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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

\_\_\_\_\_  
Certiorari to Greenville County  
The Honorable Edward W. Miller, Trial Judge  
The Honorable Grace Gilchrist Knie, Circuit Court Judge

\_\_\_\_\_  
Appellate Case No. 2024-000848  
\_\_\_\_\_

JACOBY JAMAR GREGORY,.....PETITIONER

v.

STATE OF SOUTH CAROLINA,.....RESPONDENT

\_\_\_\_\_  
**RETURN TO PETITION FOR WRIT OF CERTIORARI**  
\_\_\_\_\_

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## PETITIONERS QUESTIONS PRESENTED

1. Was trial counsel ineffective for failing to conduct a complete investigation and utilize investigations services, prior to and during trial, of an expert in cell phone extraction and mapping and forensic crime scene investigation? As a result of counsel's ineffectiveness, lay witnesses expert witnesses, and evidence were not properly utilized to corroborate Jacoby Gregory's testimony or attack the State's case.
2. Was trial counsel ineffective for failing to make a complete record, make a motion and/or move for mistrial when mistrial counsel addressed the Court making faces that made it "abundantly clear" that he did not believe Jacoby Gregory during his trial testimony?
3. We trial counsel ineffective for failing to address the conflict issue involving Scott Robinson, Esquire, pre-trial for failing to effectively address it when the issue came up at trial and for failing to make a complete record?
4. Was trial counsel ineffective for failing to make an objection under *State v. Sierra*, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) during the State's examination of Bobby Thomas and Jacoby Gregory?
5. Was trial counsel ineffective for failing to object to bolstering and vouching during the State's closing argument?

## **RESPONDENT'S QUESTIONS PRESENTED**

1. Was trial counsel ineffective by not hiring an expert in cell phone extraction when the evidence presented revealed Petitioner was present at the crime scene and corroborated testimony? And was counsel ineffective for not hiring a crime scene expert when evidence at the crime scene pointed to the Petitioner being at the scene participating in this crime?
2. Was the Petitioner entitled to post-conviction relief in their allegation that trial counsel was ineffective for not requesting a mistrial due to the trial judge “making faces” during Petitioner’s testimony, even though Petitioner failed to allege that any action made by the trial court caused a difference in the trials final outcome?
3. Was trial counsel ineffective for failing to address a conflict issue involving attorney Scott Robinson when no conflict existed?
4. Was trial counsel ineffective for failing to make an objection under *State v. Sierra* when *Sierra* did not apply?
5. Was trial counsel ineffective for failure to object to bolstering and vouching when responding to an argument raised by the Petitioner’s trial counsel questioning the co-defendant’s credibility?

## STATEMENT OF THE CASE

On October 1, 2013, Petitioner's co-defendant Mr. Shawndell Clemmons along with other individuals got into an altercation with Barry Norman (victim). The victim slapped Ms. Tiajuana Davenport, who at the time was eight months pregnant. (A. p. 429). After this occurred Shawndell, Bobby Thomas, and Smitty Sullivan went to defend Ms. Davenport and got into a fight with the victim. (A. p. 429). Petitioner was informed of this altercation after it occurred. (A. p. 436). During the rest of the night Petitioner was in constant conversation with the victim in an attempt to calm things down. (A. p. 435). It was ultimately decided by Shawndell and the victim that they would settle the matter with a fight. (A. p. 441). When the Petitioner and Shawndell arrived, they were both armed with guns. (A. p. 447). Once they got to the meeting the Petitioner shot the victim once in the head causing his death. (A. p. 277).

During the investigation, law enforcement found .45 caliber shell casings at the crime scene. (A. p. 138). At the Fountain Inn Natural Gas building near the crime scene, law enforcement also found a .45 caliber handgun. (A. p. 187). Petitioner called the Fountain Inn police the day after the incident to report his gun stolen. (A. p. 183-184). Near the crime scene law enforcement also found a hoodie that has been worn by the Petitioner. (A. p. 146).

An autopsy later revealed the victim died from a gunshot wound to the head. (A. p. 277). Law enforcement also recovered video surveillance revealing two individuals hiding something at the location where the murder weapon and hoodie were found. (A. p. 176).

Petitioner and co-defendant were later arrested and charged with murder and possession of a weapon during the commission of a violent offense. On September 16, 2014, the Greenville County Grand Jury indicted Petitioner for the offenses of murder and possession of a weapon during the commission of a violent offense. (A. p. 713 – 714). On July 11, 2016, this case was

called for trial before the Honorable Edward W. Miller. Present before the trial court were the Petitioner along with his trial counsel Randall L. Chambers and Christopher Maddox. Representing the State of South Carolina were Assistant Solicitors, Leigh B. Paoletti and Bryna Deay of the Thirteenth Circuit Solicitor's Office.

At trial Mr. Clemons testified that Petitioner never told him that his gun was missing. (A. p. 427). Clemons and Petitioner went to the crime location at the Woodside Apartments at third and fourth streets. (A. p. 447). Mr. Clemons testified that they went to this location to see the victim to either talk or fight. (A. p. 443). When they were about three to five feet away from the victim, co-defendant heard shots being fired by the Petitioner. (A. p. 451). After the shooting they ran to a fence and Petitioner gave his co-defendant his .45 caliber weapon and his hoodie. (A. p. 454). Mr. Clemons testified that he took the hoodie and threw it over the fence and took the gun and placed it in front of the building. (A. p. 457).

Investigator Dan Kelly of the Greenville County Sheriff's Department performed an analysis of the Petitioner's phone to determine his whereabouts at the time of the crime. Investigator Kelly determined that there was activity on the Petitioner's phone on October 1, 2013, at 10:48, 10:53 and 10:59. Investigator Kelly determined that the Petitioner's phone pinged at 10:48 between Third and Fourth street. (A. p. 412). Investigator Kelly also testified that at 10:53 Petitioner's phone pinged on Bates Street, the residence of eyewitness Bobby Thomas. (A. p. 413; p. 285).

After four days of testimony, a jury of his peers found the Petitioner guilty of murder and possession of a weapon during the commission of a violent offense. After the reading of the verdict the Petitioner appeared before the trial judge. Petitioner was sentenced to a forty (40) year period of incarceration for the offense of murder, and five years for possession of a weapon during the

commission of a violent crime. (A. p. 707, 708). The trial judge ordered that these sentences were to be served consecutively. (A. p. 708).

After his conviction, Petitioner filed a timely notice of appeal. In this appeal the Petitioner was represented by Laura R. Baer, Appellate Defender for the South Carolina Commission on Indigent Defense. Ms. Baer filed an *Anders* brief on August 18, 2017. On April 18, 2018, the South Carolina Court of Appeals issued an unpublished opinion accepting the *Anders* claim and dismissed Appellant's appeal. *State v. Gregory*, Op. No. 2018-UP-156 (Ct. App. filed April 18, 2018).

On May 18, 2018, Petitioner filed an application for post-conviction relief. The original application only stated one ground for relief; that Petitioner was being unlawfully held in custody based on ineffective assistance of counsel. On September 10, 2018, Respondent filed a return and motion for a more definite statement. On August 19, 2022, Petitioner's PCR counsel Tricia A. Blanchette filed an Amended Application. This amended application raised the following allegations:

1. Petitioner alleges trial counsel was ineffective for failing to conduct a complete investigation and utilize an investigator and/or expert(s) prior to and during trial. As a result of counsel's ineffectiveness, witnesses to include lay and/or expert(s) and evidence were not properly utilized to corroborate Petitioner or attack the State's case.
2. Petitioner alleges trial counsel was ineffective for failing to address the conflict issue involving Scott Robinson, Esquire pre-trial; for failing to effectively address it when the issue came up at trial and for failing to make a complete record.
3. Petitioner alleges trial counsel was ineffective for how he prepared Petitioner to testify and handled Petitioner's testimony at trial.
4. Petitioner alleges trial counsel was ineffective for failing to make a complete record, make a motion and/or move for mistrial in the following instances:
  - a. When the court placed a time limit on trial.
  - b. When trial counsel addressed the Court making faces that made it "abundantly clear" that he did not believe Petitioner during his trial testimony.

5. Petitioner alleges that counsel was ineffective for failing to make an objection under *State v. Sierra*, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999) during the State's examination of Bobby Thomas.
6. Petitioner alleges that trial counsel was ineffective for failing to object to bolstering and vouching during the State's closing argument.

On September 19, 2023, all parties appeared before the Honorable Grace Gilchrist Knie for a hearing regarding Petitioner's post-conviction relief application. Appearing before the court was the Petitioner along with his PCR counsel Tricia A. Blanchette. Representing the State of South Carolina was Assistant Attorney General Tommy Evans, Jr. Testifying for the Petitioner was Mr. Pete Skidmore, an expert in cell phone extraction and mapping, Mr. Robert Tressel, an expert in forensic crime scene investigation, and Petitioner's trial counsel Mr. Randall L. Chambers. At the conclusion of this hearing the PCR judge took this matter under advisement.

On April 9, 2024, the PCR judge informed counsel of the decision. The PCR judge decided to dismiss Petitioner's application. The PCR judge ruled that based on the evidence presented, Petitioner failed to establish any constitutional violations or deprivations that would require the Court to grant the application for post-conviction relief. After receiving the order of dismissal, Petitioner filed a Rule 59(a) & (e) motion to reconsider. On April 9, 2024, the PCR judge denied this motion and ordered the case be dismissed. Respondent now files this return to Petitioner's petition for writ of certiorari. Respondent argues that Petitioner has failed to submit sufficient evidence in order for certiorari to be granted. The Respondent sets forth its argument as follows.

### **STANDARD OF REVIEW**

The standard of review for post-conviction relief matters depend on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if there is probative evidence in the record to support 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, *citing*, *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013). Appellate courts will reverse the decision of the post-conviction relief 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

**1. Petitioner’s counsel was not ineffective by not hiring an expert in cell phone extraction or forensic crime scene investigation because the evidence that existed was so overwhelming that any testimony by these experts would not have changed the outcome of the trial.**

Petitioner claims that his counsel was ineffective. In *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984) the United States Supreme Court decided the standards that must be met for counsel’s representation to be deemed ineffective. There is a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the defendant must show that counsel’s performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed to the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose results are not reliable. *Washington*, 466 U.S. at 687, 104 S.Ct. at 2064. Petitioner must also reveal that counsel’s deficient performance prejudiced him such that, but for counsel’s unprofessional errors the result of the proceeding would have been different. *Cherry v. State*, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989).

Petitioner argues his counsel was ineffective by not hiring an expert in cell phone extraction and mapping. For the post-conviction relief hearing, Petitioner hired Mr. Tressel who was found qualified as an expert in cell phone extraction and mapping. Mr. Tressel testified that there was a

ping away from the incident location, which could have revealed that Petitioner was not at the crime scene location. During the trial, Investigator Dan Kelly testified. Investigator Kelly examined the records of the Petitioner's cell phone. Investigator Kelly testified that Petitioner's phone had activity on the incident date at 10:48pm, 10:53pm and 10:59pm. (A. p. 410). The ping that occurred at 10:48 occurred between Third and Fourth Streets. (A. 412). This is the location where the co-defendant testified they were present when the Petitioner shot the victim. (A. p. 450; 451) There was also a ping on Bates Street. This is the street where Mr. Bobby Thomas lived. Mr. Thomas testified that Petitioner came to his house after the shooting. (A. p. 285; 308). So, the pings corresponded to cell phone towers near locations that corroborated the testimony given during trial.

Petitioner also called Mr. Robert Tressel, an expert in forensic crime scene analysis. Petitioner argues that Mr. Tressel or another expert in his field should have been hired to testify regarding the mistakes made by law enforcement at the crime scene. During his testimony Mr. Tressel admitted that .45 caliber shell casings were found at the crime scene and that the victim was killed with a .45 caliber weapon. Mr. Tressel also testified that more swabs of the hoodie found near the scene should have been made. However, during his testimony Mr. Tressel also admitted that the DNA of the Petitioner and co-defendant would be found because testimony revealed they were the only people that wore the hoodie that day. The extra swabs would have been unnecessary.

The PCR judge stated within the order of dismissal that the work of law enforcement was not perfect, however, it never is. The evidence collected by law enforcement was sufficient to prove that the Petitioner committed this crime. All of the evidence collected pointed directly to only two people, the Petitioner and his co-defendant. Both individuals were present so both could

have been convicted of murder. The testimony that was presented by Mr. Skidmore and Mr. Tressel would not have changed that fact, nor the trial's outcome.

The PCR judge's decision to deny Petitioner post-conviction relief was valid. Petitioner failed to satisfy his burden of proof that his counsel was ineffective. *Strickland*, "does not guarantee perfect representation – only a 'reasonably competent attorney,'" quoting, *Strickland*, 466 U.S. at 687. Representation is constitutionally ineffective only if counsel's conduct, "so undermined the proper functioning of the adversarial process that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. No evidence was presented revealing that Petitioner's trial counsel was ineffective.

The second guessing by the Petitioner, now that his counsel was not successful, is not why post-conviction relief exists. Within *Strickland*, second-guessing valid trial strategy is not allowed by the PCR court. Within *Strickland* it states:

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action, "might be considered sound trial strategy."

*Strickland*, 466 U.S. at 689.

The fact the Petitioner's trial counsel decided not to get the murder weapon tested for DNA was simply a sound trial strategy. To get a murder weapon tested for DNA after the Petitioner has already given a statement that it was stolen would not be beneficial to the defense if Petitioner's DNA was present on the weapon. It remains the duty of the State to prove the Petitioner's guilt, not for the Petitioner to prove himself innocent. To question the decision by trial counsel not to have the weapon tested for DNA is not proper for the PCR judge according to *Strickland*.

**2. Petitioner’s trial counsel could not be considered ineffective by not requesting a mistrial due to judge making faces during the Petitioner’s testimony, because Petitioner failed to reveal any prejudice due to the trial courts actions.**

The Petitioner argues that trial counsel was ineffective for not requesting a mistrial due to the trial court “making faces” during his testimony. During the trial, Petitioner’s counsel did bring to the trial court’s attention that the judge was making faces during his Petitioner’s testimony, possibly making the jury think that he did not believe the Petitioner. Petitioner argues that trial counsel was ineffective for not requesting a mistrial due to the actions of the trial court.

In order to be granted post-conviction relief the Applicant must prove the allegations by a preponderance of the evidence. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). This proof must reveal that the outcome would have been different but for the ineffectiveness of trial counsel. There is no proof that any jury member saw the “faces” supposedly being made by the trial judge; or, that these “faces” made them believe Petitioner was not telling the truth.

The trial court also cured any possible prejudice that might have been caused through jury instructions in which the trial court judge stated:

I also remind you that in every case tried in this court before a jury, the jury is the sole and exclusive judge of the facts. A trial judge cannot comment on or have an opinion about the facts, so don’t think by anything I said or did throughout the course of the trial I have such an opinion. I do not. (A. p. 685).

Since the Petitioner failed to reveal that the “faces,” supposedly made by trial judge, changed the outcome of this trial. The Petitioner has failed to satisfy his burden of proof; therefore, he is not entitled post-conviction relief. A mere allegation of ineffective assistance of counsel is not sufficient to warrant relief. *Id.*

There was also nothing pointed out at the hearing that revealed Petitioner was entitled to a mistrial. A mistrial should be granted only when absolutely necessary. *State v. Hill*, 382 S.C. 360, 369, 675 S.E.2d 769, 768 (2009). There was no reason to grant a mistrial in this matter, when

neither trial counsel nor PCR counsel provided any evidence that these supposed “faces” were even seen by any member of the jury, or that it made any difference in the verdict. Therefore, the decision of the PCR judge was valid and should not be subject to review by this Court.

**3. Trial counsel was not ineffective for failing to raise a possible conflict of interest issue with attorney Scott Robinson during pre-trial, due to the fact no conflict exists.**

The Petitioner argues that trial counsel was ineffective for failing to address the alleged conflict of interest involving attorney Scott Robinson. However, no conflict ever existed. In the middle of trial, Petitioner’s trial counsel brought to the attention of the trial court a possible conflict. The trial court decided to hold a hearing. At its conclusion the trial court decided that no conflict existed.

During trial the co-defendant was represented by attorney Scott Robinson. It came to the attention of trial counsel that Mr. Robinson spoke to the Petitioner once when he was initially arrested. Petitioner spoke to Mr. Robinson briefly to consider if he was going to hire him, however, Petitioner eventually hired Mr. Chambers instead.

During the trial the trial court judge decided to hold a hearing after being made aware of this possible conflict. Mr. Robinson was called to testify. Mr. Robinson testified that he only spoke to the Petitioner once and there was never any discussion of his case, and the Petitioner never gave him any discovery. (A. p. 394-395). In the South Carolina Supreme Court decision of *Duncan v. State* this Court determined what criteria must be considered in order for the court to declare that a conflict exists. *Duncan* specifically states:

...When a defense attorney places himself in a situation inherently conducive to divided loyalties ...If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be determinantal to his other client.

*Duncan v. State*, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984), quoting, *Zuck v. State of Alabama*, 588 F.2d 436, 439 (5<sup>th</sup> Cir. 1979).

No evidence was presented that Mr. Robinson owed any duty to the Petitioner. He visited him once at the beginning of this case in order to discuss his fee to determine if the Petitioner was willing to hire him. No information, nor discovery was shared by either party. Therefore, there is no ineffectiveness by Petitioner's counsel for failing to raise a conflict of interest to the trial judge's attention during the trial. The decision of the PCR court was correct and this matter should not be considered.

**4. *State v. Sierra* did not apply, so the Petitioner's trial counsel cannot be found ineffective for not raising an objection during the State's cross examination of Bobby Thomas or Petitioner.**

The Petitioner attempts to argue that the PCR judge was in error for not declaring that trial counsel was ineffective for not objecting during the cross-examination by the Assistant Solicitor of Mr. Bobby Thomas and Petitioner, pursuant to *State v. Sierra*, 337 S.C. 368, 523 S.E.2d 187 (Ct. App. 1999). However, *Sierra* does not apply to the present case; therefore, no objection was made. There exists no ineffectiveness in the decision of trial counsel in not objecting. The PCR court was correct in deciding that trial counsel cannot be considered ineffective.

In *State v. Sierra*, the South Carolina Court of Appeals determined that the trial judge erred by allowing the assistant solicitor to impeach a defense witness during cross-examination with a prior inconsistent statement that was actually told to that assistant solicitor. The PCR judge was correct in his determination that *Sierra* did not apply.

During trial the Assistant Solicitor mentioned letters written by the Petitioner. (A. p. 614, 615). However, there was never any reference to the content of these letters. These letters were never used to impeach any witnesses either. Therefore, *Sierra* never applied. There were statements made to law enforcement by Bobby Thomas and Petitioner that were used by the Assistant

Solicitor during the cross-examination of the Petitioner. These were not statements made directly to the Assistant Solicitor.

*Sierra* exists so the Solicitor could not become a witness during trial. When a prior inconsistent statement is allegedly made to the prosecuting attorney, the availability of extrinsic evidence to establish the statement is directly linked to the ability of the prosecuting attorney to appear as a witness in the trial. *Sierra*, 337 S.C. at 376, 523 S.E.2d at 191. Although a prosecuting attorney can testify, it is certainly disfavored by the court because of the weight a jury will give to a prosecuting attorney's testimony. The reason for this disfavor was given by this Court in *Sierra* when the Court of Appeals decided:

The justified reluctance of courts to permit the prosecutor to become a witness in this case reflects the belief that the jury will accord far greater weight to [his or her] testimony than to that of an ordinary witness, by virtue of the prosecutor's personal prestige and official status.

*Id.*, quoting, *People v. Langdon*, 91 Ill.App.3d 1050, 47 Ill.Dec. 573, 415 N.E.2d 578, 583 (1980).

These statements were not made to the Assistant Solicitor, they were made to law enforcement, who could easily take the stand and verify these statements, and who could also be subject to cross-examination. *Sierra* never applied to the present case, so no error was made by the PCR judge in ruling that trial counsel was not ineffective for not objecting pursuant to *Sierra*.

**5. The PCR court was correct in finding that trial counsel was not ineffective for not objecting to the closing argument of the Assistant Solicitor for bolstering or vouching.**

Petitioner argues that trial counsel was ineffective by not objecting to statements made by the Assistant Solicitor during closing arguments. During closing arguments, the Assistant Solicitor mentioned the testimony of the co-defendant that confessing probably made his testimony more reliable.

The Assistant Solicitor made this argument as a rebuttal to the closing argument of trial counsel. During his closing argument, trial counsel argued that the co-defendant had already pleaded to manslaughter, a reduced charge, and he could not be trusted. (A. p. 634). Trial counsel also stated that at no point is the co-defendant telling the whole truth. (A. p. 638).

When a witness for the State his credibility attacked by trial counsel, the State has the obligation to reveal that person is telling the truth. In the Fourth Circuit case of *U.S. v. Meacham* the Fourth Circuit United States Court Appeals decided:

We do not view as improper the prosecutor's closing argument reference to the plea bargain promise of truthfulness in this case, since it was in response to defense counsel's use of the plea bargains during their closing argument, to attack the credibility of the cooperating government witness.

*U.S. v. Meacham*, 799 F.2d 751 (4<sup>th</sup> Cir. 1986).

It was clear by the record; trial counsel questioned the honesty of the co-defendant. It is only fair that the Assistant Solicitor be allowed to address the proof the co-defendant was honest in his testimony. This was not unfair bolstering nor vouching. This was addressing accusations made by opposing counsel. There was no error committed by the PCR judge; this decision should be upheld.

## CONCLUSION

Because the post-conviction relief properly determined Petitioner failed to establish any constitutional deprivations, this Court should deny certiorari. Should this Court grant certiorari, Respondent requests the opportunity to fully brief the issues raised.

Respectfully submitted,

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