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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Horry County
Court of Common Pleas

The Honorable Steven H. John, Trial Judge
The Honorable Kristi F. Curtis, PCR Judge

Appellate Case No. 2020-001398

CARNAIL GRAHAM. .... Petitioner.

v.

STATE OF SOUTH CAROLINA. .... Respondent.

RETURN TO PETITION FOR
WRIT OF CERTIORARI

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STATEMENTS OF ISSUES ON CERTIORARI

Petitioner's Statement of Issues on Certiorari

I. Trial Counsel failed to provide effective assistance when he did not elicit the testimony of Conswella Smith in support of Petitioner's defense.

II. Trial Counsel failed to provide effective assistance when he did not object to vouching by the solicitor during closing arguments.

Respondent's Counterstatement of Issues on Certiorari

I. Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective because Counsel articulated a reasonable strategy in deciding not to call Smith and, even if he was deficient, the proposed testimony was cumulative in nature and, thus, non-prejudicial?

II. Did the post-conviction relief court properly determine that Petitioner failed to establish counsel was ineffective for failing to object to allegedly improper vouching for the witness's credibility when the statements, in their totality, were not improper, an objectionable basis did not exist and, even if Counsel was deficient for failing to object, Petitioner was not prejudiced because of the strength of the State's case against him?

STATEMENT OF THE CASE

Carnail Graham (hereafter "Petitioner") is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. During its July 2012 term, the Horry County Grand Jury indicted Petitioner for murder (2012-GS-26-3077). Petitioner was represented by David J. Canty, Esquire (hereafter "Counsel"). Martin D. Spratlin and Nancy Livesay, Esquires, from the Fifteenth Circuit Solicitor's Office, represented the State. On October 13, 2014, the case proceeded to trial before the Honorable Steven H. John. On October 14, 2014, the jury found Petitioner guilty of the crimes charged. Judge John sentenced Petitioner to thirty-two years' imprisonment.

Petitioner timely filed a notice of appeal, which was perfected by Lara Caudy who raised the following issue:

> Whether the court erred by refusing to conduct a pretrial hearing to ascertain the reliability of the testimony of Keir Johnson, Sedieka McClam, and Kachief Spain, who were all jailhouse informants, and by failing to determine that the testimony of each of these witnesses was reliable and corroborated before the witness was allowed to testify before the jury?

The South Carolina Court of Appeals affirmed the conviction by written order. *State v. Graham*, Op. No. 2016-UP-437 (S.C. Ct. App. filed Oct. 19, 2016). The remittitur was issued November 8, 2016.

Petitioner timely filed a PCR application on August 14, 2017, amended on November 29, 2018, alleging:

1. "Counsel was ineffective in not properly preparing the case for trial."
2. "That Counsel was ineffective in not properly presenting pre-trial motions to:
    a. "Hire a ballistics' expert. That Counsel failed to anticipate that a ballistic expert would be necessary."
    b. "Failure to locate and subpoenaed witnesses for trial."
3. "For ineffective cross-examination of the State's Star Witness, Keir Johnson."
4. "For failure to properly present at trial the testimony of Conswella Smith. Ms. Smith was an eyewitness to the two alleged perpetrators of the crime returning from the

mobile home to the van. That her testimony would have been that the Applicant was not one of the individuals that she saw returning to the van."

5. "That counsel was ineffective for not properly using cell phone date and in examining the cell phone expert to show that the Applicant was not present at the scene."
6. "That counsel was ineffective for not objecting to the Solicitor's closing argument in which she improperly bolstered the statements of Keir Johnson. She also appealed to the emotional interest of the jury rather than the factual evidence that was before the court."
7. "That counsel was ineffective for not adequately explaining to the Applicant his right to take the stand and testify."

Respondent made its return on November 20, 2017. The evidentiary hearing occurred on November 26, 2018, before the Honorable Kristi F. Curtis. Tommy Thomas, Esquire represented Petitioner. Johnny Ellis James, Jr., Esquire of the South Carolina Attorney General's Office represented Respondent.

The Court issued an order of dismissal, denying Petitioner's PCR application and remanding him to the custody of South Carolina Department of Corrections on June 1, 2020. Specifically, the Court found:

1. Counsel conducted reasonable investigations into the case and Petitioner made no showing as to what would have been discovered if Counsel investigated further.
2. Petitioner could not establish prejudice for failure to call a ballistics expert because no testimony of an independent ballistics expert was presented at the evidentiary hearing.
3. Petitioner failed to establish prejudice for failure to call witnesses other than Conswella Smith to testify because no other witnesses were called at the evidentiary hearing.
4. Counsel was not ineffective for failing to adequately cross-examine Keir Johnson because the cross-examination at trial was exceedingly thorough, Petitioner failed to show what additional subjects could have been raised to cross-examine him with, and the Court was unable to independently identify any additional subjects.
5. Counsel was not ineffective for failing to call Conswella Smith to testify because he articulated a valid trial strategy in deciding not to call her and the proffered testimony would have been merely cumulative and, accordingly, Counsel's strategy was non-prejudicial.
6. Counsel was not ineffective for failure to adequately cross-examine the State's cell phone expert because everything that could have been elicited from the phone records was presented to the jury and no arguments were made at the evidentiary hearing concerning the records that would have changed the mind of the jury.
7. Counsel was not ineffective for failure to object to the prosecutor's closing statements

because the arguments made were not objectionable because, when viewed in their entirety, the State did not vouch for the witness's credibility and arguments made constituted reasonable inferences drawn from the witness's testimony.

8. Counsel was not ineffective for failure to adequate explain the right to testify because both Petitioner and Counsel testified at the evidentiary hearing that he was advised of his right to testify, discussed the strengths and weaknesses of testifying, Counsel advised him against testifying, and Petitioner decided not to testify knowingly, intelligently, and voluntarily. Further, Petitioner's only proffered testimony at trial would have been concerning the size of his shoes, which would not have changed the results at trial.

Thus, the request for relief was denied. Petitioner appeals from the denial of relief based upon the allegations that Counsel was ineffective for failing to call Conswella Smith as a witness at trial and for failing to object to the prosecutor's closing statements at trial for allegedly vouching for the Victim's credibility.

STATEMENT OF FACTS

Keia Pertelle (hereafter "Victim") died of a gunshot wound to the chest sustained when intruders invaded her trailer around two or three in the morning. (App. 243-45, 269-71, 286). The first responding officer located Victim in her residence's front bedroom, deceased on the bed. (App. 271). In the living room, investigators found a comforter half thrown from the couch to the floor, indicating someone leapt from the couch in a hurry. (App. 407). The bullet was retrieved from Victim's back during autopsy and collected as evidence. (App. 389).

Prior to the invasion, Victim's roommate Carlton Watts last saw her watching television on the couch. (App. 194). Watts testified that he was asleep when the invasion occurred and initially heard a few gunshots, causing him to roll to the floor and hide under his bed. (App. 189-90). Watts could not identify the intruders, but heard them screaming "where it's at, we're not playing, where it's at," and saw two pairs of sneakers pass by his bed. (App. 198-99). Victim's boyfriend, a third resident in the home nicknamed "Splurge", shared Victim's bedroom. (App. 187, 234-35). Splurge was also at the house that night, and remained inside until law enforcement arrived, demanding he exit. (App. 189, 192). During the invasion, Victim screamed out to Splurge, who was in their bedroom. (App. 197-98). Splurge did not testify at trial.

A neighbor, David Grissett, noticed the getaway van right before the incident, finding it suspicious, and watching it circle his street, park at the end, then drive two streets over and return again to park at the end of the road. The road they lived on was a dead end with no street lights. (App. 250-51). He testified to hearing the gunfire and commotion and then witnessing two people run from the home and take off in a van. (App. 245-46). Grissett called 911. (App. 246). Grissett testified he called Conswella Smith to alert her that a suspicious van was parked outside of her house. (App. 244-45, 255, 259-62).

Law enforcement documented entry marks from a fired bullet in the front door jamb. (App. 380). The front door frame showed additional signs of forced entry. (App. 385). They found a disheveled bedroom and collected fired bullets from the kitchen cabinets, the doorway from the kitchen to the living room, and from under the couch. (App. 382). Bullet holes were also found in the television and the hallway floor. (App. 382-83). Various bullet jackets and fragments were collected from the scene. (App. 401-02). In addition to the absence of shell casings on scene, the types of jackets and bullet fragments recovered signaled to law enforcement that a revolver was likely used. (App. 403). Investigators collected a .357 Taurus revolver, a .44 Redhawk Ruger, and one SK 7.62 assault rifle from the home. (App. 393).

Regarding projectiles taken from the scene, SLED's firearm and toolmark examiner determined that three projectile fragments, State's exhibits 68, 69 and 71, and a complete fired bullet, State's exhibit 67, derived from a revolver recovered from the scene. (App. 483-88). The examiner determined the fatal bullet recovered from Victim's body was a .357 caliber shot from an unrecovered revolver. (App. 488-90). A match was never made between the bullet that struck Victim and any gun. (App. 507-08).

Between six and seven o'clock on the morning following the murder, Tiffany Oliver noticed a champagne colored van with tinted windows parked behind her home. (App. 304-06). Oliver called the police regarding the van because she did not know the owner and wanted it removed. (App. 303). She did not live on the same street as Victim. (App. 302). When law enforcement fingerprinted the van, they identified the creators of thirteen fingerprints, none matching Petitioner. No prints taken from the driver's side contained sufficient ridge detail to be matched to anyone. The matches implicated Thomas Booker James, Keir Lamont Johnson (aka "Bootsie"), Letitia Tasha Freshley, and Markel Hasheem Rush. (App. 349-50, 362). Kier Lamont

Johnson's ex-girlfriend, Tiara Brown, was the owner of the van. (App. 527, 634).

Howard Parker, a lifelong friend of both Petitioner and Victim, testified at trial that he saw Bootsie driving the van and that he saw him in the van twice that night. (App. 526-28). Parker stated he saw Bootsie in the van twice that night: once at a gas station around 11:00 PM and the second after midnight, when the van arrived at a house where Parker was with friends. (App. 528-30). Two more people exited the house, got inside the van, and left. (App. 554). On both occasions, Parker noticed but could not identify other individuals inside the van. (App. 528-30). Parker identified Petitioner's co-defendant as another occupants. (App. 530-31).

Bootsie implicated Petitioner, also known as "Dubba." (App. 170). At trial, Bootsie explained how Petitioner called him from co-defendant Thomas Booker James, "Cutty's" phone and asked for a ride to buy some drugs the night of the murder. (App. 611-15). Bootsie picked up Petitioner and Cutty, and parked on a back road by Splurge and Victim's home. Bootsie testified they spoke to Smith in the trailer park while Petitioner and Cutty went inside the trailer. (App. 485-86, 621, 703-06, 712-13). They got back in Bootsie's van and drove away. (App. 611-12). While leaving, a Horry County police officer began following them and Petitioner urged Bootsie to getaway. At that point, Bootsie parked the van in "somebody's backyard" and all three men took off into the woods. (App. 612). Petitioner expressed to his cohorts that he thought he "just killed that mother------" during the getaway. (App. 622). Bootsie recalled Petitioner and Cutty wearing blue latex gloves they discarded in the woods and that they did not wear masks. (App. 711). Bootsie testified that Petitioner threw two guns out of the van window. (App. 623, 665).

Bootsie asked his girlfriend to call the police and report the van stolen. (App. 623-24, 679-80). The instruction to report the van stolen was one of Johnson's strategies in speaking to law enforcement about his involvement. (App. 623-24). Bootsie incurred a charge for driving

without permission with intention to deprive, and made bond the next day. (App. 624). Bootsie later incurred a murder charge for his involvement in Victim's death. In addition to other charges, the murder charge remained pending at the time of Petitioner's trial. (App. 624, 655-57). Bootsie admitted that he previously gave false statements to law enforcement out of fear, but that he provided a truthful version of events after retaining counsel. (App. 624-27, 633). Bootsie testified Petitioner had Bootsie's and Cutty's names tattooed on his body. (App. 609-10).

The State called a former assistant solicitor to testify about the extent of Bootsie's past charges, including first degree burglary and first degree assault and battery first in April 2013, which the State dismissed for reasons unrelated to Victim's murder. (App. 724-25).

A federal inmate, Sedieka McClam, corroborated Bootsie's testimony concerning the murder. McClam testified that he met Petitioner at a female acquaintance's home in Conway. (App. 773). In January 2011, Petitioner had a phone conversation in front of McClam in which Petitioner apologized "for what had happened to Keia" and "[t]hat he panicked when he went through the door and just started shooting." (App. 774). McClam wrote this information in a letter to the solicitor's office. (App. 774-75). McClam recalled Petitioner stating "they went to rob Keia's boyfriend, Splurge," and that "he didn't mean to shoot his gun six or seven times[.]"(App. 789). The letter referenced Petitioner stating that after the shooting, he got in the side door of a van driven away by Bootsie. (App. 790).

McClam was arrested for his federal charges shortly after overhearing the phone conversation, and testified that he "wrote the letter because in federal prison if you cooperate with the government," they may reduce your time served, but that he had no contact with Petitioner since the night he overheard him on the phone. (App. 777). At the time of trial, McClam had yet to receive any downward sentencing departure. (App. 784).

Additional corroboration came from another federal inmate, Kachief Spain, who testified that when he was housed one pod over from Petitioner in the Horry County detention center and they met in the early 1990's. (App. 807-08). Spain testified that he witnessed Petitioner come to the recreation field and call one of Spain's podmates, Ace Graham, to a door "maybe five feet" from where Spain was standing. (App. 807). Spain witnessed Petitioner slide his discovery through the door to Graham and explain to Graham that "they [the State]" did not have any evidence on him. (App. 808, 811). According to Spain, Petitioner told Graham what happened:

> We got to the house, kicked the door in, we kicked the door in, the alarm went on. Keia was on the couch, she jumped up, started running, screaming for Splurge. Everything happened so fast, he just started shooting. She seen his face. He started shooting, you know, he didn't have a choice because she seen him.

(App. 808). On cross-examination, Spain testified that Petitioner stated he went in the front door, there were eight people in the van, and that Petitioner and co-defendant Cutty "put a gun to Lil Bootsie's head and told him not to tell[.]"[1] (App. 818).

Petitioner presented the mother of his children, Nakeema Crooms, who testified that she lived with Petitioner at the time of the murder. According to Crooms, Petitioner was at home that night, asleep with their three-year-old daughter. (App. 930-31).

Through expert testimony on cell-phone tracking and electronic communications, it was established that Petitioner's cell phone remained silent when the invasion and murder occurred, with the exception of four calls at 2:16, 2:18, 6:24, and 6:28 AM all registering from the same central Conway cell site. (App. 886-89). The expert also testified that Bootsie's phone made and received a total of twenty-eight calls northwest of Conway, in the direction of the crime scene,

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[1] A discrepancy arises through both McClam and Spain's testimony as to the color of the van. These inmates testify that the van connected to Bootsie and Petitioner was blue, but direct evidence and Bootsie's testimony establishes that the van was tan or brown. (App. 372-73, 789, 818). Spain later testifies he does not recall the color, but that it was blue or brown. (App. 798).

around the time of the invasion and murder. (App. 878-82, 897).

During closing arguments, both Bobby Frederick, who appeared at trial as Counsel for Cutty, and Petitioner's Counsel attacked the adequacy of the State's case by pointing out that the State failed to call Smith as a witness, even though other witnesses confirmed she spoke to the men in the getaway van, heard the gunshots, and pointed out to investigators where to take a cast of a shoeprint. (App. 950, 970-71, 987). At trial, the State closed by focusing primarily on defending Bootsie's credibility and challenging Petitioner and Cuttys' theories of third-party guilt:

> They want to tell you that Bootsie wants to tell a lie. Bootsie could have told any two names. If he wanted to tell you Little Manzy, he could. If he wanted to tell you 110, he could. These boys are his friends. He could have told you two people that he had no relationship to, or two people that he didn't like, or two people anything. He could have told you anybody, but he didn't. He told you these two people.
>
> He has no reason to lie on these people. They are all friends, and they have been friends a long time. He's here telling on these people because it's the truth.

(App. 1015). After reviewing the disclosures made by Petitioner to the jailhouse informant, Livesay returned to the subject of Bootsie's credibility:

> They knew they shot her. Immediately they could have backed out of that house, but they didn't. And I'm here to tell you they didn't because that didn't come as a shock to them. They were ready for that to happen. They shot her and kept moving through that house, looking for whatever it was they wanted, drugs, money, guns, whatever it is they wanted.
>
> They want to tell you everybody in here has got a reason to lie, everybody. If these people had a reason to lie, they could have blamed it on anybody. But they didn't. Ironically, they blamed it on the same guy that Howard Parker saw out that night. Ironically, they blamed it on that same guy that's out at the jail bragging that we ain't got nothing on him and that he shot that girl. Bootsie had no reason to lie.

> They want to tell you that he's scared of a Crip, there are Crips in the car. This guy is a Crip. If he was going to blame it on somebody, it wouldn't be somebody in the Crip that is a close friend of his. He came up here and told you the truth.

(App. 1017). The State returned to the issue of Bootsie's credibility concerning his pending charges:

> A woman has been killed. We are not here to worry about some trespassing or littering or filing a false police report charge. These people have killed somebody. That's what we're working on. Don't be fooled by that, don't be fooled by that. They want to tell you that Bootsie, we're up here playing make a deal. Bootsie is charged with murder, murder. And they want to tell you that he's been given some deal.
>
> That charge is still pending. He got up here and told you he was the driver in a murder charge. And they want you to believe he's getting some sort of deal. Don't believe them, do not believe that. If we wanted to do something for Bootsie, we could, we could. But yet he is still charged with murder. That has not been dismissed. If he wanted to get a deal, he would not be carrying a murder charge, I can tell you that much. It is ridiculous to think we are giving some guy a deal, and he is walking around charged with murder. That is nonsense, folks. Don't believe it, do not believe it.

(App. 1020-21).

Smith testified at the evidentiary hearing, stating she received a phone call about a suspicious van outside her home. (App. 1103). Smith described her trailer as near that of Splurge's trailer where Victim was shot and killed. Smith walked outside, spoke to Bootsie at the van, and heard the voice of a person she called "Que." (App. 1103-07). While talking to Bootsie, shots rang out and the van started up. Smith testified that she saw two people jump into the van, but neither of them was Petitioner. Smith could not recall speaking to Counsel, but testified she spoke to multiple detectives. (App. 1106-07). Smith admitted she possessed a prior criminal record, but stated she was telling the truth at the hearing. (App. 1106). Smith admitted that she could not see the fleeing perpetrators well, but described them as short and skinny. (App. 1106-

07). Smith testified that the sound of gunfire nearly gave her a heart attack. (App. 1108-10). Smith described the neighborhood as peaceful, dark, and not well lit. (App. 1109-10).

Petitioner stated that the State vouched for Bootsie's credibility in closing, but did not testify as to whether the State improperly inflamed the jury's passions. (App. 1099-1100).

Counsel testified he subpoenaed Smith to appear as a witness at trial, but ultimately chose not to call her because he did not think she would be well-received by the jury, she possessed a significant criminal record with which she could be impeached, and because he thought the State had failed to prove its case, and that all of the objective data supported Petitioner's alibi. Counsel testified, in retrospect, her testimony would have been helpful, but during the trial he did not think it was necessary because he thought the State failed to meet their burden of proof and did not think Smith would be a good witness, given her criminal history. (App. 1116-17). On cross, Counsel again testified that in retrospect, he believed he should have called Smith, but described his trial decision as a tactical one. (App. 1130).

Counsel testified that the State's closing broadly appealed to juror's emotions, but more specifically took issue with the evidence and arguments introduced regarding Petitioner's gang tattoos. (App. 1126-27). As to the claims of vouching, Counsel addressed each of the above excerpted arguments in turn. As to the emphasized testimony from page 1019, Counsel opined that the argument was arguably objectionable, but that it would fall within the scope of deference afforded to closing arguments. (App. 1127-28). As to the emphasized testimony from page 1021, Counsel opined the argument could have been objectionable, but was facially farcical. (App. 1128-29). As to the emphasized testimony from pages 1024-25, Counsel testified that the murder charge was indeed still pending at the time of trial. (App. 1129).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the PCR court's findings of fact and conclusions of law", *Dempsey v. State,* 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. 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). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State,* 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a *de novo* review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

In the present case, Petitioner contends that Counsel was constitutionally ineffective for failing to call Conswella Smith as a witness and for failing to object to the State's closing argument, which he claims constituted improper witness vouching. Respondent contends that the PCR Court employed the correct standard in determining Petitioner failed to meet his burden of proof and appropriately denied relief accordingly.

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense

counsel's performance was deficient. *Id*. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

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. *Strickland*, 466 U.S. at 696. 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. *Id.* at 696-97.

I. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective because Counsel articulated a reasonable strategy in deciding not to call Smith and, even if he was deficient, the proposed testimony was cumulative in nature and, thus, non-prejudicial.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was allegedly ineffective for failing to call Conswella Smith to testify at trial. However, the PCR court properly rejected this argument, because Counsel articulated a reasonable strategy in deciding not to call Smith and, even if he was deficient on this ground, the proposed testimony was cumulative in nature and, accordingly, not prejudicial. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). "In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is

focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Prejudice will generally be found if the testimony was significant and favorable enough to Petitioner that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding counsel was deficient for failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to defendant); *Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Counsel was not deficient on this ground because he articulated a valid, reasonable

strategy for not calling Smith as a witness at trial, and no evidence was presented at the PCR hearing to refute or diminish his expressed concerns. Counsel stated that he was aware of Ms. Smith and that he spoke with her personally in the courtroom, subpoenaed her to testify at trial, and that both the police and the private investigator got a statement from her leading up to trial. (App. 1116). Specifically, Counsel testified that even though he subpoenaed Smith as a witness at trial, he decided not to call her for two reasons: first, Counsel noted that Smith possessed a significant criminal record, with which she could be impeached, and; second, Counsel did not think this witness was necessary because he thought that the State had failed to meet their burden of proof. (App. 1116-17). Though Counsel stated he thought the testimony would have been helpful in establishing that there were four perpetrators, not three, and that Petitioner was not one of the four, he still stated he thought he made the right decision because of the calculations laid out above, most notably, that he felt the State did not meet their burden of proof. (App. 1117). Thus, because Counsel's decision not to call Smith to testify was a part of a reasonable trial strategy, he was not deficient on this ground.

Even if Counsel was deficient, Petitioner was not prejudiced by the deficiency. As the PCR Court found, Smith seemingly lacked credibility, particularly in regards to what she saw and heard after the gunshots and that she heard the voice of a "Que" while talking to Bootsie. (App. 1103-07). Smith's testimony was uncertain in its delivery, and the reliability of its substance was further diminished significantly by the circumstances of her observation: namely, that by her own admission she could not see very well, as it was dark and unlit, and she was understandably terrified by the sound of gunfire. (App. 1106-10). Though the Court found Smith's testimony that she was prompted to go outside by a phone call, that she spoke with Bootsie at the van, and that she heard the gunshots credible, the Court properly found that this

testimony was merely cumulative and of little value for the purpose of impeaching Johnson concerning his testimony that neither he nor Smith heard any such gunshots prior to the defendants emerging from the trailer. However, Smith's testimony to this point was as Grissett had already testified to hearing the gunshots from a location farther away from the trailer. Thus, Smith's testimony, as articulated at the PCR hearing, was merely cumulative and, accordingly, did not prejudice Petitioner, even if Counsel was deficient on this ground. Accordingly, this court should deny relief on this ground.

II. The post-conviction relief court properly determined that Petitioner failed to establish counsel was ineffective for failing to object to allegedly improper vouching for the witness's credibility when the statements, in their totality, were not improper, an objectionable basis did not exist and, even if Counsel was deficient for failing to object, Petitioner was not prejudiced because of the strength of the State's case against him.

On appeal, Petitioner argues the PCR court erred in denying him relief because Counsel was ineffective for failing to object to the State's closing argument. Specifically, Petitioner takes issue with the following, arguing that statements concerning Bootsie's testimony constituted improper vouching for the witness's credibility, rendering Counsel deficient for failing to object and Petitioner prejudiced as a result:

> They want to tell you that Bootsie wants to tell a lie. Bootsie could have told any two names. If he wanted to tell you Little Manzy, he could. If he wanted to tell you 110, he could. These boys are his friends. He could have told you two people that he had no relationship to, or two people that he didn't like, or two people anything. He could have told you anybody, but he didn't. He told you these two people.
>
> He has no reason to lie on these people. They are all friends, and they have been friends a long time. He's here telling on these people because it's the truth.

(App. 1015). After reviewing the disclosures made by Petitioner to the jailhouse informant, Livesay returned to the subject of Bootsie's credibility:

> They want to tell you everybody in here has got a reason to lie, everybody. If these people had a reason to lie, they could have blamed it on anybody. But they didn't. Ironically, they blamed it on the same guy that Howard Parker saw out that night. Ironically, they blamed it on that same guy that's out at the jail bragging that we ain't got nothing on him and that he shot that girl. Bootsie had no reason to lie.
>
> They want to tell you that he's scared of a Crip, there are Crips in the car. This guy is a Crip. If he was going to blame it on somebody, it wouldn't be somebody in the Crip that is a close friend of his. He came up here and told you the truth.

(App. 1021).

However, the PCR court properly rejected this argument, finding that the statements, in their totality, were not improper and accordingly, no objectionable basis existed. Additionally, even if Counsel was deficient, no prejudice could be found, given the strength of the State's case. These findings are not controlled by an error of law and are supported by probative evidence in the record. Consequently, this Court should deny certiorari.

"It is undisputed that closing argument is not merely a time for recitation of uncontroverted facts, but rather the prosecution may make fair inferences from the evidence." *United States v. Francisco*, 35 F.3d 116, 120 (4th Cir. 1994); *see also State v. New*, 338 S.C. 313, 319, 526 S.E.2d 237, 240 (Ct. App. 1999) ("Undoubtedly, a Solicitor may argue the State's version of the testimony presented, and furthermore may comment on the weight to be accorded such testimony."). A prosecutor should "prosecute with earnestness and vigor" and "may strike hard blows, [but] is not at liberty to strike foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). "If a Solicitor's closing argument remains within the record evidence and the reasonable inferences therefrom, no error occurs." *New*, 338 S.C. at 319, 526 S.E.2d at 240. "On the other hand, a closing argument may be held improper where it appeals to personal bias or arouses the jury's passions or prejudice." *Id.* "[I]mproper suggestions, insinuations, and, especially,

assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." *Berger* at 88.

A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony. *State v. Cooper*, 334 S.C. 540, 514 S.E.2d 284 (1999). A solicitor may argue the credibility of the State's witnesses if the argument is based on the record and its reasonable inferences. *State v. Caldwell,* 300 S.C. 494, 388 S.E.2d 816 (1990). A solicitor may not vouch for the credibility of a State's witness based on personal knowledge or other information outside the record. *State v. Kelly,* 343 S.C. 350, 540 S.E.2d 851 (2001). Vouching for a witness based on outside material conveys the impression to the jury that the solicitor has evidence not presented to the jury but known by the prosecution which supports conviction. *Id.* It is inappropriate for the State to assure the jury of a witness' credibility, because the jury is charged with assessing the credibility of witnesses based on evidence in the record. *Id.* During closing arguments, a prosecutor improperly vouches for a witness' credibility and places the government's prestige behind a witness by making explicit personal assurances, or indicating that information not presented to the jury supports the testimony. *Vaughn v. State*, 362 S.C 163, 169, 607 S.E.2d 72, 75 (2004) (citing *State v. Shuler*, 344 S.C. 604, 545 S.E.2d 805 (2001)).

"Improper comments do not automatically require reversal if they are not prejudicial to the defendant." *Id.*, 428 S.C. at 550, 837 S.E.2d at 40 (quoting *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998)). A PCR court must view the alleged impropriety of the prosecutor's argument in the context of the entire record, and the applicant has the burden of proving he did not receive a fair trial because of the alleged improper argument. *Id.* To find whether a prosecutor's comments in closing argument violated a defendant's due process rights, the Court must determine whether the comments were improper, and if so, whether the improper

argument so unfairly prejudiced the defendant as to deny him a fair trial. *Fortune v. State*, 428 S.C. 545, 549, 837 S.E.2d 37, 39 (2019).

Counsel was not deficient for failing to object to the closing statements for improper vouching. As Counsel credibly testified at the evidentiary hearing, the statements made during the State's closing argument could have theoretically formed the basis of an objection, but ultimately fell within the scope of the deference afforded during closing arguments, which remains broader than those acknowledged during direct or cross-examination of witnesses. (App. 1126-29). When viewed in their entirety, the arguments complained of in the Solicitor's closing arguments constituted fair inferences based upon the evidence presented at trial and did not contain any improper suggestions, insinuations, or improper assertions of personal knowledge. Additionally, the statements did not hinge on information or evidence not presented to the jury. The State's closing did not improperly appeal to the passions of the jury, but rather reflect the "earnestness and vigor" that is part of the State's prosecutorial duty. The State did not vouch for Bootsie's credibility, but rather appropriately argued for the credibility of its most key witness based upon the facts in the record and reasonable inferences therefrom. No valid basis existed for Counsel to object to the identified portions of the State's closing and, even if such a basis existed, Counsel acted reasonably in granting the State more deference in their closing statements than he would have if made during direct or cross-examination. Accordingly, no deficiency can be found on this ground.

Further, Petitioner was not prejudiced by any alleged deficiency on the part of Counsel because of the strength of the State's case. In addition to Victim, two other individuals, Watts and Grissett, observed the incident and testified about the incident at trial. Though neither identified Petitioner, Grissett identified the getaway van, which was also identified by Oliver,

who called the police about it. (App. 250-51, 303-06). The investigation of the van traced the vehicle to several individuals, including Bootsie, who implicated Petitioner. (App. 170, 349-50, 362). In addition to Bootsie's incriminating testimony, McClam testified that Petitioner apologized for committing the crime over the phone, which she disclosed in a letter to the solicitor's office. (App. 773-75, 789, 790). Further, Spain testified that he saw Petitioner speaking with Ace Graham about the incident, stating that he saw Petitioner slide his discovery under the door and overheard him stating how they kicked the door in and once Victim saw them, his co-defendant did not have a choice but to shoot. (App. 807-811, 818). Finally, cell phone records placed Bootsie at the scene and found Petitioner's phone was silent during the incident, with the exception of four calls registering in Conway. (App. 878-82, 886-89, 897). Thus, even if Counsel was deficient for failing to object to the State's closing argument, the statements were not prejudicial to Petitioner, given the strength of the State's case.

CONCLUSION

For the reasons stated above, this court should deny certiorari and affirm the PCR Court's findings that Petitioner had effective assistance of counsel. However, if this Court decides to grant the petition of writ of certiorari, Respondent respectfully requests permission to more fully brief the issues herein.

Respectfully submitted,

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