STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No. 2006CP4001599

Demetrio Sears, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

DEMETRIO LUIS SEARS
Petitioner pro se

ADDRESS:

4848 Goldmine Highway, KCI
Kershaw, SC 29069

ATTORNEYS FOR PETITIONER

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

STATEMENT OF ISSUES ON APPEAL

WHETHER SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S ORDER OF DISMISSAL?

STATEMENT OF THE CASE

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Petitioner was indicted at the December 2002 term of the Court of General Sessions for Richland County for attempted armed robbery (02-GS-40-10992). He was represented by Douglas Strickler, Esquire. On January 5, 2004, the Petitioner proceeded to trial after which he was found guilty of attempted armed robbery.[1] He was sentenced by the Honorable G. Thomas Cooper, Jr., to confinement for a period of eighteen (18) years for attempted armed robbery.

A timely Notice of Appeal was filed on Petitioner's behalf and an appeal was perfected. Following an Anders brief, the South Carolina Court of Appeals dismissed Petitioner's appeal. State v. Sears , Op. No. 2006-UP-126 (S.C. Ct. App. filed February 24, 2006).[2]

The Petitioner filed his PCR application on March 20, 2006, he made several amendments up until the day of the PCR hearing. The PCR hearing was before The Honorable Alison Renee Lee on February 20, 2008 at the Richland County Courthouse. The Petitioner was present at the hearing and was represented by Charlie J. Johnson, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

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[1] Originally, the Petitioner was tried on September 23, 2003 with The Honorable J. Ernest Kinard; however, that trial resulted in a hung jury.

[2] Anders v. California, 386 US 738 (1967).

At the hearing, the Petitioner testified on his own behalf. The Petitioner's trial counsel, Douglas Strickler, Esquire also testified. The PCR Court issued an Order of Dismissal on or about December 22, 2009. The Petitioner's Rule 59(e) motion was denied on or about March 17, 2010.[3]

The Petitioner, *pro se*, filed a Petition for Writ of Certiorari on January 17, 2011. This return follows.

[3] The Order denying the Petitioner's Rule 59(e), SCRCP motion explained that the Rule 59(e) motion failed to comply with Rule 59(g), SCRCP.

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 applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

Where 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 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). 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 v. Washington. 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 v. State,

300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. 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 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 the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). Even with respect to guilty plea counsel, an applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

ARGUMENT

SUFFICIENT EVIDENCE OF PROBATIVE VALUE EXISTS TO SUPPORT THE PCR COURT'S ORDER OF DISMISSAL

The Respondent submits that despite the Petitioner's claims, trial counsel's representation was not deficient and there has been no demonstration of prejudice. Trial counsel was *the* Public Defender and had over twenty-five (25) years of experience in criminal law. (App. p. 1299). His experience and his position as the elected Public Defender support the fact that strategic choices should not be freely second guessed. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 530 (1992).

> Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See *Knowles, supra,* at ---- (slip op., at 14-15); *Rompilla v. Beard,* 545 U.S. 374, 383, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith,* 539 U.S. 510, 525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Strickland,* 466 U.S., at 699.
> Harrington v. Richter, 09-587, 2011 WL 148587 (U.S. Jan. 19, 2011).

For instance, one of the Petitioner's allegations is that trial counsel failed to utilize the services of a crime scene expert to reveal the supposed weaknesses in the victim's version of events and to support the Petitioner's version of events – mainly that the shooting took place not in the store during an attempted robbery but outside near the minivan. Trial counsel explained that he consulted with both his in-house investigator and an outside crime scene

expert. (App. p. 1301 – 1303, 1305). Trial counsel explained that after discussing the case with the Applicant and the two investigators – coupled with his years of criminal defense experience – that it would not have been advantageous to attempt to have their own crime scene expert testify and attempt to support the Petitioner's version of events. (App. p. 1301 – 1304, 1305). Trial counsel articulated valid strategic reasoning for his decision:

> "[O]ur crime scene expert would indicate would support the state's contention ... His conclusion was that the shooting could have taken place inside as described by the state's witness. The fact – you know – well; his conclusion was that the shattered glass in the front door almost looked like a body had flown through (sic) front door. It was not of assistance to the defense... It's not my habit and custom to go ahead and introduce evidence that I believe will go ahead and further the state's case."
> (App. p. 1304 L. 14 – 16, p. 1305 L. 18 – 23, p. 1306 L. 7 - 9).

At the PCR hearing, when the Petitioner was confronted with the above glass issue and how it did not match the his version of events he first tried to change his story and say that the victim could have shot the glass door from inside the store, but he realized that was inconsistent with his story that the victim was outside of the store when the shots were fired. (App. p. 1290 – 1291). Eventually the Petitioner reasoned that the victim(s) must have re-entered the store after the shootings and staged the damage. (App. p. 1290 L. 15 – 16).[4]

There is nothing deficient about trial counsel's reasoning – in this case

[4] The Petitioner also claims that the victim must have moved his (the Petitioner's) hat to support the victim's version of events. (App. p. 1020).

- to not have a crime scene expert testify for the defense. While the Petitioner may argue the significance of different elements of the scene, such as the angle of his wound and how it is inconsistent with the victim's version of events, counsel explained that as he discussed the case with his expert(s), "it doesn't really matter" bodies can be configured to go with either story considering crime scene analysis of bullet trajectory is merely "the intersection of two different plains (sic)." (App. p. 1317).

Trial counsel explained that a crime scene expert would not have aided in the defense's case. "But *Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." Harrington v. Richter. Another supposed inconsistency that the Petitioner argues was prejudicial is the color of his shoes - that trial counsel failed to properly cross-examine the victim when he claimed that the Petitioner was wearing "blue" shoes, when, according to the Petitioner, other evidence exists to show that he was wearing white shoes. (App. p. 1254). However, a full review reveals that the victim actually testified the Petitioner was wearing "blue and white" shoes (not just blue) during cross examination by trial counsel. (App. p. 190). Victim Stokes never testified on direct (or during co-defendant's cross examination of him) that his assailant was wearing blue shoes – he says blue and white shoes. The Petitioner makes this argument in his certiorari petition and references "(App. pg. 40,sp)," yet p. 40 is not victim testimony but merely the trial

judge's opening remarks to the jury with no mention of any facts. (App. p. 40). This Respondent notes the similarity in visual perception between the color blue and the shade of gray, and the relative inconsequential result of whether a witness claims shoes were *white and blue* or *white and gray* when viewing an object under differing circumstances and lighting a while a gun is pointed to the observer's head.

The Respondent submits that trial counsel's performance was hardly deficient and, contrary to the Petitioner's claims, counsel did skillfully address the inconsistencies in the State's case. Trial counsel reveals the weaknesses in the Quattlebaums' testimony and how their story changed. (App. p. 1104 - 1105). Trial counsel explained to the jury how it just did make sense that the Petitioner would be running around after suffering such serious wounds, wounds that caused him to lose "2.7" liters of blood. (App. p. 1102 – 1103). Trial counsel explained the inconsistencies in the victim's version of events – particularly the lack of bullets or bullet holes to substantiate the claim that there was fire from the defendants. (App. p. 1106 – 1107). Trial counsel explains that it "boggles the mind" that there is no blood in the store if that is where the shooting happened. (App. p. 1108 – 1109, 1112 - 1113).[5] Trial counsel thoroughly cross examined the State's witnesses, including the chief investigator, regarding the lack of blood evidence and bullet/shell location(s) as related to the victim's version of

[5] The trauma doctor explained that they did not identify any "external bleeding source." (App. p. 584 L. 4).

events. (App. p. 516 - 524,829 – 831, 834 - 836). The victim's were not the only ones testifying (not to mention the location of the cartridges) that the robbers were in the store - meaning that the incident did not happen as defendants merely pulled into the parking lot. Two uninvolved passersby testified that they saw who they perceived to be as robbers "come out of this store." (App. p. 106, 108).[6] It was trial counsel that revealed that the recording information from passersby's original statements did not involve seeing people running from the store. (App. p. 686, 1105).

The Respondent submits that the PCR Court correctly denied the Petitioner's claims regarding the supposed juror misconduct because there is no evidence of any prejudice. (App. p. 1338 – 1339). A witness (who was the mother of codefendant and the Aunt of the Petitioner) claimed to have seen a juror and one of the victims exchange greetings as they confronted each other upon entering the courtroom. (App. p. 10 – 11). Even after this supposed improper communication was revealed as nothing more than a "hi" and "how are you," the juror was asked if she "could be fair to both parties." (App. p. 11 L.6, p. 14 L. 12 – 13).[7]

The Respondent submits that the PCR Court correctly denied the Petitioner's claims regarding supposed inconsistent testimony from the victims as to the morning timeline. Victim Patterson testified that it was

[6] The co-defendant's statement explains that the shooting happened in the store. (App. p. 30, 781 L. 21 - 22).

[7] The juror was questioned initially about a note she submitted that a cousin of hers was employed by the Sheriff's office. (App. p. 14).

after he returned from the bank at 9:30 that he went over the day's activities with victim Stokes. (App. p. 216 – 217). Victim Stokes testified consistently with victim Patterson, that he (Stokes) arrived around 9:00 AM (Patterson was already there) and they both "opened" the store at the usual time, i.e. 9:00 AM. (App. p .134, p. 213 – 214).

At trial, the Petitioner himself went to great lengths to explain that he had eight (8) gunshot wounds. (App. p. 992 – 995). There is nothing deficient about trial counsel's arguments/questioning regarding the Petitioner's eight (8) gunshot wounds.

The Petitioner explained that he did not recall much of what happened immediately after he was shot, at trial he was asked specifically about what happened in the van with the police – there was no mention of him asking for an attorney. (App. p. 625 – 626, 638, 983, 988). The Petitioner was not arrested for the attempted armed robbery until after the date of the incident. (App. p. 784).[8]

The Petitioner claims that counsel was ineffective for failing to reveal inconsistencies in victim Patterson's identification regarding Horzendorf from one of the photo lineups and Patterson's claim that Horzendorf perhaps cased the location the day prior to the attempted armed robbery. The Petitioner

[8] The Petitioner does not argue that he was under the "inherently compelling pressures" of incarceration prior to the statement dated November 4, 2002 (he was in the hospital immediately following the crime on October 8, 2002). (App. p. 386, 395). Maryland v. Shatzer, 130 S. Ct. 1213, 1219, 175 L. Ed. 2d 1045 (2010).

claims it is impossible because Horzendorf was in Florida. (App. p. 1265 L. 4, Petition, p. 12). The Respondent submits that the PCR Court correctly denied the Petitioner's claims because there is no evidence to support his claim - there is no credible evidence that Horzendorf was out of state.[9]

The Respondent submits that a full review of the record reveals that the PCR Court correctly denied the Petitioner's claims because he failed to satisfy his burden of proof and demonstrate that trial counsel's performance was deficient and that he was prejudiced.

[9] The investigative report that Petitioner mentions was not admitted or otherwise authenticated at the PCR hearing. (App. p. 1232). *See also*, Rule 803(8)(B), SCRE.

CONCLUSION

For the reasons stated above, this Court should affirm the PCR Court's Order and deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

By: 
ATTORNEYS FOR THE RESPONDENT

Columbia, South Carolina
April 6, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable Alison R. Lee, Circuit Court Judge

Demetrio Sears, #271284,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

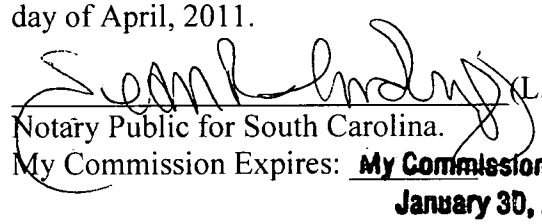
Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari has been served upon, Demetrio Sears, #271284 by mailing two (2) copies addressed to: Kershaw Correctional Institution; 4848 Goldmine Highway; Kershaw, SC 29069; with postage prepaid, this 7th day of April, 2011.

BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 7th
day of April, 2011.



(L.S.)
Notary Public for South Carolina.
My Commission Expires: My Commission Expires
January 30, 2013