STATE OF SOUTH CAROLINA
In The Supreme Court

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CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr., Circuit Court Judge

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Appellate Case No. 2012-212320



Kenneth Lee Huckabee, ..... Petitioner,

v.

State of South Carolina, ..... Respondent.

**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Did the PCR Court properly hold that Counsel was not ineffective for failing to object to statements by the Solicitor regarding Petitioner's failure to provide a written copy of his statement, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice?

Did the PCR Court properly hold that Petitioner had failed to establish that his rights had been violated as a result of the Solicitor's closing arguments?

## STATEMENT OF THE CASE

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Spartanburg County Clerk of Court's orders of commitment. The Spartanburg County Grand Jury indicted the Applicant at the October 2007 term of General Sessions for assault with intent to kill (2007-GS-42-5176) and murder (2007-GS-42-5177). N. Douglas Brannon, Esquire, represented the Applicant. On March 6, 2008, the Applicant was convicted of these charges by a jury. The Honorable J. Derham Cole sentenced the Applicant to confinement for ten (10) years for the assault with the intent to kill charge and a concurrent thirty (30) years for the murder charge.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Huckabee, Op. No. 2010-UP-4696 (filed June 9, 2010). A Petition for Rehearing was filed and subsequently denied on July 20, 2010. Applicant then filed a Petition for Writ of Certiorari, which was denied by the South Carolina Supreme Court on January 20, 2011. The Remittitur was returned on January 26, 2011.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed on October 15, 2010, and the subsequent amendments filed March 8, 2011, December 15, 2011, and February 2, 2012. The Respondent made its Return on or about July 15, 2011. An evidentiary hearing into the matter was convened on March 9, 2012, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Max T. Hyde, Jr., Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

Following the hearing, The Honorable Frank R. Addy, Jr. denied the PCR application by

written Order dated January 6, 2012. A Motion to Alter or Amend was filed on Petitioner's behalf and was granted in part and denied in part on June 27, 2012.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari was submitted. This Return to the Petition for Writ of Certiorari follows.

## STANDARD OF REVIEW

The proper standard of review of a post conviction relief evidentiary hearing is whether "any evidence of probative value" exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

## ARGUMENT

### I. The PCR Court properly held that Counsel was not ineffective for failing to object to statements by the Solicitor regarding Petitioner's failure to provide a written copy of his statement, when Petitioner failed to establish deficient performance by Counsel or any resulting prejudice.

Petitioner was charged with murder and assault and battery with intent to kill, following a drug deal that went bad. Petitioner's primary defense was that he shot at the victims in self-defense, after one of the victims began shooting at him. Petitioner was ultimately arrested and after being advised of his rights, gave a full statement to police orally; however, he refused to write the statement down to memorialize it. Petitioner argues that his right to remain silent was ultimately commented on by the State, in violation of Doyle v. Ohio, 426 U.S. 610 (1976).

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "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, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that Counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Petitioner must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of Counsel. First, the Petitioner must prove that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Petitioner such 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, 386 S.E.2d at 625.

Respondent submits that the Petitioner failed to provide any evidence or testimony that Counsel was deficient in failing to make an objection to the alleged Doyle violations, or that the outcome of his trial would have changed had Counsel done so.

During the trial, Assistant Solicitor Gray questioned Bryant as to whether or not Petitioner was advised of his rights and whether or not the Petitioner talked with investigators about the case after being advised of his rights. (App. I, p. 271). After Bryant indicated that Petitioner did speak with them about the case, he testified that he did not take a **written** statement from Petitioner because Petitioner had stated he did not want to "put anything on paper." (App. I, p. 272). However, Bryant testified that Petitioner continued to speak with investigators and Bryant testified as to what Petitioner had said regarding the incident. (App. I,

p. 272-3). On cross-examination, Bryant repeated that there was no written statement because Petitioner did not want to put anything on paper. (App. I, p. 275).

Petitioner testified that when he was initially arrested, he told the detectives what happened and answered questions. (App. II, p. 559). Petitioner also testified that he signed the form that indicated he had been advised of his rights. (App. II, p. 559). However, Petitioner testified that he "refused to write a statement." (App. II, p. 559). Petitioner alleged that his Fifth Amendment rights were violated when the Assistant Solicitor questioned Investigator Bryant about his interactions with the Petitioner that evening. (App. II, p. 560). Petitioner testified that he believed that the Assistant Solicitor's questions as to his refusal to write the statement were a violation of his rights against self-incrimination. (App. II, p. 566).

Petitioner acknowledged during cross-examination that he was informed of his rights and gave a voluntary verbal statement to police. (App. II, p. 579-80). Petitioner also acknowledged that he spoke with police and gave them his side of the story and the only thing he refused to do was "actually write it down." (App. II, p. 580). Petitioner testified that he did not think that the Assistant Solicitor should have been able to bring it to the jury's attention that Petitioner refused to write the statement down. (App. II, p. 580).

Counsel testified that he recalled, after reviewing his file notes, that Petitioner informed him that he had given a statement, but he "didn't write it down." (App. II, p. 609). However, Counsel testified that in his experience, once someone signs a waiver and gives a statement, whether it is written down or not, the police can then take the stand and discuss your statement. (App. II, p. 609). Counsel testified that in his mind, the fact that Petitioner did not write a statement, but gave a verbal statement really did not matter. (App. II, p. 610). Further, Counsel testified that his understanding of Doyle, is that if a defendant gives no statement, then the State

is barred from bringing up the fact that the defendant refused to speak to police, but in Petitioner's case, Petitioner began talking to police immediately. (App. II, p. 612).

Respondent submits that the PCR court was correct in finding that there was no merit to this ground or any assertion that Counsel was deficient in failing to object to this testimony due to Petitioner's belief that this constituted post-arrest silence. (App. II, p. 638-9). The court found that Petitioner first gave an oral statement to police, therefore he was not silent and the Solicitor's commentary was not objectionable. (App. II, p. 639). Further, the PCR court correctly found no merit in Petitioner's allegation of prosecutorial misconduct as it relates to statements made regarding Petitioner's desire to not make a written statement. (App. II, p. 642-3).

As this Court recognized, the applications of Doyle are diminished when a defendant waives his right to remain silent and voluntarily speaks after receiving Miranda warnings. State v. Simmons, 360 S.C. 33, 39-40, 599 S.E.2d 448, 451 (2004) (citing Anderson v. Charles, 447 U.S. 404, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980)). As to the subject matter of his statements, the defendant has not remained silent at all. Id. As clearly demonstrated through the record and testimony at the PCR hearing, the Petitioner waived his right to remain silent and any commentary on his desire to not write the statement down is not improper.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

## II. The PCR Court properly held that Petitioner had failed to establish that his rights had been violated as a result of Solicitor's closing arguments.

Petitioner, in his Petitioner, argues that he should be granted a new trial based upon a violation of his Fourteenth Amendment rights, based upon the Assistant Solicitor's closing remarks on the failure to write the statement down and facts not in evidence during trial.

Petitioner argued that Counsel should have objected to the State's closing argument when the Assistant Solicitor made mention of the fact that Petitioner had no job and no money, but Petitioner argued that evidence was in the record that he did have a job because he was working at Ryan's. (App. II, p. 567). Petitioner also testified that a reference was made to Counsel saying that after the truck sped off, Petitioner continued to fire, but Petitioner says that nowhere in the record does Counsel make that statement. (App. II, p. 568). Further, Petitioner argued that the statement that he was "apprehended through trickery," does not appear in the record, but the State referenced that statement during closing. (App. II, p. 568). Petitioner also continued to insist that the Assistant Solicitor should have not been able to make statements regarding the Petitioner's desire to not write down his statement after talking with police. (App. II, p. 569).

Counsel testified that his recollection was that, although Petitioner may have worked at Ryan's previously, at the time of trial he was no longer working at Ryan's. Counsel testified that his standard procedure, unless terribly egregious, is to try to not object during opening or closing arguments mainly because he does not want it to happen to him when he is on a roll. (App. II, p. 614). Also, Counsel testified that evidence was presented during trial to show that police did have to trick the Petitioner in order to arrest him by using Mr. Hudani to set him up for a drug deal. (App. II, p. 627-8).

The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. State v. Copeland, 321 S.C. 318, 468 S.E.2d 620 (1996). Furthermore, the solicitor's closing argument must not appeal to the personal biases of the jurors. Id. To be entitled to a new trial for improper closing arguments, the test is whether "the Solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Hamilton, 344 S.C. 344, 362, 543 S.E.2d 586, 596 (2001).

The PCR Court properly found that the Solicitor's comments regarding whether or not the Applicant was working or why he needed money were a fair commentary of evidence in the record. (App. II, p. 568). Furthermore, the PCR Court found the Solicitor's comments as to the Applicant's apprehension by trickery were also a fair commentary of the evidence in the record. (App. II, p. 568). Based upon the record, testimony, and established case law, the Court was correct in finding that Counsel was not ineffective for failing to object to these comments or arguments.

Respondent submits that the Petitioner failed to meet his required burden of proof and probative evidence exists to support the court's denial of his post-conviction relief application.

## CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling, with the exception of the granting of the belated direct appeal, which should be reversed. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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By: _____
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July 17, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Spartanburg County

The Honorable Frank R. Addy, Jr., Circuit Court Judge

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KENNETH LEE HUCKABEE,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**David Alexander, Esquire**
**1330 Lady Street, Suite 401**
**Post Office Box 11586**
**Columbia, SC 29201**

This 17TH day of July, 2013

Troyesh Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

July 17, 2013



The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***RE:*** **Kenneth Lee Huckabee v. State of South Carolina**
**Appellate Case No.: 2012-212320**

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

Suzanne H. White
Assistant Attorney General

JWW/tb
Enclosures

cc: David Alexander, Esquire, (2 copies with all the attachments)