STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ANTHONY MARQUISE MARTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002458

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I.

Whether the PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where during the examination of Petitioner's mother, Alba Fumbah, they failed to elicit the specific time that she dropped Petitioner off in the Atlanta area on the day of the bank robbery in North Augusta, without which her testimony did not constitute a true alibi?

II.

Whether the PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where they failed to object to the detective's testimony and solicitor's closing argument that commented on Petitioner's post-arrest assertion of his right to remain silent?

STATEMENT OF THE CASE

Indictment and Trial

On May 19 and June 21, 2010, the Aiken County Grand Jury returned indictments against Petitioner Anthony Martin for armed robbery and criminal conspiracy, related to a robbery of a North Augusta branch of Bank of America that occurred on April 23, 2009. App. 529.

On April 25 – 27, 2011, Martin appeared for trial before the Honorable Doyet A. Early, III, and a jury. App. 1. Martin was represented by C. David Hayes and De Grant Gibbons, and the state was represented by assistant solicitors Susanna Ringler and Elizabeth Young. App. 1.

Martin's three co-defendants, Quinton Harmon, Roosevelt Johnson, and David Dixon, testified against him, claiming that Martin orchestrated the bank robbery plan and was the masked robber who went inside and demanded money. App. 66 – 109; App. 125 – 153; App. 156 – 177. There was surveillance footage from just minutes before the bank was robbed of Harmon inside of the bank and of Johnson purchasing a drink in a nearby gas station. A bank employee also saw Johnson's red Mustang speed away from the scene. She only saw two people in the Mustang and her recollection of the license plate number was just one digit off from Johnson's license plate. App. 210, l. 11 – 213, l. 20; App. 218, l. 25 – 219, l. 12.

Other than the co-defendants' self-serving testimony, there was no evidence placing Martin at the scene of the robbery and none of the witnesses who were in or around the bank could identify the robber. App. 51, ll. 9-10; App. 57, ll. 12-14; App. 65, ll. 2-4; App. 113, ll. 17-19; App. 119, ll. 11-13; App. 155, l. 10 – 156, l. 3. Quinton Harmon's cousin, Tyewan Johnson (a.k.a. "Tidy"), and siblings, Kenyon and Jasmine Harmon, claimed that they saw Martin in the area the night before or morning of the bank robbery. App. 177, l. 13 – 193, l. 16. Jacob McKie, another cousin of Quinton Harmon, alleged that he provided Martin with a pellet gun on the

morning of the robbery. App. 194, l. 16 – 199, l. 14. Interestingly, police found that the phone allegedly used by Martin to call his girlfriend after the robbery belonged to Jacob McKie's brother. App. 221, l. 15 – 222, l. 12. Marquet Widener, arguably the only disinterested party who testified at the trial, recalled seeing Martin at Harmon's house "[a] couple of times" in 2009 and did not recall seeing Martin again after the bank robbery. App. 122, l. 19 – 124, l. 10. However, Widener admitted that she could not recall exactly when Martin stopped living in the area. App. 124, l. 16 – 125, l. 3.

Martin presented testimony from two witnesses, his grandmother, Dora McKenny, and his mother, Alba Fumbah. Both women said that Martin stayed with his grandmother in North Augusta from early January 2009 until Easter Sunday 2009, which fell on April 12, 2009. Martin's mother picked Martin up from North Augusta and drove him back to Snelville, Georgia. McKenny went to visit them in Snellville approximately one week later. App. 239, l. 5 – 246, l. 24. Regarding the day of the robbery specifically, Fumbah got her three younger children ready for school and then woke Martin up. She dropped Martin off at the intersection of Lawrenceville Highway and Jimmy Carter because they did not live on the bus route and he need to get on the bus to look for work. App. 244, ll. 10-17. In his closing argument, trial counsel Hayes argued that there was abundant evidence against the co-defendants who testified against Martin, such that their false accusations against Martin were the only bargaining chip they had to play in order to save themselves. App. 253, l. 3 – 260, l. 23.

After approximately three hours of deliberation, the jury returned verdicts of guilty on both counts. App. 284 – 286. Martin maintained his innocence during sentencing, and Judge Early imposed concurrent terms of twenty years for armed robbery and five years for conspiracy. App. 297.

Direct Appeal

Martin filed a notice of appeal and was represented by appellate defender LaNelle Durant. App. 263. On appeal, Martin challenged the trial judge's denial of the defense's motion to suppress evidence of flight, arguing that "when he [Martin] gave a false name and identifying information to police when he was stopped in Atlanta because he knew he was in violation of probation, and that state did not prove that Martin had knowledge that he was being sought for the bank robbery; therefore there was no nexus between the false information and the bank robbery." App. 299; App. 312. On May 1, 2013, the Court of Appeals affirmed Martin's convictions, finding that though the trial court erred in denying the motion to suppress, the error was harmless. App. 345. Both Martin and the State filed petitions for rehearing, which were denied. App. 346; App. 354; App. 367. Both parties subsequently filed cross petitions for writ of certiorari, which were also denied. App. 368; App. 382; App. 401; App. 429; App. 442. The remittitur was filed on July 30, 2014. App. 443.

Post-Conviction Relief

On March 16, 2015, Martin filed his application for post-conviction relief ("PCR""). App. 444. An amendment to the PCR application was filed through counsel on May 16, 2016. App. 458. The State filed its return on April 15, 2015. App. 460. On September 20, 2016, an evidentiary hearing was held before the Honorable Robert E. Hood. App. 465. Martin was represented by Lance Boozer, and the State was represented by assistant attorney general Julie Coleman. App. 465. At the outset of the hearing, the State consented to the oral amendment of Martin's allegations to include (1) failure to utilize State's witnesses effectively, and (2) failure to put forth an alibi defense. App. 470 – 471. Martin testified on his own behalf, and the State called both of Martin's trial attorneys, David Hayes and De Grant Gibbons.

Martin testified that the solicitor extended two plea offers to him, both of which he rejected because he did not commit the crime. App. 474, l. 21 – 475, l. 9. Regarding his claims of ineffective assistance of trial counsel, Martin said that his defense attorneys failed to elicit the specific time that his mother, Alba Fumbah, dropped him off around Atlanta on the day of the robbery. Had counsel elicited testimony that Fumbah dropped Martin off at 11:15 or 11:30 a.m., it would have made it physically impossible for Martin to have been in North Augusta to commit the bank robbery at 12:20 p.m. that same day. Without that testimony, the jury may have believed that Martin was dropped off around Atlanta earlier in the morning, allowing him "a big window of opportunity" to get to South Carolina. Thus, Martin averred that the lack of specificity in the questioning was significant. App. 482, l. 13 – 485, l. 6. Notably, the jurors had Fumbah's testimony replayed for them during their deliberations. App. 284, l. 18 – 285, l. 9.

Martin further testified that his attorneys failed to object, move to strike, or request a curative instruction when the State's witness, detective Luke Sherman,[1] commented upon Martin's assertion of his Fifth Amendment right to remain silent. App. 479, l. 8 – 480, l. 19. Specifically, when asked during cross-examination about whether co-defendant David Dixon provided a statement, Sherman responded: **"He [Dixon] never gave a statement to me. And Mr. Martin also with his attorney present didn't want to provide a statement."** App. 229, ll. 11-18 (emphasis added). Relatedly, Martin complained that his attorneys failed to object during the solicitor's closing argument, when the solicitor's comments alluded to Martin's invocation of his right to remain silent. App. 478, l. 10 – 479, l. 19. In her closing argument, the solicitor said:

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[1] The header on the trial transcript incorrectly lists "Christopher Poythress" as the witness being cross-examined from pages 221 to 230. However, a review of the preceding pages reveals that the witness being examined was Luke Sherman. *See* App. 208 – 220.

> **And there has been some discussion of an alibi and but we didn't hear about this alibi until today. Until yesterday.** That defendant's mother admitted that she never went to law enforcement with that information. Information that could have been corroborated. Police could have gone to Augusta Tech and confirmed that he was in school. Police could have gone and confirmed that he was interviewing for jobs. But because they didn't have that information, they weren't able to corroborate that information.
>
> And the story that he came to North Augusta, and went to school for three months, and then leaves to go back to live with his mother to be unemployed. I mean, that just doesn't make sense.

App. 267, l. 24 – 268, l. 12 (emphasis added).

David Hayes, who acted as lead counsel at Martin's trial, said they had originally discussed an alibi defense but he thought reasonable doubt was Martin's "best shot." He explained that the alibi defense was limited to Martin's mother and grandmother because Martin's mother never provided him with the names and contact information for persons outside of the family who could support the alibi. App. 490, l. 11 – 492, l. 7; App. 507, l. 18 – 508, l. 22. On cross-examination, Hayes agreed that it is important to specify the exact times in presenting an alibi defense. He further identified the pre-trial statement that his office obtained from Martin's mother, Alba Fumbah, in which she indicated that she dropped Martin off "around 11:15, 11:30" on the day of the robbery. App. 498, l. 3 – 502, l. 19. Hayes admitted that he failed to elicit the specific time from Fumbah and that, if true, it would have made it impossible for Martin to have been in North Augusta at the time of the robbery. However, Hayes would only go so far as to say that such testimony "couldn't have hurt" and "possibly" could have helped Martin's case. App. 502, l. 20 – 504, l. 4; see also App. 509, l. 12 – 510, l. 5.

Regarding detective Sherman's comment on Martin's failure to provide a statement, Hayes explained that even if he found the testimony objectionable, Gibbons was the attorney handling that witness' examination. Thus, he did not object because "it was not [his] witness"

and he had "already been chewed out once for objecting to somebody else's witness." App. 495, l. 16 – 496, l. 1; App. 504, l. 5 – 505, l. 19. Hayes agreed with the assistant attorney general's assertion that the jury charge regarding a defendant's right to remain silent may have "cured" any error in Sherman's testimony. App. 496, ll. 7-25. The jury charge referenced read:

> I charge you and emphasize that the fact the defendant *did not testify in this case* is not -- is not a factor to be considered by you in any way in your deliberation and in your consideration on the question of the guilt or innocence of the defendant. It must not be considered by you in any manner whatsoever. A defendant has a constitutional right to remain silent and the assertion of this constitutional right must not be considered by you in your deliberations. I repeat, under your oath you are to draw no conclusion whatsoever *from the fact that the defendant in this case did not testify.* The fact that *he did not testify* should not even be discussed in the jury room while you deliberate his guilt or innocence.

App. l. 273, l. 19 – 274, l. 7 (emphasis added); App. 505, l. 20 – 506, l. 1. Nonetheless, Hayes disagreed with PCR counsel that the charge was directed more toward the failure to testify at trial. App. 506, ll. 2-6. Regarding the solicitor's comment in her closing that an alibi defense was not even asserted until the day prior such that the officers were unable to investigate it, Hayes said that he saw no reason to object and averred: "Every time you do a case that's the State's closing." App. 506, l. 11 – 507, l. 10.

De Grant Gibbons, who served as second chair counsel for the defense in Martin's case, said that the case was "tough" and that there was no "true" alibi defense. App. 511, ll. 11-23. Regarding the unresponsive statement made by Sherman during his cross-examination, Gibbons said:

> I don't think that he was responding to the actual question I asked him and he happened to blurt out that information, if I remember correctly. And when something like that happens, I always ask myself am I going to call more attention to this by making a big deal about it, or am I going to fix it in the jury's mind. It was a kind of a tactical decision at that point just to try and let that fade away as quickly as we could.

App. 513, ll. 9-21. Gibbons averred that objecting to the statement would not have changed the outcome of the trial and "would have brought more attention to that particular unresponsive answer than we wanted anybody to give." App. 513, l. 22 – 514, l. 2. Regarding Fumbah, Gibbons said that he never spoke to her because "[t]hat was Mr. Hayes' witness." App. 514, ll. 14-17.

Judge Hood took the case under advisement. App. 516, ll. 2-4. On October 26, 2016, Judge Hood signed the Order of Dismissal denying Martin's application for post-conviction relief. App. 518. Regarding the failure to properly examine the alibi witness, the PCR judge found that Martin failed to meet his burden of proving that trial counsel was ineffective and further failed to present any testimony from the witness at the evidentiary hearing, such that he could not establish prejudice. App. 525. The PCR judge likewise found that Martin failed to prove that counsel was ineffective for failing to request a curative instruction when the detective testified that Martin did not give a statement to police. The court found counsel articulated a valid trial strategy "to avoid drawing attention to the testimony." App. 525 – 526. Though noting that trial counsel testified that "he saw no reason to object to the solicitor's comments in closing argument," the PCR judge again found that counsel articulated a valid trial strategy. App. 524. The PCR judge further found that there was overwhelming of Martin's guilty, citing the testimony of Martin's co-defendants and asserting that "Applicant did not dispute the evidence against him." App. 526.

ARGUMENT

I. The PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where during the examination of Petitioner's mother, Alba Fumbah, they failed to elicit the specific time that she dropped Petitioner off in the Atlanta area on the day of the bank robbery in North Augusta, without which her testimony did not constitute a true alibi.

"[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, 375, 271 S.E.2d 319, 320 (1980). Trial counsel Hayes admitted that he had a written statement from Martin's mother, Alba Fumbah, indicating that she dropped Martin off around Atlanta at 11:15 or 11:30 a.m. on the day of the robbery, which would have made it physically impossible for Martin to have been in North Augusta to commit a bank robbery at 12:20 p.m. Nonetheless, Hayes did not question Fumbah about the time that she dropped Martin off. Without this specificity, Fumbah's trial testimony did not constitute a true "alibi," as it left open the possibility that Martin was dropped off earlier enough in the day to have traveled to North Augusta in time for the bank robbery. Contrary to the PCR court's ruling, Martin was not required to call Fumbah as a witness at the PCR hearing to support his allegation. Rather, Hayes' admission that the time was specified in Fumbah's written statement was sufficient proof, as he could have used it to refresh her recollection or to impeach Fumbah, if necessary. See Rutland v. State, 415 S.C. 570, 785 S.E.2d 350 (2016)

A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRCP). To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the

burden of proving counsel's representation fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different. Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Strickland v. Washington, 466 U.S. 668 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Strickland, 466 U.S. at 694.

"[A] movant is not required to reenact how a hypothetical trial would have proceeded had particular evidence been utilized, but to show that counsel knew of the evidence and was ineffective in failing to use it, to movant's prejudice." Black v. State, 151 S.W.3d 49 (Mo. 2004). The United States Supreme Court specifically ruled that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 694. Moreover, the Court ruled that: "The ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Id. at 696 (emphasis added).

In Glover v. State, 318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995), the applicant presented the testimony of the two witnesses who he claimed would have testified that he was in Florida at 8:30 *a.m.* on the day when the crimes were committed. A majority of this Court found that the witnesses' testimony did not foreclose the possibility that Glover could have committed the crimes at 8:30 *p.m.* in light of testimony that Williamsburg County was only a six and a half hour drive from the witness' home in Florida. 318 S.C. at 498, 458 S.E.2d at 540. Thus, the witnesses did not provide an alibi. Id. With respect to other witnesses who the applicant claimed could provide an alibi defense but did not call to testify, this Court wrote:

> In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing **or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence**. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.

Id. at 498-99, 458 S.E.2d at 540 (emphasis added).

In Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), this Court reversed the Court of Appeals' holding that the applicant was not prejudiced by trial counsel's failure to interview the defendant's former girlfriend as a potential alibi witness. Walker was accused of kidnapping and sexual assault. 407 S.C. at 403, 756 S.E.2d at 145. The Victim reviewed surveillance footage from the gas station where she alleged that she met her assailant, who offered to help her when her car would not start. Id. A gas station employee identified Walker as the man pointed out by the Victim on the video. Id. When interviewed by police, Walker admitted going to the gas station but denied offering any help to anyone there or any involvement with the alleged victim. Id. He said he spent the afternoon and evening at a friend's home and then returned to his girlfriend's, Robina Reed's, home around 9:30 or 10:00 p.m. for the remainder of the night. Id.

Following his conviction, Walker filed for PCR, alleging that his trial counsel was ineffective in failing to conduct an adequate investigation. 407 S.C. at 403, 756 S.E.2d at 146. Walker's trial counsel admitted reviewing video of the police interview and had "Robina Reed" in her notes to interview but never did. Id. Though she said that her investigator spoke with or tried to speak with Reed, trial counsel never followed up with her investigator. Id. at 403-04, 756 S.E.2d at 146. Reed testified that she was never contacted about Walker's case and did not know why he disappeared in May 2002 until his PCR attorney contacted her. Id. at 404, 756 S.E.2d at 146. Though she could not provide specific dates and times, she testified that she and Walker spent every weekend together prior to his arrest. Id. The PCR court granted Walker's

application, but the Court of Appeals reversed, finding that Walker's trial counsel was deficient but that Walker was not prejudiced. Id.

This Court recognized that Reed's testimony at Walker's PCR hearing vacillated but finally settled on an answer that "prior to Walker's arrest, she and Walker spent every weekend together." 407 S.C. at 406, 756 S.E.2d at 147. Thus, there was evidence to support the PCR court's conclusion that Reed's testimony reasonably could have resulted in a different outcome at trial. Id. "If true and construed as meaning at least that Walker and Reed spent every night together on the weekends prior to his arrest, it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. "In other words, unlike *Glover* where the testimony of the alibi witnesses could have been true and the petitioner still could have committed the crime, it is not possible for Reed's testimony to be true and for Walker to have committed the crime." Id. at 406-07, 756 S.E.2d at 147.

Here, like Walker, had the jury been presented with and believed testimony that Fumbah dropped Martin off around Atlanta at 11:15 a.m., at the earliest, it would have been physically impossible for Martin to have committed the bank robbery in North Augusta just an hour and five minutes later. Trial counsel knew that Fumbah had previously provided the specific time of the drop-off and it was not reasonable for trial counsel to fail to elicit that testimony at the trial.

Contrary to the PCR court's ruling, Martin was not unable to establish prejudice because he did not call the alibi witness again at the PCR hearing. In Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016), this Court reversed the PCR court's denial of relief, finding that "there is no evidence of probative value supporting the PCR judge's ruling that petitioner failed to present extrinsic evidence of Kestner's prior inconsistent statements." The PCR court found that Rutland's trial counsel was deficient in failing to cross-examine the State's key

witness, Kestner, as to her prior inconsistent statements that the victim was armed at the time of the shooting. 415 S.C. at 575-76, 785 S.E.2d at 352. However, the PCR court denied relief after determining that Rutland failed to prove he was prejudiced by the deficient performance because Kestner was not called to testify at the hearing and Rutland did not "produce extrinsic evidence as to her prior inconsistent statements." Id. at 576, 785 S.E.2d at 352. Kestner's prior written statement was admitted at the PCR hearing, along with affidavits of individuals attesting to hearing Kestner say that the victim was armed, such that the PCR court's prejudice ruling was not supported by the record. Id. at 577, 785 S.E.2d at 353. Further, had Kestner denied her prior statements, trial counsel could have impeached her with the written statement or news article in which she was quoted as saying the victim was armed, which would have affected her credibility. Id. at 577-78, 785 S.E.2d at 353-54. Thus, this Court found that there was "a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting." Id. at 578, 785 S.E.2d at 353-54. In the present case, trial counsel identified Fumbah's handwritten statement, in which she indicating the specific time that she dropped Martin off on the day of the bank robbery. As such, Hayes could have used the statement to refresh Fumbah's recollection at trial, or impeach her if necessary. This was not a matter of a failure to produce the requisite evidence at the PCR hearing.

"[T]he Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146 (1986). In this case, due to the deficiency of trial counsel, Martin did not have the opportunity to present his alibi defense. Even in the trial judge's charge to the jury, he explained: "In order to establish an

alibi it must be shown that the defendant was at another specified place at the time the crime was committed, and that it was therefore impossible for him to have been at the scene of the crime." App. 278, ll. 8-12. The testimony elicited from Fumbah at trial was simply not an alibi. State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) ("[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."). Significantly, on direct appeal the Court of Appeals found that the trial court erred in denying the motion to suppress the evidence of Martin's purported flight but ruled that the error was harmless in light of the overwhelming evidence of guilt. Notably, there was no mention of the presentation of an alibi defense in the Court of Appeals' opinion. App. 337. Thus, not only is there a reasonable probability that the outcome of Martin's trial may have been different had a proper alibi defense been presented, there is a reasonable probability that the error found on the direct appeal would not have been held harmless. Thus, there was no probative evidence to support the PCR court's findings related to counsel's failure to elicit proper alibi testimony.

II. The PCR court erred in finding that trial counsel rendered constitutionally effective assistance of counsel where they failed to object to the detective's testimony and solicitor's closing argument that commented on Petitioner's post-arrest assertion of his right to remain silent.

On cross-examination, detective Luke Sherman was asked if co-defendant David Dixon provided a statement to law enforcement. Sherman responded: "He [Dixon] never gave a statement to me. **And Mr. Martin also with his attorney present didn't want to provide a statement.**" App. 229, ll. 16-18 (emphasis added). Despite the unresponsive nature of the second portion of the answer and the impropriety of the detective's comment upon Martin's assertion of his right to remain silent, defense counsel made no objection, motion to strike, or request for a curative instruction. App. 479, l. 8 – 480, l. 19; *see* Rule 661(a), SCRE; Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000) ("It is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right. Such comments may not be made either directly or indirectly."). The solicitor indirectly commented further on Martin's silence, arguing: "And there has been some discussion of an alibi and but **we didn't hear about this alibi until today. Until yesterday**." App. 267, l. 24 – 268, l. 1 (emphasis added).

Trial counsel Hayes did not object to the detective's trial testimony because he was not the attorney examining the witness and did not object to the state's closing argument because he did not recognize that there was anything objectionable. App. 495, l. 16 – 496, l. 25; App. 504, l. 5 – 506, l. 6. Trial counsel Gibbons recalled the detective's testimony was not responsive to the question asked, but claimed:

> [W]hen something like that happens, I always ask myself am I going to call more attention to this by making a big deal about it, or am I going to fix it in the jury's mind. It was a kind of a tactical decision at that point just to try and let that fade away as quickly as we could.

App. 513, ll. 9-21. He averred that an objection would not have changed the outcome of the trial and "would have brought more attention to that particular unresponsive answer than we wanted anybody to give." App. 513, l. 22 – 514, l. 2. "Labeling counsel's actions as 'trial strategy' does not 'automatically immunize an attorney's performance from Sixth Amendment challenges.'" Stacey v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (quoting Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)). In light of the settled case law prohibiting comments on a accused's post-arrest silence and articulating the necessity of a specific curative instruction, as will be discussed more fully below, the PCR court erred in ruling that trial counsel articulated a valid trial strategy for not objecting to Sherman's testimony or the solicitor's closing. See App. 524–526.

A. Trial counsel was deficient in failing to object to the testimony and argument related to Petitioner's silence.

Trial counsel was deficient in failing to object to detective Sherman's testimony and the solicitor's comment during closing argument that referenced Martin's post-Miranda[2] silence. "An accused has the right to remain silent and the exercise of that right cannot be used against him." State v. Smith, 290 S.C. 393, 394, 350 S.E.2d 923, 924 (1986). "The State cannot, through evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." Id. at 394-95, 350 S.E.2d at 924 (citing State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984); Doyle v. Ohio, 426 U.S. 610 (1976); see State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996) (It is a violation of due process for the State to permit comment on a defendant's post-arrest silence since the giving of Miranda warnings might induce silence by implicitly assuring a defendant his silence will not be used against him.). "Testimony that a defendant refused to comment on an accusation against him is an unconstitutional comment on his post-arrest

[2] Miranda v. Arizona, 384 U.S. 436 (1966).

silence." Id. at 395, 350 S.E.2d at 924 (citing State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986); State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982)).

In State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988), this Court reversed the appellant's conviction and death sentence where the solicitor made a comment in the guilt-phase closing argument that "was an indirect but unmistakable reference to appellant's silence at trial." The Cockerham Court found that it was improper for the state to refer to a defendant's exercise of a constitutional right, and held that "[a]lthough indirect, the comment was nonetheless constitutionally impermissible." 294 S.C. at 381, 365 S.E.2d at 23. In State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991), the solicitor cross-examined the defendant for impeachment purposes regarding his silence after receiving Miranda warnings in violation of Doyle.[3] The Gray Court ruled that the improper examination violated the Due Process Clause of the Fourteenth Amendment. Id. at 484-85, 405 S.E.2d at 421.

In Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000), this Court reversed the PCR court's denial of relief where the detective's testimony and the prosecutor's closing argument violated his constitutional rights to remain silent and be represented by counsel. At Edmond's trial, the detective testified: "I did pull him out [of jail] the next day to interview him. However, he invoked his right to counsel." 341 S.C. at 343, 534 S.E.2d at 684. He also testified on cross-examination that "petitioner invoked his right to remain silent and he 'honored that right.'" Id. In her closing argument while describing the detective's testimony, the prosecutor stated, "And then the very next day [after his arrest] [petitioner] invoked his right to counsel, smartly

[3] Doyle v. Ohio, 426 U.S. 610 (1976) (holding the Due Process Clause of the Fourteenth Amendment is violated when the State seeks to impeach a defendant's exculpatory story, told for the first time at the trial, by cross-examining him about his post-arrest silence after receiving Miranda warnings).

enough." Id. at 343-44, 534 S.E.2d at 684. Edmond's trial attorney did not object to the testimony or argument. Id. at 344, 534 S.E.2d at 684.

The Edmond Court explained that the inadmissibility of evidence or comment related to a defendant's decision to exercise his right to remain silent or be represented by an attorney is a principle "rooted in due process and the belief that justice is best served when a trial is fundamentally fair." 341 S.C. at 345, 534 S.E.2d at 685. This Court expounded:

> The obvious purpose is to try to prevent jurors from improperly inferring the accused is guilty simply because he exercised rights guaranteed him by the state and federal constitutions. Such an inference is constitutionally impermissible because the burden at all times remains upon the State to prove beyond a reasonable doubt every element of a crime with which the accused is charged.

Id. This Court found that there was no probative evidence to support the PCR judge's denial of Edmond's claim, writing: "Petitioner has shown error in counsel's failure to object to the detective's testimony and the prosecutor's comments, as explained by the above cases." Id. at 347, 534 S.E.2d at 686. Just as this Court found in Edmond, based on the ample case law regarding the prohibition on testimony or argument related to a defendant's post-arrest silence, trial counsel's failure to object to the testimony and solicitor's argument was deficient representation. See also Payne v. State, 355 S.C. 642, 586 S.E.2d 857 (2003) (finding that trial counsel was deficient in failing to object to counsel for co-defendant's indirect comment on Payne's silence, though error was harmless in light of overwhelming evidence of guilt).

B. Trial counsel failed to articulate a valid trial strategy.

Trial counsel's deficiency cannot be saved by the veil of trial strategy. In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), this Court explained:

> As we have often stated, counsel's strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. The necessary converse of this principle is that counsel's decision to employ a certain strategy will be deemed unreasonable under the Sixth Amendment if the reasons given for the strategy are not sound.

(internal citations omitted). "Where counsel articulates a strategy, it is measured under an objective standard of reasonableness. " Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). In Roseboro v. State, 317 S.C. 292, 293-94, 454 S.E.2d 312, 313 (1995), this Court reversed the PCR court's denial of relief, finding that trial counsel's failure to request an alibi charge was not saved by his professed "tactical decision" to focus the jury's attention on the State's failure to meet its burden of proof rather than place more emphasis on the alibi testimony by requesting an alibi charge where such "strategy" was "invalid under an objective standard of reasonableness." The Roseboro Court noted that "[a]n alibi charge places no burden on a criminal defendant but emphasizes that it is the State's burden to prove the defendant was present and participated in the crime." 317 S.C. at 294, 454 S.E.2d at 313. In Gallman v. State, 307 S.C. 273, 414 S.E.2d 780 (1992), the PCR court's denial of relief was reversed where trial counsel's failure to object to the trial judge's improper comments inviting the jury to prematurely deliberate because "objections would give the jury the idea that something was being hidden" did not constitute valid strategy. In Dawkins v. State, 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001), this Court again reversed the PCR court's denial of relief, finding that counsel's failure to object to improper hearsay "because he did not want to confuse or upset the jury" did not constitute valid strategy.

Here, the PCR court erred in finding that trial counsel articulated a valid trial "strategy." App. 524 – 525. Regarding the solicitor's comment that the State had not heard of Martin's alibi until the day prior, neither trial attorney offered any strategic reason for failing to object. App. 267, l. 24 – 268, l. 1. Following this comment, the solicitor made a direct reference to the failure of Martin's mother, Fumbah, to go to police with the alibi information. App. 267, l. 24 – 268, l. 12 (emphasis added). However, also implicit in the argument was Martin's failure to tell

the police about his alibi. Trial counsel Hayes said he did not see any reason to object to that portion of the solicitor's closing because that state argues that "every time." App. 506, l. 11 – 507, l. 10. The PCR court noted this testimony before finding that counsel articulated a valid trial strategy. App. 524.

In Bruno v. State, 347 S.C. 446, 451, 556 S.E.2d 393, 395 (2001), this Court found that although the PCR court found there was a valid strategy for the failure to object, counsel gave "absolutely no explanation for his failure to object." Thus, there was no evidence to support the PCR court's finding that the failure to object was counsel's strategic decision, such that the PCR court's finding on that issue could not be upheld. 347 S.C. at 451, 556 S.E.2d at 395-96. In Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010), this Court ruled that "[t]he presumption of adequate representation based on a valid trial strategy disappears when trial counsel acknowledged there was **no** trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony." (emphasis in original). Because Martin's trial attorneys failed to articulate any strategic reason for failing to object to the solicitor's improper closing, there was no evidence to support the PCR court's finding.

Regarding detective Sherman's testimony, trial counsel Gibbons claimed that he made a "tactical decision" not to make any objection or motion because it would have "brought more attention" to the response. App. 513, l. 9 – 514, l. 2. However, the jurors heard the testimony that "Mr. Martin also with his attorney present didn't want to provide a statement." App. 229, ll. 16-18. With no curative instruction, the jury was free to improperly infer guilt simply because Martin exercised rights guaranteed him by the state and federal constitutions. See Edmond, 341 S.C. at 345, 534 S.E.2d at 685. Though a direct appeal case, State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), is instructive. There, the trial court sustained counsel's objection to the

Doyle violation made during the solicitor's closing argument. 320 S.C. at 530, 466 S.E.2d at 365-66. However, the trial judge declined to give a curative instruction because he did not want to "exacerbate the situation." Id. at 530, 466 S.E.2d at 366. This Court found that the refusal to give a curative instruction was error. Id. In State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986), the State improperly used the defendant's post-arrest silence as substantive evidence of his sanity. This Court rejected the State's contention that the prejudicial effect was cured by the trial judge's curative instruction, finding that the "the trial judge's casual remark to 'forget' the question did not serve as a curative instruction." 290 S.C. at 395, 350 S.E.2d at 924. Rather, the jury should have been "specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations." Id. Similar to the failure to request an alibi charge in Roseboro, *supra*, there was no reason for Martin's attorneys not to request a curative instruction to clarify that detective Sherman's testimony was improper and should not have been considered by the jury in Martin's case. See also Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) ("[A]lthough we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this 'strategy' cannot be construed as a valid one given the evident impropriety of the solicitor's remarks.").

C. Petitioner was prejudiced by the uncured comments on his silence.

Martin was prejudiced by trial counsel's deficient conduct. As an initial matter, the prejudice to Martin was not cured by the trial judge's general charge on the defendant's right not to testify. See State v. Pickens, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (1996) ("[T]he trial judge's general charge, which was given shortly afterwards, did not cure the error."). Further, for a Doyle violation to be harmless, "the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not

tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; and the evidence of guilt was overwhelming." State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996). Errors are harmless where they could not reasonably have affected the result of the trial. State v. Jolly, 304 S.C. 34, 402 S.E.2d 895 (1991).

In State v. Gray, 304 S.C. 482, 484, 405 S.E.2d 420, 421 (Ct. App. 1991), the Doyle violation was held not harmless where credibility was a central issue and "Gray's exculpatory story [was] not so totally transparent or frivolous such that the evidence of guilt against him is overwhelming." Id. at 484-85, 405 S.E.2d at 421. Again in State v. Holliday, 333 S.C. 332, 344, 509 S.E.2d 280, 286 (Ct. App. 1998), the Court ruled that the solicitor's cross-examination of the defendant referencing his post-Miranda silence was improper and not harmless because credibility was a crucial issue in the trial given the conflicting versions of what happened between the state's case and the defense case. In State v. Williams, 399 S.C. 281, 289, 731 S.E.2d 338, 341-42 (Ct. App. 2012), the Court held that the cumulative effect of highlighting Williams' silence four times during trial was prejudicial error "because the State attempted to show that if Williams acted in self-defense, he would have immediately explained this to the police." The Court ruled that "[b]ecause the State directly tied Williams' silence to his claim of self-defense, the error cannot be harmless." Id. at 289, 731 S.E.2d at 342.

Here, there was more than one reference to Martin's silence – a direct reference was made in detective Sherman's testimony and an indirect reference was made in the solicitor's closing argument. App. 229, ll. 16-18; App. 267, l. 24 – 268, l. 1. The solicitor further tied Martin's silence directly to his exculpatory story, arguing that the information about Martin's

alibi could have been corroborated if the police had the information.[4] App. 268, ll. 1-8. She then argued that Martin's "story" that he came to North Augusta Technical College to attend school for three months and then returned to the live with his mother to be unemployed "doesn't make sense." App. 268, ll. 9-16. On the contrary, there are many legitimate reasons that a student would only attend the winter quarter of a technical school, including that he was not successful academically or could not afford the costs for the next semester. Familial obligations, like assisting in the care of younger siblings, may also necessitate a break in schooling. Notably, Martin had just returned to his mother's house on April 12, 2009, such that it was not unbelievable that he was still looking for work a week and a half later on April 23, 2009. Thus, Martin's defense was not "totally implausible."

Lastly, the evidence against Martin was not overwhelming. None of the employees or witnesses outside of the bank could identify Martin as the gunman and there was no forensic evidence linking him to the robbery. While Martin's co-defendants and some of their relatives alleged that Martin was in Aiken the night before and morning of the robbery, these individuals had everything to gain and nothing to lose by pointing the finger at Martin. See App. 253, l. 17 – 254, l. 16. Martin presented evidence that he had already moved back to the Atlanta area by the time of the bank robbery. As discussed more fully in Issue I, there was more specific evidence that Martin was not dropped off around Atlanta until 11:15 or 11:30 a.m. on the day of the robbery, which would have provided an alibi had it been presented at his trial. App. 239, l. 5 – 246, l. 24. However, even with the evidence presented at trial, this case was about credibility. The solicitor recognized such, arguing to the jury why they should believe the self-serving

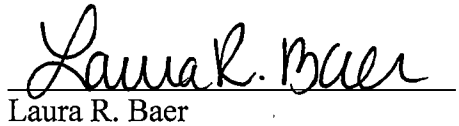
[4] Because Martin presented a defense, the state was not required to open in full on the law and the facts. As such, Martin had no opportunity to respond to the solicitor's closing argument.

testimony of the co-defendants but acknowledging that ultimately the jury would decide the truth. App. 265, l. 8 – 268, l. 22; see Gray, 304 S.C. at 484, 405 S.E.2d at 421; Holliday, 333 S.C. at 344, 509 S.E.2d at 286.

In sum, the impropriety of commenting upon an accused's assertion of his post-arrest right to silence is fundamental. Trial counsel's purported strategy of not wanting to call additional attention to the objectionable testimony was not a valid strategy in light of the danger that, without any curative instruction, the jury would consider the improper testimony in deciding Martin's case. Additionally, no valid strategy was articulated for failing to object to the solicitor's comments in her closing argument. Thus, trial counsel was deficient. Martin was prejudiced by the improper evidence and argument because there was more than a single reference to his silence, which included reference to the defense's exculpatory story, the exculpatory story was not totally implausible, and there was not overwhelming evidence of guilt. Martin is accordingly entitled to a new trial.

CONCLUSION

Based on the foregoing, Petitioner Anthony Marquise Martin respectfully requests that this Court grant the petition for writ of certiorari and allow further briefing on the issues raised therein.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 26th day of July, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ANTHONY MARQUISE MARTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Anthony Marquise Martin, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 26th day of July, 2017.

Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 26th day of July, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2027 .