STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO ANDERSON COUNTY
Court of Common Pleas

The Honorable J. C. Nicholson, Jr., Trial Judge
The Honorable R. Lawton McIntosh, PCR Judge

Appellate Case No. 2014-000545

Kevin Ware, ... Petitioner,

v.

STATE OF SOUTH CAROLINA, ... Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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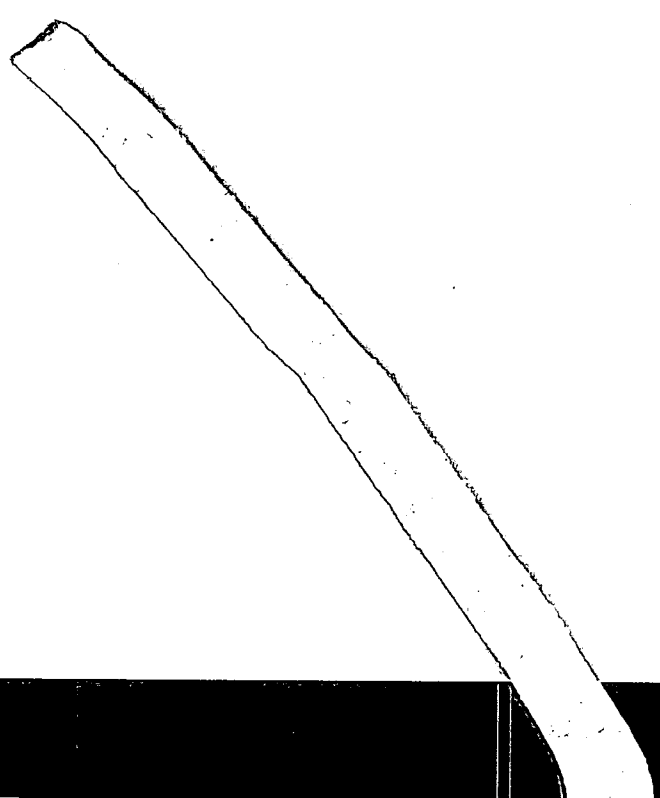
ATTORNEYS FOR RESPONDENT



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QUESTION PRESENTED

1. Is the grant of Certiorari necessary to review whether probative evidence supports the PCR Judge's sound ruling that Petitioner failed to meet his burden to counsel's purported failure to further impeach a State's witness with her remote prior convictions constituted deficient and ineffective performance?

STATEMENT OF THE CASE

Respondent adopts Petitioner's statement of the case.

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

Certiorari is unwarranted to review whether probative evidence supports the PCR Judge's sound ruling that Petitioner failed to meet his burden to prove counsel's performance in limiting cross-examination on a State's witnesses concerning remote prior convictions where counsel made a valid decision here where he caught the witness in a lie and destroyed her credibility in a global manner; moreover, probative evidence supports the PCR Judge's ruling that Petitioner failed to prove prejudice in light of the overwhelming evidence of his guilt.

At the PCR hearing, Petitioner argued that counsel's performance in failing to impeach State's eyewitness Virginia Richardson with her prior convictions constituted deficient performance. Petitioner asserted, "the [j]udge gave him the leeway to impeach him [sic] on a past criminal history, and he failed to do so."[1] **App.p.255; p.251, ln. 12-14**. However, Petitioner also testified that "[counsel] did a good job" in impeaching the witness's credibility on other maters. **App.p.259, ln. 6-8**.

[1] The Trial Judge found the solicitor "opened the door and the Court's going to allow her criminal record prior to ten years to come into evidence." **App.p.124, ln. 20-25**. Outside of the presence of the jury, counsel announced, "There are three charges I'm going to talk about, one is the marijuana charge, which is a crime of moral turpitude; a breaking and entering, which is a crime of moral turpitude, the other ones are within

Counsel testified to his course of conduct during the representation concerning the present issue as follows:

> [Virginia Richardson] testified. I impeached her. When she said she didn't use drugs, I thought the best thing to have was that she had just recently had her probation revoked for failing a drug test. She had a long record shopliftings, you know, misdemeanors. A lot of them were very old. We argued about her prior record, and you know, I was concerned if I opened the door, I might get stuck with something I didn't want in there. And I thought she had no credibility after she testified.[2]

App.p.265, ln. 8-16. Again, counsel reiterated that "Ms. Richardson had no credibility." **App.p.266, ln. 12**.

In denying Petitioner's application for post-conviction relief, the PCR Judge found that Petitioner fell well short of his burden to prove that counsel's performance was either deficient or ineffective here. **App.p.277**. The PCR Judge found that "counsel articulated valid trial strategy to limit his cross-examination where the witnesses credulity [sic] was already in doubt... and an effort to impeach the witness on her remote prior convictions yielded diminished returns at best." **App.p.277**.

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

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ten years." **App.p.125, ln. 6-10**.

[2] Counsel cross-examined the witness as follows:

> Q: Have you used drugs since [the night of the incident]?
> A: No, sir, I have not. I've went through treatment.
> Q: Well, now, I asked if you used drugs since January 15th, and you said, "No."
> A: No, Sir.
> Q: Well you have, haven't you, because you're on probation correct?
> A: I'm on probation. Yes, sir.
> Q: Wasn't your probation revoked for failing a drug test?
> A: For one drug test.

ineffective performance. See Strickland v. Washington, 466 U.S. 668 (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, 466 U.S. at 668).

A.

The PCR judge made a sound ruling in finding that Petitioner failed to prove either constitutional deficient performance or ineffective assistance here. The right to cross-examination is guaranteed by Davis v. Alaska, 415 U.S. 308, 316 (1974). It is described as an essential and fundamental right in Winzer v. Hall, 494 F.3d 1192, 1196 (9th Cir. 2007). Although cross-examination may not have been as effective as hoped, flawless cross-examination is rare, said the court in Sherron v. Norris, 69 F.3d 285, 290-91 (8th Cir. 1995). 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).

Counsel's strategy to limit his cross-examination was reasonable. First, any additional impeachment of Virginia Richardson's credibility would have been cumulative after counsel successfully elicited testimony that showed the witness lied to the jury about her post-incident drug use. See DeLozier v. Sirmons, 531 F.3d 1306, 1325-26 (10th Cir.

App.p.128, ln. 4-14 (emphasis added).

2008) (finding cross-examination effective and additional would produce only limited dividends). Second, the witness's testimony during the solicitor's direct examination exposed her self-serving posture and potential for bias:

> Q: What were you charged with?
> A: At first they said it was going to be running a crack house, something like that. And then that morning that's when they brought me the warrant in on conspiracy?

App.p.119, ln. 6-10 (emphasis added). Thus, counsel made a sound decision that potential danger in opening the door to the admission of Petitioner's bad acts and convictions outweighed the benefits of utilizing the witness's remote prior convictions in his cross. While the convictions were remote and were unrelated to narcotics dealing, Petitioner made the fundamental decision to not testify and preclude the jury's exposure to his prior distribution convictions. **App.p.126; p.216**. See Wong v. Belmontes, 558 U.S. 15, __, 130 S.Ct. 383, 386 (2009) ("prejudice considers all the evidence the jury would have heard, including additional prosecution evidence that would have been introduced if a defendant had opened the door with additional mitigating evidence"). Accordingly, Petitioner failed to prove the first prong of the Strickland test – that counsel failed to render reasonably constitutionally effective assistance under prevailing professional norms.

B.

Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance. The purported deficient performance at issue, when even viewed in a light most favorable to Petitioner, would have had negligible

effect in challenging the State's presentation of the overwhelming evidence of Petitioner's guilt. See **App.p.275** (In the PCR Judge's Order he stated, "[Counsel] faced great odds at trial in light of the State's overwhelming evidence of [Petitioner]'s guilt"); Saranchak v. Beard, 616 F.3d 292, 309-13 (3rd Cir. 2010) (strong evidence reduces the potential for prejudice). Counsel astutely testified at the PCR hearing that "[t]he thing that hurt [Petitioner] is the officer testified he was hit in the chest with a bag of crack cocaine." **App.p.265, ln. 17-19**; see also **App.p.65; p.59; p.50**.

Notably, Petitioner admitted his guilt when he declared that he was selling drugs to support his habit in his colloquy with the Trial Judge during the sentencing hearing. **App.p.219, ln. 12-15**. See State v. Sroka, 267 S.C. 664, 665, 230 S.E.2d 816, 817 (1976) ("[a]ny doubt about the correctness of this conclusion is eliminated by the admission of appellant in open court, after conviction and during the pre-sentence inquiry by the trial judge").

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,

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By: J. Walt W
ATTORNEYS FOR RESPONDENT

March 2nd, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Hon. R. Lawton McIntosh, Circuit Court Judge
Appellate Case No. 2014-000545

KEVIN WARE,

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:

Wanda H. Carter, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 2nd day of March, 2015

Ashley Haworth
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

March 2, 2015

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

RE: **Kevin Ware v. State of South Carolina**
Appellate Case No: 2014-000545

Dear Mr. Shearouse:

Enclosed for filing is the original Return to Petition for Writ of Certiorari and six (6) 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/ah
Enclosures

cc: Wanda H. Carter, Esquire
Trisha Allen, Victim Services