STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

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SC SUPREME COURT

The Honorable Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2015-000951

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Emilio B. Craig, ........................................................................................ Petitioner,

v.

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

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# RETURN TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

1. Did the PCR court err in failing to find trial counsel ineffective for requesting the trial judge instruct the jury on strong arm robbery as a lesser included offense of armed robbery when there was only evidence of armed robbery and there was a reasonable probability that the jury would have found petitioner not guilty of armed robbery because no gun was recovered?

## STATEMENT OF THE CASE

In July 2011, the Darlington County Grand Jury indicted Petitioner for armed robbery (2011-GS-16-876), possession of a weapon during the commission of a violent crime (2011-GS-16-877), pointing and presenting a firearm (2011-GS-16-879), and petit larceny (2011-GS-16-880). William E. Grove, Esquire ("trial counsel"), represented Petitioner. On August 29, 2011, Petitioner proceeded to trial before the Honorable Howard P. King and a jury. On August 31, 2011, the jury found Petitioner guilty of common law robbery and petit larceny. The jury found Petitioner not guilty of possession of a weapon during the commission of a violent crime and pointing and presenting a firearm. Judge King sentenced Petitioner to concurrent terms of fifteen (15) years' imprisonment for common law robbery and thirty (30) days imprisonment for petit larceny.

Petitioner filed a timely notice of appeal, and Wanda H. Carter, Esquire, of the Office of Appellate Defense, perfected the appeal with the filing of an Anders[1] brief. The South Carolina Court of Appeals dismissed Petitioner's appeal on June 19, 2013. State v. Craig, Op. No. 2013-UP-255 (S.C. Ct. App. filed June 19, 2013). The Court of Appeals returned the remittitur to the circuit court on July 9, 2013.

Petitioner filed an application for post-conviction relief on April 22, 2014. Respondent ("the State") filed a return on or about November 19, 2014. The Honorable Eugene C. Griffith, Jr. ("the post-conviction relief judge") convened an evidentiary

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

hearing on the application at the Darlington County Courthouse on January 21, 2015. Petitioner was present and represented by Tristan M. Shaffer, Esquire, and the State was represented by Joshua L. Thomas, Esquire. (App. 516). The post-conviction relief judge denied relief and dismissed the application with prejudice in an order signed March 30, 2015 and filed April 6, 2015. (App. p.537-543). Petitioner's attorney filed a notice of appeal, and a petition for writ of certiorari was filed by LaNelle C. DuRant, Esquire of the Office of Appellate Defense on November 30, 2015. This return follows.

**STANDARD OF REVIEW**

In a post-conviction relief action, the applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of trial counsel as a ground for relief, the applicant must prove trial 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." Id. (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court strongly presumes trial counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court applies a two-pronged test in evaluating allegations of ineffective assistance of trial counsel. Id. at 117, 386 S.E.2d at 625. First, the applicant must prove trial counsel's performance was deficient. Id. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, trial counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

When reviewing questions of fact, this Court may affirm the post-conviction relief judge's grant relief only if there is probative evidence to support his findings. Wolfe v. State, 326 S.C. 158, 163, 485 S.E.2d 367, 369 (1997) (citing McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624) (1989)). However, the Court must overturn the post-conviction relief judge if there is no probative evidence to support his findings. Jackson v. State, 329 S.C. 345, 348, 495 S.E.2d 768, 769 (1998) (citing Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). When reviewing questions of law, the Court conducts a *de novo* review, and must reverse the post-conviction relief judge when his decision is controlled by an error of law. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014), reh'g denied (Dec. 3, 2014), cert. denied, 135 S. Ct. 2387 (U.S.S.C. 2015) (quoting Jordan v. State, 406 S.C. 443, 752 S.E.2d 538 (2013).

## ARGUMENT

**Probative evidence exists to support the post-conviction relief judge's finding that trial counsel was not ineffective for requesting a charge on the lesser-included offense of common law robbery.**

Probative evidence exists to support the post-conviction relief judge's finding that trial counsel was not ineffective for requesting a charge on the lesser-included offense of common law robbery.[2] Common law robbery may be a lesser-included offense of armed robbery under the appropriate factual scenario. State v. Moore, 374 S.C. 468, 476, 649 S.E.2d 84, 88 (Ct. App. 2007) (citing State v. Scipio, 283 S.C. 124, 322 S.E.2d 15 (1984)). An instruction on common law robbery as a lesser included offense is appropriate where there is evidence the defendant took items "from the person or immediate presence of another by violence or intimidation." State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758-59 (2003) (citing State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981)). "When determining whether the robbery was committed with intimidation, the trial court should determine whether an ordinary, reasonable person in the victim's position would feel a threat of bodily harm from the perpetrator's acts." Id. (citing United States v. Wagstaff, 865 F.2d 626 (4th Cir. 1989)).

Here, the record contains evidence to support the charge of common law robbery. The victim testified Petitioner used a gun during the robbery. However, police never recovered a gun when Petitioner was apprehended shortly after the robbery. The jury was free to believe the victim's testimony that the shoes were taken from him by force, but disbelieve his testimony a gun was used. See, e.g., Small v. Pioneer Mach., Inc., 329

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[2] Petitioner notes that common law robbery and strong arm robbery are the same offense under South Carolina law.

S.C. 448, 465, 494 S.E.2d 835, 843 (Ct. App. 1997) ("[I]t is not unusual for a case to have contradictory evidence and inconsistent testimony from a witness. In a law case tried before a jury, it is the jury that must decide what part of the witness's testimony it wants to believe and what part it wants to disbelieve."). Furthermore, Petitioner did not deny taking the shoes from the victim, he just denied using force[3] to do so. See State v. Jenkins, 228 S.C. 12, 15, 88 S.E.2d 770, 772 (1955) ("[T]he jury was at liberty to accept the statement of appellant that he killed the deceased and to reject, as being contrary to other facts established by the evidence, his version as to how it occurred[.]"). Thus, trial counsel's arguments regarding the instruction on common-law robbery were reasonable in light of the facts adduced at trial. Cf. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996) (where there is conflicting testimony about the use of a weapon when deciding to charge a lesser-included offense, the reviewing court is "not confined to the State's version of the facts"). Furthermore, trial counsel testified he chose to request the common law robbery instruction to give the jury an alternative verdict if they disbelieved parts of the victim's story. Cf. Abney v. State, 408 S.C. 41, 47, 757 S.E.2d 544, 547 (Ct. App. 2014), cert. denied (Jan. 15, 2015) (acknowledging counsel should make strategic decisions regarding lesser-included offenses that are in client's best interest).

Regardless of whether trial counsel spoke with the Petitioner about the pros and cons of asking for a charge on a lesser included offense, it was up to trial counsel to make the appropriate decision for his client. The testimony produced at the post-conviction

[3] The Court notes the victim in this case was wheelchair-bound. Thus, viewing the "violence or intimidation" element of common law robbery from the perspective of a "reasonable person in the victim's position," Moore, 374 S.C. 468, 476, 649 S.E.2d 84, 88, the jury may have concluded the disparity in age, size, and health between Applicant and the victim constituted sufficient violence or intimidation to establish a robbery, even under Applicant's version of facts.

relief hearing certainly establishes a valid and articulable trial strategy. Stokes v. State, 308 S.C. 546, 548 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.")

The post-conviction relief judge found that trial counsel's testimony was credible regarding discussions with Petitioner about including the option of a lesser-included offense, especially because no gun was found. He further found credible trial counsel's testimony that he had a lengthy charge conference with Judge King about his request to add this instruction. He did not find credible Petitioner's conflicting testimony regarding the decision to use an "all or nothing" strategy. Though it is mentioned during the charge conference, this is not dispositive of any decision that was made.

It is well-established that, on review, this Court "gives great deference to a PCR judge's findings where matters of credibility are involved." Simuel v. State, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010) (citing Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)). Petitioner argues that this Court should defer to the transcript of the underlying trial rather than deferring to the decision made by the post-conviction relief judge regarding the credibility of the two (2) witnesses at issue in this allegation. This is antithetical to the standard established by this Court. For this reason and the others discussed above, this Court should leave the post-conviction relief judge's findings undisturbed and deny the petition for a writ of certiorari.

## CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny a writ of certiorari to review the post-conviction relief judge's proper findings of effective performance of trial counsel.

Respectfully submitted,

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April 18, 2016

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# CERTIFICATE OF SERVICE

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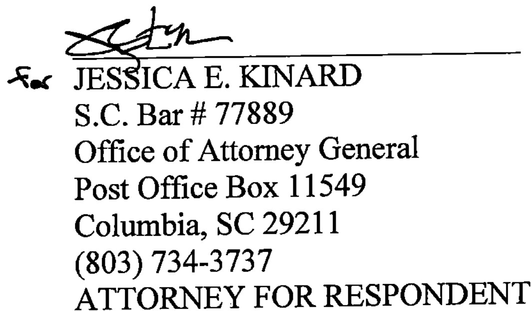
I, Jessica E. Kinard, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Petitioner by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

**LaNelle C. DuRant, Esquire**
**South Carolina Commission on Indigent Defense**
**Division of Appellate Defense**
**Post Office Box 11589**
**Columbia, South Carolina 29211-1589**

I further certify that all parties required by Rule to be served have been served.
This 18th day of April, 2016.



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