

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Colleton County  
Edgar Dickson, Circuit Court Judge

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**RECEIVED**  
**Jul 06 2023**  
SC Court of Appeals

DERRICK FISHBURNE,

RESPONDENT,

V.

THE STATE,

PETITIONER.

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Appellate Case No. 2021-000107

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PETITION FOR REHEARING

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On June 21, 2023, this Court issued an order reversing the Circuit Court’s grant of post-conviction relief. Respondent would respectfully request that this Court rehear this matter. To support this request Respondent would submit the following argument.

In its opinion this Court found that “Counsel testified he strategically referenced this information in an attempt to explain to the jury why Fishburne mistrusted law enforcement and lied to officers about his presence at the crime scene.” The Court went on to hold that this was an objectively reasonable trial strategy. Respondent maintains that this was not an objectively reasonable trial strategy.

In reviewing post-conviction relief cases the appellate court is bound by an abuse of discretion standard of review. *See Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E. 2d 836 839-40 (2018); *see also Van Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) (“This

Court gives great deference to the factual findings of the PCR court and will uphold them if there is any evidence of probative value to support them.”).

The Circuit Court made a factual finding that trial counsel employed the usual suspect strategy “based upon the belief that [Fishburne] must explain his statement to law enforcement.” App. 613. In other words, the court found that trial counsel erroneously believed he had a burden to explain a false statement. Based on this factual finding, the Circuit Court concluded the following:

This Court concludes that the [Fishburne] has met his burden of proving Defense Counsel was ineffective pursuant to the Strickland standard. The basis of Defense Counsel’s strategy was the unconstitutional belief that [Fishburne] had the burden to prove why he was lying. As such the defense strategy was objectively unreasonable. Moreover, [Fishburne] was prejudiced by this strategy because it presented [Fishburne] in a negative light. Therefore, [Fishburne] should be granted a new trial.

App. 614. The Circuit Court’s findings are supported by the testimony in the record. App. 494, 1. 1-22.

Based on the foregoing, Respondent respectfully submits that the Circuit Court did not abuse its discretion in granting post-conviction relief. Respondent requests that this Court grant rehearing and affirm the Circuit Court’s order.

s/ Tristan Shaffer

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July 6, 2023