STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Edgar W. Dickson, Circuit Court Judge

Appellate Case No. 2017-000105

Thomas E. Davis,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S QUESTIONS PRESENTED

1. Did the PCR court correctly find Petitioner did not knowingly and intelligently waive his right to a direct appeal?

2. Is there any probative evidence in the record to support the PCR court's finding trial counsel was not deficient, nor was Petitioner prejudiced by any alleged deficiencies?

STATEMENT OF THE CASE

On September 8, 2011, the Florence County Grand Jury indicted Petitioner, along with codefendants Tyon Michael Evans (Evans) and Rasheem Kevin Thomas (Thomas), for attempted murder and armed robbery. The Grand Jury additionally indicted Petitioner for possession of a weapon during the commission of a violent crime (2011-GS-21-1371). Richard Strobel represented Petitioner. Deputy Assistant Solicitor John Jepertinger prosecuted the case for the State. On June 18, 2012, Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury. On June 20, 2012, the jury convicted Petitioner as indicted of armed robbery and possession of a weapon during the commission of a violent crime and of the lesser-included offense of assault and battery of a high and aggravated nature. Judge Russo sentenced Petitioner to concurrent terms of imprisonment of thirty years for armed robbery and twenty years for assault and battery of a high and aggravated nature, plus a consecutive term of five years for the weapons charge. Petitioner did not file a notice of appeal.

On March 27, 2013, Petitioner filed an application for post-conviction relief. The State filed a return on December 17, 2013. On October 9, 2014, an evidentiary hearing was held before the Honorable Edgar W. Dickson. Jonathan D. Waller represented Petitioner at the PCR hearing. Croom Hunter represented the State. In an amended order filed December 29, 2016, Judge Dickson denied relief but found Petitioner was entitled to a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974). On January 19, 2017, Petitioner filed and served his notice of appeal. Petitioner filed a Petition for a Writ of Certiorari on March 2, 2018. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

On April 6, 2011, Johnny Henicks (Henicks) was at home with his three-year-old son, Shaheem, when a Nissan Altima pulled into his mobile home park. App. p. 61. Evans was driving with passengers Thomas and Petitioner. App. p. 61. Henicks testified a person matching Petitioner's description walked up behind him and struck him in the back of the head while his son sat on his lap. App. pp. 73-77. Henicks testified he threw his wallet out in hopes of saving his life. App. pp. 79-80. According to Henicks, Petitioner then shot him and took the gold chain from around his neck. App. pp. 77-80. Henicks testified Petitioner then fled back to the car, which drove off. App. p. 77. Arenthus Garrett, who was visiting a neighbor of Henicks' at the time of the incident, testified he looked out the window after hearing a shot and saw the shooter, whom he described as a man wearing a light-colored shirt with dreadlocks pulled into a ponytail who bore a "strong resemblance" to Petitioner. App. pp. 88-90, 96. Garrett testified the shooter got into the backseat of the Nissan Altima and left. App. p. 92. Garrett further testified he observed the Altima's license plate and remembered the tag had two Z's. App. p. 92.

Almost immediately after the Altima pulled away from the shooting, a vehicle driven by undercover Florence Police Department officers took up pursuit. App. pp. 101-02. Officer Rodney Fridley testified that after a high speed chase, the Altima[1] eventually came to a stop, and three people jumped out. App. pp. 102-05. All three occupants of the car were eventually apprehended. App. pp. 105-06. Officer Jessie Collins testified he observed Petitioner hiding underneath a house shortly after the suspects bailed out of the car, and he was forced to tase Petitioner after a struggle. App. pp. 115-16. Officer Collins testified, of the three suspects, Petitioner was the only one with dreadlocks. App. p. 117.

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[1] Officer Fridley testified dispatch notified officers to be on the lookout for a white Nissan Altima with license plate FZZ526. App. p. 101.

Officer Kendrick Spears of the Florence Police Department testified he found a gun in a wood line in the same direction Petitioner and Thomas ran. App. pp. 150-51. Sergeant Nida of the Florence Police Department testified the victim's wallet was recovered at the scene near where the suspects were apprehended. App. pp. 160-61. Ira Parnell, the SLED firearms examiner, testified the bullet recovered from the scene of the shooting matched the gun recovered from the woods near where the suspects fled. App. pp. 184-86, 218, 220, 227. Ila Simmons, also of SLED, testified both of Petitioner's hands tested positive for traces of gunshot residue, and none of the codefendants tested positive for gunshot residue. App. pp. 194-97.

Evans, Petitioner's codefendant, testified against Petitioner. App. pp. 245-70. Evans testified he drove the car to the trailer park where Henicks lived, and Thomas rode up front, while Petitioner was in the back passenger seat. App. p. 251-52. Evans testified Petitioner got out of the car at the victim's house, and a few minutes later Evans heard a gunshot. App. pp. 254-56. According to Evans, Petitioner then came back to the car, jumped in, and said to go. App. p. 256. Evans testified he saw the gun in the backseat with Petitioner when he looked in the rearview mirror. App. pp. 256-57.

Petitioner presented a much different story when he took the stand in his own defense. App. p. 284. Petitioner claimed he went to Evans' home and smoked marijuana, after which Evans said "come ride with me." App. pp. 289-90. Petitioner testified he knew nothing about the gun but did admit he sat in the backseat of the car as they drove to the trailer park where Henicks lived. App. p. 291. According to Petitioner, the other codefendant, Thomas, spotted the victim, who had allegedly been in a fight with Thomas a few weeks earlier. App. pp. 289, 291-92. Petitioner testified he was going get out of the car to backup Thomas in a confrontation with Henicks until Evans pulled the gun out, at which point Petitioner decided to stay in the car. App.

pp. 292-93. Petitioner then testified Thomas got out of the car, walked up behind Henricks and hit him in the head with the gun, then shot him. App. pp. 294-95. Petitioner testified he never shot anyone, never robbed the victim, and never touched the gun. App. p. 299.

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, 810 S.E.2d 836 (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, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. 668.

ARGUMENT

I. The PCR court correctly found Petitioner did not knowingly and intelligently waive his right to a direct appeal.

Counsel testified he did not file an appeal because Petitioner did not ask him to, nor did he see any meritorious issues for appeal. App. pp. 471-72. Petitioner testified he was not aware of his right to an appeal. App. pp. 430-31, 442. However, following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. White, 263 S.C. 110, 208 S.E.2d 35. In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in Anders v. California, 386 U.S. 738 (1967). Id. Accordingly, Respondent agrees, based on the testimony presented at the evidentiary hearing, there is probative evidence in the record to support the PCR court's finding Petitioner did not knowingly and intelligently waive his right to a direct appeal. App. pp. 540-41.

II. There is evidence of probative value in the record to support the PCR court's finding trial counsel was not deficient, nor was Petitioner prejudiced by any alleged deficiencies.

Petitioner alleges his trial counsel was ineffective for the following reasons: failing to adequately prepare for trial with Petitioner; failing to make an opening statement; failing to move to sequester the witnesses; failing to impeach a witness for the State with his prior record; failing to impeach the testifying codefendant about possible bias towards the State; failing to engage in meaningful cross-examination of the State's witnesses; failing to object to any of the State's evidence; failing to object to the Court's charge that implied malice is sufficient to sustain a conviction attempted murder; failing to object to the "hand of one, hand of all" charge as being inapplicable in this case; and failing to object to the Assistant Solicitor's alleged inappropriate

comments during closing argument. Essentially, Petitioner alleges he is entitled to a new trial based on the cumulative error doctrine. PWC pp. 9, 11.

However, after carefully considering these allegations,[2] the PCR judge denied Petitioner's application, correctly finding Petitioner failed to meet his burden of proof in showing either deficiency or prejudice because trial counsel articulated reasonable trial strategies in response to each of Petitioner's allegations. App. pp. 521-42.

A. South Carolina has not recognized the cumulative-error doctrine, and in any event, cumulative-error analysis is in applicable to Petitioner's case, so post-conviction relief is not appropriate on that basis.

Petitioner argues, essentially, the cumulative effect of all trial counsel's errors prejudiced him to the extent he is entitled to a new trial. PWC pp. 9, 11. This argument is without merit, as not only did trial counsel not commit any errors, but this Court has never recognized the cumulative-error doctrine as a basis for post-conviction relief. See, e.g., Simpson v. State, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 324-25 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina.").

[2] As discussed more fully below, Respondent contends the allegations trial counsel failed to move to sequester the witnesses, to impeach the testifying codefendant about possible bias towards the State, and to object to the Court's charge that implied malice were not raised to the PCR court and are therefore not preserved for this Court's review. See, e.g., United Carolina Bank v. Caroprop, Ltd., 311 S.C. 376, 429 S.E.2d 197 (Ct. App. 1993) (explaining an issue was not preserved for appeal where the issue was raised but not ruled on by trial court and the party raising the issue made no motion asking court to rule on it).

Many other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative-error analysis of the prejudice prong of Strickland is inappropriate, and the correct analysis focuses upon each individual allegation of ineffective assistance. Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995). As the Fourth Circuit Court of Appeals explained in Fisher v. Angelone:

> Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error. . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of the Fourth Circuit individually to assess claims under Strickland v. Washington. . . . To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. In so holding, we are in agreement with the majority of our sister circuits that have considered the issue.

Id. (citations omitted). See also Mueller v. Angelone, 181 F.3d 557, 586 n.22 (4th Cir. 1999) ("Petitioner also urges us to consider the cumulative effect of his ineffective assistance of counsel claims rather than whether each claim, considered alone, establishes a constitutional violation. This argument is squarely foreclosed by our recent decision in Fisher, 163 F.3d [...at] 852-53 [...]"). The Fourth Circuit further explained, "legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient." Fischer, 163 F.3d at 852 n. 9.

In this case, none of the actions Petitioner alleges were error were found to be so by the PCR court, nor did the PCR court find Petitioner was prejudiced by any of the alleged errors. App. p. 509. As a result, a cumulative-error analysis would be inappropriate on these facts under

any interpretation of the doctrine. This Court should therefore deny the Petition, and the PCR Court's findings should be affirmed.

B. Petitioner's allegations concerning trial counsel's failure to move to sequester witnesses, to impeach the testifying codefendant as to possible bias towards the State, and to object to the trial court's jury instruction concerning implied malice were not ruled upon by the PCR court, nor were they addressed in Petitioner's motion to amend the order the dismissal, and therefore, they are not preserved for this Court's review.

Petitioner's allegations concerning trial counsel's failure to move to sequester witnesses, to impeach the testifying codefendant as to possible bias towards the State, and to object to the trial court's jury instruction concerning implied malice are not preserved and should not be considered in any calculation of prejudice to Petitioner or as part of a cumulative-error analysis, should this Court decide it is appropriate.

It is axiomatic that an issue cannot be raised for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). As this Court has repeatedly noted, when an "issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred." Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)). Further, even if an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Here, Petitioner's application contained only a broad allegation of ineffective assistance of counsel. App. p. 388. At the evidentiary hearing, Counsel was briefly questioned about these issues, but Petitioner did not move to amend his application to include these specific allegations.

App. pp. 410-79. Therefore, the PCR court properly did not make any findings of fact as to these issues in its original Order of Dismissal, nor did Petitioner include them in his in his post-trial motion to amend pursuant to Rule 59(e), SCRCP. App. pp. 499-520. Thus, Petitioner has waived these allegations, precluding review by this Court. See Smith v. State, 404 S.C. 493, 745 S.E.2d 378 (Ct. App. 2012) (find an issue unpreserved for appellate review where, although trial counsel was questioned about the issue at the PCR hearing, it was not plead in the application or addressed in the PCR court's order, and PCR counsel did not file a motion pursuant to Rule 59(e)); Marlar v. State, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) (holding that when a PCR court fails to make specific findings as to an issue, a Rule 59(e) motion is necessary to preserve the issue for appeal).

C. As to the remaining allegations, there is probative evidence to support the PCR court's finding trial counsel was not deficient because he articulated reasonable trial strategies to explain his decisions and performance at trial, nor was Petitioner prejudiced by any of trial counsel's alleged deficiencies.

Petitioner contends, in general, trial counsel failed to adequately prepare for trial with him. Specifically, Petitioner alleges a litany of complaints, as articulated above. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. 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)). Further, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)).

1. There is probative evidence in the record to support the PCR court's finding trial counsel adequately prepared for trial.

To establish counsel failed to adequately prepare for trial, Petitioner must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel more fully prepared. See Palacio v. State, 333 S.C. 506, 511 S.E.2d 62 (1999) (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Moorehead v. State, 329 S.C. 329, 496 S.E.2d 415 (1998) (holding trial counsel's failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to the result); Davis v. State, 326 S.C. 283, 486 S.E.2d 747 (1997) (denying relief where applicant failed to present witnesses or specific testimony establishing applicant would have had a defense with additional time to prepare for trial); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (finding applicant was not entitled to relief where no evidence was presented

at the PCR hearing to show how additional preparation would have had any possible effect on the result at trial).

Although Petitioner testified that he first met with Counsel only one time, and he and Counsel never discussed his trial or the State's evidence, the PCR court expressly found this testimony was not credible. App. p. 506. In contrast, Counsel testified he met with Petitioner at least a dozen times at the detention center prior to trial, and he also spoke on the phone with Petitioner multiple times. App. p. 449. Counsel testified he did not need to meet with Petitioner any more than he did in order to prepare for trial. App. p. 449. Counsel testified he went over the elements of the charges against Petitioner, he filed Rule 5 and Brady motions and reviewed the discovery materials with Petitioner, including the gunshot residue test from SLED. App. pp. 503-04. In addition, Counsel testified he and Petitioner discussed Petitioner's version of events, and Petitioner never gave him the names of any potential witnesses to investigate. App. p. 503.

Most importantly, at the PCR hearing, Petitioner did not present any witnesses or defenses he did not have a chance to present at trial, so any claim of prejudice to Petitioner is purely speculative. App. p. 499. Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. Porter v. State, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing, 329 S.C. at 334, 496 S.E.2d at 417). Therefore, the PCR court correctly found Counsel was not deficient in his investigation and preparation of the case for trial, nor was Petitioner prejudiced by any of Counsel's alleged errors. App. pp. 531-32, 540.

2. There is probative evidence in the record to support the PCR court's finding trial counsel was not ineffective for waiving opening argument because trial counsel articulated a reasonable trial strategy for doing so.

Petitioner also contends Counsel was ineffective for waiving his opening statement. As Counsel explained at the evidentiary hearing, he did not want to lock the defense into a specific version of events because Counsel was not sure Petitioner would not change his story or decide not to take the stand at all. App. pp. 474-73, 506. Counsel also testified he elected to not give an opening statement because he did not want to put certain things in front of the jury prematurely, until he "got them straight." App. p. 465. Counsel further testified he was concerned by Petitioner's insistence that he take the stand in his own defense, and Petitioner testified against Counsel's advice. App. pp. 451-52.

Accordingly, the PCR court correctly found Counsel's concern over presenting conflicting theories of the case to the jury or being unable to back up his opening statement should Petitioner change his mind about testifying was sound, and the decision to waive opening argument was reasonable. App. p. 492. 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). Furthermore, Petitioner has not shown any prejudice from Counsel's decision to waive his opening statement.

3. There is probative evidence in the record to support the PCR court's finding trial counsel was not deficient in failing to impeach a State's witness with his prior record.

Petitioner also contends Counsel was ineffective for not attempting to impeach the State's eyewitness Arenthus Garrett based on his prior criminal record. When asked about his trial strategy in questioning Garrett, Counsel stated he felt there was no need to bring up Garrettt's

criminal record because Garrett was "a victim" and "an eyewitness." App. p. 474. Counsel testified he felt there was little to be gained by attempting to impeach the witness that way. App. p. 474. Additionally, the State questioned Garrett about his criminal history on direct examination, so the information was already in front of the jury. App. pp. 93-94.

Therefore, because Counsel articulated a reasonable strategy for not engaging in this particular line of cross-examination and because Petitioner was not prejudiced by the decision, the PCR court correctly found Counsel was not ineffective on this ground. See Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) ("[D]ecisions primarily involving trial strategy and tactics may be made by trial counsel. Examples of such decisions include 'which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined.'" (quoting Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998))).

4. There is probative evidence to support the PCR court's finding trial counsel was not deficient in his cross-examination of the State's witnesses.

Petitioner contends "trial counsel's examination with regard to all witnesses was incredibly poor," and "the strongest piece of evidence. . ., [that] Petitioner had gunshot residue on his hands and his codefendants did not. . . could have easily been cast into doubt with proper cross-examination." PWC p. 11. The specific issue of cross-examining the gunshot residue examiner was not raised by Petitioner at the evidentiary hearing or addressed in the PCR court's Order of Dismissal or Petitioner's Rule 59(e) motion. App. pp. 410-79, 517-42. However, the order did address Petitioner's allegation Counsel did not adequately rebut the evidence presented by the State's crime scene expert, Paul Bird. App. p. 550. Counsel cross-examined Bird

regarding his failure to fingerprint the getaway car and various other pieces of evidence, including the gun magazine and shell casings. App. pp. 237-241.

Petitioner also offered his own explanation for how he got gunshot residue on his hands, testifying he had been shooting "in the country" earlier that afternoon before meeting up with Thomas and Evans. App. pp. 306-07. In addition, Officer Keith Von Lutcken, who collected the gunshot residue samples from Petitioner and his codefendants, testified on cross-examination "[g]unshot residue is just a very fine powder, and just merely a ceiling fan can blow it away." App. p. 137. Von Lutcken also confirmed the residue could be transferred to a person's hands if the person merely touched an object with residue on it. App. pp. 136-37. Further, Ila Simmons, the SLED gunshot residue analyst conceded on cross-examination the residue found on Petitioner's hands could have come from any gun, and there was no way to determine specifically whether it came from the gun used in the shooting. App. pp. 198-99. Additionally, Simmons testified as to the fragility of gunshot residue and explained "everything someone does with their hands – handling a towel, putting clothes on, washing their hands, showering – can remove gunshot residue." App. p. 191. Finally, Counsel referred to all of this testimony in his closing argument and pointed out the presence of the gunshot residue on Petitioner's hands could be explained by something other than actually firing a weapon, such as picking it up from the back seat of the police car. App. pp. 323-25.

Accordingly, there is probative evidence in the record to support the PCR court's finding Counsel's performance with regards to cross-examining the State's witnesses was not deficient. App. pp. 533-34.

5. There is probative evidence in the record to support the PCR court's finding trial counsel was not deficient for consenting to the admission of the State's evidence prior to trial where trial counsel explained he saw no viable basis for objection and did not wish to delay the trial over non-meritorious issues.

Petitioner further alleges Counsel was ineffective because he agreed to the admission of the State's evidence at the beginning of the trial, prior to the State's witnesses laying a foundation of its admission. At the evidentiary hearing, Counsel explained his general practice is to review the State's proposed exhibits before trial and "put it into evidence before the trial of the case to save time." App. p. 464. However, Counsel also testified "if it was evidence that needed a foundation, then [he] would not approve for it to be put into evidence before the trial of the case." App. p. 474. Thus, Counsel offered a reasonable explanation for this decision, and the PCR court was correct in finding he was not deficient. See Underwood v. State, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective.").

In addition, Petitioner offered no evidence at the PCR hearing that any of the evidence was actually inadmissible, so the PCR court's finding Petitioner did not prove any prejudice was also correct. See, e.g., Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995) ("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.").

6. There is probative evidence in the record to support the PCR court's finding trial counsel was not deficient for failing to object to the "hand of one, hand of all" charge being applicable in this case.

Petitioner next contends Counsel was ineffective for not objecting when the solicitor requested the judge give the jury a "hand of one, hand of all" charge. However, Counsel testified at the PCR hearing that he did not object to the charge because he felt it could be beneficial to his client. App. p. 474. Petitioner brought up the theory of accomplice liability on his own, admitting he knew he and his codefendants could all be charged "for one bullet being shot," and his testimony provided a basis for this jury charge since his story was that he was not the shooter, but he was planning to help Thomas confront the victim. App. p. 293-94, 307, 439.

"The law to be charged must be determined from the evidence presented at trial." State v. Knoten, 347 S.C. 296, 302, 555 S.E.2d 391, 394 (2001). "A request to charge a correct statement of the law on an issue raised by the indictment and the evidence presented at trial should not be refused." State v. Austin, 299 S.C. 456, 458, 385 S.E.2d 830, 831 (1989). Because the charge was arguably supported by the evidence presented at trial, specifically Petitioner's own testimony, the PCR court correctly found Counsel was not deficient for failing to object to the charge. App. pp. 534-35. Additionally, there was ample evidence by which the jury could have convicted Petitioner as a principal – namely the gunshot residue on his hands and not on his codefendants' and the credible testimony of the eyewitness who described the shooter as having dreadlocks and a white shirt, and Petitioner was the only codefendant with long dreadlocks. Therefore, the PCR court correctly found Petitioner failed to prove any prejudice. App. p. 535.

7. There is probative evidence in the record to support the PCR court's finding trial counsel was not deficient for failing to object to the Assistant Solicitor's comments during closing argument.

Finally, Petitioner contends Counsel was ineffective for not objecting to the solicitor's statement during closing arguments to the effect that the solicitor felt "sorry for [Petitioner] for his ignorance of in terms of that lifestyle [in the hood]." App. p. 345. In response, Counsel testified he generally only objects during closing arguments if there is something "major" to which he thinks he should object because he believes it is rude and potentially creates a bad impression of him and his client with the jury. App. p. 477. He also testified he did not believe this statement rose to the level where objection was necessary and the solicitor was entitled to his opinion. App. p. 475.

"[Closing] argument must not be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences that may be drawn therefrom." Von Dohlen v. State, 360 S.C. 598, 609-10, 602 S.E.2d 738, 744 (2004). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the [petitioner] has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. While the solicitor's statement was arguably objectionable, Petitioner did offer any proof the solicitor's statement so injected the trial with unfairness that it tainted the result and prejudiced Petitioner. The solicitor was essentially echoing Petitioner's own testimony that he "was a street dude" and his plan when he

bailed out of the car was to "just get to the hood." App. pp. 296-97. Additionally, the comment was only a small part of the solicitor's argument, which stretched over sixteen pages of the transcript, and the statement was not repeated. App. pp. 330-46. Accordingly, the PCR court correctly found to Counsel's failure to object was not ineffective because Petitioner was not prejudiced by the lack of objection.

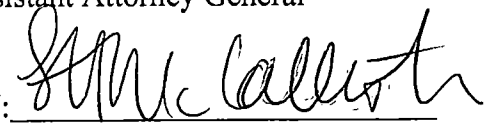
CONCLUSION

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 nor was Petitioner prejudiced. 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: 
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ATTORNEYS FOR RESPONDENT

August 1, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Florence County
Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-000105

THOMAS E. DAVIS,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Rose Mary Parham, Esquire
Parham Law Firm, LLC
Post Office Box 1514
Florence, South Carolina 29503

This 1st day of August, 2018

CAROLINE COLLINS
Administrative Coordinator

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG 01 2018
S.C. SUPREME COURT

August 1, 2018

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

Re: Thomas E. Davis v. State of South Carolina
Lower Court Case No. 2013-CP-21-0846
Appellate Case No. 2017-000105

Dear Mr. Shearouse:

Attached are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above referenced case for filing in your office.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
S.C. Bar No. 79054

LAM/cc

cc: Rose Mary Parham, Esquire