STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

The Honorable William H. Seals Jr., Circuit Court Judge

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Appellate Case No. 2014-000018

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Kevin Walton, ..... Petitioner,

v.

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

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Did the post-conviction relief judge properly find counsel was not ineffective for failing to file a merits brief addressing the trial judge's denial of a directed verdict motion where counsel stated he did not find the issue meritorious; where the issue would not have been successful; and where the Anders process ensured the issue was reviewed on appeal?

2. Did the post-conviction relief judge properly find counsel was not ineffective for entering evidence in Petitioner's defense where the evidence bolstered Petitioner's defense theory and where the waiver of final closing argument did not prejudice Petitioner?

## STATEMENT OF THE CASE

In September 2004, the Florence County Grand Jury indicted Petitioner for murder and grand larceny. (App. pp. 762-63). Patrick J. McLaughlin, Esquire ("counsel") represented Petitioner. (App. p. 30). On April 23, 2007, Petitioner proceeded to trial before the Honorable Thomas A. Russo and a jury. (App. p. 30). The jury found Petitioner guilty as indicted on April 26, 2007. (App. p. 602, lines 3-14). Judge Russo sentenced Petitioner to life imprisonment without the possibility of parole for murder and five (5) years imprisonment for grand larceny. (App. p. 605, line 25-p. 606, line 16). Judge Russo denied Petitioner's motion for a new trial on December 12, 2007. (App. pp. 617-621).

Counsel perfected Petitioner's direct appeal with the filing of an Anders[1] brief. (Supp. App. pp. 17-28). The South Carolina Court of Appeals dismissed Petitioner's appeal on June 1, 2011. State v. Walton, Op. No. 2011-UP-255 (S.C. Ct. App. filed June 1, 2011).

Respondent filed the present application for post-conviction relief on November 14, 2011. (App. pp. 624-630). Petitioner filed a return on or about September 27, 2012. (App. pp. 660-664) The Honorable William H. Seals Jr. ("the post-conviction relief judge") convened an evidentiary hearing into the application on October 10, 2013. (App. p. 665). Respondent was present and represented by J. Rene Josey, Esquire. (App. p. 665). The post-conviction relief judge denied relief in an order dated November 25, 2013, and filed December 11, 2013. (App. pp. 745-761).

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

## ARGUMENT

### I. Probative evidence supports the post-conviction relief judge's finding counsel was not ineffective in failing to brief the directed verdict issue.

Petitioner asserts the post-conviction relief judge erred in finding counsel was not ineffective in filing an Anders brief. However, counsel testified he did not see any viable issues to appeal. Furthermore, an appeal of Judge Russo's decision on the directed verdict motion would have been futile. Finally – and most damaging to Petitioner's argument – the Court of Appeals' dismissal after an Anders review indicates it also found this issues to be meritless. Accordingly, significant probative evidence supports the post-conviction relief judge's finding in this regard.

In a post-conviction relief action, the applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). On appeal, this Court must affirm the circuit court's denial of post-conviction relief when there is probative evidence to support the findings of the circuit court. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989)).

A defendant is constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 396 (1985). To be entitled to relief, an applicant must show appellate counsel's performance was deficient and he was prejudiced by the deficiency. Thrift v. State, 302 S.C. 535, 537, 397 S.E.2d 523, 526 (1990); Strickland, 466 U.S. at 687. "However, appellate counsel is not required to raise every non-frivolous issue that is presented by the record." Thrift, 302 S.C. at 539, 397 S.E.2d at 526 (citing Jones v. Barnes, 463 U.S. 745 (1983)). Appellate counsel has a professional duty to

choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985). Furthermore, an applicant must prove prejudice by showing "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) (citations omitted).

**A. Counsel briefed the issues he found meritorious.**

Here, counsel articulated a valid, strategic reason for not briefing the directed verdict issue. Counsel had a discussion with Petitioner about potential issues on appeal. (App. p. 701, line 24-p. 702, line 1). He also explained to Petitioner that those issues would not be successful on appeal. (App. p. 702, lines 1-5). Because counsel did not believe those issues were meritorious, he chose to brief other issues. Counsel was not required to raise every colorable issue on appeal simply because Petitioner desired them to be raised. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (citing Jones, 463 U.S. 745). Because counsel articulated a reason for raising certain issues to the exclusion of Petitioner's preferred issues, he was not deficient in refusing to brief the directed verdict issue.[2]

[2] Petitioner accuses counsel of failing to recognize the directed verdict issue as a significant one. While Petitioner may find this issue to be significant from his ivory tower of post-hoc review, counsel maintained throughout the evidentiary hearing that there was sound evidence linking Petitioner to the crime. (App. p. 713, lines 2-20). Because counsel was actually at trial and familiar with the evidence, Respondent submits this Court should defer to his reasoned decision that the directed verdict issue was not meritorious. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). Respondent also notes the post-conviction relief judge found the trial record contained overwhelming evidence of Petitioner's guilt. (App. p. 759-60).

**B. Arguing the trial judge erred in denying the directed verdict motion would not have been successful on appeal.**

Furthermore, Petitioner was not prejudiced by the lack of a merits brief on the directed verdict issue because he would not have been successful on appeal had counsel argued Judge Russo erred in denying the directed verdict motion. Tisdale, 357 S.C. at 476, 594 S.E.2d at 167 (no prejudice where there is no merit to arguments that were not briefed). Although built on circumstantial evidence, the State's case against Petitioner was overwhelming. The victim's daughter saw the victim and Petitioner together at the victim's house after 1:00 AM. (App. p. 534, line 1-p.536, line 23). A forensic investigator determined the victim's time of death to be between 4:00 AM and 4:30 AM. (App. p. 445, lines 12-13) A forensic pathologist opined the victim died from strangulation by another person. (App. p. 301, line 20-p. 302, line 7). The daughter testified her mother was deceased at 6:00 AM. (App. p. 551, line 5-p. 543, line 4). There was no evidence the house was broken into or that any person besides the victim, the daughter, and Petitioner were in the house between 1:00 AM and 6:00 AM. (App. p. 407, lines 4-18).

A local police officer spotted the victim's car leaving the area around 5:30 AM. (App. p. 101, line 25-p.103, line 19). The car was later recovered in Florida. (App. p. 318, lines 13-020). Police found boots in the trunk of the car that were the same brand as the boots Petitioner was wearing when arrested. (App. p. 452, line 25-p. 453, line 6). Near where the car was abandoned, police responded to a theft of a Lexus. (App. p. 366, lines 15-19). At that scene of the theft, police found a boot print consistent with Petitioner's boots. (App. p. 462, line 17-p. 463, line 11). Police also found the keys to the victim's car at the scene of the theft. (App. p. 366, line 25-p. 376, line 24.) Police

later found the Lexus in a parking lot in Virginia with Applicant's fingerprints on its exterior. (App. p. 390, line 24-p. 395, line 6; p. 402, lines 8-12). Police arrested Petitioner near the location where the Lexus was located. (App. p. 403, lines 9-25).

Although Petitioner attempts to couch this evidence as merely raising a suspicion of his guilt, the natural conclusion to be drawn from this evidence is that he was the only person present at the scene of the murder, from which he then fled. Essentially, Petitioner hopes the fact he had the wherewithal to murder the victim behind closed doors, away from the prying eyes of witnesses, will save him from a conviction. Such is not the law of South Carolina. Instead, a directed verdict motion must be denied "if there is any substantial evidence which reasonably tends to prove the guilt of the accused or from which guilt may be fairly and logically deduced. State v. Prince, 316 S.C. 57, 64, 447 S.E.2d 177, 181-82 (1993) (citing Brown v. State, 307 S.C. 465, 415 S.E.2d 811 (1992); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989)). Here, the evidence fairly and logically points to Petitioner as the murderer.[3] He was the last person seen with the victim mere hours before she died. He took the victim's car to Florida, where he has family, and stole another car. He drove this second car to Virginia, where he was finally arrested. Petitioner's attempt to cast this chain of facts as speculative and coincidental is unpersuasive. Because this circumstantial evidence overwhelmingly

[3] Petitioner's reliance on the spasmodic line of cases overruling denials of directed verdict motions is fatally flawed because those cases rely on the fact no evidence indicated the defendant was ever at the scene of the crime. See Frazier, 386 S.C. 526, 532, 689 S.E.2d 610, 613 ("In [the cited cases] we held that the State did not produce substantial circumstantial evidence of the defendant's guilt and noted that the State presented no evidence that the defendant was at the scene. We reject any interpretation that these cases altered or increased the sufficiency of evidence standard a trial court is to apply in a case based on circumstantial evidence.") Here, witnesses placed Petitioner at the scene hours before the murder, and the evidence overwhelmingly indicated he fled the next morning.

indicates Petitioner's guilt, he would not have been successful on appeal if counsel had challenged Judge Russo's directed verdict ruling.

### C. The Court of Appeals' dismissal after an Anders review implicitly indicates the directed verdict issue was not meritorious.

Furthermore, Applicant has not shown he was prejudiced by appellate counsel's decision to file an Anders brief because the Court of Appeals' dismissal indicates it also found no reversible error in Judge Russo's ruling. In State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002), this Court outlined the Anders procedure as follows:

> "[A]ccording to Anders, the reviewing court is obligated to make a full examination of the proceedings on its own. After such an examination, if the reviewing court agrees with the attorney, it may dismiss the appeal or proceed to a decision on the merits. On the other hand, if the court disagrees with the attorney's analysis of the appeal, it must afford the defendant 'the assistance of counsel to argue the appeal.' The purpose of filing a brief under Anders is to ensure the merits of the appeal are not overlooked. The court has to conclude independently, regardless of counsel's conclusion, whether or not the appeal has merit before it can dismiss the appeal."

McKennedy, 348 S.C. at 279, 559 S.E.2d at 855. A presumption of regularity attaches to judicial proceedings, and this presumption should extend to the Court of Appeal's review under the Anders procedure. See Pringle v. State, 287 S.C. 409, 410-11, 339 S.E.2d 127, 128 (1986) (citations omitted). Accordingly, this Court must presume the Court of Appeals reviewed this preserved issue before dismissing Applicant's direct appeal. See McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013) ("Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." (citing State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991))). If the Court of Appeals believed the directed verdict ruling was questionable, it would have directed counsel to file a merits brief.

Furthermore, the United States Supreme Court has indicated applicants face a difficult burden to prove prejudice in cases where counsel has filed an Anders brief. Smith v. Robbins, 528 U.S. 259, 287 (2000) ("[I]n most cases in which a defendant's appeal has been found, pursuant to a valid state procedure, to be frivolous, it will in fact be frivolous."). The burden is high because "it is reasonable to presume that when the court affirms an Anders appeal it has fully considered and rejected all potential issues that were apparent on the face of the record." Towbridge v. State, 45 So. 3d 484, 487 (Fla. Dist. Ct. App. 2010). The Anders procedure requires the court to independently examine the trial proceedings and consider "any errors apparent on the face of the record." Id. at 486-87 (citations omitted); see also McHam, 404 S.C. at 475, 746 S.E.2d at 46 (appellate court reviews all preserved issues for merit). The directed verdict and new trial motions are clearly apparent from the face of the transcript. Applicant has presented no evidence the Court of Appeals overlooked these rulings by Judge Russo. Therefore, this Court must presume the Court of Appeals' compliance with the Anders procedure included a review of the propriety of Judge Russo's denial of these motions, and its dismissal indicated it found no fault in Judge Russo's ruling. Accordingly, Petitioner has not demonstrated counsel was ineffective in failing to brief the directed verdict issue.

## II. Probative evidence supports the post-conviction relief judge's finding counsel was not ineffective in introducing evidence in Petitioner's defense.

Petitioner argues the post-conviction relief judge erred in finding counsel was not ineffective in presenting evidence in Petitioner's defense. However, the evidence presented was important to Petitioner's theory of defense. Furthermore, the admission of the evidence in no way infringed on any of Petitioner's rights. Thus, probative evidence supports the post-conviction relief judge's findings in this regard.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. The Court presumes that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 668). The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Cherry, 300 S.C. at 117, 386 S.E.2d at 625. First, the applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). 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." Id. at 117-18, 386 S.E.2d at 625.

### A. Counsel articulated valid, strategic reasons for introducing this evidence.

The post-conviction relief judge properly found counsel was not deficient in entering evidence because he articulated a valid, strategic reason for his actions. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed

ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). He entered a picture of the victim's neighborhood to demonstrate there was crime in the area and someone else could have entered the house and committed the murder. (App. p. 716, lines 18-22). He entered the forensic reports to demonstrate the police did not consider other suspects and to show the testimony at trial was different from the agent's initial impressions. (App. p. 716, line 23-p. 717, line 8; p. 719, lines 2-10). He entered the Florida district attorney's memorandum for the same reason. (App. p. 717, lines 9-22). Keeping in mind the fact "counsel's function [...] is to make the adversarial testing process work[,]" Strickland, 466 U.S. at 690, Respondent submits counsel was not deficient for using this evidence to challenge the State's case.[4] See State v. Winkler, 388 S.C. 574, 588, 698 S.E.2d 596, 603 (2010) (introduction of evidence over defendant's objection is tactical decision left to trial counsel).

**B. Counsel's introduction of evidence did not prejudice Petitioner's case.**

Even if counsel was somehow deficient because he forgot about his discussion with Petitioner to preserve last argument, Petitioner has not shown any resulting prejudice from this shift in trial strategy. The post-conviction relief judge properly determined Petitioner had not demonstrated he chose to waive his right to testify independently of his misconceptions about the order of arguments. Judge Russo gave Petitioner the opportunity to take the stand in his own defense, which Petitioner declined.

[4] Petitioner testified he thought it was very important to retain last argument, and counsel failed in abandoning this aspect of the trial strategy. (App. p. 677, lines 1-4). However, the post-conviction relief judge found this testimony to be not credible. (App. p. 754). See Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (this Court gives great deference to a post-conviction judge's credibility findings). The more likely scenario is that although counsel discussed this strategy with Petitioner, the changing landscape of the trial necessitated an abandonment of this plan. In fact, counsel admitted that "in the heat of battle when an inconsistency [...] pops out, you kind of want to highlight it, kind of bring it to the jury's attention[.]" (App. p. 707, lines 5-8).

(App. p. 552, line 24-p. 553, line 17). Petitioner avers he made this decision based on mis-advice about the order of closing arguments. [5] However, he testified he was fully aware he would only have last closing argument if he presented no evidence. (App. p. 676, line 23-p. 677, line 1). Thus, he cannot now claim he believed he still had closing arguments where at the time he retained final closing because he was present in the courtroom when counsel introduced evidence. Furthermore, Petitioner presented no testimony at the evidentiary hearing about what his testimony would have been had he taken the stand at his trial.[6] Cf. Horton v. State, 306 S.C. 252, 255, 411 S.E.2d 223, 225 (1991) (finding prejudice from mis-advice about testifying where applicant proffered at the post-conviction relief hearing what he wanted to testify about at trial). Because Petitioner failed to proffer what his trial testimony would have been, he has failed to demonstrate any possibility it would have changed the outcome of his trial. See Clark v. State, 315 S.C. 385, 388, 434 S.E.2d 266, 267 (1993) (finding of prejudice cannot be based on "pure conjecture"). Counsel also testified he advised Petitioner to not take the stand regardless of any developments at trial. (App. p. 707, line 24-p. 708, line 21; p. 721, lines 5-18). In light of this testimony,[7] Petitioner has not demonstrated he would have taken the stand under any circumstance. See Jackson v. State, 329 S.C. 345, 353, 495 S.E.2d 768, 772 (1998) (finding no prejudice where counsel would have still advised defendant not to testify).

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[5] Again, the post-conviction relief judge found Petitioner's testimony on this issue not credible. Drayton, 312 S.C. at 11, 430 S.E.2d at 521.

[6] Not only did counsel for Petitioner fail to elicit this testimony, Petitioner also refused to present this testimony when prompted by counsel for Respondent. (App. p. 693, line 12-p. 694, line 7).

[7] The post-conviction relief judge found counsel's testimony credible. (App. p. 754). Drayton, 312 S.C. at 11, 430 S.E.2d at 521.

Furthermore, Petitioner's contention he was prejudiced by the order of closing arguments is not supported by the record. See Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001) (an applicant must show prejudice from counsel's failure to secure last argument). Applicant's defense theory was that he was factually innocent and that the police failed to investigate the case thoroughly. Trial counsel's closing argument thoroughly addresses these issues by attacking the forensic evidence presented and attempting to create reasonable doubt. (App. p. 565, line 18-p. 578, line 10). The State's closing argument is largely a summary of the evidence in the case and not devoted in any significant way to attempting to counter any points raised by trial counsel. (App. p. 579, line 5-p. 587, line 5). Counsel could not have more adequately addressed the issues in this case had he been allowed to argue last. Cf. State v. Mouzon, 326 S.C. 199, 205, 485 S.E.2d 918, 921 (1997) (prejudice where defendant unable to adequately answer State's arguments). Furthermore, Petitioner has "voice[d] no complaint whatsoever about the argument [counsel] made for him and even now offers no suggestion of things that [counsel] should have argued to the jury on his behalf." State v. Charping, 313 S.C. 147, 157, 437 S.E.2d 88, 94 (1993) (Goolsby, AAJ, dissenting), overruled by[8] Franklin, 346 S.C. 563, 552 S.E.2d 718. Much like he failed to present evidence of what his trial testimony would have been, Petitioner also has not presented any evidence of what benefit he would have derived from final closing arguments – aside from generic statements about the fact he expected to have final argument. Accordingly, the post-conviction relief judge properly determined counsel was not ineffective in introducing evidence in Petitioner's defense.

[8] In fact, Franklin cited Judge Goolsby's dissent in overruling Charping and holding defendants must prove prejudice to warrant a new trial. Franklin, 346 S.C. at 575 n.9, 552 S.E.2d at 725 n.9.

The record contains significant probative evidence counsel acted reasonably and within professional norms when throughout his representation of Petitioner. He articulated strategic reasons for his work at both the trial and appellate level. Petitioner further failed to demonstrate he was prejudiced by any of counsel's actions.[9] Accordingly, the post-conviction relief judge did not err in denying the application for post-conviction relief. Wolfe, 326 S.C. at 163, 485 S.E.2d at 369.

[9] Again, Respondent notes the post-conviction relief judge properly found overwhelming evidence of Petitioner's guilt militates against a finding of prejudice. Hutto v. State, 387 S.C. 244, 249, 692 S.E.2d 196, 198 (2010) ("No prejudice occurs, despite deficient performance, when there is overwhelming evidence of guilt." (citing Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009))).

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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By: _____
ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
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Certiorari to Florence County

The Honorable William H. Seals, Jr. Circuit Court Judge

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KEVIN WALTON,

Petitioner,

v.

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:

Appellate Defender Lara M. Caudy
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 20th day of November, 2014

Norma Bigbee
NORMA BIGBEE
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL



November 20, 2014

**VIA HAND DELIVERY**
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

***RE:*** **Kevin Walton v. State of South Carolina**
**Appellate Case No: 2014-000018**

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 opposing counsel today.

Sincerely,

Joshua L. Thomas
Assistant Attorney General
Bar No: 100777

JLT/nb
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)