

STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIORARI TO OCONEE COUNTY  
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

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Appellate Case No. 2013-001637

**RECEIVED**

AUG - 7 2014

**S.C. Supreme Court**

Adarius Q. Dennis,..... Petitioner,

v.

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

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

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## QUESTION PRESENTED

1. Did the PCR Judge err in finding Petitioner failed to meet his burden to prove counsel was ineffective if her cross-examination of co-defendant Diverio Manley?
2. Did the PCR Judge err in finding Petitioner failed to meet his burden to prove counsel was ineffective for failing to advise him on a collateral manner concerning the State's guilty plea offer?

## STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Oconee County Clerk of Court. The Petitioner was indicted at the October 2008 term of the Oconee County Grand Jury for armed robbery (2008-GS-37-1590). He was represented by Suzanne Earle, Esq. On June 24, 2009, the State called its case to trial. Petitioner was tried in his absence before the Honorable Alexander S. Macaualy. He was convicted as indicted. On August 31, the Honorable James Williams unsealed his sentence. He was sentenced to an aggregated term of twenty-three (23) years imprisonment.

A timely notice of appeal was filed on Petitioner's behalf. He was represented by Elizabeth Franklin-Best, Esq., of the Office of Appellate Defense. The Court of Appeals affirmed Petitioner's convictions and sentences in an unpublished opinion. State v. Adarius O. Dennis, Op. No. 2011-UP-352 (S.C. Ct. App. filed June 29, 2011). The remittitur soon followed.

The Petitioner subsequently filed a PCR application on January 27, 2012. The Respondent made its Return on or about May 22, 2012. An evidentiary hearing into the matter was convened on February 25, 2013, before the Honorable J. Cordell Maddox, Jr. The Petitioner was represented by Keith G. Dennis, Esq. The State was represented by Walt Whitmire, Esq., of the Attorney General. Judge Maddox denied and dismissed Petitioner's application for PCR application in an order filed July 13, 2013. This appeal 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.

**Certiorari is not warranted where ample evidence of probative value supports the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel was ineffective where her strategy in cross-examining co-defendant Diverio Manley was sound in light of Petitioner's constant subversions and ultimate voluntary absence at trial.**

Petitioner alleges that PCR judge erred in finding he failed to meet his burden to prove counsel was ineffective in her performance in cross-examining of co-defendant Diverio Manley. (PWC p. 7). Respondent contends the PCR Judge correctly denied Petitioner's PCR application where ample probative evidence supports the finding that Petitioner failed his burden where counsel made sound strategic decisions in light of Petitioner's voluntary absence from his trial.

#### **Summary of Relevant Testimony and Evidence presented at the PCR hearing**

Applicant testified at the PCR hearing that one year elapsed between his arrest and trial in abstentia. (App.p.259). He stated counsel provided him a copy of the State's discovery disclosures despite never discussing the State's evidence with him. (App.p.259). He stated he never told counsel he had an alibi at the time of the offense. (App.p.259). Applicant testified he decided to attend his trial because he panicked; he was out on bond after his arrest (App.p.242). He stated that he was under the impression that his co-defendant, Diverio Manley, would testify on his behalf. When asked to expound further, Petitioner said Diverio would testify to the truth; that Petitioner had nothing to do with the robbery. (App.p.261).

The victim, Renaldo Robinson, testified during Petitioner's case-in-chief at the PCR hearing. He testified that he had no doubt Petitioner was an accomplice to armed robbery. (App.p.269). He recalled that two of Applicant's co-defendants directed Petitioner to get a

firearm during while he was being assaulted. (App.p.268). He testified on Petitioner's behalf at the PCR hearing only because of his recent opinion that Petitioner's prison sentence was too harsh. (App.p.269).

At the PCR hearing, counsel testified to her course of conduct during the representation. She was appointed to Petitioner's case soon after his arrest. (App.p.270). She independently evaluated the State's evidence against Petitioner and she consulted him on her observations and findings. (App.p.271). Petitioner told counsel his version of events and claimed an alibi defense. (App.p.272). Counsel's extensive investigation into the matter bore no fruit to corroborate Petitioner's story. (App.pp.272-73). Prior to trial, counsel interviewed Diverio who had previously been sentenced for his role in the armed robbery. Diverio provided some beneficial evidence to Petitioner's culpability. He told counsel that he never disclosed his intent to use a firearm to Petitioner; yet, he put Petitioner at the scene as an accomplice. (App.p.273). Diverio expressed some intention to testify for the defense; yet at the prospect of committing perjury, he changed his mind and version of Petitioner's role in the offense at trial. Counsel stated, "Mr. Manley had told me prior to trial that he had lied to me at the jail and that he was going to tell the truth when he testified in court." (App.p.284, ln.22-23).

Counsel testified that Petitioner made the voluntarily decision to not attend his trial despite her intensive efforts to convince him otherwise. Not only was Petitioner unavailable to assist counsel in the presentation of his defense, he waived on his version of the facts and never selected a defense theory of the case. He never admitted to counsel that he was present at the scene during the offense. (App.p.282). Counsel explained the peril she faced in cross-examining witnesses as follows:

It was difficult to cross-examine anybody in this case because of – I didn't get a lot of cooperation from my client. I had asked – him that he had to elect a defense, that his defense could not be that he was not present and that he was there but didn't participate. That only one of those was true and we could only present one of those as a defense.

(App.p.274, ln.17-24). She testified that she cross-examined State's witnesses to the best of her ability under the circumstances. (App.p.277).

The PCR Judge found Petitioner failed to meet his burden to prove counsel was ineffective for her performance in cross-examining Diverio. (App.p.320). The PCR Judge stated, "because [Petitioner] was not present to deny [Diverio]'s statements, [counsel] feared further harmful testimony from the witness that could not be refuted. Thus [the PCR Judge] found trial counsel's strategy on the matter to be valid." (App.p.320).

#### **Effective Assistance of Counsel**

In a post-conviction relief proceeding, the Petitioner bears the burden of proving the allegations in their application. *Id.* Where ineffective assistance of counsel is alleged 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, 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 Applicant 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 Applicant 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 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.

### **Discussion**

Evidence of probative value proves the PCR Judge correctly acted within his discretion in denying Petitioner's allegation that counsel was ineffective in her cross-examination of Diverio. Where trial counsel articulates a valid reason for employing certain trial strategy, he will not be deemed ineffective. Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). "Strategic choices are given greater latitude during trial when time is short." Phoenix v. Matesanz, 233 F.3d 77, 84 (1st Cir. 2000). "Counsel's actions must be viewed as of the time counsel was required to act." Strickland, 466 U.S. at 690.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's

investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions

Id., at 691 (emphasis added). Generally, however, impeachment tactics are a matter of trial strategy. Gustave v. United States, 627 F.2d 901,906 (9th Cir. 1980).

Petitioner failed to meet his burden to prove that counsel's decision to refrain from cross-examining Diverio on his prior oral inconsistent statement constituted deficient performance. Counsel provided credible testimony that Petitioner never provided her a sufficient or consistent version of his knowledge, role, or even presence at the armed robbery. See S. Carolina Dep't of Soc. Servs. v. Forrester, 282 S.C. 512, 516, 320 S.E.2d 39, 42 (Ct. App. 1984) ("Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved."). Other than stating "I wasn't involved," at the PCR hearing, Petitioner still has not explained his version of the facts. Jackson v. State, 329 S.C. 345, 354, 495 S.E.2d 768, 772 (1998) (speculation and conjecture will not support a finding of ineffective assistance of counsel). Additionally, Petitioner failed to meet his burden to show that Diverio would have been willing to memorialize his post-plea representations in an affidavit. Id. The entire allegation rests upon mere speculation. Thus, reasonable counsel had no basis to determine the credibility of Diverio's post-plea statement to her, he did not disclose his intent to use a firearm during the offense to Petitioner. Thornes v. State, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

As a result of counsel's pre-trial discussions with Diverio in conjunction with her trial preparation, she made the valid strategic choice to limit her cross-examination to Diverio's prior

statement to police and his trial testimony. Petitioner simply was unavailable to provide counsel a factual basis to rebut the testimony. Thus, counsel poignantly articulated that she risked opening the door to irrefutable testimony from Diverio had entrenched himself further to avoid committing perjury. See Ingle v. State, 348 S.C. 467, 473, 560 S.E.2d 401, 404 (2002). Thus counsel acted reasonably when faced with an Orwellian dilemma where either choice adversely affected Petitioners. See U.S. v. Pellerito, 878 F.2d 1535, 1543 (1<sup>st</sup> 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.). Therefore, ample evidence of probative value supports the PCR Judge’s finding that Petitioner failed to meet his burden of proof on this allegation.

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 also failed to prove the second prong of Strickland – that he was prejudiced by counsel’s performance.

## II.

**Certiorari is not warranted where the allegation that counsel failed to advise Petitioner about collateral matters concerning the State’s guilty plea offer is facially without merit.**

Petitioner alleges ineffective for failing to advise him on the State’s guilty plea offer. He stated that he would have entered the plea had he known that he would only serve four and one half years in Corrections on a ten year prison sentence. (App. p. 235). Counsel agreed she didn’t advise him on parole eligibility or other Corrections administrative matters because it was collateral to her duty in providing effective representation. (App.p.278). The PCR Judge found

Petitioner failed to meet his burden of proof that counsel's performance here was ineffective. (App.pp.318-19).

Petitioner contends the allegation is facially without merit. Counsel has no duty to advise a criminal defendant on a collateral matter related to a guilty plea offer. "Classification of a crime as violent or non-violent is a collateral consequence and, as such, counsel is not required to inform a defendant of the consequences." Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997). Therefore, further review is unnecessary.

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 also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

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 reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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*August 7<sup>th</sup>*, 2014

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Hon. J. Cordell Maddox, Jr., Circuit Court Judge  
Appellate Case No. 2013-001637

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ADARIUS Q. DENNIS,

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PETITIONER, AUG - 7 2014

V.

**S.C. Supreme Court**

STATE OF SOUTH CAROLINA,

RESPONDENT.

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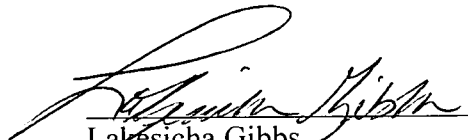
**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that a true copy of the 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 Cantey DuRant, Esquire  
S.C. Commission on Indigent Defense  
1330 Lady St., Suite 401  
Columbia, SC 29211**

This 7th day of August, 2014

  
Lakesicha Gibbs  
LEGAL ASSISTANT for the Respondent



ALAN WILSON  
ATTORNEY GENERAL

August 7, 2014

**RECEIVED**

AUG - 7 2014

S.C. Supreme Court

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

**RE: Adarius Q. Dennis v. State of South Carolina**  
**Appellate Case No: 2013-001637**

Dear Mr. Shearouse:

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

Sincerely,

J. Walt Whitmire  
Assistant Attorney General  
SC Bar No: 100793

JWW/lg  
Enclosures

cc: LaNelle C. DuRant, Esquire