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 R. Lawton McIntosh, PCR Judge

Appellate Case No. 2014-000779

Darrell Burgess, ...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. Whether this Court should entertain a grant of certiorari where trial counsel's performance was exemplary and the underlying merits of the extended objection were entirely lacking?

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 not warranted where Petitioner entirely failed to meet his burden to prove counsel's performance was ineffective in failing to extend his objection juror 72, Emanuel's service on the panel.

In denying Petitioner's application for post-conviction relief, the PCR Judge found:

> juror Emanuel did not incorrectly answer the trial judge's preliminary question to the *venire panel*. While the trial judge did ask whether any venireman or a member of the venireman's "immediate family were ... close personal friends of the victims," neither this question nor the trial judge's other inquiries asked whether any venireman had a business or working relationship with either victim's family members. This Court finds that there is nothing in the record to refute juror Emanuel's representations that he did not know anything about the case and that he did not even know that the murders had occurred. There is no indication that the victim possessed a name known in Lexington County. Subsequent to a thorough colloquy, the Trial Judge ruled within the ambit of his discretion

The PCR Judge also found "counsel made the objection and properly preserved the issue of whether the trial judge's ruling constituted an abuse of discretion. The creative logic

employed by Appellate counsel to further extend Applicant's argument on appeal does not reflect poorly on counsel's effective performance here when the Court of Appeals found the argument to be unpreserved." **App.pp.1040-41.**

Effective Assistance of Counsel

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)).

Discussion

Petitioner myopically asserts that counsel's performance was ineffective in failing to object to the juror # 72, Juror Emanuel, where the juror revealed to the court after *voir dire* that he was the supervisor of victim David Slice's estranged brother-in-law. Respondent submits that the trial judge did not abuse his discretion by denying the motion because the record supports his findings that the juror did not intentionally conceal this information, and that the juror could be fair and impartial to both Petitioner

and the State despite this relationship with the brother-in-law.

First, the PCR Judge correctly found that trial judge did not abuse his discretion by denying Burgess' motion to disqualify juror Emanuel for cause because the record supports his findings that the juror did not intentionally conceal this information, and that the juror could be fair and impartial to both Burgess and the State despite this relationship with the former brother-in-law. Smith v. Smith, 375 S.C. 507, 518-20, 654 S.E.2d 523, 529-30 (2007).

Second, the PCR Judge correctly found the PCR action was a product of appellate counsel's manufacture of a phantom of issue on appeal and not a legitimate assignment of deficient performance of trial counsel. Petitioner's appeal is frivolous because the claim of ineffective assistance at issue is per se incapable of supporting a prejudice finding on Strickland's second prong. The Court's decision in Elmore unequivocally states that "[t]he qualification of a prospective juror is addressed to the sound discretion of the trial judge, whose decision will not be disturbed unless wholly unsupported by the evidence." State v. Elmore, 279 S.C. 417, 420, 308 S.E.2d 781, 784 (1983). "Trial judges are presumed to know the law and to apply it in making their decisions." See Walton v. Arizona, 497 U.S. 639, 653 (1990); see also State v. Ray, 310 S.C. 431, 437, 427 S.E.2d 171, 174-75 (1993). Despite Burgess' contrary argument, nothing in the present record demonstrates that the trial judge failed to exercise his discretion. Further, because Burgess' motion required a "'fact intensive determination that must be made on a case-by-case basis.' " Guillebeaux, 362 S.C. at 274, 607 S.E.2d at 101-02 (citation omitted), this Court should defer to his credibility determination. See State v. Woods, 382

S.C. 153, 159, 676 S.E.2d 128, 132 (2009) (in reviewing juror qualification issues on direct appeal, "[d]eference must be paid to the trial court who saw and heard the juror"); Smith, 375 S.C. at 519-20, 654 S.E.2d at 530.

Further, juror Emanuel's representations to the trial judge are un-refuted by the entire record. Also, the trial judge's finding that "I can't sit up here and decide that jurors won't follow the law," is a correct understanding of the law. "The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." Francis v. Franklin, 471 U.S. 307, 324 n. 9 (1985).[1] See also United States v. Olano, 507 U.S. 725, 740 (1993) ("[It is] the almost invariable assumption of the law that jurors follow their instructions") (citing Richardson, 481 U.S. at 206); Gray v. Maryland, 523 U.S. 185, 200 (1998) (Scalia, J., dissenting) ("The almost invariable assumption of the law is that jurors follow their instructions") (citing Francis, *supra*). Thus, Petitioner's argument rests upon mere speculation.

Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial 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

[1] This rule "is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process." Richardson v. Marsh, 481 U.S. 200, 211 (1987)

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: _____
ATTORNEYS FOR RESPONDENT

June 11th, 2015

STATE OF SOUTH CAROLINA
In The Supreme Court

Certiorari to Lexington County
Court of Common Pleas

The Honorable R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2014-000779

DARRELL BURGESS, RESPONDENT- PETITIONER,

v.

THE STATE OF SOUTH CAROLINA, PETITIONER- RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of **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:

Lara M. Caudy, Esquire
SC Commission of Indigent Defense
Appellate Defense
Post Office Box 11589
Columbia, SC 29211

This 11th day of June, 2015.

Ashley Haworth
ASHLEY HAWORTH
LEGAL ASSISTANT

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
JUN 11 2015
S.C. Supreme Court

June 11, 2015

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

RE: Darrell Burgess v. State of South Carolina
Lower Court Case No: 2012-CP-32-2813
Appellate Case No. 2014-000779

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,

J. Walt Whitmire
Assistant Attorney General
SC Bar No. 100793

JWW/ah
Enclosures

cc: Lara M. Caudy, Esquire (2 copies)
Trisha Allen. Victim Services (1 copy)