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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County
The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001549

Gabriel Jon Rios,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

RESPONDENT'S QUESTIONS PRESENTED

I. Is there any probative evidence in the record to support the PCR court's finding Counsel was not deficient because he made a strategic decision not to introduce phone records to corroborate Petitioner's wife's testimony that she received a phone call from him the morning of the crime, nor was Petitioner prejudiced because the records do not establish a complete alibi such as to change the result at trial or on direct appeal?

II. Is there any probative evidence in the record to support the PCR court's finding Counsel was not deficient because he articulated a valid trial strategy for not introducing the 911 tape as impeachment evidence where the victim's husband, not victim, called 911, and where Counsel impeached the victim's testimony through another witness?

III. Is there any probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by the solicitor's allegedly burden-shifting comments in closing because the solicitor is entitled to comment on the evidence introduced by the defense, and because, in any event, the comments were not so egregious as to render the trial fundamentally unfair?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. Petitioner was indicted at the November 2010 term of the Spartanburg County Grand Jury for burglary – first degree (2010-GS-42-6830), armed robbery and possession of a weapon during the commission of a violent crime (2010-GS-42-6831), grand larceny – value $10,000 or more (2010-GS-42-6832),[1] kidnapping (2010-GS-42-6833), and assault and battery – first degree (2010-GS-42-6834). Matthew Shealy, Esquire, represented Petitioner. On February 26, 2013, Petitioner proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Petitioner guilty as indicted. Judge McIntosh sentenced Petitioner to imprisonment to concurrent terms of 40 years for burglary, 30 years each for armed robbery and kidnapping, and ten years for assault and battery, plus a consecutive term of five years for possession of a weapon.

Petitioner filed a timely notice of appeal. Kathrine H. Hudgins, Esquire, perfected the appeal. The South Carolina Court of Appeals affirmed Petitioner's conviction on February 1, 2015. State v. Rios, Op. No. 2015-UP-135 (S.C. Ct. App. filed March 11, 2015). The remittitur was returned on April 10, 2015.

Petitioner timely filed his application for post-conviction relief (PCR) on June 3, 2015. An evidentiary hearing was convened on January 30, 2017, at the Spartanburg County Courthouse before the Honorable Edward W. Miller. Susannah C. Ross, Esquire, represented Petitioner. Caitlin B. Hastings, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Petitioner's trial counsel testified for the State. The PCR court found Petitioner received effective assistance of

[1] The State elected to proceed on the armed robbery charge and dismissed the grand larceny charge before trial.

counsel and dismissed Petitioner's application in its entirety by order signed March 21, 2017, and filed March 27, 2017. Petitioner filed a Petition for a Writ of Certiorari to this Court on January 16, 2018. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

On the morning of August 14, 2010, Gail Holt ("Mrs. Holt") testified she woke up shortly before 7:30 a.m. App. p. 107. Sometime between 7:30 and 8:00 a.m., as she was preparing to take her dog out, she heard the sound of glass breaking somewhere in the house. App. p. 107, 116. Mrs. Holt went to investigate and came face-to-face with an intruder in the hallway of her home. App. pp. 107-08. At trial, Mrs. Holt testified she "immediately" recognized the man as "Gabe," a man who previously worked for her husband both at his business and in their home. App. p. 108.

According to Mrs. Holt, the intruder held a sharp object at her neck, forced her down the hall to her husband's office, and demanded she open the safe. App. pp. 109-10. When she was unable to open the safe, the man forced her into the bedroom, tied her hands behind her back while she was lying face down, and pulled the Holts' gun from its holster. App. pp. 111-12. The man then demanded Mrs. Holt's money and her purse. App. p. 112. He told Mrs. Holt not to move and threatened to kill her. App. pp. 112-13. The man ultimately took her money, cell phone, and stole her car. App. p. 113. Mrs. Holt testified she was able to free herself from the restraints a short time later, and she immediately called her husband, who then called the police. App. p. 114.

Mrs. Holt testified she identified Petitioner to the responding officers as "Gabe." App. p. 131. However, the first officer on the scene testified for the defense, and he stated Mrs. Holt was initially unable to identify the intruder. App. pp. 264-65. However, she identified Petitioner as the perpetrator in a photo line-up later that morning on the same day the crime occurred. App. pp. 131-34, 138.

Phil Holt ("Mr. Holt"), the victim's husband, he was at work when he received a call from his wife about the robbery. App. p. 148-49. According to Mr. Holt, he immediately set out for their house, called police along the way to report the crime, and then called his wife again. App. p. 149. He testified he knew Petitioner, who had worked for him on and off for a number of years. App. pp. 149-150. Specifically, Petitioner helped Mr. Holt install the safe that the intruder attempted to open and rob. App. p. 150. Mr. Holt also testified, several months earlier he had broken the same pane of glass in the door the intruder smashed, and Petitioner had not been to the Holts' home since Mr. Holt replaced the pane. App. pp. 153-54.

The Holts' neighbor, Mrs. Ollinger, testified she left her house around 7:30 a.m. that morning to go on a walk, and she encountered a black male she had never seen before walking in the direction of the Holts' home. App. pp. 164-65, 167. Mrs. Ollinger testified she saw the man approximately six or seven minutes into her walk. App. p. 167.

Investigator Lorin Williams with the Spartanburg County Sherriff's Department testified he responded to the Holts' home and spoke with Mrs. Holt. App. p. 176. Investigator Williams testified Mrs. Holt provided a description of the intruder and identified him as "Gabe." App. p. 117. Williams explained Mr. Holt was able to give him Petitioner's full name, so he prepared a photo line-up and presented it to Mrs. Holt later that day. App. pp. 178-79. According to Investigator Williams, Mrs. Holt unequivocally identified Petitioner in the line-up. App. pp. 179-80. Finally, Investigator Williams testified Petitioner was arrested later that evening, approximately a quarter mile from where Mrs. Holt's vehicle was recovered the next morning. App. pp. 181-83, 187-88.

Officer Brandon Howard testified he responded to the scene at the Holt residence as part of the crime scene unit. App. pp. 191-92. Officer Howard testified he found a large piece of

broken glass from the door in the kitchen, which appeared to be the intruder's point of entry, laying in the hallway. App. p. 193. Officer Howard collected the glass and took it back to the Sherriff's Office where he dusted it for fingerprints. App. pp. 197, 208, 210. According to Officer Howard, he recovered one fingerprint from the glass and made a fingerprint card, which was then sent to another division within the office to be identified. App. pp. 210-14. Officer Theo Saar testified as an expert in fingerprint analysis, and identified Petitioner's fingerprint on the glass shard from the hallway. App. pp. 229-30, 233-34, 238.

Petitioner presented an alibi defense. Deputy David Welch, the first officer on the scene, testified neither of the Holts gave Petitioner's name when he first made contact with them. App. pp. 264-65. Next, the defense called Estar Byrd (Ms. Byrd), who testified she occasionally let Petitioner, along with several other people on her street, use her phone to make and receive calls. App. pp. 267-68. However, she could not say whether she let Petitioner use the phone on the day of the incident. App. p. 269. Sonia Rios, Petitioner's wife, testified she received a call from Petitioner that morning from Ms. Byrd's phone number at approximately 7:25 a.m. App. pp. 271, 276. Counsel's investigator testified he drove the route from the Holts' house to Florida Avenue, where Ms. Byrd lives, and the quickest route was approximately 5.2 miles and took 16 minutes. App. pp. 281-82.

Counsel then requested a jury charge on alibi, which Judge McIntosh declined to give, finding Petitioner had only established a partial alibi. App. pp. 288-91. However, he allowed Counsel to argue alibi and point out the potential problems with the timeline in closing, which Counsel did, arguing Petitioner was at Ms. Byrd's house, which was too far away from him to have committed the crime. App. pp. 291, 312-14.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, Petitioner bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Petitioner must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 443, 334 S.E.2d at 814. Courts presume counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 689. Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The PCR court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, Petitioner must prove counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Id. (quoting Strickland, 466 U.S. at 688).

Second, counsel's deficient performance must have prejudiced Petitioner 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. <u>There is probative evidence in the record to support the PCR court's finding Counsel was not deficient because he made a strategic decision not to introduce phone records to corroborate Petitioner's wife's testimony that she received a phone call from him the morning of the crime, nor was Petitioner prejudiced because the records do not establish a complete alibi such as to change the result at trial or on direct appeal.</u>

Petitioner's defense to this crime was alibi. PWC p. 3; App. pp. 288-91. To this end, Counsel called witnesses at trial to establish Petitioner made a phone call to his wife from a house on Florida Avenue around 7:25 a.m. on the morning of the crime. Counsel's investigator testified the victim's home was approximately 5.2 miles away, which equated to a sixteen minute drive. In his closing argument, Counsel argued Petitioner had an alibi for the morning of the crime. Specifically, he stated:

> We presented Ms. Byrd who testified that she had a landline phone, what her phone number was. It's [xxx-xxxx]. And Mrs. Rios testified that she got this phone call around 7:22. I don't believe that she testified to the duration of that call. But she did speak with her husband, she testified to, and she, she received that phone call from that number, [xxx-2858], that that happened at 7:22. . . .
>
> Mr. Jones testified that it takes about 16 minutes from Florida Avenue to get over to Hillbrook, and that that drive was – it was in a car and it was the fastest way he could figure out, and the State had the opportunity to call a witness to reply to that and they didn't. So, that's – you just have to go with that. That's the only evidence in the record as to the distance between the one, the two points. . . .
>
> And if this happened about 7:30, then even if he caught a ride, he couldn't get over there because 16 minutes, plus 22, is 7:38. So, if he called her, immediately hung up, gotten into the car, driven over there, all of that without anytime in-between, he certainly couldn't have done it now.

App. pp. 260-62. However, Counsel did not introduce into evidence Petitioner's

wife's phone records, which show a four-minute phone call between the wife and Ms. Byrd's number at 7:10 a.m. and a one-minute phone call at 7:22 a.m. App. pp. 481-82. Petitioner alleges these records "substantiate Petitioner's alibi" and create a reasonable probability the outcome of trial would have been different had Counsel introduced them. PWC p. 3.

These records, however, do not solve the problem with Petitioner's defense – he has no alibi for the entire time period in which the crime was committed; thus, he has no alibi at all. As this Court explained in State v. Robbins:

> Alibi means elsewhere, and the charge should be given when the accused submits that he could not have performed the criminal act because he was in another place at the time of its commission. In other words, by an alibi the accused attempts to prove that he was at a place so distant that his participation in the crime was impossible. To be successful, *his alibi must cover the entire time when his presence was required for accomplishment of the crime*. To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it impossible for him to have been at the scene of the crime. . . . [S]ince an alibi derives its potency as a defense from the fact that it *involves the physical impossibility of the accused's guilt*, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all.

275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980) (emphasis added).

The timeline established by the State at trial showed the robbery occurred sometime between approximately 7:30 a.m. and 8:30 a.m. At trial, the victim testified she woke up shortly before 7:30 a.m. and had been awake for "a little while" when she heard the sound of glass breaking somewhere in the house. App. p. 107, 116. When she went to investigate, she encountered Petitioner in the hallway of her home. App. pp. 107-08. Specifically, the victim testified this occurred sometime between 7:30 and 8:00 a.m. App. p. 116. The man then tied her up and rummaged through several rooms in the house, and she waited several minutes after he left before freeing herself and calling her husband. App. pp. 111-14, 116.

At the evidentiary hearing, Counsel pointed out the records did not establish a complete alibi. App. p. 472. Counsel also testified he made a conscious decision not to admit the phone records because "a record doesn't show who made the phone call. The real, live person can testify that, yeah, it was [Petitioner] using this phone." App. p. 477. Counsel specifically testified the decision not to subpoena someone to authenticate the phone records was a strategic decision, and therefore, Counsel was not deficient.

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 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).

Because Counsel articulated a valid strategy for using Petitioner's wife to establish both that a phone call was made around 7:25 a.m. and it was Petitioner who made the call, the PCR

court correctly found Counsel was not deficient for choosing not to admit the records. App. p. 553. Petitioner takes issue with this finding and seems to argue this was an unreasonable strategic decision because Petitioner's wife was not credible, as she had a previous conviction for giving false information to law enforcement. PWC p. 7; App. p. 277. Petitioner also characterizes Counsel's explanation that any benefit from introducing the phone records would have been outweighed by requiring Petitioner to testify as "inexplicable." PWC pp. 7-8. However, Counsel could not call *only* a representative from the phone company because he needed to establish it was Petitioner who made the call. Petitioner cannot have it both ways – either Petitioner or his wife would have had to testify, and both had credibility issues.[2] Counsel's decision to elicit both pieces of information (i.e. the fact that a phone call occurred and who made it) from the same witness is not unreasonable.

Further, as Counsel noted, even if these records had been introduced at trial, the most they do is establish Petitioner was not at the victim's home between 7:23 a.m. and 7:39 a.m., which is not a complete alibi. In his ruling denying Counsel's request to charge alibi, Judge McIntosh specifically pointed out this issue. He stated, "Now, even in the light most favorable to [Petitioner], if you look at the 7:22 or 7:24 timeframe, there's still time for him to have gotten from the Florida [Avenue] address to the Perrin Street address, and therefore, there's insufficient evidence in the record for alibi because the entire time period in which the crime occurred. . . at least based on the evidence in the record, is not covered by the other evidence presented in this matter." Nothing presented at the PCR hearing changes this analysis; the phone records do not

[2] Counsel testified he did not feel it was in Petitioner's best interest to testify because "the way [Petitioner] said all this happened or the motivations for it being made up were going to be difficult for us, quite frankly." App. pp. 478-79. In any event, both Petitioner and Counsel agreed it was ultimately Petitioner's decision not to testify. App. pp. 466-67, 479.

expand the amount of time covered by Petitioner's "alibi," and he did not present the testimony of any witness who could account for his whereabouts after 7:39 a.m.[3]

Therefore, the PCR court correctly found Petitioner cannot establish any prejudice as a result of Counsel's decision not to introduce the phone records. App. pp. 553-54. The trial judge's analysis as to the applicability of the alibi charge is unchanged by the records, so logically, the outcome of Petitioner's direct appeal would also be no different. See, e.g., McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") (citing Sikes v. State, 323 S.C. 28, 30, 448 S.E.2d 560, 562 (1994) ("When the defendant claims that counsel's failure to articulate a Fourth Amendment claim was ineffective assistance, [the] defendant must show that such claim is **meritorious** and that the verdict would have been different absent the evidence that should have been excluded." (emphasis in McHam)).

Because Counsel was not deficient and Petitioner suffered no prejudice from Counsel's decision not to admit the phone records, the Petition should be denied and dismissed as to this issue.

II. There is probative evidence in the record to support the PCR court's finding Counsel was not deficient because he articulated a valid trial strategy for not introducing the 911 tape as impeachment evidence where the victim's husband, not victim, called 911, and where Counsel impeached the victim's testimony through another witness.

Petitioner contends Counsel was deficient and Petitioner was prejudiced by Counsel's decision not to introduce the 911 tape at trial, because on the tape, the 911 operator immediately

[3] Other than Petitioner's own testimony, he offered only the testimony of his daughter, who said she talked to her father on the day in question at 7:02 a.m. – well before the window of time at issue in the case. App. p. 468.

asks Mr. Holt, the caller, if he knew who the intruder was, and Mr. Holt replies, "Don't know." PWC p. 10. Petitioner contends this statement would have impeached Mrs. Holt's testimony at trial that she recognized Petitioner "immediately." PWC p. 10.

Counsel testified he had three reasons for not introducing the tape. First, because it was Mr. Holt's statement, and Mr. Holt was not present during the robbery, which created problems with admissibility, as he had no personal knowledge of the identity of the perpetrator. App. pp. 471-72. Second, Counsel testified there were a number of statements made by Mr. Holt during the conversation with the 911 operator which Counsel felt "were bad" and "suggested that parts of his story were true." App. p. 471. Third, Counsel testified he introduced the same information – that neither Mr. or Ms. Holt immediately identified Petitioner to law enforcement – in through his own witness, the first responding officer, and that testimony was "a little more powerful than Mr. Holt. . . ." App. p. 471. Accordingly, the PCR Court correctly found Counsel was not deficient because he articulated valid trial strategies for choosing not to introduce the tape. App. p. 555-56.

First, Mr. Holt's statement is not impeachment evidence against Ms. Holt. The plain language of Rule 801 contemplates the prior statement being made by the testifying witness, i.e. the declarant. South Carolina Rules of Evidence, Rule 801(c) ("'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(d)(1)(A) ("A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is inconsistent with the declarant's testimony.") See also State v. Caulder, 287 S.C. 507, 513, 339 S.E.2d 876, 880 (Ct. App. 1986) ("A prior inconsistent statement is admissible as substantive evidence when the declarant testifies at trial and is subject

to cross-examination."). Petitioner implies that because Ms. Holt can be heard in the background during portions of the tape, the statement can be used against her.[4] PWC p. 10. However, Petitioner does not cite any case law for the proposition that one witness's statement can be used to impeach another, and in fact, the only cases he cites in support of this argument are instances where trial counsel failed to use a witness's own statement against him. PWC pp. 11-12.

At most, the 911 tape could have been used to impeach Mr. Holt's testimony only. [5] However, as Counsel pointed out at the PCR hearing, other aspects of the Holts' testimony are confirmed by the tape – for example, that the intruder threw a rock through the carport window and came down the hall looking for money. App. pp. 112, 193-94. Most importantly, Mr. Holt and the 911 operator discuss that the time frame for the robbery, and Mr. Holt says their best estimate is "eight o'clock." This statement pushing the crime closer to 8:00 a.m. rather than 7:30 a.m. undermines Petitioner's already weak "alibi" defense, and Counsel could reasonably choose not to introduce that statement.

Finally, Counsel was able to impeach Mrs. Holt's claim she recognized Petitioner "immediately" by calling the first officer to arrive at the scene to testify about his interaction with the Holts. App. pp. 264-66. That officer, Welch, testified he spoke to Mr. Holt first who "did not know the suspect at that time" and described him as "an unknown suspect," which is the exact same statement Petitioner claims makes the 911 call so important. App. p. 264. Welch

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[4] Notably, Mrs. Holt is not heard at the beginning of the tape, when the 911 operator asks Mr. Holt if he knows who the intruder was.

[5] In addition, in order for Counsel to be permitted to introduce the 911 tape for impeachment, Mr. Holt first would have to be asked about his statements on the tape and deny making them. Rule 613(b), SCRE. If Mr. Holt agreed he made the prior statement, the 911 tape would not be admissible anyway. Id. Other than Mrs. Holt's statement that she recognized Petitioner right away (but purposely did not call him by his name), nothing in either Mr. or Mrs. Holt's testimony suggested they identified Petitioner by name until sometime after law enforcement arrived at the house. App. pp. 106-61.

testified he then spoke with Mrs. Holt who initially gave him only a physical description of the robber, but did not give a name. App. pp. 265-66. Welch also impeached Mrs. Holt's testimony that the intruder already knew the location of the safe in the home, testifying instead that Mrs. Holt reported he asked her where the safe was. App. pp. 137, 265.

As noted above, "judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. "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." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992) (citing Strickland, 466 U.S. at 691). 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). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing 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).

Counsel offered myriad reasons why he chose not to introduce the 911 tape, all of which are valid trial strategy considerations supported by the record. Accordingly, the PCR court correctly found Counsel was not deficient, and this Court should deny the petition as to this issue.

III. There is probative evidence in the record to support the PCR court's finding Petitioner was not prejudiced by the solicitor's allegedly burden-shifting comments in closing because the solicitor is entitled to comment on the evidence introduced by the defense, and because, in any event, the comments were not so egregious as to render the trial fundamentally unfair.

Petitioner argues Counsel was deficient for failing to object to the part of the State's closing which was allegedly a burden-shifting argument, and this failure prejudiced Petitioner. As part of solicitor argued Petitioner "has had two and a half years, since this incident happened, to come up with this story, and that is all this is is [sic] just a story." App. p. 322. She also argued, "No one said that they were with him that morning. . . . [N]obody who testified for him accounted for his whereabouts. Nobody." App. p. 322. At the evidentiary hearing, Counsel testified he "probably" should have objected to that argument because it "sounded like it was burden shifting." App. p. 474. Nonetheless, the PCR court found Counsel was not deficient, nor was Petitioner prejudiced by Counsel's lack of objection. App. p. 550.

The PCR court correctly found Counsel was not deficient, as these statements were made in the context of a larger argument rebutting Petitioner's partial alibi defense. App. pp. 322-23. She was specifically rebutting Petitioner's argument "that [Petitioner] was on the phone before this happened. So, he couldn't have been there." App. p. 322. She pointed out that Petitioner's wife was not with him at the time and did not see him at all that morning, and noted "it was absolutely possible" for Petitioner to have committed the crime, despite the defense's contention "that there's no way he could have been on Perrin Drive between 7:30 and 8:00 when Mrs. Holt says this incident happened because he was on the phone with his wife at 7:20 something." App. p. 322. Her argument to the effect that "no one said that they were with him" and "nobody. . . accounted for his whereabouts" was appropriate in the context of responding to the witnesses

presented by the defense. She was merely pointing out the same hole in Petitioner's case recognized by the trial judge, the Court of Appeals, Counsel, and the PCR court – no one can account for his whereabouts during the entire timeframe the crime could have taken place.

"A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. Improper comments do not require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004) (citing Humphries v. State, 351 S.C. 362, 570 S.E.2d 160 (2002)). "[I]t 'is not enough that the prosecutors' remarks were undesirable or even universally condemned.' The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Darden v. Wainwright, 477 U.S. 168, 181 (1986) (citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974)).

Here, the solicitor's allegedly objectionable comments were a small fraction of her closing argument, approximately five lines out of nine pages of the transcript. App. pp. 315-324. See also Randall, 356 S.C. at 643, 591 S.E.2d at 611 ("[T]he objected-to argument consists of only 10 lines of the transcript. This is not akin to other situations in which we have reversed for repeated improper references throughout trial."); State v. Tubbs, 333 S.C. 316, 509 S.E.2d 815 (1999) ("We hold that the solicitor's references to 'Cobra' during summation, though undesirable, constituted an occasional use of Defendant's nickname and did not infect the entire trial with unfairness as to deprive Defendant due process of law."). Further, the trial judge gave a lengthy charge on what constitutes evidence, including an admonition that:

> any things the attorneys told you in their opening statements, in their closing statements. . . or whatever else during the course of this trial is not evidence. Now, they're not sworn witnesses. They do not take this witness stand. And so

> what they say is not technically evidence. It is helpful, and it is designed to help you understand the issues and what is in this case, but it is not evidence.

App. p. 328. See also State v. Goodwin, 384 S.C. 588, 605, 683 S.E.2d 500, 509 (Ct. App. 2009) ("The comment was not so grievous that its alleged prejudicial effect could not be removed in any other way. After reviewing the record in its entirety, we do not believe the solicitor's comments so infected the trial with unfairness as to make Goodwin's conviction a denial of due process. Moreover, any alleged error was cured by the trial court's extensive jury charge. . . .").

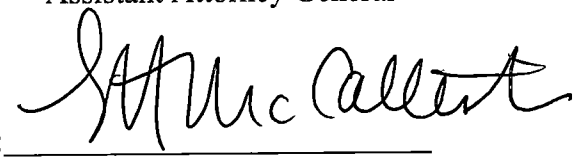
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not deficient in declining to request a competency evaluation, nor was Petitioner prejudiced by the lack of one, and Petitioner's guilty plea was freely and voluntarily given. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
Lindsey A. McCallister

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

ATTORNEYS FOR RESPONDENT

July 2, 2018

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2017-001549

Gabriel Jon Rios,.....Petitioner,

v.

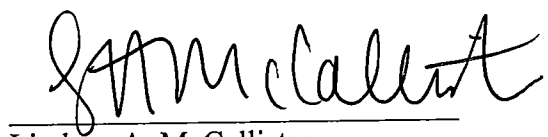
State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Lindsey A. McCallister, certify that I have today served the within **Motion for Fourth Extension to File Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

David Alexander, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 2nd day of July, 2018.



Lindsey A. McCallister
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Office of Attorney General
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Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

July 2, 2018

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

Re: **Gabriel Jon Rios, #344751 v. State of South Carolina**
Appellate Case No.: 2017-001549
Lower Court Case: 2015-CP-42-2541

Dear Mr. Shearouse:

Enclosed for filing please find an original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar #79054

LAM/lm
Enclosures

cc: David Alexander, Esquire
Trisha Allen, Director - Victim Advocacy Division