STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 17 2020
S.C. SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002110

Troy Darnell Hunter, #226094,

Petitioner,

v.

State of South Carolina,

Respondent,

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General
SC Bar #79054

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

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

RESPONDENT'S QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 3

STANDARD OF REVIEW 7

ARGUMENT 9

I. Petitioner's allegation Counsel was constitutionally ineffective for failing to request a jury charge on any lesser-included offenses is not properly before this Court because it was not raised at the evidentiary hearing. In any event, in response to the issue actually raised at the evidentiary hearing, the PCR court correctly found Counsel made a strategic decision to ask the jury to decide between the greater offense or an acquittal, in accordance with the defense's theory of the case that no robbery took place. Therefore, Petitioner cannot meet his burden as to the deficiency prong, even if the issue is preserved.................9

II. The PCR court correctly found Counsel was not constitutionally ineffective because Counsel's decision not to call Charles Hunter as a witness was based on a reasonable trial strategy where Hunter's testimony contradicted the defense theory Petitioner was not present, and, in any event, Hunter's testimony did not establish Petitioner did not have a gun.......................11

III. The PCR court correctly found Counsel was not constitutionally ineffective for declining to object during the solicitor's closing argument because the solicitor was not bolstering or otherwise making an improper argument, so Counsel had no basis to object. 14

IV. The PCR court correctly found Counsel was not constitutionally ineffective for declining to object to the testimony of Dr. Lawhan as outside the scope of his expertise when Dr. Lawhan was qualified as an expert in dentistry and facial trauma, and Lawhan opined about the mechanism of injury to the victim's face, jaw, and teeth, all of which is within his scope of expertise.. 15

CONCLUSION..17

RESPONDENT'S QUESTIONS PRESENTED

I. If Petitioner's allegation Counsel was constitutionally ineffective for failing to request a jury charge on any lesser-included offenses is not procedurally barred because it was not raised at the evidentiary hearing, did Counsel render effective assistance when he decided not to ask for a charge on any lesser-included offenses because Counsel strategically wanted the jury to decide between the greater offense or an acquittal, in accordance with the defense's theory of the case that no robbery took place?

II. Did the PCR court correctly find Counsel was not constitutionally ineffective because Counsel's decision not to call Charles Hunter as a witness was based on a reasonable trial strategy where Hunter's testimony contradicted the defense theory Petitioner was not present, and, in any event, Hunter's testimony did not establish Petitioner did not have a gun?

III. Did the PCR court correctly find Counsel was not constitutionally ineffective for declining to object during the solicitor's closing argument because the solicitor was not bolstering or otherwise making an improper argument, so Counsel had no basis to object?

IV. Did the PCR court correctly find Counsel was not constitutionally ineffective for declining to object to the testimony of Dr. Lawhan as outside the scope of his expertise when Dr. Lawhan was qualified as an expert in dentistry and facial trauma, and Lawhan opined about the mechanism of injury to the victim's face, jaw, and teeth, all of which is within his scope of expertise?

STATEMENT OF THE CASE

Troy Darnell Hunter (Petitioner) is incarcerated with the South Carolina Department of Corrections pursuant to orders of commitment from the Florence County Clerk of Court. Petitioner was indicted at the June 2012 term of the Florence County Grand Jury for armed robbery, attempted murder, assault and battery – second degree, and possession of a firearm (2012-GS-21-692). H. Steven DeBerry, IV, Esquire (Counsel), represented Petitioner. On January 14-16, 2013, Petitioner proceeded to a jury trial before the Honorable D. Craig Brown on the counts of armed robbery and assault and battery – second degree. The remaining charges were dismissed. The jury convicted Petitioner as indicted, and Judge Brown sentenced him to confinement for thirty years for armed robbery concurrent with three years for assault and battery – second degree.

Counsel filed a notice of appeal on Applicant's behalf, and an appeal was perfected by Lara M. Caudy, Esquire, of the South Carolina Commission on Indigent Defense – Appellate Defense Division. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Hunter, Op. No. 2014-UP-437 (December 3, 2014). The remittitur was issued on December 22, 2014.

Petitioner filed an application for post-conviction relief on January 8, 2015. Respondent filed its Return on November 21, 2016. An evidentiary hearing into the matter convened on August 31, 2017, at the Florence County Courthouse. Jonathan Waller, Esquire, represented Petitioner. Lindsey A. McCallister of the South Carolina Attorney General's Office, represented Respondent. By written order filed October 29, 2018, the PCR court denied Petitioner's claims and dismissed his application for relief with prejudice.

Petitioner filed a timely notice of appeal of the denial of post-conviction relief. On September 3, 2019, Petitioner, through counsel, filed a petition for writ of certiorari in this Court.

STATEMENT OF THE FACTS

At approximately 2:00 p.m. on November 30, 2011, Demetrius Holloman (Victim) and Roderick Titus returned to Titus's home after attending a funeral. App. pp. 63-64, 130. At trial, Roderick Titus testified that he, Victim, and Petitioner were all friends. App. pp. 60-61. Titus testified that on November 30, 2011, he and Victim attended a funeral together and then returned to his residence. App. pp. 63-64. Titus went inside the home to change clothes, while Victim walked to the side of the house. App. p. 65. Titus testified he heard a "loud bang noise" that could have been gunshots, at which time his sisters ran inside screaming and upset. App. pp. 66, 69-70.

Nate Orgbon testified he was also at Titus's house on November 30, 2011, and saw Petitioner there later in the day, after lunch. App. pp. 84-85. He testified Petitioner was looking for Victim, and someone told Petitioner where to find Victim. App. p. 86. Orgbon explained Petitioner walked up to Victim and "clean clocked" him with his fist. App. p. 87. Orgbon testified, "He just punched the man, you know what I mean, so they (sic) fighting." App. p. 87. Orgbon stated he left after he saw Victim "go back" after Petitioner hit him. App. p. 87.

The State also called Idena Titus Simmons, Roderick Titus's mother, who lived at the address where the incident occurred. App. p. 109. She testified when she returned from the funeral after lunch, she heard a loud boom. App. p. 112. She recalled telling her husband it sounded like a truck hitting a transmitter, and her husband said it sounded like a gun. App. p. 112.

Deloris Titus Johnson, Simmons' sister, testified she was also at the Simmons' residence on November 30, 2011. App. p. 119. Johnson testified she was parked in the front yard talking on her cell phone when she saw Petitioner arrive with a man she did not know. App. pp. 119-21. Next, she recalled hearing gunshots and saw the people in the backyard begin to scatter. App. p. 121. She testified she saw Petitioner and the man walk back to their car and leave. App. p. 122.

Victim testified regarding the details of the assault and robbery. According to Victim, when he arrived at the home, he walked to the side of the house, where he had his cell phone charger plugged in, and kneeled down to unplug it. App. p. 131. While Victim was kneeling down, Petitioner came up behind him and hit him in the mouth with a .357 Magnum. App. pp. 131-32. Victim testified he fell to the ground, and Petitioner hit him on the top of the head with the gun, stood over him, and asked where "it" was. App. pp. 132-33. Victim testified Petitioner shot the gun right by Victim's head and then reached into Victim's pants pocket, taking $1,000. App. pp. 133-34. Victim testified Petitioner then threatened to kill Victim if he said anything, and left the scene. App. p. 133.

Immediately after he saw Petitioner drive away, Victim got up and walked straight to his mother's house and told her what happened and who did it. App. pp. 135-36. However, initially, Victim told police he did not know who did it, but he eventually gave Petitioner's name. App. pp. 137-39. Victim testified he went to the hospital and spoke to police there, but he did not give Petitioner's name at first because he was afraid. App. p. 139. Victim testified he told the police what really happened a couple days later once he realized the full extent of his injuries and the money it would cost to repair them. App. pp. 138-39. He testified he was so scared after telling police Petitioner's name, he stayed inside for two weeks, fearing for his life. App. p. 140.

On cross-examination, Counsel thoroughly questioned Victim regarding the timing of when he named Petitioner to police as the person who assaulted and robbed him. App. pp. 147-48. Counsel asked several times whether Victim realized he could not receive money to have his teeth fixed unless he gave a statement and cooperated with the investigation. App. pp. 147, 154-56. Specifically, Counsel asked, "Because of your recorded statement, you said to Sergeant Davis

that it was only when you realize[d] that you couldn't get your mouth fix[ed] without giving a statement, that you decided to tell that it might have been Troy Hunter?" App. pp. 154-55.

Victim's mother, Debra Singleton, also testified. Singleton testified Victim came into her house, calling out to her. App. p. 170. She said she saw blood everywhere, "just pouring," and asked him what happened. App. p. 170. She testified, "He say [Petitioner] hit me in my mouth with a gun." App. p. 170. Singleton accompanied Victim to the emergency room and told Victim he needed to tell the police what happened. App. p. 172. She recalled Victim was scared to say anything because he knew Petitioner carried a gun and was afraid Petitioner could kill him. App. p. 173. Singleton further testified she sensed Victim might still have been scared even after he told police because he stayed at her house for several weeks and did not return to his own place until after Petitioner was arrested. App. pp. 173-74.

Investigator Lee Davis of the Florence Police Department testified he got involved in the case when Victim contacted the police department's Victim's Services division and was told he had to cooperate with the investigation in order to receive services. App. pp. 181-82. Davis testified, at that time, Victim then reported Petitioner assaulted him. App. p. 182. Davis took a recorded statement from Victim, and Victim's Services took photographs of Victim's injuries, which were admitted without objection. App. p. 182-83. Davis also testified he went out to the incident location but could find no evidence at the scene to indicate a gun was used in the commission of the crime. App. p. 205.

Next, the State called Dr. James M. Lawhan, an oral and maxillofacial surgeon, to testify regarding Victim's injuries. App. pp. 220, 223-24. The trial court qualified Lawhan as an expert in the field of dentistry and facial trauma without objection. App. pp. 222-23. Dr. Lawhan testified he saw Victim on December 1, 2011, for an evaluation of trauma to Victim's face. App. p. 224.

Lawhan testified he found one fractured bottom tooth, two adjacent teeth to the right missing, and two fractured teeth on the top. App. p. 231. Dr. Lawhan testified that between the swelling, the fresh blood clots he observed where the teeth had been knocked out, and the clean edges of the fractured teeth, he could tell the injuries were recent. App. p. 233. Further, Dr. Lawhan testified Victim's injuries were "consistent" with being hit with a gun butt, and he felt the mechanism of injury was something more condensed than a fist. App. pp. 235-36. However, on cross-examination, Lawhan conceded Victim's injuries could also be consistent with being hit by a knuckle. App. p. 240.

After the State rested, the trial court conducted a charge conference, and Counsel objected to the inclusion of a charge on strong-arm robbery as a lesser-included offense of armed robbery. App. p. 249. The trial court agreed the evidence presented was that there was a robbery and a firearm was used, and, therefore, decided not to include the strong-arm robbery charge. App. p. 249. During the trial court's reading of the charge, the trial judge called the attorneys to the bench and informed them he intended to charge that fists could be a deadly weapon, depending on the circumstances. App. pp. 284-85. Ultimately, the trial court charged as follows:

> [A] fist can be considered a deadly weapon. A hand or a fist. . . is not normally considered a deadly weapon. However, under some circumstances depending on the manner and means of its use, the wounds inflicted, and other relevant facts, a hand or fist may be considered a deadly weapon. It is for you to decide in this case beyond a reasonable doubt whether or not a hand or fist is a deadly weapon.

App. pp. 284-85.

The jury found Petitioner guilty of both charges, and Judge Brown sentenced him to three years' imprisonment for second-degree assault and battery and thirty years' imprisonment for armed robbery, to be served concurrently. App. pp. 303, 311-12.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180, 810 S.E.2d at 839 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Id. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). Petitioner must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

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

ARGUMENT

I. Petitioner's allegation Counsel was constitutionally ineffective for failing to request a jury charge on any lesser-included offenses is not properly before this Court because it was not raised at the evidentiary hearing. In any event, in response to the issue actually raised at the evidentiary hearing, the PCR court correctly found Counsel made a strategic decision to ask the jury to decide between the greater offense or an acquittal, in accordance with the defense's theory of the case that no robbery took place. Therefore, Petitioner cannot meet his burden as to the deficiency prong, even if the issue is preserved.

As an initial matter, Respondent argues this issue is not properly before this Court because it was not argued at the evidentiary hearing below. See, e.g., United Carolina Bank v. Caroprop, Ltd., 311 S.C. 376, 429 S.E.2d 197 (Ct. App. 1993) (explaining an issue was not preserved for appeal where the issue was raised but not ruled on by trial court and the party raising the issue made no motion asking court to rule on it). It is axiomatic that an issue cannot be raised for the first time on appeal. Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). As this Court has repeatedly noted, when an "issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred." Plyler v. State, 309 S.C. 408, 409, 424 S.E.2d 477, 478 (1992) (citing Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983)). Further, even if an issue is raised but not ruled upon, it is not preserved for appeal. State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (1996). "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

Here, Petitioner alleges Counsel was constitutionally ineffective when he decided not to ask for a jury charge on any lesser-included offenses. In support of this allegation, Petitioner cites the PCR court's finding Counsel was not ineffective because he made a strategic decision to make

the jury decide for the higher charge or an acquittal. PWC p. 4; App. pp. 476-77. However, that finding was made in the context of the allegation Petitioner actually raised below – that Counsel was constitutionally ineffective for failing to object to the trial court's jury instruction charging fists as a deadly weapon. App. p. 476. Although Petitioner attempted to amend his original application prior to the hearing, he did so after PCR counsel had been appointed. The *pro se* amendments were never filed with the Clerk of Court,[1] and thus, those amendments were improper. See Rule 11, SCRCP ("Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is admitted to practice law in South Carolina.... If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.); App. pp. 380-95. At the beginning of the evidentiary hearing, counsel for Petitioner clearly articulated the four issues on which Petitioner wished to proceed. App. pp. 399-400. Therefore, only issue raised below as to the jury instructions was whether Counsel was ineffective for failing to object to the trial court's charge on fists as a deadly weapon, as all other allegations were either a nullity or were waived. App. pp. 399-400.

At the evidentiary hearing, Counsel stated, in the context of explaining his reaction to the Court's decision to give the "fists as deadly weapon charge," his defense strategy was to force the jury to decide between the higher charge – which he did not believe the State had proven – and an outright acquittal. However, Petitioner did not move to amend his application to include an allegation that the decision not to ask for any lesser-included offenses was deficient. App. pp.

[1] See Florence County Public Index, https://publicindex.sccourts.org/Florence/PublicIndex/CaseDetails.aspx?County=21&CourtAgency=21002&Casenum=2015CP2100056&CaseType=V&HKey=511086612276816690487999717811885671074848122106106855280541057475100887511188547312177761129710885, (last checked January 17, 2020).

411-13. His only allegation was that Counsel should have objected to the trial court charging that fists may be considered a deadly weapon. App. pp. 399-400.

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

Notwithstanding Respondent's procedural objection, Petitioner cannot prove Counsel was deficient, as this was clearly a strategic decision on Counsel's part. Counsel testified he objected to the State's proposed jury instruction on strong-arm robbery because he felt there was a good chance the jury would conclude no robbery had taken place at all and, if they did conclude it had taken place, it did not involve a gun. App. pp. 411-13, 421-22. Therefore, Counsel testified, he did not want to give them the option of finding Applicant guilty of the lesser-included offense in

[2] This situation is not akin to that discussed in this Court's recent ruling in Love v. State, Op. No. 27921 (S.C. Sup. Ct. filed October 2, 2019). In Love, PCR counsel attempted to amend Love's application to add claims prior to the beginning of the hearing, the State objected, and the PCR court did not allow the amendment. Here, PCR counsel formulated a very clear allegation related to a particular portion of the jury instructions given at trial, testimony was taken on the issue, and the issue was clearly addressed in the PCR court's order denying relief. It is only on appeal that Petitioner attempts to frame the issue differently than the allegation specifically put before the PCR court at the evidentiary hearing. Therefore, this allegation should be dismissed as not preserved.

lieu of armed robbery. App. pp. 411-12. This was a reasonable trial strategy, and therefore, Counsel was not deficient, and Petitioner cannot meet his burden of proof. Abney v. State, 408 S.C. 41, 48, 757 S.E.2d 544, 547 (Ct. App. 2014) (finding trial counsel articulated a valid reason for failing to request an instruction on a lesser-included offense of armed robbery when trial counsel testified he did not do so because he felt the trial was going well and it was not in his client's best interest to do so). This Court should therefore deny certiorari as to this issue.

II. The PCR court correctly found Counsel was not deficient nor was Petitioner prejudiced by Counsel's decision not to call Charles Hunter as a witness because Hunter's testimony contradicted the defense theory Petitioner was not present, and, in any event, his testimony did not establish Petitioner did not have a gun with him.

Petitioner alleges Counsel was constitutionally ineffective for failing to call a specific witness, Charles Hunter. However, because Counsel offered a reasonable strategic reason for not doing so, and because Hunter's testimony was not helpful to the defense anyway, the PCR court correctly found Counsel was not deficient and denied relief.

"Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed

ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Further, decisions primarily involving trial strategy and tactics may be made by trial counsel. Sexton v. French, 163 F.3d 874, 885 (4th Cir. 1998). Examples of such decisions include "which jurors to accept or strike, which witnesses should be called on the defendant's behalf, what evidence should be introduced, whether to object to the admission of evidence, [and] whether and how a witness should be cross-examined." Abney, 408 S.C. at 48, 757 S.E.2d at 547 (Ct. App. 2014) (Pieper, J., concurring). What motions to file and "whether to put on evidence so as to preserve the final word in closing argument" are also strategic and tactical decisions to be made by trial counsel. Id.

Here, at the evidentiary hearing, Hunter testified he and Petitioner went over to the house on Dixie Street, where the incident took place. Hunter stated Petitioner and Victim got into an argument, and he saw Victim swing at Petitioner, then saw Petitioner hit Victim with his fist. Hunter testified he then heard what he thought was a gunshot behind him, and when he turned back around, everyone was gone except Victim and Petitioner, who were still fighting. Hunter stated he broke up the fight, and he and Petitioner got back in his car and left. Hunter testified he did not see Petitioner with a gun, but he acknowledged on cross-examination he had not been with Petitioner all day, so he did not know what Petitioner had in his pockets or under his clothes.

Additionally, Counsel testified he spoke to Hunter and included him on the witness list for trial. App. pp. 403-04. Counsel further testified he spoke with Petitioner about the decision as to whether to call witnesses after the State rested, and they ultimately decided not to present any testimony. App. pp. 404-06, 421-22. Counsel testified he explained to Petitioner the two main issues Counsel saw with the State's case. App. pp. 404-06, 411-13. First, Counsel explained he

felt the State had not proved beyond a reasonable doubt the incident had occurred at this specific time and place, as the witnesses who claimed to have seen Petitioner only testified to a fight, not a robbery, and there was no evidence recovered from the scene suggesting a gun was fired or someone had been injured there. App. pp. 405-06, 411-13. Counsel testified calling Hunter would require Petitioner to admit he was there and fought with Victim. App. pp. 406, 421. Second, Counsel testified Petitioner had already decided not to testify, so he also explained to Petitioner he would lose the last argument to the jury if the defense introduced any evidence. App. p. 406.

The PCR court found credible Counsel's testimony he discussed with Petitioner the issues Counsel saw with the State's case after the evidence had been presented, and Counsel and Petitioner made a strategic decision not to call Hunter as a witness. App. pp. 421, 474. Additionally, the PCR court found Petitioner had not met his burden of proving he was prejudiced by Counsel's conduct because the testimony offered by Hunter at the evidentiary hearing was not plainly exculpatory, and in fact placed Petitioner at the scene, engaging in a physical altercation with Victim, which the defense did not want to concede. App. pp. 405-06, 421, 474. Although Hunter testified he did not see Petitioner with a gun, neither did any of the State's witnesses at trial, a fact which Counsel highlighted in his closing argument – without needing to call Petitioner as a witness. App. pp. 266-68. The PCR court therefore correctly found neither deficiency nor prejudice regarding Counsel's decision not to call Hunter as a witness. Accordingly, this Court should deny certiorari on this issue.

III. The PCR court correctly found Counsel was not deficient in failing to object during the solicitor's closing argument because the solicitor was not bolstering or otherwise making an improper argument, so Counsel had no basis to object.

Petitioner alleges Counsel failed to object to impermissible comments in the solicitor's closing argument, specifically the solicitor's statement that Victim was telling

the truth.[3] PWC p. 10; App. p. 259. Counsel testified regarding his strategy for objections during closing arguments. Counsel explained he feels it is risky to object during opening and closing arguments. Counsel testified he believes it is appropriate for an attorney to comment on the evidence in closing, and in any event, he did not feel the solicitor's statement the Victim was telling the truth was sufficiently objectionable to risk alienating the jury. App. pp. 415-16. Counsel explained he watches the jury very closely, and he felt this jury was clearly ready for the case to conclude. App. p. 416. Counsel testified he might have objected if the solicitor had continued to belabor the point. App. p. 416.

Counsel is not required to object at every opportunity if Counsel has a reasonable explanation for not doing so. There is a strong presumption that counsel's decisions are based on tactical strategy rather than neglect. Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)). "Accordingly, when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy).

[3] Again, Respondent argues Petitioner has not properly preserved this issue for review. See Plyler, 309 S.C. at 409, 424 S.E.2d at 478 (holding an "issue was neither raised at the PCR hearing nor ruled upon by the PCR court, it is procedurally barred."). Petitioner's allegation at the evidentiary hearing pointed to a very specific portion of Counsel's closing argument, a single line – "So did he tell us the truth. I think he did. In fact, I know he did." App. pp. 259, 415. The argument in Petitioner's petition encompasses a much broader portion of Counsel's closing argument, which was not part of Petitioner's original allegation.

Further, "[i]mproper comments do not automatically require reversal if they are not prejudicial. . .," and Petitioner "has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Id. The challenged statement does not rise to that level. The PCR court correctly found "it [is] not reasonably likely" that the solicitor's comment in his closing argument caused the jury to act in a "manner inconsistent with the notion that the State has the burden of proof beyond a reasonable doubt." State v. Daniels, 401 S.C. 251, 260, 737 S.E.2d 473, 477 (2012). Therefore, Petitioner has not met his burden of showing he was prejudiced by the allegedly improper comment. Because trial counsel was not deficient by not objecting to this argument, this Court should deny certiorari as to this issue.

IV. The PCR court correctly found Counsel did not err in failing to object to the testimony of Dr. Lawhan as outside the scope of his expertise when Dr. Lawhan was qualified as an expert in dentistry and facial trauma, and Lawhan opined about the mechanism of injury to the victim's face, jaw, and teeth, all of which is within his scope of expertise.

Counsel testified he understood Dr. Lawhan, as an oral surgeon, to deal with injuries to the teeth and jaw. Lawhan testified he is a board-certified oral and maxillofacial surgeon, and he deals with treatment of trauma to the head and face due to a variety of issues such as "facial fractures, gunshot wounds, cancer, car wrecks, wisdom teeth, [and]. . . skin grafts." App. pp. 221-22. Lawhan also testified he had treated thousands of trauma cases over the course of his career, including "many impacts of the mouth." App. pp. 222, 235. Lawhan testified he reviewed x-rays of Victim's mouth, conducted a physical examination, and spoke to Victim about the cause of the damage. App. p. 231. Lawhan's testimony about the mechanism of injury was appropriately

within the fields of expertise for which he was qualified – "dentistry and facial trauma." App. pp. 222-23.

Further, since whether or not a gun was used was a contested issue, Lawhan's opinion could logically assist the jury in determining a fact in dispute. See, e.g., Creed v. City of Columbia, 310 S.C. 342, 426 S.E.2d 785 (1993) (finding trial court correctly overruled City's objection to testimony of general practitioner regarding plaintiff's mental and emotional injuries as outside the scope of his expertise); Gazes v. Dillard's Dept. Store, 341 S.C. 507, 534 S.E.2d 306 (Ct. App. 2000) ("[I]t is exactly this type of situation, where direct evidence of an accident's cause is scant and in dispute, that testimony from an accident reconstructionist can assist the trier of fact in 'determining a fact in issue.'"). Because Lawhan's opinion testimony as to the mechanism of injury was appropriate to assist the jury with determining a fact in issue and was within the scope of his expertise, this PCR court correctly found Counsel's lack of objection was not deficient performance. This Court should therefore deny certiorari as to this issue.

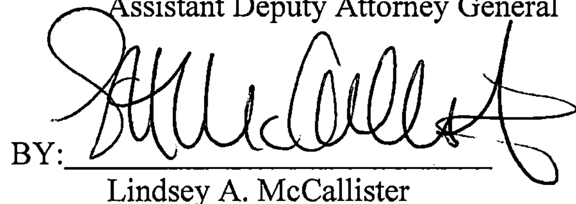
CONCLUSION

For the reasons stated above, this Court should deny the petition for writ of certiorari and affirm the PCR court's denial of relief. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Deputy Attorney General



BY:______________________
Lindsey A. McCallister

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

January 17, 2020

ATTORNEYS FOR RESPONDENT

RECEIVED
JAN 17 2020
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JAN 17 2020
S.C. SUPREME COURT

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2018-002110

Troy Darnell Hunter,

Petitioner,

v.

State of South Carolina,

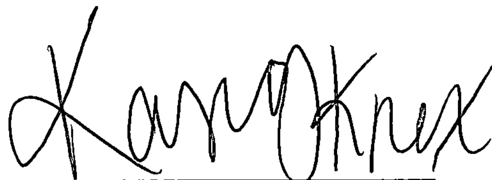
Respondent.

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:

Wanda H. Carter
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 17th day of January, 2020



Kasey Knox
Legal Assistant for Respondent