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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO COLLETON COUNTY
Court of Common Pleas
The Honorable Jennifer B. McCoy, Post-Conviction Relief Judge
The Honorable Michael B. Nettles, Post-Conviction Relief Judge
The Honorable Perry M. Buckner, III, Trial Judge

Appellate Case No. 2017-CP-15-00383

ANDRE T. RICHARDSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON CERTIORARI

PETITIONER'S STATEMENT OF ISSUE ON CERTIORARI

I. Did the PCR Court err in denying Petitioner relief in finding that trial counsel was effective when he failed to move to suppress and failed to object when witnesses testified that the Petitioner refused to allow a warrantless search of his car and refused to allow a GSR test on his hands in violation of the 4th, 6th, and 14th Amendments?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON CERTIORARI

I. The post-conviction relief court properly denied post-conviction relief where Counsel enumerated a valid trial strategy for not objecting to the testimony and Petitioner failed to show prejudice resulting from the testimony being admitted.

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Colleton County Clerk of Court. In June 2009, the Colleton County Grand Jury indicted Petitioner for financial identity fraud and murder. The charges arose from the October 27, 2008 murder of Frederick Steward. On September 1, 2008, Petitioner proceeded to trial before the Honorable Perry M. Buckner, III. Petitioner was present and represented by Harris S. Beach, Public Defender of the 14th Circuit. Deputy Solicitor Sean P. Thornton, of the 14th Circuit Solicitor's Office, prosecuted the case. On September 2, 2009, the jury found Petitioner guilty on both indictments. Judge Buckner sentenced Petitioner to terms of thirty-five years imprisonment for murder and five years, concurrent, for financial identity fraud.

Petitioner filed a timely notice of appeal. Robert M. Dudek, Esquire, of the Office of Appellate Defense perfected the appeal. On January 6, 2011, appellate counsel made a Final Anders Brief of Appellant and Petition to be Relieved as Counsel. A *pro se* brief was filed by Petitioner. On February 1, 2012, the South Carolina Court of Appeals issued an order denying the petition to be relieved as counsel and directed the parties to brief the following issue:

> Did the circuit court err in denying Richardson's motion for a directed verdict on his murder charge in light of *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011) and *State v. Odems*, Op. No. 27084 (S.C. Sup. Ct. filed Dec. 28, 2011) (Shearhouse Adv. Sh. No. 46 at 87)?

State v. Richardson, Order (S.C. Ct. App. February 1, 2012).

The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences on May 22, 2013. *State v. Richardson*, No. 2013-UP-223 (S.C. Ct. App. filed May 22, 2013). The remittitur was returned to the circuit court on June 14, 2013.

Petitioner filed an application for Post-Conviction Relief ("PCR") on June 6, 2013, alleging:

1. Ineffective assistance of counsel.
    a. Denial of his 4th, 6th, and 14th amendment rights.
    b. Failure to object to the prosecutor's highly prejudicial improper closing argument when the prosecution argued Petitioner was guilty of an unindicted offense and therefore also guilty of the offense Petitioner was on trial for.
    c. Failure to object to trial court's malice instruction that shifted the burden of proof.
    d. Failure to object to the trial court impermissibly commenting on the facts of the case by charging examples directly related to the Petitioner's case.

Respondent made its Return on August 20, 2014. An evidentiary hearing into the matter was convened on October 18, 2016, at the Beaufort County Courthouse in Beaufort, South Carolina before the Honorable Michael Nettles. Petitioner was present and represented by Tristan M. Shafer, Esquire. Assistant Attorney General, Ruston W. Neely, of the South Carolina Attorney General's Office, represented Respondent. Petitioner's trial counsel, Harris S. Beach, Esquire, was deceased at the time of the evidentiary hearing.

Judge Nettles, in an order filed December 30, 2016, denied and dismissed the application with prejudice finding Petitioner had not satisfied his burden under *Strickland's* two-part test. Petitioner did not file a timely notice of appeal.

On May 17, 2017, Petitioner filed a second application for PCR, stating that PCR counsel had failed to file an appeal and he was seeking a "belated appeal of 2013-CP-15-0442 pursuant to *Austin v. State*." App'x p. 630. Petitioner was represented by Ashley A. McMahan, Esquire. Assistant Attorney General Christian A. Saville, of the South Carolina Attorney General's Office, represented Respondent. On November 27, 2018, Petitioner, through counsel, sent Respondent an amended PCR application to add the following allegation:

1. Ineffective Assistance of PCR Counsel – Counsel failed to raise in the first PCR ineffective assistance of appellate counsel in that the malice instructions allowing for inference of malice by the use of a deadly weapon (ROA p. 428, lines 8-14) given by the Court were no longer good law in South Carolina as of October 12, 2009, approximately one month after Applicant's trial, when the opinion of *State v. Belcher*, 385 S.C. 597 (2009), was released. Respondent made its Return (*Austin* Review) on November 5, 2018.

An evidentiary hearing into the matter was convened on December 6, 2018, at the Beaufort County Courthouse, before the Honorable Jennifer B. McCoy. Petitioner was present and represented by Ashleigh A. McMahan, Esquire. Assistant Attorney General, Christian A. Saville, of the South Carolina Attorney General's Office, represented Respondent. During the hearing, Ms. McMahan introduced a letter from Tristian M. Shaffer, which stated he failed to file the Notice of Appeal in Petitioner's first PCR action. App'x p. 645-48. Respondent did not enter any objections to the letters introduction, and consented to *Austin* review. App'x p. 645-46. However, Respondent objected to Petitioner's secondary raised allegation.

Judge McCoy, in an order filed February 8, 2019, granted Petitioner belated appellate review of his first PCR action pursuant to *Austin v. State*. The court denied and dismissed Petitioner's allegation of ineffective assistance of (PCR) counsel finding it was not properly raised. *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). App'x p. 650-54 Petitioner filed a notice of appeal pursuant to *Austin*, and, through counsel, filed a petition for writ of certiorari on January 22, 2020. This return follows.

STATEMENT OF THE FACTS

On October 27, 2008, the body of 80 year-old Freddie Stewart was discovered by Jerrol Lingard, lying on the side of the road in rural Colleton County, South Carolina. Lingard was driving down Bethel Road and noticed a light colored car parked on the side of the road with the emergency flashers on. After Lingard observed a man lying on the ground behind the vehicle, he stopped and called 911. Lingard observed numerous cartridges scattered on the ground. After other passerby's stopped, Lingard left the scene, but returned later to provide a statement to law enforcement. App'x p. 157-162.

Postal Worker Aaron Virden testified he stopped on Bethel Road after noticing Lingard's truck and inquired what was wrong. He noticed a silver car parked by the side of the road that he recognized as Mr. Steward's vehicle. Virden walked over to the victim and saw at least three dispensed shells behind the body. App'x p. 164-166. Virden recognized the victim as Mr. Steward. Virden encouraged Lingard to leave the scene because Virden had young children with him. App'x p. 165. Virden stayed at the scene after the deputy sheriff arrived and provided a statement. App'x p. 165-166. He recalled he had phoned his supervisor around 12:30 informing him that he could not continue on his postal route. App'x p. 167. Virden stated that Mr. Steward's car was pointed toward the Low Country Highway and both the driver's side door and trunk were open. App'x p. 167-168.

Petitioner, the victim's grandson, gave his initial statement to law enforcement the day Mr, Steward was murdered. In this initial statement, Petitioner stated he woke up at 10 AM and his grandfather, the victim, was not home. App'x p. 207-208. Petitioner indicated the victim returned home around 11:30 AM carrying plastic bags. Petitioner stated he then left the home at 11:45 AM to go meet up with his cousin, but ended up going to get his hair cut instead, and stayed at the

barber's for 30 to 40 minutes. While at the barber's, Petitioner received a phone call from his cousin Myeshia who told Petitioner that his grandfather had been found murdered. App'x p. 207. Petitioner was then called by his sister and they went to the crime scene together. App'x p. 207-208.

On October 29, 2008, Petitioner gave a second statement to investigators, which was similar to his first. App'x p. 217-218. Petitioner stated that after he could not meet up with his cousin, he stopped and got gas and proceeded to go to the barber's shop until he got a phone call from his cousin Myeshia 40 minutes later. Petitioner recalled asking his cousin 'why someone would want to kill her Uncle Freddie' and she corrected him, explaining that it was in fact his grandfather who had been killed. App'x p. 218.

On February 20, 2009, Petitioner gave a third statement to investigators, which was essentially the same as the October 29, 2008 statement. App'x p. 222. After his arrest, Petitioner requested to speak with law enforcement and was brought to the Colleton County Sherriff's Department for an interview. App'x p. 307-308. Petitioner reviewed and signed a Miranda Rights Form, and proceeded with the interview. During this interview, Petitioner put forth a completely new version of events leading up to his grandfather's murder. Petitioner explained that on the morning of the murder he was awakened in his bedroom by an individual dressed in all black – black gloves, black mask, and black coveralls. The unknown assailant placed his hand over Petitioner's mouth, and pointed a handgun at his head. Petitioner stated he was then directed to get out of bed and move into the living room where he saw his grandfather. Petitioner described two other men standing in the living room, who were dressed identically and wearing all black. He could not identify their race, but stated the assailants "sounded like they were white guys trying to act black." App'x p. 311, ll. 19 – 312, ll. 14. Petitioner stated the masked men asked his grandfather

for money or asked 'where the money was at,' but Mr. Steward refused to give them money. At gunpoint, one of the men demanded the keys to Petitioner's car, which Petitioner obliged. Petitioner stated he gave the keys to the man who drove off in Petitioner's Mustang, which was white, "black rims, black racing stripes from the hood to the trunk, loud pipes and a spoiler." App'x p. 310, ll. 19-25. Petitioner stated the individual was gone in his Mustang for about 20 minutes. App'x p. 311, ll. 1. When the man returned, he told Petitioner and the victim, Mr. Steward, that they were going to take a ride and were going to the BB&T Bank in Walterboro. App'x p. 311, ll. 2-5.

Petitioner and Mr. Steward were then escorted out of the house to Mr. Steward's silver Ford Focus. Mr. Steward got in the driver's seat. One man in black sat in the front passenger's seat, while Petitioner and another man in all black sat in the rear. Petitioner explained that a third man in all black, gloves and mask, stayed behind at the house. App'x p. 313, ll. 6-14. Petitioner, his grandfather, and the two masked men left the home and proceeded towards Bethel Road, while supposedly headed to the BB&T Bank in Walterboro to withdraw money from the Petitioner and the Victim's account. App'x p. 313, ll. 15-21. While traveling down Bethel Road, the Victim pulled over and stopped on the shoulder.[1] The masked man in the front passenger seat then made the Victim exit the vehicle, and the second masked man seated next to Petitioner also exited the vehicle, leaving Petitioner alone in the back seat. The two masked men escorted the Victim to the trunk of the vehicle, while Petitioner remained alone in the backseat the entire time. Petitioner explained that he overheard some type of altercation between his grandfather and the masked men, after which he heard several gun shots. Petitioner did not leave the vehicle after hearing these shots. Petitioner then heard his Mustang pull up, which was driven by the third

[1] It is not clear from Petitioner's account of the events if the Victim chose to pull off the road or if the masked assailants demanded he do is.

masked man. Another vehicle pulled up to the scene – identified only as 'a dark colored' – and the three masked men got into the unidentifiable dark colored vehicle. Before they left, one of the masked men went back to Petitioner and told him "this is what happens when you don't cooperate and if you tell anyone what happened, then I'll harm you, your sister, and your mom." App'x p. 315, ll. 3-6. Then all of the masked men left the scene in the dark colored vehicle, leaving Petitioner completely unharmed and his Mustang fully operational nearby. Petitioner waited until the masked men had left, exited his grandfather's vehicle, did not check on his grandfather or think to call 911, got into his Mustang and drove to Hodges' Barber Shop to get his hair cut. App'x p. 315-317.

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 give great deference 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 179, 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); *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. *Id.* 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 denied post-conviction relief where Counsel enumerated a valid trial strategy for not objecting to the testimony and Petitioner failed to show prejudice resulting from the testimony being admitted.

Petitioner contends the PCR court erred by finding trial counsel was not ineffective for failing to suppress and object to testimony at trial concerning Applicant's refusal to consent to a refusal to consent to a GSR [gunshot residue] kit examination and refusal to consent to a search of his vehicle. In support of that claim, Petitioner maintains the PCR court incorrectly determined trial counsel exercised valid trial strategy by not contesting and objecting to this testimony raised at trial. To the contrary, the PCR court properly denied relief determining trial counsel's lack of objection to the testimony and comments made by the solicitor regarding Petitioner's refusal to consent to a warrantless search was not a mistake, and Petitioner was not prejudiced by this omission. Therefore, this Court should deny certiorari.

Trial counsel was deceased at the time of the evidentiary hearing and, therefore, unable to testify in his own defense. The Court strongly presumes trial counsel's decisions were reasonably made. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668, 690 (1984).When reviewing an ineffective assistance of counsel claim, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 691.Typically, counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. *Roseboro v. State*, 317 S.C. 292,

294, 454 S.E.2d 312, 313 (1995). When counsel articulates a strategy, it is measured under an objective standard of reasonableness. *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

However, when trial counsel cannot be present to defend their strategy, all articulable arguments, which can be inferred from the transcript as trial strategy, can be argued in favor of competence. A strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record. *Wood v. Allen*, 558 U.S. 290 (2010).

In *Reeves v. Alabama*, Justice Sotomayor addressed the absence of trial counsel's testimony in her dissenting opinion:

> This Court has never, however, required that a defendant present evidence of his counsel's actions or reasoning in the form of testimony from counsel, nor has it ever rejected an ineffective-assistance claim solely because the record did not include such testimony. Rather, *Strickland* and its progeny establish that when a court is presented with an ineffective-assistance-of-counsel claim, *it should look to the full record* presented by the defendant to determine whether the defendant satisfied his burden to prove deficient performance. *The absence of counsel's testimony may make it more difficult for a defendant to meet his burden, but that fact alone does not absolve a court of its duty to look at the whole record and evaluate the reasonableness of counsel's professional assistance in light of that evidence.*

Reeves v. Alabama, 138 S. Ct. 22, 26 (2017) (Sotomayor, J., *dissenting*) (emphasis added).

"Courts must indulge the strong presumption that counsel's performance was reasonable and that counsel made all significant decisions in the exercise of reasonable professional judgment"; and (2) "an ambiguous or silent record is not sufficient to disprove the strong and continuing presumption," such that "where the record is incomplete or unclear about counsel's actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir.

2000) Fn. 15. (quotation marks, brackets, and citations omitted); *Wood v. Allen*, 542 F.3d 1281, 1304–05 (11th Cir. 2008), *aff'd,* 558 U.S. 290 (2010).

An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, [courts] will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999).; *see also Waters v. Thomas*, 46 F.3d 1506, 1516 (11th Cir. 1995) (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment). The United States Supreme Court has instructed that there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 104 S.Ct. at 2065; *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) Fn. 15.

In the present case, absent the availability of trial counsel's testimony, the PCR court carefully reviewed the entire record, specifically trial counsel's cross-examination of Detective Allen Inabinett and closing argument, and determined his trial strategy was to attack the State's lack of direct evidence, because the State's entire case was built exclusively on circumstantial evidence.

At the evidentiary hearing, PCR counsel candidly told the court numerous times he believed trial counsel's strategy and failure to object to these comments was a strategic trial decision to "mitigate." App'x p. 589, ll. 19. "And it appears what [trial counsel] was doing is to try to lessen the effect of him refusing the GSR. App'x p. 582, ll. 16-18. "I think what [trial counsel] was doing there is he recognized the fact that that was bad evidence against his client, and wanted to at least try to mitigate that in some way by saying, well, is it true, Officer, you told

him that, you know, it's possible that the gunshot reside would have been dissipated anyway?" App'x p. 583, ll. 10-15. "Essentially, what I think [trial counsel] was trying to do is mitigate it. Because once it's already in, you know, obviously he can attempt to mitigate the evidence. And I think that's what he was doing. He was trying to minimize the effect of, well, he refused the GSR and give some reason for it." App'x p. 589, ll. 18-23.

On cross-examination of Detective Allen Inabinett, trial counsel pinned the absence of any physical and forensic evidence against Petitioner on the failure of law enforcement to obtain it. "[W]as there any attempt to attain any fingerprints or anything like that from the house? Any forensic evidence from the house that would bear on this statement?" App'x p. 342, ll. 1-4. In his closing argument, trial counsel argued the lack of evidence failed to overcome the State's burden of guilt beyond a reasonable doubt:

> [Y]ou have to have something to convict somebody of murder. You have to have real evidence, not that circumstantial evidence isn't real evidence, but you have to have evidence that adds up to he did it beyond a reasonable doubt. Most cases are a lot simpler. Most cases you've got somebody pointing at him saying he did it or you've got a big old pile of forensic evidence, fingerprints, DNA, and all this stuff that you see on CSI and programs like that that point to that person. You don't have that here.

App'x p. 412, ll. 17-25

Regarding Detective Allen Inabinett's testimony on Petitioner's refusal to consent to a GSR kit, trial counsel exposed the fact for any GSR kit to be accurate it must be completed within six hours of the firearm's discharge. Here, trial counsel was able to elicit testimony from Det. Inabinett that law enforcement did not attempt to obtain the GSR kit from Applicant until *more than eleven hours* after the murder weapon was discharged. Thus, even if Petitiober had consented to the GSR kit, it would have produced inconclusive results of absolutely no evidentiary value.

> Q: I believe you said you had offered a gunshot residue test to the defendant and he had refused to take it?

A: I did. That was the night of 10-27-08.

Q: And about what time was that?

A: Between 11:45 and then midnight to the early morning hours of 10-28-08.

Q: And what time did the, to the best of your knowledge, did this shooting occur?

A: We had an approximate timeframe of 12:50 p.m. Well, let me back up, between 12:30 and 12:50 pm, approximately, on the afternoon of 10-27-08.

Q: Isn't it true that gunshot residue dissipates after about six hours?

A: That's approximately correct. Yes, about six hours.

App'x p. 328-329, ll. 16-25; 1-3.

This testimony elicited by trial counsel was not available without opening the door for the State to question the witness about Petitioner's lack of consent to the GSR test. The PCR court reasonably inferred, based not only on the record, but of the inferences made by PCR counsel, that trial counsel made the strategic decision to use Petitioner's refusal to consent to the GSR test to show law enforcement failed to obtain any forensic evidence. App'x p. 342. By allowing this testimony, trial counsel was able to show the jury that Petitioner's refusal of the GSR kit was of no evidentiary value because it was offered outside of the six hour window of reliability. Petitioner's refusal to consent to a vehicle search was cured by law enforcement processing his vehicle numerous times without any evidence being found.

However, as this Court has held before, the law is clearly established that the state cannot, through evidence or argument, comment upon an accused's exercise of a constitutional right. *Simmons v. State*, 308 S.C. 481, 484, 419 S.E.2d 225, 226 (1992); *See Doyle v. Ohio*, 426 U.S. 610 (1976); *State v. Johnson*, 293 S.C. 321, 360 S.E.2d 317 (1987); *State v. Smith*, 290 S.C. 393, 350 S.E.2d 923 (1986); *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986). Furthermore, the

United States Constitution, Amendment IV, prohibits unreasonable searches and seizures, prescribes the procedure for obtaining search warrants, and bestows the right to refuse entry and search without a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1983); *United States v. Prescott*, 581 F.2d 1343 (9th Cir.1978).

In *Simmons*, this Court found Simmons' had overcome the presumption that his trial counsel was effective and granted relief. This Court held trial counsel's performance deficient for failing to object to the solicitor's cross examination and closing argument concerning Simmons' refusal to allow a warrantless search of his vehicle in violation of the fourth amendment of the United States Constitution, which was clearly an attempt to invoke an inference of guilt from the invocation of silence. *Id*. at 484, 419 S.E.2d at 227. Specifically, this Court held the following portion of the solicitor's cross examination of Simmons at trial to be unconstitutional:

> Q. And the trooper wanted to search your car and you wouldn't let him, would you?
> A. That is right.
> Q. *Because you had something to hide, didn't you?*
> A. No, I don't have nothing to hide.
> Q. The dope is right there, came out of the trunk of your car, and *you wouldn't let the trooper search your car because you didn't want him to find the dope, did you?*
> A. You are saying that.
> Q. I am asking you; isn't that right?
> A. No, that is not right.
> Q. Would you tell us if it was right?
> A. No, it is not right.

The relevant portion of the solicitor's closing argument to the jury follows.

> ... So, he asked them-this is very, very important. He asked them if he could search the car. And you know what Mr. Campbell said. We all have a right not to let someone search our car, *but what reason would he have not to let him search the car?* Just a rental car. He said he had never went in the trunk. *Why didn't he want him to search the car?* Right here, folks, right here. They picked it up in Miami and they were bringing it back home to Georgetown.

Simmons, at 484, 419 S.E.2d at 226–27 (emphasis added).

In the present case, it is apparent from the testimony given by numerous witnesses at trial that the State's entire argument centered on impeaching Petitioner's numerous statements. Counter to Petitioner's argument, the one off mention of the refusal of the GSR test and vehicle search was not to done or used by the State to infer Petitioner's guilt, as was done in *Simmons*.

Petitioner argues the PCR court correctly analyzed *Gantt* in concluding that trial counsel's failure to object resulted in prejudice to Petitioner. This claim is not supported by the record before this Court.

In *Gantt*, this Court enumerated four factors to consider in determining whether a trial counsel's failure to object results in prejudice:

> An applicant for PCR, however, must show prejudice from counsel's deficient performance. Patrick v. State, 349 S.C. 203, 562 S.E.2d 609 (2002). When a *Doyle* violation has occurred, as alleged here, we will consider the following factors in determining prejudice on PCR: 1) whether the reference to the accused's exercise of his constitutional right was a single reference; 2) whether the State tied the exercise of this right directly to the accused's exculpatory account; 3) whether the accused's exculpatory account was totally implausible; and 4) whether the evidence of guilt was overwhelming. *McFadden v. State*, 342 S.C. 637, 539 S.E.2d 391 (2000).

Gantt v. State, 354 S.C. 183, 188, 580 S.E.2d 133, 136 (2003).

In that case, the solicitor referred once to respondent's refusal in the context of "he knew his rights" when police arrived with the search warrant, but the solicitor did not argue this refusal as evidence of guilt. The solicitor's entire colloquy with the officer was:

> Q: What was [respondent's] response to you in the request for these samples?
> A: That he did not want to do it.
> Q: Did he refuse?
> A: Yes, sir.

Gantt at 189, 580 S.E.2d at 136.

Then, as argued by the solicitor in closing, *Gantt* turned on credibility. The evidence against Gantt was not overwhelming in contrast to Gantt's exculpatory account of the crime. This

Court found "the reference to respondent's refusal to comply with the search warrant, however, was only a single reference and was not tied to respondent's guilt." *Id*.

This Court reversed the PCR court's ruling granting relief, holding that Gantt "failed to make the requisite showing that there is a reasonable probability the result of the trial would have been different but for counsel's error."

Here, there was only one question asked by the solicitor about the GSR kit and vehicle search refusal, and one additional mention in closing argument. The State's entire case against Petitioner revolved around the fact that Petitioner gave five different statements to law enforcement. As detailed above, the first four statements were fairly innocuous with Petitioner claiming he was at home the entire morning, went to the Hodges' Barber Shop around noon, and had no knowledge of the events leading to his grandfather's murder.

It was the fifth statement, a four hour long recorded interview after his arrest for financial fraud relating to Petitioner's use of the victim's bank account after his death, that Petitioner claimed to have been abducted and present for the murder of his grandfather. Completely contrary to his first four statements, where Petitioner claimed to have zero knowledge of the events, the fifth statement provided a completely ludicrous story:

> He was home that morning with his grandfather. They were forced at gunpoint to get into the Victim's silver Ford Focus and the Victim was allegedly forced to drive to the BB&T Bank in Walterboro, where these four unidentifiable masked men would have the Victim withdraw money for them. After the Victim pulled over on the side of Bethel Road, the masked men brought the Victim behind the car and proceeded to shoot him multiple times, while Petitioner remained motionless in the backseat. A third masked man happened to pull up on the road in Petitioner's Mustang. Then, while his grandfather bled out on the side of the road a mysterious, again unidentifiable, "dark colored vehicle" pulled up and all of the unidentifiable masked men jumped in and drove off – not only leaving Petitioner completely unharmed, but also left the keys to his Mustang, and failed to take the $139 dollars and expensive wrist watch from his grandfather's body. Nest, instead of Petitioner checking on his grandfather or calling 911, he simply got in his Mustang and drove straight to Hodges' Barber Shop to get his hair cut.

App'x p. 199 – 122.

The State's entire case centered on the evidence that showed Petitioner committed financial identity fraud of the Victim after he was murdered on Bethel Road, and the incredibly conflicting statement Petitioner gave to police. Petitioner's first statements deny any knowledge, then three days after he is arrested for his grandfather's murder he requests to speak with law enforcement and changes his story, which is not supported by any witness testimony at trial. The incredibly ludicrous statement Petitioner made on February 27, 2009 was the only connection between Petitioner and his grandfather's murder, which placed not only him, but his extremely identifiable Mustang at the scene when his grandfather was shot to death and left to die on the side of Bethel Road. This combined with the fact that the gun used in the murder was the same one stolen from Petitioner's co-worker a year earlier.[2] The State called numerous witnesses at trial, and each provided testimony which clearly refuted this statement.

Akeem Shider testified that he had not spoken to Petitioner the morning of Mr. Stewards' murder because he was asleep and woke up between 12 and 1 to head to the auto supply store to pick up a part for his car. The only phone call he received from Petitioner that day was around 13:00 when Petitioner called stating his grandfather had been murdered. App'x p. 239, ll. 9-20.

Tyrone Kinnard testified on the day Mr. Steward was murdered he was working at a logging site on Red Root Road, less than a half mile from Bethel Road, where Mr. Steward was murdered. He explained that around 11:30, while working on his truck on the side of the roadway, he observed a white Mustang with black racing stripes driving down towards Bethel Road and back in 15-20 minute intervals. Kinnard testified that around 11:45, a few minutes after he

[2] The gun was never recovered, however, spent casings at the scene matched the spent casings from the same firearm, provided to law enforcement by the co-worker.

observed the white Mustang head down towards Bethel Road, he clearly identified Mr. Steward, who he knew, driving by heading towards Bethel Road. Kinnard observed Mr. Steward driving "a little silver car. I know it was a Ford." App'x p. 254, ll. 10. Most damning to Petitioner's fantastical tale of being held at gun point, in that same silver ford focus, with his grandfather by two masked men was Kinnard's testimony that he could clearly see inside of the Mr. Steward's car as he drove past towards Bethel Road.

> Q: … Did Mr. Freddie's [Victim] car have dark, tinted windows?
> A: No, sir.
> Q: All right, sir. Could you see inside the car good?
> A: Yes, sir.
> Q: All right. You saw it well enough to see it was Mr. Freddie?
> A: Yes, sir.
> Q: All right, sir. Was there a bunch of people in the car with him?
> A: No, he was by himself.
> Q: All right, sir. Do you think you were close enough you would have seen if there would have been anybody else in the car with him?
> A: I was standing right there by the white line.
> Q: All right, sir. No question in your mind that he was by himself?
> A: No question.
> …
> A: [Victim] came by… about a quarter of twelve, maybe 10 mins after the white car went down the last time, and I never saw it after that.

App'x p. 255, ll. 14 – p. 256, ll. 10.

It is apparent from the trial testimony of these witnesses that the State's entire argument centered on impeaching Petitioner's statements. Counter to Petitioner's argument, the one off mention of the refusal of the GSR test and vehicle search was not to done or used by the State to infer Petitioner's guilt.

Furthermore, even if trial counsel's strategic choice, as found by the PCR court, not to object to the testimony was ineffective, Petitioner failed to show a reasonable probability that the outcome would have changed. Although there little question that the Solicitor's comments during

cross-examination and closing argument were improper comments on Petitioner's invocation of his right to silence, and trial counsel could have reasonably objected, Petitioner has failed to show prejudice. Under *Strickland,* it is not enough for Petitioner to show that any "errors had some conceivable effect on the outcome of the proceeding." 466 U.S. at 693. Instead, Petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," and that counsel's errors were so serious that they rendered the proceedings unfair or the result unreliable. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In other words, he must show that "the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. "A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is ... high." *Van Poyck v. Fla. Dep't of Corr.,* 290 F.3d 1318, 1322 (11th Cir.2002). A petitioner must "affirmatively prove prejudice." *Strickland,* 466 U.S. at 693.

Furthermore, this Court has held where evidence produced during PCR proceedings is cumulative to or does not otherwise aid evidence introduced at trial, no prejudice results from counsel's failure to bring it forward. *See Edwards v.* State, 392 S.C. 449, 710 S.E.2d 60 (2011); *Jackson v. State*, 329 S.C. 345, 350–51, 495 S.E.2d 768, 770–71 (1998); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); *Cherry v. State*, 300 S.C. 115, 118–19, 386 S.E.2d 624, 625–26 (1989); *See also Thompson v. State*, 423 S.C. 235, 814 S.E.2d 487 (2018) (trial counsel's deficient failure to object to such testimony does not remove an applicant's burden to prove prejudice. As part of the prejudice analysis, the PCR court and the reviewing court must therefore consider the strength of the State's case apart from the inadmissible evidence to which trial counsel deficiently failed to object.)

In *State v. Weaver*, the Court of Appeals address a similar question to the case at bar. In *Weaver*, the Court held the defendant was not prejudiced, as element of ineffective assistance of counsel, by counsel's deficient performance in failing to object to solicitor's closing argument at penalty phase of capital murder trial, by asking jurors to "put yourself in [victim's] shoes, size six". The Court opined that although improper, the solicitor's single comment did not so infect the trial with unfairness as to make the death sentence a denial of due process. *State v. Weaver*, 361 S.C. 73, 89, 602 S.E.2d 786, 794 (Ct. App. 2004), *aff'd as modified*, 374 S.C. 313, 649 S.E.2d 479 (2007); U.S.C.A. Const.Amend. 6; *see also Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2004), reh'g denied, (Oct. 6, 2004), mandamus granted, 322 S.C. 49, 471 S.E.2d 455 (1993). The Court went on to address an additional comment made by the Solicitor on Weaver's silence, finding the Solicitor's comment "Nobody can tell you that except Levell Weaver," plainly implied a question for which only Weaver could supply an answer, and therefore indirectly commented on Weaver's silence.

However, while the Court acknowledged the impropriety of the Solicitor's comments, the Court held they did not warrant a mandatory reversal of Weaver's conviction. "Thus, as a prerequisite to reversal, Weaver must demonstrate the effect of the solicitor's closing argument was to deny him a fair trial. In making this determination, we must examine the alleged impropriety in light of the entire record." *Weaver*, at 89, 504 S.E.2d at 794; *see State v. Brown*, 333 S.C. 185, 191, 508 S.E.2d 38, 41 (Ct.App.1998); *State v. King*, 349 S.C. 142, 159, 561 S.E.2d 640, 649 (Ct.App.2002) ("The test of granting a new trial for alleged improper closing argument is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.") Indeed, a criminal defendant is entitled to a fair trial, not a perfect one. *State v. Mizell*, 332 S.C. 273, 285, 504 S.E.2d 338, 345 (Ct.App.1998). *See also*

State v. Pace, 337 S.C. 407, 415, 523 S.E.2d 466, 470 (Ct. App. 199) ("As a general rule, any act or conduct on the part of the accused is admissible as some evidence of consciousness of guilt."); *United States v. Burgoes*, 94 F.3d 849, 867 (4th Cir. 1996) ("Relating implausible, conflicting tales to the jury can be rationally viewed as further circumstantial evidence indicating guilt."); *State v. Trull*, 571 S.E.2d 592, 599 (N.C. Ct. App. 2002) (noting "evidence of a defendant's refusal to submit to a lawful testing or identification procedure has been held admissible when offered as circumstantial evidence of guilt."); *Id*. (holding the trial court did not err in admitting evidence that the defendant refused to submit to a gunshot residue test.).

Here, the PCR court, as the Court of Appeals did in *Weaver*, correctly found Petitioner failed to overcome his burden and show prejudice. After balancing trial counsel's errors—failing to object to the Solicitor's comments on direct-examination and during closing argument – against the strength of the State's case, there is little merit to a claim that the errors significantly undermined "confidence in the outcome of the trial," *Rutland*, 415 S.C. at 577, 785 S.E.2d at 353, and ***do not leave*** "a reasonable probability that, but for counsel's errors, the result of the trial would have been different," *Ard*, 372 S.C. at 331, 642 S.E.2d at 596; *State v. Smalls*, 422 S.C. 174,195, 810 S.E.2d 836, 847 (2018) given the amount of circumstantial evidence against Petitioner.

Ultimately, Petitioner has failed to meet his burden of proof in showing prejudice resulting from the alleged deficiency of counsel, and the PCR court properly denied relief. Accordingly, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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