

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County
Steven H. John, Circuit Court Judge

2013-CP-45-006
Appellate Case No. 2016-000048

RECEIVED

DEC 28 2016

S.C. SUPREME COURT

ANTWINE MATTHEWS,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

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PETITIONER'S ISSUES PRESENTED

- I. Whether the PCR court erred in finding trial counsel was effective where trial counsel failed to object to a change in the presiding judge midway through the trial?
- II. Whether the PCR court erred in finding that trial counsel was effective where trial counsel failed to properly advise Petitioner regarding the ten-year plea offer and Petitioner was ultimately sentenced to a total of twenty years incarceration?
- III. Whether the PCR court erred in finding appellate counsel was effective where they failed to file a motion to reconstruct the important missing portions of the trial transcript and by the time of the PCR hearing trial counsel's memory had faded and the Clerk's office had lost or misplaced all of the trial exhibits?
- IV. Whether the PCR court erred in finding that Petitioner could not prove prejudice as to any of his allegations due to overwhelming evidence of guilt?
- V. Whether the PCR court erred in denying Petitioner's Motion to Alter or Amend where the court failed to set forth specific findings of fact and conclusions of law relating to the allegation that trial counsel was ineffective in failing to object to the Court's response to the jury's questions and recharge of the jury?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Petitioner was true billed indicted at the May 2009 term of the Williamsburg County Grand Jury for Assault with Intent to Kill, Attempted Armed Robbery, Possession of a Weapon during a Violent Crime, and Criminal Conspiracy (2009-GS-45-90). Charles D. Barr, Esquire, represented him. Petitioner proceeded to a jury trial before the Honorable D. Craig Brown. Petitioner was found guilty of Attempted Armed Robbery and Criminal Conspiracy, and on May 14, 2010, Petitioner was sentenced to fifteen years for Attempted Armed Robbery and to a consecutive term of five years for Criminal Conspiracy.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected by Tristan Shaffer, Esquire and Susan Hackett, Esquire. The South Carolina Court of Appeals dismissed the appeal. State v. Matthews, Op. No. 2012-UP-508 (Ct. App. filed September 5, 2012). The Remittitur was issued on September 24, 2012.

Petitioner subsequently filed an application for post-conviction relief (PCR) on January 8, 2015 and amended on June 12, 2015 (2013-CP-45-006). Respondent filed its Return on June 17, 2013. An evidentiary hearing was held on July 16, 2015, at the Sumter County Courthouse. The Honorable Steven H. John issued an Order of Dismissal denying and dismissing the application signed on September 2, 2015 and filed on September 16, 2015.

Petitioner filed a "Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 50€ , SCRCP" on October 30, 2015. Respondent submitted its "Return to Applicant's 'Motion to Reconsider'" on November 13, 2015. Judge John filed an "Order Denying Motion to Reconsider" on November 30, 2015.

Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on January 6, 2016. Petitioner's Appendix and Petition for Writ of Certiorari were filed on August 12, 2016. This Return to the Petition for Writ of Certiorari follows.

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).

ARGUMENT

I. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to a switch in the presiding judge during the trial.

Petitioner argues the PCR court erred in finding that Trial Counsel was not ineffective for failing to object to a change in the presiding judge during Petitioner's trial. Respondent submits that the PCR court correctly relied on probative evidence in making its decision, and this Court should affirm its findings.

Relevant Law

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1e, SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 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. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this

prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Discussion

Petitioner argues that Trial Counsel was ineffective for failing to object to a change in the presiding judge during the course of his trial. However, the PCR court properly found that Petitioner failed to meet his burden of proving both that Trial Counsel was ineffective and that Petitioner was prejudiced.

First, it is important to note that the PCR court found Trial Counsel's testimony to be credible and Petitioner's and Mother's testimony to be not credible. App. 668. The PCR judge was in the best position to determine credibility and, as such, his findings must be given great deference. See Drayton v. Evatt, 312 S.C. 4, 13, 430 S.E.2d 517, 522 (1993) (finding great deference is given to the PCR judge's findings on the credibility of witnesses); Menne v. Keowee Key Prop. Owners' Ass'n, Inc., 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved.").

During Petitioner's trial, two judges presided over the court, Judge Newman and Judge Brown. Judge Newman primarily presided over the first part of the trial, and Judge Brown presided over the second part of the trial. It was explained to the jury as follows:

THE COURT: Ladies and gentlemen, you have witnessed two judges here presiding this week. I explained it all to the members of the jury panel earlier in the week during the course of orientation. Judge Brown is going to now take over presiding in this case.

App. 196.

At the evidentiary hearing, Trial Counsel testified that Judge Brown tried a "good case". App. 488. He stated that the only thing that surprised him about Judge Brown in this case was that he sentenced Petitioner to a consecutive five years' imprisonment for the conspiracy conviction. App. 488. Trial Counsel testified that two judges sitting together on a trial is something that you see all the time, and he had seen it himself a number of times. App. 488-89. He stated that he knew Judge Brown was in the courtroom during the entire trial. App. 490, 527. Trial Counsel testified that he saw no reason to object to the judicial procedure of this case because it did not create a jurisdictional issue. App. 494, 527.

The PCR court relied on this testimony in making its ruling, and it held that Trial Counsel's testimony on the subject was credible. App. 673. The PCR court noted in its Order of Dismissal that, while it may be unusual for two circuit judges to preside over a trial, Petitioner failed to meet his burden as defined by Strickland in proving ineffectiveness and prejudice. App. 673. The PCR court noted that Petitioner failed to present any credible evidence as to how he was prejudiced by Judge Brown presiding over his trial. App. 674.

All of the relevant testimony from the PCR hearing is probative evidence that the PCR court relied on in making its decision to deny post-conviction relief. Petitioner failed to present any credible evidence to meet his burden of proving that Trial Counsel should have objected to the both judges presiding, and he further failed to prove that Judge Brown presiding over his case changed the outcome of his trial in any way. Because the PCR court's decision in denying the petition for post-conviction relief was supported by the probative evidence above, this Court should affirm its denial of the application and deny this Petition for Writ of Certiorari, as certiorari is not warranted in this case.

II. Probative evidence supports the PCR court's finding that Trial Counsel effectively advised Petitioner of the plea offers and the risks of trial.

Petitioner argues the PCR court erred in finding that Trial Counsel was not ineffective for failing to properly advise Petitioner regarding the ten-year plea offer because Petitioner was ultimately sentenced to twenty years' incarceration. Respondent submits that the PCR court correctly relied on probative evidence in making its decision, and this Court should affirm its findings.

Relevant Law

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1e, SCRPC; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 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. 441, 334 S.E.2d 813 (1985). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms."

Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Discussion

Petitioner argues that Trial Counsel was ineffective for failing to properly advise Petitioner about the risks of trial compared to the ten-year plea offer from the State. Respondent submits that the PCR court relied on probative evidence in making its findings and properly ruled that Trial Counsel was not ineffective.

At the evidentiary hearing, Petitioner acknowledged that he was offered a ten year plea deal and he chose to reject the offer based off Trial Counsel's advice that he would most likely be sentenced to fifteen years' imprisonment if convicted at trial. App. 393. Trial Counsel testified at the evidentiary hearing that it was ultimately Petitioner's decision to accept or reject the plea offer. App. 526.

The PCR court properly relied on this testimony as probative evidence supporting its ruling that Trial Counsel was reasonable and effective in his advice to Petitioner regarding the plea offer. It noted that Trial Counsel was surprised by the consecutive five year sentence for criminal conspiracy. App. 673. It further noted that Petitioner was ultimately acquitted of two of his four charges. App. 673. Petitioner was clearly advised of the plea deal and of all the risks of going to trial, and it was ultimately his decision whether to accept or reject the offer.

Furthermore, Respondent submits that Petitioner cannot prove prejudice to meet the second prong of the Strickland test under this allegation. The standard of proof is not whether Petitioner would have chosen to plead guilty rather than go to trial, but instead Petitioner must

prove that the outcome of the trial would have been different. Strickland, *supra*. Even if Trial Counsel had known that Petitioner would receive a twenty year sentence at trial, advising Petitioner that he would receive that sentence would not change the jury's verdict. It was Petitioner's decision to reject the plea deal and face the risks of trial, and he has not proven that Trial Counsel was ineffective or that the outcome of the trial would have been different.

Because the PCR court relied on probative evidence in finding that Trial Counsel was effective, and because Petitioner cannot prove either prong of the Strickland test to meet his burden of proof, this Court should deny the Petition for Certiorari and affirm the lower court's ruling.

III. The PCR court correctly found that Appellate Counsel was effective in his representation because Petitioner failed as a matter of law to meet his burden of proving ineffectiveness.

Petitioner argues that Appellate Counsel was ineffective for failing to move to reconstruct the missing portions of the trial transcript. Respondent submits that, as a matter of law, Appellate Counsel cannot be found ineffective on this ground because Petitioner has failed to present any evidence to meet his burden of proving prejudice by this inaction.

Relevant Law

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, “appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). “For judges to second-guess reasonable professional judgments and impose on ... counsel a duty

to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy..." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Thus, in this case, we ask 1) whether appellate counsel's performance was deficient, and 2) whether Respondent was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Discussion

Petitioner argues that Appellate Counsel should have moved to reconstruct the trial transcript before too much time had passed for its participants to recall the important missing portions. Respondent submits that, because Petitioner failed to provide the reconstructed portions of the transcript that he argues would have changed the outcome of the appeal, he cannot, as a matter of law, prove that he was prejudiced by Appellate Counsel's failure to make this motion.

In order to prove prejudice to the PCR court, Petitioner was required to show what the missing portions of the transcript were and exactly which lines would have changed the outcome of the appeal had they been discussed and argued on to the appellate court. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland at 693, 104 S. Ct. at 2067. This Court has repeatedly held that "a PCR

applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis in original). "The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice." Glover v. State, 318 S.C. 496 at 498-99, 458 S.E.2d 538 at 540 (1995). Here, as noted by the PCR court in the Order of Dismissal, Petitioner "failed to present any credible evidence on this issue." App. 677. "Instead, [Petitioner] merely pointed to the excerpts missing from [the] transcript without presenting any credible evidence as to what actually took place during the portions that were missing." App. 677.

Petitioner argues that the first discussion of what happened during the missing portions of the trial transcript took place at the PCR hearing, which was over three years after the trial, and that this period of time was unreasonably long for the witnesses to recall the specific details of the trial. PWC at 20. He further argues that he was prejudiced because reconstruction was not possible at the PCR hearing in order to effectuate meaningful appellate review. PWC at 21. This Court should take note that missing transcripts are very often reconstructed after five years or longer in many other cases. Court reporters are required to keep their tapes of court proceedings for a minimum of five years before they are allowed to reuse or destroy the tapes. SCRCP 607(i). In post-conviction relief, it is not uncommon for a trial or guilty plea transcript to be reconstructed because more than five years have passed and the tapes no longer exist for the action to be transcribed. While it is true that participants in the trial might not remember all of the details of the proceeding as time passes, it is clearly not impossible to make a meaningful reconstruction of a transcript years after the trial.

Furthermore, if anything prejudicial or objectionable had occurred in the missing portions of the transcript, it is likely that the witnesses would have remembered them. If any of the trial testimony or jury charges had been so questionable as to allow Petitioner a new trial, it is extremely likely that Trial Counsel would remember it. The fact that Trial Counsel was asked to recall what occurred during the missing portions of the transcript and he could not remember detail supports the theory that nothing memorable occurred. While it is conceivable that something objectionable did occur and Trial Counsel had simply forgotten it, Petitioner's speculation of this suggestion is not enough to overcome his burden of proving prejudice.

Additionally, one of the reasons Petitioner asserts that the missing portions of the transcript are important is that Petitioner "raised an allegation that trial counsel was ineffective in failing to object to the recharge of the jury in response to the jury questions." PWC at 18. Petitioner seems to be arguing that Appellate Counsel should have reconstructed the transcript so that Petitioner could prove that Trial Counsel was ineffective at trial. This argument is meritless. First, Petitioner would not have raised this issue until he filed his application for post-conviction relief, which was after the dismissal of his direct appeal. Ineffective assistance of counsel is an issue that is only proper for post-conviction relief. See S.C. Code Ann. § 17-27-20; Al-Shabazz v. State, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (1999). Appellate Counsel on direct appeal had no duty to act on Petitioner's behalf on claims of ineffective assistance of counsel, which were unrelated to the direct appeal. Appellate Counsel cannot and should not be held responsible for failing to argue or preserve post-conviction relief issues which are not yet relevant and not within the scope of his representation.

Petitioner should not be granted a new trial only because a few small portions of the transcript of his original trial are missing. Petitioner has failed to prove that anything in those

missing portions affected his trial or that his conviction would have been overturned on appeal because of the missing portions of the transcript. Because Petitioner has not proven that these missing portions of transcript are prejudicial, he cannot, as a matter of law, meet his burden in proving that Appellate Counsel was ineffective. Therefore, this Court should affirm the PCR court's finding that Appellate Counsel was effective and deny this Petition for Writ of Certiorari.

IV. Probative evidence supports the PCR court's finding that Petitioner can show no resulting prejudice stemming from any allegations of ineffective assistance of counsel because there is clear overwhelming evidence of guilt.

Petitioner argues that the PCR court erred in making a finding of clear overwhelming evidence of guilt and held Petitioner to an improperly high burden. Respondent submits that the PCR court's finding of overwhelming evidence was supported by probative evidence and was properly applied under South Carolina case law.

Relevant Law

Where there is overwhelming evidence of guilt, an applicant cannot meet his burden of proving prejudice by any alleged deficiencies by trial or appellate counsel. See Franklin v. Catoe, 346 S.C. 563, 570 n. 3, 552 S.E.2d 718, 722 n. 3 (2001), cert. denied, 535 U.S. 1114, 122 S.Ct. 2332, 153 L.Ed.2d 162 (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of the defendant's trial); Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991) (concluding reasonable probability of a different result does not exist when there is overwhelming evidence of guilt); cf. Ford v. State, 314 S.C. 245, 248, 442 S.E.2d 604, 606 (1994) (holding respondent failed to prove prejudice from trial counsel's failure to request an alibi charge where there was overwhelming evidence of guilt).

Discussion

The PCR court specifically pointed to several pieces of evidence supporting their finding of overwhelming evidence of guilt. App. 668. The PCR court noted that the victim identified Petitioner as one of the three defendants who robbed him. The victim stated that he saw a white car running outside shortly before he was robbed, and co-defendant witness Jeffrey Dawkins testified that Petitioner owned a white Crown Victoria. The PCR court noted "[a]lthough Victim could not positively identify [Ppetitioner] as the shooter, it was undisputed that [Ppetitioner] was in the store when the armed robbery took place." App. 669.

The PCR court further pointed to Dawkins's testimony that he and Petitioner committed the armed robbery and he provided the reason that they committed the crime—they and the third co-defendant had run out of marijuana and they planned to rob Victim in order to get money to purchase more marijuana. Dawkins testified that Petitioner was driving his white Crown Victoria when they robbed the victim. Dawkins testified that Petitioner got shot by the victim during the robbery when he fired a .38 caliber pistol at Petitioner and his co-defendants. James Green of the South Carolina Law Enforcement Division testified at trial that the bullet recovered from Petitioner's abdomen matched that of a .38 or .357 weapon.

The PCR court also pointed to the testimony of witness Kim Hannah that Petitioner was driving his white Crown Victoria that day and that he had a gun on him that day that she only saw in his possession. Finally, the PCR court noted that Petitioner addressed the trial court prior to sentencing to apologize for everything that happened and indicate that he learned from the mistakes he made and wanted to change his life.

All of these details are probative evidence upon which the PCR court relied in making its finding of overwhelming evidence of guilt. South Carolina case law clearly states that

overwhelming evidence of guilt negates any claim that counsel's deficient performance could have reasonably affected the result of the trial. Franklin, *supra*. Therefore, because the PCR court's finding was based on probative evidence, and because its implications were properly applied under South Carolina case law, this Court should affirm the PCR court's finding and deny this Petition for Writ of Certiorari.

V. The PCR court's finding that Trial Counsel was not ineffective for failing to object to the jury recharge was proper because it adequately stated the basis for the result it reached and substantially complied with statutory requirements for making findings of fact.

Petitioner argues that the PCR court erred in denying Petitioner's Motion to Alter or Amend because the PCR court failed to make specific findings of fact and conclusions of law relating to the allegation that Trial Counsel was ineffective for failing to object to the trial court's response to the jury's questions and recharge of the jury. Respondent submits that, regardless of the lack of specific, detailed findings regarding this issue in the Order of Dismissal, probative evidence supports the PCR court's finding that Trial Counsel was not ineffective on these grounds, and the Order of Dismissal adequately stated this evidence as the basis for its findings.

Relevant Law

"When reviewing an action at law, on appeal of a case tried without a jury, this Court will not disturb the judge's findings of fact 'unless found to be without evidence which reasonably supports the judge's findings.'" In re Treatment & Care of Luckabaugh, 351 S.C. 122, 131, 568 S.E.2d 338, 342 (2002) (citing Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). The South Carolina Rules of Civil Procedure require "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. Rule 52(a), SCRPC. "The rule is

directorial in nature so 'where a trial court **substantially complies with Rule 52(a) and adequately states the basis for the result it reaches**, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding.'" In re Treatment & Care of Luckabaugh at 131, 568 S.E.2d at 342 (citing Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991)(emphasis added)).

Discussion

Petitioner correctly states that the PCR court did not provide an enumerated section in the Order of Dismissal where it included any specific findings of facts or conclusions of law regarding the allegation of ineffective assistance of trial counsel that was orally amended to the application at the evidentiary hearing. However, despite the lack of its own subheading in the Order of Dismissal, the amendment was noted in the Order, App. at 657, and it is clear that the PCR court's conclusion that Trial Counsel was not ineffective was based on probative evidence.

As Petitioner noted, both Petitioner and Trial Counsel testified at the evidentiary hearing about Trial Counsel's alleged failure to object to the jury questions and recharge at trial. PWC at 27; App. at 440-441; App. at 500-502. The PCR court specifically noted in the Order of Dismissal's "Summary of Testimony Presented" that (1) Petitioner testified that Judge Brown answered various questions received from the jurors during deliberations, App. at 660; (2) that Petitioner alleged that Trial Counsel should have requested that the jury questions be placed on the record, App. at 662; (3) that Trial Counsel testified that if he felt that additional jury instructions were warranted then he would have requested them, App. at 666; and (4) that Trial Counsel testified that Judge Brown's jury instructions were not confusing and he gave proper jury instructions, App. at 667. The PCR court was clearly presented with this testimony at the evidentiary hearing and considered it in its decision. It also reviewed the trial transcript and all

relevant testimony regarding the missing portions of the trial transcript and the no-longer-existent trial court exhibits. The PCR court reviewed and used all of this probative evidence in making its decision of whether Trial Counsel was ineffective in this regard, and it held that Petitioner failed to meet his burden in proving ineffectiveness.

Furthermore, PCR Counsel filed a Motion to Alter or Amend, and the PCR court went back to review its findings again. After a **second** review of the evidence and the Order of Dismissal, the PCR court found that Petitioner's Motion to Alter or Amend should be denied because the Order of Dismissal properly made all findings that the PCR court intended to make.

The PCR court clearly found that Petitioner "has not established any constitutional violations or deprivations that would require this court to grant his application." App. 687. The PCR court substantially complied with Rule 52(a)'s requirement of adequately stating the basis for the result it reached. It clearly listed the probative evidence relating to this allegation that it used in making its decision. Regardless of the lack of a paragraph in the Order of Dismissal about this portion of the testimony, it is clear that the PCR court specifically addressed all aspects of Petitioner's allegations of ineffective assistance of counsel. Based on the evidence presented, the PCR court found that Petitioner failed to meet his burden in proving ineffective assistance of counsel.

Because the PCR court's ruling substantially complies with the statutory requirement, and because the PCR court's Order of Dismissal did include specific details that stated the basis on which it found that Trial Counsel was not ineffective, this Court "should not vacate the trial court's judgment for lack of an explicit or specific factual finding." Noisette v. Ismail, 304 S.C. 56, 58, 403 S.E.2d 122, 123 (1991). Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

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

Respectfully submitted,

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Attorney General

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Assistant Attorney General
Bar No. 102214

By 
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December 28, 2016

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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Williamsburg County

The Honorable Steven H. John, Circuit Court Judge

ANTWINE MATTHEWS, #340876

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

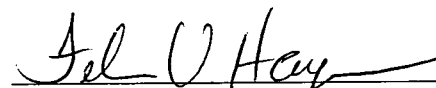
PROOF OF SERVICE

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

Laura R. Baer, Esquire
Post Office Box 11589
Columbia, SC 29211

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

This 28th day of December 2016.



FELICIA V. HAYES

Legal Assistant
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ALAN WILSON
ATTORNEY GENERAL

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December 28, 2016

S.C. SUPREME COURT

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

**RE: Antwine Matthews, #340876 v. State of South Carolina
2016-000048**

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:fvh
Enclosures

cc: Laura R. Baer, Esquire
Trisha Allen, Victim Services (letter only)