STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Appellate Case No. 2016-002458

ANTHONY MARQUISE MARTIN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
S.C. Bar No. 102214

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEY FOR RESPONDENT

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RESPONDENT'S ISSUES PRESENTED

I. Whether the issue of Trial Counsel's failure to elicit a specific timeline from Petitioner's alibi witness, Alba Fumbah, is preserved for appellate review where it was not ruled upon by the PCR court, and regardless, whether probative evidence supports the PCR court's ruling that Trial Counsel was not ineffective and overwhelming evidence of Petitioner's guilt precludes a finding any finding of prejudice under the Strickland standard.

II. Whether probative evidence supports the PCR court's finding that Trial Counsel was not ineffective for failing to object to alleged improper comments by the solicitor or request a curative instruction for testimony on Petitioner's choice not to give a statement.

STATEMENT OF THE CASE

Factual History

At around 12:00 p.m. on April 23, 2009, Mona Floyd, a teller at a Bank of America branch in North Augusta, South Carolina, was working at her counter when a man entered the bank. App. 37-38; App. 40. The man approached her at the counter, asked a few questions about different types of accounts, looked around the bank, and then left after only a minute or two. App. 40-41. After the man left, Floyd requested more money to handle the needs of any customers who might come in and received $12,000 in cash from the vault. App. 41-42. A few minutes later, another man entered the bank, ordered everyone inside to get onto the floor, pointed a gun, threw a pillow case at Floyd, and stated: "Put the money in the bag, [b]itch." App. 43-45; App. 52; App.. 54; App. 115. Floyd put the money from the vault into the man's pillow case, and the robber, who was wearing a dark hoodie and something over his face, demanded more money in larger denominations. App. 44-45; App. 54; App. 112; App. 116. In response, Floyd tried to remove the smaller denominations from the pillow case, but the robber grabbed it and fled. App. 44; App. 56; App. 112-113. Floyd then triggered an alarm, and another bank employee called 911 to report the robbery. App. 46; App. 55-56.

Meanwhile, Tammy Murphy, another teller at the Bank of America branch, was getting into her car in the parking lot when she observed a man wearing black hooded clothing and something over his face run out of the bank. App. 58-61. Murphy realized the man just robbed the bank, and she saw a customer in the parking lot yell at the robber and then fire shots at him when the robber did not stop. App. 61-62; p. 211. Patricia Christopher, who was at a car wash next to the bank, heard the gunshots, believed the sound was from firecrackers, and then

observed a red Ford Mustang quickly leaving the area.[1] App. 77; App. 153-154. Christopher saw two men in the front seats of the car, but she was unable to see if anyone was in the rear seats because the vehicle was moving too rapidly. App. 155.

Shortly thereafter, Detective Luke Sherman of the North Augusta Department of Public Safety responded to the scene of the robbery and spoke with the witnesses inside of the bank. App. 208-209. He learned a black male wearing all black clothing, a hoodie, and gloves entered the bank, pointed a gun, demanded money, and absconded with $12,000 in cash. App. 209. The detective further learned a person behaving in a suspicious manner came into the bank shortly before the robbery and a red Ford Mustang was observed leaving the scene. App. 210; p. 213. Detective Sherman then obtained a photograph of the suspicious person and released it to the media. App. 210.

Subsequently, Detective Sherman went to the home of Roosevelt Johnson, who owned a red Ford Mustang and was stopped by law enforcement officers on two separate occasions on the day of the crime, and attempted to speak to him about the robbery. App. 215-216. However, Johnson claimed he was at the mall during the relevant time frame and requested to speak with an attorney. App. 215-216. Detective Sherman then left Johnson's home but saw a red Ford Mustang that appeared to have been recently washed in Johnson's driveway. App. 216.

On the day after the robbery, Quinton Harmon, the suspicious man who entered the bank shortly before the robbery, learned his photograph was printed in the newspaper in connection to the robbery. App. 87. In response, Harmon spoke with a friend in law enforcement and then went to the police headquarters to discuss the robbery. App. 87-88; App. 92; App. 213-214. At the police headquarters, Harmon met with Detective Sherman and initially claimed he was

[1] Murphy also observed the red Ford Mustang, and she was able to obtain the vehicle's license plate number. Tr. pp. 63-64; p. 213.

brought to the bank by his girlfriend in order to open an account. App. 87-88; App. 92-93; App. 214. However, Detective Sherman called Harmon's attention to some inconsistencies in his version of events, and Harmon confessed to being involved in the robbery. App. 93-96; p. 214. Additionally, Harmon implicated Johnson, David Dixon, and a man who went by "T-Money" in the crime. App. 214-215. Thereafter, Harmon, Johnson, and Dixon were all arrested and charged for their roles in robbing the bank. App. 69; p. 127; App. 158; App. 215.

During the course of the investigation into the incident, Detective Sherman learned "T-Money" attempted to purchase a bus ticket to Atlanta immediately after the robbery but his grandmother still lived near Harmon. App. 218-219. Through that information, Detective Sherman discovered the mother of "T-Money" lived in Snellville, Georgia. App. 219. In response, he asked officers in Georgia to go to the mother's home, and they were able to obtain Petitioner Anthony Marquese Martin's name and date of birth from Petitioner's grandmother, who was at Petitioner's mother's home. App. 219-220. Detective Sherman then acquired a photograph of Petitioner and showed it to Harmon and Johnson. App. 220. Both of the men identified Petitioner as "T-Money." App. 220.

During trial, Petitioner's accomplices testified about their involvement in the robbery and implicated Petitioner as the mastermind of the crime. App. 69-70; p. 127; App. 129; App. 158; App. 160. Harmon testified Petitioner approached him the day before the robbery and told him he wanted to "hit a lick," which meant commit a robbery. App. 70-71. Harmon stated they subsequently met up with Johnson and Dixon along with several other people and determined which bank they were going to rob. App. 71-73. The next day, Harmon indicated Johnson picked him up, and Petitioner and Dixon were already in Johnson's red Ford Mustang. App. 73-74. He testified they then went to a Popeye's restaurant, and Petitioner went inside and returned

with some clear plastic gloves.[2] App. 74-75. Harmon stated they then went to Dixon's house, Petitioner got a pillow case and a white t-shirt from Dixon, and Petitioner assigned each of them a role in the robbery. App. 76-77. Harmon indicated his role was to go into the bank before the robbery and determine how many people were inside. App. 76-77. Thereafter, Harmon testified they went to a car wash next to the bank, he went into the bank to determine how many people were inside, and he spoke with a teller about opening a bank account. App. 77-79. After he returned from the bank, Harmon stated Petitioner changed into all black clothing, put the white t-shirt he got from Dixon over his face, and then went into the bank. App. 79-80. A few seconds later, Harmon indicated they heard gunshots and saw Petitioner running back to the car with a black handgun. App. 80-83. Harmon testified Petitioner jumped into the car, told them he did it, and ordered Johnson to drive. App. 81-82. As they were driving away from the bank, Harmon stated Petitioner divided the money between them, put his share into the backpack, transferred the other items from his backpack into the pillow case, and gave it to a friend they encountered on the street. App. 83-84. Harmon testified they then went to a bus station because Petitioner stated he was going to go to Atlanta, the bus station was closed because the power was off, and they went to the mall and stayed there until Petitioner was able to obtain a ride away from the area.[3] App. 85-87. As Petitioner was leaving the mall, Harmon indicated Petitioner again stated he was going to Atlanta. App. 86-87. Harmon testified he then left the mall with Johnson and Roosevelt and was subsequently arrested for the robbery. App. 87-88.

Following Harmon's testimony, Johnson and Dixon testified about the planning and execution of the robbery in a substantially similar manner to Harmon and confirmed Petitioner

[2] The surveillance footage of the robbery showed the robber was wearing clear plastic gloves. (Tr. p. 75).
[3] During trial, Anthony Costello, an electrical contractor, testified he was working on the Greyhound bus station on April 23, 2009, and the power was out at the station from around 10:30 a.m. or 11:00 a.m. until 6:00 p.m. or 7:00 p.m. (Tr. pp. 120-121).

stated he was going to Atlanta after the crime. App. 128-141; App. 159-174. Additionally, Jacob McKie, Harmon's cousin, confirmed Petitioner was present at Harmon's house on the night before the robbery and stated he provided Petitioner with a pellet gun that looked like a black handgun on the morning of the robbery. App. 194-196; App. 198-199. McKie further testified the pellet gun was never returned to him and he did not see Petitioner in the area again after the robbery. App. 196-197. Furthermore, Harmon's brother testified he overheard Petitioner discussing the bank robbery with Harmon on the day before the incident, and Harmon's sister stated Petitioner attempted to sleep at their home on the night before the robbery until he was forced to leave by her mother.[4] App. 183-184; p. 186; App. 188-189; App. 191.

At the close of the State's case, Petitioner presented two witnesses on his behalf. Dora L. McKenney, Petitioner's grandmother, testified Petitioner lived with her on Belvedere Terrace to attend school at Augusta Tech from January of 2009 until April 12, 2009. App. 240; 241. On April 12, which was Easter Sunday, Petitioner's mother came to get him to take him back to Snelville, Georgia, to live with her. App. 240. McKenney did not see Petitioner in Aiken County at any time after April 12, 2009. App. 241.

Alba Fumbah, Petitioner's mother, confirmed McKenney's testimony that Petitioner lived with his grandmother from January of 2009 until Easter Sunday, 2009, when Fumbah picked him up and brought him back to Atlanta. App. 243. On April 23, 2009, Fumbah, woke up, got her three children ready for school, and dropped Petitioner off in Atlanta so he could catch the bus and look for work. App. 244. She did not know of any time when Petitioner left Atlanta to go back to Aiken County. App. 244-245. On cross-examination, Fumbah admitted that she

[4] Like the other witnesses, neither Harmon's sister nor brother saw Petitioner in the neighborhood again after the robbery. (Tr. p. 185; p. 192).

never contacted law enforcement to give them this information during the year that Petitioner was awaiting trial. App. 245.

Thereafter, the trial judge instructed the jury on the law and included an alibi charge. App. 279. At the conclusion of trial, the jury convicted Petitioner as indicted. App. 286. The trial judge then sentenced Petitioner to an aggregate term of imprisonment of twenty years. App. 297.

Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Petitioner was true bill indicted at the April 2010 term of the Aiken County Grand Jury for armed robbery (2012-GS-02-00666) and criminal conspiracy (2010-GS-02-01087). C. David Hayes, Esquire, and DeGrant Gibbons, Esquire, represented Petitioner. Petitioner proceeded to a jury trial before the Honorable Doyet A. Early, III. On April 27, 2011, Petitioner was found guilty as indicted. Judge Early sentenced Petitioner to a twenty year term of imprisonment for armed robbery and a concurrent five year term of imprisonment for criminal conspiracy.

A timely Notice of Appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Anthony Martin, 403 S.C. 19, 742 S.E.2d 42 (Ct. App. 2013). The Court of Appeals held the State presented insufficient evidence to support an inference that Petitioner lied to law enforcement about a false identity to avoid prosecution for the robbery, but because of the strong evidence of Petitioner's guilt, any error was harmless beyond a reasonable doubt. App. 337. On May 16, 2013, Petitioner and the State both filed a Petition for Rehearing. The Court of Appeals denied both petitions on June 20, 2013.

Petitioner filed a Petition for Writ of Certiorari to this Court on September 18, 2013, and the State filed its Return on September 19, 2013. The State filed a cross-appeal Petition for Writ of Certiorari on August 6, 2013, to which Petitioner filed his Return on September 18, 2013. This Court denied both petitions on July 25, 2014. The Remittitur was issued on July 30, 2014.

Petitioner filed a timely application for post-conviction relief on March 16, 2015. Petitioner subsequently amended his application on May 12, 2016, to include additional allegations. Petitioner alleged he was being held unlawfully based on the following allegations:

1. Ineffective Assistance of Trial Counsel
    a. Counsel failed to object to constructive amendment or armed robbery indictment.
    b. Counsel failed to object to solicitor's improper closing argument.
    c. Counsel failed to investigate telephone records to establish alibi defense.
    d. Counsel failed to call additional alibi witnesses at trial.
    e. Counsel failed to request a curative instruction regarding Detective Poythress' testimony that Applicant did not want to provide a statement.

Before the evidentiary hearing, Petitioner orally amended his applicant to include an allegation of ineffective assistance of counsel for failure "to utilize State's witnesses effectively" and failure "to put forth an alibi defense as it relates to actual witnesses that were called on his behalf." App. 471. An evidentiary hearing was held on September 20, 2016, at the Aiken County Courthouse. Petitioner was present at the hearing and represented by Lance S. Boozer, Esquire. Respondent was represented by Assistant Attorney General Julie A. Coleman of the South Carolina Attorney General's Office.

At the hearing, Petitioner testified on his own behalf. Respondent presented testimony from Trial Counsel David Hayes, Esquire, and DeGrant Gibbons, Esquire, who assisted in the defense. The Honorable Robert E. Hood issued an Order of Dismissal signed on October 26, 2016, and filed on November 9, 2016, denying and dismissing the application with prejudice. Petitioner did not file any Rule 59, SCRCP, motions.

Petitioner filed a timely Notice of Appeal of the denial of his post-conviction relief application on December 6, 2016. Petitioner's Appendix and Petition for Writ of Certiorari were filed on July 26, 2017. This Return to the Petition for Writ of Certiorari follows.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). 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 his or her application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

In a post-conviction relief action, the applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler, at 441, 334 S.E.2d at 814. 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, at 442, 334 S.E.2d at 814.

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, at 442, 334 S.E.2d at 814. The applicant must overcome this presumption to receive relief. Cherry, at 118, 386 S.E.2d at 625.

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove 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.

ARGUMENT

I. The issue of Trial Counsel's failure to elicit a specific timeline from Petitioner's alibi witness, Alba Fumbah, is not preserved for appellate review because it was never ruled upon by the PCR court. Regardless, probative evidence supports the PCR court's finding that Trial Counsel was not ineffective and overwhelming evidence of Petitioner's guilt precludes any finding of prejudice under the Strickland standard.

Petitioner alleges the PCR court erred in failing to find Trial Counsel ineffective for failing to elicit specific timeline testimony from alibi witness Alba Fumbah. However, this issue was never ruled upon by the PCR court, and thus is unpreserved for appellate review. Furthermore, even if it were preserved for appellate review, the issue is meritless, as probative evidence supports the PCR court's finding that Trial Counsel was not ineffective, and overwhelming evidence of Petitioner's guilt precludes a finding of prejudice.

Preservation

The issue Petitioner presents to this Court is unpreserved for appellate review. Although it was raised in an oral amendment before the evidentiary hearing[5], it was not specifically ruled upon by the PCR court. In his Petition for Writ of Certiorari, Petitioner mentions the Order of Dismissal denied this issue by finding Petitioner failed to call alibi witnesses at the evidentiary hearing, thus failing to meet their burden of proving prejudice. PWC 12-13. However, the portion of the Order to which Petitioner refers only to Petitioner's separate allegation of failure to call additional alibi witnesses at trial. It makes no mention of Alba Fumbah's testimony or of Trial Counsel's failure to elicit timeline testimony from her. The order includes no ruling or finding on this issue.

[5] Petitioner, through counsel, orally amended his application to include an allegation that "counsel failed to utilize State's witnesses effectively and failed to put forth an alibi defense as it relates to actual witnesses that were called on his behalf." App. 471, line 5-8.

Although there was some testimony about Alba Fumbah at the evidentiary hearing, which was summarized in the order, the PCR court did not rule on this specific issue. Notably, when the Order denying post-conviction relief was issued, Petitioner did not file a Rule 59(e), SCRCP, motion to reconsider to raise or preserve that specific issue, as required by South Carolina law. Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (holding that when a PCR court fails to make specific findings as to an issue, a Rule 59(e) motion is necessary to preserve the issue for appeal); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992) (finding the PCR court's failure to specifically rule on the issues presented precludes appellate review of the issues). Petitioner was given the opportunity to raise and fully argue this issue in a Rule 59(e), SCRCP, motion, and he failed to do so. Accordingly, the issue should be dismissed as it is not preserved for appellate review.

Merits

Regardless, even if this issue were properly preserved for appellate review, it has no merit because Petitioner can show no prejudice from any alleged failure to properly present an alibi defense at trial. On direct appeal, the South Carolina Court of Appeals found that, although the trial court erred in admitting evidence of Petitioner's flight and attempt to avoid arrest, the error was harmless because "the State presented ample competent evidence of Martin's guilt." App. 345. The Court of Appeals specifically cited to the testimony of all three co-defendants, which implicated Petitioner as the mastermind and gunman of the robbery, as well as eyewitness testimony which corroborated accounts of Petitioner's clothing and pillowcase-style money bag. App. 345. It further cited to the testimony of Jacob McKie, "a disinterested party," who loaned a small black pellet gun to Petitioner the night before the robbery. App. 345.

The PCR court also made a finding over overwhelming evidence of Petitioner's guilt. App. 526. The Order of Dismissal noted that Petitioner's co-defendants all testified against him

and gave statements placing him at the bank robbery and identifying him as the gunman.[6] App. 526. The PCR court relied on this overwhelming evidence of guilt in making its finding that Petitioner could show no prejudice from any alleged deficiency by Trial Counsel.

The presence of overwhelming evidence of guilt negates any claim that counsel's performance could have reasonably affected the result of the defendant's trial. 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, (2002) (finding overwhelming evidence of guilt negated any claim that counsel's deficient performance could have reasonably affected the result of defendant's trial); see also 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).

In the present case, because the evidence against Petitioner was overwhelming as noted by both the Court of Appeals on direct appeal and the PCR court, Petitioner cannot show prejudice to satisfy the second prong of the Strickland test. Multiple co-defendants testified the same account of Petitioner's involvement as the mastermind of the crime. Witnesses that were not involved in the crime corroborated details that matched their testimony and the evidence presented of the robbery, including Petitioner's clothing, pillowcase money bag, and black pellet gun. Other disinterested witnesses testified that they overheard Petitioner discussing his plan to rob the bank the night before the crime. The State also presented evidence which matched the testimonial accounts of Petitioner's plan to return to Atlanta after the crime was committed, and

[6] The Order of Dismissal mistakenly notes that "Applicant's four co-defendants" testified against him. This is a typographical error, as the trial transcript, appellate records, and testimony at the evidentiary hearing all show only three co-defendants in the crime, each of which testified against Petitioner.

Petitioner was eventually found and arrested in Atlanta. All of this evidence supports the findings by both the Court of Appeals and the PCR court.

Furthermore, even if the evidence against Petitioner was not overwhelming, it is still unlikely that the presentation of a stronger alibi defense would have changed the outcome of the trial. Although it was reasonable for Trial Counsel to present Petitioner's mother and grandmother as alibi witnesses, their testimony was not strong evidence of an alibi. Even if Alba Fumbah had testified about the exact time she dropped Petitioner off in Atlanta on the morning of the crime, it would not change the fact that she was an inherently suspect alibi witness because she was Petitioner's mother. See Dupont v. United States, 224 F. App'x 80 (2d Cir. 2007) (finding the trial attorney's decision not to call the purported alibi witnesses was a reasonable tactical decision where the witness was a family member with an obvious interest in protecting her husband and the father of her children).

Petitioner compares his case with Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014), in which this Court granted post-conviction relief based on counsel's failure to investigate a potential alibi witness and present an alibi defense at trial. Although Walker held the alibi witness could have affected the outcome of the trial, the circumstances of the case different from Petitioner's case at hand. Here, unlike in Walker, Trial Counsel *did* investigate and present two alibi witnesses—the only alibi witnesses in this case. Both witnesses, Alba Fumbah and Dora McKenney, testified Petitioner lived in Atlanta and was in Atlanta the morning of the crime. The alibi was discussed and argued at trial, and an alibi charge was given to the jury. In Walker, the court was forced to speculate that an alibi defense may have altered the outcome of the case because it was not presented to the jury. Here, the alibi was presented to the jury, and it is

unlikely that one further detail of the alibi would have swayed the jury, who clearly did not find Fumbah credible in the face of the State's evidence.

Because the evidence of Petitioner's guilt was overwhelming, and because the presentation of a stronger alibi defense likely would not have changed the outcome of the trial, Petitioner can show no prejudice from any alleged deficiency by Trial Counsel regarding the presentation of his alibi. Therefore, the Strickland test cannot be met, and this Court should affirm the PCR court's finding that Trial Counsel was not ineffective.

II. Probative evidence supports the PCR court's finding that Trial Counsel was not ineffective where he articulated a valid trial strategy in choosing not to object to the solicitor's closing argument and the detective's testimony that Petitioner refused to give a statement and where there is no prejudice.

Petitioner argues the PCR court erred in finding Trial Counsel was not ineffective for choosing not to object to the solicitor's closing argument comment on Petitioner's invocation of his Fifth Amendment Rights, or for requesting a curative instruction about the detective's testimony that Petitioner did not wish to give a statement to law enforcement after he was Mirandized. However, probative evidence supports the PCR court's findings that Trial Counsel was not ineffective on these grounds, so this Court should affirm its findings.

Deficiency

Detective's testimony

Petitioner alleges Trial Counsel and counsel DeGrant Gibbons were ineffective for failing to object or request a curative instruction after Detective Poythress testified at trial that Petitioner did not want to give a statement to law enforcement. App. 229, line 16-18 ("Q: Did he [Dixon] ever give a statement? A: He [Dixon] never gave a statement to me. And Mr. Martin also with his attorney present didn't want to provide a statement."). It is well-settled in South Carolina law that it is improper for the State to refer to or comment upon a defendant's exercise of a constitutional right. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); Edmond v. State, 341 S.C. 340, 345, 534 S.E.2d 682, 685 (2000). However, where Trial Counsel articulates a valid strategical reason for choosing not to object or request curative instruction, he cannot be found deficient under Strickland.

Strickland requires that trial 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 (1984). "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 his 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).

Mr. Gibbons testified at the evidentiary hearing that he made a strategical choice not to bring any more attention to the statement and let it "fade away" as quickly as possible:

> Q: Did you see any reason to object to Investigator Poythress's testimony about how the [Petitioner] did not give him a statement in this case?
>
> A: 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 tactical decision at that point just to try and let that fase away as quickly as we could.
>
> Q: Do you believe that if you had objected to these things that it would have changed the outcome of the trial?
>
> A: I don't. I think it would have brought more attention to that particular unresponsive answer than we wanted anybody to give.

App. 513, line 9 – App. 514, line 2.

The PCR court relied upon this testimony to find Mr. Gibbons was not deficient because he made a strategic decision to avoid drawing attention to the testimony. App. 525. Mr. Gibbons clearly articulated a valid strategy to support his actions, so his strategic decision cannot be deficient.

Solicitor's closing argument

At trial, the solicitor commented in his closing argument: "And there has been some discussion of an alibi and – but we didn't hear about this alibi until today. Until yesterday." App. 267, line 24 – 268, line 1. Petitioner asserts this argument was an improper comment on Petitioner's choice not to give a statement to law enforcement and choosing to exercise his Fifth Amendment right to remain silent. However, this argument is not objectionable under the circumstances because it was not a comment on Petitioner's silence, but rather an attempt to call the credibility of Petitioner's alibi witnesses into question by pointing out that there were no prior statements from any of these witnesses, including Petitioner's mother and grandmother, to confirm their testimony. Nothing in this comment is a reference to Petitioner's choice to remain silent. This is supported by the State's cross-examination of Petitioner's alibi witness, Alba Fumbah:

> Q: And you also said that the police came out and talked to you. But you didn't give them this information when they came out to your residence, did you? You didn't tell them everything that you've testified here today?
>
> A: They did not talk to me. I was in school at the time.
>
> Q: But your son was arrested over a year ago; is that correct?
>
> A: Yes.
>
> Q: And in that year plus time, you never once contacted law enforcement to give them this information, did you?
>
> A: I did not.

App. 245, line 14-25. The solicitor's statements in closing argument were simply a reference back to the incredible testimony of Fumbah as an alibi witness.

At the evidentiary hearing, Trial Counsel testified he saw no reason to object to the solicitor's closing argument, and that the State always used that argument in their closings at trial. App. 507. The PCR court found Trial Counsel was not ineffective for choosing not to object because he reasonably saw no reason to object, and there was no resulting prejudice for the failure to object. App. 524. Accordingly, because this comment was not an objectionable comment on Petitioner's silence, Trial Counsel cannot be deficient for failing to object.

Prejudice

Notwithstanding the fact that Trial Counsel's actions were not deficient, Petitioner cannot prove the prejudice prong of the Strickland test. "The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial." Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001) (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). Petitioner has not presented competent evidence to prove he was prejudiced by any comment by the detective or the solicitor in his case.

First, the trial judge gave a jury instruction not to consider the fact that Petitioner's assertion of his constitutional right to remain silent must not be considered in deliberations, so any failure to request an instruction is not prejudicial. App. 273, line 19 – 274, line 7. Gill explains that a jury instruction such as the one given here cures any possible error:

> It is impermissible for the prosecution to comment directly or indirectly upon the defendant's failure to testify at trial. However, even improper comments on a defendant's failure to testify do not automatically require reversal if they are not prejudicial to the defendant. The defendant bears the burden of demonstrating that improper comments on his refusal to testify deprived him of a fair trial. Furthermore, even if the solicitor makes an improper comment on the defendant's

> failure to testify, a curative instruction emphasizing the jury cannot consider defendant's failure to testify against him will cure any potential error.

Gill, at 209, 221, 552 S.E.2d at 33 (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). Because the trial court's jury instruction cured any potential defect caused by the detective's testimony or the solicitor's closing argument, Petitioner can show no prejudice.

Most importantly, as stated in the first issue above, the PCR court relied on probative evidence from the record to make a finding of overwhelming evidence of Petitioner's guilt, which prevents Petitioner from making any showing of prejudice based on any alleged deficiency by Trial Counsel. Even if Trial Counsel were deficient for failing to object to these comments, South Carolina law holds that counsel's deficiency for failing to object to a comment on the defendant's silence is harmless error in light of overwhelming evidence of guilt. Payne v. State, 355 S.C. 642, 586 S.E.2d 857 (2003). In Payne, this Court held trial counsel was deficient for failing to object to his co-defendant's argument that indirectly commented on the fact that the defendant chose to invoke his Fifth Amendment right to remain silent. Payne, at 645, 586 S.E.2d at 859. However, this Court found there was no prejudice because of the overwhelming evidence of the defendant's guilt. Id. In making this finding, this Court relied only on the testimony of Payne's two co-defendants, who explained exactly how Payne raped and murdered the victim, and the evidence presented which corroborated their testimony. Id. The overwhelming evidence finding in Payne is based on the same circumstances as the overwhelming evidence here in Petitioner's case, where three co-defendants testified exact details about Petitioner's involvement in the crime. Any alleged deficiency by Trial Counsel on these grounds was harmless error, as the PCR court's finding of overwhelming evidence precludes any prejudice against him. Accordingly, Trial Counsel cannot be ineffective on either of these grounds.

The reasons specifically stated above are clearly probative evidence supporting the PCR court's ruling. The PCR court's rulings are correct under the law and are based upon the evidence introduced at trial as well as Trial Counsel's testimony from the evidentiary hearing. Therefore, because probative evidence supports the PCR court's finding that Trial Counsel was not ineffective, this Court should affirm and uphold its ruling.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

JULIE A. COLEMAN
Assistant Attorney General
S.C. Bar No. 102214

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

December 13, 2017

RECEIVED
DEC 13 2017
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Aiken County

The Honorable Robert E. Hood, Circuit Court Judge

ANTHONY M. MARTIN, #345836

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

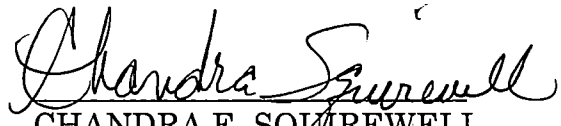
PROOF OF SERVICE

I, CHANDRA E. SQUIREWELL, 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 13th day of December 2017.



CHANDRA E. SQUIREWELL
Legal Assistant
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
DEC 13 2017
S.C. SUPREME COURT

December 13, 2017

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

RE: **Anthony M. Martin, #345836 v. State of South Carolina**
2016-002458

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:ces
Enclosures

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