RECEIVED
AUG 25 2014
S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTORARI TO SALUDA COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-001199

Frank Tolen, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

1. Whether there is sufficient evidence to support the PCR Judge's finding that Petitioner failed to prove counsel's performance was ineffective in allegedly failing to preserve an objection to the victim's identification of Petitioner, in separately investigating an alleged out-of-court identification procedure, in investigating the origins of a certain photograph that the State disclosed to counsel prior to trial, and in preparing and executing the cross-examination of the victim?

2. Whether there is sufficient evidence to support the PCR Judge's finding that Petitioner failed to prove counsel's performance was ineffective regarding the scope of his cross-examination of the co-defendant concerning the terms of his guilty plea?

3. Whether there is sufficient evidence to support the PCR Judge's finding that Petitioner failed to meet his burden to prove counsel was ineffective for failing to make a Batson motion?

4. Whether the PCR Judge erred as a matter of law in not applying a cumulative error analysis in rendering a judgment on Petitioner's PCR action?

5. Whether there is sufficient evidence to support the PCR Judge's finding that Petitioner failed to prove appellate counsel's performance was ineffective for failing to raise an issue concerning the admissibility of a decedent's prior trial testimony?

6. Whether the PCR Judge erred as a matter of law in finding that Petitioner failed to prove counsel was ineffective for not making a double jeopardy argument?

STATEMENT OF THE CASE

Petitioner was indicted at the January 1998 term of the Saluda County Grand Jury for armed robbery (1998-GS-41-0165) and possession of a firearm by a person previously convicted of a crime of violence (1998-GS-41-0166). He was represented by Vannie Williams, Esq. Petitioner proceeded to trial and was found guilty. On January 27, 1998, Petitioner was sentenced by the Honorable James Johnson, Jr. to confinement for a period of life without parole for the armed robbery and five years for possession of a firearm by a person previously convicted of a crime of violence. (App.pp.1-136).

Petitioner filed his first application for post-conviction relief (1998-CP-41-0064) which resulted in the grant of a discretionary review of direct appeal issues. Petitioner filed a Notice of Appeal and a brief pursuant to Anders.[1] The Court of Appeals denied the Petition for Writ of Certiorari and the Remittitur was sent April 9, 2002. (App.pp.316-74).

Petitioner filed a second application for post-conviction relief (2002-CP-41-0085). It was granted based on the State's failure to comply with the life without parole notice requirements prior to trial. The State appealed the granting of the Petitioner's post-conviction relief application. The South Carolina Supreme Court affirmed the lower court's decision and remanded the case to the lower court for a new trial. (App.pp.375-445).

Petitioner proceeded to trial for the second time. Petitioner was represented by Andrew Thompson, Esq. On November 9, 2006, the Applicant was found guilty as

[1] Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

indicted. The Honorable William P. Keesley sentenced the Applicant to confinement for a period of life without parole for the armed robbery and five years for possession of a firearm by a person previously convicted of a crime of violence. (App.pp.446-742)

Petitioner filed a timely Notice of Appeal. Kathrine Hudgins, Esq., of the South Carolina Office of the Appellate Defense, perfected the appeal. Petitioner's sentence and conviction was affirmed. (App.pp.743-44).

Petitioner filed his third and final Application for post-conviction relief on June 30, 2009. Respondent filed its pleadings and then filed an amended pleadings. An evidentiary hearing on the matter was convened on January 30, 2013 at the Lexington County Courthouse before the Honorable R. Lawton McIntosh. Petitioner was present at the hearing and represented by Stephen Geoly, Esq. Ashleigh R. Wilson, Esquire of the South Carolina Office of the Attorney General represented the Respondent. Present and testifying at the hearing were Attorney Thompson (counsel) Attorney Hudgins (Appellate Counsel) and Petitioner. (App.pp.745-891).

Judge McIntosh denied and dismissed Petitioner's action with prejudice in an order dated March 25, 2013. (App.pp.82-910). Petitioner filed a post-trial motion to alter or amend judgment on April 12, 2013. (App.p.911). Respondent filed its return on May 21, 2013. (App.p.915). Judge McIntosh issued an order denying Petitioner's post-trial motion. (App.p.917). This appeal follows.

STATEMENT OF THE FACTS

1998 Trial

Petitioner was tried and convicted during the course of a two day trial for armed robbery. A Biggers[2] hearing was held to determine the admissibility of the victim's identification testimony. Dyson, the victim, made an in-court identification of Petitioner as the assailant who held him at gunpoint during a prolonged armed robbery. At a moment Dyson stated, "I know [Petitioner] robbed me. I'll never forgot [sic] that." (App.p.46, ln. 6-7). Judge Williams' found the victim's identification to be admissible.

During the State's case-in-chief, Dyson testified to Petitioner's lead role in committing the offense. Dyson, a long haul commercial truck driver, was slumbering in rig in what he assumed was a well-lit intersection in Saluda; he was in-route to a warehouse in Greenwood County to pick up his haul. Petitioner and his co-defendant, Wade Brannon, entered the rig and Petitioner holstered his firearm at Dyson. The vicious encounter ensued; Brannon rummaged through Dyson's rig while Petitioner kept his gaze and firearm upon Dyson. Dyson testified that he had "no question in my mind" that Petitioner was his assailant. Petitioner took sixty dollars from Dyson and directed him to drive the tractor trailer to a remote and wooded outpost. Brannon remained in the vehicle. Facing the sheer terror at the thought of his impending execution, Dyson fled his tractor trailer at a fortuitous moment where Petitioner became distracted. Dyson successfully escaped and ran to a nearby residence. The property owner testified to Dyson's frantic state. (App.pp.76-126; pp.127-29).

---

[2] Neil v. Biggers, 409 U.S. 188 (1972).

Brannon turned State's evidence and testified against Dyson. Brannon and Dyson had been lifelong friends and were abusing crack cocaine on the night of the crime. Petitioner originally decided to burglarize a local store at the relevant Saluda traffic circle. Brannon testified he was following Petitioner's command. Petitioner made an impromptu change of plans when he observed Dyson's tractor trailer near the intended target. Brannon followed Petitioner's lead and aided him in the armed robbery. Brannon's testimony substantially corroborated Dyson's account of the crime. (App.pp.150-203).

Tony Tolen testified Petitioner's post-offense statements made while the police were investigating its case. (App.pp.210-22). Tolen recalled Petitioner state, "If the sheriff come looking for us, just say you haven't seen us... Don't tell them where we are because we are on our way to Batesburg" (App.p.212, ln. 13-14; p.212, ln.9-10). The police captured Petitioner and Brannon after they fled to a desolate location. (App.p.226). Petitioner was taken into custody after an unsuccessful attempt to evade capture by jumping in a pond to swim away. (App.p.229). The police located the firearm used by Petitioner in the crime. (App.p.230). The police interviewed Dyson after the offense and presented him with numerous unrelated "mug shot" photographs to aid Dyson in formulating a physical description of his assailants. (App.p.244).

The State rested and the jury subsequently found Dyson guilty as indicted. During sentencing, the solicitor apprised Judge Williams that he noticed Petitioner with the State's intent to seek life without the possibility of parole (LWOP). Judge Williams made the following comment when he pronounced Petitioner's sentence, "I don't view the statute as giving the Court discretion. Even if it did, based on the history of prior armed

robberies, all of which are classified as most serious offenses, it is the sentence of this Court that [Petitioner] be confined in the Department of Corrections for a term of [LWOP]." (App.p.312, ln.22—p.313, ln.4).

1998-CP-41-064

Petitioner filed his first application for PCR in 1998. He contested the legality of the procedure to sentence him to LWOP in this nine page pro se application. (App.pp.315-24). Respondent filed its responsive pleadings. A hearing on the matter was convened in 2000 before the Honorable Rodney A. Peeples. An order of dismissal, without prejudice, pursuant to White v. State was issued. (App.pp.355-56). Robert M Pachak, Esq., perfected the discretionary appeal pursuant to Anders v. California. The South Carolina Supreme Court affirmed Judge Peeples' grant of a review of direct appeal issues and ultimately affirmed Petitioner's sentence and conviction in an unpublished memoranda opinion filed in 2002. (App.pp.272-73).

2002-CP-41-085

Petitioner filed his second application for PCR in 2002. In this seven page *pro se* application, Petitioner alleged Attorney Williams was ineffective on numerous grounds that included failure to investigate and failure to interview witnesses to establish an alibi defense. (App.pp.374-80). Respondent filed its return pleadings. Petitioner retained an accomplished local defense attorney, Wayne Floyd, Esq., to prosecute his case. At the subsequent hearing before the Honorable Kenneth G. Goode, Petitioner testified that the State conducted a "show up" identification procedure for Dyson to identify Petitioner on the precipice of trial. No legitimate evidence was submitted to corroborate Petitioner's

suspicious testimony. Counsel disputed Petitioner's version as fantasy. (App.p.420). Counsel further opined that he "felt it was in [Petitioner]'s best interest to strongly consider the offer of plea bargain." (App.p.430, ln. 2-4). Petitioner made false allegations and attacked retired Judge Baggett, a contract solicitor who aided the prosecution of Petitioner's case. (App.p.405). Yet, Judge Good granted Petitioner's application on numerous grounds that were all subsequently reversed except a finding that counsel was ineffective for failing to object to the solicitor's non-compliance with the LWOP statute's directives on notice. (App.pp.435-45).

2006 Trial

The same solicitor reprosecuted his case against Petitioner again calling the case to trial before the Honorable William P. Keesley. (App.p.446). Petitioner, again, qualified for indigent representation and was represented by Andrew Thompson, Esq. (App.pp.734-36). The jury, again, found Petitioner guilty as indicted based on substantially the same clear and abundant evidence of Petitioner's guilt that supported his 1998 conviction. Again, Petitioner was sentenced to a term of LWOP in corrections. An unsuccessful appeal followed

2009-CP-41-088

Petitioner filed third and present application for PCR in 2009. The Respondent filed its responsive pleadings. Steven Geoly, Esq.[3], was retained by Petitioner, and filed an amended application for PCR in January of 2013. (App.pp.761-65). At the subsequent

[3] Respondent notes the troubling nature of Petitioner, again, retaining counsel to collaterally attach his conviction despite qualifying for indigent representation at both his trials.

PCR hearing, Petitioner's third counsel again pursued recycled allegations of ineffective assistance of counsel previously posited by Petitioner on prior PCR actions.

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 the PCR Judge correctly found counsel preserved his objection to the victim's identification of Petitioner. Further, ample probative evidence supports the PCR Judge's finding that the Petitioner failed to prove that he was subjected to a secret out-of-court "show up" identification procedure prior to trial and that the picture of Petitioner provided to counsel in discovery had exculpatory value; ample probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove that counsel's performance in investigating, preparing, and executing his cross-examination of the victim was ineffective.

Effective Assistance of Counsel

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)).

A criminal defense attorney has a duty to investigate, but this duty is limited to reasonable investigation. Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007). "Where a judge makes a ruling on the admission of evidence on the record immediately prior to the introduction of the evidence in question, the aggrieved party does not need to renew the objection." State v. Govan, 372 S.C. 552, 557, 643 S.E.2d 92, 94 (Ct. App. 2007).

The right to cross-examination is constitutionally guaranteed. Davis v. Alaska, 415 U.S. 308, 316 (1974). "The question is not whether the prosecution witness was attacked on every conceivable point but whether the testimony was subjected to adversarial testing." Johnson v. Nagle, 58 F.Supp.2d 1303, 1355, n. 42 (N.D. Ala. 1999). "Whether to engage in cross-examination, its extent and its manner, is a strategic decision of counsel." U.S. v. Nersesian, 824 F.2d 1294, 1321 (2nd Cir. 1987); Phoenix v.Matesanz, 233 F.3d 77, 83 (1st Cir. 2000) (choice of emphasis in cross-examination is prototypical example of strategy). Instead, as with other assertions of trial strategy, we consider the particular circumstances of the case. See Solomon v. State, 347 S.C. 635,

557 S.E.2d 666 (2001) (court considers reasonableness of trial strategy on case-by-case basis). 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).

Discussion

The PCR Judge correctly found that counsel preserved his objection the victim's in-court identification for appellate review. Judge Keesley denied counsel's pre-trial motion to suppress Dyson's prior in-court identification of Petitioner at the conclusion of the pre-trial Biggers hearing. (App.p.120). Dyson was the first witness to testify in the State's case-in-chief. No evidence was submitted between Judge Keesley ruling on the matter and Dyson's identification of Petitioner as the assailant that held him at gunpoint. (App.p.548; p.121). See State v. Govan, 372 S.C. 552, 557, 643 S.E.2d 92, 95 (Ct. App. 2007) (Since no evidence was entered between the trial court's ruling and the admission of the evidence, there was no opportunity for the court to change its ruling.). Indisputably, counsel's performance here was sound. Regardless, cannot prove prejudice where the Dyson's prior in-court identification of Petitioner was admissible. See State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000) ("Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion.").

Next, all of the probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove his counsel was ineffective for failing to investigate unproven matters concerning the alleged out-of-court identification procedure

and the photograph of Petitioner that the State disclosed to counsel prior to trial. "Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." Moorehead v. State, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). Here, Petitioner has failed to even pass the first hurdle in showing an unduly suggestive out-of-court identification procedure even occured. There is no credible evidence in the record of an out-of-court identification. Petitioner's assertion that he was whisked away from counsel and covertly pointed out to the witness by the prosecution is directly refuted by the testimony of Dyson, and the testimony of Petitioner's original 1998 counsel, Attorney Williams. (App.p.589; p.419).

Similarly, regarding the photograph at issue, Petitioner does little more than point out that it "screams foul." (App. p. 882, l. 13). Respondent contends that simply alleging that counsel did not sufficiently investigate the origins of the photograph, however, is not sufficient to state a claim in PCR—Petitioner must also produce some showing of what further investigation of the photograph would have yielded in terms of exculpatory value. Because Petitioner failed to make a cognizable showing that the evidence was in fact exculpatory, further discussion here is unnecessary.

Next, probative evidence supports the PCR Judge's finding Petitioner failed to prove counsel's performance in cross-examining the victim was ineffective pursuant to counsel's sound trial strategy. The record shows that counsel thoroughly cross-examined Dyson regarding the circumstances surrounding his in-court identification of Petitioner at the 1998 trial. Last, Petitioner failed to even explain how questioning on the

circumstances surrounding his temporary detention as a material witness in 1998 benefited his defense. Dyson simply did not waiver in his convincing testimony of Petitioner's central involvement in the crime. Logic dictates that eliciting testimony that showed Dyson possibly harbored resentment at the solicitor for detaining him in 1998 does nothing to diminish the strength of his testimony against Petitioner. If anything, it accents the harm. 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 probative evidence supports the PCR Judge's finding that Petitioner failed to prove counsel was ineffective for not cross-examining the co-defendant on the sentencing exposure he faced prior to his plea bargain.

Effective Assistance of Counsel

The appropriate question under a Confrontation Clause analysis is whether there has been any interference with the defendant's opportunity for effective cross-examination at trial. Kentucky v. Stincer, 482 U.S. 730 (1987). "Included in the Confrontation Clause protection is the right to cross-examine any State's witness as to possible sentences faced when there exists a substantial possibility [the witness] would give biased testimony in an effort to have the solicitor highlight to [a] future [court]" how the witness cooperated in the instant case" State v. Curry, 370 S.C. 674, 691, 636 S.E.2d 649, 658 (Ct. App. 2006) (internal citations and quotations omitted). A violation of a defendant's Sixth Amendment

right to confront a witness is not *per se* reversible error if the error is harmless beyond a reasonable doubt. State v. Graham, 314 S.C. 383, 385, 444 S.E.2d 525, 527 (1994)

Discussion

Probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden here where questioning Brannon on original sentencing exposure would have merely cumulative to counsel's already sound performance in impeaching the witness. "A criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." State v. Gillian, 360 S.C. 433, 451, 602 S.E.2d 62, 71 (Ct. App. 2004) aff'd as modified, 373 S.C. 601, 646 S.E.2d 872 (2007) (citing Delaware v. Van Arsdall, 475 U.S. 673 (1986)). Counsel opened his cross-examination where the direct examination ended: the favorable plea agreement Brannon entered as a result of his admission of guilt and willingness to testify against Petitioner. (App.p.628). From there, counsel honed in on a series of questions concerning Brannon's chronic history of illegal narcotics use that simultaneously exposed the jury to the witnesses' potential motive and reliability. Thus, counsel elicited testimony from Brannon had abused illegal narcotics for a decade prior to the crime. (App.p.633). Counsel also elicited testimony that Brannon was high on the night of the crime; further questioning resulted in counsel eliciting an admission from Brannon that smoking crack-cocaine had an contemporaneous adverse effect on his mental faculties when he used. (App.p.634; p.638). Notably, counsel elicited testimony

that Brannon faced other criminal charges at the time of Petitioner's second trial, nearly eight years after he committed the armed robbery with Petitioner. (App.p.633). 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.

III.

Certiorari is not warranted where the PCR Judge correctly found that the Petitioner failed to meet his burden to prove counsel was ineffective for choosing not to make a Batson[4] motion to challenge the composition of the jury panel. The argument here is readily disposable where Petitioner failed to even make a credible prima facie case to establish prejudice.

Effective Assistance of Counsel

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender. When one part strikes a member of a cognizable racial group or gender, the trial court must hold a Batson hearing if the opposing party requests one. The proponent of the strike must offer a race or gender neutral explanation. The opponent must show the race or gender neutral explanation was mere pretext, which is generally established by showing the party did not strike a similarly situated member of another **race or gender**. Under some circumstances, the explanation given by the proponent may be so fundamentally implausible the trial judge may determine the explanation was mere

[4] Batson v. Kentucky, 476 U.S. 79 (1986).

pretext, even without a showing of disparate treatment." State v. Edwards, 384 S.C. 504, 508-09, 682 S.E.2d 820, 822 (200) (internal citations omitted). "A criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury" Palcio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999).

Discussion

Petitioner alleges counsel was ineffective for failing to make a Batson motion for the sake of making a Batson motion to challenge the composition of the diverse jury panel. Respondent submits Petitioner's allegation itself is fatally reliant on the proposition that a *post hoc* academic inquisition regarding counsel's legal acumen establishes a cause of action in this forum without any showing that Petitioner was actually deprived of his constitutional to a fair trial.

The PCR Judge correctly found Petitioner failed to meet his burden here where Petitioner offers no actual evidence that had Counsel requested a Batson hearing, he would have been able to show that any potential race or gender neutral explanations offered by the state would have been pretextual, or that the situation was such that no explanation given by the State would have been plausible. See also, Simpson v. Moore, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) (relief for ineffective assistance denied where defendant failed to present any evidence that potential jurors were struck for impermissible reasons, and failed to show that he was prejudiced by the jury selected). 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.

IV.

Certiorari is not warranted where the PCR Judge correctly applied the appropriate standard in ruling on each of Petitioner's allegations of ineffective assistance of counsel separate and distinct from another.

Probative evidence supports the PCR Judge's finding that Petitioner failed to meet his burden to prove that numerous instances of counsel's interactions with him constituted ineffective assistance of counsel. Respondent entirely rejects Petitioner's argument that this Court should employ a cumulative prejudice analysis to ineffectiveness claims, such as employed in Brady cases. See Kyles v. Wheatly, 514 U.S. 419 (1985).

The Strickland Standard of Review

In Green v. State, 351 S.C. 184, 196-97, 569 S.E.2d 318, 324-25 (2002), the Court expressly declined to address whether a PCR applicant is entitled to relief based upon the supposed cumulative effect of trial counsel's alleged errors. See also Simpson, 367 S.C. at 604, 627 S.E.2d at 710 (recognizing that "[w]hether several errors, which are independently found not to be prejudicial, may cumulatively warrant relief is an unsettled question in South Carolina" and holding that "[b]ecause the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis"). This Court finds that such an analysis is not constitutionally required and declines to employ that analysis.

Before an alleged error may be considered as a factor contributing to cumulative prejudice, a court first must find that the alleged error is, in fact, constitutional error. Only then can the cumulative prejudice arising from the error be considered. To hold otherwise is to conclude that even non-deficient performance might result in reversal of a conviction. Such a conclusion is manifestly contrary to the analysis set forth in Strickland v. Washington. See 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., deficient performance and prejudice] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Even in the absence of a cumulative prejudice analysis, a reviewing court, quite properly, analyzes the same class of errors together, such as the failure to present adequate evidence of mitigation. Yet, it is inappropriate to consider the cumulative prejudice from various alleged errors that are not related, such as the failure to request a jury charge and the failure to introduce certain testimony. A number of other jurisdictions, including the Fourth Circuit Court of Appeals, have held a cumulative effect analysis is inappropriate and that the appropriate analysis focuses upon each individual allegation of ineffective assistance. See Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998); Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir. 1996); Jones v. Sotts, 59 F.3d 143, 147 (10th Cir. 1995).

Discussion

Counsel's performance was determined not to be deficient on most of the individual claims that Petitioner wishes to aggregate, and there was no prejudice on any

Ground. To hold otherwise is to conclude that even non-deficient performance under Strickland might result in reversal of a conviction, a conclusion that is manifestly contrary to the analysis set forth in Strickland. See Strickland, 466 U.S. at 687 ("Unless a defendant makes both showings [i.e., both deficient performance and prejudice –] it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable").

Further, ample evidence of probative value shows that Petitioner's claims are suspect, incredible, and simply incapable to if establishing a competent facial allegation as to prejudice. He is not neophyte to South Carolina General Sessions and he should have learned in prior successful PCR action that counsel's ability to provide sound representation hinges upon his willingness to aid counsel's efforts. Therefore, further discussion is unnecessary.

V.

Certiorari is not warranted where probative evidence supports the PCR Judge's finding that Petitioner failed to prove appellate counsel was ineffective for failing to raise an issue concerning the admissibility of a decedent's prior trial testimony as an alleged violation of the Confrontation Clause.

Effective Assistance of Appellate Counsel

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C.

535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983)). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Jones, at 754, 103 S.Ct. at 3308.

Generally, in analyzing a claim of ineffective assistance of appellate counsel, the Court applies the Strickland test just as it would when analyzing a claim of ineffective assistance of trial counsel. See Southerland at 616, 524 S.E.2d at 836. Thus, the relevant questions are (1) whether appellate counsel's performance was deficient; and (2) whether Petitioner was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 237, 276 (2009). To prove prejudice, the applicant must show that, but for cousnel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Discussion

Ample probative evidence supports the PCR Judges finding that appellate counsel thoroughly reviewed the trial transcript and researched the relevant issues before briefing the issues presented on appeal. Regardless, Petitioner's allegation is substantively without merit. Petitioner alleges that the information from Frontis Smith was not admissible because it was hearsay, it violated the confrontation clause, was testimonial, and was made during an investigation and not in responds to any ongoing emergency. Smith's prior testimony does not constitute inadmissible hearsay because Petitioner had a prior opportunity to cross-examine him. See SCRE Rule 804(b)(1); see also State v.

Ladner, 373 S.C. 103, 111, 644 S.E.2d 684, 688 (2007); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) ("admission of testimonial hearsay statements against an accused violates the Confrontation Clause if: (1) the declarant is unavailable to testify at trial, and (2) the accused has had no prior opportunity to cross-examine the declarant"). Here, Petitioner actually did cross-examine. Smith at his first trial. Accordingly, Petitioner failed to prove the first prong of the Strickland test – that appellate 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 appellate counsel's performance.

VI.

Certiorari is not warranted where Petitioner's argument that counsel was ineffective for failing to raise an alleged double jeopardy violation predicated upon this Court's decision to grant Petitioner a new trial instead of a sentencing hearing is wholly without merit and beyond pale.

Discussion

This Court's decision to affirm the grant of Petitioner's first PCR case inured to his benefit and constituted law-of-the-case.); See In re Morrison, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal). Therefore, further discussion is unnecessary.

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,

ALAN WILSON
Attorney General

WALT WHITMIRE
Assistant Attorney General
S.C. Bar # 100793

Post Office Box 11549
Columbia, S.C. 29211
(803) 734-3737

By: _____
ATTORNEYS FOR RESPONDENT

Aug. 21st, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-001199

FRANK TOLEN,

PETITIONER,

V.

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:

Stephen D. Geoly, Esquire
Geoly Law Firm
1225 S. Main Street
Greenwood, SC 29646

This 21st day of August, 2014

Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2013-001199

FRANK TOLEN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

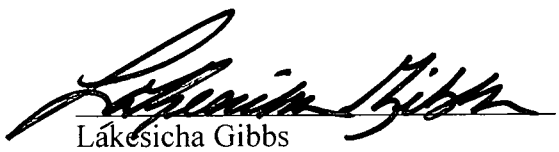
RESPONDENT.

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:

E. Charles Grose, Jr., Esquire
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646

This 21st day of August, 2014



Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
AUG 25 2014
S.C. Supreme Court

August 21, 2014

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

RE: **Frank Tolen v. State of South Carolina**
Appellate Case No: 2013-001199

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: E. Charles Grose, Jr., Esquire
Stephen D. Geoly, Esquire