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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Brooks P. Goldsmith, Circuit Court Judge

DOMINIC A. GALLMAN,

Petitioner,

vs.

THE STATE OF SOUT CAROLINA,

Respondent.

Appellate Case No. 2018-001179

**RETURN TO PETITION
FOR WRIT OF CERTIORARI**

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STATEMENT OF ISSUES ON APPEAL

I.

Because trial counsel articulated a valid strategy for withdrawing the motion for severance and because it is unlikely that a motion for severance would be granted, probative evidence supports the PCR court's findings that counsel was not ineffective.

II.

Probative evidence supports that counsel was not ineffective for failing to object to the State's summary of phone records because the three entries in question were supported by the phone records admitted into evidence and counsel's performance did not fall below professional norms because he challenged inaccurate entries. Further, Petitioner was not prejudiced by the alleged deficiency because the omission of the three entries was unlikely to affect the outcome of trial.

III.

Probative evidence supports the PCR court's finding that the codefendant's PCR testimony claiming Petitioner was not involved in the triple homicide was not credible because the codefendant emphatically professed his own innocence during sentencing at trial and the evidence at trial does not support his new version of events that excludes Petitioner's involvement.

STATEMENT OF THE CASE

Petitioner Gallman was tried jointly with Stanley Oliver and Kenneth Joy on multiple charges at a jury trial starting December 3, 2007, before the Honorable G. Thomas Cooper, Jr. Petitioner and Oliver were tried for three counts of murder, three counts of robbery, and burglary in the first degree. Joy was tried for both accessory before the fact and accessory after the fact to all the substantive counts. At the close of the State's case in chief, Judge Cooper granted a directed verdict for one count of armed robbery only for both Petitioner and Oliver. Judge Cooper granted directed verdict for all the counts of accessory before the fact and also one count of accessory after the fact to armed robbery. Petitioner and Oliver were both acquitted of the remaining armed robbery charges but convicted for three counts of murder and burglary in the first degree. Joy was acquitted of his remaining charges. Judge Cooper sentenced Petitioner to life imprisonment without parole.

Petitioner appealed his convictions and sentences, which were affirmed by the Court of Appeals. 2011-UP-006 (S.C. Ct. App. filed Jan. 20, 2011). This Court subsequently denied his petition for certiorari on June 7, 2012.

Petitioner filed an application for post-conviction relief (PCR) on July 20, 2012. A hearing was held before the Honorable Brooks P. Goldsmith on March 20 and 23, 2018. By order dated June 5, 2018, Judge Goldsmith denied relief. Petitioner filed a petition for writ of certiorari. The State's return follows.

STATEMENT OF FACTS

Zondria McKie, a friend of victim Desiree Felder, tried to find Felder to repay a loan Felder made to McKie. App. pp. 594-95. Shortly before five p.m. on September 4, 2005, McKie went to the home Felder shared with her boyfriend, George “Jim” Batie. App. pp. 501-02; p. 532; pp. 595-96; p. 603. McKie found Batie and another person later identified as Kevin Miller inside, both dead, and she called 911. App. pp. 597-99. She tried to find Felder, but Felder was not in the house. App. pp. 600-01.

Batie was a drug dealer. Miller went to Batie’s home to buy drugs for his friend, Christopher Cochran, while Cochran kept working at the house Miller was helping him refurbish. Miller used Cochran’s ATM card to withdraw \$80 for the drugs. Cochran testified Miller left around 2:30 a.m. on September 4, 2005. Cochran identified a receipt as a receipt for his bank account showing a withdrawal at 2:40 a.m. App. pp. 562-67. Miller was shot once in the back of the head. App. pp. 1695-96. Batie was shot three times, once in his hip, once in his thigh, and the fatal wound – a shot to the head. App. pp. 1703-06; pp. 1714-16. Batie’s house was ransacked, and a nearby safe was found opened but empty, with blood smears evident on the outside. App. p. 598; pp. 637-39. Investigators found co-defendant Oliver’s fingerprint on a shoe box in the ransacked home. App. p. 675. They also recovered two .40 caliber shells from inside the home. App. p.630; pp. 739-40.

Felder’s body was found off a dirt road in Richland County three days later, when a nearby resident walking his dog investigated the smell of decomposition he noticed over the course of several days walking by the woods. App. pp. 767-69. Felder’s body was wedged between two trees. She had been shot in the head. App. pp. 781-82; p. 785; pp. 1523-25.

Oliver's girlfriend, Renata Williams, testified Oliver came into the apartment the two occasionally shared sometime after two a.m. on September 4, 2005. Oliver then called Petitioner. The next day, she overheard him telling "Mike" about "doing a lick," and she also saw Oliver with a large amount of drugs and money. App. p. 830; pp. 835-38. Oliver later took Williams on a spending spree, paying in cash. App. pp. 838-44; p. 865. After seeing a news report on the murders, Oliver asked Williams if she would tell people he was her husband if he was "locked up." App. 844.

Oliver's longtime friend Ulicen "Mike" Allen (who called Oliver his "brother") testified Oliver called him in the early morning hours of September 4, 2005, and asked him to come over to Oliver's apartment. When Allen arrived, he saw "guns," a .12 gauge shotgun, bundles of money, crack cocaine, and digital scales. Oliver explained he robbed someone, and when Allen expressed concern the robbery victim may come after Oliver, Oliver advised, "[t]he guy we got this from ain't going to be looking for us." App. pp. 902-04. He testified Oliver had a .40 caliber gun and a 9 mm gun. App. pp. 928-29. Allen subsequently testified he has seen Oliver with weapons before: 9 mm, .40 caliber, and a .12 gauge shotgun. App. pp. 928-29.

Oliver later discussed the robbery again with Allen and told Allen he knew the police were looking for him because his fingerprint was at the crime scene, **but maintained that while he "tore the guys up," he was Muslim, and so he did not kill the woman.** App. 908-10.

Allen explained the significance of violence against a woman in the Muslim faith:

Well, I mean, our faith is Muslim, you know. And it's totally forbidden for you to even strike a woman. And, you know, knowing Stanley as long as I've known Stanley, you know, I've seen women assaulted. And Stanley, he's never even raised a hand to 'em. So, you know, for him to tell me that was enough for me to know, you know, that he didn't kill the woman, you know. He wouldn't kill a

woman. I mean, the bottom line was, you know, whatever had happened, he was willing to let me know that he didn't kill that woman, you know. Not to say that he didn't kill anybody else, but to make me understand that he didn't kill that woman. And, you know to me, that was all that really mattered, you know, that he didn't kill the woman.

App. p. 910, lines 8-22. In a later conversation, Oliver reiterated “[L]isten, I didn’t kill the woman. I didn’t kill that woman. I don’t care what they say, I didn’t kill that woman.” App. p. 912, lines 15-17.

Allen testified he knew Petitioner to be “associated” with his friend Oliver, and he confronted Petitioner about the incident, asking why Petitioner “let him” leave fingerprints at the scene, “why did [he] let him leave his prints all over the place if it was going to go down like this?” Petitioner responded, “you know how your brother be. Your brother was all on that cocaine. Man, I couldn’t tell your brother that. You know, your brother wanted to do what he wanted to do.” Petitioner further admitted his involvement in the crime, telling Allen he and Oliver gained entry “[w]hen the white boy got out the car, they rushed the white boy into the house. That is how they gained entrance.” App. pp. 924-28.

Allen took Oliver to the police station to turn himself in. Afterwards, he used Oliver’s cell phone to call attorney Jimmy Rogers and then codefendant Kenneth Joy. Allen met Joy later that night. Allen testified Joy told him everything was alright because Joy burned the clothes. Joy said two guns were used in the murders and Joy got rid of both of them. Joy also claimed to have made the car used in the murders disappear. App. pp. 916-22.

Petitioner’s girlfriend, Leticia Jones, testified Petitioner tearfully confessed to her in the early morning hours of September 4, 2005, telling her:

. . . [she] was right about his friend, that he had gotten him into trouble and that – said, Leticia, listen to me. He said that – he said that he had gotten him into trouble and that he made him do something that he didn't want to do and that he didn't know what to do. He couldn't – he just was upset and that he didn't know how to handle it.

He said that his – his friend had – had some idea to make someone and that he didn't really know what was involved but he went with him and it just turned out to be not what he thought it was.

He said that they went to the house and that his friend, that they knocked on the door and somebody opened the door and his friend shot the guy that opened the door. And then they – that the guy he was with shot the other guy that was in the house and that then they were trying to rob the man and that the man wouldn't tell him where his – his money was. And so the guy he was with just flipped out and got really mad and angry and just shot the man. . . .

App. pp. 1031-32.

He also confessed to Felder's murder:

The person that he was with said that they had to take her because she probably knew where . . . the money was. And so he put her in the car and they drove with the lady. And I don't – I don't know what happened. But that the person that he was with told him that he had gotten his hands dirty and he had to do the same thing and that he was like crazy and he tried to hurt the lady and that Dominic had to stop him from him – from attacking the lady, from like raping her and stuff. But that he put the gun to his head and told him that if he didn't shoot the lady that he would shoot him. So Dominic said he didn't know what to do. And he had just closed his eyes and pulled the trigger. And that was it.

App. pp. 1033-34.

She later saw Petitioner and his father burning something – not food, but some kind of material – on the grill the next day. App. pp. 1034-35. She testified Petitioner used her cell phone sometimes. She testified she would not have called Oliver, Joy, or Moaney. App. p. 1036. Her cell

phone records were authenticated by Ronald Witt, an employee from T-mobile. App. p. 1161. Witt admitted to trial counsel on cross-examination that the records only show the phone was used, it does not show who was making the phone calls. App. p. 1162.

Jones explained when she was originally interviewed by law enforcement, she did not tell the truth, but told law enforcement what Petitioner told her to say. When she was re-interviewed several weeks before trial, she could not lie anymore. App. pp. 1037-39. Trial counsel elicited testimony from Jones admitting her parents had custody of her child and the parents wanted her to cut all ties with Petitioner. She admitted she previously wrote Petitioner and told him she thought he was innocent. App. pp. 1048-49. On redirect, Jones explained she told the things to law enforcement in the first interview because she loved Petitioner and did not want to believe he was responsible for the murders. She wanted to protect Petitioner. She pushed his previous admissions to the back of her mind. App. p. 1053-54. She told the prosecutor, “[A]nd I don’t think he did it because he wanted to do it. I think he was forced.” App. p. 1054, lines 3-6.

Omekas Moaney, a/k/a “Blue,” testified he met Oliver in 2003, but knew Petitioner since childhood. App. p. 1077; p. 1097. He testified Ken Joy dropped Oliver off at Moaney’s home on September 5, 2005. Petitioner came by approximately thirty minutes later. They asked Moaney to cook a large amount of cocaine they had obtained into crack and to distribute it. They also had some crack cocaine for him to distribute. A share of the money from the subsequent sales were distributed back to Oliver and Petitioner. App. pp. 1081-87. Moaney explained that he always sold Petitioner and Oliver drugs, but **they never supplied him with drugs before**. App. p. 1084-85. Oliver eventually told Moaney that he obtained the drugs through robbery, and asserted “they didn’t intend

to harm anybody. They did not go there with the intentions of harming anybody but things got out of hand, things went wrong.” App. p. 1091.

Tatanisha Robinson, another of Oliver’s girlfriends, gave a statement to investigating officers that Oliver admitted he did something that could possibly send him to jail for life, and that Oliver had a significant amount of cash and cocaine the day following the murders. In her statement, she told law enforcement she saw the story about the murders and knew what Oliver had done. App. pp. 1206-07; pp. 1211-12. She also noted in her statement that Petitioner was “bragging” about the murders until Oliver was arrested. App. p. 1216. When Robinson testified at trial, she denied making the statements and alternatively claimed she said what she did to law enforcement because she was mad at Oliver or scared of law enforcement. App. p. 1216, lines 12-13; p. 1251; p. 1257; p. 1260; p. 1271; p. 1276.

Jason Brown, a longtime friend of Oliver’s, was an inmate at the Detention Center in October of 2005 at the same time as Oliver. Brown testified Oliver confided to Brown his involvement in the crimes. Oliver told him that he and “another person” robbed and killed two people at a house on Mildred Avenue over drugs and money and forced another person from the house. Oliver told Brown he made the other person kill her at another location. He told Brown he trashed the home, “looking through shoe boxes” and under furniture. He also said two guns were used: Oliver used a .40 caliber, and the other person had a .38. App. pp. 1412-15. Oliver later asked Brown to kill Renata Williams, Omekas “Blue” Moaney, and Ulicen “Mike” Allen, for giving statements to the police. App. pp. 1417-19.

While Oliver’s counsel, Doug Strickler, cross-examined Brown, Strickler asked Brown the

following question about Brown's statement: "Q: A man opened the door. Stanley and Dominic rushed in, correct?" App. p. 1438, lines 1-2. Petitioner's counsel immediately objected, and after a bench conference, the trial court struck the question with the following instruction:

All right, ladies and gentlemen. An objection has been lodged as to that last question and answer. I'm going to ask you to disregard that question and answer. Strike it from the record and just, as I say, disregard the answer. So move ahead Mr. Strickler.

App. p. 1438, lines 6-11. Counsel requested to be further heard at the conclusion of testimony. App. p. 1438, lines 12-14. He made a motion for mistrial, noting "We have taken very careful, painstaking efforts to try and keep any Crawford or Bruton materials out of this case." The trial court ruled that its curative instruction was sufficient and denied the motion for mistrial. App. p. 1453, lines 3-25.

The bullets recovered from autopsies and crime scene investigations revealed two guns were used, a .40 caliber and a .38 or .357. App. pp. 1377-90.

Codefendant Oliver called Investigator Paul Mead as a witness. During trial counsel's examination, Investigator Mead admitted Batie's phone records reflected a call from an individual named Rasheed Rucker, and Rucker's fingerprint was found on one of the vehicle's parked by Batie's house. App. pp. 1857-58. Trial counsel called private investigator Lee Connelly, who testified he interviewed Jones several times during December 2005 and January 2006, and she never admitted having any knowledge about the murders. App. pp. 1910-11.

Codefendant Kenneth Joy testified in his own defense. He would later be acquitted of all the accessory charges. He denied any involvement in the robbery and denied disposing of guns, clothing or a car as previously testified to by Allen. App. pp. 1921-22. Joy testified Oliver bought drugs

from Moaney for Joy and Joy would drive Oliver over to Moaney's, but he only ever met Moaney once. App. p. 1949; p. 1951. Joy testified he knew of Petitioner, but did not know him. He only knew him as a friend of Oliver's. App. pp. 1959-60.

STANDARD OF REVIEW

In a post-conviction relief action, an applicant bears the burden of proving the allegations in the application. Rule 71.1(e), SCRCPP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Only pure questions of law will be reviewed *de novo*. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Because the issues presented by Petitioner in the instant case are questions of fact, they should be affirmed if supported by probative evidence.

ARGUMENT

I.

Because trial counsel articulated a valid strategy for withdrawing the motion for severance and because it is unlikely that a motion for severance would be granted, probative evidence supports the PCR court's findings that counsel was not ineffective.

Petitioner misleadingly claims counsel “failed” to pursue severance. This is inaccurate because Counsel chose not to move for severance as a matter of sound trial strategy. Counsel explained his deliberate choice to withdraw his prior motion for severance, explaining:

Because as we got into trial prep mode, I was looking at, again, the government pointing the finger at the physical evidence they had as it relates to Stanley Oliver, looking to say, you know what, I don't know if Stanley did it or not, but they don't have Dominic's fingerprint on here.

They don't have any evidence suggesting this about Dominic or anything like that, and so, if you have a joint trial and you can draw and distinguish one defendant from the next, I thought it gave us a tactical advantage there.

If it's just Dominic going forward with a single trial, the government is going to be focusing entirely upon him. You lose that argument. It's gone completely because every day they're going to talk about him in some way, shape or fashion. And so I mean, that in a nutshell was why I looked at it and evaluated what I thought made the most sense.

App. p. 2656, lines 9-25. Counsel later mentioned, “I mean, in my mind, again, the less Dominic's name was mentioned, the better.” App. p. 2671, lines 3-4. Counsel explained that in his view there was more evidence against Oliver than Petitioner:

As I recall, there was a thumbprint or some sort of a fingerprint. There was – I think most of the witnesses who said anything said that they – that Oliver may have admitted to something. So that in my mind showed that there was more evidence against Oliver than there was against Dominic. I mean, there was absolutely no physical

evidence.

App. p. 2684, lines 10-16.

Counsel spoke on his strategy regarding the lack of physical evidence against Petitioner, explaining to the PCR court:

[W]hat actual evidence do you have showing that he did it?

You mean to tell me that he went into somebody's house, shot two people, kidnapped another person, took them out to the woods, killed her and you don't have a single hair follicle, DNA gunshot residue, anything taken, anything like that.

App. p. 2668, lines 4-15.

Counsel executed his strategy at trial in his opening argument, telling the jury:

You're not going to hear about my client, Dominic Gallman's, fingerprint being anywhere. DNA evidence, you are not going to hear any evidence suggesting that my client's DNA was anywhere at the scene.

. . . There were search warrants which were executed in this case on the various different residences. You are not going to hear that any samples from Mildred Avenue were found either on my client or my client's residence.

You heard testimony – you've heard [the prosecution] suggest that one of the co-defendants in this case, Mr. Oliver, allegedly was seen with money and drugs. You won't hear that about my client, because he had nothing to do with this, ladies and gentlemen.

* * *

Law enforcement developed a theme in this case. The prosecution, the Solicitor's Office, has a theme in this case. Their theme as you heard [the prosecution] talk about it is that a drug dealer was robbed for drugs and for money. None of those things can be linked to my client. My client was not found with drugs. My client was not found with a large amount of money. Period.

App. p. 482, line 17 – p. 483, line 23. Counsel later emphasized to the jury again that Petitioner's fingerprints were not found at the murder scene. App. p. 485, lines 3-8 (“Lo and behold, my client's

fingerprints weren't found there.”).

Counsel noted a further strategic advantage for the joint trial, testifying at the PCR hearing:

One other thing, I think I neglected to mention this earlier, we've got John Delgado and Dough Strickler, and while they were representing the interest of their clients, when you've got three lawyers dealing with what ended up being either two – I guess it was three lawyers for the government's case, they're not looking out for Dominic's case, but at the same time to the extent they challenge and discredit the witnesses, it helps Dominic's case. So that was one other thing that factored into my decision.

App. p. 2657, line 23 –p. 2658, line 7. Counsel and petitioner also entered into a joint defense agreement with the other two defendants and their attorneys. Counsel found this arrangement beneficial because it allowed counsel to anticipate the codefendants' trial strategy. App. p. 2655.

In order to prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance will be deemed deficient if it falls “outside the wide range of professionally competent assistance.” Id. The applicant is prejudiced by the deficient performance if “there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.” Id. at 694.

“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.” Id. at 689. “Judicial scrutiny of counsel's performance must be highly deferential.” Id., at 689. In order to prove a claim of ineffectiveness, “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” Id. “[T]he existence of detailed

guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Id. at 689.

Counsel's articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). "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). Strickland requires **extreme deference** to counsel's strategic judgments that are adequately investigated; as Strickland explains: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options **are virtually unchallengeable**. . . ." Strickland, 466 U.S. at 690-91 (emphasis added).

In the instant case, counsel articulated a reasonable trial strategy. Trial counsel's strategy was to be able to juxtapose the absence of physical evidence against Petitioner to the physical evidence against Oliver, and to attack the credibility of the witnesses implicating Petitioner. He noted significantly more evidence, including admissions against interest, directly implicated Oliver rather than Petitioner, and he noted Petitioner would gain the benefit of not only counsel's own cross-examination, but the codefendants' attorney's cross examination of the State's witnesses. Counsel also noted that statements by the other defendants implicating Petitioner were redacted in accordance with Bruton v. United States, 391 U.S. 123 (1968).¹

¹ After the trial court noted a statement made **by Petitioner** to law enforcement was "rife with Crawford issues," the prosecution explained he anticipated making appropriate redactions and submitting a redacted version of Petitioner's statement to the parties for further review. App. pp.

Counsel noted how the redactions were consistent with his trial strategy:

Specifically, as a result of a statement from whomever it came that Stanley Oliver and his friends did X, Y and Z, again, it sort of fit into our theory, I don't care who it is.

Stanley Oliver may be the worst dude on the planet, but nobody is implicating Dominic. He didn't say Dominic Gallman. You know, even if Dominic's statement – or his name had been thrown in there – and I think Doug Strickler messed up and threw his name in there at some point in time, we were able to discredit and discount these witnesses and show that they had reasons to lie, they had motives to lie or they were just crazy.

App. p. 2661, lines 8-19.

Our courts have expressed for joint trials, saying joint trials “play a vital role in the criminal justice system.” Richardson v. Marsh, 481 U.S. 200, 209 (1987). They promote efficiency and “serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.” Id. at 210. Moreover, criminal defendants who are jointly tried for murder are not entitled to separate trials as a matter of right. State v. Kelsey, 331 S.C. 50, 73, 502 S.E.2d 63, 75 (1998); State v. Garrett, 350 S.C. 613, 620, 567 S.E.2d 523, 526 (Ct.App.2002). There is no clearly defined rule for determining when a defendant is entitled to a separate trial, because the exercise of discretion means that the decision must be based upon a just and proper consideration of the particular circumstances which are presented to the court in each case. State v. McIntire, 221 S.C. 504, 504, 71 S.E.2d 410, 415 (1952); State v. Avery, 374 S.C. 524, 533, 649 S.E.2d 102, 107 (Ct.App.2007).

Trial counsel reasonably noted there was little likelihood that the motion for severance would be granted. “Criminal defendants who are jointly tried for murder are not entitled to separate trials as

226-56. Petitioner falsely suggests in his petition that the trial court was commenting on a statement by Oliver. See Pet. p. 7.

a matter of right.” State v. Boys, 302 S.C. 545, 547, 397 S.E.2d 529, 531 (1990). “A severance should be granted only when there is a serious **risk that a joint trial would compromise a specific trial right of a co-defendant** or prevent the jury from making a reliable judgment about a co-defendant’s guilt.” Hughes v. State, 346 S.C. 554, 559, 552 S.E.2d 315, 317 (2001) (citing State v. Dennis, 337 S.C. 275, 523 S.E.2d 173 (1999)) (emphasis in original). In order to reverse a conviction on the basis of an allegation that a defendant was improperly tried jointly, a defendant must show prejudice. Dennis, 337 S.C. at 281, 523 S.E.2d at 17. Such prejudice is established by a showing that the defendant would have obtained a more favorable result at a separate trial. Hughes, 346 S.C. at 559, 552 S.E.2d at 317 (“An appellate court should not reverse a conviction achieved at a joint trial in the absence of a reasonable probability that the defendant would have obtained a more favorable result at a separate trial.”).

Petitioner misleads by omission, claiming counsel’s assessment of the likelihood of success on a severance motion was based solely on the fact the State had all the same witnesses. Pet. p. 7. Counsel’s assessment was not as simplistic as Petitioner portrays. Counsel testified as follows on the merits of a severance motion:

Essentially, when you’re looking at a motion to sever, you’ve got to demonstrate real actual prejudice counterbalanced against the need for judicial economy.

And I feel certain – while we didn’t argue it, but I feel certain that the State’s position is no, we need to have a joint trial. We’ve got all the same witnesses.

The allegations are that everybody did everything together and so there’s really no need to sever it, and making or formulating a prejudice argument would have been challenging because, essentially, the only rational would have been there’s evidence against him and there’s no evidence against us, so . . .

App. p. 2658, lines 11-24 (ellipses in original transcript). Counsel's assessment is based on a reasonable understanding of the law. See United States v. Akinkoye, 185 F.3d 192 (4th Cir. 1999) (noting a defendant is not entitled to severance merely because separate trials are more likely to result in acquittal or because evidence against one defendant is stronger than the other).

The challenge of formulating a prejudice argument becomes apparent when assessing the merits of Petitioner's prejudice argument. In his petition, Petitioner recounts the testimony of each witnesses to whom either Oliver or Petitioner made statements against their interest. Petitioner first claims "none" of Renata William's testimony would have been admissible against Petitioner in a severed trial. Pet. p. 9. However, Petitioner recounts Williams' testimony that she was present when Oliver was on the phone with Petitioner, that she saw Oliver with money and drugs, that Oliver admitted to her he did a "lick" (robbery), that Oliver and Williams went on a shopping spree, and that Oliver asked her to say he was her husband (presumably to invoke a marital privilege). Her testimony consists of her observations and Oliver's statements against interest. She would have been able to testify about her personal observations. She would also be able to testify about Oliver's admissions against interest because Oliver's admissions are not testimonial. "[A] statement cannot fall within the [protections of] the Confrontation Clause unless its primary purpose was testimonial." Ohio v. Clark, 135 S.Ct. 2173, 2180 (2015); State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 61 (2006) (finding an out-of-court statement fell outside the scope of the Confrontation Clause because it was "made outside of an investigatory or judicial context"); Crawford v. Washington, 541 U.S. 36, 68 (2004) (noting only testimonial statements require compliance with the Confrontation Clause; a nontestimonial statement is admissible, subject to traditional limitations upon hearsay evidence,

regardless of the defendant's opportunity to cross-examine the declarant).

Bruton v. United States, 391 U.S. 123 (1968) does not apply to Oliver's out of court statements to Williams because the statements are not testimonial. United States v. Figueroa, 729 F.3d 267, 276 n. 14 (3d Cir. 2013) ("The protections of the Confrontation Clause and Bruton apply only to testimonial statements"). As the Fifth Circuit Court of Appeals observed, "Many circuit courts have held that Bruton applies only to statements by co-defendants that are testimonial under Crawford," including the First, Second, Third, Fourth, Sixth, Eighth, Ninth, and Tenth Circuits. United States v. Vasquez, 766 F.3d 373, 378-79 (5th Cir. 2014). The Fourth Circuit found Bruton's rule "simply irrelevant in the context of nontestimonial statements" made to a cellmate. United States v. Dargan, 738 F.3d 643, 650-51 (4th Cir. 2013).

Rule 804(b)(3), SCRE, provides:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

A statement against interest may be admitted against a co-defendant. See, e.g., United States v. Jordan, 509 F.3d 191, 203 (4th Cir. 2007) (finding statements of co-conspirator to friend in an effort to relieve herself of guilt before her suicide subjected her to criminal liability for a drug conspiracy and murder and were admissible against defendant under Rule 804(b)(3)); People v. Taylor, 759 N.W.2d 361, 368 (Mich. 2008) (finding a co-defendant's statement to a third party

admissible against defendant under 804(b)(3)).

Further, the redactions to Oliver's out of court statement substituted "another person" for Petitioner's name, which is a proper, gender neutral, redaction. United States v. Akinkoye, 185 F.3d 192, 198 (4th Cir. 1999) (finding replacing the defendant's name with "another person" or "another individual" was an appropriate redaction in compliance with Bruton and Gray v. Maryland, 523 U.S. 185 (1998)); United States v. Logan, 210 F.3d 820 (8th Cir. 2000) (finding substitution of "another individual" for defendant sufficient).

In the instant case, trial counsel was not ineffective for declining to make the incorrect legal argument advocated in the petition. Likewise, contrary to Petitioner's claims in his petition, Mike Allen, Tatanisha Robinson, and coconspirator Moaney would have been able to testify about Oliver's admissions and statements against interest, contrary to the conclusory statements made in Gallman's petition. Rule 804; see also SCRE 801(d)(2)(E) (a statement by a coconspirator of a party during the course and in furtherance of the conspiracy is admissible against a party).

Probative evidence supports the PCR court's findings because counsel made a reasonable strategic choice for a joint trial and because Petitioner was not prejudiced as it was unlikely the trial court would have granted the motion for severance or that an appellate court would find the trial court abused its discretion in denying such a motion.

II.

Probative evidence supports that counsel was not ineffective for failing to object to the State's summary of phone records because the three entries in question were supported by the phone records admitted into evidence and counsel's performance did not fall below professional norms because he challenged inaccurate entries. Further, Petitioner was not prejudiced by the alleged deficiency because the omission of the three entries was unlikely to affect the outcome of trial.

The State introduced phone records for four different phone numbers, authenticating the records through witnesses from the service providers. The State also submitted a summary of the phone records. Counsel considered the phone records and their summary to be of limited value for the State. Counsel testified at the PCR hearing:

As it relates to what the phone company provided, calls were made. They're not verifying who placed that call. They're not saying it's Dominic and not Latisha or Albert or whoever the case may be. They're simply saying these are records that we've got that we maintain in a central repository, so those generally don't concern me.

App. p. 2673, lines 4-10.

Rule 1006, SCRE, allows for the contents of voluminous writings to be presented in the form of a chart, summary, or calculation, if the underlying data supporting the summary is admissible into evidence. See also Crowley v. Spivey, 285 S.C. 397, 329 S.E.2d 774 (Ct. App. 1985) (finding, prior to the adoption of the Rules of Evidence, a summary of numerous phone calls was admissible). The summary should fairly and accurately represent the evidence being summarized. United States v. Bakker, 925 F.2d 728, 736 (4th Cir. 1991). Lost in Gallman's argument is the fact that the three phone calls about which Gallman complains – calls made from 599-0434 to 799-6080 – are accurate summaries of the phone records. As Gallman acknowledges, they appear in the records associated

with 599-0434. App. pp. 2764-65. Therefore, the summary is supported by admissible evidence.

Petitioner argues that because the record of these three phone calls fails to be correspondingly reflected in the BellSouth records for 779-6080, the entire summary should have been inadmissible. However, Petitioner merely identifies a weak, albeit plausible, argument as to the weight of evidence, but not an argument that goes to the admissibility of the evidence. United States v. Porter, 821 F.2d 968 (4th Cir. 1987) (finding discrepancies appellants found in some of the telephone toll records raised questions about the weight of the evidence but did not render it inadmissible); see Doe v. DeBuono, 193 F.R.D. 117 (S.D.N.Y. 2000) (citing In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig., 642 F.Supp. 1212, 1224-26 (S.D. Ohio 1985) ("Even inaccuracy does not render the charts inadmissible, it only addresses their weight and sufficiency.")).

In the instant case, counsel's assessment of the evidentiary value of the phone records is valid and his objection would not have been successful since the summary is supported by the actual phone records. Petitioner's argument is a mere weight argument. Counsel did review the summary at trial: Strickler noted counsel had been more diligent than himself in reviewing the summary. App. p. 1768. Counsel called attention to the errors he found and brought the trial court's attention to other issues he had with the summary. App. p. 1759-61; p. 1764; pp. 1777-78; p. 1780. Further, Petitioner was not prejudiced since even if the three disputed entries were struck, it was unlikely to change the result of trial. Strickland.

III.

Probative evidence supports the PCR court's finding that the codefendant's PCR testimony claiming Petitioner was not involved in the triple homicide was not credible because the codefendant emphatically professed his own innocence during sentencing at trial and the evidence at trial does not support his new version of events that excludes Petitioner's involvement.

Oliver testified at the PCR hearing that he planned the robbery with Felder, he killed Miller and Batie, then later killed Felder. He claimed Petitioner was not involved with the robbery or murders. App. pp. 2519-27. The PCR court, at the end of the reconvened evidentiary hearing, made the following finding as to Oliver's testimony:

My take on it is that one potential reason for Mr. Oliver's statement before the Court on Tuesday, in other words, his confession was to straighten things out between him and [Petitioner], but nevertheless, the Court agrees with the position of the Attorney General. I don't find that testimony to be credible and deny that as a ground for Post-Conviction Relief.

App. p. 2721.

In order to obtain a new trial based on after-discovered evidence, the party requesting a new trial "must show that the evidence: (1) is such as would probably change the result if a new trial was had; (2) has been discovered since the trial; (3) could not by the exercise of due diligence have been discovered before the trial; (4) is material to the issue of guilt or innocence; and (5) is not merely cumulative or impeaching." Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1993) (citing State v. Caskey, 273 S.C., 325, 256 S.E.2d 737 (1979)).

The determination of whether new evidence is credible for purposes of a new trial rests with the trial court. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). In particular, "our

jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment.” State v. Mercer, 381 S.C. 149, 168, 672 S.E.2d 556, 565 (2009). “When testimony is in direct conflict and depends largely on the credibility of the new evidence, the trial judge is charged with the duty of assessing the evidence.” State v. Deese, 266 S.C. 534, 538, 225 S.E.2d 175, 176 (1976). Moreover, inconsistency in statements undermines the possibility that the result of a new trial would be different. See Johnson v. Catoe, 345 S.C. 389, 548 S.E.2d 587 (2001) (holding the petitioner failed to meet the requirement for a new trial such that the evidence would probably change the result if a new trial were granted when the witness on which the newly discovered evidence was based made prior inconsistent statements and, therefore, was not credible).

The PCR court found Oliver’s testimony was not credible. This determination is supported by the record. As the PCR court observed, Oliver insisted he was innocent during sentencing at trial.

Oliver told the trial court at sentencing:

I have a higher judge to be judged by. If I was guilty of these crimes, that would be the judge that I would be worried about more so than anything.

I’m hurt at the fact that this case was initiated behind me, just being in the wrong place at the wrong time. I didn’t witness a murder. I didn’t commit a murder. I didn’t accompany nobody who committed a murder or witness the murder.

App. p. 2345, lines 14-23. He told the victims’ family members in the court room that justice was not served because “the person that did this to your people, they’re still free. And by my judge one day I’ll be free from this illegal prosecution that John Meadors put down.” App. p. 2346, lines 2-7.

Further, Oliver’s claim at the PCR hearing, that he committed all the murders alone, is contradicted by Petitioner’s admissions to Allen and Jones, in which Petitioner admitted

participating in the robberies, as well as his statement to Robinson, which was admitted when she denied making the statement to police. Additionally, a different gun was used to murder Felder, and Oliver insisted to Allen that he did not murder Felder. Oliver's subsequent claims that Felder was an accomplice in the robbery and that he killed Felder, in addition to Batie and Miller, is simply not credible, and circumstances suggest he was merely attempting to help his associate. Oliver's direct appeal and PCR were unsuccessful and he already had his bite at the apple, so he did not have anything to lose.

The PCR court properly executed its role in determining the credibility of Oliver's testimony and it simply did not believe Oliver. Who would? Oliver, allegedly devout, nonetheless invoked God to lie to the trial court in dramatic fashion during sentencing. Oliver even admitted at the PCR hearing that if he testified at trial, he probably would have lied about his involvement, further proving Oliver cares little about the duty to testify truthfully under oath. App. p. 2526-27. The PCR court was not obligated to throw away critical thinking in finding Oliver's testimony during the PCR hearing was likewise a sham. Therefore, the PCR court's denial of relief on this ground is supported by probative evidence.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

June 14, 2019

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2018-001179

DOMINIC GALLMAN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

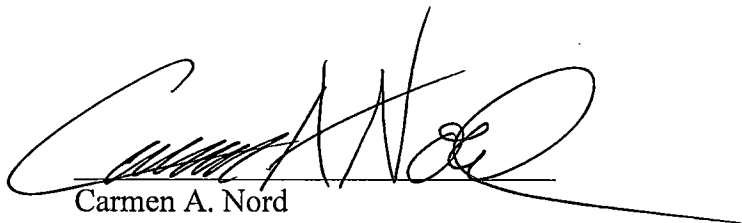
Respondent.

CERTIFICATE OF SERVICE

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

Susan Barber Hackett
S.C. Commission on Indigent Defense
Division Of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211-1589

This 14th day of June, 2019



Carmen A. Nord
Legal Assistant for Respondent



RECEIVED
JUN 14 2019
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

June 14, 2019

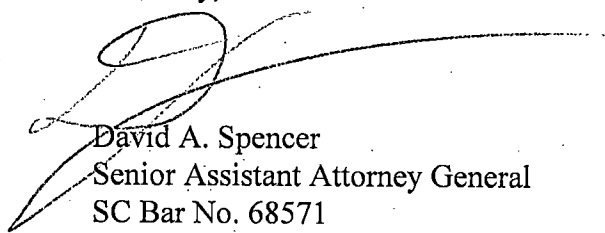
The Honorable Daniel E. Shearouse
Clerk of the South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Dominic Gallman v. State of South Carolina
Appellate Case No. 2018-001179
Lower Court Case No. 2012-CP-40-5000

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,



David A. Spencer
Senior Assistant Attorney General
SC Bar No. 68571

DAS/can
Enclosures

cc: Susan B. Hackett, Esquire (2 copies)