

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Appeal from Charleston County  
Honorable Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2013-000083

**RECEIVED**

DEC 12 2013

JAMES AIKEN,

**S.C. Supreme Court**  
Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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## QUESTIONS PRESENTED

1. Is there probative evidence to support the lower court's ruling that trial counsel was not ineffective for not objecting to the victim's testimony about his missing wallet when there was no legal basis to object to the testimony and counsel was able to use the testimony to the benefit of the defense?
2. Is there probative evidence to support the lower court's ruling that statements made by trial counsel during closing argument were not prejudicial to the Petitioner when counsel's closing argument supported the defense theory of the case and counsel articulated a valid strategic reason for making the statements?

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Charleston County Clerk of Court. The Petitioner was indicted at the May 2010 term of the Charleston County Grand Jury for first degree burglary (2010-GS-10-3117). He was represented by Mary Beth Mullaney, Esquire, and Lorelle Proctor, Esquire.

The Petitioner proceeded to trial and was found guilty. On January 19, 2011, the Petitioner was sentenced by the Honorable R. Markley Dennis to confinement for twenty (20) years.

A Notice of Appeal was filed on the Petitioner's behalf at the South Carolina Court of Appeals. Breen Stevens, Esquire of the South Carolina Office of the Appellate Defense perfected the appeal. The Applicant signed an affidavit dated August 11, 2011 indicating that he wished to withdraw the appeal. The Court of Appeals issued an Order dismissing the appeal on September 2, 2011 and the Remittitur was issued on September 22, 2011.

The Petitioner filed an application for post-conviction relief (PCR) on October 13, 2011. The Respondent made its Return on February 13, 2012. An evidentiary hearing on the matter was convened on December 5, 2012 at the Charleston County Courthouse. The Petitioner was present at the hearing and represented by Justin Bamberg, Esquire. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. The Applicant testified at the hearing along with Mary Beth Mullaney, Esquire, Breen Stevens, Esquire, Leon Goodwin, and Cora Aiken. By Order filed January 15, 2013, the Honorable Roger M. Young, Sr. denied and dismissed with prejudice the Petitioner's application. The Petitioner filed a Notice of Appeal and a Petition for Writ of Certiorari. This Return follows.

## ARGUMENT

The Petitioner asserts that the post-conviction relief court erred by finding trial counsel was ineffective for failing to object to testimony from the victim about his missing wallet. The Petitioner also asserts the post-conviction relief court erred by finding trial counsel's comments during closing argument were proper and did not prejudice the Petitioner. The Respondent submits probative evidence exists to support the post-conviction relief court's findings that counsel was not ineffective for failing to object to testimony about the missing wallet and counsel's closing argument was proper. The petition should be denied and the appeal dismissed.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant 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 (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, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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 Applicant 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. The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test.

On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 369 (1997); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

**I. There is probative evidence to support the lower court's finding that counsel was not ineffective for failing to object or move to exclude the testimony of Michael Morrison, the victim, about his missing wallet.**

The Petitioner asserts trial counsel was ineffective for failing to object to testimony from the victim, Michael Morrison, at trial about his missing wallet. The Respondent submits the Petitioner failed to carry his burden of proving counsel should have objected to Morrison's testimony and that counsel's failure to do so resulted in prejudice. The Petitioner has failed to present any legal basis for an objection to Morrison's testimony and trial counsel was ultimately able to use the testimony to benefit the Petitioner at trial.

The Petitioner was accused of entering the victim's bedroom and rummaging through the victim's dresser drawers while the victim was sleeping in bed. After the victim made himself known to the intruder, the intruder responded he was simply returning a shoe. (App. 107:3-10). The man left the home and the victim followed him on foot until the police arrived. (App. 107:11-110:21). In a statement given to police, the Petitioner admitted being present in the victim's home without permission. (App. 151:1-18).

The victim testified he later noticed his wallet was missing from the apartment. (App. 112:8-16). He testified he usually kept his wallet on the dresser with his keys. (App. 113:5-19).

The victim testified further he retraced his steps and was unable to find the wallet. (App. 114:2-11).

The Respondent submits the victim's testimony about the missing wallet was not objectionable and the Petitioner has failed to present any legal basis for the exclusion of the testimony. Trial counsel testified she argued at trial that there was no evidence that the Petitioner took the victim's wallet. (App. 368:22-24). She testified further that she did not object to the victim's testimony about the wallet because she did not have any legal grounds to exclude the testimony. (App. 369:9-13, 370:10-14). Trial counsel testified further the victim's testimony was not evidence, but simply the victim's recollection of events. (App. 378:23-25).

Trial counsel also testified she did not want to make a motion for something that she did not feel she was going to win. (App. 379:6-7). The Respondent submits trial counsel could not have been reasonably expected to make an objection that she thought would have been futile. "[O]ur courts have developed the doctrine of futility, which recognizes that in circumstances where it would be futile to raise an objection to the trial judge, failure to raise the objection will be excused." State v. Covert, 368 S.C. 188, 201, 628 S.E.2d 482, 489 (Ct. App. 2006) aff'd as modified, 382 S.C. 205, 675 S.E.2d 740 (2009). The Respondent submits the Petitioner failed to carry his burden of proving counsel's performance was deficient for failing to object to the victim's testimony about his missing wallet.

The Respondent also submits the Petitioner has also failed to show prejudice resulted from counsel's failure to object. At the evidentiary hearing, trial counsel testified she was able to use the testimony about the missing wallet to the Petitioner's advantage at trial. (App. 370:19-24, 386:21-387:3). Following the victim's testimony about the wallet, trial counsel was able to cross-examine the victim on the fact that he never lost sight of the Petitioner and he never saw the

Petitioner discard anything while he was chasing him. (App. 387:18-24). This line of questioning supported the defense theory that the Petitioner did not steal the victim's wallet and he did not have the intent to commit a crime when he entered the victim's bedroom. This line of question also presented the jury with an alternative to the State's theory that the Petitioner stole the victim's wallet after rummaging on the victim's dresser. The Respondent submits the Petitioner failed to carry his burden of proving prejudice resulted from counsel's failure to object to the victim's testimony about his missing wallet.

The Petitioner also asserts trial counsel's failure to object resulted in the issue not being preserved for appellate review. In order for an issue to be properly preserved for appeal, it must have been both raised to and ruled on by the trial court. Mathis v. Brown & Brown of South Carolina, Inc., 698 S.E.2d 773 (S.C. 2010). The Petitioner has failed to show that had the issue been preserved for appellate review, an appellate court would have found the testimony should have been excluded and that verdict in the Petitioner's case would have been different had the testimony been excluded. Further, the Petitioner failed to present a basis for any objection to the victim's testimony and Appellate courts do not require parties to engage in futile actions in order to preserve issues for appellate review. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). The Respondent submits there is probative evidence to support the lower court's ruling that counsel was not ineffective for failing to object to the victim's testimony about his missing wallet.

**II. There is probative evidence to support the lower court's ruling that counsel's closing argument was proper and did not prejudice the Petitioner.**

The Petitioner asserts trial counsel's closing argument was improper and prejudicial to the Petitioner's defense. The Petitioner asserts the two following statements made by trial counsel during closing argument were improper:

And Mr. Aiken thinks, ‘you know what? I’ll return this shoe to someone in the house and I’ll tell them, you know, your door’s open. And maybe, just maybe, they’ll give me a dollar or two. Maybe I’ll get a tip. So that’s what I’ll do.’ (App. 251:7-12).

This case is not a popularity contest between Mr. Morrison or Mr. Aiken. It’s not about who is more likeable. Because if it’s about who’s more likeable, then Mr. Morrison wins. (App. 257:21-25).

The Respondent submits trial counsel’s closing argument was proper and did not prejudice the Petitioner’s case.

“It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries’ positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant’s guilt.” State v. Mouzon, 321 S.C. 27, 31-32, 467 S.E.2d 122, 124-25 (Ct. App. 1995) aff’d, 326 S.C. 199, 485 S.E.2d 918 (1997) (citing Herring v. New York, 422 U.S. 853, 862 (1975)).

The Respondent submits trial counsel’s statements supported the defense theory of the case and trial counsel articulated a valid strategic basis for the statements made during closing argument. Strickland requires that trial counsel must be given leeway to make reasonable strategic decisions. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Strickland v. Washington, 466 U.S. 668, 688-689 (1984). “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.” Id. at 691. Therefore, judicial scrutiny of counsel’s performance must be highly deferential. Id. at 689. Where counsel articulates a valid strategic reason for his action or inaction, counsel’s performance should not be found ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). Courts must be wary of

second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992).

The Respondent submits trial counsel's statement about the defendant thinking he could return the shoe and possibly be given money was proper. The statement supported the defense theory that the Petitioner did not enter the home with the intent to commit a crime. Also, trial counsel reasoned that during her closing argument she wanted to explain to the jury why someone would go into someone's home on a Saturday morning. (App. 421:3-11).

The Respondent submits trial counsel's statement about the victim being more likable than the Petitioner was also proper. Counsel testified she did not feel the statement was prejudicial to the Petitioner. She testified further "the jury had already heard when that evidence came in that Mr. Aiken was somebody who, you know, was potentially homeless because he was carrying around his clothing and selling homemade greeting cards, so I was trying to reconcile that evidence." (App. 410:8-20). She also testified "sometimes you have to be honest with a jury and reconcile what the evidence is and ask them to follow the law and they have to deal with the facts that they're given." (App. 411:12-17). The Respondent submits the statements made by counsel during closing argument were an attempt for counsel to gain credibility with the jury. During closing argument, counsel effectively presented to the jury the Petitioner's version of the case. The Respondent submits counsel articulated a reasonable strategic basis for the statements made during closing argument.

The Petitioner also asserts Lounds v. State is dispositive on the issue of whether or not counsel's closing argument was proper. 380 S.C. 454, 670 S.E.2d 646 (2008). However, the facts of this case are distinguishable from the facts surrounding counsel's closing argument in

Lounds. In Lounds, trial counsel was found ineffective for making a closing argument that did not support the defense of the case. The defendant was charged with armed robbery and kidnapping. Id. at 457, 670 S.E.2d at 648. At trial, the victim and the defendant gave two different accounts of the night of the incident. Id. at 458, 670 S.E.2d at 648. The defendant's version of the facts did not include any threats or the use of weapons or force. Id. During his closing argument, trial counsel made comments contrary to the defendant's version of the facts which suggested the defendant may have used force during the incident. Id. at 465, S.E.2d at 651. Trial counsel also pounded his fist repeatedly during his argument to display use of force to the jury. Id. This Court found counsel's performance was deficient and it affected the outcome of the defendant's trial.

Unlike in Lounds, the closing argument presented by trial counsel in this case supported the Petitioner's version of the case and there is no evidence that counsel made any physical displays contrary to the defense's theory of the case. The Respondent submits Lounds is not dispositive in this case since the two cases are distinguishable. The Respondent submits the Petitioner failed to carry his burden of proving counsel's closing argument was improper and prejudiced the outcome of the proceeding.


**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

Dec. 12, 2013

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

Appeal From Charleston County  
The Honorable Roger M. Young, Sr. Circuit Court Judge

JAMES IVAN AIKEN

Petitioner,

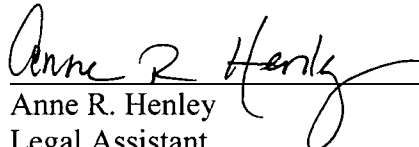
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STATE OF SOUTH CAROLINA

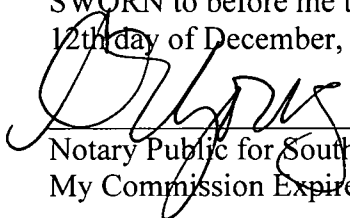
Respondent,

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Respondent's Returns to Petition for Writ of Certiorari has been served upon opposing counsel, David Alexander, this 12th day of December.

  
\_\_\_\_\_  
Anne R. Henley  
Legal Assistant

SWORN to before me this  
12th day of December, 2013.

  
\_\_\_\_\_  
(L.S.)  
Notary Public for South Carolina.  
My Commission Expires: 12/28/2014



ALAN WILSON  
ATTORNEY GENERAL

December 12, 2013

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

**RECEIVED**

DEC 12 2013

**RE: James Ivan Aiken v. State of South Carolina  
Appellate Case No. 2013-000083**

**S.C. Supreme Court**

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Respondent's Return to Petition for Writ of Certiorari in the above matter for filing in your office. By copy of this letter we are serving opposing counsel with this return today.

With highest regards,

Ashleigh R. Wilson  
Assistant Attorney General

ARW/arh  
Enclosures

cc: Lanelle C. Durant, Esquire

STATE OF SOUTH CAROLINA