STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2013-002786

Timothy L. Wallace, ... Petitioner,

v.

State of South Carolina, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Is Certiorari necessary to review whether the PCR Judge erred in finding Petitioner failed to meet his burden to prove that counsel was ineffective for failing to object to the Trial Judge's decision to allow the State to introduce Petitioner's prior conspiracy conviction for impeachment purposes?

2. Is Certiorari necessary to review whether the PCR Judge erred in finding Petitioner failed to meet his burden to prove that counsel was ineffective for failing to object to an isolated and innocuous comment made by the solicitor during the State's closing argument?

STATEMENT OF THE CASE

The Oconee County Grand Jury indicted Petitioner at the January 2006 term of General Sessions for trafficking in cocaine, more than 400 grams (2006-GS-37-175) **App.pp.324**. Suzanne Earle, Esq., represented Petitioner.

After the State called the case to trial on September 18, 2007, Petitioner was found guilty as indicted. The Honorable J.C. Nicholson, Jr., sentenced Petitioner to a term of twenty-five (25) years imprisonment. **App.pp.1-251.**

A notice of appeal was filed at the South Carolina Court of Appeals. Elizabeth Franklin-Best, Esq., of the South Carolina Office of Appellate Defense represented Petitioner on appeal. The Court of Appeals affirmed Petitioner's convictions and sentences. State v. Wallace, Op. No. 4800 (S.C. Ct. App. filed March 2, 2011) Petitioner filed a Petition for Writ of Certiorari with the South Carolina Supreme Court. The Petitioner was granted on April 5, 2012. The Court dismissed the appeal as improvidently granted. State v. Wallace, Op. No. 27203 (S.C. Court filed December 19, 2012).

Petitioner filed an application for post-conviction relief (PCR) on April 12, 2013. **App.pp.251-58**. A hearing was convened at the Oconee County Courthouse on September 2, 2013. **App.pp.279-313**. Petitioner was present and represented by Hugh Welborn, Esq. Walt Whitmire, Esq., of the Office of the Attorney General represented Respondent. The Honorable R. Lawton McIntosh denied relief in an order dated November 26, 2013. **App.pp.315-24**. This appeal for discretional review follows.

STATEMENT OF THE FACTS FROM THE TRIAL

On September 14, 2005, Cpl. Crompton was patrolling Interstate 85 in Oconee County and saw a car cross the center lane. Cpl. Crompton then testified before the jury regarding the circumstances of the traffic search and the canine alert. Cpl. Crompton approached the driver's door and asked the driver, identified as Wallace, for his license, registration and proof of insurance. For safety reasons, Cpl. Crompton asked Petitioner to get out and step to the back of the car.

While Cpl. Crompton and Petitioner were sitting in the patrol car, a black BMW with a hispanic male driver pulled up behind the car and sat there for a couple of minutes before pulling back onto Interstate 85 when Cpl. Crompton walked up to Petitioner's car to speak to the co-defendant. As he approached Petitioner's car, a cell phone on the seat next to the co-defendant rang, but the co-defendant did not answer it. Cpl. Crompton testified this was consistent with drug trafficking because the traffickers sometimes use decoy cars and call each other on cell phones during the trip.

The car Petitioner was driving was registered to a female who was not traveling with him and the co-defendant. Cpl. Crompton testified it is common in drug cases for a third party to rent or own a car used to transport drugs. He also testified Interstate 85 is a "drug corridor," and Atlanta is considered a drug "source" or "hub" city.

Right before he ran the canine around the car, Sgt. Colegrove, of the Oconee County Sheriff's Office, arrived at the scene to assist. The canine alerted on the car, and Cpl. Crompton searched the trunk and removed luggage from inside the car. As he removed the luggage, he held each bag up to be identified as either Petitioner's or co-

defendant's. There was a black bag neither initially claimed, but Petitioner ultimately claimed it. When Cpl. Crompton opened the bag, he found a plastic bag containing 752 grams of cocaine.

After Cpl Crompton found the cocaine in a bag claimed by Petitioner, Sgt. Colgrove read Petitioner his Miranda rights, and Petitioner waived his right to counsel. Petitioner then told Sgt. Colgrove he picked the cocaine up in Atlanta and was delivering it to North Carolina. The court found the police properly advised Petitioner of his Miranda rights, and Petitioner's statements were voluntary. Sgt. Colgrove then testified before the jury regarding Petitioner's roadside statements.

Petitioner testified in his own defense, stating co-defendant was his cousin, and he asked Petitioner to go with him to his brother's house in Atlanta for a baby shower. Petitioner stated co-defendant claimed the bag with the cocaine, and he did not know it was in the car. On direct examination, Petitioner testified he pled guilty to conspiracy to distribute cocaine in 1999. The State did not reference that conviction during cross-examination. The jury convicted Petitioner of trafficking cocaine

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 to review whether the PCR Judge erred in finding that Petitioner failed to meet his burden to prove that counsel was ineffective for failing to object to the Trial Judge's decision to allow the State to utilize Petitioner's prior conspiracy conviction for impeachment purposes.

At the PCR hearing, Petitioner argued counsel failed to properly object to the State's employment of his prior conspiracy conviction for impeachment purposes. He speculated that the jury found him guilty because he had a prior record. **App.pp.288-90**.

Counsel testified to her course of conduct during the representation. **App.pp.301-09**. She advised Petitioner to accept a favorable guilty plea offer based upon her opinion of the State's convincing evidence of guilt. Petitioner declined. At trial, Petitioner was made aware of his right to testify; counsel advised him on his prior convictions that she reasoned would be admissible for impeachment purposes. **App.p.305**.

In denying Petitioner's Application, the PCR judge commented that Petitioner failed to prove that an objection held sufficient merit, based upon the jurisprudence at the time of trial, to even make a prima facie showing that deficient performance. **App.p.312; p.319.** Furthermore, he commented that Petitioner's conviction was supported by overwhelming evidence of guilt. **App.p.312; p.322**.

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 question of whether Certiorari is necessary to review whether the PCR Judge's finding was sound here is readily disposable in light of the obvious overwhelming evidence of guilt that would have rendered any possible deficiency here per se non-prejudicial harmless error. Evidence of a prior conviction is admissible to impeach a witness unless a period of more than ten years has elapsed since the date (1) of the conviction or (2) of the release of the witness from confinement for that conviction, whichever date is later. Rule 609(b), SCRE. To constitute error, a ruling to admit or exclude evidence must affect a substantial right. Rule 103(a), SCRE. An error is harmless if the defendant's guilt has been conclusively proven by competent evidence, such that no other result could have been reached. State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). The circumstances of each individual case are to be considered. State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985). In addition, the error is harmless if the error could not have reasonably affected the outcome of the trial. Id.

In the present case, Petitioner's admission of dominion over the black bag that

contained the narcotics, Petitioner's subsequent confession that he was trafficking the narcotics through interstate travel, and even the circumstances of the traffic stop and arrest were individually more damaging to Petitioner's credibility concerning his incredible version of the facts as told to the jury than the introduction of the prior conspiracy conviction. See Johnson, 363 S.C.t at 60, 609 S.E.2d at 524. Collectively, the glaring evidence of his guilt was exponentially more damaging than the introduction of the prior conviction.

Furthermore, counsel strategically introduced Petitioner's prior convictions on direct examination to lessen the impact they might have on Petitioner's credibility. The State placed no other emphasis on these prior convictions. Id. Therefore, ample probative evidence supports the PCR Judge's finding that Petitioner's conviction was supported by overwhelming evidence of guilt. See Pinckney v. Warren, 344 S.C. 382, 387, 544 S.E.2d 620, 623 (2001) ("The trial judge is in the better position to assess the credibility of the witnesses."). Thus, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. In the interest of judicial economy, further discussion on the matter is unwarranted.

II.

Certiorari is not warranted to review whether the PCR Judge erred in finding Petitioner failed to meet his burden to prove that counsel was ineffective for failing to object to select comments made by the solicitor during the State's closing argument.

At the PCR hearing, Petitioner alleged counsel was ineffective for failing to object to the "solicitor's improper vouching of State's witnesses." **App.p.291**. Petitioner

challenges the propriety of the following comment in insolation:

> Not one officer said this, but two; two officers with combined more than 20 years experience in law enforcement. They are not gonna put their reputations and their jobs on the line to come into court and tell you something that's not true.

App.pp.218-19. Counsel testified that at the time of trial, the comment did not "strike me as being bolstering." **App.p.306.** Counsel testified that her general practice is to only object to a "blatantly" improper argument. **App.p.306.** The PCR Judge found the comment to be concerning, a result of the post-hoc incomplete manner it was presented at the PCR hearing, but that any possible impropriety did not rise to a level to support Petitioner's deficiency and ineffective assistance arguments. **App.pp.319-30**.

Again, Certiorari is unnecessary to review the PCR Judge's sound finding here. "A solicitor's closing argument must be carefully tailored so as not to appeal to the personal biases of the jury." State v. Copeland, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996). "The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence." Id. "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004). "Improper comments do not automatically require reversal if they are not prejudicial to the defendant, and the appellant has the burden of proving he did not receive a fair trial because of the alleged improper argument." Humphries v. State, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due

process." Id.

Similarly, probative evidence supports the PCR Judge's finding that Petitioner failed, in resounding fashion, to prove Strickland's prejudice prong, The dash-cam video recording of the traffic stop and arrest was submitted at trial. The jury was also able to view the conduct and demeanor of the officers and make an independent assessment on the credibility of the witnesses at issue. Additionally, Petitioner's conviction was supported by overwhelming evidence of guilt. Thus, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel's performance

Regardless, Petitioner's argument that counsel's performance was unsound in failing to object to the comment is not supported by the record. Counsel delivered an effective closing argument that opened the door to the solicitor's comment here. "[W]hen a party introduces evidence about a particular matter, the other party is entitled to explain it or rebut it, even if the latter evidence would have been incompetent or irrelevant had it been offered initially." State v. Beam, 336 S.C. 45, 52, 518 S.E.2d 297, 301 (Ct. App.1999); Counsel attacked the veracity of the arresting officers in light of minor evidentiary weakness in the dash-cam video. **App.p.214**. Therefore, the solicitor properly exercised his equitable discretion in making the insolated comment at issue[1].

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

[1] Rule 220(c), SCACR, in turn, provides that "[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record on Appeal" I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418, 526 S.E.2d 716, 722 (2000).

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: _____
ATTORNEYS FOR RESPONDENT

Oct. 16th, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Hon. J. Cordell Maddox, Jr., Circuit Court Judge
Appellate Case No. 2013-002786

TIMOTHY L. WALLACE,

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:

Elizabeth A. Franklin-Best, Esquire
Blume Norris & Franklin-Best LLC
900 Elmwood Avenue
Suite 101
Columbia, SC 29201

This 16th day of October, 2014

Lakesicha Gibbs
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
OCT 16 2014
S.C. Supreme Court

October 16, 2014

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

RE: **Timothy L. Wallace v. State of South Carolina**
Appellate Case No: 2013-002786

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: Elizabeth A. Franklin-Best, Esquire
Trisha Allen