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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Richland County
Court of Common Pleas
The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

AYREE HENDERSON,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

Appellate Case No. 2014-001126

SUPPLEMENTAL APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-CP-400-1696

Ayree Henderson, #237887 Respondent,

v.

State of South Carolina, Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On September 24, 2004, following a jury trial, the Respondent was convicted of Murder and sentenced by the Honorable Alison R. Lee to confinement for thirty (30) years.

A timely Notice of Appeal was filed on Respondent's behalf. Pursuant to an Anders brief, the South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Henderson, Unpublished Op. No. 2008-UP-107 (S.C. Ct. App. Filed February 12, 2008).[1] The remittitur was issued on February 28, 2008.

Respondent then filed an Application for Post Conviction Relief on March 4, 2008, alleging that he was being held in custody unlawfully for the following reasons:

1.) Ineffective Assistance of Trial Counsel; and

2.) Ineffective Assistance of Appellate Counsel.

The Petitioner made its Return on or about January 30, 2009. An evidentiary hearing was convened on August 12, 2009 at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. The Respondent was present and represented by Charles T. Brooks, III, Esq. At Judge Cooper's request, both parties submitted proposed orders. Judge Cooper granted the requested relief by written order dated July 12, 2010. A

[1] Anders v. State of Cal., 386 U.S. 738, 87 S.Ct. 1396 (1967).

timely notice of intent to appeal was filed on July 20, 2010. Petitioner now seeks a writ of certiorari to review this grant of Post-Conviction Relief.

STANDARD OF REVIEW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper standard of review of a post conviction relief 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, 386 S.E.2d 624 (1989). If any probative evidence exists to support the PCR judge's decision, the ruling must be upheld. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). However, the Court will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases.

The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. 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." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

THE PCR COURT INCORRECTLY CONCLUDED THAT ACCESSORY AFTER THE FACT IS NOT A CRIME OF DISHONESTY OR FALSE STATEMENT FOR THE PURPOSES OF A RULE 609(A)(2), SCRE ANALYSIS

- *Rule 609(a)(2), SCRE*

The PCR court incorrectly concluded that accessory after the fact is not a crime that *involved dishonesty* or *false statement* for the purposes of a Rule 609(a)(2), SCRE analysis.

> The following elements must exist before an accused may be found guilty of accessory after the fact of a felony: (1) the felony has been completed; (2) the accused must have knowledge that the principal committed the felony; and (3) the accused must harbor or assist the principal felon. *State v. Hodge*, 278 S.C. 110, 292 S.E.2d 600 (1982), *cert. denied*, 459 U.S. 910, 103 S.Ct. 217, 74 L.Ed.2d 172 (1982); *State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981). The assistance or harboring rendered must be for the purpose of **enabling the principal felon to escape detection or arrest.** *State v. Nicholson*, 221 S.C. 399, 70 S.E.2d 632 (1952).

State v. Legette, 285 S.C. 465, 466-67, 330 S.E.2d 293, 294 (1985) (emphasis added).

Rule 609(a)(2), SCRE provides:

> [E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

The Court of Appeals recognized that "[t]o restrict the application of Rule 609(a)(2) [SCRE] only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word 'dishonesty.' " State v. Al-Amin, 353 S.C. 405 at 425, 425, 578 S.E.2d 32, at 43 (Ct. App. 2003). "We decline to follow the federal courts' restrictive interpretation of the phrase "dishonesty or false statement" in Rule 609(a)(2)." Id, at 416. Therefore, unlike other jurisdictions, in South Carolina a broad interpretation of "crimes of dishonesty" is applied. As this Court stated in Nicholson, the intent for *accessory after the fact* is to enable the principal felon to escape detection, i.e. deception. The Petitioner submits that because the principal purpose of *accessory after the fact* is to evade public justice and/or to actively suppress evidence there exists an "obvious bearing on a defendant's credibility." Id, at 417.[2]

At trial, the Respondent testified that he had knowledge that an acquaintance had committed a murder, and that he tried to hide that knowledge from Law Enforcement. (App. p. 470). To justify its findings, the PCR court explained that the Respondent claimed to have only committed the prior *accessory after the fact* crime because he was in fear for his life. The

[2] 22 C.J.S. Criminal Law §179 (2010). *See also* U.S. v. Anthony, 145 F.Supp. 323, 339 (D.C.Pa. 1956)(explaining that accessory after the fact is an offense principally tending to evade the public justice).

PCR court went on to rationalize that because of such a fear he (Respondent) could not be guilty of a crime of dishonesty. The Petitioner submits that the PCR court's conclusion is legally incorrect. If the Respondent were truly in fear for his life then he could have argued his alleged affirmative defense, i.e. necessity, in response to the prior *accessory after the fact* charge.[3] Instead, the Respondent waived any defenses he may have had and pled guilty.[4] A guilty plea acts as a waiver of all non-jurisdictional defects and defenses. State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002).

Because the rule is to be interpreted broadly, the Petitioner submits that it would be an improper analysis to suggest that the nature of the actual predicate crime is material to the analysis. The very definition of *accessory after the fact* requires that the predicate crime has been completed when the assistance is rendered; otherwise he who renders assistance would aid in the commission of the offense and be guilty as a principal. Accordingly, consistent with a broad interpretation of Rule 609(a)(2), SCRE, it matters not what the predicate offense was for the purposes of whether *accessory after the fact* is a crime that *involved dishonesty* or *false statement.*

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[3] The defense of necessity is an affirmative defense and must be established by the preponderance of the evidence. State v. W.M.S., 320 S.C. 403, 408, 465 S.E.2d 580, 583 (S.C. Ct. App. 1995).

[4] The online Richland County Judicial Index indicates that the Respondent pled guilty on January 7, 1997 to [97GS4014457] "0430-VEHICLE/POSS, SELL, DISP;STOLEN, $5000/M" and [97GS4014589] "1244-ACCESSORY/AID, ABET VIOL CHAP 21, T 16."

Therefore, because *accessory after the fact* is by its very nature a crime of dishonesty, the prior conviction was admissible without regard to whether its probative value outweighed its prejudicial effect. *See* Rule 609(a)(2) SCRE.; State v. Elmore, 368 S.C. 230,628 S.E.2d 271 (Ct. App. 2006), *cert. denied* April 5,2007, *citing* Al-Amin, 353 S.C. at 425-27,578 S.E.2d 43-44 (evidence admitted under Rule 609(a)(2) is admissible without regard to whether its probative value outweighed its prejudicial effect). There was no ineffective assistance of counsel and there is no prejudice to Respondent; the PCR court's conclusion was an error of law and should be reversed.

IF ACCESSORY AFTER THE FACT IS NOT A CRIME OF DISHONESTY OR FALSE STATEMENT, THE PCR COURT INCORRECTLY CONCLUDED THAT THE RESPONDENT WAS PREJUDICED FOR THE PURPOSES OF A RULE 609, SCRE ANALYSIS

- Lack of Prejudice and Rule 609(a)(1), SCRE

Assuming for the sake of argument that *accessory after the fact* is not a crime of dishonesty, the PCR court's conclusion is both incorrect as a matter law and is not supported by sufficient probative evidence. While, the following is speculative it is merely an extension of the PCR court's initial speculation regarding what would have happened had trial counsel made an objection, i.e. the court's prejudice analysis. The Petitioner submits that had trial counsel objected and argued (as the PCR court concludes) that a conviction for *accessory after the fact* is not a crime of dishonesty, then it is logical to assume that the State would have attempted to get the impeachment evidence in under the other section of the Rule, i.e. Rule 609(a)(1), SCRE.

Rule 609(a)(1), SCRE provides that "evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect

to the accused..." Respondent was on trial for murder. There was no contention by anyone, including the Solicitor, that Respondent was a principal or participant in the prior homicide.[5] The jury knew he was only an *accessory after the fact* to the prior crime. It was uncontested that he was only convicted as an *accessory after the fact.* No one, including the Solicitor, attempted to argue that Respondent had been convicted of a prior homicide. Additionally, no one argued Respondent had previously been convicted of murder and therefore he was more likely to have committed the murder for which he was on trial.

Credibility was an issue in the case, because appellant alone raised the self-defense issue, and so his credibility was important. The State was entitled to present and the jury should have had all of the available evidence to judge appellant's credibility, especially a criminal history involving assisting in covering up a crime.

The PCR Court found that the risk of prejudice to the applicant was amplified in this case because the State "did not present any direct evidence to disprove Applicant's version of events." (App. p. 780). The State presented direct evidence in the form of testimony from several witnesses that another person present at the back door of victim's home shot and killed victim without provocation, although none of the witnesses were able to identify the

[5] After all, it was the Respondent himself who freely volunteered the specific nature of his accessory after the fact conviction. "I had accessory after the fact of involuntary manslaughter." (App. p. 470 L. 11 – 12).

second person. (App. pp. 130-135, 190-193). Respondent admitted to being that other person, though his version of the facts was that he had not brought a gun or started the conflict but rather that he had been attacked by Victim. (App. pp. 472-483). The State also presented direct evidence in the form of witness testimony, that Respondent had announced that "he was going to rob [someone] tonight." (App. p. 203, line 23). Further, direct evidence was presented to show that Victim did not own a gun at the time of the incident. (App. p. 167, lines 3-19). The Respondent's versions was that after Victim had entered the house, put on pants, and re-exited, that the gun had accidentally discharged in the scuffle. (App. pp. 514-517). All the other evidence presented purely contradicted the story told by Respondent, making it unlikely that Respondent would have been believed and acquitted had Respondent's prior conviction for *accessory after the fact* not been admitted. As no probative evidence exists to prove that but for Counsel's alleged deficiency, the result of the trial would have been different, this Court should reverse the finding of the PCR Court.[6]

The test to determine whether or not a conviction is more probative

[6] The test is not whether the outcome "could" have been different; rather, the PCR Applicant must demonstrate that the outcome "would" have been different. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984).

than prejudicial for purposes of Rule 609(a)(1) SCRE, has five prongs. A judge must weigh (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Though Colf addressed the balancing test required by Rule 609(b) SCRE, this Court has since pronounced those factors to be appropriate for citation and review in balancing the weight of prejudice versus probative value for the admission of prior convictions for impeachment under Rule 609(a)(1) SCRE. See State v. Bryant, FN1, 369 S.C. 511, 633 S.E.2d 152 (2006).

The crime *accessory after the fact* has a high impeachment value as it shows a willingness to impede the administration of justice, i.e. thwart the truth. "An accessory after the fact is not an accomplice . . . but is guilty of a separate substantive offense in the nature of an obstruction of justice." 22 C.J.S. Criminal Law §179 (2010). Second, the crime was clearly within the ten year window prescribed by Rule 609(b) SCRE.

Accessory after the fact is a three-element crime that has nothing whatsoever in common with Murder. Accordingly, the admitted conviction passes the third prong of the Colf test, because the offenses are entirely dissimilar, and proof that Respondent is guilty of the former does not lead to

an improper presumption that he would be guilty of the latter.

Finally, the Respondent's testimony and credibility were central in the case because all of the witnesses, other than Respondent and one incredible witness, indicated that Respondent had attacked and killed victim without provocation. Further, the stories told by Respondent and his witness were in direct contradiction of the evidence and testimony submitted by the State but would have indicated self-defense. Accordingly, Respondent's testimony and questions of Respondent's credibility are highly probative in this context and would have led to the prior charge being admitted.

Therefore, Respondent suffered no prejudice from trial counsel's failure to object to the admission of Respondent's prior conviction for *accessory after the fact*, as a balancing test pursuant to Rule 609(a)(1) SCRE would have resulted in admission of the prior conviction. Accordingly, Petitioner submits that the finding of the PCR Court is erroneous.

Therefore, as the prior conviction would be properly admitted, there can be no prejudice to the Respondent. A balance of the Colf factors clearly weighs in favor of the admission of the prior conviction. The PCR court erred in concluding that the trial judge would/could have erred in not admitting the prior conviction only for the purposes of impeachment.

CONCLUSION

For the reasons stated, petitioner asks this Court to grant the petition for a writ of certiorari. Should this Court grant certiorari, the Petitioner asks permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

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Sept. 28, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

STATE OF SOUTH CAROLINA,

Petitioner,

v.

Ayree Henderson, 237887,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Appendix and Petition for Writ of Certiorari has been served upon opposing counsel, M. Celia Robinson by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 30th day of September, 2010.

BRIAN T. PETRANO
ATTORNEY FOR RESPONDENT

SWORN to before me this 30th
day of September, 2010.

(L.S.)
Notary Public for South Carolina.
My Commission Expires: My Commission Expires
January 30, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

AYREE HENDERSON,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

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QUESTIONS PRESENTED

I. Whether the PCR Court incorrectly concluded that accessory after the fact is not a crime of dishonesty or false statement for the purposes of a Rule 609(A)(2), SCRE analysis?

II. Whether, if accessory after the fact is not a crime of dishonesty or false statement, the PCR Court incorrectly concluded that the respondent was prejudiced for the purposes of a Rile 609, SCRE analysis?

COUNTER-QUESTIONS PRESENTED

I. Did the PCR Court correctly find that Respondent's previous conviction for accessory after the fact to murder was not admissible under *Rule* 609 SCRE and that Trial Counsel was ineffective for failing to object to the admission of the prior conviction?

II. Even if this Court was to find that Respondent's accessory after the fact conviction was not a basis for relief, was Respondent denied effective assistance of counsel when Trial Counsel did not object to a self-defense charge that did not inform the jury that the State must disprove self-defense beyond a reasonable doubt?

STATEMENT OF THE CASE

Procedural History

On September 21, 2004, Respondent stood trial for murder in Richland County before the Honorable Alison Lee and a jury. App. 1. Respondent was represented by Charlie J. Johnson, Jr.[1] App. 750 ll. 10-23. The State was represented by Kathryn Luck Campbell and Bryan Jefferies. App. 1. On September 24, 2004, Respondent was convicted of murder and sentenced to thirty years.

Respondent filed a direct appeal. For his direct appeal Respondent was represented by Joseph L. Savitz; who filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967). App. 674-683. Respondent then filed a pro se brief. App. 684-694. The Court of Appeals dismissed the appeal in an unpublished opinion on February 12, 2008. App. 696-697.

Respondent filed an application for post-conviction relief (PCR) on March 8, 2008. App. 698-703. An evidentiary hearing was convened on August 12, 2009 before the Honorable G. Thomas Cooper. App. 711. The State was represented by Brian Petrano. App. 711. Respondent was represented by Charles Brooks. App. 711. In an order dated July 12, 2010, the PCR Court granted relief. App. 775-782. The State petitioned this Court for Writ of Certiorari. This Return follows.

Factual History

During the trial, Respondent testified that he had killed Alonzo Gale in self-defense when Gale's own gun discharged during a struggle. App. 475, l. 17 – App. 478, l. 128; App. 525, ll. 18-22. Likewise, the State's case demonstrated that Gale had been shot during an altercation. App. 73,

[1] The appendix is unclear on who represented Respondent. The trial transcript indicates that Charles E. Johnson was Trial Counsel, App. 1, but Charlie J. Johnson, Jr. testified at the PCR hearing. App. 750 ll. 10-11.

ll. 23-24; App. 76, ll. 20-22; tr. p. 158, l. 17 – p. 160, l. 6; App. 190, ll. 4-24. A crime scene investigator found no evidence inconsistent with self-defense. App. 268, l. 25 – App. 269, l. 5. Finally, an eyewitness to the incident corroborated Respondent's account of the shooting. App. 396, ll. 2-16; App. 403, ll. 9-11.

Prior to Respondent testifying, the Court advised him that if he decided to testify that his criminal record might be used against him. App. 381, ll. 15-20. The Trial Court then gave Respondent a chance to confer with Counsel Johnson before deciding to testify. After this break, Counsel Johnson and Solicitor Campbell informed the Trial Court that they had come to an agreement regarding respondent's criminal record. App. 383, ll. 8-21. During the direct examination of Respondent, Counsel Johnson questioned him about a prior conviction for accessory after the fact to murder[2]. App. 465, l. 7 – p. 467, l. 24. Respondent informed the jury that he knew about the murder but was afraid to tell police because it might put his life in jeopardy. App. 466, ll. 1-15. The solicitor then cross-examined Respondent regarding the conviction. App. 847, ll. 12-18; p. 489, ll. 3-7.

At the close of the defense's case the Trial Court held a charge conference. App. 538, l. 12 – p. 555, l. 24. During this conference the Trial Court read the law that it intended to charge the jury with. Counsel Johnson made no objection to the Court's proposed charge. The Trial Court charged the jury "Ladies and gentlemen, the burden to disprove self-defense falls on the State." App. 648, ll. 15-16. However, the Trial Court never charged the jury that the State must disprove self-defense beyond a reasonable doubt. App. 644, l. 4 – p. 648, l. 16. Counsel Johnson never objected to this

[2] It is unclear whether the prior charge was accessory after the fact to involuntary manslaughter or Murder. The PCR courts order refers to it as accessory after the fact to Murder.

charge. App. 653, ll. 15-16. Despite the evidence of self-defense, the jury nevertheless convicted Respondent of murder, and the judge sentenced him to imprisonment for thirty years.

During Respondent's PCR hearing, he testified that he believed Counsel Johnson was ineffective by failing to object to the introduction of the accessory after the fact to murder conviction and that he was ineffective in failing to object to the self-defense charge. App. 716, l. 4 – p. 721, l. 19; App. 727, ll. 4-7. Counsel Johnson testified that he saw no reason to object to the accessory after the fact charge explaining "It was a felony. It was within a ten year period." App. 751, ll. 14-18. Counsel Johnson never gave a reason for why he did not object to the self-defense charge that was given at trial. The PCR Court granted relief finding that Counsel Johnson was ineffective in failing to object to the evidence of the accessory after the fact conviction, but failed to rule on any other issues raised by Respondent during the PCR hearing. App. 780 – 781.

ARGUMENT

I. The PCR Court correctly found that Respondent's previous conviction for accessory after the fact to murder was not admissible under *Rule* 609 SCRE and that Trial Counsel was ineffective for failing to object to the admission of the prior conviction.

A. Accessory after the fact to murder is not a crime of dishonesty under *Rule* 609(a)(2).

"Evidence that any witness has been convicted of a crime shall be admitted if it involves dishonesty or a false statement." *Rule* 609(a)(2), SCRE. A majority of federal circuits and the conference committee for the federal rules define crimes of dishonesty as those involving crimen falsi or the crime of falsifying. *State v. Al-Amin*, 353 S.C. 405, 415, 578 S.E.2d 32, 37 (2003). However, South Carolina courts have defined "crimes of dishonesty" as including larceny. *E.g. State v. Shawl*, 328 S.C. 454, 492 S.E.2d 404 (Ct. App. 1997), *Al-Amin, Supra.* The underlying reason for defining stealing as a crime of dishonesty is that "crimes involving larcenous intent imply a *general disposition*[3] towards dishonesty." *Al-Amin*, 353 S.C. at 418, 578 S.E.2d at 39 (*citing State v. Banks*, 58 Conn. App. 603, 755 A.2d 279 (2000)). Since "*Rule* 609(a)(2) vests no discretion in the trial judge, it must be construed narrowly and not carte blanche for purposes of impeachment. Otherwise, *every* crime would be admissible under the dishonesty element of the Rule." E. Warren Moïse, *Credibility and Character Evidence: History, Policy, and Procedure* Book II, p. 27 (2003)(*citing United States v. Fearwell, 595 F.2d 771, 777 (D.C. Cir. 1978)*).

The State argues that accessory after the fact to murder should be viewed as a crime of dishonesty or false statement because "the principle purpose of accessory after the fact is to evade public justice and/or to actively suppress evidence, there exist an obvious bearing on the defendant's

[3] A thief would be less credible because "robbery *is not a crime of passion or violence* done in response to some form of provocation. It is generally a *pre-planned* crime designed to steal property from a person in rightful possession." *Al-Amin*, 353 S.C. at 418-419, 578 S.E.2d at 39 (citing *People v. Dee, 26 Ill. App. 3d 691, 325 N.E.2d 336 (1975)*).

credibility." Petition for Writ of Certiorari, p. 7. Essentially, the State is arguing that when a criminal commits a crime and tries not to get caught, the crime should be considered a crime of dishonesty under *Rule* 609 (a)(2), SCRE. However, the intent to evade public justice certainly does not "imply a general disposition toward dishonesty" the same way that committing a larceny or crimen falsi crime would. *See Al-Amin*, 353, S.C. at 418, 578 S.E.2d at 39.

To find that a crime committed with the "intent to evade public justice" is a "crime of dishonesty" would make crimes such as resisting arrest and failure to stop for a blue light "crimes of dishonesty". Even States that view larcenies as "crimes of dishonesty" have not extended *Rule* 609 (a)(2) to cover prior convictions for accessory after the fact and resisting arrest. *See What constitutes a crime involving dishonesty or false statement under Rule 609(a)(2) of uniform rules of evidence or a similar state rule – crimes involving violence or potential for violence*, 83 A.L.R. 5th 277 (2000); *see e.g., Commonwealth v. Harris*, 442 Pa. Super. 116, 658 A.2d 811 (1995) (holding: hindering apprehension, 18 Pa. Cons. Stat. Ann. Section § 51-05, was not a crime of dishonesty), *People v. Stover*, 89 Ill. 2d 189, 432 N.E.2d 262 (1982) (resisting arrest was not a "crime of dishonesty").

Respondent was pleaded guilty to accessory after the fact after failing to tell authorities what he knew about a homicide. App. 465, l. 10 – p. 467, l. 1; App. 780. The PCR Court found that Respondent was acting out of fear for his life, and there is nothing in the record to contradict that story. App. 780.

Respondent's accessory after the fact to murder conviction is not a "crime of dishonesty" because, as the PCR court correctly noted, "doing or not doing something out of fear for one's personal safety does not necessarily indicate dishonesty." App. 780. There is nothing about accessory after the fact to murder which would be probative of "a general disposition toward

dishonesty." See *Al-Amin*, 353 S.C. at 418, 578 S.E.2d at 40. Therefore, this Court should affirm the PCR Court's finding.

B. Respondent's prior conviction for accessory after the fact to murder was more prejudicial than probative and therefore inadmissible under Rule 609 (a)(1) SCRE.

The proper standard of review for and appeal of a post-conviction relief hearing is whether any evidence exists to support the PCR Court's findings. *Cherry v. State*, 300 S.C. 115, 383 S.E.2d 624 (1989). If any evidence exists to support the PCR Court's findings, the ruling must be upheld. *Jackson v. State*, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998).

"Evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." *Rule* 609(a)(1), SCRE. In Respondent's case, the admission of the prior accessory after the fact to murder conviction was never objected to at trial; so the Trial Court never engaged in this balancing test. However, the PCR Court found that "admission of the applicant's prior conviction was *much* more prejudicial than probative." App. 781 (emphasis added). The PCR court found, in part, that the jury likely used the prior conviction for accessory after the fact to murder to prove action and conformity therewithin. App. 781. The PCR Court found Respondent was prejudiced because there was little evidence to disprove Respondent's claim of self-defense. App. 781. Due to the similarity of *accessory after the fact to murder* and *murder*, the PCR Court's finding are supported by evidence of the record. *See Cherry, Supra.*

The State argues that accessory after the fact to murder and murder have different elements, and that the prior conviction is necessary because it demonstrate Respondent's willingness to "impede the administration of justice." Writ of Certiorari, p. 13 & 14. This argument incorrectly imparts a highly technical knowledge of criminal law to the jury. The PCR court correctly found

that admitting evidence of accessory after the fact conviction in a murder trial would likely leave the jury to use it as impermissible character evidence. App. 781. A jury is not going to differentiate between accessory after the fact of murder conviction and a murder conviction. This conviction was probably not used by the jury to show that Respondent is willing to "impede the administration of justice." This conviction was most likely used by the jury to show that when he was seventeen Respondent was an accessory to a homicide and only spent four months at the Department of Juvenile Justice. App. 465 l. 10 – App. 467 l. 19. The PCR Court correctly found that this was conviction was much more prejudicial than probative of Respondent's credibility. Therefore, if objected to, the Trial Court likely would have also found that is was not admissible under *Rule* 609(a)(1) and suppress the prior conviction.

II. Even if this Court was to finds that Respondent's prior conviction for accessory after the fact is not a basis for PCR relief, Respondent was denied effective assistance of counsel when Trial Counsel did not object to the self-defense charge that did not inform the jury that the State must disprove self-defense beyond a reasonable doubt.

In its charge on the law the Trial Court instructed the jury that "[L]adies and gentlemen, the burden to disprove self-defense falls on the State." App. 648, ll. 15-16. Counsel Johnson failed to object to the self-defense charge given. App 653, ll. 12-16.

Counsel Johnson was ineffective in failing object to the Trial Court's charge. Counsel Johnson should have requested that the Trial Court instruct the jury that the State had the burden of disproving self-defense *beyond a reasonable doubt*. "Current law requires the State to disprove self-defense, once raised by the defendant, beyond a reasonable doubt." *State v. Wiggins*, 330 S.C. 538, 500 S.E.2d 489, 493 (1998).

> When self-defense is properly submitted to the jury, the defendant is entitled to a charge, if requested, that the State has the burden of disproving self-defense by proof beyond a reasonable doubt.

State v. Addison, 343 S.C. 290, 540 S.E.2d 449, 451 (2000). The jury instructions in this case did not adequately convey that the State had the burden of disproving self-defense beyond a reasonable doubt. *See State v. Burkhart*, 350 S.C. 252, 565 S.E.2d 298 (2002).

Although this issue was properly before the PCR Court, the PCR Court did not grant relief on this issue. App. 674-683; App. 727, ll. 4-7. Should this Court grant certiorari, Respondent respectfully requests that this Court consider this as an additional basis to affirm the PCR Court.

CONCLUSION

For the foregoing reasons Respondent respectfully requests that this Court deny the State's petition for writ of certiorari.

Respectfully submitted,

Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 22nd day of February, 2011

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

AYREE HENDERSON,

RESPONDENT,

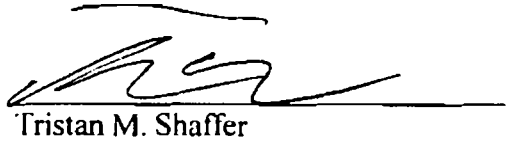
V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

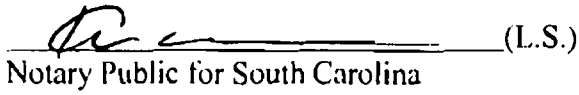
I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Brian Petrano, Esquire, this 22nd day of February, 2011.



Tristan M. Shaffer
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 22nd day
of February, 2011.


(L.S.)

Notary Public for South Carolina
My Commission Expires: October 2, 2013

STATE OF SOUTH CAROLINA
In The Court of Appeals

CERTIORARI TO RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

2010-167027

State of South Carolina,.....Petitioner,

v.

Ayree Henderson, 237887.....Respondent.

BRIEF OF PETITIONER

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I. Whether the PCR Court incorrectly concluded that accessory after the fact is not a crime of dishonesty or false statement for the purposes of a Rule 609(a)(2) SCRE analysis?

II. Whether, if accessory after the fact is not a crime of dishonesty or false statement, the PCR court incorrectly concluded that the respondent was prejudiced for the purposes of a Rule 609, SCRE analysis?

STATEMENT OF THE CASE

On September 24, 2004, following a jury trial, the Respondent was convicted of murder and sentenced by the Honorable Alison R. Lee to confinement for thirty years.

A timely Notice of Appeal was filed on Respondent's behalf. Pursuant to an Anders brief, the South Carolina Court of Appeals affirmed the conviction and sentence. State v. Henderson, Unpublished Op. No. 2008-UP- 107 (S.C. Ct. App. Filed February 12, 2008). The remittitur was issued on February 28, 2008.

Respondent then filed an Application for Post-Conviction Relief on March 4, 2008, alleging that he was being held in custody unlawfully for the following reasons:

1.) Ineffective Assistance of Trial Counsel; and

2.) Ineffective Assistance of Appellate Counsel.

The Petitioner made a timely Return on or about January 30, 2009. An evidentiary hearing was convened on August 12, 2009 at the Richland County Courthouse before the Honorable G. Thomas Cooper, Jr. Respondent was present and represented by Charles T. Brooks, III, Esq. At Judge Cooper's request, both parties submitted proposed orders. Judge Cooper granted the requested relief by written order dated July 12, 2010.

A timely notice of intent to appeal was filed on July 20, 2010. Petitioner now requests this Court reverse the lower court's ruling and deny the requested relief.

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). The Court will reverse the decision of the PCR judge when it is controlled by an error of law. Suber v. State, 371 S.C. 554, 558-59, 640 S.E.2d 884, 886 (2007).

ARGUMENT

THE PCR COURT INCORRECTLY CONCLUDED THAT ACCESSORY AFTER THE FACT IS NOT A CRIME OF DISHONESTY OR FALSE STATEMENT FOR THE PURPOSES OF A RULE 609(a)(2), SCRE ANALYSIS.

The PCR court incorrectly concluded that accessory after the fact is not a crime that involved dishonesty or false statement for the purposes of a Rule 609(a)(2), SCRE analysis.

> The following elements must exist before an accused may be found guilty of accessory after the fact of a felony; (1) the felony has been completed; (2) the accused must have knowledge that the principal committed the felony; and (3) the accused must harbor or assist the principal felon. State v. Hodge, 278 S.C. IID, 292 S.E.2d 600 (1982), cert. denied, 459 U.S. 910, 103 S.Ct. 217, 74 L.Ed.2d 172 (1982); State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981). The assistance or harboring rendered must be for the purpose of enabling the principal felon to escape detection or arrest. State v. Nicholson, 221 S.C. 399, 70 S.E.2d 632 (1952).

State v. Legette, 285 S.C. 465, 466•67, 330 S.E.2d 293, 294 (1985) (emphasis added).

Rule 609(a)(2), SCRE provides:

> **[E]vidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.**

The Court of Appeals recognized that "[t]o restrict the application of Rule 609(a)(2) [SCRE] only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word 'dishonesty.' " State v. Al-Amin, 353 S.C. 405 at 425, 425, 578 S.E.2d 32, at 43 (Ct. App. 2003). "We decline to follow the federal courts' restrictive interpretation of the phrase "dishonesty or false statement" in Rule 609(a)(2)." Id, at 416. Therefore, unlike in other jurisdictions, in South Carolina a broad interpretation of "crimes of dishonesty" is applied. As this Court stated in Nicholson, the intent for accessory after the fact is to enable the principal felon to escape detection, *i.e.*, deception. The Petitioner submits that because the principal goal of an accessory after the fact is to evade public justice or to actively suppress evidence there exists an "obvious bearing on a defendant's credibility." Id, at 417.[1]

At trial, Respondent testified he had knowledge that an acquaintance had committed a murder, and that he tried to hide that knowledge from law enforcement. (App. p. 470). To justify its findings, the PCR court explained that Respondent claimed to have only committed the prior accessory after the fact crime because he was in fear for his life. The PCR court went on to rationalize that because of such a fear he (Respondent)

[1] 222 C.J.S. Criminal Law §179 (2010). See also U.S. v. Anthony. 145 F.Supp. 323, 339 (D.C.Pa. 1956)(explaining that accessory after the fact is an offense principally tending to evade the public justice).

could not be guilty of a crime of dishonesty. The Petitioner submits that the PCR court's conclusion is legally incorrect. If the Respondent were truly in fear for his life then he could have argued his alleged affirmative defense, *i.e.*, necessity, in response to the prior accessory after the fact charge.[2] Instead, Respondent waived any defenses he may have had and pled guilty.[3] A guilty plea acts as a waiver of all non-jurisdictional defects and defenses. State v. McKennedy, 348 S.C. 270, 280, 559 S.E.2d 850, 855 (2002).

Because the rule is to be interpreted broadly, Petitioner contends that the nature of the actual predicate crime is not material to the analysis. The very definition of accessory after the fact requires that the predicate crime has been completed when the assistance is rendered; otherwise he who renders assistance would aid in the commission of the offense and be guilty as a principal. Accordingly, consistent with a broad interpretation of Rule 609(a)(2), SCRE, it matters not what the predicate offense was for the purposes of whether accessory after the fact is a crime that involved *dishonesty* or *false statement.*

Therefore, because accessory after the fact is by its very nature a crime of dishonesty, the prior conviction was admissible without regard to whether its probative value outweighed its prejudicial effect. *See* Rule 609(a)(2) SCRE.; State v. Elmore, 368 S.C. 230,628 S.E.2d 271 (Ct. App. 2006), cert. denied April 5,2007, citing Al-Amin, 353 S.C. at 425-27,578 S.E.2d 4344 (evidence admitted under Rule 609(a)(2) is admissible

[2] The defense of necessity is an affirmative defense and must be established by the preponderance of the evidence. State v. W.M.S., 320 S.C. 403, 408, 465 S.E.2d 580, 583 (Ct. App. 1995).

[3] The online Richland County Judicial Index indicates that the Respondent pled guilty on January 7, 1997 to [97GS4014457j "0430-VEHICLEIPOSS, SELL, DISP;STOLEN, $50001M" and [97GS4014589} "1244-ACCESSORY/AID, ABET VIOL CHAP 21, T 16."

without regard to whether its probative value outweighed its prejudicial effect). Counsel was not required to object, there was no ineffective assistance of counsel and there is no prejudice to Respondent; the PCR court's conclusion was an error of law and should be reversed.

IF ACCESSORY AFTER THE FACT IS NOT A CRIME OF DISHONESTY OR FALSE STATEMENT, THE PCR COURT INCORRECTLY CONCLUDED THAT THE RESPONDENT WAS PREJUDICED FOR THE PURPOSES OF A RULE 609, SCRE ANALYSIS.

Assuming for the sake of argument that accessory after the fact is not a crime of dishonesty, the PCR court's conclusion is both incorrect as a matter law and is not supported by sufficient probative evidence. While the following is speculative it is merely an extension of the PCR court's initial speculation regarding what would have happened had trial counsel made an objection, *i.e.*, the court's prejudice analysis. The Petitioner posits that had trial counsel objected and argued (as the PCR court concludes) that a conviction for accessory after the fact is not a crime of dishonesty, then it is logical to assume that the State would have attempted to get the impeachment evidence in under the other section of the Rule, *i.e.*, Rule 609(a)(1), SCRE.

Rule 609(a)(l), SCRE provides that "evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused..." Respondent was on trial for murder. There was no contention by anyone, including the Solicitor, that Respondent was a principal or participant in the prior homicide.[4] The jury knew he was only an accessory after the fact to the prior crime. It was uncontested that he was only convicted as an accessory after the fact. No one, including the solicitor, attempted to argue that Respondent had been convicted of a prior homicide. Additionally, no one

[4] It was the Respondent himself who freely volunteered the specific nature of his accessory after the fact conviction. "I had accessory after the fact of involuntary manslaughter." (App.470 Lines 11-12).

argued Respondent had previously been convicted of murder and therefore he was more likely to have committed the murder for which he was on trial.

Credibility was an issue in the case, because Respondent alone raised the self-defense issue, and so his credibility was important. The State was entitled to present and the jury should have had all of the available evidence to judge Respondent's credibility, especially a criminal history involving assisting in covering up a crime.

The PCR Court found that the risk of prejudice to Respondent was amplified in this case because the State "did not present any direct evidence to disprove [Respondent's] version of events." (App. p. 780). The State presented direct evidence in the form of testimony from several witnesses that another person present at the back door of victim's home shot and killed victim without provocation, although none of the witnesses were able to identify the second person. (App. pp. 130-135, 190-193). Respondent admitted to being that other person, though his version of the facts was that he had not brought a gun or started the conflict but rather that he had been attacked by Victim. (App. pp. 472-483). The State also presented direct evidence in the form of witness testimony, that Respondent had announced that "he was going to rob [someone] tonight." (App. p. 203, line 23). Further, direct evidence was presented to show that Victim did not own a gun at the time of the incident. (App. p. 167, lines 3-19). Respondent's version was that after Victim had entered the house, put on pants, and re-exited, that the gun had accidentally discharged in the scuffle. (App. pp. 514•517). All the other evidence presented purely contradicted the story told by Respondent, making it

unlikely that Respondent would have been believed and acquitted had Respondent's prior conviction for accessory after the fact not been admitted. As no probative evidence exists to prove that but-for Counsel's alleged deficiency, the result of the trial would have been different, this Court should reverse the finding of the PCR Court.[5]

The test to determine whether or not a conviction is more probative than prejudicial for purposes of Rule 609(a)(1) SCRE, has five prongs. A judge must weigh (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Though Colf addressed the balancing test required by Rule 609(b) SCRE, this Court has since pronounced those factors to be appropriate for consideration in balancing the weight of prejudice versus probative value for the admission of prior convictions for impeachment under Rule 609(a)(1) SCRE. *See* State v. Bryant, 369 S.C. 511, 633 S.E.2d 152, N1 (2006).

The crime accessory after the fact has a high impeachment value as it shows a willingness to go from a position of *infra legem* to one of *contra legem*, to join in a criminal act for the purpose of covering it up, and to impede the administration of justice,

[5] The test is not whether the outcome "could" have been different; rather, the PCR Applicant must demonstrate that the outcome "would" have been different. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984).

i.e. thwart the truth. "An accessory after the fact is not an accomplice ... but is guilty of a separate substantive offense in the nature of an obstruction of justice." 22 C.J.S. Criminal Law §179 (2010). Second, the crime was within the ten year window prescribed by Rule 609(b) SCRE.

Accessory after the fact is a three-element crime that has nothing whatsoever in common with murder. Accordingly, the admitted conviction passes the third prong of the Colf test, because the offenses are dissimilar, and proof that Respondent is guilty of the former does not lead to an improper presumption that he would be guilty of the latter.

Finally, the Respondent's testimony and credibility were central in the case because all of the witnesses, other than Respondent and one less-than-credible witness, indicated that Respondent had attacked and killed victim without provocation. Further, the stories told by Respondent and his witness were in direct contradiction of the evidence and testimony submitted by the State but would have indicated self-defense. Accordingly, Respondent's testimony and questions of Respondent's credibility are highly probative in this context and would have led to the prior charge being admitted.

Therefore, Respondent suffered no prejudice from trial counsel's failure to object to the admission of Respondent's prior conviction for accessory after the fact, as a balancing test pursuant to Rule 609(a)(l) SCRE would have resulted in admission of the prior conviction. Accordingly, Petitioner submits that the finding of the PCR Court is erroneous.

Because the prior conviction would be properly admitted, there can be no prejudice to the Respondent. A balance of the Colf factors weighs in favor of the admission of the prior conviction. The PCR court erred in concluding that the trial judge would/could have erred in not admitting the prior conviction only for the purposes of impeachment.

CONCLUSION

For the reasons stated above, this Court should reverse the lower court's ruling and deny the requested relief.

Respectfully submitted,

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By:_____
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March 25, 2013

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II. The PCR court properly found that the respondent was prejudiced by the admission of his prior conviction of accessory after the fact to murder into evidence during his murder trial because the prejudicial value of the prior outweighed any probative value.

STATEMENT OF THE CASE

Procedural History

The respondent was convicted of murder per jury trial held during the September 2004 term of the Richland County General Sessions Court before Judge Alison R. Lee. The respondent was sentenced to imprisonment for a period of thirty years. Charlie J. Johnson, Jr.[1] represented the respondent at trial. The state was represented by Kathryn Luck Campbell and Bryan Jefferies.

The respondent appealed and was represented on direct appeal by Joseph L. Savitz, who filed a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). App. 674 – 681. The respondent then filed a pro se brief. App. 684-694. The Court of Appeals dismissed the appeal in an unpublished opinion on February 12, 2008. See State v. Ayree Henderson, Unpublished Opinion No. 2008-UP-107 (Ct. App. Filed February 12, 2008). App. 696-697.

On March 8, 2008, the respondent filed a PCR application with the Richland County Office of the Clerk of Court. App. 698-703. A PCR hearing was convened on August 12, 2009 before the Judge Thomas Cooper. App. 711- 759. The State was represented by Brian Petrano. The respondent was present at the hearing and represented by Charles Brooks. In an order dated July 12, 2010, the PCR Court granted relief. App. 775-782. The state petitioned this Court for Writ of Certiorari and the respondent's Return followed. On January 17, 2013, this Court granted the petition for writ of certiorari in the case. This brief of respondent follows.

Factual History

At trial, Terrell Myers testified that she and her live-in boyfriend Alonzo Gale were sleeping on the morning of August 3, 2002, when she woke to the sound of a tapping noise at the door of the

[1] The appendix is unclear on who represented Respondent. The trial transcript indicates that Charles E. Johnson was Trial Counsel, App. 1, but Charlie J. Johnson, Jr. testified at the PCR hearing. App. 750 ll. 10-11.

apartment in which they resided. Myers stated that when she saw the respondent outside, Gale went out to investigate. Myers stated that she heard the two arguing and then heard gunfire. Myers added that when she rushed to open the door she found Gale bleeding. App. 139, l. 24 – p. 168, l. 18. Myers made an in-court identification of the respondent as the shooter, and prior to trial she made a pre-trial photo layout identification of the respondent as the perpetrator as well. App. 168, l. 23 – p. 169, l. 25; App. 353 l. 13 – p. 354, l. 25. Neighbors Everett Wilson, Kathy Wilson, and Dianne Crawford also heard gunfire sounds coming from the direction of Meyers' and Gale's apartment on the morning in question. App. 182, l. 6 – p.197, l. 10; App. 119, l. 18 – p. 137, l. 9; App. 198, l. 1 – p. 212, l. 22. Police Officer Robert Hill testified that he was dispatched to the crimes scene at 6:21 am on August 3, 2002, and arrived at there at 6:22 am, and added that Gale died shortly after his arrival. App. 82, l. 11 – p. 113, l. 1. Gale died from a gunshot wound to his "right" neck. App. 289, l. 3 – p. 295, l. 16.

The respondent's defense at trial was self-defense. The gun Alonzo Gale's held in his possession during this incident discharged as he (Gale) and the respondent fought on the morning in question. Eyewitness Shea Thomas testified that she and the respondent went to Gale's apartment around 5:30 am on August 3, 2002, to buy marijuana from Gale. Thomas stated that when they knocked on the apartment door, Gale opened the door while holding a gun and warned them not to come to his residence at such an early hour. Then, Gale went back inside, but returned back outside still fussing regarding his early wakening and said that he had something for the respondent. Thereafter, Gale and the respondent started to argue, and then began tussling. Minutes later, the gun Gale held fatally struck him (Gale). App. 388, l. 1 – p. 405, l. 25.

The respondent testified that he and Thomas started to leave after Gale fussed and appeared with a gun after they knocked on his door on the morning in question, but that Gale appeared again holding a gun and continuing to fuss and curse at them. App. 471, l. 12 – p. 472, l. 20. The respondent described the shooting as follows:

> Defendant: [Gale said] ... Man what you doing at my door this time of night, huh? What the f---you doing at my door ....I told you about coming to my door this time of night, like that. So...[Gale] went in the door, he went inside. so he went in the house, so I started walking off, me and Shea started walking off, but then when I got around the corner of the building, that's when [Gale] met me with the gun.

App. 472, l. 20- p. 473, l. 3 App. 473, l.20; App. 474, l. 6 - 10

> Mr. Johnson: So [Gale] pointed [the gun] at you?
> Defendant: Yes, sir.
> Mr. Johnson: And then what did you do?
> Defendant: I grabbed like this (indicating).
> Mr. Johnson: And y'all started tussling?
> Defendant: Yes, sir.
> Defendant: When we started tussling with the gun, I mean, it was – I can't give you no time frame on that because it all happened at a blur, but I know when I grabbed that gun, all I can think about was, damn, you know. All I was thinking about was I either get this gun or [Gale] going to kill me with it because I was scared. So when we started tussling with the gun, all I heard – I heard a shot. And when the gun shot – when the gun shot went off, I seen him fall. And when I seen [Gale] fall, I just... –
> mean, I'm in a drug neighborhood, me and somebody just got in a tussle with a gun, the gun went off. I seen him fall. I seen blood come out his mouth. I ran.

App. 482, l. 2 – p. 478, l. 12.

A crime scene investigator found no evidence inconsistent with self-defense. App. 268, l. 25 – App. 269, l. 5.

Before the respondent testified, the trial judge advised him that if he decided to testify then his criminal record might be used against him. App. 381, ll. 15-20. The trial judge then gave the respondent a chance to confer with trial counsel before deciding to testify. After this break, trial

counsel and the solicitor informed the trial judge that they had come to an agreement regarding respondent's criminal record. App. 383, ll. 8-21. During the direct examination of the respondent, trial counsel questioned him about a prior conviction for accessory after the fact to murder[2]. App. 465, l. 7 – p. 467, l. 24. The respondent informed the jury that he knew about the murder but was afraid to tell police because it might put his life in jeopardy. App. 466, ll. 1-15. The solicitor then cross-examined the respondent regarding the conviction. App. 847, ll. 12-18; p. 489, ll. 3-7.

During the respondent's PCR hearing, he testified that he believed trial counsel was ineffective in failing to object to the introduction of the accessory after the fact to murder conviction at a trial where he was being tried on a murder charge. App. 716, l. 4 – p. 721, l. 19; App. 727, ll. 4-7. Trial counsel testified that he saw no reason to object to the accessory after the fact charge explaining "it was a felony...within a ten year period." App. 751, ll. 14-18.

The PCR Court granted relief by finding that trial counsel was ineffective in failing to object to the admission of the respondent's prior crime of accessory after the fact to murder conviction into evidence at a trial where he (the respondent) was being tried on a murder charge because the prior was not an impeachable crime of dishonesty under Rule 609, and also because the prejudicial value of the prior outweighed any probative value to the extent that the prior involved murder and the crime for which the respondent was on trial involved murder. Certainly, this misled the jurors to believe that the respondent possessed a criminal propensity to involve himself in murder situations and that he surely acted in conformity therewith in the instant case and was probably guilty of the murder charge for which he was on trial. App. 780 – 781.

[2] It is unclear whether the prior charge was accessory after the fact to involuntary manslaughter or Murder. The PCR courts order refers to it as accessory after the fact to Murder.

QUESTION I

The PCR court correctly found that the respondent's prior conviction for accessory after the fact to murder was not a crime of dishonestly under Rule 609(a)(2), SCRE, and therefore should not have been admissible for the purpose of impeachment against the respondent during his murder trial "

Evidence that any witness has been convicted of a crime shall be admitted if it involves dishonesty or a false statement." Rule 609(a)(2), SCRE. Even though the court held in State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct App. 2003), that armed robbery was a crime of dishonesty and automatically admissible; nonetheless, in State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), the Court adopted the position that a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. See, United States v. Smith, 181 F. Supp. 2d 904 (N.D. Ill. 2002). Moreover, even stealing is not always a crime of dishonesty if there are no additional affirmative false statements or acts of deceit beyond the crime itself. State v. Broadnax, Opinion Number 5071 (Ct. App. Filed January 9, 2013). In Broadnax, where the defendant was on trial for armed robbery, the Court held that it was error to admit the defendant's prior armed robbery convictions for the purpose of impeachment because there was nothing presented to show any further affirmative false statements or acts of deceit beyond the basic crime itself, and that prejudice resulted because the priors were identical to the charge of armed robbery for which he was on trial. In Bryant, the Court held it was error for the state to use the defendant's prior firearms convictions for impeachment during his trial on charges of murder and unlawful possession of a weapon because the prior firearms convictions did not involve dishonesty and were not probative of truthfulness, particularly where the priors were similar to the offenses for which the defendant was on trial. Note further that violations of narcotic laws are

generally not probative of truthfulness either. See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001).

The basis of admitting a prior of dishonesty is not to show that one is a bad person, but rather that one has a propensity to lie, which would bear on one's believability, truthfulness and credibility. State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012). In Black the court held that the prior crime of manslaughter admitted against him during his criminal sexual conduct trial was error because manslaughter is not a crime of dishonesty or untruthfulness that directly impacted the witness' veracity.

The State argued that accessory after the fact to murder should be viewed as a crime of dishonesty or false statement because "the principle purpose of accessory after the fact is to evade public justice and/or to actively suppress evidence, there exist an obvious bearing on the defendant's credibility." Petition for Writ of Certiorari, p. 7. Essentially, the state is arguing that when a criminal commits a crime and tries not to get caught, the crime should be considered a crime of dishonesty under Rule 609 (a)(2), SCRE. However, the intent to evade public justice certainly does not imply a general disposition toward dishonesty.

Here, the respondent pled guilty to accessory after the fact to murder after failing to tell authorities what he knew about a homicide. App. 465, l. 10 – p. 467, l. 1; App. 780. The PCR Court found that the respondent was acting out of fear for his life, and there is nothing in the record to contradict that story. App. 780.

The respondent's accessory after the fact of murder conviction was not a crime of dishonesty because, as the PCR court correctly noted, "doing or not doing something out of fear for one's personal safety does not necessarily indicate dishonesty." Additionally, there was nothing presented beyond the crime of accessory beyond the basic crime that would indicate that the same

was committed under the veil of dishonestly; and finally, there is nothing about the offense of accessory after the fact to murder which would have been probative of a general disposition toward dishonesty in the same manner that manslaughter was found to have been a dishonest crime that would impact veracity

To find that a crime committed with the "intent to evade public justice" is a "crime of dishonesty" would make crimes such as resisting arrest and failure to stop for a blue light "crimes of dishonesty". Even states that view larcenies as "crimes of dishonesty" have not extended *Rule* 609 (a)(2) to cover prior convictions for accessory after the fact and resisting arrest. Commonwealth v. Harris, 442 Pa. Super. 116, 658 A.2d 811 (1995) (holding: hindering apprehension was not a crime of dishonesty), People v. Stover, 89 Ill. 2d 189, 432 N.E.2d 262 (1982) (resisting arrest was not a "crime of dishonesty").

Therefore, based on the foregoing argument, this Court should affirm the PCR Court's correct finding that the prior in question was indeed not a crime of dishonesty and thus inadmissible at trial.

QUESTION II

The PCR court properly found that the respondent was prejudiced by the admission of his prior conviction of accessory after the fact to murder into evidence during his murder trial because the prejudicial value of the prior outweighed the probative value.

The proper standard of review for and appeal of a post-conviction relief hearing is whether any evidence exists to support the PCR Court's findings. Cherry v. State, 300 S.C. 115, 383 S.E.2d 624 (1989). If any evidence exists to support the PCR Court's findings, the ruling must be upheld. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998).

Evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused. Rule 609(a)(1), SCRE. In the respondent's case, the admission of the prior accessory after the fact to murder conviction was never objected to at trial; so the trial judge never engaged in this balancing test. However, the PCR Court found that the "admission of the applicant's prior conviction was *much* more prejudicial than probative." App. 781 (emphasis added). The PCR judge found, in part, that the jury likely used the prior conviction for accessory after the fact to murder to prove action and conformity therewith. App. 781. The PCR judge found that the respondent was prejudiced because there was little evidence to disprove the respondent's claim of self-defense. App. 781. Moreover, due to the similarity of *accessory after the fact to murder* and *murder*, the PCR Court's finding are supported by evidence of the record. *See Cherry, Supra.*

The State argued that accessory after the fact to murder and murder have different elements, and that the prior conviction was necessary because it demonstrated the respondent's willingness to "impede the administration of justice." Writ of Certiorari, p. 13 & 14. This argument incorrectly imparted a highly technical knowledge of criminal law to the jury. The PCR court correctly found that admitting evidence of accessory after the fact conviction in a murder trial would likely leave the jury to use it as impermissible character evidence. App. 781. This conviction was probably not used by the jury to show that the respondent was willing to "impede the administration of justice," but rather that he was an accessory to a homicide and spent four months at the Department of Juvenile Justice as a result. App. 465 l. 10 – App. 467 l. 19.

A jury is not likely to differentiate between the respondent's prior accessory after the fact to murder conviction and the murder charge for which he was on trial. In other words, the jury probably processed the prior as a negative portrayal of the respondent as one who is predisposed to

involve himself in murder situations, and that he was probably guilty of the murder charge for which he was on trial. Compare State v. Green, 338 S.C. 428, 527 S.E.2d 98 (2000), where trial counsel was found ineffective in failing to object to the admission of the defendant's prior convictions of possession of cocaine and possession of crack cocaine while he was on trial for distribution of crack cocaine charges because the prejudicial effect of the jury hearing those priors outweighed any probative value. Compare also the case of Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989), where counsel was found ineffective in failing to object to testimony about the defendant's mafia and devil worship associations (and a prior manslaughter conviction) also while he was being tried for murder, assault and battery with intent to kill, and burglary because this suggested that the defendant was a bad person who possessed a propensity to commit the crimes charged in that case. More importantly, see again Broadnax, where the Court held that the admission of the armed robbery priors prejudiced the defendant because the priors were identical to the armed robbery charge for which he was on trial at the time.

Prior bad acts evidence is inadmissible to show that the accused is a bad person, especially where the prior crimes are similar to the one for which the accused in on trial. State v. Colf, 337 S.C. 622, 525 S.E.3d 246 (2000); State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2007); State v. Gore, 283 S.C. 118, 322 S.E.2d 13 (1984). This is especially true where the defendant's credibility is on the line. See State v. Green, supra. Here, there was no overwhelming evidence of guilt in the case and note that petitioner's self-defense claim was viable and not disproved by the state; and also note that the prior (which involved a murder incident) was similar to the crime of murder for which the respondent was on trial.

In order to prevail in a case where ineffective assistance of counsel is alleged, one must show that counsel's legal representation was below the standard of competence to the point of

deficient legal performance and that this deficient legal performance prejudiced one's case, and that but for the incompetence, a reasonable probability exists that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984). In the case at bar, the PCR judge correctly found that the admission of the prior at issue was much more prejudicial than probative of the respondent's credibility. Therefore, if objected to, the trial judge likely would have also found that the same was not admissible under *Rule* 609(a)(2), SCRE, and would have suppressed the prior conviction. In other words, had the prior not been admitted, the outcome of the respondent's trial would have been different. There is no question that the prior crime evidence portrayed appellant as one who involved himself in murder incidents and that this certainly marked his character as such. This meant that the jury could not avoid processing the prior to mean that the respondent was probably guilty as charged on the murder offense for which he was being tried, which in turn meant that the prejudicial value of this prior crime testimony outweighed any probative value and affected the jury verdict. An error is not harmless if it affected the jury verdict. State v. Hill, 368 S.C. 649, 630 S.E.2d 274 (2006)

CONCLUSION

Based on the foregoing reasons, the respondent respectfully requests that this Court uphold the ruling of the PCR judge in the case.

Respectfully submitted,

Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR RESPONDENT.

This 24th day of April, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

G. Thomas Cooper, Judge

AYREE HENDERSON,

RESPONDENT,

V.

STATE OF SOUTH CAROLINA,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Brief of Respondent in the above referenced case has been served upon Megan Harrigan, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 and Ayree Henderson, #237887, at Lee Correctional Institution, 990 Wisacky Highway, Bishopville, SC 29010, this 24th day of April, 2013.

Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR RESPONDENT.

SUBSCRIBED AND SWORN TO before me
this 24th day of April, 2013.

(L.S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2022.

STATE OF SOUTH CAROLINA
IN THE S C COURT OF APPEALS

Appeal From Richland County
Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Ayree Henderson, 237887,

Respondent,

v.

STATE OF SOUTH CAROLINA,

Petitioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Petitioner has been served upon opposing counsel, Wanda H. Carter by mailing two (2) copies addressed to: South Carolina Office of Appellate Defense; 1330 Lady Street, Suite 401; Columbia, SC 29211; with postage prepaid, this 27th day of March, 2013.

TYSON ANDREW JOHNSON, SR.
ATTORNEY FOR PETITIONER

SWORN to before me this 27th
day of March, 2013.

(L.S.)
Notary Public for South Carolina.
My Commission Expires: 3/12/23

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ayree Henderson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2010-167027

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Unpublished Opinion No. 2014-UP-122
Heard November 14, 2013 – Filed March 19, 2014

AFFIRMED

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Salley W. Elliott, and Assistant Attorney General Mary Shannon Williams, all of Columbia, and Assistant Attorney General Tyson A. Johnson, Sr., of Saluda, for Petitioner.

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Respondent.

PER CURIAM: The State of South Carolina appeals the granting of post-conviction relief to Ayree Henderson, arguing the PCR court erred in finding a prior conviction for accessory after the fact of murder was prejudicial and was not a crime of dishonesty under Rule 609(a)(2), SCRE. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to ineffective counsel: *Strickland v. Washington,* 466 U.S. 668, 687 (1984) (stating to prove trial counsel was ineffective, the defendant must show (1) trial counsel's performance was deficient and (2) the deficiency prejudiced the defendant).

2 As to finding prior conviction for accessory after the fact of murder was not a crime of dishonesty: *Brown v. State*, 375 S.C. 464, 469, 652 S.E.2d 765, 768 (Ct. App. 2007) (stating "[t]his court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law").

3. As to finding prior conviction was prejudicial: *State v. Martin*, 347 S.C. 522, 530, 556 S.E.2d 706, 710 (Ct. App. 2001) (stating "Rule 609(a)(1)[, SCRE,] requires the trial [court] to balance the probative value of the evidence for impeachment purposes against the prejudice to the accused"); *State v. Bryant*, 369 S.C. 511, 517-18, 633 S.E.2d 152, 156 (2006) (stating "we note that when the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission").

AFFIRMED.

HUFF, GEATHERS, and LOCKEMY, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Certiorari to Richland County
G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2010-167-027

Ayree Henderson,

Petitioner,

vs.

State of South Carolina,

Respondent.

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, the Petitioner State now requests a hearing on the following points that this Court may have overlooked or misapprehended:

(1) Petitioner maintains that the crime of accessory after the fact of a crime is one that involves dishonesty or false statement for purposes of a Rule 609(a)(2) analysis. The intent for accessory after the fact is to enable the principal felon to escape detection, i.e. deception. The Petitioner submits that because the principal purpose of accessory after the fact is to evade public justice and/or to actively suppress evidence there exists an "obvious bearing on a defendant's credibility." State v. Nicholson, 221 S.C. 399, 70 S.E.2d 632 (1952). The nature of the crime is not material to the analysis. Even if it were, Henderson is not aided by further inquiry into the facts. If Henderson had any fear of

reprisal in being honest with law enforcement about what he knew, it did not rise to the level of a valid defense, and in his own words was "not justifiable." (App. p. 466, line 11.) Further, generalized fear of reprisal for honesty with law enforcement about what he knew is strongly indicative of his dishonesty in the present situation. Counsel was not ineffective in failing to object where the offense had not previously been the subject of 609(a)(2) precedent.

(2) Applying the analysis of Rule 609(a)(1), SCRE, the conviction would still be admissible. A balance of the State v. Colf, 337S.C. 622, 525 S.E.2d 246 (2000) factors clearly weighs in favor of the admission of the prior conviction. Further, even if admission of the conviction was erroneous, many other factors much more negatively shaded Henderson's credibility. The defense elicited the prior convictions, thereby lessening impact, and there was no other mention emphasis on the crime by the State. (App. p. 581, line 16 – p. 582, line 4; solicitor emphasizes that prior convictions serve only for purposes of credibility.) Henderson was not the only defense witness, meaning that the jury disbelieved not only Henderson but Shea Thomas as well. Further, Henderson had other crimes indicative of dishonesty. Any error in admitting the offense was harmless. State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005).

CONCLUSION

For all of the foregoing reasons, this Court should grant the State's petition for rehearing, vacate its opinion, and affirm the PCR court's denial of relief.

Respectfully submitted,

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BY: Mary L. Williams
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ATTORNEYS FOR RESPONDENT

April 2, 2014

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Richland County
The Honorable G. Thomas Cooper, Circuit Court Judge
Appellate Case No. 2010-167-027

AYREE HENDERSON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

PROOF OF SERVICE

I, Mary S. Williams, certify that I have served the within **Petition for Rehearing** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Wanda H. Carter, Esquire
South Carolina Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, South Carolina 29211

I further certify that all parties required by Rule to be served have been served.

This 2nd day of April, 2014.

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The South Carolina Court of Appeals

Ayree Henderson, Respondent,

v.

State of South Carolina, Petitioner.

Appellate Case No. 2010-167027

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Thomas E. Cuffie J.

John D. Geathers J.

James E. Lockemy J.

Columbia, South Carolina

cc:
Wanda H. Carter, Esquire
Tyson A. Johnson, Sr., Esquire
Mary Shannon Williams, Esquire

FILED
April 24, 2014