STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO BARNWELL COUNTY
Court of Common Pleas
The Honorable R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-001629

SAMMIE LEE GERRICK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

RESPONDENT'S STATEMENT OF THE ISSUES

I. Did the post-conviction relief court properly find Counsel was not ineffective for failing to request Judge Early recuse himself from presiding over Petitioner's trial since Petitioner failed to establish how Judge Early's involvement at trial created a conflict of interest or resulted in any prejudice to Petitioner?

II. Did the post-conviction relief court properly find Counsel was not ineffective for failing to investigate the "root" because Counsel provided credible testimony that Petitioner told him he was aware the "root" was in his vehicle and the "root" was his?

III. Did the post-conviction relief court properly find Counsel was not ineffective for failing to object to the trial judge's comments to the jury in his opening and closing where the trial judge instructed the jury to find "true facts" in Petitioner's case?

IV. Did the post-conviction relief court properly find Counsel was not ineffective for failing to object to Petitioner's absence during the in-chambers discussions regarding whether jurors 9 and 23 would be retained by finding the in-chamber discussions were not critical to the outcome of Petitioner's trial and counsel for both parties were present during those discussions, thus alleviating any alleged due process violation?

V. Did the post-conviction relief court properly find Counsel was not ineffective for failing to stipulate or object to graphic photographs being introduced by the State at trial because, as Counsel credibly testified, some of the photographs were relevant to the State's case and would be admitted at trial?

VI. Did the post-conviction relief court properly find Counsel was not ineffective for failing to exclude the testimony of Petitioner's wife because, although she invoked her spousal privilege at trial, she was properly questioned by the State regarding events she was directly involved in that were relevant to the State's case?

VII. Did the post-conviction relief court properly find Counsel was not ineffective for failing to object to "victim impact" testimony by State's witnesses because the testimony Petitioner points to was offered to corroborate the State's theory of the case, and Counsel articulated a valid trial strategy as to why he did not object to such testimony?

VIII. Did the post-conviction relief court properly find Counsel was not ineffective for failing to object to testimony Petitioner alleges was improper character testimony because that testimony was admissible as *res gestae* evidence against Petitioner?

IX. Did the post-conviction relief court properly find Counsel was not ineffective for failing to object during the State's closing argument because, as Counsel credibly testified, the State's comments were proper comments on the record established at trial, and, further, Counsel also credibly testified it was part of his trial strategy not to object during the closing argument?

X. Did the post-conviction relief court properly find Counsel was not ineffective for failing to request an opportunity to respond to the State's closing because, as Counsel credibly and correctly testified, he was not entitled to reply to the State's closing because he had moved items into evidence during the trial, foreclosing his opportunity to present the last argument, and additionally, Counsel was aware the trial judge followed this rule in his regular practice.

XI. Did the post-conviction relief court properly find Counsel was not ineffective for failing to make a motion to quash Petitioner's indictment due to a grand juror being a witness in Petitioner's case because, as the State acknowledge on the record, the issue was recognized before trial and properly rectified when the State obtained a new, valid indictment?

XII. Did the post-conviction relief court properly find Counsel was not ineffective for failing to present a third-party guilt theory at trial because Counsel was unable to substantiate any third-party guilt claims after his investigation and, therefore, Counsel made a valid strategic decision not to present a such a theory at trial?

XIII. Did the post-conviction relief court properly determine Counsel was not ineffective for failing to "federalize" the objections raised in his direct appeal because, Petitioner failed to provide any testimony during the hearing as to how his appellate issues would have been stronger had those issues been raised under federal constitutional law?

STATEMENT OF THE CASE

Petitioner is presently confined with the South Carolina Department of Corrections pursuant to the Aiken County Clerk of Court's orders of commitment. In November 2013, Petitioner was indicted by the Barnwell County Grand Jury for one count of murder (2013-GS-06-465). Daniel W. Williams, Esquire (Counsel), represented him. On November 18, 2013, Petitioner proceeded to a jury trial at the conclusion of which he was found guilty as indicted. The Honorable Doyet A. Early, III, sentenced Petitioner to confinement for life without parole.

A notice of appeal was filed on Petitioner's behalf and an appeal was perfected by Appellate Defender Laura M. Caudy of the South Carolina Commission on Indigent Defense pursuant to Anders v California, 378 U.S. 738, 87 S. Ct. 1396 (1967). The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Gerrick, Op. No. 2016-UP-092 (filed on February 24, 2014). The remittitur was issued on March 25, 2015.

Petitioner filed his application for post-conviction relief on March 15, 2016, alleging numerous allegations of ineffective assistance of counsel, lack of subject matter jurisdiction, and trial court error. (App. 964-973.) On May 7, 2018, Petitioner, through counsel, amended his application to add numerous allegations of ineffective assistance of counsel. (App. 980-984.)

An evidentiary hearing into the matter was convened on May 9, 2018, at the Aiken County Courthouse before the Honorable R. Scott Sprouse. Petitioner was present at the hearing and testified on his own behalf. Counsel and Dr. Janice Ross also testified. By order filed August 3, 2018, Judge Sprouse denied Petitioner's application in its entirety finding Petitioner failed to demonstrate how Counsel's performance was unreasonable under prevailing professional norms. Petitioner filed a timely notice of appeal. Thereafter, Petitioner filed his petition for writ of certiorari.

STATEMENT OF FACTS

A full summary of the facts in this case can be located in the post-conviction relief court's order of dismissal. (App. 1235-1248.)

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, 839 (2018). When reviewing factual findings, the 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. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40 (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. Smalls, 422 S.C. 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).

ARGUMENT

I. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to request Judge Early recuse himself from presiding over Petitioner's trial since Petitioner failed to establish how Judge Early's involvement at trial created a conflict of interest or resulted in any prejudice to Petitioner.

Though Petitioner asserts the trial court should have been recused from the case, this argument is meritless, as the mention of Judge Early's name in the "root"[1] does not create an actual conflict of interest. Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned...." Canon 3(E)(1), Rule 501, SCACR. "Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) (citation omitted).

The "root" was found during the execution of a search warrant in Petitioner's vehicle. Law enforcement found it in the center console of Petitioner's truck. Counsel moved to suppress the evidence found in the vehicle, arguing it was overly prejudicial and would cause the jury to act on emotion or prejudice. (App. 36.) The trial court denied the motion to suppress and allowed the "root" in as evidence of consciousness of guilt. Counsel did not move for the trial court to recuse himself from the case based on the "root," and the trial court made no mention of the

[1] The "root" refers to a handmade capsule like object crafted from a brown paper bag that contained dust, weed, twigs, and a penny. Upon opening the "root" there was writing on the paper that read, "Set me Sammie Gerrick free from murder and revoke bond." It also had the phrases "Jack Early set me free now," "Sammie Gerrick, Sr.," "So shall it be," and "Amen" written on it and each phrase was repeated three times. (App. 346.)

inclusion of his name in the writing.

Petitioner has failed to establish any deficiency on Counsel's behalf as the judicial canons do not provide a basis for recusal fitting of the facts of Petitioner's case, and therefore, Counsel had no basis to make such a request. Canon 3(E)(1)(a)-(d). The use of the trial judge's name in the "root" introduced at trial does not create any kind of conflict or the appearance of a personal bias or prejudice on the judge's behalf. The trial court made no mention of his personal opinion on the root during trial and carefully avoided all potentially prejudicial references of the root as evidence of "witchcraft."

Even if, as Petitioner asserts, Judge Early's involvement in Petitioner's trial somehow conveyed a personal opinion about the "root" evidence to the jury, any potential prejudice was cured by the judge's jury instruction

During his charge, Judge Early explained he had no opinion of the facts and that the jury's sole duty was to determine the true facts of the case. (App. 749-750.) Our courts "presume juries follow their instructions." State v. Young, 420 S.C. 608, 623, 803 S.E.2d 888, 898 (Ct. App. 2017); Richardson v. Marsh, 481 U.S. 200, 206, 107 S.Ct. 1702 (1987). The trial court's jury instructions directed the jury to disregard any act or appearance on his own part that may suggest to a juror that he has any opinion about the facts. (App. 749-50.) As such, the post-conviction court properly denied Petitioner relief and this Court should deny certiorari.

II. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to investigate the "root" because Counsel provided credible testimony that Petitioner told him he was aware the "root" was in his vehicle and the "root" was his.

Counsel testified at the evidentiary hearing that he spoke with Petitioner's wife, Charlene Gerrick (Charlene), about the case, but he did not speak with her specifically about the "root" because Petitioner admitted the "root" was his. Counsel further testified his concern during his

investigation was the inevitable impression upon the jury that the "root" constituted evidence of consciousness of guilt. Accordingly, Counsel moved to exclude the "root" under Rule 403, SCRE as overly prejudicial, arguing it would arouse passion in the jury, but Counsel was ultimately unsuccessful. (App. 36-47.) The motion was denied, and that denial was affirmed on direct appeal. Counsel explained when his motion was denied and the "root" was admitted into evidence, his trial strategy was to try to minimize the "root" as much as possible because it was damaging to his client.

Petitioner failed to establish how Counsel was deficient for failing to investigate any further information about the "root." Where a significant investigation has been conducted, and a defendant raises a collateral challenge to the strong presumption that the attorney's investigation was reasonable, a court must look to the specific facts of the case, as well as the decisions of the defendant that may have hindered trial counsel's preparation. Campbell v. Coyle, 260 F.3d 531, 553 (6th Cir. 2001.) To establish deficient performance, it is not enough for the petitioner to show his attorney's strategy was merely wrong, or his actions unsuccessful; he must demonstrate the actions his attorney took were "completely unreasonable." See Hoxsie v. Kerby, 108 F.3d 1239, 1246 (10th Cir. 1997.) It is well established in the record and by the credible testimony of Counsel that he investigated the issue of the "root" and was told by Petitioner the "root" belonged to him, thus negating any need for further investigation. Accordingly, the post-conviction relief court correctly found Counsel was not deficient in his investigation of the "root."

Petitioner has also failed to establish any resulting prejudice from Counsel's alleged deficiency regarding his investigation of the "root." As held in the direct appeal, the "root" was admissible in the manner utilized by the State at trial, as it was valid evidence of consciousness

of guilt, and any evidence presented to explain it likely would not have affected the outcome of the trial. Therefore, the post-conviction relief court properly denied relief to Petitioner as to this allegation and this Court should deny certiorari.

III. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to object to the trial judge's comments to the jury in his opening and closing to find "true facts" in Petitioner's case, because the jury was properly instructed on the State's burden of proof and the phrase "true facts" was not directing the jurors to "seek the truth," but rather suggests an evaluation of credibility, which is in fact the role of the jury.

At the evidentiary hearing, this claim was addressed through testimony by Counsel. Counsel testified he did not identify a big distinction between an instruction telling the jurors to find the "true facts" or just "the facts." Counsel later testified that he did not believe the cited jury instructions were misleading or confusing for the jury regarding the State's burden of proof.

On this issue, this Court has cautioned that "[j]ury instructions on reasonable doubt which charge the jury to 'seek the truth' are disfavored because they '[run] the risk of unconstitutionally shifting the burden of proof to the defendant.'" State v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000) (emphasis added). However, the Aleksey court went on to hold that because the "truth-seeking" instruction in that case was "given in the context of the jury's role in determining the credibility of witnesses" there was "not a reasonable likelihood the jury applied the challenged instruction in a manner inconsistent with the burden of proof beyond a reasonable doubt." Id. at 28-29, 538 S.E.2d at 252. The Court cautioned circuit courts to abandon the truth-seeking language in future charges, but held that the instruction as a whole in that case was a correct statement of law and found no basis for reversal on that ground. Id.

The recent opinion in State v. Beaty revisited the Aleksey decision and held that a preliminary instruction using the phrases "search for the truth," "true facts," and "just verdict" were delivered in error but caused no prejudice warranting reversal where the instruction

appeared in the preliminary remarks to the jury and, again, did not speak to the State's burden of proof. 423 S.C. 26, 813 S.E.2d 502 (2018). The Beaty court held "the disputed comments can be distinguished from Aleksey because they were a mere statement to the jury and not a charge on the law. Further, the remarks were not linked to either the reasonable doubt or the circumstantial evidence charges as was condemned in Aleksey." Id.

The instructions delivered in this case do not mirror either Aleksey's "seek the truth" or "search for the truth" language, or Beaty's "just verdict." The language at issue here is limited to the phrase "true facts." The limited nature of this phrase imparted no duty upon Counsel to object in light of the Aleksey decision, which existed at the time of trial, and the failure to object to this limited phrase did not rendered Counsel's performance deficient. As Counsel's testimony touched upon, the use of the word "true" as a modifier of the word "facts" does not carry same connotation as instructing the jury that the trial is a search for the truth. "True facts" merely indicates there may be incongruent testimony, and the jury may have to weigh credibility of evidence in reaching their conclusion, which is indeed the jury's role.

The relevant case law makes it clear that the instructions did not prejudice Petitioner because they spoke only generally to the jury's role as the factfinder. There is no reasonable possibility of a different outcome had Counsel lodged an objection to the "true facts" phrasing. Accordingly, Petitioner has failed to show how Counsel was deficient pursuant to Aleksey and Beaty, or any resulting prejudice from the alleged deficiency. As such, the post-conviction relief court properly denied Petitioner relief as to this allegation and this Court should deny certiorari.

IV. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to object to Petitioner's absence during the in-chambers discussions regarding whether jurors number 9 and 23 would be retained because the in-chamber discussions were not critical to the outcome of Petitioner's trial and counsel for both parties were present during those discussions, thus alleviating any alleged due process violation.

"A defendant has the right to be present at any stage of the criminal proceeding that is *critical to its outcome* if his or her presence would contribute to the fairness of the procedure." Starnes v. State, 307 S.C. 247, 250, 414 S.E.2d 582, 583 (1991) (emphasis in original). This may include "when a trial judge conducts voir dire during the course of the trial to determine the jury's continued impartiality." State v. Rivers, 294 S.C. 123, 125, 363 S.E.2d 105, 106 (1987). A violation of the right to be present may occur when a court's mid-trial voir dire of a juror occurs in the jury room without the presence of counsel. Id. "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Snyder v. Massachusetts, 291 U.S. 97 (1934).

Here, the alleged due process violation does not form a basis for relief. State v. Caldwell, 300 S.C. 494, 500, 388 S.E.2d 816, 819 (1990), overruled on other grounds by State v. Evans, 371 S.C. 27, 30, 637 S.E.2d 313, 315 (2006). The in-chambers discussions included counsel for both parties and were revisited on the record. (App. 139-41, 481-82). Thus, the in-chambers talks were not in and of themselves critical to the outcome of the proceedings. The trial court presented the context of those discussions on the record, providing Counsel an opportunity to agree or disagree with the characterization, and further lending an opportunity for Counsel to alter his course after consulting with his client. See State v. Faries, 125 S.C. 281, 118 S.E. 620, 621 (1923) ("At the hearing of these motions the defendant was represented, and was fully heard by his able counsel. His personal presence could have subserved no useful purpose. It cannot be assumed, certainly in the absence of an affirmative showing, that he would have elected, if present, to be heard by himself as well as by counsel.").

Juror 23 was elevated from an alternate to the regular jury panel and came forward to one of the deputies when she realized she was a Facebook "friend" of one of the witnesses in the

case, although she had never corresponded with the witness. (App. 481-482.) The initial in-chambers discussion concerning this information was revisited on the record, at which time Petitioner was present and Counsel had an opportunity to alter his position regarding whether the juror should continue or be excused. (App. 482.) Counsel testified he took the position that he wished to keep Juror 23 on the jury because he thought the fact the juror had come forward indicated she was a good, honest juror. Thus, her continuing on the jury did not concern Counsel.

In a similar vein, Juror 9 was released after an on-the-record discussion regarding the concerns leading to the juror's excusal. The trial record reflects this juror appeared before Counsel's wife, who was a probate judge, for "mental health issues," and some of the issues presented to the court left it with "great concern as to her ability to serve as a juror." (App. 14.) Ultimately, the trial court decided this juror should not continue. (App. 139-41.) Counsel testified he did not wish to have a juror whose competency may be questioned due to a known history of mental health issues, and he in fact preferred the alternate juror who was elevated in place of Juror 9.

Furthermore, Petitioner was not prejudiced by the excusal of Juror 9 and retention of Juror 23. Petitioner must demonstrate he was actually prejudiced by the inclusion and exclusion of the cited jurors. See Weaver v. Massachusetts, __ U.S. __, 137 S. Ct. 1899 (2017) (applying Strickland error-and-prejudice standard to claim of ineffective assistance of counsel for an alleged violation of the defendant's right to public trial). The relevant question on whether juror's service prejudiced a defendant is whether there is any indication in the record that the challenged jurors, or the jurors who did serve, did so without impartiality. Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318, 326 (2002); State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244,

247–48 (2002) There is no right to be tried by a jury composed of particular individuals. State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980).

As the record establishes in this case, Petitioner has failed to show any actual prejudice caused by the excusal of Juror 9 and retention of Juror 23, as there exists no evidence of bias or other improvident mindset. As such, the post-conviction relief court properly denied Petitioner relief as to this allegation, and this Court should deny certiorari.

V. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to stipulate or object to graphic photographs being introduced by the State at trial because, as Counsel credibly testified, some of the photographs were relevant to the State's case and would be admitted at trial, so his trial strategy was to confer with the State in order to limit the number of photographs that would be introduced at trial.

At trial, Counsel objected to the admission of photographs of Victim's body at the time they were offered by the State. The parties immediately conferred and agreed upon which photos the State would introduce. (App. 411-13.) The record evidences that some photographs were eliminated from the State's intended introduction. (App. 419.) The photographs ultimately entered into evidence depicted the condition of Victim as discovered and the process by which he was withdrawn from the shallow grave, including details associated with the condition of the gravesite. (App. 410-21.)

Counsel testified during the evidentiary hearing he recalled the photographs coming in, commenting that the State believed the ligatures found on Victim's body connected Petitioner to the homicide. (App. 1025.) Trial Counsel testified that he did not want the ligatures themselves introduced. Counsel testified he conferred with the State as well as the trial court regarding what photographs would be excluded, and the total number of photos the State sought to introduce was in fact reduced. Counsel testified he gave consideration to the total number of photographs and

thought the best course of action was to limit that number since he was aware the court would allow at least some into evidence.

On this record, there can be no finding of deficient performance or prejudice. First, as to Counsel's decision to confer with the State and consent to the limitation of photographs, that course of action denotes a reasonable exercise of valid trial strategy. Any post-conviction relief court must be wary of second-guessing trial counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992). "[W]hen 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)).

Petitioner also failed to meet his burden of establishing prejudice in regards to this claim. The photographs were admissible so that, even if Counsel had taken some alternate course of action, there remains no reasonable probability of a different result at trial. Photographs "are not inadmissible merely because they are gruesome, especially where, as here, the photos simply mirror the unfortunate reality of the case." State v. Collins, 409 S.C. 524, 535, 763 S.E.2d 22, 28 (2014). When photographs, even gruesome ones taken prior to autopsy, corroborate witness testimony and illustrate the circumstance of the crime, they will be deemed admissible. Collins, 409 S.C. at 536, 763 S.E.2d at 28.

Notably, Petitioner did not incorporate the photographs into the post-conviction relief record in this case. However, the remainder of the record demonstrates the photographs identified by Petitioner served to corroborate other circumstantial evidence. Although, the discovery of Victim's body in a shallow grave was not disputed at trial, the location and condition of the body and gravesite were relevant to the State's case. Photographs of that

gravesite and of Victim's body during autopsy were probative of factual issues before the jury such as the timing and manner of death. The forensic pathologist in this case could not determine, to any reasonable degree of certainty, how the victim died. "Where the State had the burden of proving the elements of the offenses charged and there were no eyewitnesses to the incident resulting in the victim's death, the photos here provided concrete evidence as to what transpired on that fateful day." Id. at 536, 763 S.E.2d at 28. The photographs were relevant to the integrity of the investigation as well.

Given the status of South Carolina jurisprudence on this issue, any likelihood that Petitioner would have prevailed in preventing admission of the photographs in some other manner is substantially low. Counsel articulated a valid trial strategy in addressing the photographs introduced in Petitioner's case, and, further, Petitioner has failed to show how a different tactical decision by Counsel would have resulted in a different outcome at trial. As such, the post-conviction relief court properly denied Petitioner relief as to this allegation, and this Court should deny certiorari.

VI. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to exclude the testimony of Petitioner's wife, Charlene, because, although she invoked her spousal privilege at trial, she was properly questioned by the State regarding events she was directly involved in that were relevant to the State's case.

South Carolina Code Section 19-11-30 provides that, in criminal proceedings, "no husband or wife may be required to disclose any communication made by one to the other during their marriage." The privilege belongs to the witness and cannot be invoked by the other spouse. State v. Motes, 264 S.C. 317, 215 S.E.2d 190 (1975). The spousal privilege applied to Charlene such that only Charlene could invoke it, which she did. S.C. Code Ann. § 19-11-30; Motes, 264 S.C. at 324, 215 S.E.2d at 192–93. However, invocation of the privilege does not stop law enforcement officer testimony regarding what transpired after speaking with the witness who

invoked the privilege. State v. Copeland, 321 S.C. 318, 468 SE2d 620 (1996). Similarly, Charlene's invocation of the privilege did not preclude fact testimony about what actions she directly witnessed and participate in and, therefore, formed no basis for a motion to exclude. Id.

Counsel moved pre-trial to exclude Charlene's testimony about her communications with her husband. The trial court correctly ruled the privilege was the witness's to invoke, and she would need to invoke it at the proper time. Counsel ensured Charlene was given the opportunity to invoke her right during the trial outside the presence of the jury. However, her assertion of the spousal privilege did not prevent the State from questioning her as a fact witness about events in which she partook that were directly relevant to the investigation into the victim's disappearance and the discovery of his body. Id.

Counsel testified he was aware of the statements Charlene provided to law enforcement as part of the investigation. He testified he advised Charlene of her right to seek representation by independent counsel, however, she did not do so until the post-conviction relief hearing. To the extent Charlene testified at trial, the record reflects that the court and the parties respected her invocation of the spousal privilege and her testimony did not divert from the boundaries prescribed. Id. No communications between Charlene and Petitioner were placed on the record. She served solely as a fact witness to things she personally observed. (App. 302-10; 294-98). Any statement(s) Charlene submitted to law enforcement were not made part of the trial record.

Counsel also testified at the evidentiary hearing that he believed he had no basis on which to move to suppress any of this testimony as "fruit of the poisonous tree" because he did not have standing to raise that issue; only Charlene herself had standing, as it was her right that was allegedly violated. As such, Counsel could not have successfully moved to suppress Charlene's statements on this basis, so he cannot be found deficient for failing to do so. "[A]

defendant challenging the admissibility of evidence obtained in violation of constitutional rights must often show he is challenging the evidence based on a personal violation of *his* rights by the manner in which the evidence was obtained[.]" State v. Miller, 359 S.C. 589, 598–99, 598 S.E.2d 297, 302 (Ct. App. 2004), aff'd, 367 S.C. 329, 626 S.E.2d 328 (2006) (emphasis added).

Furthermore, as a result of Copeland, any error in Charlene's testimony would not change the outcome of the trial because the testimony from law enforcement about Charlene taking them to Victim's Honda at the Chinese restaurant was still admissible. As such, the post-conviction relief court properly found Petitioner failed to meet either prong of the Strickland analysis regarding this allegation and this Court should deny certiorari.

VII. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to object to "victim impact" testimony by State's witnesses because the testimony Petitioner points to was offered to corroborate the State's theory of the case, and Counsel articulated a valid trial strategy as to why he did not object to such testimony.

Ordinarily, true victim impact evidence should be reserved for the court's consideration at sentencing. S.C. Code § 16-3-1550(F); State v. Hill, 331 S.C. 94, 105, 501 S.E.2d 122, 128 (1998). The testimony Petitioner alleges was improper "victim impact evidence" was properly found by the post-conviction relief court not to be so.

Petitioner points to snippets of testimony from Victim's girlfriend, Maurice Williams (Williams), and Lana Joyner (Joyner) to support his claim. However, the testimony provided by those witnesses was offered as probative evidence of whether Victim would have acted in a manner consistent with the versions of events put forward by Petitioner throughout the course of the investigation. The jury learned through Joyner and Williams that Victim was not known to use drugs or engage in drug deals, and he had received a monetary settlement from his wife's wrongful death; any money he had to lend Petitioner came from honest means. (App. 183-84, 176-77, 493-94.) Additionally, each witness testified Victim would not have ignored calls or

texts from his loved ones and would not have gone "off the grid" or skipped town without talking to his family and friends. Williams and Victim's girlfriend also established Victim was responsible for a family; he was the primary caretaker of his children.

Further, Counsel credibly testified he perceived this testimony to be background about Victim. He testified he did not object to the limited nature of this testimony because he did not want the jury to think he was trying to hide something. Counsel testified that had the evidence at issue implied more, he would have objected. His testimony on this point evidences an exercise of valid trial strategy which cannot now, in hindsight, be deemed deficient. Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008). Accordingly, Petitioner was properly denied relief as to this allegation, and this Court should deny certiorari.

VIII. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to object to testimony Petitioner alleges was improper character testimony because that testimony was admissible as *res gestae* evidence against Petitioner.

Any testimony regarding Petitioner being incarcerated before or during the crime in question is admissible as *res gestae* evidence, such that no prejudice flows from its introduction by either the State or by Counsel. *Res gestae* provides for the admissibility of "other bad acts" evidence when such acts are close in time to the charged crime and "'furnishes part of the context of the crime' or is necessary to a 'full presentation' of the 'case, or is so intimately connected with and explanatory of the crime charged against the defendant and is so much a part of the setting of the case'" that its proof completes "the story of the crime on trial by proving its immediate context . . . ." State v. Adams, 322 S.C. 114, 122, 470 S.E.2d 366, 370-71 (1996) (quoting United States v. Masters, 622 F.3d 86 (4th Cir. 1980)).

The evidence at trial, which showed Petitioner was in custody at various times, was relevant to the investigation into Victim's death because the circumstances under which Victim

was last seen alive directly pertained to him bailing Petitioner out of jail. (App. 179-85, 214-18). This evidence was thus admissible as *res gestae.* The crux of the case was that Victim bailed Petitioner out of jail, and then Victim went missing when it was time for Petitioner to pay him back. Some of the evidence referred to by this allegation was also contained within, or pertained to, the circumstances in which Petitioner provided several statements to law enforcement over the course of the investigation. (App. 269, 333.) As such, Petitioner has failed to meet his burden as to deficiency or prejudice under Strickland, and this Court should deny certiorari.

IX. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to object during the State's closing argument because, as Counsel credibly testified, the State's comments were proper comments on the record established at trial, and, further, Counsel credibly testified it was part of his trial strategy not to object during the closing argument.[2]

The proper evaluation of these allegations asks "whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Simmons v. State, 331 S.C. 333, 338, 503 S.E.2d 164, 166–67 (1998). Any arguments made by the solicitor "should stay within the record and reasonable inferences to it." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). However, any excerpt of the State's closing exists as "one moment in an extended trial." Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974). Accordingly, a court must conduct an "examination of the entire proceedings" in context. Id. at 643. Even "[i]mproper comments do not require reversal if they are determined not to be prejudicial to the defendant." State v. Navy, 370 S.C. 398, 412, 635 S.E.2d 549, 556 (Ct. App. 2006), aff'd in part, rev'd in part on other grounds, 386 S.C. 294, 688 S.E.2d 838 (2010).

In support of these allegations, Petitioner points to several instances in closing argument where the State referred to Petitioner as lying and concealing the truth. (App. 696-740.) Counsel,

[2] This section addresses allegations 9, 11, and 12 of Petitioner's PWC.

however, testified he did not recognize anything particularly inflammatory within the State's closing. He credibly testified he felt the State's closing argument permissibly commented on the record established at trial. He testified he felt objecting to the State's closing would draw negative attention and may damage his own credibility with the jury. He explained his general trial strategy is not to object where he believed the jury may interpret the objection as an attempt to hide something. Counsel further testified that he was acutely aware that the problem inherent in defending Petitioner was the number of inconsistent statements he made to law enforcement. In order to retain his credibility with the jury, Counsel testified, he had to concede that the Petitioner indeed changed his story over time and not all statements could be explained.

Petitioner also complains the State "advanced a theory of the forensic evidence that was not supported by. . . [the] forensic pathologist, Dr. Janice Ross." (PWC. 18.) Dr. Ross testified the body was in a moderate-to-advanced state of decomposition at the time of autopsy, that she could identify "probable defensive wounds" on Victim, there was evidence Victim had been bound, and that "it was most likely that there was some kind of asphyxiation" or "strangulation around the neck . . . as a cause of death." (App. 439-48.) The record, therefore, directly reflects the facts and reasonable inferences therefrom which were argued by the State in closing. (App. 696-740.)

In light of this evidence and the remainder of the circumstantial evidence presented, the State's closing argument tracked the evidence of (1) motive, (2) opportunity, and (3) guilty acts in the context of the record developed at trial. (App. 707.) The State argued a number of different statements Petitioner provided law enforcement could not be corroborated or squared with the chain of circumstantial evidence presented at trial. (App. 696-744.) The characterizations singled out by Petitioner during the evidentiary hearing were supported by, and contained within, the

record presented. It could reasonably be inferred from the record in this case that Petitioner was in fact concealing the truth. As law enforcement presented Petitioner with more information about Victim's disappearance, Petitioner would deliver a statement which was inconsistent with the last and which would explain away the additional details with which he was confronted. The State is entitled to comment on these inconsistencies during its closing argument. See State v. New, 338 S.C. 313, 319, 526 S.E2d 237, 240 (Ct. App. 1999) (Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony.").

Petitioner has failed to show this Court that the State's closing argument was not contained to the record and reasonable inferences therefrom. Therefore, Petitioner has failed to meet his burden as set forth in Strickland. As such, this Court should deny certiorari.

X. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to request an opportunity to respond to the State's closing because, as Counsel credibly and correctly testified, he was not entitled to reply to the State's closing because he had moved items into evidence during the trial, foreclosing his opportunity to present the last argument, and additionally, Counsel was aware the trial judge followed this rule in his regular practice.

Counsel testified he was aware there is a rule regarding the order of closing arguments. The rule, Counsel correctly testified, is that where the defense put in evidence, the State gets the final closing. State v. Gellis, 158 S.C. 471, 485-86, 155 S.E. 849, 855 (1930). Counsel further testified he was aware the presiding judge not only followed that rule, but followed a routine practice of having the State's initial closing argument be only "on the law" in such a circumstance, saving argument on the facts of the case for the end. State v. Lee, 255 S.C. 309, 318, 178 S.E.2d 652, 656 (1971); Rule 37, SCRCrimP. Counsel also testified that when he made the strategic decision to put in evidence at trial, he knew that doing so waived his right to have the last word before the jury.

Petitioner's reliance on the opinion in Beaty is misplaced as the opinion did not alter the practice or procedure of closing arguments in a criminal trial. Beaty, 423 S.C. 26, 813 S.E.2d 502 (2018). Instead, the Beaty court stressed "trial judges must, on a case-by-case basis, ensure that a defendant's due process rights are not violated during the closing argument stage." Id.

In the context of a PCR action, our courts have "never required an attorney to be clairvoyant or anticipate changes in the law." Teamer v. State, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016). Even if the edict in Beaty could be construed as a change in the law, trial counsel in this case is not ineffective for failing to request the last argument before the jury. Beaty does not authorize the right to final closing in this case even if trial counsel had requested it. Counsel put in evidence and waived his right to last closing. Not even today's precedent allows Petitioner the last closing argument after he introduces evidence at trial. Accordingly, there is no deficiency or prejudice as to this allegation, and this Court should deny certiorari.

XI. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to make a motion to quash Petitioner's indictment due to a grand juror being a witness in Petitioner's case because, as the State acknowledge on the record, the issue was recognized before trial and properly rectified when the State obtained a new, valid indictment.

The trial record reflects the State acknowledged a potential defect in a previous indictment issued in this case because one of the grand jurors ended up as a witness in Petitioner's case. The State cured any potential defect prior to the start of trial because the grand jury was in session at the time the potential defect came to light, and the State obtained new indictment. (App. 136.) At the evidentiary hearing, Counsel testified he believed the defect in the indictment was cured when the third indictment, which was the basis of the prosecution at issue, was issued in this case. This claim, therefore, lies solely on Petitioner's speculation that there was an error in the grand jury proceedings. Yet the record affords no basis to "presume that the

State abused the grand jury process in order to obtain a finding of probable cause to prosecute." State v. Thompson, 305 S.C. 496, 501, 409 S.E.2d 420, 424 (Ct. App. 1991).

Where a defendant does not present clear evidence of an abuse of the grand jury proceedings, a motion to quash the indictment will not prevail. "Speculation about 'potential' abuse of grand jury proceedings cannot substitute for evidence of actual abuse as grounds for quashing an otherwise lawful indictment." State v. Thompson, 305 S.C. at 502, 409 S.E.2d at 424. See also State v. Shands, Op. No. 5569, Adv. Sh. Pp. 63-65 (S.C. Ct. App. filed June 13, 2018) (Shearouse Adv. Sh. No. 24 at 59) (finding speculation about potential abuse of grand jury proceedings is insufficient grounds for quashing an otherwise lawful indictment). Given that Petitioner produced no credible evidence in support of this allegation at the evidentiary hearing, it follows that Counsel cannot be found deficient for failing to move to quash the indictment. See State v. Moses, 390 S.C. 502, 521, 702 S.E.2d 395, 405 (Ct. App. 2010) (affirming the trial court's denial of the defendant's motion to quash the indictments even though direct evidence "is difficult to provide due to the secretive nature of the grand jury proceedings").

There can also be no resulting prejudice on this ground, as Counsel testified he was on notice of the charges before the trial. "An indictment is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005)). The trial court must look at "the indictment with a practical eye in view of all the surrounding circumstances. The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that

are intended to be charged." Id. (citing Gentry, 363 S.C. at 102-103, 610 S.E.2d at 500).

Petitioner has failed to prove there was a flaw in the indictment, or any resulting prejudice as to this claim. Therefore, Petitioner has failed to meet his burden as set forth in Strickland and this Court should deny certiorari.

XII. The post-conviction relief court properly determined Counsel was not constitutionally ineffective for failing to present a third-party guilt theory at trial because Counsel was unable to substantiate any third-party guilt claims after his investigation and, therefore, Counsel made a valid strategic decision not to present a such a theory at trial.

Before his trial, Petitioner convinced two separate people who were incarcerated with him, Early Glover (Glover) and Dustin Williams (Williams), to write a note falsely confessing to the crime for which Petitioner was charged. Williams' note included information alleging he killed Victim in Santee, and the body was moved to the gravesite. In an attempt to corroborate this information, Counsel did an extensive investigation into the possibility that Victim was killed elsewhere and moved. He testified he consulted with a friend who was a forestry major and hired an expert from Clemson University to analyze the bright green leaves found around Victim's body which did not match the surrounding leaves. Counsel testified the result of this investigation showed the leaves could have come from a Laurel Oak tree at the gravesite. This information did not align with Counsel's attempt to show the leaves came from another location. Based on the results of this investigation, Counsel strategically chose not to use this argument to assert third-party guilt.

Additionally, the note written by Williams that would have corroborated this defense lost all credibility when the trial testimony of Glover came to light. As Counsel recalled, Glover testified at trial that Petitioner paid him $1000 to write a note providing Petitioner with an alibi. Counsel testified he had to make a strategic decision as to whether, after Glover's testimony, his own defense witness (i.e. Williams) would be credible.

In short, these third-party guilt investigations dead-ended and Counsel exercised a strategic decision in not presenting evidence of third-party guilt because he could not credibly corroborate it. Particularly since Petitioner admitted in one statement to law enforcement that he was present at the crime scene. 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. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996). Thus, the post-conviction relief court correctly found Counsel not deficient.

Additionally, Petitioner failed to present any specific evidence of third-party guilt at the evidentiary hearing that could have been used by Counsel at trial, and thus his allegation this was a valid defense is purely speculative. 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 from the witness' failure to testify at trial." Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998). Petitioner did not present any testimony from favorable witnesses to show how Counsel should have properly presented the defense, thus he has failed to meet his burden of proving prejudice as set forth in Strickland. As such, this Court should deny certiorari.

XIII. The post-conviction relief court properly found Counsel was not constitutionally ineffective for failing to "federalize" the objections raised in his direct appeal because, Petitioner failed to provide any testimony during the hearing as to how his appellate issues would have been stronger had those issues been raised under federal constitutional law.

If a direct appeal claim is based solely in state law, it is ordinarily barred from review by the United States District Court should Petitioner later pursue the same claim in a collateral federal action seeking a writ of habeas corpus. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). Petitioner has not proffered the federal nature of the claims he perceives should have been pursued on appeal. Petitioner also failed to proffer any testimony in furtherance of this allegation

at the evidentiary hearing. Therefore, Petitioner has failed to present any factual support for this claim and has thus has failed to meet his burden of proof.

Nevertheless, no grant of post-conviction relief is warranted in regards to Counsel's pursuit and treatment of the issues raised on direct appeal. To demonstrate prejudice here, Petitioner must prove that, if Counsel had objected in a way that "federalized" the issues above, that "'there is a reasonable probability the outcome of the [appellate] proceeding would have been different.'" Stone v. State, 419 S.C. 370, 390, 798 S.E.2d 561, 572 (2017) (quoting Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005)).

By and through appellate counsel, Petitioner raised three evidentiary issues on direct appeal. The Court of Appeals affirmed Petitioner's conviction and sentence, upholding the trial court's evidentiary rulings on the merits. State v. Gerrick, Op. No. 2016-UP-092 (S.C. Ct. App. filed Feb. 24, 2016). There is no probability these issues would have been stronger on appeal had they been "federalized" rather than raised simply as state law evidentiary issues. The underlying facts and applicable law would remain the same on direct appeal to the South Carolina Court of Appeals had they been "federalized."

As the opinion of the South Carolina Court of Appeals is supported by relevant facts and case law, Petitioner cannot demonstrate any due process violation or other error of a federal constitutional dimension which would warrant relief had the issues been framed in an alternative way. As such, Petitioner has failed to meet his burden as to either deficiency or prejudice as set forth in Strickland and this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied. Should this Court grant the petition for writ of certiorari, Respondent requests permission to more fully

brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

JANELL H. GREGORY
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Aug. 2nd, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
AUG 02 2019
S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
R. Scott Sprouse, Circuit Court Judge

Appellate Case No. 2018-001629

SAMMIE LEE GERRICK,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

I, Kaitlyn Slice, certify that I have served the within Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, South Carolina 29646

I further certify that all parties required by Rule to be served have been served. This 2nd day of August, 2019.

Kaitlyn Slice

KAITLYN SLICE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

August 2, 2019

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

Re: **Sammie Lee Gerrick v. State of South Carolina**
Appellate Case No. 2018-001629
Lower Court Case No. 2016-CP-06-00111

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,

Janell H. Gregory
Assistant Attorney General
SC Bar No. 103176

JHG/ks
Enclosures

cc: E. Charles Grose, Esquire (2 copies)