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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2008-CP-10-0057

Anthony ~~Petitioner~~ Mann, 242498,

Petitioner,

v.

State of South Carolina,

Respondent.

2012-212824

PETITION FOR A WRIT OF CERTIORARI

J. Wesley Locklair III
LOCKLAIR LAW FIRM
2007 Lincoln Street
Columbia, SC 29201
(803) 254-9007

Joshua Snow Kendrick
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
(803) 667-3186

Attorneys for the Petitioner

Other Counsel of Record:

Ashleigh Wilson, Esquire
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970
Attorney for the Respondent

QUESTIONS PRESENTED

1. THE PCR COURT ERRED BY NOT FINDING PETITIONER'S RIGHT TO A PUBLIC TRIAL WAS DENIED THROUGH CLOSED HEARINGS INCLUDING AN EX PARTE MEETING BETWEEN THE SOLCITOR AND THE JUDGE

2. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OR MOVE TO SUPPRESS EVIDENCE RELATED TO A SHOTGUN.

3. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PRESENCE OF PRISON GUARDS AT TRIAL AND THE JURY'S KNOWLEDGE OF PETITIONER'S DETENTION IN LIEBER CORRECTIONAL INSTITUTION AT THE TRIAL.

4. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OR MOVING TO LIMIT IMPROPER CHARACTER EVIDENCE.

5. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE THE ADMISSION OF PETITIONER'S STATEMENT.

6. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CALL AN EXPERT WITNESS.

7. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST A JURY CHARGE ON THE VOLUNTARINESS OF THE STATEMENT AND FOR FAILING TO OBJECT TO NO FINDING THAT THE STATEMENT WAS TAKEN IN ACCORDANCE WITH MIRANDA.

8. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF A GRAPHIC CRIME SCENE VIDEO.

9. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO WITNESS' HEARSAY STATEMENTS AND CORROBORATION.

10. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PRESENT AN ALIBI DEFENSE OR REQUEST AN ALIBI INSTRUCTION FROM THE COURT.

11. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER

COMMENTS ON PETITIONER'S EXERCISE OF HIS RIGHT TO A JURY TRIAL AND FAILURE TO CALL CERTAIN WITNESSES.

12. **THE PCR COURT ERRED BY NOT FINDING APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO ORDER CERTAIN TRANSCRIPTS, MAINTAIN CONTACT WITH PETITONER AND PROPERLY ADVISING HIM OF HIS RIGHTS AND CORRECT PROCEDURES.**

STATEMENT OF THE CASE

Petitioner was tried in Charleston County on two counts of murder. (APP. PP. 85-1578). Petitioner filed a direct appeal which was denied and subsequently filed an application for post-conviction relief. (APP. P. 1635). A post-conviction relief hearing was held beginning on November 14, 2011, (APP. PP. 1647-1909), and the application was denied. (APP. P. 1910). A Motion to Amend Judgment was submitted on February 10, 2012, (APP. PP. 1930 – 1935), and this was denied on August 6, 1012. (APP. P. 1940).

Prior to the trial even starting, the entire jury pool was informed that Petitioner was being held in Lieber Correctional Institution in the custody of the South Carolina Department of Corrections, when a potential juror stood up and said that he "used to work for SCDC where he's at . . .I used to work for Lieber Correctional Institution. (APP. P. 111, lines 2-14). There were also two SCDC guards seated directly behind Petitioner during the entire trial (APP. P. 1840, lines 1-14), wearing bullet proof vests with SCDC stenciled across them in large block lettering. (APP. PP. 193-194, lines 19-15, 1-5). Counsel for Petitioner kept referring to Petitioner being "at Lieber" (APP. P. 708, l. 16) and talking about "before he went to prison" (APP.P. 723, l. 7).

During the course of Petitioner's trial, there were four separate in camera hearings that were held not only outside of the presence of the jury (one of which was an ex parte hearing between the Solicitor and the trial judge), but were completely closed to the public. (APP. p. 1864, lines 1-2).

During Petitioner's trial a shotgun was introduced into evidence at trial that Detective Walker testified was found in the bushes at a McDonald's restaurant on Ashley Phosphate Road (which is not in proximity to the alleged crime scenes, nor does the shotgun have any relation to the alleged crime scenes).. (APP. P. 1155, lines 10-17). The shotgun was moved into evidence

with no objection by defense counsel. (APP. P. 1166, lines 13-19). Furthermore, counsel for Petitioner introduced a box of ammunition as defense exhibit 25, which contained rifle slugs, magnum loads. (APP. 534, lines 13-20).

The defense offered no expert witnesses to address the issue vitreous fluid in order to contradict the State's position as to the time of death of Beverly Blake. At the PCR hearing, Petitioner called Dr. Janice Edwards Ross, an expert witness in the area of forensic pathology. (APP. pp. 1801-1802, lines 19, 25, 1-2). Dr. Ross testified that the expert testimony at trial regarding using vitreous fluid to determine time of death is unreliable, that some of the formulas have been found to be incorrect and that the major players in forensic pathology do not use vitreous fluid in determining time of death due to its unreliability. (APP. p. 1803, lines 12-23).

While the Court held a Jackson v. Denno hearing, there were no findings on the record that the statement was taken in compliance with Miranda. Counsel failed to object to this lack of finding on the record. Counsel also failed to object to the lack of a jury instruction on the voluntariness of a defendant's statement, and the fact that the jurors are the sole determinates of whether they believe a statement was voluntary.

During trial, counsel for Petitioner chose to enter a graphic crime scene video into evidence. (APP. P. 1716, lines 16-18). This was a video of law enforcement personnel recovering the body of Beverly Blake, aka Brownie. (APP. P. 1716, line 20.). According to petitioner's counsel, there was steam coming from the body when it was moved and there was insect activity on the body. (APP. P. 1717, lines11-18).

During Petitioner's trial, the State asked Dustin James if he had heard anything about Beverly Blake, and Mr. James responded that "I heard that her roommate was dead and her and Amp [Petitioner's nickname] were on the run", and trial counsel did not object. (APP. P. 895, lines 16-

17). Another witness testified that Petitioner "told Dustin in the bathroom before the fight that he killed both, I don't know, Brownie and the guy," and trial counsel failed to object. (APP. P. 911, lines 6-10).

Petitioner had discussions with his attorney about presenting an alibi defense as to the alleged murder of Beverly Blake, yet no such defense was presented at trial. (APP. p. 1875, lines 10-14). Petitioner testified at his PCR hearing that had he testified he would have testified to an alibi as to Beverly Blake. (APP. p. 1875, lines17-24). Kristy Bunch had given a statement to police that she was with Petitioner from ten o'clock on January seventh, which could have been used to help establish Petitioner's alibi. (APP. 706, lines 6-11). There was never an alibi instruction requested from the defense in this case. (APP. p. 1876, lines 3-5).

During closing arguments, the solicitor stated, "If a crime is committed by two or more persons . . . the act of one is the act of all. This is true if there are two people or more than two people involved in the crime. Eric Zack and Michael Crumb pleading guilty. The hand of one is the hand of all (emphasis added) (APP. P. 1496, lines 3-10). The prosecutor further stated that "The defendant went to rob Dante Tobias. He went to pick up Beverly Blake. It was a mixed motive, no doubt, but on he felt like he needed a gun for. And one that Eric Zack and Michael Crumb have taken responsibility for." (emphasis added) (APP. P. 1529, lines 1-4).

ARGUMENT

In order to successfully prove ineffective assistance of counsel, Petitioner must show that "trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813(1985). The proper measure of performance is whether the attorney provided representation within the range of

competence required in criminal cases. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813(1985). Petitioner must show that counsel's performance was deficient and fell below reasonable professional norms and that but for counsel's errors, the outcome would have been different. Cherry v. State, 300 S.C. 117, 386 S.E.2d 624 (1989). A reasonable probability is a probability sufficient to undermine the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

Petitioner states a variety of grounds as to which he alleges the trial judge erred in failing to find that counsel for Petitioner was ineffective. While each of these grounds specifically and separately constitute ineffective assistance of counsel, when combined as a whole, the cumulative effect of counsel's actions so undermines the outcome of the trial as to be ineffective. A competent criminal attorney does not make as many errors at trial, and an attorney who does has clearly fallen below the range of competency required to ensure that a defendant receives a fair and just trial.

1. THE PCR COURT ERRED BY NOT FINDING PETITIONER'S RIGHT TO A PUBLIC TRIAL WAS DENIED THROUGH CLOSED HEARINGS INCLUDING AN EX PARTE MEETING BETWEEN THE SOLCITOR AND THE JUDGE

During the course of Petitioner's trial, there were four separate in camera hearings that were held not only outside of the presence of the jury, but were completely closed to the public. (APP. p. 1864, lines 1-2). These hearings were ordered sealed by the trial judge and then the transcripts of those hearings were subsequently destroyed by the court reporter. (APP. P. 1729, lines 12-16). As a result, 125 pages are missing from the trial transcript (pages 58-66, 180-203, 1402-1452, 1479-1523). Petitioner was allowed to be present for only ONE of these hearings, which concerned alleged witness intimidation and was held in a sealed conference room. (APP. p. 1864, line 10). One of the hearings was an ex parte hearing involving the Solicitor and the trial

judge. (APP. P. 1865, lines 1-2. 17-21). Because appellate counsel never ordered these transcripts for the direct appeal, they were destroyed by the court reporter prior to Petitioner trying to obtain them through his post-conviction relief counsel. Therefore, there is no public record as to what occurred at these hearings.

Trial counsel testified at the PCR hearing that she did not know why the Court did not make specific findings on the record to support the closure of the hearing to the public. (APP. 1730, lines 3-13). When asked why she did not request that specific findings be made on the record to justify the closed proceedings or object to the failure of the judge to do so, counsel for Petitioner stated that she did not know how to answer. (APP. P. 1730, lines 3-12). No other findings were made on the record to support the closing of the other three hearings either.

The South Carolina Constitution provides that "all courts shall be public" S.C. Const Art 1, § 9. The Sixth Amendment to the United States Constitution states that "in all criminal proceedings the accused shall enjoy the right to a speedy and public trial." The United States Supreme Court has made it clear that this right extends to the states. In re Oliver 333, U.S. 257, 273, 68 S.Ct. 499, 92 L.Ed. 682 (1948).

The U.S. Supreme Court further clarified this in Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984), where they held that the Sixth Amendment right to a public trial extends beyond the actual proof offered at trial. The Court in Waller clearly outlined standards to be applied prior to excluding the public from any stage of a criminal trial. "The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider the reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." Id at 511. This Court has held that the "exclusion of the press and the

public from judicial proceedings is a drastic measure calling for a careful weighing of interests affected." Steinle v. Lollis, 279 S.C. 375, 376-377, 307 S.E.2d 230, 231 (1983).

In this case, the record shows that the trial court weighed no interests, considered no alternatives to closure, did not identify any overriding interest likely to be prejudiced absent closure, and did not make any findings justifying closure to allow for appellate review of the decision. Trial counsel did not object to any of the sealed hearings and the exclusion of the public.

Trial counsel was clearly ineffective for failing to object to the closures and for failing to request that the Court make specific findings on the record to justify the closing of these hearings, the exclusion of the public, and, in three out of four of the hearings, the exclusion of the defendant. Furthermore, Petitioner should not be required to prove specific prejudice in this matter due to its overwhelming importance and significance to the very foundation of our entire judicial system. "The harmless error rule is no way to gauge the great, though intangible, societal loss that flows from closing the courthouse doors." Presley v. Georgia, 558 U.S. ___, 130 S.Ct. 721, 175 L.Ed.2d 675 (2010); Waller v. Georgia 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

Based on counsel's ineffectiveness and the crucial nature of this right to the defendant, the Constitution, every citizen of our country, and the very fabric of our judicial system, this Court should grant the Petition for a writ of certiorari on this issue.

2. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OR MOVE TO SUPPRESS EVIDENCE RELATED TO A SHOTGUN.

During Petitioner's trial, a random, completely unrelated shotgun was introduced into evidence at trial that Detective Walker testified was found in the bushes at a McDonald's

restaurant on Ashley Phosphate Road. (APP. P. 1155, lines 10-17). The shotgun was moved into evidence with no objection from trial counsel. (APP. P. 1166, lines 13-19). No chain of custody for the shotgun was ever shown at trial. And, when the shotgun was sent off for expert ballistics tests and examinations, it was found to be inconsistent with the bullets fired at the scene of the alleged crime. (APP. P. 1155, lines 20-22). Furthermore, counsel for Petitioner introduced a box of ammunition as defense exhibit 25, which contained rifle slugs, magnum loads. (APP. 534, lines 13-20). Counsel continued to ask about ammunition from a shotgun being inside the alleged victim's house. (APP. 833, lines, 13-14, P. 791, lines 23-25).

During the closing arguments by the State, the solicitor picked up this unrelated, irrelevant weapon and pranced around in front of the jury with the shotgun while stating that Petitioner had this weapon with no objection from trial counsel. (APP. P. 1592, line 2). Trial counsel testified at the PCR hearing that she had no independent recollection of this weapon at Petitioner's trial. (APP. P. 1712, lines 10-13).

In Hollman v. State, 644 S.E.2d 171 (2009), the Court found that the admission of bullets and a pistol unconnected to the crime was erroneous and prejudicial and that trial counsel was ineffective for failing to object to the admission of the gun and bullets into evidence. This is exactly the same factual scenario as occurred in this case.

There was absolutely no evidence offered at trial linking the shotgun to the Petitioner, the alleged victims, or anyone else in the case. There was no evidence offered linking the shotgun to the victim's residence or to any alleged robbery that occurred. In short, there was no evidence whatsoever offered at trial to link this shotgun in any way, shape, manner or form to the crimes for which Petitioner was being tried.

Petitioner's counsel introducing the box of ammunition further exacerbated the problem by making it appear as though Petitioner could have taken the weapon and left the ammunition. This helped further the state's case that there was a robbery and a murder.

Based on Hollman, supra, trial counsel's failure to object clearly constitutes ineffective assistance of counsel.

3. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PRESENCE OF PRISON GUARDS AT TRIAL AND THE JURY'S KNOWLEDGE OF PETITIONER'S DETENTION IN LIEBER CORRECTIONAL INSTITUTION AT THE TRIAL.

Prior to the trial even starting, the entire jury pool was informed that Petitioner was being held in Lieber Correctional Institution in the custody of the South Carolina Department of Corrections, when a potential juror stood up and said that he "used to work for SCDC where he's at . . .I used to work for Lieber Correctional Institution. (APP. P. 111, lines 2-14). It should be noted that Lieber is a maximum security prison located in the greater Charleston area. While this was being stated, and throughout the course of the ENTIRE trial, two South Carolina Department of Corrections guards were seated directly behind Petitioner, just behind the bar, and that is where they sat during the entire trial. (APP. P. 1840, lines 1-14). These guards were wearing bullet proof vests with SCDC stenciled across them in large block lettering. (APP. PP. 193-194, lines 19-15, 1-5).

Not only did trial counsel make no objection to the juror's comments and move for a new jury venire, she inexplicably and inexcusably compounded her error during her cross-examination of Kristy Bunch by referring to Petitioner being "at Lieber" (APP. P. 708, l. 16) and talking about "before he went to prison" (APP.P. 723, l. 7). She further failed to object when

State's witness Paula Stone testified that she had visited Petitioner at Lieber and another prison. (APP. P. 1091. lines 19-15).

At his post-conviction relief hearing Petitioner testified that he asked trial counsel about having the guards removed from the courtroom, and trial counsel told him that the jury would not know the difference between jail, prison, or SCDC so it would not matter (APP.P. 1885, lines 4-21), and that there was nothing she could do to have the guards removed.

The United States Supreme Court has stated that where a defendant is forced to wear prison clothes when appearing before a jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a jury's judgment." Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691 (1976). "One accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody or other circumstances not adduced at trial. Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930 (1978). It has been previously held that certain practices pose such an enormous threat to the "fairness of the fact finding process" that they must be subjected to "close, judicial scrutiny." Estelle, supra at 425 U.S. 501, 503-504.

The failure of counsel to object to these references and conditions and to then pile on top of them during her cross examination is the equivalent of marching Petitioner into the courtroom in prison garb and handcuffs with shackles and leg irons. For counsel to say that there was nothing she could do is not only incompetent but also ignorant of the law. While attorneys cannot make certain things occur in a courtroom, they can make motions, objections, arguments and a proper record to ensure that they are either done, or if not done, that the client's constitutional rights are protected. If every criminal defense attorney acted that way, we would just take our accused criminals straight to jail without a trial. It was her job and duty to not only

protect her client but to protect the Constitution of these United States. She allowed (and helped) her client to be portrayed as a dangerous, untrustworthy criminal, so dangerous in fact that it takes TWO guards in bullet proof vests to protect everyone from him in the courtroom, even though there are many armed deputies in the courtroom.

The combination of factors here created an inherently prejudicial situation. Inherent prejudice occurs when "an unacceptable risk is presented of impermissible factors coming into play." Hollbrook v. Flynn, 445 U.S. 560, 572, 106 S.Ct. 1340, 1346-1347, 89 L.Ed.2d 525, 535 (1986); State v. Tucker, 324 S.C. 155, 478 S.E.2d 260, 271 (1996). Counsel sat idly by while all of this impermissible character evidence was shown to the jury. The most egregious act though is her doing it herself. Petitioner did not testify or place his character into evidence during this trial, yet it was shown to the jury that he was a convicted felon, at a maximum security prison who requires two additional guards wearing bulletproof vests (in addition to the numerous armed deputies already present) just to protect the people in the courtroom.

Trial counsel testified at trial that she was not sure why she did not object. (APP. P. 1695, lines 3-6). Trial counsel's failure to object during the juror's comments and move for a new jury venire, her failure to object to the impermissible character evidence coming in, and then her offering negative character evidence against her very own client constitutes ineffective assistance of counsel.

4. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO OR MOVING TO LIMIT IMPROPER CHARACTER EVIDENCE.

During the testimony of Kristy Bunch, she stated that Petitioner had warrants out for his arrest, that Petitioner was in trouble and on probation (APP.708, lines 16-18), that Petitioner and another individual were bragging about having "busted up" someone's house (APP. P. 626, lines

12-14), that Petitioner was attempting to bribe officers and judges (APP.P. 635, lines 8-11), and that Petitioner was organizing drug activity from within the prison. (APP. APP.P. 635, lines 15-16). Trial counsel failed to object until the evidence of alleged drug activity from prison was mentioned. (APP.P. 635, lines 17-18).

Trial counsel eventually did move for a mistrial, however this was done after all of the evidence had already been put before the jury. Furthermore, Counsel failed to make contemporaneous objections to the testimony during the trial. The Court eventually gave a curative instruction much later in the trial.

The failure to contemporaneously object was prejudicial and affected the outcome of the trial. While contemporaneous objection are necessary to preserve issues for appellate review, as a trial lawyer they serve a much more important and serious role. They allow the judge to deny the admission of the evidence and allow for a curative instruction and to request items be stricken from the record, but most critically they let the jury know that something is trying to be admitted into evidence that should not be admitted.

A good trial lawyer pays close attention during the course of a trial so as to object prior to many statements coming out of the witnesses mouth because they know that once the "bell is rung", you cannot unring it. Counsel's blatant inattention to the testimony occurring during the trial, her failure to contemporaneously object and her failure to immediately seek a curative instruction clearly demonstrate ineffective assistance of counsel in this case.

5. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PROPERLY CHALLENGE THE ADMISSION OF PETITIONER'S STATEMENT.

Petitioner was arrested by officers in plain clothes who pointed firearms at him and threatened to blow his head off during the arrest. (APP. P. 1826, lines, 19-20). During the PCR

hearing, Petitioner testified that he was placed in a small room where he was handcuffed and shackled to a chair so tightly that it was causing him physical pain. Petitioner informed Detective Walker of the pain and was told the restraints would be loosened once he gave a statement (APP. 1828, lines, 15-20), clearly implying that he would be forced to endure continued physical pain unless he relinquished his right to remain silent and his right to have an attorney present during any questioning.

Petitioner requested an attorney and was denied that right, and further was told that he would only receive a public defender who worked for the county just like the detectives did. (APP. P. 1828, lines, 20-25).

Petitioner was threatened with sexual assault by the detective if he did not give a statement (APP. 1831, lines, 11-18), and he was threatened with racial retaliation against him in jail should he not cooperate. Detective Walker told Petitioner that he used to work at the jail and he would make sure the guards and inmates knew that this was a racially motivated crime, which would obviously put Petitioner's life in grave danger. (APP. P. 1830, lines, 5-23).) Detectives additionally threatened to charge Petitioners girlfriend in the crimes and take away her children should Petitioner not give a statement (APP. P. 1829, lines, 5-10), but that his girlfriend could come see him in the interrogation room, go free, and keep her children should he give a statement to them.

Eventually Petitioner succumbed to all of the pressure and physical pain and gave a statement, which Detective Walker chose to write himself and changed many substantial items. (APP. P. 1832, lines, 12-14). Of particular importance is the fact that there was a video camera in the interrogation room that was intentionally not turned on so as to prevent this interrogation from being recorded. This begs the simple question of if the cops are following the law and

doing their job, if they really want a fair and just conviction, then why not video tape the entire interrogation so there is not a question as to what occurs. The answer is simple: The police do not want to record themselves breaking the law and violating the United States Constitution.

There was a Jackson v. Denno hearing held, but counsel allowed it to be more a formality rather than treating it like the extraordinarily important event that it was. At the PCR hearing, trial counsel testified that she did not recall any discussions with Petitioner about his statement (APP. P. 1743, lines 20-25), that she did not recall him telling her about the sexual assault that occurred in the interrogation room (APP. 1831, lines, 11-18), that she did not remember being told about the threats against his girlfriend and her children (APP. 1829, lines, 5-10), and that she had no recollection of why she did not place Petitioner on the stand during his Jackson v. Denno hearing. (APP. P. 1745, lines 13-19). Dale Davis, the investigator for the public defender, testified at the PCR hearing that Petitioner had informed her of the threats against Petitioner's girlfriend and her children. (APP. P. 1815, lines 6-11).

Additionally, a statement of Petitioner's that Blake's hair would be on him was admitted as an excited utterance, but counsel cannot recall why it was not addressed at the Jackson v. Denno hearing. (APP. 1747, lines 5-17).

In Dupree v. State, 305 S.C. 285, 408 S.E.2d 215 (1991), trial counsel was found ineffective for failing to pursue the issue of whether or not threats against the defendant resulted in an involuntary statement. In this case, trial counsel just went through the motions of the hearing without getting into the exact reason the hearing is held – to determine whether the statement was voluntary or not. She may as well have just skipped the hearing so as not to have wasted the trial court's time based on the poor performance she rendered at trial.

Clearly Petitioner's statement was crucial in this case to convict him. The lack of a real Jackson v. Denno hearing was pure incompetence on the part of trial counsel and certainly undermines the outcome of the trial. This "hearing" was a rubber stamp due to trial counsel being completely unprepared for the hearing since she had no recollection of her discussions with her client regarding his statement to police and failed to place Petitioner on the witness stand during the hearing. Even counsel admitted that not letting Petitioner testify at the hearing was in error, which is clearly the case under Strickland. And a review of the evidence in this case clearly shows that her failure to properly handle the Jackson v. Denno hearing in the manner which a competent lawyer would have handled it resulted in an outcome that undermines the adversarial process, calls the judgment of the jury into question, and certainly proves that the result of this trial is clearly in question as to whether or not justice was served.

6. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO CALL AN EXPERT WITNESS.

During the trial of the case, the defense offered no expert witnesses to address the issue vitreous fluid in order to contradict the State's position as to the time of death of Beverly Blake. At the PCR hearing, Petitioner called Dr. Janice Edwards Ross, who was admitted as an expert witness in the area of forensic pathology. (APP. pp. 1801-1802, ll 19, 25, 1-2). Dr. Ross testified that the expert testimony at trial regarding using vitreous fluid to determine time of death is unreliable, that some of the formulas have been found to be incorrect and that the major players in forensic pathology do not use vitreous fluid in determining time of death due to its unreliability. (APP. p. 1803, lines 12-23).

Dr. Ross further testified that "you cannot tell the time – the postmortem time interval from the potassium levels in the vitreous", (APP. p. 1804, lines 15-17), and that it is an unreliable way to determine a postmortem interval. (APP. p 1804, lines 18-20). Dr. Ross further stated that at

the time of Petitioner's trial, this was not a reliable way to determine postmortem interval. (APP. p. 1805, lines 14-18). Further proving the need for an expert and the ease of obtaining an expert, Dr. Ross agreed that an opinion such has hers could have been offered by almost anybody in the field of forensic pathology. (APP. p. 1805, lines 19-22).

Trial counsel's failure to call an expert to refute the State's testimony was clearly ineffective. Counsel even admitted that the alleged time of death for Beverly Blake was in dispute and part of their trial strategy was "to show that she had not been killed on the evening in question but, in fact, later." (APP. p. 1717, lines 2-3). While counsel gets great latitude in trial strategy, the way that strategy is executed must provide effective assistance of counsel. Trial Counsel defined her trial strategy concerning Beverly Blake during her testimony at the post-conviction relief hearing, so that is not in question. Her failure to execute that strategy at trial, however, constitutes ineffective assistance of counsel.

7. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO REQUEST A JURY CHARGE ON THE VOLUNTARINESS OF THE STATEMENT AND FOR FAILING TO OBJECT TO NO FINDING THAT THE STATEMENT WAS TAKEN IN ACCORDANCE WITH MIRANDA.

While the Court held a Jackson v. Denno hearing, there were no findings on the record that the statement was taken in compliance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed 2d 694 (1966). South Carolina has found that for a statement to be admitted, it must be found that the statement was voluntary and that it was taken in compliance with Miranda. See State v. Middleton, 288 S.C. 21, 339 S.E.2d 692 (1986); State v. Adams, 277 S.C. 115, 283 S.E.2d 382 (1981); State v. Callahan, 263 S.C. 35, 208 S.E.2d 284 (1974). Counsel failed to object to this lack of finding on the record.

While the failure of counsel to object to the wrong law being applied at the Jackson v. Denno hearing and throwing away her client's right to challenge that on appeal, her larger and

more egregious mistake is that she did not request a jury instruction on voluntariness nor did she object to the trial court's failure to give such an instruction when the judge charged the jury. "When an issue of fact is in dispute the matter must be submitted to the jury." State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982).

Trial counsel testified at the PCR hearing that she had no recollection of requesting a jury charge on voluntariness of a defendant's statement (APP. P. 1772, lines 1-8), but admitted if the judge failed to give the proper jury instructions it was incumbent on her to make sure it was done. (APP. P. 1799, lines 2-19). It is evident from a review of the record that no instruction was ever given, nor was any objection to the lack of the charge ever entered by trial counsel.

The failure of counsel to request proper jury instructions constitutes ineffective assistance of counsel. Battle v. State, 305 S.C. 460, 409 S.E.2d 400 (1991). In this case, it is indisputable that the proper charge was not given and the counsel did not request such a charge nor did she object to the lack of such a charge being given. Any competent criminal lawyer would have made sure this jury instruction was given at any trial, but during a double murder trial where the statement is a key piece of evidence, such lack of competence demands that the trial be overturned to ensure that a just result is received. The failure to request this charge was inexcusable and highly prejudicial to Petitioner.

8. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE INTRODUCTION OF A GRAPHIC CRIME SCENE VIDEO.

During trial, counsel for Petitioner chose to enter a graphic crime scene video into evidence. (APP. P. 1716, lines 16-18). This was a video of law enforcement personnel recovering the body of Beverly Blake, aka Brownie. (APP. P. 1716, l. 20.). According to

petitioner's counsel, there was steam coming from the body when it was moved and there was insect activity on the body. (APP. P. 1717, lines11-18).

While many decisions can amount to trial strategy, the introduction of this graphic video goes well beyond strategy and into the realm of ineffective assistance of counsel. Any evidence the defense wanted to be put before the jury was already done through law enforcement witnesses and other witnesses, or could have been brought in through the defense hiring their own expert. To introduce a video that would have been inadmissible had the state attempted to offer it is clearly unreasonable and presented what are normally impermissible reasons to convict the defendant, mainly inciting the passion and emotion of the jury. Based on counsel's ineffectiveness in introducing evidence to be used to convict her client and taint the jury with emotion, Petitioner should be awarded a new trial.

9. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO WITNESS' HEARSAY STATEMENTS AND CORROBORATION.

During Petitioner's trial, the State asked Dustin James if he had heard anything about Beverly Blake (a red flag to any competent criminal trial lawyer to object to hearsay before the witness can answer), and Mr. James responded that "I heard that her roommate was dead and her and Amp [Petitioner's nickname] were on the run", and trial counsel did not object. (APP. P. 895, lines 16-17). The solicitor then asked a witness, Maria Jacques, if Dustin James had given her any instructions (once again a HUGE red flag to anyone that has ever studied evidence and tried a criminal case), to which Ms. Jacques replied, "Yes, Ma'am. Dustin suggested that I stay away from Amp because he told Amp – Amp told Dustin in the bathroom before the fight that he killed both, I don't know, Brownie and the guy," and trial counsel failed to object. (APP. P. 911, lines 6-10).

The State went on to ask if Jacques had heard anything (another red flag to counsel which was ignored) about Brownie before that night and she stated, "I heard that she was the one, that no one could really find her," to which counsel did not object. (APP. P. 911. lines 13-14). Jacques then stated "I heard Amp and her [Brownie] were missing or whatever, and that she [Brownie] was last seen with him [Petitioner]", and counsel once again failed to object. (APP. P. 911, lines 17-18).

Petitioner testified at his PCR hearing that when he brought this to his attorney's attention she told him it was admissible testimony and she would not object. (APP. P. 1890, lines 9-13). Counsel's failure to object also resulted in Jacques bolstering James' testimony, as James was not a credible witness in the least as he had a lengthy criminal history, was recently released from federal prison, and was on federal supervised release.

Erroneously admitted corroboration testimony is not considered harmless just because it is cumulative; "it is precisely this cumulative effect which enhances the devastating impact of improper corroboration." See State v. Saltz, 346 S.C. 114, 551 S.E.2d 240 (2001). This Court has previously held trial counsel ineffective for failing to object to hearsay and improper corroboration testimony. Jolly v. State, 314 S.C. 17, 443 S.E.2d 566 (1994).

Furthermore, counsel failed to request a curative instruction when the Solicitor made references to the victim's family and told a witness to look at one of the victim's parents, even after an objection that was sustained. (APP. P. 1349, lines 23-15, P. 1350, lines 1-6).

In the instant case, counsel fell below the standard of care required of a trial attorney and this performance was below the norms of our profession. Furthermore, but for her errors, the outcome of the trial would have been different.

10. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO PRESENT AN ALIBI DEFENSE OR REQUEST AN ALIBI INSTRUCTION FROM THE COURT.

Petitioner had discussions with his attorney about presenting an alibi defense as to the alleged murder of Beverly Blake, yet no such defense was presented at trial. (APP. p. 1875, lines 10-14). Petitioner testified at his PCR hearing that had he testified he would have testified to being sick and staying with Kristy Bunch at her residence for an entire week from the day of Dante Tobias' alleged murder, save for two hours on January 8. (APP. p. 1875, lines17-24). It was during this same time frame that the State was alleging that Beverly Blake was killed by Petitioner. There was never an alibi jury instruction requested from the defense in this case. (APP. p. 1876, lines 3-5).

Kristy Bunch had given a statement to police that she was with Petitioner from ten o'clock on January seventh, which could have been used to help establish Petitioner's alibi. (APP. 706, lines 6-11). At Petitioner's trial, Ms. Blake admitted to writing this statement, and the contents were in evidence before the jury; therefore, there was a factual basis to request an alibi charge as to the alleged murder of Beverly Blake.

The State's expert had place the time of death at 4.98 days plus or minus twenty hours, or at 6.8 days, depending on which method was used. (APP. 1000, lines, 1-14).

11. THE PCR COURT ERRED BY NOT FINDING TRIAL COUNSEL INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTION'S IMPROPER COMMENTS ON PETITIONER'S EXERCISE OF HIS RIGHT TO A JURY TRIAL AND FAILURE TO CALL CERTAIN WITNESSES.

During closing arguments, the solicitor stated, "If a crime is committed by two or more persons . . . the act of one is the act of all. This is true if there are two people or more than two people involved in the crime. Eric Zack and Michael Crumb pleading guilty. The hand of one is

the hand of all (emphasis added) (APP. P. 1496, lines 3-10). The prosecutor further stated that "The defendant went to rob Dante Tobias. He went to pick up Beverly Blake. It was a mixed motive, no doubt, but on he felt like he needed a gun for. And one that Eric Zack and Michael Crumb have taken responsibility for." (Emphasis added) (APP. P. 1529, lines 1-4).

It is impermissible to emphasize the guilty pleas of witnesses as substantive evidence of guilt of a defendant charged with the same or a similar crime. See U.S. v. Mitchell, 1 F.3d 235 (4th Cir. 1993). The United States Supreme Court has held that improper use of a co-conspirator's conviction infringes upon the principle that the "central aim in a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdale, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436 (1986). By emphasizing the pleas of two codefendants, the solicitor interjected improper evidence into the case hoping to convict Petitioner based not on the evidence presented at trial towards his guilt or innocence, but instead sought a conviction based on the idea if his codefendants are guilty, he must be guilty too, thus striking an impermissible "foul blow". See Berger v. U.S., 295 U.S. 78, 55 S.Ct 629 (1935).

Clearly the solicitor stating that Petitioner had not pled guilty or "taken responsibility" for the crimes was an improper reference to Petitioner exercising his constitutionally guaranteed right to a jury trial and to put the state to the burden of proving his guilt beyond a reasonable doubt. "It is impermissible for the State to comment upon a defendant's exercise of a constitutional right." See Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1946); State v. Brown, 347 S.E.2d 882 (1986); State v. Johnson, 360 S.E.2d 317 (1984); State v. Sloan, 298 S.E.2d 92 (1982).

Unfortunately for Petitioner, his trial counsel testified at the PCR hearing that she did not hear or think of those comments by the solicitor as being improper. (APP. P. 1764, lines 5-20).

She was clearly ineffective for failing to object to these comments, move for a mistrial and seek a curative instruction should the mistrial be denied. Any competent criminal attorney knows how crucial it is to listen carefully to every word said at trial, especially those coming from a prosecutor. Yet, counsel for Petitioner once again sat idly by and did nothing, either due to inattention or lack of knowledge of the law, both of which show her lack of competence and the ineffective assistance of counsel that she provided to Petitioner.

12. THE PCR COURT ERRED BY NOT FINDING APPELLATE COUNSEL INEFFECTIVE FOR FAILING TO ORDER CERTAIN TRANSCRIPTS, MAINTAIN CONTACT WITH PETITONER AND PROPERLY ADVISING HIM OF HIS RIGHTS AND CORRECT PROCEDURES.

There were four in camera hearings which were held during the trial and the transcripts were ordered sealed by the trial judge. When Petitioner filed his direct appeal, his appellate counsel did not order these transcripts and obviously did not read them. (APP. p. 1867, lines 7-15). Petitioner had specifically advised appellate counsel of the sealed transcripts and requested that he file a motion to unseal the transcripts, which was never done. (APP. p. 1872, lines 1-6). Due to counsel never ordering these transcripts, they were destroyed prior to Petitioner having a post-conviction relief hearing so they were unavailable to Petitioner.

In fact, appellate counsel never contacted Petitioner about his case, other than serving him a copy of the brief. (APP. p. 1868, lines 13-17). Appellate counsel failed to advise Petitioner of his right to file a petition for a writ of certiorari to this Court, nor did he advise him that he could lose all federal habeas corpus rights by failing to do so. (APP. p. 1869, lines 4-16). In fact, Petitioner specifically wrote to appellate counsel instructing him to file a petition for rehearing on his appeal and if that was denied to file petition for writ of certiorari with the South Carolina Supreme Court, and neither of those were done by appellate counsel in spite of instructions from his client to do so. (APP. p. 1870, lines 22-25, p. 1871, lines 1-9).

CONCLUSION

Petitioner has shown that his attorney's conduct was such that it clearly undermined the proper functioning of the adversarial process to such an extent that Petitioner's trial cannot be relied upon as having produced a just result. It is clear that counsel's performance fell well below the range of competence required of a trial attorney in a criminal case. Petitioner has shown that counsel's performance was deficient and fell below reasonable professional norms and that but for counsel's errors, the outcome would have been different. This Court should grant the Petition for a Writ of Certiorari as to all issues in this case.

Respectfully submitted,

J. Wesley Locklair III
LOCKLAIR LAW FIRM
2007 Lincoln Street
Columbia, SC 29201
SCBN 15621
(803) 254-9007

Joshua Snow Kendrick
KENDRICK & LEONARD, P.C.
P.O. Box 886
Columbia, SC 29202
(803) 667-3186

Attorneys for the Petitioner

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2008-CP-10-0057

Anthony ~~Petitioner~~ Mann, 242498,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Wesley Locklair, attorney for Petitioner, certify that on May 17, 2013, I hand-delivered a copy of Petitioner's Petition for a Writ of Ceritorari along with a copy of the Appenidix, to the Respondent's attorney, Ashliegh Wilson at the South Carolina Attorney General's Office, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, S.C. 2920

J. Wesley Locklair III
LOCKLAIR LAW FIRM
2007 Lincoln Street
Columbia, SC 29201
(803) 254-9007
Attorney for the Petitioner