STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-002102

Jermaine Mayweathers,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI PURSUANT TO AUSTIN V. STATE

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
SC Bar #101254

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

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III. Did the PCR court correctly find Counsel subjected the prosecution's case to meaningful adversarial testing?

STATEMENT OF THE CASE

Jermaine Mayweathers (Petitioner) was indicted at the July 2009 term of the Florence County Grand Jury for homicide by child abuse (2009-GS-21-1048). He was represented by Carrington Salley Baker Wingard, Esquire (Counsel). On September 21-23, 2009, Petitioner proceeded to trial before the Honorable Ralph King Anderson and a jury, wherein Petitioner was convicted as indicted. Judge Anderson sentenced Petitioner to a term of imprisonment of thirty years.

Thereafter, a notice of appeal was filed on Petitioner's behalf at the South Carolina Court of Appeals. Wanda H. Carter, Esquire, of the South Carolina Office of Indigent Defense – Appellate Defense Division, perfected the appeal, raising the issue of whether Petitioner's case should have been transferred from Family Court to General Sessions. The South Carolina Court of Appeals affirmed Petitioner's conviction on December 9, 2011. State v. Mayweathers, Op. No. 2011-UP-549 (S.C. Ct. App. filed December 9, 2011). The Remittitur was returned to the circuit court on January 5, 2012.

Petitioner filed his first post-conviction relief (PCR) application (2012-CP-21-2999) on November 9, 2012, alleging ineffective assistance of trial counsel in that Petitioner did not feel he met with Counsel "on enough occasions to properly prepare for trial," Counsel did not represent him properly or effectively at the Family Court waiver hearing or at the trial itself, and witnesses were not interviewed and family members were not called to testify on his behalf. An evidentiary hearing was held on February 27, 2013. Henry M. Anderson, Jr., Esquire, represented Applicant. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent. The Honorable William H. Seals denied and dismissed the application with prejudice by written order filed December 10, 2013. Applicant did not appeal Judge Seals' order.

Petitioner filed a second application for PCR on December 10, 2014, alleging his previous PCR counsel was ineffective for failing to file a notice of appeal following the denial of Petitioner's first action. Respondent made its Return on July 17, 2015. An evidentiary hearing on the matter was convened on August 28, 2017, at the Florence County Courthouse before the Honorable Thomas A. Russo. Petitioner was present at the hearing and represented by Jonathan Waller, Esquire. Lindsey A. McCallister, Esquire, of the South Carolina Office of the Attorney General represented Respondent. At the hearing, Respondent introduced evidence from PCR counsel's file regarding Petitioner's request for an appeal. Respondent did not contest Petitioner's assertion he had not freely and voluntarily waived his right to appeal and agreed Petitioner was entitled to belated appellate review of the denial of his first PCR application pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The PCR court issued an order filed September 27, 2017, granting such relief.

Through counsel, Petitioner filed a timely notice of appeal on October 10, 2017.[1] Petitioner filed a Petition for a Writ of Certiorari on June 20, 2018. This Return to the Petition for a Writ of Certiorari follows.

[1] Petitioner's notice of appeal stated he was challenging the September 17, 2017 order issued by Judge Russo, as well as his conviction for indictment number 2009-GS-21-1048, "as ordered by Judge Russo in the same order." However, Judge Russo's order granted Petitioner "the right to seek a belated appellate review of case 2012-CP-21-2999 pursuant to Austin v. State." Petitioner's case has already received direct appellate review, and Petitioner's current Petition for Writ of Certiorari only raises PCR issues consistent with Judge Russo's order. Respondent considers this language in the notice of appeal to be merely a scrivener's error.

STATEMENT OF THE FACTS

On July 24th, upon Deborah Williams' (Mother) return from work, Victim ran up to Mother when she arrived home, and Mother noticed a bump on his head. App. pp. 507-08. Mother asked about the bump, but before Victim could reply, Petitioner said it occurred when they were all playing and Victim hit it on the bunk bed. App. p. 508, 533. Victim told Mother his head did not hurt, but Mother watched him, and he stayed up late watching movies with the family. App. pp. 508-09, 511, 537. The next day, July 25, 2008, Mother went to work and left her two young sons, K.P. and Shaquan (Victim), in the care of fifteen-year-old Petitioner. App. pp. 505-06, 519. Petitioner was the son of Mother's live-in boyfriend, William Jerido, who had left the house earlier that morning. App. pp. 511-12, 519-20. Mother testified Victim was fine that morning when she peeked into his room before leaving for work. App. pp. 505-06.

When Mother arrived home that afternoon around 5 p.m., she found only Petitioner and K.P. in the home. App. p. 513. Petitioner told her Victim had been taken to the hospital. App. p. 514. Mother, Petitioner, and K.P. immediately went in Mother's car to the hospital. App. p. 514. When Mother asked Petitioner what happened, he claimed K.P. and Victim were fighting, and he separated them. App. p. 514. Victim died in the hospital the next day. App. p. 717.

Dr. Susan Presnell performed the autopsy and was qualified to testify as an expert in forensic pathology. App. pp. 699-700. She noted blunt-force trauma to Victim's chest, buttocks, and legs. App. pp. 707-10. Dr. Presnell also noted whip-like injuries which she testified were injuries typically made by a whip or belt. App. p. 708. She testified the cause of Victim's death, however, was blunt-force trauma to the head from a beating. App. pp. 720. The blunt-force injuries to the head caused extensive brain swelling. App. p. 704. Victim underwent a craniotomy, in which a large, oval piece of skull was removed the right side of his head, in an attempt to

alleviate the pressure from Victim's brain as it swelled. App. p. 656-67, 704. The surgeon also removed some subdural blood from within Victim's skull. App. pp. 704-05. He continued to have massive brain swelling, and he was ultimately pronounced brain dead. ROA. pp. 141 -1 52.

Dr. Presnell further testified although simple falls can sometimes result in a fatality, in Victim's case he had "massive, massive head injuries" and given "the extent and the multiple bruising. . . even on the scalp and brain, that it was unlikely from a single fall." App. p. 722. Additionally, Dr. Presnell noted she found no anatomical evidence of an injury to Victim's forehead during the autopsy, although she had been told Victim may have bumped his head on the bunk bed. App. pp. 719. Dr. Presnell testified Victim's injuries were "more consistent with the beating, the severe beating, than bumping his head on the bunk bed." App. p. 719. Finally, she testified Victim may have exhibited nausea, vomiting, and lethargy for a short period after injury, but "he would be unconscious relatively early" after the injury, and he would not be able to run around, eat, or play video games. App. p. 718.

Dr. Atwood testified as an expert witness in the areas of pediatrics, critical care, and child abuse. App. p. 648. Dr. Atwood testified Victim suffered an "extremely devastating injury," which would have caused him to "immediately lose consciousness or certainly not be able to respond in any. . . appropriate manner or controlled manner to anything." App. p. 658. Dr. Atwood further testified "there [was] no question in [his] mind that when that injury occurred there was an immediate change in [Victim's] functioning." App. pp. 658-59. Dr. Atwood also testified vomiting is one of the first signs of a brain injury, indicating increased pressure in the brain. App. p. 658. He testified Victim may have been able to moan or make a noise, but walking and talking would have been impossible. App. p. 658.

Dr. Atwood also explained it was unlikely Victim's symptoms had a delayed onset from the time of injury because that is normally seen in cases where the injury causes bleeding into the brain. App. pp. 660-61. In Victim's case, Dr. Atwood testified there were very few signs of hemorrhage in the brain. App. p. 661. His opinion was the trauma came from at least two separate blows to the head, due to the location of the swelling on both sides of the brain. App. pp. 661-62. Finally, Dr. Atwood testified Victim's injuries were similar to what he has seen in cases where the patient was in a car accident and ejected from the car onto the pavement or from the backseat into the windshield, and it was impossible they were caused by "[a] simple trip and fall, even getting hit with a baseball bat, falling out of a bunk bed, [or] normal roughhousing. . . ." App. pp. 662-63.

Victim's seven year old brother, K.P., witnessed Petitioner's attack on Victim. App. pp. 485-86. K.P. was firm in his testimony that Petitioner beat Victim. He testified Petitioner took Victim in the bedroom and beat him with a belt, then "bammed" him repeatedly against the wall. App. pp. 486-88. K.P. also testified Victim was throwing up and was not awake immediately after the incident. App. pp. 488-89. K.P. testified he asked Victim to wake up, but Victim could not answer or do anything. App. p. 488.

Investigator Renae Lowder Jenco from the Florence County Sheriff's Office also testified. App. p. 600. Her investigation began when she went to the Emergency Room at McLeod Hospital. App. p. 601. She spoke with Mother, K.P., and Petitioner. App. p. 602. Petitioner told her Victim seemed fine, then started throwing up, went to sleep, and began having breathing problems. App. p. 602. Petitioner also told her Victim had hit his head the day before. App. p. 602. Petitioner called 911 to report Victim's injuries at 5:19 p.m. on July 25th. App. pp. 554-55.

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. There is evidence of probative value in the record to support the PCR court's finding Counsel was not deficient in conducting a pre-trial investigation in Petitioner's case.

Petitioner alleges his trial counsel was ineffective for failing to prepare for trial by not conducting a reasonable investigation. Specifically, Petitioner contends Counsel should have hired a mental health expert to challenge the State's evaluation performed by Dr. Heffler prior to the waiver hearing, should have hired a private investigator to interview neighbors and potential witnesses who may have seen Petitioner playing with Victim on the day of the incident, and should have obtained various documents such as the victim's toxicology report and notes from DSS and the investigator. Austin PWC pp. 17-18. The PCR court found Counsel conducted a proper investigation and adequately prepared Petitioner's case for trial, and there is probative evidence in the record to support such findings. App. pp. 895-96. This Court should therefore deny certiorari as to this issue.

"[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." Walker v. State, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by Walker v. State, 407 S.C. 400, 756 S.E.2d 144 (2014)). In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Wiggins v. Smith, 539 U.S. 510, 521-22 (2003). 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 Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)).

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, 513, 511 S.E.2d 62, 66 (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, 329 S.C. at 334, 496 S.E.2d at 417 (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, 288, 486 S.E.2d 747, 749 (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, 217, 481 S.E.2d 129, 133 (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).

As an initial matter, the allegation regarding Counsel's failure to hire an independent mental health expert is not preserved as it was not specifically set forth in Petitioner's application or addressed in the PCR court's order of dismissal. App. pp. 828-36, 889-98. Further, Petitioner did not file a motion pursuant to Rule 59(e), SCRCP, asking the PCR court to rule on the issue. Therefore, this contention is not preserved for this Court's review. See 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) ("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.'").

Additionally, notwithstanding the preservation issue, Petitioner failed to establish Counsel was ineffective in investigating his case because the only testimony Petitioner presented at the evidentiary hearing was his own and that of his grandmother. App. p. 844 Petitioner contends Counsel should have hired a mental health expert to challenge the State's evaluation performed by Dr. Heffler prior to the waiver hearing, but Petitioner presented no testimony from any such expert at the hearing. App. p. 844. Petitioner next contends Counsel was deficient because she "appear[ed]" not to have hired a private investigator to interview neighbors and potential witnesses who may have seen Petitioner playing with Victim outside earlier in the day or heard noises coming the home the night before. Austin PWC p. 18. However, Petitioner did not present any testimony from these witnesses at the evidentiary hearing either. App. p. 844.

Finally, Petitioner contends Counsel's investigation was unreasonable because she did not "obtain Investigator Renae Lowder Jenco's notes, the chain of custody for the toxicology report, or view the physical evidence seized by law enforcement." Austin PWC p. 18. None of these items were introduced into evidence at the evidentiary hearing, nor has Petitioner offered any testimony as to their significance or how the outcome of the trial would have been different had Counsel obtained them. App. pp. 844-45. Therefore, this allegation is supported by nothing more than speculation, which is insufficient to meet Petitioner's burden of proof. See, e.g., Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. . . .").

In addition to Petitioner's complete lack of evidence to support these claims, the PCR court properly determined Counsel adequately investigated Petitioner's case because Counsel testified she felt Dr. Heffler's evaluation of Petitioner prior to the wavier hearing was "very, very

favorable." App. p. 872. Thus, there was no reason for Counsel to hire an additional expert, as she was able to elicit helpful testimony from the State's expert. See Lorenzen v. State, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (finding counsel's failure to procure expert witnesses did not constitute deficient representation when counsel vigorously cross-examines the State's witnesses and attacked the accuracy of the evidence). In this case, it was undisputed that Petitioner, Victim, and Victim's seven-year-old brother were the only people in the home when Victim collapsed. App. pp. 875-76. Victim's brother, K.P., testified against Petitioner for the State, naming Petitioner as the perpetrator. App. pp. 485-86. Counsel's strategy was to challenge the timeline and the medical evidence as best she could. App. pp. 875-76. Counsel hired a medical expert to review the doctors' testimony at the waiver hearing, as well as Victim's medical records, and, even after interviewing Petitioner to confirm his version of events, that expert could not offer Counsel any helpful testimony or alternate explanation for Victim's injuries. App. pp. 869-70, 878. She also spoke to the doctor who performed emergency surgery on the Victim, and he did not want to get involved. App. p. 877. According to Counsel, neither the surgeon nor the defense expert were able to offer any information to contradict the State's timeline or suggest an alternate explanation for Victim's injuries. App. pp. 870, 875-76, 878. Petitioner himself admitted he did not give Counsel the names of any witnesses or offer any defense except for the character witnesses. App. pp. 858-59.

Counsel testified the biggest obstacle in developing a defense was the incontrovertible medical evidence establishing Victim would have been incapacitated immediately after receiving the injuries. App. pp. 869-70, 878. Therefore, whether a neighbor heard a disturbance the night before or saw Petitioner and Victim playing together earlier in the day is irrelevant because the medical testimony established, and Petitioner's own statement confirmed, Victim's injuries

occurred immediately prior to the 911 call at 5:19 p.m. Additionally, as Petitioner himself noted, Counsel pointed out none of the physical evidence seized from the home implicated Petitioner as neither his fingerprints nor his DNA were found on the belt. App. pp. 610, 856. Counsel cannot be deficient for failing to investigate witnesses and evidence which were irrelevant and could not be used to establish a defense for Petitioner. Harrington v. Richter, 562 U.S. 86, 108 (2011) (citing Strickland, 466 U.S. at 691) ("An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense.").

The PCR court found Counsel's testimony on these issues to be credible, while also finding Petitioner's testimony not credible. App. p. 895. Such a determinations are to be given great deference by this Court. 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)) (explaining this Court "gives great deference to a PCR judge's findings where matters of credibility are involved"). All of the foregoing constitutes probative evidence in the record to support the PCR court's finding Petitioner "failed to meet his burden of proof regarding his allegation that trial counsel did not properly prepare for trial," and therefore, Counsel was not deficient. App. p. 895. Further, because Petitioner failed to introduce at the evidentiary hearing any of the testimony or documents he alleges Counsel should have obtained, he has not met his burden of proving prejudice. See Palacio v. State, 333 S.C. at 513, 511 S.E.2d at 66 (finding trial counsel not ineffective for failing to timely request discovery because the contents of the documents were not presented at the PCR hearing); Skeen, 325 S.C. at 217, 481 S.E.2d at 133 (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). Certiorari should therefore be denied as to this issue.

II. There is evidence of probative value in the record to support the PCR court's finding Counsel was either not deficient or articulated reasonable trial strategies to explain her decision not to object to the admission of the belt, declining to call character witnesses on Petitioner's behalf, and failing to use the words "not guilty" in either her opening or closing argument.

Petitioner asserts Counsel was deficient for failing to properly object to prejudicial evidence (specifically, belts found in the home), failing to call character witnesses on Petitioner's behalf, and failing to ask the jury to find Petitioner not guilty in either her opening or closing statement. Austin PWC p. 20. However, after carefully considering these allegations, 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. 895-96. Certiorari should therefore be denied as to this issue.

"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. Further, "[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.*'" Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (quoting Sexton v. French, 163 F.3d 874, 885 (4th Cir.1998)) (emphasis added). 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)).

As to the admission of the belt, Counsel testified the belt was seized as part of the State's investigation, and the record reflects it was properly authenticated at trial. App. pp. 417, 591. Thus, Counsel would have had no grounds to exclude the belt at trial, and she cannot be deficient for failing to object to its admission, although she did object to the sufficiency of the State's foundation linking it to Petitioner, which was overruled. App. pp. 517-18. The record also indicates Counsel brought out on cross-examination that Petitioner's prints were not on the belt, and Petitioner's mother sometimes used the belt to spank Victim. App. pp. 491-92, 610-11, 887. Further, Dr. Atwood testified it was possible the bruises from the belt and the head injury were not inflicted simultaneously. App. pp. 673-74. Counsel stressed the lack of physical evidence, include

any link between Petitioner and the belt, in her closing argument. App. pp. 753-56. Therefore, even if Counsel was deficient in failing to object, the admission of the belt was not prejudicial to Petitioner. See Strickland, 466 U.S. at 691 ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

Regarding Counsel's decision not to call any witnesses, Counsel testified she explained the risks of calling family members as character witnesses with Petitioner and his family, and she consciously chose not to call them because she felt it would open the door into some of Petitioner's past criminal history and problems at home and because she wanted to have the last argument to the jury. App. pp. 876, 885-86. She testified Petitioner also understood the benefits of not presenting a defense and having last argument. App. pp. 876-77. Thus, the PCR court correctly found Counsel articulated a valid trial strategy for not calling these witnesses. See, e.g., Buckson v. State, 423 S.C. 313, 320-21, 815 S.E.2d 436, 440 (2018) ("In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court— is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks. . . . A PCR court's analysis of counsel's strategic decisions must be 'highly deferential' to counsel's judgment, and 'a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight.'") (citations omitted).

Finally, Petitioner contends Counsel was deficient because she did not use the words "not guilty" in her arguments to the jury. Austin PWC p. 22. However, Counsel opened the trial by telling the jury what happened to Victim was "an accident," and that the story K.P. initially gave was that Petitioner had not done anything to Victim at all. App. p. 479. In closing, Counsel began

by telling the jury she did not "want a second mother to lose a child," because that's what Petitioner was – "a child, a boy." App. p. 752. Counsel then began to discuss all "the reasonable doubts in this case," including whether K.P. was so suggestible as to render his testimony unreliable, the lack of physical evidence, and the fact Victim was seen with a knot on his forehead the night before which did not receive any medical attention. App. pp. 752-59. She concluded by asking the jury "to please not turn one tragedy into two," to look at all the reasonable doubt in the case, and to take their oath seriously and "[do not] make [Petitioner] a second tragedy." App. p. 759. Therefore, there is evidence in the record to support the PCR court's finding Counsel was not deficient because "[w]hen viewed in light of the whole record, the jury clearly understood trial counsel was arguing for a verdict of not guilty." App. p. 896.

Accordingly, because Counsel was either not deficient or articulated reasonable trial strategies to explain conduct which may be deficient in other circumstances, the PCR court correctly found Petitioner was not entitled to relief on any of these grounds, and the petition should therefore be denied as to these issues.

III. Petitioner's contention Counsel provided ineffective assistance because she failed to subject his case to meaningful adversarial testing is an improper argument for cumulative-error analysis, and in any event, is clearly refuted by the record.

Petitioner's allegations concerning trial counsel's failure to subject his case to meaningful adversarial testing is, essentially, an argument for an improper cumulative-error analysis, and in any event, is clearly refuted by the record. In this case, Petitioner's application contained allegations Counsel was not prepared for trial or the waiver hearing because she did not meet frequently enough with Petitioner, and did not investigate and interview witnesses he asked to be called. At the evidentiary hearing, Counsel was questioned about her preparation for trial, her defense strategy and the decision not to call character witnesses, her handling of the belt evidence,

and her failure to use the words "not guilty" in her opening and closing arguments. Petitioner did not move to amend his application to include a specific allegation Counsel "abandoned her role as defense counsel." Austin PWC p. 24. However, the PCR court, in finding Counsel's performance at trial was not deficient, also made a finding Counsel "subjected the State's case to thorough and 'meaningful adversarial testing,'" noting Counsel "raised objections to the introduction of [Petitioner's] statement, the autopsy photographs, and the expert testimony of the EMT. Trial counsel also thoroughly cross-examined each witness and attempted to discredit the medical testimony as best she could." App. p. 895. Because these findings are supported by the record, this Court should deny certiorari as to this issue.

To the extent Petitioner's argument in the third section of his Austin Petition can be construed as advocating a cumulative-error analysis, 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.").

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 Smalls v. State, 422 S.C. 174, 810 S.E. 2d 836 (2018), this Court explained "the strength of the evidence must be considered along with the specific impact of counsel's errors." "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. In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury. In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." Id. (internal citations omitted). Petitioner has not presented a single piece of evidence to overcome the main issue identified by Counsel in preparing his defense – the fact Victim was injured when only Petitioner and his seven-year old brother were

home, and the medical experts opined those injuries could not have come from an accidental fall into a bunk bed. Additionally, none of the actions Petitioner alleges were error were found to be so by the PCR court. App. pp. 985-97. As a result, because the PCR court found neither deficiency or prejudice, a cumulative-error analysis would be inappropriate on these facts under any interpretation of the doctrine.

Finally, any contention Counsel failed to subject the prosecution's case to meaningful adversarial testing such that Petitioner was constructively denied counsel is wholly unsupported by the record, as evidenced by the discussion in sections I and II above. In fact, Petitioner's PCR counsel conceded at several points during the evidentiary hearing that Counsel had made appropriate objections and cross-examined witnesses. See App. pp. 879, 883, 885. This Court should therefore deny the Petition, and the PCR Court's findings should be affirmed.

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: _____
Lindsey A. McCallister

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

ATTORNEYS FOR RESPONDENT

9/24, 2018

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2017-002102

JERMAINE MAYWEATHERS,

Petitioner,

v.

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 Pursuant to Austin V. State**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Dayne C. Phillips, Esquire
Price Benowitz LLP
1614 Taylor Street, Suite D
Columbia, South Carolina 29201

This 24th day of September, 2018

CARMEN NORD
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

September 24, 2018

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

Re: Jermaine Mayweathers v. State of South Carolina
Appellate Case No. 2018-002102

Dear Mr. Shearouse:

Please find enclosed for filing the original and six copies of Respondent's Return to Petition for Writ of Certiorari Pursuant to Austin v. State.

Respectfully,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/can

Cc: Dayne Phillips, Esquire (2 copies)

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Lindsey A. McCallister, AAG
SC Attorney General's Office
Post Office Box 11549
Columbia, South Carolina 29211-1549

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