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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable Alexander S. Macaulay, Circuit Court Judge

Appellate Case No. 2015-001335

Sammy Cowan, #214656, ... Petitioner,

v.

State of South Carolina, ... Respondent.

BRIEF OF RESPONDENT

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ISSUES PRESENTED

I. Is there any probative evidence in the record to support the PCR judge's finding Counsel was not ineffective in failing to enhance 911 tape introduced at trial, where Counsel was acting pursuant to a valid trial strategy, and Petitioner failed to show prejudice?

II. Is there any probative evidence in the record to support the PCR judge's finding Counsel was not ineffective in failing to object to alleged hearsay testimony by Detective Reeves, where the testimony in question was not hearsay, and Petitioner failed to show prejudice?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. Petitioner was indicted at the April 2005 term of the Anderson County Grand Jury for Murder (2005-GS-04-0696); and possession of a firearm by a convicted felon (2005-GS-04-2157). He was represented by Nancy Jo Thomason, Esquire. On November 14, 2005, Petitioner proceeded to a jury trial before the Honorable Lee S. Alford. Upon conviction, Judge Alford sentenced him to life imprisonment for murder and five years for possession of a firearm by a convicted felon, to be served concurrently.

A timely Notice of Appeal was filed on Petitioner's behalf, and an appeal was perfected. Petitioner was represented by Katherine Hudgins, Esquire, of the Office of Appellate Defense. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Cowan, Op. No. 08-UP-577 (filed on October 14, 2008). The Remittitur was issued on October 30, 2008.

Petitioner subsequently filed an application for post-conviction relief on January 27, 2009. An evidentiary hearing was convened on June 5, 2012, at the Anderson County Courthouse, with the Honorable Alexander S. Macaulay presiding. Petitioner was represented by C. Rauch Wise, Esquire. Respondent was represented by Kaelon May, Esquire, of the Office of the Attorney General. In a written order dated April 2, 2015, and filed April 7, 2015, Judge Macaulay denied and dismissed the application with prejudice. Petitioner filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, on April 20, 2015, and the State filed a reply on April 29, 2015. Judge Macauley denied the motion by order dated May 14, 2015. Petitioner filed a timely notice of appeal on June 12, 2015, followed by his Petition for Writ of Certiorari on January 21, 2016. Respondent filed its Return to Petition for Writ of Certiorari on June 16,

2016. By order dated June 16, 2017, this Court granted certiorari on Petitioner's Questions 1 and 3. Petitioner filed a brief on July 17, 2017. Respondent's brief follows.

STATEMENT OF THE FACTS

On February 6, 2005, Fred Penn ("Victim") attended a Super Bowl party at Club Envy in Anderson County. App. pp. 82-84, 111-13, 138. Petitioner was also in attendance, along with hundreds of other patrons, including a man named Kinshaba Simmons ("Simmons"). App. pp. 85, 96-97, 113-15. The club's bouncer, Allen Johnson ("Johnson"), testified the club was "standing room only," and he searched patrons with a "magic wand" metal detector before entering. App. p. 82, lines 14-21, p. 84, lines 7-12. Johnson testified Petitioner, Victim, and Simmons were all searched for weapons before being allowed to enter. App. p. 86, lines 7-15, p. 97, lines 2-5. Simmons was evicted from the club earlier in the evening, then allowed to re-enter. App. p. 105, lines 11-22, p. 126, lines 19-25. After his re-entry, Simmons and Victim got into a heated argument, and both were escorted out. App. p. 84, line 17-p. 85, line 4. Johnson testified he escorted Simmons out first, then Victim a few minutes later; neither left the premises and the argument resumed outside. App. p. 85, lines 8-25. Johnson testified he became concerned at that point because a crowd was gathering, so he called 911. App. p. 86, lines 1-2.

Johnson testified he saw Petitioner, whose nickname was "Detroit," run by with "a gun down his left side" while Johnson was on the phone with the 911 operator. App. pp. 86-87. According to Johnson's testimony at trial, as Petitioner ran towards the altercation between Simmons and Victim, Petitioner was shouting, "We run this 'sh' Detroit style. This is south side. I done killed one of your boys, and I don't mind doing it again." App. p. 86, line 19-p. 87, line 9. The State introduced the 911 tape at trial. App. p. 76, l. 22-23. On cross-examination, Counsel pointed out the only statement that can be heard on the tape is "We run this," and the part regarding "Detroit style" and "south side" is not captured on the recording. App. p. 99, line 6-p. 100, line 15. Johnson claimed he was not on the phone when Petitioner said "Detroit style."

App. p. 100, lines 23-25. Johnson further testified after he saw Petitioner run by with the gun, Petitioner rounded the side of the building out of Johnson's sight, and then Johnson heard several gunshots. App. p. 88, lines 15-24. Johnson testified Petitioner was wearing a "whole brown outfit" that night including khaki pants, a brown sweater, and a matching ball cap. App. p. 87, lines 19-23.

The club's manager also testified he witnessed Victim engaged in an altercation outside the club with another man. App. pp. 115-16, 128-29. The manager testified he then saw Petitioner "coming over to the incident with a gun." App. p. 116, lines 21-22. The manager described Petitioner as wearing a "t-shirt and brown khaki pants." App. p. 116, lines 12-17. He further testified after he heard five gunshots, Petitioner ran towards him and Johnson, still holding the gun in his hand. App. p. 117, lines 10-20. The manager also testified he did not see anyone else with a gun, and the man he initially saw arguing with Victim was not the man he saw with a gun. App. p. 117, lines 21-23, p. 129, lines 1-14.

Multiple eyewitnesses to the altercation and the shooting testified at trial. Craig Williston ("Williston"), a friend who was with Victim that night, testified he saw Victim walk outside with a group of men Williston did not know, so he followed Victim. App. p. 140, lines 1-8. Williston testified he saw Petitioner dressed in "some sort of brown suit" pull a gun out of each pocket and walk towards the area where Victim was standing, though he lost sight of Petitioner around the corner of the building just before he heard the gunshots. App. p. 141, line 19-p. 144, line 5. A friend of Simmons, Joctavious Williams ("Williams"), also testified he saw Victim and Simmons being escorted from the club and followed them outside to see what was going on. App. p. 189, line 13-p. 190, line 3. Williams testified he saw Simmons and Victim exchange words and a couple of blows, then Petitioner ran into the road, came back with pistols, and fired a shot. App.

p. 190, lines 5-10. Williams also testified Petitioner was dressed in brown or tan colored clothing, and he saw Petitioner pull out two pistols and shoot at Victim. App. p. 191, lines 5-6, p. 192, line10-p. 193, line 4. Williams testified he heard five shots in total, and he saw neither Victim nor Simmons with a gun during the altercation. App. p. 193, lines 16-24. Additionally, Natasha Reed ("Reed") testified when she pulled into the club parking lot, she noticed a crowd gathered in the corner where she saw Simmons and Victim were fighting. App. p. 200, lines 2-13. Reed testified she and her friends never got out of the car because she saw a black guy in a brown khaki suit standing with his back to her with a gun in his hand, so they left immediately. App. p. 201, lines 6-19, p. 202, lines 4-15. Reed testified she heard several gunshots as they pulled out. App. p. 202, lines 4-15. Reed further testified she did not see either Victim or Simmons with a weapon. App. p. 200, line 25-p. 201, line 5.

Simmons also testified at trial. Simmons admitted he had been evicted from the club for causing problems earlier in the night, but denied he and Victim had an altercation inside the club. App. p. 183, line 23-p. 184, line 8. Instead, Simmons testified Petitioner and Victim were arguing outside, then as Simmons followed them outside, he threw a drink on Victim, and they also started fighting. App. p. 172, lines 8-25, p. 179, line 6-p. 180, line 8. Simmons testified Petitioner momentarily "ran off", and when he came back, he "just started shooting." App. p. 172, lines 23-35. Simmons testified Petitioner was dressed "in all brown," and Simmons saw him with two guns in his hands and saw him pull the trigger. App. p. 173, lines 11-15, p. 174, line 24-p. 175, line 6. Simmons also testified before he started shooting, Petitioner said something to effect of "I killed one of your homeboys, don't make me kill you." App. p. 174, lines 5-7. Simmons denied either he or Victim had a weapon. App. p. 185, lines 21-25.

Finally, Thomas McDonald ("McDonald"), an inmate incarcerated with Petitioner in the

Anderson County Detention Center, testified he heard Petitioner say he had been in an argument in a nightclub, and Victim "kept running his mouth, so [Petitioner] fired him up." App. p. 208, line 15-p. 209, line 9. McDonald testified he understood this to mean Petitioner had shot Victim, and he heard Petitioner identify Victim as "Fred." App. p. 209, lines 12-15. McDonald further testified he heard Petitioner say, "I had two .357s, and yeah, I fired him up." App. p. 210, lines 2-6. McDonald also testified Petitioner indicated he purchased a bus ticket and went to Atlanta on the night of the shooting. App. p. 210, lines 14-19.

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I. There is probative evidence in the record to support the PCR judge's finding Counsel was not ineffective in failing to enhance the 911 tape introduced at trial, where, although Counsel did not articulate any strategy for failing to enhance the tape, Counsel was acting pursuant to a valid trial strategy of showing the witnesses' testimony did not match the statements on the tape, and Petitioner failed to show prejudice because Counsel was able to elicit the same information in a different way.

Petitioner argues counsel was ineffective for failing to hire an investigator to enhance the 911 tape, and that had counsel done so, the jury would have conclusively determined that there was no mention of "Detroit style" on the tape, and an investigator could have identified the voice on the tape as Simmons rather than Petitioner. Brief of Petitioner, pp. 8-9. However, the record supports the PCR court's finding Counsel was not ineffective in her handling of the 911 tape because, although Counsel admitted she had not thought of enhancing the tape, she articulated an alternate, reasonable trial strategy which she accomplished without the need for an enhanced tape.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland v. Washington, 466 U.S. 668, 690 (1984). There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid

reasons for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir. 1977)). Trial counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004).

In this case, there is probative evidence in the record to support the PCR court's finding Counsel pursued a valid trial strategy, which did not include enhancing the tapes. Counsel testified her strategy was to show the witnesses at trial "were just flat-out lying," and what they were "saying to the solicitor, to the jury and the Court one thing, and that wasn't supported by what the jury heard coming from the 911 tape." App. p. 391, lines 6-15. Counsel testified all of the witnesses' accounts were inconsistent, which she honed in on during her cross-examination. App. p. 377, line 12-p. 378, line 14. Counsel further testified she never had any concern about who was saying what on the tape, and her strategy on cross-examination was to emphasize the fact the words the witnesses allegedly heard Petitioner say were not on the tape even though other things happening in the background could clearly be heard. App. p. 378, line 22-p. 379, line 12. Counsel testified it "never occurred to [her] to have any analysis done on the 911 tape," and based on hearing the enhancement during the evidentiary hearing she did not believe it would have helped at trial. App. p. 394, lines 16-24.

Petitioner contends the enhanced version of the tape would have allowed the jury to conclusively determine the words "Detroit style" do not appear on the tape. Brief of Petitioner,

p. 10. However, Counsel extensively cross-examined Johnson, the bouncer, on the fact that the "Detroit style" and "south side" language was not on the 911 tape.[1] App. p. 99, line 6-p. 100, line 15. Johnson admitted those words were not on the 911 tape, and the explanation he gave for their absence did not make sense in the context of the scene he described. App. p. 100, line 23-p. 101, line 14, p. 379, lines 8-17. The "enhanced" version therefore fails to add anything on this issue, and Counsel's admission she did not think to enhance the tape does not negate the fact she was pursuing an alternate, reasonable trial strategy of impeaching the witness with the inconsistencies between his live testimony and the tape.

Petitioner also contends Counsel should have enhanced the tape in order to identify the speaker as Simmons rather than Petitioner. Brief of Petitioner, pp. 7-8. At the PCR hearing, Petitioner's witness, Mr. Powers, testified that in addition to removing the background noise to confirm whether or not "Detroit style" could be heard on the tape, the enhancement also allowed him to identify the voice saying "we run this" as that of Simmons, rather than Petitioner. App. p. 367, line 19-p. 368, line 1, p. 369, lines 4-25. However, while Mr. Powers may be a competent private investigator, he was not a qualified expert in any field related to multimedia analysis or voice comparison, and he testified the identification was based solely on the fact he had spoken to both Petitioner and Simmons.[2] App. p. 369, lines 4-25. Notwithstanding Mr. Powers' assertion the voice belonged to Simmons rather than Petitioner, Counsel still testified she did not

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[1] Counsel also questioned Johnson at length about the description of the gun he gave to police, which did not match other evidence introduced at trial. Counsel further elicited testimony from Johnson that it was Simmons fighting with Victim, both inside and outside the club, and Johnson had searched Petitioner for weapons earlier in the night and found none on him. App. pp. 96-107.

[2] While Mr. Powers testified he spoke with Simmons, he gave no details as to how many times they spoke, the length of the conversations, or whether those conversations occurred face-to-face or over the telephone. Powers also did not give any explanation as to specific characteristics of the voice or speech pattern which lead him to conclude it was Simmons rather than Petitioner. App. p. 369, line 4-p. 370, line 5.

believe enhancing the tape would have aided Petitioner's defense. App. p. 394, lines 21-24. Three witnesses testified at trial Petitioner was the person shouting immediately before shots were fired, and additional witnesses testified they saw Petitioner, seconds before the shooting with a gun or guns in his hand, going around the corner of the building to the location where Victim was shot. App. pp. 87, 92, 174.

Petitioner argues the entire case would have been different had he been able to present the opinion of a single lay witness, hired by the defense, who was not qualified as an expert in voice recognition or forensic multimedia analysis, to counter the eyewitness testimony of six people who either directly identified Petitioner as the shooter or saw Petitioner with a gun in his hand yelling something at Victim moments before the shooting. Additionally, the original tape was played for the jury, and Simmons testified at trial. App. p. 76, lines 22-23, pp. 168-86. Petitioner does not suggest the voice alleged to be that of Simmons cannot be heard on the original tape, only that "Detroit style" is not said as the witness Johnson testified and the "enhanced" version is clearer. Brief of Petitioner, p. 7. However, it is clear from the trial transcript a.voice can be heard on the original tape saying, "We run this." App. p. 99, lines 18-25. The jury, therefore, had access to the tape and heard Simmons' voice firsthand in order to make a comparison. Furthermore, the PCR court heard both the enhanced 911 tape *and* testimony from Mr. Powers, Petitioner, and Counsel during the evidentiary hearing, and the PCR court is just as capable as any lay witness or jury – in its fact-finding capacity – of determining whether or not the voice on the tape was inconsistent with the voice of Petitioner. The PCR court's determination to credit Counsel's assessment of the usefulness of that tape over that of Petitioner and Mr. Powers is reasonable and supported by the record.

Strickland requires Counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for Counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland, 466 U.S. at 688-689. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Id. at 691. Therefore, judicial scrutiny of Counsel's performance must be highly deferential. Id. at 689. Where Counsel articulates a valid strategic reason for her action or inaction, Counsel's performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). Here, Counsel was able to achieve the same outcome – showing the jury the words "Detroit style" are not on the tape – without enhancing the tape. Additionally, the original tape was played for the jury, who also heard Simmons testify, and the jurors could draw their own conclusions as to whose voice it was.

Petitioner has also failed to show prejudice. The PCR court found the evidence against Petitioner was overwhelming. App. p. 442-43. See also Harris v. State, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (finding overwhelming evidence of guilt negated claim that counsel's deficient performance could have reasonably affected the result of defendant's trial). Notably, two eye witnesses saw Petitioner shoot at Victim, and several others saw him approaching Victim and Simmons with at least one gun in his hand. App. pp. 86-87, 116, 138-39, 173-75, 191-93. After Petitioner was apprehended by law enforcement, he confessed several times to his

fellow inmates. App. p. 209. The witness testimony was corroborated, albeit circumstantially, by evidence Petitioner fled the state the night of the murder. App. pp. 157-60, 210, 226-27, 240-41. In light of the numerous eye witnesses, as well as the corroborating circumstantial evidence, the PCR judge's finding of overwhelming evidence is appropriate.

Even if this Court finds the evidence against Petitioner was not overwhelming, he failed to establish how the failure to enhance the tape resulted in any prejudice to him. Concerning identification of the voice as Simmons, the PCR court found that the enhanced tape still "would not have diminished the eyewitness identification testimony of [Petitioner's] involvement in the victim's murder," and agreed with Counsel that it would not have benefited Petitioner's defense. App. pp. 438-39. The respective weight attributed to each witness by the PCR judge commands great deference on review. See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) ("This Court gives great deference to the post-conviction relief court's findings of fact and conclusions of law."); see also Harris v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor, 3 F.3d 103, 106-07 (4th Cir. 1993) (Appellate courts are ill suited "to overturn a factfinder on a question on which two views of the evidence are possible. . . . Factfinders routinely resolve discrepancies between evidentiary sources, and by being able to observe testimony first-hand, they are in the best position to do so."). Clearly the PCR judge found Counsel's testimony to be more probative and informative on this point than that of Mr. Powers, and this Court should defer to the factfinder's determination of credibility when there is evidence in the record to support such determination.

II. There is probative evidence in the record to support the PCR judge's finding Counsel was not ineffective in failing to object to alleged hearsay testimony by Detective Reeves, where the testimony in question was not hearsay because it was statement explaining the investigatory steps he took in this case, and in any event, Petitioner failed to show prejudice because the information was already before the jury.

Detective Reeves testified that following his interviews with witnesses, he did not have anyone he considered a suspect other than Petitioner, and no witness said Simmons killed Victim. App. p. 242, lines 16-22. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Rule 801(c), SCRE. A statement that is not offered to prove the truth of the matter asserted should not be excluded as hearsay. Deep Keel, LLC v. Atlantic Private Equity Group, LLC, 413 S.C. 58, 773 S.E.2d 607 (Ct. App. 2015). The PCR court correctly determined this testimony did not constitute improper hearsay, or negative hearsay, because it was not elicited to prove the truth of the matter asserted. Rather, the PCR court found the information was used for the limited purpose of explaining why a government investigation was undertaken, and therefore, was not hearsay, citing State v. Brown, 317 S.C. 55, 63, 451 S.E.2d 888, 894 (1994). App. p. 439. In Brown, police officers were allowed to testify at trial "about receiving information before establishing a surveillance, receiving complaints while in the neighborhood, and being 'familiar with' the neighborhood," which Brown argued was inadmissible hearsay. Id. at 63, 451 S.E.2d at 894. This Court held the testimony was properly admitted because the statements were not entered for their truth, but rather to explain why the officers began their investigation. Id. "An out-of-court statement is not hearsay if it is offered for the limited purpose of explaining why a government investigation was undertaken." Id. The context and the record support the PCR court's similar finding in Petitioner's case as well.

During direct examination of Detective Reeves, the Solicitor questioned Reeves as to his investigation chronologically. The Solicitor asked a series of questions concerning the various investigative steps Reeves took, and Reeves explained he learned Simmons had been in a fight with Victim from interviews conducted on scene that night and through interviews with various witnesses in the days following the shooting. App. p. 235, lines 4-15, p. 238, lines 3-7. Reeves also testified Petitioner was identified as the shooter the same night, and Simmons was merely a "person of interest" because of his proximity to the Victim during the shooting and was not a suspect. App. p. 238, lines 4-18. The questions immediately preceding the passage at issue concerned Petitioner's whereabouts after the shooting and when he was located. App. p. 240, line 3-p. 241, line 14. Directly after Reeves explained Petitioner was the only suspect, the Solicitor asked about information Reeves obtained from Greyhound regarding Petitioner's possible whereabouts. App. p. 242, line 23-p. 243, line 22. The testimony Petitioner, rather than Simmons, was the suspect informed Detective Reeves' investigation, and further explained to the jury why he was out chasing down Greyhound bus tickets rather than focusing on other leads. Furthermore, Counsel had already asked Simmons during her cross-examination of him whether the police wanted to question him as a potential suspect, and Simmons responded he was never told he was considered a suspect and in fact was told the police knew he was not the shooter. App. p. 184, lines 18-25. Reeves' testimony was therefore merely cumulative and a restatement of testimony from previous witnesses.

As such, there is also probative evidence to support the PCR judge's finding that Petitioner failed to show any resulting prejudice. As outlined above, this was a case involving overwhelming evidence of guilt. See Harris, 377 S.C. at 79, 659 S.E.2d at 147 (finding overwhelming evidence of guilt negated claim that counsel's deficient performance could have

reasonably affected the result of defendant's trial); see also State v. Jennings, 394 S.C. 473, 478, 716 S.E.2d 91, 93 (2011) ("Improper admission of hearsay testimony constitutes reversible error only when the admission causes prejudice."). The testimony at issue – even if inadmissible – is not of such weight and consequence that it calls into question the validity of the proceeding. The information elicited was Petitioner was a suspect during the investigation, and Mr. Simmons was not. Such information was already before the jury, as there was no evidence or testimony tending to show Mr. Simmons was armed; multiple witnesses had identified Petitioner as the shooter; Simmons himself had already testified he was questioned due to his involvement in the fight, not as a suspect; and Reeves testified moments earlier, without objection, Petitioner was the suspect based on the investigation up to that point, not Simmons, so the specific testimony at issue was merely cumulative. See State v. Price, 384 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) ("[T]he admission of improper hearsay evidence is harmless where the evidence is merely cumulative to other evidence.").

Finally, as Counsel pointed out at the PCR hearing, while objecting might have helped Petitioner, the solicitor could have brought in the same information simply by rephrasing the question after an objection, and on the other hand, an objection might hurt him by allowing the Solicitor to "go into specifics" and calling more attention to Reeves' statement. App. p. 392, lines 3-13, p. 397, line 23-p. 398, line 17. Indeed, the Solicitor had already asked Reeves specifically whether the police were "able to determine a potential suspect in this case," and Reeves answered affirmatively, explaining Simmons had named Petitioner in his statement and several other witnesses had identified Petitioner as the shooter from a line up conducted at the club that night. App. p. 238, lines 8-18. As a result, Respondent submits there is probative

evidence in the record supporting the PCR judge's finding Petitioner failed to show prejudice with respect to this allegation.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR court's ruling.

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The Honorable Alexander S. Macaulay, Circuit Court Judge

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THE STATE SOUTH CAROLINA, Respondent,

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CERTIFICATE OF COUNSEL

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

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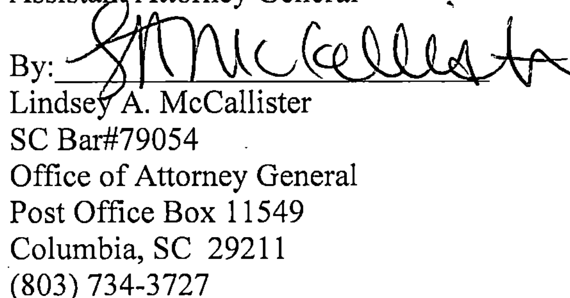

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PROOF OF SERVICE

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

Kathrine H. Hudgins, Esquire
S.C. Commission on Indigent Defense
PO Box 11589
Columbia, SC 29211

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

This 15th day of September, 2017.

DEONNA ROGERS
Legal Assistant

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