STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

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S.C. Supreme Court

The Honorable Clifton Newman, Circuit Court Judge

Appellate Case No. 2012-213347

George Grant,.....Petitioner,

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is certiorari warranted to determine whether there is evidence of probative value to support the PCR judge's finding that counsel's trial strategy to undermine the victim's credibility was valid despite counsel opening the door to the State introducing evidence of a prior CDVHAN incident between the victim and Petitioner? Was the evidence of the prior CDVHAN incident ultimately admissible to establish the *mens rea* element of one of the charged offenses, burglary, first-degree?

2. Is certiorari warrented to review whether counsel sufficiently raised a Rule 403, SCRE, objection to the admissibility of evidence concerning the prior CDVHAN incident?

STATEMENT OF THE CASE

The Anderson County Grand Jury indicted Petitioner at the November 2006 term of General Sessions for kidnapping (2006-GS-04-3462), burglary, first-degree (2006-GS-04-3463) and criminal sexual conduct, first-degree (2006-GS-04-3464). (App.pp.422-29). Scott Robinson, Esq., represented Petitioner.

The State called its case to trial on October 9, 2008. The victim Petitioner sexually assaulted her numerous times during the course of one night. (App.p.64-114). Semen located in a vaginal swab matched Petitioner's DNA profile. (App.p.200). The SANE nurse testified to the sexual trauma the victim incurred in her vaginal canal. (App.p.180).

The victim's minor daughter detailed her eyewitness account of watching Petitioner violently rape her mother. (App.pp.142-43). Minor daughter testified to comments made by Petitioner during the commission of the offense. (App.p.142, lines 4-6; p.143, line 9; p.144, lines 5-8).

The jury returned guilty verdicts for kidnapping and criminal sexual conduct, first-degree. On October 10, 2008, the Honorable J.C. Nicholson, Jr. sentenced Petitioner to twelve (12) years imprisonment for kidnapping, and twenty-four years imprisonment suspended upon the service of fourteen (14) years imprisonment and the service of five (5) years probation. Petitioner was acquitted on the burglary, first-degree charge. (App.pp.1-328).

A notice of appeal was filed at the South Carolina Court of Appeals and was perfected by Elizabeth Franklin-Best, Esq., of the Office of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions

and sentences. State v. George Grant, Jr.., Op. No. 2011-UP-295 (S.C Ct. filed June 14, 2011). (App.pp.420-21).

Petitioner filed an application for post-conviction relief (PCR) on September 1, 2006 (2012-CP-04-0527). (App.pp.329-37). A hearing was convened at the Anderson County Courthouse on October 2, 2012. (App.pp.343-408). Petitioner was present and represented by Linda Whisenhunt, Esq. Karen Ratigan, Esq., of the South Carolina Attorney General's Office represented Respondent. The Honorable Clifton Newman denied relief in an order dated November 5, 2012. (App.pp.410-19).

STANDARD OF REVIEW

The proper standard for review of a PCR 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, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

I.

Certiorari is not warranted where evidence of probative value supports the PCR judge's finding that counsel made a valid strategic decision to risk opening the door to the State's introduction of evidence of a prior CDVHAN incident between Petitioner and victim where the alternative course of action would have inhibited any presentation of a meaningful defense. Furthermore, evidence of the prior CDVHAN incident was ultimately admissible to establish an element of the offense of burglary, first-degree, that Petitioner entered the victim's residence with the intent to commit a crime.

At the PCR hearing, Petitioner argued counsel was ineffective for cross-examining the victim in a manner that opened the door to the admission of evidence of a prior CDVHAN incident between the victim and the Petitioner five weeks prior to the commission of the offense. (App.pp.346-60).

Counsel testified Petitioner's always maintained that a consensual sexual encounter with the victim resulted in false accusations of rape, burglary, first-degree, and kidnapping. Petitioner surmised that his disengagement from the romantic relationship manifested the victim's motive for revenge. (App.p.316). Counsel executed a trial strategy to undermine the credibility of the victim in line with the victim's story. (App.p.385). The State submitted physical evidence corroborated the victim's account (App.p.386). Counsel explained to Petitioner that if victim testified in a consistent manner to her detailed statement, a positive outcome of his case would in doubt. (App.p.387). Counsel was concerned because physical evidence showed consensual rough sex viewed in a light most favorable to the Petitioner or evidence of a horrid rape viewed in a light most favorable to the State. (App.p.383). Counsel viewed minor

daughter's eyewitness account of her mother's rape particularly harmful to his case. (App.p.386). As the State called its case, counsel understood the treacherously fine line between presenting Petitioner's defense and opening the door to admission of evidence the prior July 26, 2006 incident. (App.p.388). Counsel testified there was nothing else he could have done to further prepare Petitioner's case to dodge the inevitable dilemma in opening the door in exposing the jury to the prior July 26, 2006 incident.

> Well if [counsel] didn't walk the tight line that he felt compelled to walk and you have at one o'clock in the morning [victim] says she's awakened by this man standing over who turns out to be her former boyfriend who proceeds to rape her. And her daughter – [the victim] screams out to her child, call 9-1-1. And the child grabs the phone, runs down the hall, attempts – or goes to try to call 9-1-1. And [Petitioner] chases her and takes the phone, proceeds to rape her in one place, then another. Given that testimony by the State, if he did not – if [counsel] did not seek to challenge her credibility or at least as a matter of strategy push the envelope to some extent, what other evidence could [counsel] have offered in defense of the charge.

(App.p.403, line 20—p.404, line 8). In denying Petitioner's application for post-conviction relief, the PCR judge found counsel was not ineffective for opening the door to evidence of the prior July 26, 2006 incident. The PCR judge found "[Counsel] had a difficult job in this case. The defense strategy was that the sexual encounter between the parties was consensual and [counsel] believed he could undermine the victim's credibility by pointing out there were no signs of a struggle." (App.p.417). The PCR judge noted "the trial judge disagreed and stated that its not that you did anything wrong, but that insinuation on cross-examination opened the door to testimony about the prior incident."

(App.p.416) (internal quotations and citations omitted).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)).

The PCR judge correctly found Petitioner failed to prove counsel was deficient in light of a counsel's objectively reasonable trial strategy. "Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). This Court recently reaffirmed the substantial deference granted to a PCR court's finding that a defense attorney's conduct constituted reasonable trial strategy. See Edwards v. State, 392 S.C. 449, 458, 710 S.E.2d 60, 65 (2011) ("Given this Court's admonition against second-guessing counsel's trial strategy, [the defense attorney's] performance and the cumulative nature of his testimony provide probative evidence under our prevailing law to support the PCR court's determination that Petitioner's attorney articulated a valid trial strategy.").

Respondent submits evidence supports not one but two finding from two judges that the potential detriment of opening the door to the prior CDVHAN incident was necessitated in order to present an effective defense. Counsel's early victory in suppressing the admission of evidence of the prior CDVHAN incident was nominal and short-lived. The trial judge's ruling hinged upon limiting counsel from breaching subject matter concerning the victim's fear of Petitioner, "**et cetra, et cetra, et cetra, or whatever, [Petitioner's] such a good guy or whatever**, and then expect [the State] not to be able to bring that out on redirect." (App.p.66, lines 20-23) (emphasis added). See Rule 404(a)(1), SCRE.

The present rape case involves a victim and defendant that were not strangers or mere acquaintances; instead they were former lovers with a turbulent history. Counsel faced the added burden of physical evidence that corroborated the victim's testimony and the minor daughter's testimony. Developing evidence of consent necessitated counsel's cross-examination of victim concerning on resistance during the commission of the offense. It was critical in a rape case where intercourse is stipulated. Simply Petitioner's actions in returning to the same home of the same victim five weeks after he was charged on July 26, 2006 with criminal domestic violence, of a high and aggravated nature, created the certain dichotomy. Counsel had to choose between lesser of two evils, forgoing a meaningful defense or exposing the jury to the prior CDVHAN incident. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1st Cir. 1989) ("If counsel was ineffective in any sense, it was only because the client rendered him so, first by keeping Noriega in the dark, and then, by refusing to heed his advice. That is not the sort of "ineffectiveness" for

which relief can be granted."). The PCR judge found counsel's testimony that he presented the best possible defense at trial to be credible. (App.p.414). See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) ("We give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses.").

In the alternative, had counsel complied with the trial judge's broad exclusions, he would have not been able to introduce Petitioner's account of the victim's motive for revenge or present Petitioner's sisters as witnesses that testified in manner that placed Petitioner in favorable light as a man that could not escape an alleged hostile ex-girlfriend. (App.pp.76-77; pp.242-43; p.250). One sister even described an alleged stalking encounter from the victim. (App.p.249). Had counsel followed a course of conduct outlined in Petitioner's retrospective critique, he certainly would have faced the Orwellian dilemma of now having to answer the all too familiar Chronic allegation. See United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)([P]er-se prejudice occurs if there has been, the most egregious circumstances, a fundamental denial of the right to counsel."). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms.

Similarly, Petitioner failed to prove the second prong of the Strickland test – that he was prejudiced by counsel's performance. Evidence of the prior incident was alternatively admissible because it established an element of the burglary, first-degree,

offense.[1] "A person is guilty of first-degree burglary if he enters a dwelling without consent and with intent to commit a crime in the dwelling and either enters or remains in the dwelling during the nighttime. "First-degree burglary requires that, at the time the offender entered the dwelling, he intended to commit a crime once inside." State v. Gilliland, 402 S.C. 389, 398, 741 S.E.2d 521, 526 (S.C. Ct. App. 2012) (internal quotations omitted); see also S.C. Code Ann. § 16–11–311(A) (2003). Evidence of Petitioner's prior CDVHAN incident would have been admissible to show he unlawfully entered the victim's residence with the intent to commit violent crime against the victim.

State v. Holder, 382 S.C. 278, 289, 676 S.E.2d 690, 696 (2009), is instructive to the present case. This Court rejected the Holder petitioner's argument that evidence of child abuse that occurred a month prior to the Holder victim's death constituted inadmissible propensity evidence. Id. This Court announced:

> [t]he State's purpose for offering the testimony was not to show Holder had a propensity to abuse her child in conformance with a character trait. Rather, it was to show Holder's strong desire to please Martucci instead of protecting the welfare of her child and to establish an **element of the offense**, that she **manifested an extreme indifference** to the well-being of her son.

Id., at 289, 676 S.E.2d at 696. Similarly here, evidence of the prior CDVHAN incident was established the *mes rea* element of burglary, first-degree. The evidence centered on the same victim and same crime scene where Petitioner's actions within the residence resulted in the victim being physically harmed.

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[1] Pursuant to Rule 220(c), SCACR, an appellate court may affirm the lower court's judgment for any reason appearing in the record on appeal. The solicitor only argued the prior CDVHAN was admissible pursuant to Rule 404(b), SCRE, and the theory of *res gestae*.

II.

Certiorari is not warranted where evidence of probative value supports the PCR judge's finding that counsel adequately raised a Rule 403, SCRE, objection to the admission of evidence concerning the prior CDVHAN incident. Furthermore, any alleged error would have constituted harmless error in light of the overwhelming evidence of Petitioner's guilt.

At the PCR hearing, Petitioner argued counsel was ineffective for not explicitly renewing his prior Rule 403, SCRE, objection once the trial judge found counsel opened the door to the admission of the evidence. Counsel testified he attempted to keep out evidence surrounding the pending CDVHAN charge. (App.p.388). The PCR judge found the objection was raised made and ruled upon. (App.p.417).

Evidence of probative value supports the PCR judge's finding that trial judge was aware from the beginning of trial of the the bifurcated nature of evidentiary issue before the court. An objection was properly made because "[a]lthough [counsel] did not state a specific objection, it is clear from the trial judge's comments he was aware of the grounds for the objection." State v. Sweet, 342 S.C. 342, 347, 536 S.E.2d 91, 93 (Ct. App. 2000)

During the motions hearing, the trial judge outlined the two pronged approach he would consider in ruling on the admissibility pursuant to Rule 404(a) first followed with a Rule 403 analysis concerning evidence of the prior CDVHAN incident. (App.p.66, lines 3-5). The trial judge subsequently announced his restrictions on counsel's ability to approach relevant subject material that were contingent to the trial judge maintaining his posture towards inadmissibility. (App.p.66). The matter was held under advisement until counsel's completion of his first cross-examination. (App.pp.67-68). The bifurcated

nature of the trial judge's ruling was readily apparent when he directed the solicitor, "[the Court] is not going to allow you to go into the facts that [Petitioner's] been charged criminally with [CDVHAN]." (App.p.117, lines 15-16). The trial judge's limitation addressed counsel's prior Rule 403 objection concerning the undo prejudice of exposing the jury to pending charges in light of the limited probative value. See Rule 103(a)(1), SCRE (a party's objection must be accompanied with a specific ground unless the specific ground is contextually apparent.). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably effective assistance under prevailing professional norms.

Similarly, Petitioner failed to prove the second prong of the Strickland test – that he was prejudiced by counsel's performance. First, the State was compelled prove the pending prior CDVHAN incident by clear and convincing evidence. State v. Smith, 300 S.C. 216, 218, 387 S.E.2d 245, 246–47 (1989) ("Evidence of prior bad acts that are not the subject of a conviction must be establishing by clear and convincing evidence.").

Second, any alleged Rule 403, SCRE, error would have merely constituted harmless error. Evidence of probative value supports the PCR judge's finding that of Petitioner's overwhelming evidence of guilt. "A "reasonable probability of a different result does not exist when there is overwhelming evidence of guilt." Geter v. State, 305 S.C. 365, 367, 409 S.E.2d 344, 346 (1991). . The victim provided detailed testimony of the prolonged assault. (App.pp.64-81). The emergency room nurse testified the victim had redness around her vaginal canal. (App.pp.163; pp.165-67). DNA evidence (from the Applicant's hair, fingernail, and the semen recovered from both the victim's vaginal

canal and her underwear) was recovered. (App.pp.183-87). The victim's minor daughter testified about hearing her mother scream, seeing the Applicant on top of her mother, and the Applicant chasing her to take the phone when she tried to call 911. (App.pp,121-29; pp.131-32). Detective Hendrix testified she interviewed both of the victim's minor children and they gave stories consistent with that given by the victim. (App.p.209).

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) ("The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.").

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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By: _____
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Jan 13th, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Anderson County
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

GEORGE GRANT, JR.,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

LaNelle C. Durant, Esq.
SC Commission of Indigent Defense
1330 Lady St. Suite 401
Columbia, SC 29201

This 13th day of January, 2014

Troyeshi Brailey
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JAN 16 2014
S.C. Supreme Court

January 13, 2014

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211-1330

RE: **George Grant, Jr. v. State of South Carolina**
Appellate Case No.: 2012-213347
Lower Court Case No: 2012-CP-04-0527

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving the opposing counsel today.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/tb
Enclosures

cc: LaNelle C. Durant, Esq. (2 copies with all the attachments)