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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Lancaster County
Honorable Roger E. Henderson, Trial Judge
Honorable Patrick C. Fant, III, Post-Conviction Relief Judge

Appellate Case No. 2025-001688

DEMARCUS O. FOSTER, #328197,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S ISSUES PRESENTED

(I) Did the PCR court err in excusing trial counsel's ineffective assistance in failing to object to the lower court's improper implied malice charge, and did the PCR court err in finding the matter harmless beyond a reasonable doubt?

(II) Did the PCR court err in denying trial counsel was ineffective when he failed to object on the record to the admission of petitioner's prior record without the required judicial scrutiny under Rule 609, SCRE?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES PRESENTED

(I) Whether the post-conviction relief court correctly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object to the trial court's improper implied malice charge?

(II) Whether the post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object on the record to the admission of Petitioner's prior record without the required judicial scrutiny under Rule 609, SCRE?

STATEMENT OF THE CASE

Petitioner Demarcus O. Foster was indicted by the Lancaster County Grand Jury during its May 2018 term for Murder (2018-GS-29-00899), Possession of a Weapon by a Convicted Felon (2018-GS-29-00902), and Possession of a Weapon During a Violent Crime (2018-GS-29-00903). Mark H. Grier, Jr., Esquire (Trial Counsel), represented Petitioner. Assistant Attorney Generals Jarrod Fussnecker and Heather Weiss prosecuted the case. In pre-trial negotiations, the State agreed to withdraw life without parole and make a recommendation or a cap of 50 (fifty) years; however, Petitioner rejected the offer and was served with the intent to seek life without parole.

On March 18, 2019, Petitioner waived his right to a jury trial on his charge of Possession of a Weapon by Convicted Felon (-00902). A bench trial was held before the Honorable Roger E. Henderson on indictment 2018-GS-29-00902, and a jury trial was held simultaneously on the remaining indictments. The jury convicted Petitioner as indicted, and Judge Henderson sentenced him concurrently to life for murder and 5 (five) years for the weapon charge.

Petitioner filed a direct appeal. Appellate Defender David Alexander submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal pursuant to Anders. The Remittitur was returned on October 25, 2021.

Petitioner filed his application for post-conviction relief on September 14, 2022. The State filed its Return and Partial Motion to Dismiss on January 4, 2023. On February 20, 2024, an evidentiary hearing was convened before the Honorable Patrick C. Fant, III. Petitioner was present and represented by Rodney W. Richey, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II, represented the State. At the hearing, the court heard testimony from Petitioner and Trial Counsel. In an order filed on May 19, 2025, Judge Fant denied relief and dismissed the application with prejudice.

Petitioner timely filed a notice of appeal on August 25, 2025. On December 15, 2025, Petitioner filed his Petition for Writ of Certiorari and Appendix. This Return to Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

At trial, the State presented evidence that the victim was hanging out with several other individuals outside Roger Harris's (Harris) home at 946 16th Street in Lancaster, South Carolina, when the victim was shot. (App'x pp. 80-81).

Sergeant Carroll testified he was dispatched to 946 16th Street at 8:33 p.m., and other than the victim, Mr. Harris, and Kaneisha Young, there was no one else there when he arrived at the scene. (App'x p. 102).

Dr. Janice Ross, an expert in the field of forensic pathology, testified that the cause of victim's death was brain death due to the laceration of the brain due to a gunshot wound to the head. (App'x p. 395).

Harris testified that he remembered seeing the victim in the yard and that the victim was not a violent man. (App'x p. 81). Harris testified that earlier that evening, he sat on the porch and, when it got dark, he went inside. (App'x p. 86). Harris testified that after having been inside for about fifteen minutes, he heard a gunshot. Id. Harris testified that when he went outside to see what was happening, he saw the victim had been shot and was lying in the yard. Id. Harris testified that the victim was trying to move, and he told the victim not to move and called 911. Id. Harris further testified that he did see[1] Deuce, after the gunfire, who lived across the street at that point in time. (App'x p. 89). Harris further testified that a man later identified as Petitioner stood in front of him on his porch that night, and he told the man to move, and there was no issue after that. Harris testified that he did not know who Petitioner was, and this was the first time he had seen him there. (App'x p. 90).

[1] Deuce was the nickname for Lashawn White. (App'x p. 106).

Kaneish Young (Young), who lived across the street from Harris, testified that she heard a gunshot while she was inside her house but did not see anything. (App'x p. 112; pp. 115-116). However, Young testified over the defense's excited-utterance objection that Quaterious Peay ran inside her house and said Petitioner shot Victim.[2] (App'x pp. 104-08; pp. 116-17).

Kristavius Stevens (Stevens) testified that he saw the victim outside Harris's home that night. (App'x p. 165). Stevens testified that he saw Maryam driving a white Honda pull into the lot where everyone was standing. (App'x p. 166). Stevens testified that Petitioner and Tweak were also in the car with her. Id. Stevens testified that Petitioner got out of the passenger's side of the door and headed toward the porch while carrying a Yuengling Lager bottle. (App'x p. 172). Stevens testified that Petitioner chatted and then pulled out a gun and said, "You all ain't seen nothing." (App'x p. 171). Stevens testified that he took off running when he heard a gunshot. Id. Stevens testified that Petitioner had a revolver and shot the victim. Id.

Jalisa Stover testified she saw a white Honda fleeing the area shortly after the shooting. (App'x pp. 151-52).

Lashawn White (White)[3], who was outside Harris's home that night, acknowledged his hands were positive for gunshot residue[4] following the shooting. (App'x p. 199). White testified that he does not have a nickname and would be surprised to know he has been referred to as "Deuce." (App'x p. 185). White testified that on the night of September 27, 2017, he remembered a shot was fired. (App'x p. 195). White further testified that he did not recall telling law

[2] Although Peay testified, he denied seeing who shot Victim or telling anyone that Petitioner shot Victim. (App'x p. 230).
[3] At the time of trial, Mr. White was incarcerated for cocaine, marijuana, and common law robbery, along with other pending charges in Lancaster County. (App'x p. 184). However, he denied being a business associate and selling drugs to the victim. (App'x p. 368).
[4] At trial, it was discovered that they found three particles of gun residue, two on the palm of his right hand and one on the back of his right hand. (App'x p. 337).

enforcement that the person who did the shooting was Bullet's brother. (App'x p. 197). White testified that Bullet had passed away and was one of his old friends. Id. White testified that he probably recalled telling law enforcement that when the man walked up on the porch, the shot happened seconds after he got on the porch. (App'x p. 372).

Maryam Rivera (Rivera) testified that at the time of trial, she was Petitioner's girlfriend. (App'x p. 280). Rivera testified she was charged with accessory after the fact to murder. (App'x p. 280). Rivera testified that Petitioner did not have a car and that she had a white Honda Accord. (App'x p. 295). Rivera testified that on the night of the murder, the plan was to take Petitioner to see his niece, which she had done frequently on separate occasions. (App'x p. 284). Rivera testified that she would take him to a house that was behind Shrimp Boat. Id. Rivera testified that when she picked up Petitioner, they headed to 16th Street to see his niece. (App'x p. 287). Rivera testified that Petitioner was with Tweak, whose first name is Quinterious. (App'x p. 291). Rivera testified that when they arrived, she pulled up on the side and remained in the car on the phone listening to music. (App'x p. 287). Rivera testified that they were there for about 30 minutes, then left to pick up her cousin to hang out. (App'x pp. 287-291). Rivera testified that they all returned to 16th Street the second time, and she backed into the gravel area because Petitioner told her to. (App'x p. 293).

Rivera testified that she remained in the car, with her cousin, smoking and drinking while Tweak and Petitioner got out of the car. (App'x p. 294). About fifteen minutes later, Rivera testified that she heard a gunshot and not even a minute later, Petitioner and Tweak returned to the car, and Petitioner told her, "Let's go." (App'x p. 297). Rivera testified she did not see any weapons that night and did not know what was inside Petitioner's bag. (App'x p. 296). Rivera testified that when they left, Petitioner told her to head over to "Big Richard's house," where only Petitioner got

out when they arrived. (App'x p. 298). Rivera further testified that "Big Richard's" house is behind the cemetery, where they went after visiting Petitioner's brother's grave. Id.

Ladario Jones (Jones) testified he was on Harris's porch on the night of the shooting. (App'x p. 318). Jones testified that the victim arrived five minutes after Petitioner had arrived. Id. Jones testified that everyone was gathered around the porch steps, including Petitioner. Id. Jones testified that he first met Petitioner in 2014. (App'x p. 315). Jones testified that, leading up to the incident, he saw Petitioner with a gun more than once. (App'x p. 316). Jones further testified that it was a gray, chrome pistol. Id.

Jones testified he had arrived at Roger Harris's house around 5:30/6:00 p.m. on the night of the incident. Id. Jones testified that Petitioner arrived shortly after that, around 6:30 p.m. (App'x p. 317). Jones testified that the victim arrived about five minutes after the Petitioner did. Id. Jones testified that Maryam drove Petitioner to Harris' house in a white Honda. Id. Jones testified that while everyone was standing there together, Lashawn and the victim were speaking. (App'x p. 320). Specifically, Jones testified Lawshawn said to the victim, "This is my friend. He is my home boy. I love you, boy. I love you back." (App'x p. 320). Next, Jones testified that Petitioner "got off the porch, and he shot him in the head." (App'x p. 321). Jones testified that he saw the gun Petitioner used, and it was a revolver. (App'x p. 322). Jones testified that after having shot the victim, he passed the gun off to "Quinn aka Tweak," grabbed his beer, and walked back to the car. (App'x p. 323).

Petitioner testified that his brother, Markevis, also known as "Bullet," was his best friend. (App'x p. 478). Petitioner testified that he was called that because of his speed. Id. Petitioner testified that he recalled when his brother died in June 2017. Id. Petitioner testified he had been accused of murder within a few months after his brother's death. Id. Petitioner testified that he

had just met his niece and would always visit them. Id. Petitioner testified that after his brother's death, he stepped in, visited her at Baker Street, where she lived, right by the Shrimp boat. Id.

Petitioner testified on September 27, 2017, that he had planned to meet with his "girl" after she finished work. (App'x p. 481). Petitioner testified that when they arrived, there was a crowd of people gathered outside, including his cousin Ny and niece, Markhyla. Id. Petitioner testified that he chatted with his niece, who shared her words of the day, including "horse" and "orange." Id. Petitioner further testified that 16th Street had a bad reputation, but on this day, it was a "fair vibe." Id.

Petitioner further testified that he chatted with a man who goes by the nickname of Bad Ass near the car and was joking about a fight he had been in the night before. Id. Petitioner testified that they ended up walking on the porch, where they encountered a "dude" he had seen in the projects, and they chatted briefly. Id. Petitioner testified that he went back towards the car and could not remember whether he left. Id. Petitioner also testified that he remembered that it was starting to get dark, and the same guy he had spoken to earlier on the porch asked for a beer. (App'x p. 490). Petitioner testified that when he went to give him the beer, he heard a gunshot, and went towards the car and told his girl, "Let's go." Id.

STANDARD OF REVIEW

The standard of review for post-conviction relief 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 post-conviction relief court's factual findings and will uphold them if there is any 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 give great deference to a PCR court's credibility findings because appellate courts lack 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 will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180–81, 810 S.E.2d at 839–40. 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

I. The post-conviction relief court correctly determined Petitioner failed to establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object to the trial court's improper implied malice charge.

Petitioner contends that the post-conviction relief court erred in failing to find he was prejudiced by Trial Counsel's deficient performance in failing to object to the trial court's improper implied malice charge. However, the post-conviction relief court correctly found that while Trial Counsel's performance was deficient, Applicant failed to prove any prejudice where the other evidence of malice present in this case rendered the error harmless. Accordingly, this Court should deny certiorari to this issue.

An ineffective assistance claim based on a failure to object is tied to the admissibility of the underlying evidence." Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001). "If evidence admitted without objection was admissible, then the complained of action fails both prongs of the Strickland test: failing to object to admissible evidence cannot be a professionally 'unreasonable' action, nor can it prejudice the defendant against whom the evidence was admitted." Id. Also, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691.

The "use and timing of objections at trial is a quintessential matter of strategy and discretion on the part of the trial attorney and will very seldom constitute objectively deficient representation." United States v. Nguyen, 379 F. App'x 177, 181 (3d Cir. 2010); see Humphries v. Ozmint, 397 F.3d 206, 234 (4th Cir. 2005) (Luttig, J., concurring) ("[I]t is well established that failure to object to inadmissible or objectionable material for tactical reasons can constitute objectively reasonable trial strategy under Strickland."); cf. Bergmann v. McCaughtry, 65 F.3d

1372, 1380 (7th Cir. 1995) (noting that deciding when to object is a matter of trial strategy that a lawyer has to make on the spot.).

"A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense." Lowry v. State, 376 S.C. 499, 505–06, 657 S.E.2d 760, 763 (2008). For this reason, an unconstitutional jury instruction will not require reversal of the conviction if the Court determines "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 507, 657 S.E. 2d at 764 (quoting from Chapman v. California, 386 U.S. 18 (1967).

In Belcher, the Supreme Court held that "[a] jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina where evidence is presented that would reduce, mitigate, excuse or justify the homicide." State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019). Belcher was overruled by Burdette in September 2019, holding that "[r]egardless of the evidence presented at trial, a trial court shall not instruct the jury that it may infer the existence of malice when the deed was done with a deadly weapon." Burdette, 427 S.C. at 503, 832 S.E.2d at 582.

In Gibson v. State, the Supreme Court held that the Gibson was prejudiced by the inferred malice charged, given that it completely omitted the permissive language suggested in Elmore[5]. Gibson v. State, 416 S.C. 260, 786 S.E.2d 121 (2016), overruled by State v. Burdette, 427 S.C.

[5] State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), overruled by on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), and overruled by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

490, 832 S.E.2d 575 (2019). The Gibson Court held that counsel was deficient for failing to object to the charge, as the malice charge shifted the burden to Gibson based on the omission of the required permissive language. 416 S.C. at 265, 786 S.E.2d at 124. Additionally, the Gibson Court held that Gibson was prejudiced by counsel's failure, as there was little evidence of malice presented at trial other than the use of a deadly weapon. Id., citing State v. Fennell, 340 S.C. 266, 531 S.E.2d 512 (2000) (malice is hatred, ill-will, or hostility toward another person; a wrongful intent to injure another person indicating a wicked or depraved spirit intent on doing wrong; a formed purpose and design to do a wrongful act without legal justification or excuse).

Here, the post-conviction relief court expressly found deficiency under Gibson v. State, *supra*. The post-conviction relief court held in detail:

> Turning to Applicant's allegation Trial Counsel should have objected based on Gibson, this Court finds that Trial Counsel was deficient for failing to object on this basis. The trial court's charge completely omitted the required permissive language from Elmore, similar to Gibson. Trial Counsel should have objected to the malice charge, as it constituted burden shifting, and therefore, he was deficient.

(App'x p. 766).

The post-conviction relief court then correctly held that Petitioner failed to prove any prejudice:

> However, Applicant cannot show prejudice from Trial Counsel's deficient performance, as he cannot show that the erroneous instruction contributed to the verdict based on all the evidence presented to the jury. … The following evidence was presented to the jury for consideration to this issue alongside the evidence of the use of a deadly weapon: Applicant told a witness, Jakenia, 'You need to get your daughter inside,' prior to the shooting (ROA pp. 253-54); Applicant left the scene to change his clothes from a bright colored shirt to a black shirt and black hat when it got dark (ROA pp. 317, 539); Applicant drove back to the scene of the crime in the passenger seat when it was dark, and instructed the driver to back into the lot, next to the steps of the residence (ROA pp. 166; 293); Prior to the shooting, Applicant said, 'You-all ain't seen nothing' (ROA p. 171); an eyewitness, Jones, saw Applicant shoot the victim in the head (ROA pp. 317-23; 262). Considering all these, Trial Counsel's failure to object to the omission of the permissive language was harmless error, as there was overwhelming evidence of malice.

(App'x p. 767).

Notably, Petitioner ignores this overwhelming independent evidence of malice. Two eyewitnesses gave direct, unimpeached testimony that Petitioner deliberately executed the Victim. Kristarius "Bree" Stevens testified that Petitioner chatted with folks on the porch, then pulled out a gun and said, "You all ain't seen nothing," before shooting the victim in the head with a revolver. (App'x p. 171). Similarly, Ladario "Dario" Jones testified that Petitioner got off the porch and shot the victim in the head, and that he saw the revolver used by Petitioner. (App'x pp. 321-322).

Further ignored in the petition is that Petitioner left the scene, changed from a bright-colored shirt into dark clothing, returned to the scene in dark clothing, and instructed the driver to back the car in next to the porch steps and wait, *then* the shooting occurred. (App'x pp. 166; 293; 317, 539). These deliberate pre-shooting actions demonstrate planning, preparation, and malice aforethought.

Additionally, Petitioner's attempt to manufacture a "heat of passion" or third-party-guilt theory from the earlier murder of Petitioner's brother and Lashan White's statements is unavailing. Petitioner's trial strategy was one of complete innocence and alibi, where he denied shooting the Victim or even possessing a gun. The jury was never asked to consider involuntary or voluntary manslaughter. The solicitor argued a deliberate, unprovoked execution. (App'x pp. 646-647). The post-conviction relief court properly concluded that, given the strength of the State's case, the instructional error did not contribute to the verdict and was thus harmless. See Lowry v. State, *supra*. Because the error was harmless, there is no Strickland prejudice.

Accordingly, this Court should deny certiorari to this issue.

II. The post-conviction relief court correctly determined Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's failure to object on the record to the admission of Petitioner's prior record without the required judicial scrutiny under Rule 609, SCRE.

Next, Petitioner contends that the post-conviction relief court erred in not finding Trial Counsel deficient or any resulting prejudice where Trial Counsel failed to secure an "on-the-record" Rule 609(a), SCRE, balancing test. However, the record before this Court shows that the issue was raised with the trial court. Furthermore, Petitioner has not shown that an on-the-record objection would have resulted in a different ruling at trial or that the trial result would have been different. Accordingly, this Court should deny certiorari to this issue.

At the post-conviction relief hearing, Trial Counsel testified to the following:

> "[W]e had a conversation in a in camera meeting with the judge about how that would be treated and, of course, he did not allow the specific — I objected to the specific crimes being used and — but he said he was going to allow just the fact that there were felonies and misdemeanors. … I would have done that as a matter of course.

(App'x p. 737).

In its order of dismissal, the post-conviction relief court held the following:

> "As an initial matter, a 609(b) analysis would not have been applicable because (1) Trial Counsel objected to the use of Applicant's prior convictions to impeach Applicant and (2) the Judge did not allow any evidence of the nature of those convictions, merely that those convictions were felonies and misdemeanors. … Trial Counsel credibly testified that he explained to Applicant the consequences Applicant faced if he chose to testify. Additionally, Trial Counsel credibly testified that he mentioned that Applicant had prior convictions, not what those convictions were, to be transparent with the jury, should the State elect to bring that out in cross-examination."

(App'x pp. 769-70). The post-conviction relief court further held the following on the prejudice prong of Strickland:

> "Moreover, Applicant testified and was not impeached with his prior convictions. … Trial Counsel credibly testified that he had an in-camera meeting with the Judge to discuss how Applicant's prior conviction would be treated and that Trial Counsel objected to the use of prior convictions. However, the trial court conducted a balancing test and determined that the fact that those convictions were misdemeanors and felonies would be admissible, but not the details of those convictions."

(App'x p. 770).

Under Rule 609(a), SCRE, prior convictions are admissible for impeachment only if the trial court determines that "the probative value of admitting this evidence outweighs its prejudicial effect to the accused." The balancing must consider the factors set forth in State v. Colf, 337 S.C. 627, 525 S.E.2d 246 (2000), and reaffirmed in State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019): (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue.

Here, it can be inferred from the trial record and from Trial Counsel's direct testimony at the post-conviction relief hearing that Trial Counsel secured a favorable ruling limiting impeachment to the bare fact of felonies and misdemeanors. The solicitor's brief reference in closing was limited and tied only to the witness's reluctance to cooperate: "She knew Demarcus Foster's history. She didn't know what was going to come out of this case. She just told some people that she had heard Demarcus Foster shot him, and that information got to law enforcement." (App'x p. 645). On cross-examination, Petitioner was asked only general questions about having "been in some trouble before" and taking responsibility for prior arrests. (App'x pp. 588-589). Contrary to Petitioner's assertions otherwise, the jury never heard the nature of the convictions, including the prior voluntary manslaughter conviction.

Notably, the post-conviction relief court expressly found that Trial Counsel credibly testified that he raised the issue in an in-chambers conference with the trial judge, objected to the admission of the specific nature of Petitioner's prior convictions, and secured a favorable ruling limiting any impeachment to the bare fact that Petitioner had prior "felonies and misdemeanors." The post-conviction relief court credited this testimony and found that the trial court conducted the required balancing test and determined that only the fact of the convictions, not their details, would be admissible. Because the record as a whole, including the post-conviction relief court's credibility determination, demonstrates that the trial judge engaged in a meaningful Colf balancing, Trial Counsel's performance cannot be deficient. See Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (appellate courts give great deference to a post-conviction relief court's credibility findings).

Moreover, Trial counsel's strategic decision to elicit the limited priors on direct examination to "be transparent with the jury" was reasonable professional assistance under prevailing professional norms. Strickland, 466 U.S. at 689 (strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance). This further negates any prejudice.

Lastly, assuming arguendo that Trial Counsel's representation was deficient, what is truly lacking in this record is that Petitioner presented no evidence to the post-conviction relief court that, had Trial Counsel objected on the record, and the trial judge conducted a balancing test on the record, the evidence would have been excluded entirely, and the result of his trial would have been different. See Hough v. Anderson, *supra*. Thus, Petitioner cannot show any prejudice from the alleged deficiency.

Accordingly, this Court should deny certiorari to this issue.

CONCLUSION

For the reasons stated above, this Court should affirm the post-conviction relief court's order. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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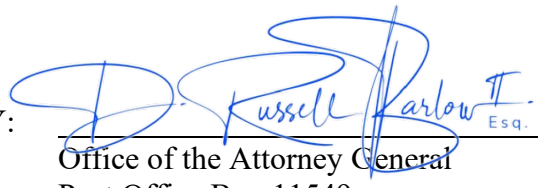
BY: 

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