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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Greenville County
The Honorable Robin B. Stillwell, Trial Judge
The Honorable R. Scott Sprouse, PCR Judge

Appellate Case No. 2024-00627

DWAYNE C. TALLENT, #357180,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

I. Did the PCR court err in denying petitioner relief where trial counsel was ineffective for failing to make a contemporaneous objection at the time overly prejudicial evidence of other bad acts was offered?

STATEMENT OF THE CASE

The Greenville County grand jury indicted Petitioner Dwayne C. Tallent (hereinafter "Petitioner") for criminal sexual conduct with a minor in the first degree, criminal sexual conduct with a minor in the second degree, lewd act on a child, and contributing to the delinquency of a minor. (2014-GS-23-011873; 011877; 011875; 7 011874). Petitioner proceeded to a jury trial before the Honorable Robin B. Stillwell and was represented by attorney Matthew J. Kappel. A jury convicted Petitioner of all charges following trial on July 17-19, 2017, before the Honorable Robin B. Stillwell. (App., p. 809). Judge Stillwell sentenced Petitioner to thirty years imprisonment for CSC 1st, and concurrent sentences of twenty years imprisonment for CSC 2nd, fifteen years imprisonment for lewd act, and three years for contributing to the delinquency of a minor. (App., p. 814-815).

Petitioner appealed his conviction to the South Carolina Court of Appeals on July 24, 2017, and he perfected the appeal with the filing of his Final Brief on January 31, 2019. Therein, Petitioner raised two issue for review:

1. Did the trial court err in denying the Appellant's motion to sever the charge of contributing to the delinquency of a minor from the trial of CSC and Lewd Act?

2. Did the trial court err in admitting evidence of the Appellant's manufacture, sale and use of cocaine, crack cocaine, and methamphetamine?

(App., p. 235). The Court of Appeals affirmed his conviction by published opinion on June 10, 2020. (App., p. 270). See *State v. Petitioner*, 430 S.C. 438, 845 S.E.2d 508 (Ct. App. 2020). Petitioner filed a Petition for Writ of Certiorari on September 3, 2020, but the Petition was denied on March 9, 2021. (App., p. 289; p. 318). The Remittitur was then issued on March 15, 2021.

Petitioner filed his application for post-conviction relief on February 22, 2022. Therein Applicant asserted six grounds for relief:

1. Trial counsel was constitutional ineffective for failing to properly prepare and investigate;
2. Trial counsel was constitutionally ineffective for failing to make necessary objections to preserve issues for appeal;
3. Trial counsel was constitutionally ineffective for failing to make necessary motions to suppress evidence and testimony;
4. Trial counsel was constitutionally ineffective for failing to adequately cross-examine witnesses;
5. Trial counsel was constitutionally ineffective for failing to communicate all plea offers to Applicant in a timely fashion and to give accurate and adequate advice to Applicant in regards to said offers; and
6. Trial counsel was constitutionally ineffective for failing to conduct adequate discovery, offer relevant evidence, make adequate argument to the jury, and present an adequate defense.

(App., p. 16). The State made its Return to the Application on June 20, 2022. (App., p. 22). PCR counsel filed a PCR memorandum in advance of the hearing. (App., p. 52). The evidentiary hearing was then convened on January 17, 2024, before the Honorable R. Scott Sprouse. (App., p. 32). Attorney J. Faulkner Wilkers represented Petitioner and Assistant Attorney General Joe Maye represented the State. Petitioner abandoned all but his allegation that counsel was ineffective for failing to make a contemporaneous objection during trial that allegedly led to an appellate issue being unpreserved for review. (App., p. 35). Mr. Kappel testified at the hearing, arguments were presented to the PCR court, and Respondent provided post-hearing memorandum. (App., p. 65). The PCR court issued an Order of Dismissal on March 12, 2024.

This Petition for Writ of Certiorari now follows.

STATEMENT OF FACTS

Pretrial Motions

Petitioner's trial began on July 17, 2017, with pretrial motions. Therein, Mr. Kappel informed the court of his *Lyle* 404(b) motion seeking to suppress the testimony of C.R., a second alleged victim that the State had available to testify at trial. (App., p. 325). With the necessary motions identified, the court proceeded to empanel a jury and then release them for lunch while the motions were addressed. (App., p. 350).

Mr. Kappel then asserted his motion to suppress and noted the need to take some testimony in order for the court to make a ruling. (App., p. 353). The State called both E.G. and C.R. to provide in-camera testimony. At the conclusion of their testimony the defense's sole argument was that the severity of the abuse differed between E.G. and C.R, such that one described oral sex and penetration while the other describing touching. Mr. Kappel referenced generally *State v. Lyle*, 125 S.C. 406, 118 S.E. 803 (1923), *State v. Tutton*, 354 S.C. 319, 580 S.E.2d 186 (Ct. App. 2003), *State v. Rogers*, 293 S.C. 505, 362 S.E.2d 7 (1987), overruled by *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993). (App., p. 395), and the absence of escalation.[1]

In response, the State cited to *State v. Wallace*, 384 S.C. 428, 683 S.E.2d 275 (2009) and *State v. Taylor*, 399 S.C. 51, 731 S.E.2d 596 (Ct. App. 2012). The solicitor noted that defense counsel had failed to address all but one of the factors that our Supreme Court had instructed courts to consider in the evaluation of whether there is a close degree of similarity between the bad act and the crime charged, so as to establish admissible evidence of a common scheme or plan. He argued to the court that essentially every factor set forth under *Wallace* was met by the facts of the

[1] Each of these cases was decided before *Wallace*.

case. The State argued that 1) both victims were at the age of five when the abuse began, 2) Petitioner established the same relationship with both victims (i.e. their stepfather[2]), 3) both victims suffered abuse at the same 79 Ferguson Road home while primarily in the bedroom of Petitioner, 4) both victims' were coerced into silence by Petitioner telling them that his love was special and that others would not understand, and 5) that even the type of abuse was similar because it started with touching of both vagina and rectum. The Solicitor noted that E.G.'s escalated abuse primarily took place in her older age years and that C.R. was likely spared that escalation due to Petitioner's intervening arrest and conviction when she was only 11. (App., p. 398-401). Additionally, though not listed during the argument, both victims also testified that the abuse would come during opportunities when their respective mothers were at work or at the store.

The Court informed the parties that such evidence is not appropriate for showing character, but that it can be admitted to show other purposes under *Lyle*. Here, the evidence was offered and considered as demonstrating a common scheme or plan. (See App., p. 408). With that in mind, the court took the issue under advisement during the lunch break so as to review the various cases and testimony presented. In so doing, the court noted the need to determine the evidence is reliable, clear and convincing, the degree of similarity, and whether it is overly prejudicial under Rule 403. (App., p. 402).

After lunch the court returned and noted that it had taken sufficient time to review the referenced cases and law and that C.R.'s testimony was admissible. The court found that the evidence was relevant, that the similarities clearly outweighed the dissimilarities, and that the probative value outweighed the prejudicial effect. The Court referenced specifically *State v. Scott*

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[2] C.R.'s testimony demonstrated that Petitioner and her mother never married, but that Petitioner filled the role of a stepfather and that she grew up calling him dad.

and *State v. Wallace* and further noted that in one case the Supreme Court had specifically overruled a trial court that found such similar evidence inadmissible. (App., p. 407-410).

The Trial

Victim was twenty-nine years old at the time of trial. She was around five years old when Petitioner began sexually abusing her. (App., p.465-466). Victim testified it began when she was little and she was bored. She ran into the bedroom and plopped down on him. Petitioner had an erection and began to rub up against Victim through the blanket. (App., p. 466). This occurred in a trailer in Deer Road Run. (App., p. 453-454). Victim's biological mother and father divorced before she was two years old and he had a limited role in her life. On the other hand, Petitioner was her father figure from when she was eighteen months old until she ultimately moved away at the age of fourteen. (App., p. 452-453). The abuse escalated in severity and included Petitioner masturbating with Victim in the room, masturbating while touching (but not penetrating her vagina), rubbing his penis between Victim's legs to the point of ejaculation, kissing and fondling Victim's breasts, performing oral sex on Victim, forcing Victim to perform oral sex on him, one occasion where he penetrated her vagina with his penis, and digital penetration of her rectum with his fingers and penis. (App., p. 468-478; 481-482; 486-487). All of this conduct began prior to her turning 11 years old.

She testified at this age, she did not know any better. She loved and cared for Petitioner. Petitioner wasn't always bad. He was caring and took the family camping and fishing. (App., p. 472-473). Petitioner told her the conduct was their secret. (App., p. 474). Victim told Petitioner's sister about the abuse once, but ultimately nothing came of her disclosure. (App., p. 474-475). The sister ran after Petitioner. Petitioner later glared at Victim as if she were in trouble. He later told her people would not understand and it was their secret. It was something special they had. (App.,

p. 474-475).

When she was about eleven years old, her two brothers, Christopher and Joseph, moved into the doublewide. Victim was not allowed to be alone with the brothers unless Petitioner was present: "He kept me around him." (App., p. 482). One day, Petitioner was masturbating and rubbing Victim's vagina in the bedroom when her brother walked in the room. He asked, "[H]ow long has this been going on?" Then Petitioner chased him out of the room. Later officers came to the house and Victim told them nothing happened. (App., p. 482-484).. She explained why:

> I was scared of any and all consequences that could – I didn't want people to know. I feared what people would have thought of me. I feared at what if they didn't believe me, and whether or not if I said something and they didn't believe, he would try to hurt people I cared about.

(App., p. 484, lines 13-18). She also admitted at the time she felt some blame for what was happening. (App., p. 484, lines 19-22). She later denied abuse to law enforcement and to a forensic interviewer, but she explained she was not telling the truth back then. (App., p. 485-486). The abuse ended when she moved in with her biological father.

Victim reported the abuse when she was twenty-six years old. (App., p. 499-500). Joseph Greco, Victim's oldest brother, testified against Petitioner, in summary noting that Petitioner was often physical affectionate with Victim, with hugs, pats on the butt, and "skin" contact, and that Victim spent a lot of time in Petitioner's bedroom. (App., p. 553).

Joseph noticed Petitioner hugged Victim a lot and consistently maintained had "skin" contact. "He'd always have his hands on her." (App., p. 553). He would pat her on the butt. Petitioner spent a lot of time in the bedroom with Victim and always called for her. (App., p. 553-554). One time he walked into the bedroom and Petitioner "shot up like a deer in the headlights, you know, wide-eyed, like didn't know I was there." (App., p. 555, lines 20-24). Joseph explained

before Petitioner shot up, Victim was on the bed and Petitioner was on top of her, towards her feet. (App., p. 555-556). He also recalled on another occasion seeing them both under the covers and Petitioner moving his hand "pretty funny" around his crotch area, which "weirded" Joseph out. (App., p. 557). Things changed the day Joseph's brother walked into Petitioner's bedroom and Joseph heard him shout and come out of the room with Petitioner chasing him out of the house. (App., p. 558). On the way out he said, "Dude, Dwayne's molesting [Victim]." (App., p. 559, lines 12-13).

Christopher Greco also testified against Petitioner. He noticed Petitioner always touched Victim, rubbing her inner thigh. He found it awkward and inappropriate. (App., p. 575-576). He testified it was not uncommon for Victim to be in bed with Petitioner. (App., p. 577). The only time Christopher was invited into the bedroom was to use drugs with Petitioner. (App., p. 578). On one occasion, Christopher was up to use the bathroom when he heard a slight moaning. He looked through the keyhole of the bedroom and saw Petitioner and Victim under the covers. Petitioner was touching himself and Victim with his other hand. He told her "that is how you do it." Christopher kicked open the door and demanded to know how long it had been going on. He called Petitioner sick. Petitioner "freaked out" and jumped out of bed. Petitioner chased Christopher outside, threw coolers at him, and told Christopher that Christopher could ruin his whole world. (App., p. 579; p. 593, lines 18-24 (direct quote)). When asked if they were clothed, Christopher testified Petitioner was in his boxers, he could not tell whether Victim was dressed or not. (App., p. 581). Christopher and his brother moved out afterwards. They told their father and Christopher told DSS about what happened. (App., p. 580).

C.R. provided *Lyle* testimony. She was fifteen years old when she testified at trial. Her and her mother moved in with Petitioner. Petitioner was a father figure in CR's life. Petitioner

started touching CR when she was around five years old, and she did not know it was wrong. As she later realized the abuse was wrong, she kept it to herself because she was scared. (App., p. 655-657). She explained she still loved Petitioner and even told the jury Petitioner is a good person. Nonetheless, she explained Petitioner would touch around her vagina. The abuse would continue until Petitioner moved away when C.R. was eleven years old. (App., p. 658-659). Petitioner also touched C.R.'s chest and kissed her on the lips. (App., p. 659-660). Sometimes the abuse occurred with the clothes on and sometimes Petitioner took her clothes off. (App., p. 660). Petitioner told her not to tell because nobody would understand it and that nobody would understand his love for her. (App., p. 662, lines 7-9).

Deputy Richter visited her at school – she did not know he was going to visit. Although tempted to disclose the abuse, she decided she did not want to tell Richter because it would ruin her school day, and ruin her family. (App., p. 663-664). She later disclosed the abuse to a DSS caseworker. (App., p. 664-665).

The prosecutor asked if her life was easier or harder since she disclosed, and she replied, "It was so much harder on me." (App., p. 668, lines 9-11). She explained why:

> Because knowing that I came out, I knew that right then and there, the place that I was at as not a safe environment. I knew that I would be [taken] from my home. I knew that I would be [taken] away from my family, which I, basically, have been.

(App., p. 668, lines 13-23). C.R. explained she was afraid she would lose her family, and in the end, it was worse than she feared. She admitted Petitioner's family put pressure on her to change her story. (App., p. 669, lines 1-15).

The defense put up the testimony of four witnesses. Selena Brunson, who briefly shared the home with Petitioner, testified that she never witnesses anything wrong. (App., p. 683-694).

Lenore Brissey, Petitioner's mother, testified that she had a close relationship with both Victim and C.R. and neither girl ever told her of Petitioner's abuse. (App., 708-710; 717). Diana Rogers and Debbie Seymore, Petitioner's sisters, both testified that Victim never disclosed to them that Petitioner had abused her. (App., p. 723-730).

The PCR Evidentiary Hearing

At the PCR evidentiary hearing, Mr. Kappel was the sole witness called to testify. PCR counsel then asked him a total of eight questions. The substance of which demonstrated that Mr. Kappel represented Petitioner at trial, recalled the trial, and recalled making an argument to suppress 404(b) evidence regarding another alleged victim. He noted that the motion was denied, and that when the witness was called toward the end of trial he did not raise objection or renew his argument made during the suppression hearing.[3] Mr. Kappel considered this to be "an unfortunate oversight" on his part concerning highly prejudicial testimony. (App., p. 35, line 20 through p. 37, line 5).

On cross-examination, Mr. Kappel testified that he did not believe the evidence satisfied Rule 404(b). Mr. Kappel disagreed with the court's reasoning, but he did not offer any testimony that he believed that the court's ruling was in contravention of the controlling authority or the legal standard at the time of trial, and he evaded the questions posed as to *Wallace* being the controlling authority on the issue. (App., p. 38-40). Counsel could not remember whether he made references

[3] PCR counsel also asked if "subsequent to [the suppression hearing] there was additional evidence that the trial had been continued . . ." Mr. Kappel recalled that *he did* recall such a continuance or delay. In review, Respondent can find no indication that the trial was continued or otherwise delayed in the context for which the question suggests. The suppression hearing was conducted and ruled upon on July 17, 2017. Opening statements followed immediately after the ruling. After opening statements, the court adjourned for the day at 3:55pm rather than begin a witness that could not be completed in the limited time remaining that day. The State began and concluded its case-in-chief on July 18, 2017.

to C.R. and her testimony during his opening statement, nor could he remember whether the State had made the same type of references in its opening. (App., p. 41).

STANDARD OF REVIEW

The standard of review for PCR depends on the specific issue before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's findings and will uphold them if any probative evidence in the record supports them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." *Thompson v. State*, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." *Foye v. State*, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are reviewed *de novo* without deference to the PCR court. *Id.* Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

I. Trial counsel cannot be found constitutionally ineffective for failing to preserve an issue on appeal where the trial court's ruling was not in error and where Petitioner's argument for prejudice rests upon a change in the controlling law that did not exist at the time of trial.

Certiorari is not warranted in this matter. Petitioner's argument is based on a number of improper presumptions and Petitioner seeks to overlook the critical question of whether trial counsel was ineffective in favor of litigating the supposed impropriety of the 404b evidence in this case. Petitioner's arguments are mistaken. The ruling of the PCR court was appropriate and the

Petition should be denied.

Notwithstanding Petitioner's misapprehensions regarding preservation of issues for appeal (*infra*), the overarching and insurmountable error in Petitioner's arguments for certiorari is his reliance upon *Perry* (2020) as a means of showing ineffective assistance of counsel *in 2017.*

Petitioner does not contest the fact that *Wallace* was the controlling authority at the time. Petitioner does not contest that *Wallace* permitted the introduction of common plan or scheme evidence when the similarities outweighed the dissimilarities. And while Petitioner would attempt to persuade this Court that his argument for suppression was correct even under *Wallace*,[4] despite the record showing similarity *in every single Wallace factor*, Petitioner's real argument is that Petitioner was prejudiced for not having received appellate review for the issue during the time that *Wallace* was ultimately overturned by *Perry*.

Petitioner's entire argument rests upon the premise that had counsel raised a contemporaneous objection, *to a ruling where there is no apparent error*, he would have preserved the issue for appeal and Petitioner would have received the benefit of a change in the law before the conclusion of his direct appeal. Petitioner conveniently overlooks this massive distinction and he offers no argument to the PCR court's reliance upon the maxims of collateral review under *Strickland*: "the court must consider the law as it existed at the time of trial and 'not as it has evolved today'", and that an attorney will not be deemed deficient in his representation for failing "'to be clairvoyant or anticipate changes in the law.'" (App., p. 10, quoting *Chappell v. State*, 429 S.C. 68, 79, 837 S.E.2d 496, 501 (Ct. App. 2019)). In short, counsel cannot be deemed ineffective for allegedly failing to preserve meritless issues for appeal in the hope that the law will change

[4] Mr. Kappel's arguments to the trial court referenced pre-Wallace case law and he addressed only one of the factors that require consideration.

during the pendency of appeal. As such, the PCR court's findings and holding were correct and certiorari should be denied.

II. The PCR Court did not err in finding that the *Wallace* issue would likely have been deemed preserved and that Petitioner failed to satisfy his burden in showing why the issue was not raised on appeal.

The PCR court did not err in its consideration of the issue of preservation. There were valid arguments that the issue would have been preserved for review and the PCR court rightfully denied relief in finding that Petitioner failed to satisfy his burden of proof as to why the issue was not pursued on appeal. Certiorari should therefore be denied.

Petitioner asserts that trial counsel was ineffective for failing to preserve an issue for appeal. However, the record shows that the *Wallace* issue was not even raised on appeal. Instead, Petitioner has presumed a lack of preservation and there are facts within the record that render that presumption tenuous at best. Moreover, in presuming the issue of preservation Petitioner has essentially presumed the very prejudice he argues exists under *Strickland.*

Here, the motion in limine was concluded and the Court immediately proceeded to giving the jury opening instructions and allowing counsel to make their opening statements. Critically, the opening statements of both the State and the Defense demonstrate the perceived understanding of the finality of the court's ruling. The State explained the allegations of abuse that E.G. would testify to and then informed the jury that they would hear from another young lady victimized by Petitioner under similar circumstances as E.G., and that such would corroborate E.G.'s testimony. (App., p. 428-429). No objection was raised by the defense to this opening.

Not only did defense counsel not object, but during his own opening statement he referenced the existence of more than one victim against Petitioner as well. He provides details

about her relationship to Petitioner and even provides her name to the jury in an effort to discuss how her testimony might be impeached by a failure to disclose the abuse. (App., p. 437; 439). These are the actions of *both* parties that understood the court's ruling to be final.

The record evidence goes further, though. Witness C.R. was then referenced by the State during direct examination of its first witness, E.G., and whether E.G. knew C.R. at the time that C.R. came forward with allegations of abuse. (App., p. 502-503). Again, no objection was raised by the defense. The State's fourth witness, Detective William Richter, testified as to his effort to investigate child sexual abuse by Petitioner and that in doing so, he spoke with C.R. He noted that she initially denied such abuse, but at a later date came forward and disclosed abuse which was made a separate criminal case. (App., p. 614-616). Again, no objection was raised by the defense.[5] By the time the jury actually heard C.R. testify, they were well aware of the fact that C.R. had made similar allegations of abuse against Petitioner. The ruling had been treated as final by both parties and the court for the entirety of trial.

This is especially so in comparison to Mr. Kappel's supposed characterization of the matter at the evidentiary hearing. Mr. Kappel called his supposed failure to raise a contemporaneous objection "an unfortunate oversight." (App., p. 36). But that assertion simply does retain credibility in light of the persistent references to the contested evidence by both parties without objection. Instead, the record demonstrates that counsel did not forget to object; it suggests that counsel believed the court's ruling on a pivotal portion of the State's case to be a final adjudication on the issue and that his motion was simply not supported by the existing law.

In review, the PCR court correctly noted that motions in limine are not "generally" final

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[5] An objection was raised to the officer testifying as to the "vibe" that C.R. was giving off during their first meeting, but not to the basic articulation that C.R. came forward to report abuse.

determinations on legal issues, and that a contemporaneous objection is needed to preserve the issue for appeal. However, the court noted that there are exceptions to the rule, such as when the ruling is reached immediately prior to the introduction of the contested evidence. When the finality of a ruling is clear, there is no need to renew the objection.[6] In that vein, the PCR court referenced *State v. Wiles.* In *Wiles* Supreme Court's considered preservation arguments under circumstances where the court *and both parties* referenced the contested evidence in their opening statements. Such was indicative of their understanding that the ruling was final. The PCR court found that "there is support" for the argument that had the issue been raised on appeal it would "likely" have been found preserved, and that Petitioner's argument is based upon an unproven presumption. (App., p. 9-10). This finding is correct, as there is no affirmative decision that prevented appellate counsel from raising this issue for consideration by the appellate court. Petitioner's assertion to the contrary is unproven and he has proceeded to presume the underlying basis for his ineffective assistance claim.

Moreover, Petitioner elicited extremely limited testimony during the PCR hearing and did not provide any allegations or testimony that would prove to the court that the claim was not raised on appeal solely because of a lack of preservation. In tandem with that failure, the PCR court also noted that there is nothing prohibiting counsel from raising an issue on appeal, even if its preservation is in question. PCR counsel's presumption, without providing testimonial support, runs afoul of Petitioner's burden to prove his own case.

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[6] Petitioner claims error in the application of *State v. Morales*, 439 S.C. 600, 889 S.E.2d 551 (2023). However, the only reference to *Morales* by the Order of Dismissal was simply setting forth the exception to contemporaneous objections where the disputed evidence is admitted without intervening testimony. The PCR court was referenced the general law and its exceptions; nothing suggests that it ruled C.R. was the first witness to be called to testify.

The PCR court's rulings in this regard were appropriate and certiorari should be denied.

CONCLUSION

The PCR court's reasoning and legal basis for denying relief under *Strickland* was proper.

For all the foregoing reasons, it is respectfully submitted that certiorari be denied in this matter.

Respectfully submitted,

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