STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Dorchester County
Honorable Diane Schafer Goodstein, Circuit Court Judge

Tashon Hurell,

Respondent,

vs.

State of South Carolina,

Appellant.

Appellate Case No. 2020-001172

Return to Petition for Writ of Certiorari

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

I.

Did the PCR judge err in refusing to find trial counsel ineffective for waiving a mistrial motion when Petitioner's sister inadvertently testified before the jury that Petitioner had served time in prison?

II.

Did the PCR judge err in refusing to find trial counsel ineffective for failing to call Petitioner's mother, Janah Hurell, and brother, Tramaine Hurell, as alibi witnesses?

RESPONDENT'S STATEMENT OF THE ISSUES ON APPEAL

I.

Trial counsel's decision to withdraw his motion for mistrial was reasonable trial strategy because he did not think the prosecution's case was going well, and receiving a mistrial could lead to a missed opportunity for Petitioner to be acquitted.

II.

Because trial counsel interviewed both potential alibi witnesses, Petitioner's mother and brother, and trial counsel determined their testimony was not compelling and it was more beneficial to have last closing argument, the PCR court did not err in finding counsel was not ineffective for failing to call the alibi witnesses at trial.

STATEMENT OF THE CASE

Petitioner Hurell was indicted for attempted murder, kidnapping, and armed robbery (2015-GS-18-85, 86, & 87). The first trial ended in a mistrial. The jury found Petitioner guilty at the second trial before the Honorable Edgar W. Dickson on February 8-10, 2016. Judge Dickson sentenced Petitioner to concurrent sentences of thirty years' imprisonment. On appeal, the Court of Appeals affirmed the convictions and sentence. State v. Hurell, 424 S.C. 341, 818 S.E.2d 21 (Ct. App. 2018).

Petitioner filed an application for post-conviction relief (PCR) on September 25, 2018, and amended the application on September 3, 2019. Following a hearing on September 11, 2019, the Honorable Diane Schafer Goodstein denied relief by written order filed April 23, 2020. A pro se Rule 59(e) motion was filed and denied by form order dated June 30, 2020. Notice of appeal was served on August 21, 2020.

STATEMENT OF FACTS

On April 23, 2014, Mary Pecorora (Victim) was working at the Kangaroo gas station in the early morning hours when a man wearing a mask and carrying a bat threatened to cut her throat and swung the bat into her head. The robber grabbed her by the neck and dragged her to the cash register. She opened the register upon his command, and he grabbed the money, hopped over the counter, and left. App. p. 52, line 10 - p. 54, line 15. Victim described the robber as Afro-American, slender, five feet, ten inches to five feet, eleven inches tall, and wearing a ski mask, bandana, hooded jacket, gloves, and red shoes. App. p. 54, line 16–p. 55, line 2. She called 911 and EMS. The police also responded to the store, although she spoke only briefly to the police because EMS was attending to her injuries. She was subsequently transported to MUSC for several days of treatment, including

surgery. App. p. 55, lines 3–25; p. 56, lines 1–16.

Officer Bernard Nelson responded to the store and relayed Victim's description of the suspect to all units. App. p. 63, line 17 – p. 65, line 10. Through the surveillance video he gained a better description of the suspect to provide to the other units. App. p. 65, lines 11–12; p. 67, lines 13–21. The description he provided to the other units was: "black male subject wearing a light hoodie with the multi-colored graphic designs on the front. Bright lime green hoodie, black pants, red shoes, black gloves, dark colored bandana over his face. He was a medium build and had a husky voice carrying a baseball bat." App. p. 68, line 22 – p. 69, line 1.

Officer Hobie Williams brought his K-9 to the crime scene and his K-9 tracked from the Kangaroo store to Somerset Apartments. App. p. 91, line 19–p. 94, line 23. However, Officers discontinued the track because they lacked available officers to set up a perimeter. App. p. 95, lines 2–7. Instead, Officer Williams and another officer searched for evidence on the path between the Kangaroo store and the Somerset Apartments. App. p. 95, lines 8–15. At Building G, they encountered a white male smoking on the upper level and when asked, the man told them he saw a black male with a bat running to the apartment below his, G-4. App. p. 96, line 18–p. 97, line 1. Officer Williams saw a dollar bill lying on the ground inside the breezeway of the balcony. App. p. 97, lines 5–6; p. 98, lines 1–8. He noted the bill was dry even though the area all around was wet, and the bill also had blood on it. App. p. 98, lines 9–14. He placed the bill into an evidence bag. App. p. 102, lines 6–22. Officer Williams spoke to Tashima Jones, Appellant's sister and the occupant of the apartment, who allowed him to come in and search. App. p. 99, lines 4–21.

An expert in DNA analysis from SLED compared a swab from the dollar bill officers found at the apartment to a known standard from the victim, and the swab from the dollar bill matched Victim's DNA profile. App. pp. 259–262.

Lucas Hartman, the man who lived above apartment G-4, testified he sat on his balcony on April 23, 2014, around 1:30 to 2:00 a.m., when he saw a man wearing black clothes and carrying a baseball bat and a backpack jump over the balcony below. He then heard the door open. The man came back out, jumped over the balcony, and drove away in a white vehicle, possibly a Mustang. The man came back and did the same thing again. App. p. 112, line 3 – p. 114, line 1.

Detective Michael Weaver became involved in the case on April 23, 2014, and obtained the officers' reports. App. p. 140, line 22 – p. 141, line 22. DMV records listed apartment G-4 as Petitioner's address. App. p. 142, lines 2–17. Detective Weaver obtained a search warrant for apartment G-4, obtained a key from the apartment manager, and searched the apartment while no one was home, finding nothing of evidentiary value. App. p. 144, lines 1–23. After returning the key to the apartment manager, he noticed a white car was parked in front of G-4, so he knocked on the door and found Petitioner lying on a couch inside and also Jana Hurell, Appellant's mother, at the apartment. App. p. 147, lines 3–7.

Detective Weaver testified he showed Victim each of the three lineups that contained photos of the three Hurell brothers. She only identified Tramaine, who she recognized as a customer visiting the gas station that night and who was a regular customer. App. p. 161, line 4–p. 162, line 7. Detective Weaver spoke to Tramaine during the investigation. Tramaine was tall and skinny, with a high-pitched voice that did not sound like the suspect in the video. App. p. 68, lines 2–12. Detective

Weaver discovered a photo of Appellant on Facebook wearing shoes that looked similar to the ones pictured in the video of the crime. App. p. 163, line 19–p. 164, line 25.

Shelby Bradt dated Tramaine for three or four months, including during April 2014. App. p. 209, lines 5–19. The solicitor showed her a video clip of the robbery and Bradt testified she did not recognize the robber and the robber did not look or sound like Tramaine. App. p. 211, lines 6–14. During closing argument, trial counsel insinuated that as Tramaine's former girlfriend, she was biased and unreliable, and very well could have lied to police to protect Tramaine. App. pp. 310-11.

Tashima Jones, Appellant's sister who lived in apartment G-4, testified she was awakened by police knocking on her door. The police told her a robbery took place at the nearby Kangaroo and asked to come in. App. p. 212, line 10–p. 213, line 3. They asked her who else was home and she answered that her son and brother (Traquan) were home. She allowed the officers to search the apartment. App. p. 213, lines 6–15. When asked where Appellant was living at the time, she reported he stayed at both his girlfriend's and his mother's house and often came to Jones's house but did not stay there. App. p. 214, line 13–Tr. 215, line 1. When the State asked whether she was aware Appellant listed her address as his with the DMV, she answered, "Prior to him getting out from serving some time, yes, I am." App. p. 217, lines 17–22.

At this point, trial counsel told the trial court he had a matter of law to discuss and the trial court excused the jury. Trial counsel moved for a mistrial due to Jones's response being a comment on a prior conviction that was clearly prejudicial to Appellant. App. p. 217, line 25–p. 218, line 20. The solicitor was quick to point out he simply asked if she was aware he was using her address and in no way intended to elicit that response. App. p. 218, line 22–p. 219, line 2. Before trial counsel argued his motion, he asked for time to confer with Petitioner, and after a thirty-minute discussion,

trial counsel reported to the court he would withdraw the motion for mistrial while reserving his right to renew it later if it became necessary. App. p. 219, line 20–p. 221, line 17. Trial counsel placed on record that he discussed whether or not to pursue the mistrial motion with Petitioner, and trial counsel concluded by saying, "Once we put it back and the jury starts going, it gets waived, it's over. We don't get to renew it down the road." App. p. 221, line 17 – p. 223, line 15.

Traquan testified police visited him at his workplace in April 2014, and showed him a picture of a man in a hoodie. Traquan claimed he told them he did not recognize the robber but recognized that the hoodie had a picture of the Tasmanian Devil, a Warner Brothers' cartoon character, on the front. Traquan said he did not own a hoodie like that. App. p. 231, line 22–Tr. 232, line 20. Traquan denied telling police it was his hoodie he received as a gift in the eighth grade and that it was in his closet recently. App. p. 231, line 22–p. 232, line 19; p. 233, lines 1–6. At that point, the State recalled Detective Weaver, who testified Traquan told him the sweatshirt was given to him by a friend when he was in the eighth grade. Detective Weaver pointed out that the photo he provided Traquan showed a side angle of the robber and the cartoon character was not visible in the picture. App. p. 234, line 2–p. 235, line 2.

Sergeant Nick Santana testified he was present when Detective Weaver spoke to Traquan and Detective Weaver showed Traquan a photograph with a side profile of the suspect and asked if Traquan recognized the clothing. App. p. 237, line 14–p. 238, line 5. Traquan told them he did recognize the sweatshirt and it was given to him in the eighth grade by a friend and he advised the sweatshirt should be in his closet. App. p. 238, lines 6–10.

Derek Cheek, an investigator with the solicitor's office, identified a photograph from Appellant's Facebook page showing Appellant wearing red and black shoes with a white mark,

possibly a Nike swoosh. App. p. 240, line 13–p. 241, line 23. He testified the suspect in the surveillance photo wore red and black shoes and identified those shoes in a still shot from the video. App. p. 241, line 23–Tr. 242, line 8. He then identified a photograph of a shoe print left behind at the incident location in the victim's blood. App. p. 242, lines 9–12. He searched the internet for those shoes and found red and black shoes with a white Nike swoosh with a similar tread pattern to the print. App. p. 242, lines 13–23.

During deliberations, the jury sent a note to the trial court requesting to review the sister's testimony and specifically asking, "Did she say when he got out he sometimes stayed with her?" Trial counsel renewed his motion for a mistrial contending the note indicated the jury was deliberating about this topic. App. p. 332, line 9–p. 333, line 18. However, the jury sent another note asking to disregard the last request. App. p. 333, line 22–p. 334, line 2. The trial court disclosed the court was initially concerned when the jury sent the first note wanting more information about the sister's testimony and would have reconsidered a motion for mistrial if that had been a question for the court to resolve. However, because the jury immediately asked the court to disregard the question, he took the position the jury was also disregarding the question and denied the motion. App. p. 335, line 18–p. 336, line 11. Ultimately the jury found Appellant guilty of all charges, and the trial court sentenced Petitioner to thirty years' imprisonment for each charge, to be served concurrently. App. p. 366.

STANDARD OF REVIEW

Appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support them. Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018); Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). Only pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Because the issues presented by Petitioner in the instant case are questions of fact, they should be affirmed if supported by probative evidence.

ARGUMENT

I.

Trial counsel's decision to withdraw his motion for mistrial was reasonable trial strategy because he did not think the prosecution's case was going well, and receiving a mistrial could lead to a missed opportunity for Petitioner to be acquitted.

Petitioner argues the PCR court erred in denying Petitioner's claim that trial counsel was ineffective for withdrawing the motion for mistrial when testimony was inadvertently elicited that Petitioner had not lived with his sister since he got out of prison. The jury did not hear why Petitioner was in prison. Trial counsel testified he thought he should withdraw the motion for mistrial because he felt the prosecution's case was not going well.

In order to prove counsel was ineffective, a PCR applicant must show counsel's performance was deficient and the applicant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668, 687 (1984). Counsel's performance will be deemed deficient if it falls "outside the wide range of professionally competent assistance." Id. The applicant is prejudiced by

the deficient performance if "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Id. at 695.

Strickland does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation, instead Strickland requires the PCR applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 697. Therefore, the function of the PCR court is to determine if "in light of all the circumstances, the identified acts or omissions were outside **the wide range** of professionally competent assistance" required of a criminal defense attorney. Id. at 690 (emphasis added).

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

Counsel's articulation of valid trial strategy defeats a claim of ineffective assistance of counsel. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546; 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for

employing such strategy, such conduct is not ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

Trial counsel testified that the prosecution called Petitioner's sister to testify without being able to interview her beforehand. The prosecution asked if the sister was aware Petitioner listed her apartment as his address for his driver's license. She testified Petitioner had not lived with her since he got out of prison in response. App. p. 217, lines 18-24; pp. 564-66. Trial counsel moved for a mistrial and thought chances were good the trial court would grant the motion, but he conferred with Petitioner and advised him it was his call, but "I would've given my opinion and perspective." App. p. 564, lines 8-12.

Trial counsel testified, "He did not want a mistrial at that point. He said he thought that the case was going very well; that he had already been in jail for a . . . really long period of time." App. p. 564, lines 13-15. Trial counsel then offered his view of the prosecution's case at that point:

> We also discussed the fact that the state essentially had—the – the first case hung. . . . But I think it was 8 to 4 voted for not guilty is what I was told, where they ended up, is my recollection.
>
> And the state, to their credit, I mean, they tried a – they tried a different case. They came back' they changed their strategy. They presented evidence they didn't put in. It wasn't just a replay from the first case.
>
> And part of what they did was they left out what Mr. Hurell and I though was the most compelling piece of evidence against him. And when we got past that point in the trial and we said, "Oh, we – they're not doing that," we were both, like – like, relieved at the table. We were not going to have to argue with this.
>
> And even at that point, he's like, "They're still not doing this thing, you know. Let's – let's go while that's not the form."

App. p. 564, line 16 – p. 565, line 9.

Later during trial counsel's testimony, he explained the evidence introduced at the first trial

that concerned him was a recorded conversation between Petitioner and Detective Weaver. The FBI analyzed the recording and reported it was inconclusive if it matched Petitioner's voice. But trial counsel elicited testimony establishing the recording was sent to the FBI for analysis and during closing argument contended that if there was anything useful, the FBI would have testified about it at trial. App. pp. 570-71. This concealed his true assessment of the evidence that the robber's voice heard in the recording sounded just like Petitioner: "[H]e has a fairly distinctive voice, the video from the store, as well as the video from the call, as well as his voice there." App. p. 573, lines 18-25.

The evidence the prosecution did not present was the recording itself. Trial counsel explained the significance of this:

> But the most critical point, as far as that goes, is when I talked earlier about not wanting the – mistrial. And when I said it was because there were things they weren't doing in this case they and done, this is the tape. I mean, the fact that they pulled this tape, Mr. Hurell and I agreed. And we discussed it a good bit. We thought was the most compelling evidence that they had.
>
> . . . [A]nd I told Mr. Hurell, if I was prosecuting the case, I would've just lined those two hits and – play the one in the store, play the phone call; play the one in the store, play the one in the phone call. Because it sounds exactly like you, which is another reason we really were very hesitant or reticient about the idea of testifying.
>
> . . . [T]he fact that the tape-recorded conversation had not been produced, we felt like strengthened our case tremendously, even over and above what we had the first time out . . . .

App. p. 571, line 21 – p. 572, line 16.

Petitioner corroborated counsel's recollection that the prosecution's case was not going well: "[Trial counsel] said that, you know, we had two of their witnesses already caught up on the stand in lies. And we had another witness up there looking like a fool, so we got this." App. p. 508, lines 9-

12. Petitioner disclosed he was of a similar mind, even as he complained on the stand at the PCR hearing that he felt pressured, he nonetheless explained, "And we probably got them, you know, dead to rights right now." App. p. 508, lines 18-23. No doubt Petitioner felt pressure, from the circumstances of a difficult choice: Petitioner may have avoided, temporarily at least, a conviction with a mistrial; on the other hand, he may have missed the best opportunity for acquittal – ultimately the desired end result. While "a defendant's consent to trial strategy in itself, [does not vitiate] all claims of ineffective assistance of counsel . . . [his consent is] probative of the reasonableness of the chosen strategy and of trial counsel's performance." Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995); but see United States v. Leggett, 162 F.3d 237, 247 (3d Cir. 1998) ("[T]here is no constitutional right to be represented by a lawyer who agrees with the defendant's trial strategy").

Probative evidence supports the denial of relief because trial counsel's testimony established a reasonable trial strategy. Trial counsel believed the prosecution's case was weaker than the past trial which resulted in a hung jury with more jurors voting to acquit than to convict. He therefore felt it was advantageous to go forward. In Phyle v. Leapley, 68 F.3d 154 (8th Cir. 1995), the Eighth Circuit found it was reasonable trial strategy in eliciting some of the defendant's prior bad acts during the cross-examination of his brother, who was a codefendant cooperating with the government, because of the resulting effectiveness of diminishing the brother's credibility in front of the jury.

In reaching the result, the Eighth Circuit explained, "These are the kinds of broad, highly subjective factors that trial lawyers must take into account as they make repeated, instantaneous decisions whether to object to a question, whether to move to strike a damaging unresponsive answer, or whether to move for a mistrial when a witness has delivered an unexpected low blow.

When we review such trial decisions, the ineffective assistance standard is high – they are 'virtually unchallengeable' – in part because appellate judges cannot recreate from a cold transcript the courtroom dynamics that are an essential part of evaluating the effectiveness of counsel's performance." Id. at 160; see also Green v. State, 351 S.C. 184, 569 S.E.2d 318 (2002) (finding counsel's decision to ask for a curative rather than a mistrial based on trial counsel's belief that it was a good jury for the defendant was reasonable trial strategy).

Additionally, despite withdrawing the mistrial motion, counsel later renewed the motion when the jury referenced the testimony in a note to the trial court during its deliberations. The trial court denied the mistrial motion because the jury sent another note asking to disregard the testimony. The trial court observed it would have reconsidered the motion for mistrial if the jury had not sent the second note. The Court of Appeals, rather than finding the claim was waived or not preserved for review, found the trial court did not abuse its discretion in denying the motion for mistrial. App. pp. 455-456. In reaching the result on the substantive issue, the Court of Appeals held:

> "The decision to grant or deny a motion for a mistrial is a matter within a trial court's sound discretion, and such a decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law." *State v. Council*, 335 S.C. 1, 12, 515 S.E.2d 508, 514 (1999). "A mistrial should not be granted unless absolutely necessary." *Id.* at 13, 515 S.E.2d at 514. "In order to receive a mistrial, the defendant must show error and resulting prejudice." *Id.* We find no abuse of discretion by the trial court. Further, we find Hurell has not shown prejudice. *See State v. Thompson*, 352 S.C. 552, 561, 575 S.E.2d 77, 82 (Ct. App. 2003) ("[A] vague reference to a defendant's prior criminal record is not sufficient to justify a mistrial where there is no attempt by the State to introduce evidence that the accused has been convicted of other crimes."); *State v. Manning*, 400 S.C. 257, 270, 734 S.E.2d 314, 320 (Ct. App. 2012) (holding a single reference to a severed charge did not constitute sufficient prejudice to warrant a mistrial).

App. p. 456.

The authority cited by the Court of Appeals explains why the PCR court was correct that Petitioner was not prejudiced by the tactical retraction of the motion. The sister's testimony did not disclose why Petitioner was previously in prison and the isolated reference was not sufficient, as in Manning, to warrant a mistrial.

Because probative evidence supports the PCR court's denial of relief, certiorari should be denied.

II.

Because trial counsel interviewed both potential alibi witnesses, Petitioner's mother and brother, and trial counsel determined their testimony was not compelling and it was more beneficial to have last closing argument, the PCR court did not err in finding counsel was not ineffective for failing to call the alibi witnesses at trial.

Petitioner argues the PCR court erred in finding counsel was not ineffective for declining to call his mother or brother as alibi witnesses. Petitioner contends: "The record reflects that trial counsel did not testify at the PCR hearing that he decided that the jury would not believe the alibi witnesses." Pet. p. 15. However, Petitioner supplied evidence of trial counsel's strategy when he admitted at the hearing that trial counsel told him that the jury would not believe mother or brother. This is sufficient evidence to support the PCR court's findings that counsel's performance was not deficient.

Counsel testified he interviewed both the mother and the brother that would provide the alibi. Counsel offered, "I guess I didn't find them compelling; I didn't want to give up our right to find – to closing argument." App. p. 574, lines 15-18. Further, counsel found problematic evidence

showing Petitioner's phone was moving around during the time Petitioner was alleged by the alibi witnesses to be home sleeping in bed. Moreover, the brother "was pretty angry and uncooperative" and counsel decided was not going to be helpful for the defense. App. p. 574, lines 18-25. He explained, "Within the context of the case, we felt like it would be disadvantageous to pursue that, and so we did not." App. p. 575, lines 17-21. Counsel testified he prefers to retain last closing argument when he can. App. p. 576, lines 1-10.

Petitioner's earlier testimony in the hearing corroborates this strategic view, despite attempting to shade the determination as a lack of diligence: "And they [Mother and Brother] told me that he told them the same thing he told me, which was the judge and the jury wouldn't believe them because of they were family and they are expected to lie for me." App. p. 493, lines 16-23; see App. p. 516, lines 16-22.

Strickland v. Washington, 466 U.S. 668, 690-91 (1984) requires extreme deference to counsel's strategic judgments that are adequately investigated; as Strickland explains: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." Counsel verified he interviewed the prospective alibi witnesses before concluding it was not prudent to call them as witnesses at trial and forgo last closing argument. He adequately investigated the defense and rejected it as a strategic judgment.

Trial counsel's reluctance to call family members with readily expected bias in Petitioner's favor was reasonable. The Tenth Circuit Court of Appeals rejected a claim of ineffective assistance of counsel for failure to pursue presenting the defendant's cousin as an alibi witness, noting: "Finally, we must consider the potential value to the defense of the evidence that might have been discovered in assessing the reasonableness of counsel's failure to conduct further investigation; alibi

testimony by a defendant's family members is of significantly less exculpatory value than the testimony of an objective witness." Romero v. Tansy, 46 F.3d 1024, 1030 (10th Cir. 1995); see also Maxwell v. Gilmore, 37 F.Supp.2d 1078, 1089 (N.D. Ill. 1999) ("But Maxwell's attorneys may well have thought – and surely reasonably so – that Maxwell's mother and girlfriend would not be credible alibi witnesses, given their obvious personal interest in his acquittal (certainly less of a problem with the presumably more neutral girlfriend's mother)"); Bergmann v. McCaughtry, 65 F.3d 1372, 1380 (7th Cir. 1995) ("Nor will we second-guess trial counsel's decision not to call Bergmann's step-father . . . to testify that Bergmann's guns were at home at the time of the crime. As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias"). In the present case, counsel found it preferable to have last closing argument than to present Petitioner's mother and brother, the latter not being cooperative. Both witnesses could be seen by the jury to be biased witnesses and by virtue of being close family, their exculpatory value is greatly diminished. Accordingly, probative evidence supports the PCR court's denial of the PCR application.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be denied. Should this Court see fit to grant the petition, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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