STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Fairfield County

R. Markley Dennis, Jr., Circuit Court Judge

DAVID ALLEN GOINS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

APPELLATE CASE NO 2017-000826

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

I. Is there evidence of probative value to support the PCR court's finding counsel was ineffective for failing to introduce evidence of the victim's reputation for violence?

II. Is there evidence of probative value to support the PCR court's finding counsel was ineffective for failing to investigate, identify or call a favorable witness to Goins?

III. Is there evidence of probative value to support the PCR court's finding counsel was ineffective for failing to request a charge of voluntary manslaughter?

STATEMENT OF THE CASE

On June 30, 2005, Respondent shot and killed Michael Robertson. App. 498, ll. 12-19. He also shot and injured Jamie Robertson. App. 498, ll. 13-14. He turned himself into law enforcement, explaining he shot the Robertsons in self-defense. App. 265, ll. 4-8; App. 306, ll. 1-22; App. 506, ll. 3-5. Nevertheless, on July 19, 2005, a Fairfield County grand jury indicted Respondent for the murder of Michael Robertson (2005-GS-20-348) and assault and battery with intent to kill (ABWIK) of Jamie Robertson (2005-GS-20-347). App. 729-730; App. 733-734.

Trial counsel, Michael Hemlepp, was appointed to represent Respondent in 2005 or 2006. App. 663, ll. 21-25. He was familiar with the Robertson family, having prosecuted several of them when he was an assistant solicitor. App. 663, ll. 16-21. Trial counsel obtained Respondent's release from jail on bond, but there was an unusual condition – Respondent was barred from Fairfield County. App. 664, ll. 1-3. "[T]here was fear there would be retaliation against [Respondent] and the bond judge wanted to get him out of the county to make things calm down." App. 664, ll. 5-8. In 2006 and 2007, trial counsel investigated the charges. App. 667, ll. 6-10; App. 669, ll. 13-14. Trial counsel did not refresh his investigation when the case was called to trial in 2010, however. App. 670, ll. 6-12. Before the state called Respondent's case to trial, Jamie died from injuries unrelated to the incident involving Respondent; he was murdered by someone else. App. 46, ll. 22-23; App. 664, l. 23 – App. 665, l. 1.

Shortly after Hemlepp was appointed to represent Respondent, he became the Executive Director of the South Carolina Association for Justice and "was not practicing law." App. 33, l. 16; App. 66, l. 23 – App. 667, l.2.

Almost five years after the shooting incident, the state, represented by Douglas Barfield and Riley Maxwell, called the case for trial before the Honorable Clifton Newman and a jury on

January 4, 2010. App. 1. Hemlepp represented Respondent. App. 1. In 2010, Hemlepp was a competitive strength athlete. App. 668, ll. 2-4. He went to the gym on January 2, 2010, and tore his triceps. App. 31, ll. 10-13; App. 668, ll. 5-9. Due to his injury, trial counsel moved for a continuance, explaining the injury likely required surgery and was causing him severe pain, but Judge Newman denied the motion, stating that "often ... we have to perform our jobs despite injuries and discomfort." App. 31, ll. 10-25; App. 35, ll. 4-22; App. 668, ll. 17-18.

At the conclusion of the trial, the jury found Respondent guilty of murder and not guilty of ABWIK and the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). App. 621, ll. 13-18; App. 727. Judge Newman sentenced Respondent to thirty-five years' imprisonment for murder. App. 640, ll. 20-23.

Respondent filed a notice of appeal, which was perfected by Tristan M. Shaffer by the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). App. 643-644. The Court of Appeals dismissed the appeal. App. 643-644; State v. Goins, 2012-UP-331 (S.C. Ct. App. filed May 30, 2012). Remittitur issued on June 15, 2012. App. 645.

Respondent filed an application for post-conviction relief (PCR) on September 6, 2012. App. 646-652. Almost four years later, the Honorable R. Markley Dennis, Jr., presided over an evidentiary hearing on the application on July 12, 2016. App. 660. Patrick Schmeckpeper represented Petitioner. App. 660. Ernest Spong represented Respondent. App. 660. By an order filed on December 19, 2016, Judge Dennis granted Respondent relief from his conviction. App. 713-720. Petitioner filed a motion to reconsider, alter or amend. App. 721-725. Judge Dennis denied the motion on February 6, 2017. App. 726.

On April 6, 2017, Petitioner served a notice of appeal. Subsequently, on August 7, 2017, Petitioner filed its petition for writ of certiorari. This return follows.

ARGUMENT

STANDARD OF REVIEW

The proper standard for appellate review of a PCR court's grant of relief is whether "any evidence of probative value" exists to sustain the PCR court's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989); see also Terry v. State, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011); Webb v. State, 281 S.C. 237, 238, 314 S.E.2d 839, 839 (1984)(setting forth the scope of review applicable to the grant of post-conviction relief: "'any evidence' of probative value to support the post-conviction judge's factual findings is sufficient to uphold those findings on appeal"). If any probative evidence exists to support the PCR court's decisions, the ruling *must* be upheld. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006); Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). The appellate court "will uphold the findings of the PCR judge when there is any evidence of probative value to support them" and "will reverse the PCR judge's decision when it is controlled by an error of law." Suber v. State, 371 S.C. 554, 558-559, 640 S.E.2d 884, 886 (2007). The reviewing court must give great deference to the PCR court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). Also, appellate courts must consider that the PCR applicant has the burden of proving his entitlement to relief, but the standard of proof is by a preponderance of the evidence. Rule 71.1(e), SCRCP. As will be discussed in greater detail infra, extensive evidence in the record supports the PCR court's order granting Respondent relief on ***three*** instances of ineffective assistance of trial counsel.

Petitioner argued "the PCR court improperly granted [Respondent]'s application for post-conviction relief as there was no evidence of probative value to support the court's findings on any of the three issues." Cert. pet. at 6. This argument has no merit as evidenced by the order

demonstrating the court properly analyzed Respondent's claims and the evidence in the trial transcript and PCR hearing transcript. Thus, this Court should deny the petition for certiorari.

RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI. To prove ineffective assistance of counsel, Respondent must establish that counsel's representation fell below an objective standard of reasonableness, and that counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 687-688. "[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. Concerning prejudice, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Rather, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

All three claims presented involve Respondent's right to the ineffective assistance of trial counsel as guaranteed by the Sixth and Fourteenth Amendments; thus, the PCR court required

Respondent to establish that counsel's performance was unreasonable under prevailing professional norms, and that counsel's deficient performance prejudiced his defense. See Strickland v. Washington, 466 U.S. 668 (1984); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

I. There is evidence of probative value to support the PCR court's finding counsel was ineffective for failing to introduce evidence of the victim's reputation for violence.

Relevant facts

Trial counsel was well aware of the deceased's reputation for violence in the community. The deceased "had a terrible criminal reputation in the community." App. 670, l. 24 – App. 671, l. 2. He recalled prosecuting Jamie and Michael Robertson as juveniles and adults. App. 671, ll. 4-8. When Respondent's brother, Christopher Kauffin, testified at the trial, he indicated he was scared following the shooting. App. 440, ll. 7-8. When asked why he was scared, he stated, "I because I know how they is and ---." App. 440, ll. 9-10. The solicitor objected, explaining he did not know what the response meant or who Kauffin was talking about, and requested the response be stricken. App. 440, ll. 11-13. Trial counsel offered no argument to permit the introduction of the testimony. The trial judge sustained the objection. App. 440, l. 14.

Trial counsel admitted he was unsuccessful in introducing this critical evidence at trial. App. 671, ll. 9-12. He opined that "some of the witnesses were scared of the victim's family." App. 670, ll. 1-2. Trial counsel thought getting into a deceased's reputation for violence was "difficult to do anyway." App. 671, ll. 13-14. He considered there to be "a high hurdle to get that in, that reputation evidence in." App. 672, ll. 4-5; App. 672, l. 19.

When law enforcement interrogated Respondent, he explained what happened when the shooting occurred. This interrogation was audio and video recorded. App. 673, ll. 2-5. During

the interrogation, law enforcement talked about the reputation of the Robertsons. App. 327, ll. 10-15; App. 673, ll. 13-14. During the trial, the solicitor stated there was "a good bit of discussion ... about the character and reputation of the Robertson Boys." App. 327, ll. 10-12. He "certainly [did] not want the jury to hear that" and he did not "think" it would "be admissible under ordinary circumstances because it - - well, I just think it's not admissible." App. 327, ll. 12-15. Trial counsel argued "[t]he reputation of the victims" as Respondent "perceived it" was "an element of self-defense." App. 328, ll. 23-24. Trial counsel clarified the video explained the deceased had "a reputation [for] violence." App. 329, ll. 4-6.

Although the recording was admitted in its entirety, the portion regarding the deceased's reputation for violence was not played for the jury. App. 337, ll. 6-12; App. 417, ll. 17-25; App. 554, ll. 1-3; App. 673, ll. 5-17; App. 674, l. 12.[1] Additionally problematic was the judge's ruling that if a party did not play a portion of the recording during the trial, then the jury would not be at liberty to hear that portion during deliberations despite the admission of the recording in its entirety into evidence: "I will agree with the solicitor that the jury cannot hear evidence for the first time during deliberations. So if it's something you want them to consider, it has to be presented during the trial." App. 340, ll. 1-4. At the PCR hearing, trial counsel offered that law enforcement's statements were hearsay and inadmissible to explain his deficiency in failing to play the portions of the recording to permit the jury to learn of the deceased's reputation for violence in the community. App. 673, l. 19 – App. 674, l. 3.

During the charge conference at Respondent's trial, the trial judge asked if part of the self-defense argument would include "a reputation for violence." App. 552, ll. 11-14. Trial counsel responded that he was making such a request based upon Respondent testifying that he

[1] The solicitor played the following portions: 10:15-10:46; 11:29-12:14; and 12:34-12:45. App. 420, ll. 12-18.

was afraid of the deceased. App. 552, ll. 15-18. The judge responded that what was in Respondent's mind was not sufficient to warrant an instruction. App. 552, ll. 19-21. The solicitor argued:

> I don't think it's risen anywhere near the level for a reputation for violence as to the two victims in this case for you to give the jury any kind of charge about that. There's just some vague comments about being scared of them. Of course, by the time he made those statements he was running because he had shot them.
>
> And some vague comments on the videotape about the Robertsons in general. But nothing specific about things they had done. Nothing at all specifying any acts of violence they'd committed, just we were scared of them.

App. 553, ll. 1-10. The solicitor explained that of the portions played for the jury, the only reference to Robertson's penchant for violence was Respondent stating on the recording that his uncle said "they always doing stuff to people, I could have been the one dead." App. 554, ll. 1-6. He also explained law enforcement expressed fear for Respondent's safety based on retaliation, but those fears were not due to a reputation for violence. App. 554, ll. 7-11. Trial counsel then clarified, based on questioning from the trial judge, that he was not requesting a charge based on the alleged victim's violent reputation. App. 555, ll. 13-15.

The PCR judge found that trial counsel "testified that evidence of the victims' reputation for violence was important but that it was difficult to find anyone to testify to that and difficult to get that evidence admitted." App. 717. Additionally, the PCR judge found that trial counsel was "personally aware of both victims' history of violence, in that while employed with the Solicitor's office in the past he had prosecuted both victims both as juveniles and as adults." App. 717. The trial transcript showed Petitioner and Christopher Kauffin, both of whom testified at trial, "were knowledgeable of the victims' reputation but no effort was made to include it in their testimony." App. 717. As the PCR judge observed, Kauffin "actually began to testify about the victims' reputation but was prevented from doing so by objection from the state."

App. 717. When the prosecutor interposed the objection, trial counsel "did not oppose the objection" and failed to raise Rule 404(a)(2), SCRE as a basis for exploring the reputations for violence of Michael and Jamie Robertson. App. 717. Judge Dennis concluded, based upon the trial transcript and the PCR testimony that trial counsel was either "unaware" of the evidentiary rule supporting admission of an alleged victim's reputation for violence or "overlooked it." App. 717.

Fleming Anderson was present for Respondent's trial, but did not testify. App. 685, l. 24 – App. 686, l. 4; App. 698, l. 22 – App. 699, l. 19. However, he did testify at the PCR hearing. According to Anderson, he knew Michael for a long time and knew him to be "a bad person in the community." App. 701, l. 25 – App. 702, l. 8. The PCR judge explained Anderson was "available for the purpose of establishing the victims' reputation for violence," but trial counsel inexplicably failed to call him as a witness. App. 718.

Finally, the PCR judge noted the video of Respondent's statement to law enforcement was admitted into evidence in its entirety and contained statements by law enforcement regarding the alleged victims' reputation for violence, but those portions were not published to the jury by the solicitor or trial counsel. App. 718. The PCR court found trial counsel's explanation that law enforcement's comments were hearsay failed to "adequately explain his failure to publish in so much as it had already been admitted in its entirety." App. 718. Based upon the lack of evidence produced at the trial, the judge refused to instruct the jury concerning the victim's reputation for violence. App. 718. The PCR judge found "there was ample opportunity to get into evidence the violent reputation of both victims" and held this failure could have had a significant impact on the outcome of the trial." App. 718.

Discussion

The South Carolina Rules of Evidence permit admission of "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor." Rule 404(a)(2), SCRE. Generally, "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." Rule 404(a), SCRE. One of the exceptions to this rule is evidence of the character of an alleged victim. Rule 404(a)(2), SCRE. This has long been the rule in South Carolina – even prior to the adoption of the Rules of Evidence. See State v. Boyd, 126 S.C. 300, 119 S.E. 839 (1923)(explaining a defendant has the right to attack the reputation of the prosecuting witness for violence); see also, State v. Thrailkill, 71 S.C. 136, 50 S.E. 551, 553 (1905)(explaining general reputation evidence of the deceased for turbulence is admissible). Whenever "evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion." Rule 405(a), SCRE.[2]

The South Carolina Supreme Court explained that evidence of the reputation of the deceased for turbulence and violence "has a direct bearing upon each of the four familiar

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[2] Furthermore,

> In the murder prosecution of one pleading self-defense against an attack by the deceased, evidence of other specific instances of violence on the part of the deceased are not admissible unless they were directed against the defendant or, if directed against others, were so closely connected in point of time or occasion with the homicide as reasonably to indicate the state of mind of the deceased at the time of the homicide, or to produce reasonable apprehension of great bodily harm.

State v. Day, 341 S.C. 410, 419-420, 535 S.E.2d 431, 436 (2000); see also State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924).

elements of the [self-defense] plea, but particularly upon the element of a reasonable apprehension of immediately impending danger upon the part of the defendant." State v. Hill, 129 S.C. 166, 123 S.E. 817 (1924).

As the PCR judge held, the evidentiary rules would have permitted trial counsel to introduce evidence of the deceased's reputation for violence in the community had trial counsel been aware of the evidentiary rules and made an effort to introduce the evidence. The trial record disclosed that at least one witness was prepared to testify about the deceased's reputation – Christopher Kauffin – but the testimony was cut short by the solicitor's objection and trial counsel's failure to argue any basis for its admission. Additionally, portions of the interrogation recording revealed the deceased's reputation for violence in the community, but trial counsel failed to publish those portions, which the state had omitted in its presentation, to the jury. At the PCR hearing, Fleming Anderson explained that he was available to testify at Respondent's trial and would have explained the deceased had a reputation as a bad person in the community. Finally, trial counsel was well aware of the deceased's reputation as he had prosecuted the deceased on multiple occasions. Trial counsel performed deficiently in failing to present evidence of the deceased's character to the jury. In light of Respondent's claim of self-defense and the contradictory witness testimony for the jury, this deficiency was prejudicial to Respondent.

To the extent Petitioner claimed trial counsel's failure to introduce character evidence of the alleged victim was the result of trial counsel's strategy to build his defense around Respondent's statement to police that he was in fear of Michael based upon Michael's aggression and brandishing of a firearm, this argument must fail. Respondent's recorded interrogation *included* evidence of the deceased's reputation in the community. Therefore, had trial counsel

intended to build the defense around Respondent's statement, the defense would have *necessarily* included introduction of evidence of Michael's character. Additionally, a defense centered on Respondent's statement that he feared Michael because Michael pulled out a firearm during a heated argument was *not* incompatible with evidence of Michael's bad reputation. Retreating into the old familiar territory of "trial strategy" cannot save trial counsel's prejudicial deficient performance.

Ample evidence in the record supported the PCR judge's conclusion that trial counsel rendered ineffective assistance by failing to present readily available character evidence of the deceased in Respondent's homicide trial.[3] The shooting death of Michael by Respondent was undisputed. Thus, the jury was left to determine whether Respondent acted in self-defense. To arrive at this conclusion, the jury had to rely on the testimony of Michael's friends, who witnessed the shooting, and Respondent and his brother, who also witnessed the shooting. Had the jury been aware of Michael's reputation in the community for violence and turbulence, there is a reasonable probability that the outcome of the trial would have been different, particularly in light of the jury's acquittal of Respondent for shooting of Jamie.

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[3] Petitioner argued the PCR judge could not rely upon the interrogation recording in arriving at his decision because Respondent "did not present the video at the evidentiary hearing." Cert. pet. at 7-8. According to Petitioner, introducing the interrogation video, which had been introduced at the trial, was necessary in order for Respondent to show prejudice. Cert. pet. at 7-8. This argument must fail. A PCR applicant is not required to introduce all exhibits, motions, orders, etc., that were part of the original trial. The Court's file related to Respondent's conviction, which necessarily included the exhibits, was available for the PCR judge's review.

II. There is evidence of probative value to support the PCR court's finding counsel was ineffective for failing to investigate, identify or call a favorable witness to the Goins.

Relevant facts

Fleming Anderson was present for Respondent's trial pursuant to a subpoena, but was not called as a witness. App. 698, l. 22 – App. 699, l. 19. When Anderson testified at the PCR hearing, he explained he never spoke to trial counsel. App. 699, ll. 20-21. Anderson recalled the day of the shooting. Importantly, he explained that he, Respondent, and others were invited to Michael's home. App. 700, ll. 6-14. Michael began arguing with Respondent over some rims. App. 700, ll. 14-16. The argument escalated. App. 700, ll. 15-16. When Anderson intervened, he heard Michael call out for a gun. App. 700, ll. 17-22; App. 701, ll. 14-19. Respondent and Michael then wrestled over the gun. App. 700, l. 24 – App. 701, l. 3. Anderson was certain the gun originated with the Robertsons and that Respondent did not have a gun on him. App. 700, l. 25 – App. 701, l. 13.

Trial counsel was aware of Anderson prior to Respondent's trial. App. 703, ll. 19-21. He was also aware of Anderson's presence during the trial. App. 703, l. 23. However, counsel was not aware of the reason he did not call Anderson as a witness. App. 703, l. 24 – App. 704, l. 18.

The PCR judge found Anderson "was present all week at the trial, under a subpoena from the state, listed on the state's witness list, and will to testify" on Respondent's behalf. App. 718. Also, the judge concluded Anderson's testimony "would have directly contradicted the state's case in several significant particulars." App. 718. Anderson would have contradicted the state's claim that Respondent was armed with a gun. App. 718. Anderson "would have disputed the state's theory of motivation, that they were at Michael Robertson's residence not to seek revenge but by an invitation from Robertson's cousin to 'drink some beers.'" App. 718. Additionally,

Anderson "would have testified that Michael Robertson started the argument and was the aggressor." App. 718. Judge Dennis rejected any suggestion that Anderson's testimony would have been cumulative to Kauffin's testimony. App. 718. In the PCR judge's view, Anderson "could have had a substantial impact on the outcome of a trial that depended heavily on the credibility of the witnesses." App. 718. The PCR judge found trial counsel "should have and easily could have located [Anderson], identified the importance of his testimony, and called him to testify." App. 718.

Discussion

Without question, a trial attorney "'has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" Walker v. State, 407 S.C. 400, 405, 756 S.E.2d 144, 147 (quoting Strickland, 466 U.S. at 691). In Walker, 407 S.C. at 407, 756 S.E.2d at 147, this Court held trial counsel rendered ineffective assistance by failing to interview Walker's girlfriend regarding Walker's whereabouts on the night of the alleged kidnapping and sexual assault. At the PCR hearing, Walker's girlfriend testified that when she was dating Walker, which included the time of the alleged crimes, the two spent every weekend together. Id. at 406, 756 S.E.2d at 147. This Court acknowledged that the girlfriend's "testimony was not as clear as it could have been, due in part to the passage of five years, one viable interpretation of it was that Walker spent the night of March 2 with her." Id. at 407, 756 S.E.2d at 147. Thus, "it would be physically impossible for Walker to have committed the kidnapping and assaults." Id. at 406, 756 S.E.2d at 147. This Court held Walker was entitled to relief based upon his counsel's failure to interview his alibi witness. Id.

Trial counsel failed to call Anderson as a witness and offered *no* reason for this failing.[4] Without question, Anderson's testimony at the PCR hearing was favorable to Respondent as it supported his and Kauffin's testimony in numerous vital ways. Petitioner's only argument on appeal is the PCR court erred in finding trial counsel ineffective for failing to investigate, identify, and call Anderson as a witness because Anderson's testimony "would have simply been cumulative and was practically identical to the other witnesses that testified at trial." Cert. pet. at 8. However, the PCR judge expressly addressed this contention in his order. App. 718. The judge explained:

> Though Mr. Anderson's testimony would have been similar to [Respondent]'s other witness, Mr. Kauffin, this Court does not find it to be cumulative. This was a murder trial with a self-defense claim, the principal witnesses were either related or friends of the victims. Mr. Kauffin, [Respondent]'s only witness, was the brother of [Respondent]. [Anderson], though a friend of [Respondent], in the Court's view could have had a substantial impact on the outcome of a trial that depended heavily on the credibility of the witnesses.

App. 718. The PCR judge placed emphasis on the relationship between Respondent and Anderson as not familial as important for his determination that the testimony would not have been cumulative to that presented through Kauffin, Respondent's brother. The PCR judge also emphasized that the outcome of the trial rested largely upon the jury's credibility determinations about the witnesses presented. While Anderson's testimony may have been similar to Kauffin's, it was not cumulative because it aided evidence introduced at trial. Further, trial counsel expressed no concerns regarding Anderson's credibility or fears about the state's evidence of guilt. Cf. Edwards v. State, 392 S.C. 449, 460, 710 S.E.2d 60, 66-67 (2011).

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[4] Although Petitioner does not argue that trial counsel employed a strategy by failing to call Fleming Anderson as a witness, to the extent Petitioner would rely upon such an argument in the future, the argument would be unavailing as counsel could articulate no reason for his failure. App. 703, l. 19 – App. 704, l. 17; Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002)("A blanket statement by counsel at a PCR hearing that he employed 'strategy' does not automatically insulate the lawyer from being found ineffective").

III. There is evidence of probative value to support the PCR court's finding counsel was ineffective for failing to request a charge of voluntary manslaughter.

Relevant facts

Respondent's brother, Christopher Kauffin, told the jury that he went to Michael Robertson's home with Respondent on June 30, 2005. App. 433, ll. 15-16; App. 434, ll. 10-21. According to Kauffin, Respondent did not have a gun with him. App. 435, ll. 7-8. Kauffin heard an argument involving Michael. App. 436, ll. 8-14. Michael then pulled a gun out and pointed it at Respondent. App. 436, ll. 1-2. Michael directed Jamie and Renardo Wood to get guns as well. App. 439, ll. 2-4. Kauffin saw Jamie point a gun at Respondent. App. 443, ll. 1-7. Respondent and Michael then wrestled over the gun. App. 439, ll. 6-8. At some point, Respondent got the gun and it went off. App. 439, ll. 8-9. He recalled Michael had Respondent's legs preventing Respondent from getting away. App. 439, l. 10; App. 442, ll. 10-25. According to Kauffin, Respondent shot Jamie and Michael during this melee. App. 439, ll. 9-11. Kauffin was adamant that Respondent did not cause the altercation. App. 447, ll. 3-7.

Respondent explained that while he and others were at a local store, he was invited to Michael Robertson's home. App. 487, l. 6 – App. 498, l. 9. Respondent went to Michael's home where he had a few drinks. App. 489, ll. 7-9. Michael was irritated and thought Respondent had disrespected him when Respondent stated he did not want to hear about some earlier incident. App. 493, ll. 5-18. Michael grew even more agitated with Respondent when he demanded the return of a rim from Respondent's car and Respondent refused. App. 494, ll. 4-14. Michael pulled out a gun. App. 496, ll. 3-4.

Respondent grabbed Michael's arm, and Michael pushed Respondent down to the ground. App. 497, ll. 6-10. The two men began to wrestle over the gun. App. 497, l. 11.

Respondent got the gun and was trying to leave, but Michael grabbed his legs causing him to lose his balance. App. 497, ll. 16-20. Jamie Robertson walked out of the home with a long gun. App. 497, ll. 22-24. Believing he was about to die, Respondent started shooting. App. 498, ll. 10-14. When Jamie was unable to shoot his gun, he turned it around like a bat and began swinging it at Respondent. App. 498, ll. 14-18.

When Respondent's legs were free from Michael's grip, Respondent began to run. App. 498, ll. 19-20. He did not run to his car because Renardo Wood also had a gun and Respondent feared Renardo would shoot him as he made his way to his car. App. 498, ll. 20-24. Several days later, Respondent turned himself in to law enforcement. App. 505, l. 18 – App. 506, l. 5.

During the charge conference, trial counsel indicated he was *not* requesting any jury instructions on any lesser-included offenses for murder. App. 549, l. 21 – App. 550, ll. 5.[5] He explained he did not "know if there's evidence in this case of provocation." App. 549, ll. 24-25.

At the PCR hearing, trial counsel indicated he did not believe Judge Newman would have instructed the jury on voluntary manslaughter. App. 679, ll. 14-20. He claimed Respondent was consistent that he acted in self-defense, and trial counsel believed him. App. 681, ll. 4-15. In his mind, asking for a voluntary manslaughter instruction would have done two things: (1) "it would have been giving the jury a compromised verdict that would still carry significant prison time, and (2) "it could seem like, not an admission, but a recognition of guilt." App. 681, ll. 17-22. Although trial counsel recognized there was a significant difference in the potential sentences, he did not recall discussing his decision not to request the judge instruct the jury on the lesser-included offense. App. 682, ll. 3-23. "In hindsight," trial counsel knew he should have

[5] Trial counsel did request an instruction on assault and battery of a high and aggravated nature as a lesser-included offense of ABWIK. App. 550, ll. 11-16. Judge Newman agreed the evidence supported the charge and provided it to the jury. App. 551, ll. 17-24. The jury acquitted Respondent of ABWIK and the lesser-included. App. 727.

discussed this decision with Respondent. App. 683, ll. 12-15. Trial counsel admitted that had the jury been given the option of voluntary manslaughter, then Respondent probably would have been convicted of voluntary manslaughter, not murder. App. 685, ll. 3-16.

Contrary to the state's contention that trial counsel testified he did not believe the evidence supported voluntary manslaughter, trial counsel testified unequivocally that a voluntary manslaughter conviction could not have been overturned on a legal ground. App. 685, ll. 17-23.

The PCR judge found that a voluntary manslaughter instruction likely would have been given had it been requested based upon a review of the trial record. App. 719. The PCR court credited the exchange during the charge conference during which trial counsel opposed an instruction on voluntary manslaughter and trial counsel's testimony he did not believe the evidence supported such an instruction as the reason counsel failed to make the request. App. 719. Noting the jury acquitted Respondent of ABWIK, the PCR judge concluded the jury "was not convinced the entire responsibility for events fell on" Respondent. App. 719. Due to the "significant" "differential punishment for murder and voluntary manslaughter," the PCR judge determined counsel's failure to request the instruction on a lesser-included offense prejudicial. App. 719.

Turning to the claim that trial counsel's failure to make the request was part of a trial strategy, the PCR court found trial counsel "had a duty to discuss this decision with" Respondent. App. 719. Trial counsel failed to do so. App. 719. According to the PCR judge, "the decision to go for 'all or nothing' on the self-defense claim in a murder trial was [of] such importance that it should have been discussed" with Respondent. App. 719. Again, the significant sentencing differences between murder and voluntary manslaughter was particularaly persuasive to the judge. App. 719. Also, the judge was persuaded by trial counsel's testimony

"this decision could have had a substantial impact on the outcome of the case." App. 719. Respondent testified unequivocally that trial counsel never discussed this decision with him. App. 720. Trial counsel "could not recall if it had been or not, but upon reflection agreed that it should have been." App. 720.

Discussion

A jury charge to a lesser-included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006. South Carolina law mandates a jury instruction on a lesser-included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow "a rational inference" that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), "[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

An appellate court views the evidence in the light most favorable to the defendant in determining whether the evidence required a charge of voluntary manslaughter. State v. Gadsden, 314 S.C. 229, 442 S.E.2d 594 (1994). Only when the record contained no evidence to support voluntary manslaughter should the trial court decline to charge the jury concerning the lesser-included offense. State v. Cooley, 342 S.C. 63, 67-68, 536 S.E.2d 666, 668-669 (2000). "To warrant the court in eliminating the offense of manslaughter it should very clearly appear

that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter." State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009); see also Casey v. State, 305 S.C. 445, 447, 409 S.E.2d 391, 392 (1991) (emphasis in original)(holding that in murder cases, trial courts should charge manslaughter unless "there is no evidence whatsoever tending to reduce the crime from murder to manslaughter").

Manslaughter is defined by Section 16-3-50 of the South Carolina Code as "the unlawful killing of another without malice, express or implied." S.C. Code Ann § 16-3-50. Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). The South Carolina Supreme Court made it clear that both of these elements must be present in order to warrant a voluntary manslaughter charge. See State v. Starnes, 388 S.C. 590, 596, 698 S.E.2d 604, 608 (2010) "The provocation must be such as to render the mind of an ordinary person incapable of cool reflection and produce an uncontrollable impulse to do violence." Cooley, 342 S.C. at 67, 536 S.E.2d at 668. "Sudden heat of passion upon sufficient legal provocation" mitigating felonious killing to manslaughter "must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence." State v. Wiggins, 330 S.C. 538, 549, 500 S.E.2d 489, 495 (1998) (citing State v. Lowry, 315 S.C. 396, 399, 434 S.E.2d 272, 274 (1993) (quotations omitted).

"[F]ear resulting from an attack can constitute a basis for voluntary manslaughter." Starnes, 388 S.C. at 598, 698 S.E.2d at 609. While fear of an attack, by itself, is not enough to satisfy the heat of passion element, Starnes reaffirmed "the principle that a person's fear

immediately following an attack or threatening act may cause the person to act in a sudden heat of passion." Id.

"Whether a voluntary manslaughter charge is warranted turns on the facts." Id. at 597, 698 S.E.2d at 608.

"Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation." State v. Wharton, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). In order for a judge to charge voluntary manslaughter there must be some evidence of both sufficient legal provocation and heat of passion. State v. Smith, 391 S.C. 408, 413, 706 S.E.2d 12, 15 (2011); see also, State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001) ("The law to be charged must be determined from the evidence presented at trial."). "[I]n order to constitute 'sudden heat of passion upon sufficient legal provocation,' the fear must be the result of sufficient legal provocation and case the defendant to lose control and create an uncontrollable impulse to do violence." See State v. Starnes, 388 S.C. 590, 598, 698 S.E.2d 604, 609 (2010). Evidence of a struggle during an armed robbery is not sufficient legal provocation. State v. Tyson, 283 S.C. 375, 379, 323 S.E.2d 770, 772 (1984); see also, State v. Shuler, 344 S.C. 604, 632, 545 S.E.2d 805, 819 (2001).

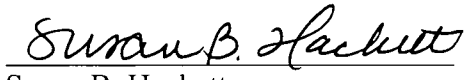
The PCR judge's decision that trial counsel provided ineffective assistance by failing to request a voluntary manslaughter instruction is supported by ample evidence in the record. Despite the state's contention that no evidence supported the PCR judge's factual finding that trial counsel did not discuss his decision not to request a voluntary manslaughter instruction with Respondent, the record does contain evidence to support the PCR judge's finding – Respondent's testimony that he and trial counsel did not discuss the decision. App. 695, ll. 10-18. The evidence presented at trial supported a voluntary manslaughter instruction as the PCR judge's

review of the record demonstrated. The pulling of the gun, the heated exchange between the men, the wrestling match, Michael's recruitment of others to arm themselves against Respondent, and even the state's evidence that Michael was spreading rumors about Respondent and his girlfriend having affairs provided evidence of sudden heat of passion and sufficient legal provocation. Further, trial counsel's claims about strategy were not supported by the record. His claims that he did not request the lesser-included instruction because he believed Respondent acted in self-defense and that a lesser-included instruction amounted to an admission were incongruous with his on-the-record request for a lesser-included instruction for ABWIK. The same set of considerations would have applied to that decision as well.

While a trial lawyer may set out an objectively reasonable strategy for not requesting a lesser-included instruction, counsel failed to do so in this case. See Abney v. State, 408 S.C. 41, 46-47, 757 S.E.2d 544, 546-547 (Ct. App. 2014). Trial counsel failed to discuss counsel's decision not to request the lesser-included offense instruction with Respondent as the PCR judge found. In Abney, the Court of Appeals concluded trial counsel presented a reasonable trial strategy for failing to request a lesser-included offense instruction where counsel and the defendant discussed the strategy during a break in the trial proceedings. Id. at 47, 757 S.E.2d at 547. Trial counsel provided ineffective assistance in derogation of the Sixth and Fourteenth Amendments to the Constitution by failing to request a jury instruction on the lesser-included offense of voluntary manslaughter where the record evidence supported the instruction, trial counsel failed to discuss any alleged strategy not to make such a request with Respondent, and trial counsel's claimed strategy for not making the request was not in harmony with his other actions during the trial.

CONCLUSION

Respondent respectfully requests this Court deny the petition for writ of certiorari as ample probative evidence supports the PCR judge's findings of fact and conclusions of law.



Susan B. Hackett
Appellate Defender

ATTORNEY FOR RESPONDENT

This 27th day of December, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Fairfield Coun

R. Markley Dennis, Jr., Circuit Court Judge

DAVID ALLEN GOINS,

RESPONDENT

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari in the above referenced case has been served upon DeShawn H. Mitchell, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and David Allen Goins, #210510, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 27th day of December, 2017.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 27th day of December, 2017.

Courtney Powers (L.S)
Notary Public for South Carolina
My Commission Expires: May 2, 2027.