos, the pathologist was able to opine that two blows were inflicted on the couch, but that the victim either came off, or was pulled off, the sofa and was hit on the floor with a “cylindrical and linear” object such as the bat, and that he was hit on the head with a glass potpourri bowl, remnants of same still being on the couch.

Investigators obtained a copy of a receipt from the local Walmart confirming a purchase of a ski mask and purple gloves on December 12, 2006, at 10:43 p.m. Photos from the scene also confirmed the use of the latex gloves, the bat, the placement of the frozen chicken near victim’s head, the broken glass bowl, and the overturned lamp and Christmas tree. In sum, the physical

¹⁴ Like Petitioner’s statement, his statement was also redacted before introduction.

evidence supported the detailed confessions of both Petitioner and McDonald, as well as the details overheard in Whitehead's detention center conversations.

The photographs at issue in this case were not unduly graphic, and they corroborated witness testimony. Accordingly, the circuit court did not abuse its discretion by admitting them. Furthermore, the admission of the photographs did not change the outcome of the case because there was overwhelming evidence of Petitioner's guilt. Therefore, Counsel's deficiency in not properly joining in his co-defendants' objection to the exhibits or in objecting to Exhibit 114 was not prejudicial to Petitioner.

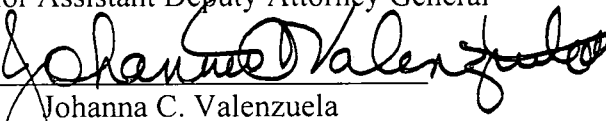
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling as there is ample evidence of probative value to support the PCR Court's denial of Petitioner's application. Should this Court grant Certiorari, Respondent requests permission under the rules to fully brief the issue discussed above.

Respectfully submitted,

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Attorney General

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December 12, 2016

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Kershaw County
Court of Common Pleas
The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2015 – 002143
Lower Court Case No. 2012-CP-28-0145

ROBERT CANNON, #328347,

Petitioner,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 12th day of December, 2016



FELICIA V. HAYES
Legal Assistant For Respondent



RECEIVED

DEC 12 2016

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

December 12, 2016

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

RE: Robert L. Cannon, III, v. State of South Carolina
Appellate Case No. 2015-002143
Lower Court Case No: 2012-CP-28-00145

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,

Johanna C. Valenzuela
Senior Assistant Deputy Attorney General
S.C. Bar No. 79834

JCV/fvh
Enclosures

cc: Susan B. Hackett, Esquire