STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal from Spartanburg County

The Honorable Roger L. Couch, Circuit Court Judge

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Appellate Case No. 2010-158727

Stanley Wise, ..... Petitioner,

v.

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

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**BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

Did the PCR Court properly hold that Counsel was not ineffective for failing to object to the partially redacted transcript of Mr. Carson's testimony being sent back with the jury, when Petitioner demonstrated no prejudice?

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Spartanburg County. The Petitioner was indicted at the May 1995 term of the Spartanburg County Grand Jury for two counts of assault and battery with intent to kill (ABWIK) (1995-GS-42-3513; -3514) and one count of murder (1995-GS-42-3515). Each indictment also carried a second count of possession of a weapon in commission of a violent crime. The Petitioner was represented by Tom Dillard, Esquire. On July 15-16, 1995, the Petitioner proceeded to trial after which he was found guilty of all charges. He was sentenced by the Honorable J. Derham Cole to confinement for a period of twenty (20) years for each of the ABWIK convictions and five (5) years concurrent on each of the two related weapons convictions, natural life on the murder, and five (5) years consecutive on the related weapons conviction.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal perfected. The South Carolina Court of Appeals dismissed the appeal. State v. Wise, Op. No. 97-MO-086 (S.C. Ct App. filed August 13, 1997).

The Petitioner filed an Application for Post-Conviction Relief on September 9, 1997. In his application, the Petitioner claimed he was being held in custody unlawfully due to ineffective assistance of counsel. A hearing on the application was held on January 9, 2001, before the Honorable John C. Hayes III. The Petitioner was present for the hearing and was represented by James Spears, Esquire. On January 24, 2001, Judge Hayes granted post-conviction relief and ordered a new trial for the Applicant. The State

filed a timely Notice of Appeal. On April 7, 2003 the South Carolina Supreme Court dismissed the appeal. Wise v. State, Op No. 2003-MO-029 (filed April 7, 2003).

On October 18-20, 2004, a second trial was conducted before Judge Cole and a jury. Petitioner was represented at this trial by Thomas A.M. Boggs, Esquire. On October 20, 2004, Petitioner was again found guilty of all charges. He was sentenced by Judge Cole to terms of life in prison for murder, ten (10) years on each of the ABWIK convictions, and five (5) years on each of the related weapons charges. The sentences were to run concurrently.

A timely Notice of Appeal was filed and an appeal perfected. The South Carolina Court of Appeals dismissed the appeal. State v. Wise, Op. No. 2008-UP-001 (S.C. Ct. App., filed January 2, 2008).

Petitioner then filed an Application for Post-Conviction Relief on May 15, 2008. On April 8, 2009, an evidentiary hearing was convened at the Spartanburg County Courthouse. The Applicant was present in court and represented by T. Ryan Langley, Esquire. Michelle Parsons Kelley, Assistant Attorney General, represented the State. Judge Roger L. Couch dismissed Petitioner's application by written Order on March 16, 2010.

A timely Notice of Appeal was filed on Petitioner's behalf and a Petition for Writ of Certiorari and Respondent's Return to the Petition were submitted. The Supreme Court of South Carolina granted the Petition for Writ of Certiorari on April 3, 2013. A Brief of Petitioner was filed and this Brief of Respondent 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 the partially redacted transcript of Mr. Carson's testimony being sent back with the jury, when Petitioner demonstrated no prejudice.

In this case, Petitioner was indicted on charges of murder, assault and battery with intent to kill, and possession of a weapon during commission of a violent crime. Petitioner was found guilty of all charges. After his first post-conviction relief application was granted, Petitioner was tried on the same charges again. Again, Petitioner was found guilty of all charges. A witness who testified at Petitioner's first trial, Marcus Carson, was also present to testify at the second trial on behalf of the State. However, at the second trial, Mr. Carson proceeded to testify that he did not recall any previous statements or testimony that he had given as related to the charges Petitioner faced. The State introduced into evidence, over Counsel's objections, Mr. Carson's previous statement to the police, as well as the transcript of Mr. Carson's previous testimony in an attempt to impeach Carson. Ultimately, after much discussion, the court allowed for a redacted copy of the transcript to be entered into evidence, and published to the jury in its written form as they entered deliberations.

Petitioner now alleges that Counsel was ineffective because Counsel failed to object when the court allowed the redacted copy of Carson's testimony to go back with the jury during deliberations. Respondent submits that Counsel made appropriate motions and objections in an attempt to prevent the jury from hearing or reviewing Mr. Carson's previous testimony. Respondent submits that not only has Petitioner failed to prove that Counsel was deficient as to this matter, but Petitioner has also failed to demonstrate any prejudice suffered as a result of the alleged deficiency. Therefore, Respondent argues that Petitioner has failed to meet his burden of proof as to the claim of ineffective assistance of counsel.

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. Here, Petitioner has failed to meet either prong of the Strickland test and has failed to show that Counsel was ineffective.

At the PCR hearing, Petitioner testified that Counsel should have objected to the jury being permitted to take the redacted version of Mr. Carson's prior testimony into the jury room for deliberations. (App. p. 509). Petitioner testified that this unduly emphasized the evidence pursuant to State v Gulledge[1]. (App. p. 509). Petitioner further testified that he specifically asked Counsel to make that objection during the trial. (App. p. 511). Counsel testified that he objected to Carson's prior testimony's admissibility as a whole and did not renew his objection once the evidence had been admitted. (App. p. 525). Counsel also testified that he did not recall whether or not Petitioner asked him to object at that time. (App. p. 525).

The record reflects that Counsel first objected to the introduction of the transcript as evidence under Rule 613(b), SCRE, after the State asked Mr Carson to either admit or deny that he made the statements included in the testimony. (App. p. 335). At that time, the court overruled Counsel's objection and instructed that the document should be entered as a court's exhibit. (App. p. 335). Extrinsic evidence of a prior inconsistent

1 277 S C 368, 287 S E 2d 488 (1982)

statement by a witness is admissible when the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement and does not admit that he has made the prior inconsistent statement. Rule 613(b), SCRE.

The exhibit was not published to the jury at that time. A conversation was later held outside the presence of the jury, with Counsel again reiterating that he objected to the introduction of the transcript, but acknowledging that the court was going to only publish a redacted copy. (App. p. 353). Counsel also objected to the transcript being entered into evidence as a violation of the confrontation clause. (App. p. 375). However, the court ruled that the evidence was admissible through Rule 613, SCRE, and also under Rule 804(b)(1), the transcript would be admissible. (App. p. 402-3).

In the Order dismissing Petitioner's application for post-conviction relief, the court found that Petitioner had failed to meet his burden of proof as to this issue. The court pointed out, after reviewing the record and established case law[2], it was well within the trial court's discretion to either publish evidence entered at trial to the jury in the courtroom or allow them to take it into the jury room. (App. p. 562). In the case at hand, as the court noted, the redacted version of the transcript was not available until the completion of the trial. (App. p. 560, 562). Therefore, the option of publishing the redacted copy of the testimony in the courtroom was not available to the State or Petitioner.

"Absent clear prejudice to appellants . . . the decision to send properly admitted exhibits to the jury room rests within the discretion of the trial court." United States v.

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2 The Court reviewed State v Gulledge, 277 S C 368, 287 S E 2d 488 (1982), State v Plyler, 275 S C 291, 270 S E 2d 126 (1980) and State v Hess, 279 S C 14, 301 S E 2d 547 (1983) (App p 560-1)

Aragon, 983 F.2d 1306, 1309 (4th Cir. 1993). Respondent submits that Petitioner failed to demonstrate that he suffered any prejudice as a result of the redacted copy of the transcript being sent back into the jury room. In addition to the redacted transcript, Mr. Carson's previous statement to the police was introduced and published to the jury in the courtroom. (App. p. 326-9). This statement detailed the events of that night and of Petitioner's actions, which led to the victim's death. (App. p. 328-9). Furthermore, the jurors heard several times from the court that it was their duty to weigh the evidence presented to them and to judge the credibility of the evidence presented. (App. p. 49, 449). Counsel, during closing arguments, focused on the jury's duty to weigh the credibility of Mr. Carson by weighing his demeanor on the stand and his unwillingness to answer questions. (App. p. 441). Further, Counsel pointed out Carson's age at the time he made the statement, supposed threats by the State, and his criminal record. (App. p. 441-2).

The only case to find that a trial judge abused his discretion by allowing transcripts to go to a jury was the Gulledge case. State v. Gulledge, 277 S.C. 368, 287 S E 2d 488 (1982). The court found because two previous State witnesses had testified to the substance of the 911 call during trial and the tape of the call was played to the jury; sending a transcript of that call to the jury overemphasized the evidence. However, in the case at hand, the jury heard nothing of substance related to Mr. Carson's previous testimony and had seen or heard no version of the testimony before retiring to the deliberation room.

It is clear from the record presented, that Counsel made all efforts to prevent the jury from hearing or reviewing Mr. Carson's previous statements or testimony.

Therefore, Respondent submits that Counsel properly objected to the evidence when it was offered and worked with the State to make sure the redacted version was proper before the jury viewed it. Counsel was not ineffective for failing to further object to the redacted copy of the transcript. Respondent submits that Petitioner has failed to meet his burden of proof as to this argument.

**CONCLUSION**

For the reasons stated above, this Court should affirm the lower court's ruling.

Respectfully submitted,

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By: _____
ATTORNEYS FOR THE RESPONDENT

November 4, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Appeal From Spartanburg County
In The Court of Common Pleas

The Honorable Roger L Couch, Circuit Court Judge

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Case No 2008-CP-42-2536
**Appellate Case No.: 2010-158727**

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STANLEY WISE, Petitioner,

v

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 Brief of Respondent was served upon Petitioner by depositing the same in the United States mail, postage prepaid, addressed to his attorney of record, Kathrine H Hudgins, Esquire, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina, 29211, on this the 4th day of November, 2013.

Anne Mueller
Anne A Mueller
Legal Assistant for Respondent

SWORN to before me this
4th day of November, 2013

_____(L S)
Notary Public for South Carolina
My Commission Expires _____