STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Supreme Court County

Honorable Robert E. Hood, Circuit Court Judge

ANTHONY MARQUISE MARTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002458

BRIEF OF PETITIONER

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II.

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

STATEMENT OF THE CASE

Indictment and Trial

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

On April 25 – 27, 2011, Martin appeared for trial before the Honorable Doyet A. Early, III, and a jury. App. 1. Martin was represented by C. David Hayes and De Grant Gibbons, and the State was represented by assistant solicitors Susanna Ringler and Elizabeth Young. App. 1. The jury returned verdicts of guilty on both counts. App. 284 – 286. Martin maintained his innocence during sentencing. App. 297, ll. 5-11. Judge Early imposed concurrent terms of twenty years for armed robbery and five years for conspiracy. App. 297, ll. 12-22.

Direct Appeal

Martin filed a notice of appeal and was represented by appellate defender LaNelle Durant. App. 263. On appeal, Martin challenged the trial judge's denial of the defense's motion to suppress evidence of flight. App. 299; App. 312. On May 1, 2013, the Court of Appeals affirmed Martin's convictions, finding that though the trial court erred in denying the motion to suppress, the error was harmless. App. 345. Both Martin and the State filed petitions for rehearing, which were denied. App. 346; App. 354; App. 367. Their subsequent cross-petitions for writ of certiorari were also denied. App. 368; App. 382; App. 401; App. 429; App. 442. The remittitur was filed on July 30, 2014. App. 443.

Post-Conviction Relief

On March 16, 2015, Martin filed his application for post-conviction relief ("PCR'"). App. 444. An amendment to the PCR application was filed through counsel on May 16, 2016. App. 458. The State filed its return on April 15, 2015. App. 460.

On September 20, 2016, an evidentiary hearing was held before the Honorable Robert E. Hood. App. 465. Martin was represented by Lance Boozer, and the State was represented by assistant attorney general Julie Coleman. App. 465. At the outset of the hearing, the State consented to the oral amendment of Martin's allegations to add: (1) failure to utilize State's witnesses effectively, and (2) failure to put forth an alibi defense. App. 470 – 471. Martin testified on his own behalf, and the State called both of Martin's trial attorneys, David Hayes and De Grant Gibbons.

Judge Hood took the case under advisement. App. 516, ll. 2-4. On October 26, 2016, Judge Hood signed the Order of Dismissal denying Martin's application for post-conviction relief. App. 518.

Petitioner filed his petition for writ of certiorari with this Court on July 26, 2017. Respondent filed its return to the petition on December 13, 2017. Petitioner filed a reply to the return on January 26, 2018. By order filed May 24, 2018, this Court granted the petition for writ of certiorari and directed further briefing. This is the Brief of Petitioner.

STANDARD OF REVIEW

This Court defers to a PCR court's findings of fact and will uphold them if there is any evidence of probative value in the record to support them. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, if there is no evidence to support the PCR court's ruling, this Court will reverse. Pierce v. State, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000) (citation omitted). Questions of law are reviewed de novo, with no deference to trial courts. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839–40 (2018); Sellner, 416 S.C. at 610, 787 S.E.2d at 527 (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014)).

STATEMENT OF FACTS

Trial

Petitioner Martin was accused of robbing a branch of Bank of America in North Augusta, South Carolina at 12:20 p.m. on April 23, 2009, along with three co-defendants, Quinton Harmon, Roosevelt Johnson, and David Dixon. Harmon, Johnson, and Dixon all testified against Martin at his trial, claiming that Martin orchestrated the bank robbery plan and was the masked robber who went inside and demanded money. App. 66 – 109; App. 125 – 153; App. 156 – 177. There was surveillance footage from just minutes before the bank was robbed of Harmon inside of the bank and of Johnson purchasing a drink in a nearby gas station. App. 210, l. 11 – 211, l. 16; App. 213, l. 21 – 214, l. 22; App. 218, l. 25 – 219, l. 12. A bank employee also saw Johnson's red Mustang speed away from the scene. She only saw two people in the Mustang and her recollection of the license plate number was just one digit off from Johnson's license plate. App. 58, l. 3 – 65, l. 10; App. 73, l. 10 – 74, l. 13; App. 211, l. 17 – 213, l. 20.

Other than the co-defendants' self-serving testimony, there was no evidence placing Martin at the scene of the robbery and none of the witnesses who were in or around the bank could identify the robber. App. 51, ll. 9-10; App. 57, ll. 12-14; App. 65, ll. 2-4; App. 113, ll. 17-19; App. 119, ll. 11-13; App. 155, l. 10 – 156, l. 3. Quinton Harmon's cousin, Tyewan Johnson (a.k.a. "Tidy"), and siblings, Kenyon and Jasmine Harmon, claimed that they saw Martin in the area the night before or morning of the bank robbery. App. 177, l. 13 – 193, l. 16. Jacob McKie, another cousin of Quinton Harmon, alleged that he provided Martin with a pellet gun on the morning of the robbery. App. 194, l. 16 – 199, l. 14. Interestingly, police found that the phone allegedly used by Martin to call his girlfriend after the robbery belonged to Jacob McKie's brother. App. 221, l. 15 – 222, l. 12. Marquet Widener, arguably the only disinterested party

who testified at the trial, recalled seeing Martin at Harmon's house "[a] couple of times" in 2009 and did not recall seeing Martin again after the bank robbery. App. 122, l. 19 – 124, l. 10. However, Widener admitted that she could not recall exactly when Martin stopped living in the area. App. 124, l. 16 – 125, l. 3.

Martin presented testimony from two witnesses, his grandmother, Dora McKenny, and his mother, Alba Fumbah. Both women said that Martin stayed with his grandmother in North Augusta from early January 2009 until Easter Sunday 2009, which fell on April 12, 2009. Fumbah picked Martin up from North Augusta that day and drove him back to Snellville, Georgia. McKenny went to visit them in Snellville approximately one week later. App. 239, l. 5 – 246, l. 24. Regarding the day of the robbery, April 23, 2009, Fumbah got her three younger children ready for school and then woke Martin up. She dropped Martin off at the intersection of Lawrenceville Highway and Jimmy Carter Boulevard because they did not live on the bus route and he need to take the bus to look for work. App. 244, ll. 10-17. Martin's grandmother, McKenny, had no information regarding the specific day of the robbery, but she never saw Martin in Aiken County following his return to Georgia on April 12, 2009. App. 239, l. 5 – 242, l. 22.

In his closing argument, trial counsel Hayes argued that there was abundant evidence against the co-defendants who testified against Martin. As such, their false accusations against Martin were the only bargaining chip they had to play in order to save themselves. App. 253, l. 3 – 260, l. 23.

Post-Conviction Relief Hearing

At the PCR hearing, Martin testified that the solicitor extended two plea offers to him, both of which he rejected because he did not commit the crime. App. 474, l. 21 – 475, l. 9.

Regarding his claims of ineffective assistance of trial counsel, Martin said that his defense attorneys failed to elicit the specific time that his mother, Alba Fumbah, dropped him off around Atlanta on the day of the robbery. Had counsel elicited testimony that Fumbah dropped Martin off at 11:15 or 11:30 a.m., it would have made it physically impossible for Martin to have been in North Augusta to commit the bank robbery at 12:20 p.m. that same day. Without that testimony, the jury may have believed that Martin was dropped off around Atlanta earlier in the morning, allowing him "a big window of opportunity" to get to South Carolina. Thus, Martin averred that the lack of specificity in the questioning was significant. App. 482, l. 13 – 485, l. 6. Notably, the jurors had Fumbah's testimony replayed for them during their deliberations.[1] App. 284, l. 18 – 285, l. 9. While Martin's written amendment to the PCR application included a further allegation that "[c]ounsel failed to call additional alibi witnesses at trial," he readily admitted that those witnesses were not present to testify at the PCR hearing and he was proceeding without them. App. 458; App. 475, l. 10 – 477, l. 4; App. 487, l. 24 – 488, l. 13.

Martin also testified that his attorneys failed to object, move to strike, or request a curative instruction when the State's witness, detective Luke Sherman,[2] commented upon Martin's assertion of his Fifth Amendment right to remain silent. App. 479, l. 8 – 480, l. 19. Specifically, when asked during cross-examination about whether co-defendant David Dixon provided a statement, Sherman responded: **"He [Dixon] never gave a statement to me. And**

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[1] The testimony for Quinton Harmon's sister, Jasmine Harmon, and from Martin's grandmother, Dora McKenney, was also replayed at the jury's request. App. 285, ll. 1-11; see State v. Blassingame, 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978) (finding when a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked); Rutland v. State, 415 S.C. 570, 579, 785 S.E.2d 350, 354 (2016), *reh'g denied* (May 18, 2016) (same).

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

Mr. Martin also with his attorney present didn't want to provide a statement." App. 229, ll. 11-18 (emphasis added). Relatedly, Martin complained that his attorneys failed to object during the solicitor's closing argument, when the solicitor's comments alluded to Martin's invocation of his right to remain silent. App. 478, l. 10 – 479, l. 19. In her closing argument, the solicitor said:

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

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

David Hayes, who acted as lead counsel at Martin's trial, said that while Martin was adamant about his alibi defense, he thought reasonable doubt was Martin's "best shot." He explained that the alibi defense was limited to Martin's mother and grandmother. App. 490, l. 11 – 492, l. 7; App. 507, l. 18 – 508, l. 22. On cross-examination, Hayes agreed that it is important to specify the exact times in presenting an alibi defense. He further identified the pre-trial statement that his office obtained from Martin's mother, Alba Fumbah, in which she indicated that she dropped Martin off "around 11:15, 11:30" on the day of the robbery. App. 498, l. 3 – 502, l. 19. Hayes admitted that he failed to elicit the specific time from Fumbah and that, if true, it would have made it impossible for Martin to have been in North Augusta at the time of the robbery. However, Hayes would only go so far as to say that such testimony "couldn't have

hurt" and "possibly" could have helped Martin's case. App. 502, l. 20 – 504, l. 4; see also App. 509, l. 12 – 510, l. 5.

Regarding detective Sherman's comment on Martin's failure to provide a statement, Hayes explained that even if he found the testimony objectionable, Gibbons was the attorney handling that witness' examination. Thus, he did not object because "it was not [his] witness" and he had "already been chewed out once for objecting to somebody else's witness." App. 495, l. 16 – 496, l. 1; App. 504, l. 5 – 505, l. 19. Hayes agreed with the assistant attorney general's assertion that the jury charge regarding a defendant's right to remain silent may have "cured" any error in Sherman's testimony. App. 496, ll. 7-25. The jury charge referenced read:

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

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

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

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

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

Order of Dismissal

In the PCR court's written order denying post-conviction relief, there were several subparagraphs under the heading "Ineffective Assistance of Counsel," which included: "Failure to object to solicitor's improper closing argument;" "Failure to call alibi witness;" and "Failure to request a curative instruction regarding Detective's testimony that Applicant chose not to give a statement." App. 523 – 525. Under the alibi heading, the PCR court wrote:

> Applicant has failed to meet his burden in proving that Trial Counsel was ineffective for failing to call additional alibi witnesses ***or for failing to examine them correctly at trial.*** Furthermore, Applicant failed to present testimony from any alibi witnesses at the evidentiary hearing, and thus cannot establish prejudice because their testimony is merely speculative.
>
> > In order to support a claim that trial counsel was ineffective for failing to interview or call potential alibi witnesses, a PCR applicant must produce the witnesses at the PCR hearing or otherwise introduce the witnesses' testimony in a manner consistent with the rules of evidence. The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice.
>
> *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Therefore, this allegation is denied and dismissed with prejudice.

App. 525 (emphasis added).

The PCR court likewise found that Martin failed to prove that counsel was ineffective for failing to request a curative instruction when the detective testified that Martin did not give a statement to police. The court found counsel's failure to object "was a strategic decision to avoid drawing attention to the testimony." App. 525. The court ruled: "Since Trial Counsel articulated a valid trail strategy in not objecting, this Court finds that this was neither ineffective nor prejudicial, and this allegation is denied and dismissed with prejudice." App. 526. Additionally, though noting that trial counsel testified that "he saw no reason to object to the solicitor's comments in closing argument," the PCR court again found that counsel articulated a valid trial strategy. App. 524. The PCR court further found that there was overwhelming of Martin's guilty, citing the testimony of Martin's co-defendants and asserting that "Applicant did not dispute the evidence against him." App. 526.

ARGUMENT

I.

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

Introduction

Trial counsel for Petitioner Martin failed to present a true alibi defense and failed to object to improper comments on Martin's post-arrest silence. As will be discussed more fully *infra*, while trial counsel averred that Alba Fumbah was called as an alibi witness for the defense, his failure to ask Fumbah the specific time that she dropped Martin off near Atlanta on the day of the robbery rendered her testimony useless to the defense, as it left open the possibility that Martin had time to travel from Atlanta to Aiken to commit the robbery. Trial counsel admitted that his office collected a written pre-trial statement from Fumbah, indicating that she dropped Martin off "around 11:15, 11:30," which would have made it impossible for Martin to have been in Aiken at 12:20 p.m. App. 498, l. 3 – 502, l. 23. The PCR court erred in finding that Martin could not satisfy the prejudice prong to prove ineffective assistance of counsel because he did not call Fumbah to testify at the PCR hearing. App. 525. On the contrary, testimony regarding the content of Fumbah's written statement, which could have been used to refresh her recollection or impeach, was sufficient extrinsic proof to support a finding of prejudice. See Rutland v. State, 415 S.C. 570, 577-78, 785 S.E.2d 350, 353-54 (2016) (finding the PCR judge's ruling as to the prejudice prong was not supported by the evidence where the petitioner produced extrinsic evidence of Kestner's statements at the PCR hearing). Tellingly, Respondent made no

attempt in its return to the petition for certiorari to defend the "failure to call witnesses" reasoning relied upon in the PCR court's order. See Respondent's Return, pp. 14-17.

Regarding trial counsel's failure to object to comments upon Martin's post-arrest silence, the PCR court erred in finding that such was a reasonable trial strategy, especially in light of the well-established case law explaining the necessity of a curative instruction under such circumstances. Further, the facts of this case fail the four-part test, as recognized in State v. Truesdale, 285 S.C. 13,328 S.E.2d 53 (1984) and State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), for determining whether the comment upon a defendant's assertion of the right to silences was harmless. The general jury charge regarding the defendant's right not testify at trial did not cure the prejudice to Martin. The PCR court further erred in finding that there was overwhelming evidence of guilt to negate a finding of prejudice as to all of Martin's allegations.

Right to Effective Assistance of Counsel

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86 (1984). A PCR applicant has the burden of proving his entitlement to relief by a preponderance of the evidence. Wigington v. State, 413 S.C. 578, 584, 776 S.E.2d 407, 410 (Ct. App. 2015) (citing Thompson v. State, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) and Rule 71.1(e), SCRCP). To prove ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense." Id. at 687. "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.

The Issue is Preserved

To the extent that Respondent continues to challenge the preservation of this issue in its brief, the Order of Dismissal, while poorly written, is sufficient for this Court's review. Pursuant to S.C. Code Ann. § 17-27-80, the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. Marlar v. State, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007) (citing Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992)). The failure to specifically rule on the issues precludes appellate review of the issues. Id.

In the Order of Dismissal, the PCR court acknowledged that courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel – first, whether counsel's performance was deficient, and second, whether counsel's deficient performance prejudiced the applicant. App. 522. However, in its rulings on the specific allegations of ineffective assistance, the PCR court never utilized the term "deficient" or "deficiency," though there was discussion of trial strategy in some sections. See App. 523 – 526. Regardless, the Strickland Court made clear that "[a] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." 466 U.S. at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice... that course should be followed." Id. As such, it is not unusual for a PCR court to deny an allegation based solely upon prejudice without a discussion of deficiency.

It is notable that Respondent previously admitted that the PCR hearing testimony regarding the deficiencies in Fumbah's examination was summarized in the Order of Dismissal. State's Return, p. 14; see App. 520 – 521. Moreover, the first sentence of the text immediately below the heading "failure to call alibi witness" in the Order was: "Applicant has failed to meet his burden in proving that Trial Counsel was ineffective for failing to call additional alibi witnesses **or for failing to examine them correctly at trial.**" App. 525 (emphasis added). While headings are a useful organizational tool, it is the substantive ruling contained within the text of the Order that must be reviewed to determine issue preservation. See S.C. Code Ann. § 17-27-80 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."). The paragraph went on to include: "Applicant failed to present testimony from any alibi witnesses at the evidentiary hearing, and thus cannot establish prejudice because their testimony is merely speculative;" and included a quote from Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538,540 (1995). App. 525.

In Marlar v. State, this Court reminded the bench and bar: "[C]ounsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to issuance of the order, and the PCR judge should carefully review the order prior to signing it." 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (quoting Pruitt v. State, 310 S.C. 254, 256, 423 S.E.2d, 127, 128). "Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRCP, motion to alter or amend *if the order fails to set forth the findings and the reasons for those findings as required by 17-27-80 and Rule 52(a), SCRCP.*'" Id. (emphasis added).

Unlike the present case, the PCR court in Marlar failed to specifically address any of the allegations raised by the applicant. 375 S.C. at 408, 653 S.E.2d at 266. Rather, the order

provided that Marlar's counsel rendered "reasonably effective assistance under the prevailing professional norms and demonstrated a normal degree of skill, knowledge and professional judgment that is expected of an attorney who practices criminal law." Marlar v. State, 373 S.C. 275, 278, 644 S.E.2d 769, 771 (Ct. App. 2007), rev'd by, 375 S.C. 407, 653 S.E.2d 266 (2007). It also included the following general ruling: "As to any allegations raised in the application or at the hearing not specifically addressed by this Order, this Court finds that the applicant failed to present any evidence regarding such allegations. Accordingly, this Court finds that the applicant failed to meet his burden of proof regarding them." Id. at 278-79, 644 S.E.2d at 771. While the Order of Dismissal in the present case contained an "all other allegations" paragraph similar to the one in Marlar, that is not the portion of the Order upon which Petitioner relies for the ruling on the alibi related allegation. See App. 527. The substantive paragraph, specifically finding that Martin failed to prove that trial counsel was ineffective for failing to examine the alibi witnesses correctly at trial because he could not prove prejudice, was sufficient to preserve this issue for appellate review. See App. 525.

It was not unreasonable for PCR counsel to conclude that the PCR court's reason for the denial of all allegations related to alibi was the failure to call anyone other than the applicant and attorneys as witnesses at the PCR hearing. This is especially so since the preceding sentence specifically referenced the failure to "correctly" examine the alibi witnesses at trial. See App. 525. The deficient examination of Fumbah was the only allegation to which that statement could have possibly referred.[3] As such, no motion to alter or amend was necessary in this case.

[3] Martin made a separate allegation regarding the failure to call additional alibi witnesses at trial, but he essentially abandoned it by failing to name the additional witnesses at the PCR hearing, much less call them testify or otherwise present their testimony. App. 475, l. 10 – 477, l. 4; App. 487, l. 24 – 488, l. 13.

Discussion

A. Trial counsel was deficient in failing to elicit the specific time from the defense witness in order to establish alibi.

At the PCR hearing, trial counsel Hayes described Martin as "adamant as to the alibi." App. 491, ll. 9-11. He further characterized both Martin's mother and grandmother as "alibi witnesses."[4] App. 28, ll. 2-9; App. 250, ll. 3-17; App. 278, l. 8-20; App. 491, ll. 11-21; App. 492, ll. 2-5; App. 498, ll. 3-14; App. 500, ll. 2-10. Fumbah was called as a defense witness at trial; however, Hayes failed to ask her about the specific time that she dropped Martin off near Atlanta on the morning of the robbery. App. 243, l. 3 – 246, l. 17; App. 500, l. 11 – 501, l. 5. Without specificity, Fumbah's trial testimony did not constitute a true "alibi," as it left open the possibility that Martin was dropped off earlier enough in the day to have traveled to North Augusta in time for the bank robbery. Trial counsel Gibbons recognized that the testimony adduced at trial was not "a true alibi defense," and instead averred that there was "some information that may have looked kind of like an alibi." App. 511, ll. 17-23. Nonetheless, the trial judge charged the jury on the defense of alibi. App. 278, ll. 8-20.

"[S]ince an alibi derives its potency as a defense from the fact that it involves the physical impossibility of the accused's guilt, a purported alibi which leaves it possible for the accused to be the guilty person is no alibi at all." State v. Robbins, 275 S.C. 373, 375, 271 S.E.2d 319, 320 (1980). Hayes admitted that his office obtained a written statement from Martin's mother, Alba Fumbah, which he reviewed in preparation for Martin's trial. Therein, she wrote that she dropped Martin off near Atlanta "around 11:15, 11:30" on the day of the

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[4] Martin's grandmother testified at trial about when Martin stopped living with her and moved back to Atlanta with his mother. However, she had no personal knowledge of Martin's whereabouts on the day of the robbery. App. 239, l. 5 – 242, l. 22.

robbery. If believed by the jury, her testimony would have made it physically impossible for Martin to have been in North Augusta to commit the bank robbery at 12:20 p.m. App. 498, l. 3 – 503, l. 12.

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

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

Following his conviction, Walker filed for PCR, alleging that his trial counsel was ineffective in failing to conduct an adequate investigation. 407 S.C. at 403, 756 S.E.2d at 146. Walker's trial counsel admitted reviewing video of the police interview and had "Robina Reed"

in her notes to interview but never did. Id. Though she said that her investigator spoke with or tried to speak with Reed, trial counsel never followed up with her investigator. Id. at 403-04, 756 S.E.2d at 146. Reed testified that she was never contacted about Walker's case and did not know why he disappeared in May 2002 until his PCR attorney contacted her. Id. at 404, 756 S.E.2d at 146. Though she could not provide specific dates and times, she testified that she and Walker spent every weekend together prior to his arrest. Id. The PCR court granted Walker's application, but the Court of Appeals reversed, finding that Walker's trial counsel was deficient but that Walker was not prejudiced. Id.

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

While Walker involved a failure to investigate, trial counsel's failure to utilize alibi evidence that was uncovered by his investigation is no less egregious than a failure to investigate alibi altogether. Here, like Walker, had the jury been presented with and believed testimony that Fumbah dropped Martin off around Atlanta at 11:15 a.m., at the earliest, it would have been physically impossible for Martin to have committed the bank robbery in North Augusta just an

hour and five minutes later at 12:20 p.m. Trial counsel knew that Fumbah had previously provided the specific time of the drop-off and it was not reasonable for trial counsel to fail to elicit that testimony at the trial.

B. Petitioner was prejudiced by the failure to present an alibi defense.

i. Fumbah's live testimony at the PCR hearing was not necessary, as trial counsel's testimony regarding her prior written statement was sufficient to establish prejudice.

The PCR court ultimately resolved the allegation about failure to properly examine the alibi witness under the prejudice prong of Strickland, ruling that Martin could not establish prejudice because he did not call Fumbah to testify at the PCR hearing. See App. 525. This was error, as testimony from Fumbah was not the only means of proving Martin's allegation. Trial counsel Hayes' testimony that Fumbah's written statement included the specific time that she dropped Martin off on the day of the robbery was sufficient proof, as he could have used the statement to refresh her recollection or to impeach Fumbah, if necessary. App. 501, l. 10 – 502, l. 19.

The PCR court relied on the following quotation from Glover, discussed *supra*, in support of its ruling, apparently overlooking the portion emphasized below:

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

318 S.C. 496, 497, 458 S.E.2d 538, 539 (1995) (emphasis added). In Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998), the defendant was convicted of first degree burglary and first degree criminal sexual conduct. This Court agreed that defense counsel provided ineffective assistance of counsel where he failed to call the triage nurse who treated the alleged victim as a defense

witness. 331 S.C. at 607-611, 503 S.E.2d at 469-71. The nurse's notes, which stated: "pt states pt did not penetrate the vagina. Was hit in face and laceration rt hand," were admitted into evidence at the PCR hearing. Id. at 609, 503 S.E.2d at 470. This Court rejected the State's argument, which relied on Glover, that Pauling failed to meet his burden of proof because the triage nurse did not testify at the PCR hearing. Id. at 610, 503 S.E.2d at 471. Specifically, this Court wrote:

> The State misconstrues *Glover*.... At the PCR hearing, petitioner presented evidence as to the nature of the nurse's testimony by introducing her triage notes. This evidence is sufficient under *Glover*. Similarly, the PCR judge concluded petitioner failed to establish prejudice because the triage nurse had no independent recollection of the case. The nurse's notes, however, could have been used to refresh her recollection at petitioner's trial.

Id. at 610-11, 503 S.E.2d at 471.

More recently, in Rutland v. State, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016), this Court reversed the PCR court's denial of relief, finding that "there is no evidence of probative value supporting the PCR court's ruling that petitioner failed to present extrinsic evidence of Kestner's prior inconsistent statements." The PCR court found that Rutland's trial counsel was deficient in failing to cross-examine the State's key witness, Kestner, as to her prior inconsistent statements that the victim was armed at the time of the shooting. 415 S.C. at 575-76, 785 S.E.2d at 352. However, the PCR court denied relief after determining that Rutland failed to prove he was prejudiced by the deficient performance because Kestner was not called to testify at the PCR hearing and Rutland did not "produce extrinsic evidence as to her prior inconsistent statements." Id. at 576, 785 S.E.2d at 352. Kestner's prior written statement was admitted at the PCR hearing, along with affidavits of individuals attesting to hearing Kestner say that the victim was armed, such that the PCR court's prejudice ruling was not supported by the record. Id. at 577, 785 S.E.2d at 353. Further, had Kestner denied her prior statements, trial counsel could have

impeached her with the written statement or news article in which she was quoted as saying the victim was armed, which would have affected her credibility. Id. at 577-78, 785 S.E.2d at 353-54. Thus, this Court found that there was "a reasonable probability the outcome of the trial would have been different had trial counsel impeached Kestner, as her prior inconsistent statements demonstrate all three witnesses to the incident attested at some juncture the victim was armed at the time of the shooting." Id. at 578, 785 S.E.2d at 353-54. Similarly here, if Fumbah could not recall the time, Hayes could have used the written statement to refresh her recollection. See Rule 612, SCRE (providing for the use of writing to refresh the memory of a witness). If Fumbah gave a different time than she did previously, Hayes could have used the written statement to impeach her. See Rule 607, SCRE (providing that a party can impeach its own witness); Rule 613, SCRE (providing for the examination of a witness concerning their prior statement and extrinsic evidence of a prior inconsistent statement).

Notably, Respondent abandoned the "failure to produce the witness" reasoning in its return to the petition for writ of certiorari and instead relied upon the trial judge's finding of overwhelming evidence of guilt. See Respondent's Return, pp. 14-16. Thus, even the State seems to recognize that there was no failure to produce the requisite evidence at the PCR hearing.

ii. There is a reasonable probability that the outcome of Martin's trial would have been different if a true alibi defense had been presented.

"In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018), *reh'g denied* (Mar. 29, 2018). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." Id. "Ordinarily, the existence of "overwhelming evidence" does not automatically

preclude a finding of prejudice." Id. at 189, 810 S.E.2d at 844. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice... the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of a 'reasonable probability... the factfinder would have had a reasonable doubt' cannot possibly be met." Id. at 191, 810 S.E.2d at 845.

Here, there is a reasonable probability, sufficient to undermine confidence in the outcome, that Martin's trial would have been different had the alibi defense been properly presented to the jury. "[T]he Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 2146 (1986). Trial counsel Hayes admitted that Martin was "adamant" about his alibi defense. App. 491, ll. 11-13. In the trial judge's charge to the jury, he explained: "In order to establish an alibi it must be shown that the defendant was at another specified place at the time the crime was committed, and that it was therefore impossible for him to have been at the scene of the crime." App. 278, ll. 8-12. Unfortunately, as presented by trial counsel, the testimony simply did not constitute an alibi at all. Respondent's argument that "it is unlikely that one further detail of the alibi would have swayed the jury," ignores the fact that the missing detail is *the detail* that would have made Fumbah an actual alibi witness. See Respondent's Return to Cert., pp. 16-17.

The jury was obviously interested in the evidence regarding Martin's whereabouts, as they requested to replay the testimony of both of the defense witnesses, Alba Fumbah and Dora McKenney, during their deliberations, as well as the testimony of Jasmine Harmon, the sister of co-defendant Harmon who claimed she saw Martin at their house on the morning of the robbery.

App. 284, l. 18 – 285, l. 9; see App. 187, l. 20 – 193, l. 19; App. 239, l. 5 – 246, l. 24. When a jury submits a question to the court following a jury charge, it is reasonable to assume the jury is focusing "critical attention" on the specific question asked. State v. Blassingame, 271 S.C. 44, 46–47, 244 S.E.2d 528, 530 (1978). Thus, it is fair to assume that the jury in this case gave serious consideration to the purported alibi defense but likely realized its lack of specificity.

Furthermore, on direct appeal the Court of Appeals found that the trial court erred in denying the motion to suppress the evidence of Martin's purported flight but ruled that the error was harmless in light of the overwhelming evidence of guilt. Significantly, there was *no* mention of the presentation of an alibi defense in the Court of Appeals' opinion. App. 337. Thus, not only is there a reasonable probability that the outcome of Martin's trial would have been different had a proper alibi defense been presented, there is a reasonable probability that the error found on the direct appeal would not have been held harmless.

iii. There was not overwhelming evidence of guilt against Martin to categorically preclude a finding a prejudice.

The evidence against Martin was not overwhelming. The PCR court was in no better position to review the trial transcript than this Court, and thus is not entitled to any deference regarding its assessment of the state's evidence against Martin. See Thompson v. State, __ S.C. __, 814 S.E.2d 487, 493 (2018), *reh'g denied* (June 12, 2018).

As an initial matter, there is no probative evidence to support the PCR court's finding that: "Applicant did not dispute the evidence against him." App. 526. Martin's chief allegation on PCR is that he had an alibi for the time of the robbery that was not properly presented. He maintained his innocence at trial, during sentencing, and at the PCR hearing. See App. 6, ll. 19-22; App. 297, l. 11; App. 475, l. 4. Moreover, this finding improperly suggests that Martin, who did not testify at his trial, had the burden of producing evidence at his criminal trial that would

dispute the evidence introduced by the State. See Thompson, 814 S.E.2d at 493-94 (holding that PCR court erred as a matter of law in considering the "absence of contradictory testimony" in its prejudice analysis). "At all times during a criminal trial, the State has the burden of proving a defendant's guilt beyond a reasonable doubt." Id. at 494. "At no time does a defendant assume the burden of either contradicting the State's evidence or proving himself not guilty." Id. "Since a criminal defendant does not have the burden of presenting contradictory evidence during his criminal trial, the absence of contradictory testimony should not have been considered by the PCR court in its prejudice analysis." Id.

Ultimately, the trial in this case was about credibility. The solicitor recognized such, arguing to the jury why they should believe the self-serving testimony of the co-defendants but acknowledging that ultimately the jury would decide the truth. App. 265, l. 8 – 268, l. 22; see State v. Gray, 304 S.C. 482, 484, 405 S.E.2d 420, 421 (Ct. App. 1991); State v. Holliday, 333 S.C. 332, 344, 509 S.E.2d 280, 286 (Ct. App. 1998). Notably, none of the employees or witnesses outside of the bank could identify Martin as the gunman and there was no forensic evidence linking him to the robbery. Despite the co-defendants claims that Martin was with them "scoping out" banks the night prior and at various locations on the day of the robbery, there was no surveillance footage presented showing Martin in the Augusta area at those times. See App. 221, l. 9 – 230, l. 4.

The only evidence against Martin came in the form of testimony from Martin's co-defendants and some of their relatives, all of whom had everything to gain and nothing to lose by pointing the finger at Martin. See App. 253, l. 17 – 254, l. 16. The co-defendants, Quinton Harmon, Roosevelt Johnson, and David Dixon, all gave the same general order of events from the night before and day of the robbery, which was an easy task in light of their admitted

involvement in the planning, execution, and concealment of the bank robbery. It was simple for them to either substitute or insert Martin into their version of events to protect themselves. Martin was just a boy who used to live in the area with his grandmother. He was not a part of their closely-knit circle of friends and family. See App. 67, l. 8 – 68, l. 6; App. 71, ll. 17-19; App. 126, l. 9 – 127, l. 9; App. 157, l. 8 – 158, l. 16; App. 178, ll. 3-12; App. 181, l. 20 – 182, l. 1; App. 184, l. 18 – 184, l. 2; App. 188, ll. 2-10; App. 193, ll. 3-16; App. 194, l. 20 – 195, l. 2.

It was in the details that the boys and their cohorts could not remain consistent. For example, the co-defendants all said that Tyewan "Tidy" Johnson and Jacob McKie were present during their discussions of the robbery and reconnaissance the night before the robbery. App. 71, l. 16 – 72, l. 24; App. 129, l. 2 – 130, l. 3; App. 159, l. 12 – 160, l. 14. Tidy said that he had no knowledge of any plan to rob a bank. App. 182, l. 3 – 183, l. 4. McKie likewise denied joining the co-defendants to "ride around" and look at banks. App. 197, l. 12 – 198, l. 7. Obviously at least two of the prosecutions' witnesses were lying, casting serious doubt on the testimony that they all provided.

Additionally, all three co-defendants gave different versions of when and where Martin allegedly changed clothes before the robbery. According to Quinton Harmon, Martin was wearing jeans, a white T-shirt and, white and black "Jordans" while the boys finalized their scheme at Dixon's house. When Harmon got back from checking to see how many people were inside the bank, he claimed that all four boys got into Johnson's car, where Martin put black pants and a black hoodie on over the top of his clothes. He then put another white T-shirt, that he got from Dixon, over his face. App. 76, ll. 11-22; App. 79, l. 6 – 80, l. 8. Roosevelt Johnson said that Martin did not change any clothing until after the robbery and was wearing boots, dark jeans, a black jacket, and a skull cap the entire morning. App. 135, ll. 6 – 15. David Dixon

claimed that Martin was wearing a fitted cap, wife beater, and black pants when they picked him up that morning. He said that Martin was outside of the car when he put on a black hoodie, gray wool cap, and T-shirt over his face, just before the robbery. App. 166, l. 20 – 167, l. 17.

The co-defendants also varied in their accounts of what Martin allegedly said when he returned to the car after the robbery. Harmon averred that Martin only said: "I did it y'all. I did it." App. 81, l. 23 – 82, l. 1. Johnson claimed he said: "Drive" App. 137, ll. 2-3. Dixon purportedly heard: "Go, go, go, go, go." App. 169, ll. 3-9.

None of the co-defendants had written plea agreements with the prosecution, though they each faced charges of armed robbery and conspiracy. App. 69, l. 21 – 70, l. 4; App. 127, l. 21 – 128, l. 11; App. 158, l. 19 – 159, l. 11. Dixon claimed he was testifying "just... to speak on my part on what I did." App. 159, l. 8-11. Harmon and Johnson were more candid, admitting that they were hoping that their testimony would prove beneficial in the resolution of their own charges. App. 70, ll. 5-7; App. 106, ll. 5-7; App. 128, ll. 9-11. In sum, the evidence in this case is far from "conclusive." See Smalls, 422 S.C. at 188, 810 S.E.2d at 843 (2018).

The PCR Court erred in finding that Martin could not prove that trial counsel was ineffective with respect the presentation of the alibi defense. This Court should accordingly reverse the denial of post-conviction relief and remand to the court of general sessions for a new trial.

II.

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

Discussion

The PCR court erred in finding trial counsel's failure to object to testimony and argument regarding Martin's post-arrest silence was a reasonable trial strategy, especially in light of the well-established case law explaining the necessity of a curative instruction under such circumstances. "Labeling counsel's actions as 'trial strategy' does not 'automatically immunize an attorney's performance from Sixth Amendment challenges.'" Stacey v. Solem, 801 F.2d 1048, 1051 (8th Cir. 1986) (quoting Kellogg v. Scurr, 741 F.2d 1099, 1102 (8th Cir. 1984)). Martin was prejudiced by trial counsel's deficient performance, and there is no overwhelming evidence of guilt to negate a finding of prejudice.

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

arguing: "And there has been some discussion of an alibi and but **we didn't hear about this alibi until today. Until yesterday**." App. 267, l. 24 – 268, l. 1 (emphasis added).

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

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

App. 513, ll. 9-21. He averred that an objection would not have changed the outcome of the trial and "would have brought more attention to that particular unresponsive answer than we wanted anybody to give." App. 513, l. 22 – 514, l. 2. In light of the settled case law prohibiting comments on an accused's post-arrest silence and articulating the necessity of a specific curative instruction, as will be discussed more fully below, the PCR court erred in ruling that trial counsel articulated a valid trial strategy for not objecting to Sherman's testimony or the solicitor's closing. See App. 524–526.

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

Trial counsel was deficient in failing to object to detective Sherman's testimony and the solicitor's comment during closing argument that referenced Martin's post-Miranda[5] silence. "An accused has the right to remain silent and the exercise of that right cannot be used against him." State v. Smith, 290 S.C. 393, 394, 350 S.E.2d 923, 924 (1986). "The State cannot, through

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

evidence or the solicitor's argument, comment on the accused's exercise of his right to remain silent." Id. at 394-95, 350 S.E.2d at 924 (citing State v. Woods, 282 S.C. 18, 316 S.E.2d 673 (1984); Doyle v. Ohio, 426 U.S. 610 (1976); see State v. Reid, 324 S.C. 74, 476 S.E.2d 695 (1996) (It is a violation of due process for the State to permit comment on a defendant's post-arrest silence since the giving of Miranda warnings might induce silence by implicitly assuring a defendant his silence will not be used against him.). "Testimony that a defendant refused to comment on an accusation against him is an unconstitutional comment on his post-arrest silence." Id. at 395, 350 S.E.2d at 924 (citing State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986) and State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982)).

In State v. Cockerham, 294 S.C. 380, 365 S.E.2d 22 (1988), this Court reversed the appellant's conviction and death sentence where the solicitor made a comment in the guilt-phase closing argument that "was an indirect but unmistakable reference to appellant's silence at trial." The Cockerham Court found that it was improper for the state to refer to a defendant's exercise of a constitutional right, and held that "[a]lthough indirect, the comment was nonetheless constitutionally impermissible." 294 S.C. at 381, 365 S.E.2d at 23. In State v. Gray, 304 S.C. 482, 405 S.E.2d 420 (Ct. App. 1991), the solicitor cross-examined the defendant for impeachment purposes regarding his silence after receiving Miranda warnings in violation of Doyle.[6] The Gray Court ruled that the improper examination violated the Due Process Clause of the Fourteenth Amendment. Id. at 484-85, 405 S.E.2d at 421.

In Edmond v. State, 341 S.C. 340, 534 S.E.2d 682 (2000), this Court reversed the PCR court's denial of relief where the detective's testimony and the prosecutor's closing argument

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

violated his constitutional rights to remain silent and be represented by counsel. At Edmond's trial, the detective testified: "I did pull him out [of jail] the next day to interview him. However, he invoked his right to counsel." 341 S.C. at 343, 534 S.E.2d at 684. He also testified on cross-examination that "petitioner invoked his right to remain silent and he 'honored that right.'" Id. In her closing argument, while describing the detective's testimony, the prosecutor stated, "And then the very next day [after his arrest] [petitioner] invoked his right to counsel, smartly enough." Id. at 343-44, 534 S.E.2d at 684. Edmond's trial attorney did not object to the testimony or argument. Id. at 344, 534 S.E.2d at 684.

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

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

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

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

Trial counsel's deficiency in failing to object to the testimony and argument regarding the defendant's post-arrest silence cannot be saved by the veil of trial strategy. In Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017), this Court explained:

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

(internal citations omitted). "Where counsel articulates a strategy, it is measured under an objective standard of reasonableness." Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Here, the PCR court erred in finding that trial counsel articulated a valid trial "strategy" as to both the detective's testimony and the prosecutor's argument. App. 524 – 525.

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

counsel's failure to object to improper hearsay "because he did not want to confuse or upset the jury" did not constitute valid strategy.

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

Though a direct appeal case, State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996), is instructive. There, the trial court sustained counsel's objection to the Doyle violation made during the solicitor's closing argument. 320 S.C. at 530, 466 S.E.2d at 365-66. However, the trial judge declined to give a curative instruction because he did not want to "exacerbate the situation." Id. at 530, 466 S.E.2d at 366. This Court found that the refusal to give a curative instruction was error. Id.

In State v. Smith, 290 S.C. 393, 395, 350 S.E.2d 923, 924 (1986), the State improperly used the defendant's post-arrest silence as substantive evidence of his sanity. This Court rejected the State's contention that the prejudicial effect was cured by the trial judge's curative instruction, finding that the "the trial judge's casual remark to 'forget' the question did not serve as a curative instruction." 290 S.C. at 395, 350 S.E.2d at 924. Rather, the jury should have been "specifically instructed to disregard the evidence, and not to consider it for any purpose during deliberations." Id.

Similar to the failure to request an alibi charge in Roseboro, *supra*, there was no reason for Martin's attorneys not to request a curative instruction to clarify that detective Sherman's testimony was improper and should not have been considered by the jury in Martin's case. See also Brown v. State, 383 S.C. 506, 517, 680 S.E.2d 909, 915 (2009) ("[A]lthough we do not believe trial counsel was disingenuous in articulating a trial strategy to explain his failure to object to these comments, we find this 'strategy' cannot be construed as a valid one given the evident impropriety of the solicitor's remarks.").

Regarding the solicitor's comment that the State had not heard of Martin's alibi until the day prior, neither trial attorney offered any strategic reason for failing to object. App. 267, l. 24 – 268, l. 1. Following this comment, the solicitor made a direct reference to the failure of Martin's mother, Fumbah, to go to police with the alibi information. App. 267, l. 24 – 268, l. 12 (emphasis added). However, also implicit in the argument was Martin's failure to tell the police about his alibi. Trial counsel Hayes said he did not see any reason to object to that portion of the solicitor's closing because that state argues that "every time." App. 506, l. 11 – 507, l. 10. The PCR court noted this testimony before finding that counsel articulated a valid trial strategy. App. 524.

In Bruno v. State, 347 S.C. 446, 451, 556 S.E.2d 393, 395 (2001), this Court found that although the PCR court found there was a valid strategy for the failure to object, counsel gave "absolutely no explanation for his failure to object." Thus, there was no evidence to support the PCR court's finding that the failure to object was counsel's strategic decision, such that the PCR court's finding on that issue could not be upheld. 347 S.C. at 451, 556 S.E.2d at 395-96. In Smith v. State, 386 S.C. 562, 568, 689 S.E.2d 629, 633 (2010), this Court ruled that "[t]he presumption of adequate representation based on a valid trial strategy disappears when trial

counsel acknowledged there was **no** trial strategy in mind when he failed to object to the improper hearsay and bolstering testimony." (emphasis in original). Because Martin's trial attorneys failed to articulate any strategic reason for failing to object to the solicitor's improper closing, there was no evidence to support the PCR court's finding.

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

Martin was prejudiced by trial counsel's deficient conduct. For a Doyle violation to be harmless, "the record must establish the reference to the defendant's right to silence was a single reference, which was not repeated or alluded to; the solicitor did not tie the defendant's silence directly to his exculpatory story; the exculpatory story was totally implausible; ***and*** the evidence of guilt was overwhelming." State v. Pickens, 320 S.C. 528, 531, 466 S.E.2d 364, 366 (1996) (emphasis added). Errors are harmless where they could not reasonably have affected the result of the trial. State v. Jolly, 304 S.C. 34, 402 S.E.2d 895 (1991).

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

"[b]ecause the State directly tied Williams' silence to his claim of self-defense, the error cannot be harmless." Id. at 289, 731 S.E.2d at 342.

Here, there was more than one reference to Martin's silence – a direct reference was made in detective Sherman's testimony and an indirect reference was made in the solicitor's closing argument. App. 229, ll. 16-18; App. 267, l. 24 – 268, l. 1. The solicitor further tied Martin's silence directly to his exculpatory story, arguing that the information about Martin's alibi could have been corroborated if the police had the information.[7] App. 268, ll. 1-8. She then argued that Martin's "story" that he came to North Augusta Technical College to attend school for three months and then returned to the live with his mother to be unemployed "doesn't make sense." App. 268, ll. 9-16. On the contrary, there are many legitimate reasons that a student would only attend the winter quarter of a technical school, including that he was not successful academically or could not afford the costs for the next semester. Familial obligations, like assisting in the care of younger siblings, may also necessitate a break in schooling. Notably, Martin had just returned to his mother's house on April 12, 2009, such that it was not unbelievable that he was still looking for work a week and a half later on April 23, 2009. Thus, Martin's defense was not "totally implausible." Lastly, as discussed *supra* in Issue I, the evidence against Martin was not overwhelming. Thus, applying the four-part test, the Doyle violation in this case was not harmless.

Further, the prejudice to Martin was not cured by the trial judge's general charge on the defendant's right not to testify. See App. 496, ll. 7-25; App. 505, l. 20 – 506, l. 1. In Gill v. State, 346 S.C. 209, 221, 552 S.E.2d 26, 33 (2001), this Court noted that "even if the solicitor

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

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." (citing Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997)). In both Gill and Johnson, the Court found that the prosecutor's arguments in closing did not violate Doyle. Gill, 346 S.C. at 221-22, 552 S.E.2d at 32-33 (solicitor argued "They are limited as to what they can do in the case. What can they do to put up a defense in the case? There is no defense in this case."); Johnson, 325 S.C. at 187-88, 480 S.E.2d at 735-36 (solicitor argued "You have seen that the defendant has not put up a defense, he's not testified,... you cannot even consider the fact that this man has not testified in this trial."). Nevertheless, the Courts found that any potential error was cured by the trial court's instruction to the jury that it could not consider Johnson's failure to testify in any way and could not use it against him. Gill, 346 S.C. at 222, 552 S.E.2d at 33; Johnson, 325 S.C. at 188, 480 S.E.2d at 735-36.

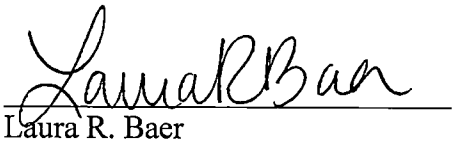
In the present case, the detective's original testimony specifically referenced Martin's failure to give a statement to police and retention of counsel. In State v. Pickens, 320 S.C. 528, 530, 466 S.E.2d 364, 366 (1996), this Court found that the trial judge erred in failing to give a curative instruction following a Doyle violation. This Court further ruled that "the trial judge's general charge, which was given shortly afterwards, did not cure the error." Pickens, 320 S.C. at 530, 466 S.E.2d at 366. Like Pickens, the jury general charge in this case did not cure the error because it referenced only the defendant's right not to testify at the trial. App. l. 273, l. 19 – 274, l. 7. A defendant's Fifth Amendment right against self-incrimination is multi-faceted. The charge to the jury failed to mention anything about the prohibition against the jury's consideration of Martin's post-arrest silence. A specific curative instruction tailored to the violation in this case was never given.

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

The PCR Court erred in finding that Martin could not prove that trial counsel was ineffective with respect the failure to object to the Doyle violations. This Court should reverse the denial of post-conviction relief and remand to the court of general sessions for a new trial.

CONCLUSION

Based on the foregoing, Petitioner Anthony Martin respectfully requests that this Court reverse the denial of post-conviction relief and remand his case for a new trial.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 17th day of July, 2018.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Aiken County

Honorable Robert E. Hood, Circuit Court Judge

ANTHONY MARQUISE MARTIN,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner in the above referenced case has been served upon Julie Coleman, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Anthony Marquise Martin, at Tyger River Correctional Institution, 200 Prison Road, Upper Yard, Enoree, SC 29335-9308, this 17th day of July, 2018.

Laura R. Baer
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 17th day of July, 2018.

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