STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO LEXINGTON COUNTY
Court of Common Pleas

The Honorable R. Knox McMahon, Trial Judge
The Honorable Frank R. Addy, PCR Judge

Appellate Case No. 2014-000446

Stanley Golson, ... 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 2

STATEMENT OF THE CASE 3

STANDARD OF REVIEW 3

ARGUMENT

Certiorari is unwarranted to review whether the PCR Judge's ruling that the allegation of ineffective assistance of counsel for failure to object to the trial judge providing audio equipment to the jury during deliberations was readily without merit where the allegation itself was facially deficient. 3

CONCLUSION 7

QUESTION PRESENTED

1. Is the grant of Certiorari necessary to review whether the PCR Judge erred in finding Petitioner's allegation that counsel's performance was ineffective for failing to object to the Trial Judge providing audio equipment to jury that allowed them to listen to State's evidence during deliberation?

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 the PCR Judge's ruling that the allegation of ineffective assistance of counsel for failure to object to the trial judge providing audio equipment to the jury during deliberations was readily without merit where the allegation itself was facially deficient.

In denying and dismissing Petitioner's PCR Application, the PCR Judge ruled "[Petitioner]'s allegation that counsel was ineffective for not objecting to the jury having access to the exhibits during deliberations to wholly without merit." App.p.327. The PCR Judge made the following findings in support of his ruling: Petitioner alleged counsel's performance was ineffective for failing to object to the admission of the wire tape because the State failed to properly authenticate the exhibit at trial based on Petitioner's assertion that "you couldn't hardly hear nobodies voice, you definitely could not hear my voice on the tape." **App.p.323.**[1]

Because Petitioner's *post hoc* Strickland allegation is facially flawed, the PCR

[1] The PCR Judge's Order here was supported by Petitioner's testimony at the hearing. See **App.p.264, ln.4-6; p.275 ln.22—p.276, ln.1.**

Judge made the correct ruling in finding that the allegation itself was readily without merit. 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 (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).

Petitioner's allegation is deficient where he asserted that counsel's failure to object on this matter prejudiced his case because the audio from the wire tape did not capture his voice, thereby lacking evidentiary value because it did not implicate him in the controlled buy that led to his arrest. Thus, Petitioner asserted that he was denied the fundamental right to an adversarial proceeding because the jury purportedly should not have been improperly urged to listen to evidence that supported the defense's case based on the proposition that audio tape was inadmissible evidence that lacked relevance to the State's case-in-chief. Thus, the PCR Judge's swift denial and dismissal here was appropriate where the allegation was solely supported by Petitioner's illogical speculation. See White v. Livingston, 231 S.C. 301, 308, 98 S.E.2d 534, 537 (1957) ("It may be added that the evidence adduced before the referee indicates that the result of the

case is not a serious miscarriage of justice, if it is a miscarriage at all. At any rate, appellant has made his bed and he must lie in it").

Furthermore, the solicitor's purportedly improper request that the jury listen to the audio tape played into counsel's certain trial strategy to focus the jury's attention to this evidence.[2] Counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness. Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). "Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) (citing Goodson v. United States, 564 F.2d 1071 (4th Cir.1977)).

In the defense's closing argument, counsel commented "[The police] didn't want to tip anybody off to what they were doing. Because as you have hard, there was a lot people around here. As you will hear on that tape, there were a lot of people around. [The police] don't want to drive into that mess and get found out." **App.p.178, ln.9-13** (emphasis added). Counsel summarized the solicitor's closing argument and the State's case as follows:

> [The State] didn't play the whole thing for you in this last argument because [the State] needed to give you a snapshot in hopes that you will lose sight of the big picture. Listen to the rest of that tape. Listen to the other people there. Listen to what other people are saying.
>
> Listen to who is saying way, who is not saying what. Listen to the inflections. Listen to the tones. Listen to what they are discussing on there. Think about what [the informant] said happened while that tape was going on.
>
> Stanley, my buddy, known him for 20 years, he is the target. He's

[2] See Wood v. Allen, 558 U.S. 290 (2010) ("a strategic or tactical decision does not have to be articulated by counsel on the record; counsel doesn't to have to personally identify his or her thinking. It is enough that the record show a basis for strategy, not that counsel announce that strategy on the record.")

> the guy I will get paid to get arrested. Stanley left. Where did he go? I don't know. Out the back door? Yeah. Could you see out back? Yeah. So where did he go? I don't know. I didn't see.

App.p.182, ln. 10—p. 183, ln. 6 (emphasis added). Counsel circled back to this matter of the tape, **App.p.185, ln. 3-12**, and concluded the defense's closing argument by stating "Like I said, go back, look at the evidence, listen to that tape. Think about what is not here. Think about what hasn't been shown to you. Realize that is also as important as what has been. I think when you do that, you will come back with a verdict of not guilty." **App.p.187, ln. 11-16**. Therefore, the matter at issue was the central focus of counsel's valid trial strategy in the presentation of the defense's theory of the case. See Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) ("This was a valid **trial strategy**, and should not be the basis of a finding of **ineffective** assistance of counsel").

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. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by counsel's performance.

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

March 4th, 2015

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Honorable Frank R. Addy, Circuit Court Judge
Appellate Case No. 2014-000446

STANLEY GOLSON,

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:

Robert M. Pachak, Esquire
S.C. Commission on Indigent Defense
Appellate Defense
PO Box 11589
Columbia, SC 29211

This 4th day of March, 2015

Ashley Haworth
LEGAL ASSISTANT for the Respondent

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAR - 4 2015
S.C. Supreme Court

March 4, 2015

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

RE: **Stanley Golson v. State of South Carolina**
Appellate Case No: 2014-000446

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: Robert M. Pachak, Esquire
Trisha Allen, Victim Services