STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable George C. James, Jr., Circuit Court Judge

Case No. 2015-CP-23-3450

Robert M. Jones,..... Respondent,

v.

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

NOTICE OF APPEAL

The State of South Carolina appeals the Honorable George C. James, Jr.'s order dated August 15, 2016 and filed August 18, 2016 granting post-conviction relief to the Respondent. The State received notice of entry of the order on August 25, 2016. A copy of the order on appeal is attached to this notice.

Respectfully submitted,

ALAN WILSON
Attorney General

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By: _____
Attorneys for the Petitioner

Columbia, South Carolina
September 13, 2016

Other counsel of record:

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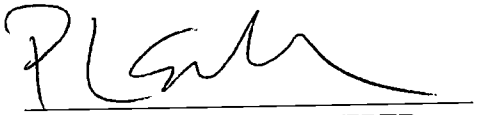
PROOF OF SERVICE

I, Patrick Schmeckpeper, Counsel for the Petitioner, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

William G. Yarborough, III, Esquire
522 North Church Street
Greenville SC 29601

I further certify that all parties required by Rule to be served have been served this 13th day of September, 2016.



PATRICK SCHMECKPEPER
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STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Robert M. Jones, SCDC# 00344801, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT C.A. No. 2015-CP-23-3450 **ORDER GRANTING POST-CONVICTION RELIEF**

This matter comes before the Court by way of an application for post-conviction relief (PCR) from Robert M. Jones (the Applicant), which was filed on May 29, 2015. Respondent made its Return on or about November 30, 2015. A hearing into the matter was convened on June 14, 2016, at the Greenville County Courthouse, before this Court. The Applicant was present and represented by William G. Yarborough, III, Esquire. Patrick Schmeckpeper, Esquire, appeared on behalf of the Respondent. Applicant testified on his own behalf at his hearing. Larry H. Cooke, Esquire, the Applicant's trial counsel, also testified. The parties agreed to a limited evidentiary hearing, and each party agreed to submit briefs for the Court's consideration.

The Court has had the opportunity to review the record in its entirety and has considered the testimony presented at the post-conviction relief hearing. The Court has further had the opportunity to review the parties' post-hearing briefs and the opinion of the South Carolina Court of Appeals in *State v. Jones*, Op. No. 2013-UP-993 (S.C. Ct. App. Filed October 16, 2013) . Upon careful consideration of the facts, arguments, and record, the Court concludes the

Applicant has satisfied his burden of establishing his allegations of ineffective assistance of counsel.

PROCEDURAL HISTORY

The Applicant is currently incarcerated with the South Carolina Department of Corrections pursuant to the Greenville County Clerk of Court's orders of commitment. The Greenville County Grand Jury indicted the Applicant at the February 2010 term of General Sessions for possession of a pistol by a person under 18 years of age (2010-GS-23-0692), murder (2010-GS-23-0693), possession of a weapon during commission of a violent crime (2010-GS-23-0694), and assault and battery with intent to kill (ABWIK) (2010-GS-23-0695). Larry Cooke, Esquire represented the Applicant.

After the State called the case to trial, the Applicant was found guilty. On February 10, 2011, the Honorable Edward W. Miller sentenced the Applicant to concurrent terms of 5 years for possession of a pistol by a person under 18 years of age, 40 years for murder, 5 years for possession of a weapon during commission of a violent crime, and 20 years for ABWIK.

A notice of appeal was filed at the South Carolina Court of Appeals. Kathrine H. Hudgins, Esquire of the South Carolina Commission on Indigent Defense, Division of Appellate Defense perfected the appeal. The Court of Appeals affirmed the Applicant's convictions and sentences. *State v. Jones,* Op. No. 2013-UP-393 (S.C. Ct. App. filed October 16, 2013). The South Carolina Supreme Court denied the Applicant's subsequent petition for writ of certiorari on August 7, 2014. The Remittitur was sent on August 27, 2014. The application for post-conviction relief, which forms the basis for this order, followed.

PROCEDURAL STANDARD

The Applicant bears the burden of proving the allegations in his application. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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 on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 669 (1984).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under this prong, the court reviews counsel's performance by its "reasonableness under professional norms." *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989). The second prong requires a showing that counsel's deficient performance 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, 386 S.E.2d at 625.

ISSUES PRESENTED

The issues in this case center upon trial counsel's failure to object at trial to the solicitor's cross-examination of the Applicant regarding his gang membership history, which cross-examination later resulted in the admission of rebuttal testimony from a gang expert testimony and from another witness concerning the Applicant's past gang membership. The Court must determine whether trial counsel's failure to object constitutes deficient performance, and whether the admission of the gang membership evidence unfairly prejudiced the Applicant such that, but for trial counsel's failure to object, there is a reasonable probability that the outcome of the trial likely would have been different.

The Court concludes that trial counsel's failure to object did constitute deficient performance and that the resulting admission of irrelevant gang evidence by the solicitor did unfairly prejudice the Applicant. Therefore, the Court concludes that the Applicant has met his burden in proving ineffective assistance of counsel. In support thereof, the Court sets forth the following findings of fact and conclusions of law:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The shooting of the victim in the Applicant's case was unrelated to gang activity.[1]

2. During direct examination of the Applicant at trial, no testimony was elicited from the Applicant pertaining to current or past gang membership.

3. During cross-examination of the Applicant, the solicitor asked numerous questions about photographs taken in the Applicant's home showing red bandanas and gang-related graffiti.

4. The solicitor also asked the Applicant about a tattoo on the applicant's arm that was gang-related.

5. During cross-examination, the Applicant admitted that he had been a member of a gang known as the Nine Trey Gangstas.

6. The Applicant testified on cross-examination that he joined the Nine Trey Gangstas when he was fourteen or fifteen years old and that he ceased membership when he was sixteen. He was seventeen years old at the time of the shooting and nineteen at the time of trial.

7. Trial counsel did not object to any of this questioning.

8. In rebuttal, the solicitor called a gang expert to testify as to the induction of a person into a gang. The expert testified that once a person is in the gang, he is a member for life unless

[1] The Attorney General stipulates that the shooting of the victim had nothing to do with gang activity, and furthermore, the solicitor agreed in his closing argument at trial that the shooting was not related to gang activity.

he reaches the age of 30 or 40 or unless he gets out the same way he gets in (by a beat-in or by committing a criminal act).

9. At that time, trial counsel objected to the calling of the gang expert on relevance grounds, but the objection was overruled on the basis that the Applicant's credibility was in question because he denied on cross-examination that he was still in a gang. In its unpublished opinion, the Court of Appeals held that the testimony of the gang expert was proper because "extensive evidence of [the Applicant's] gang involvement had already been admitted without objection." *State v. Jones*, Op. No. 2013-UP-993.[2]

10. Also in rebuttal, the solicitor called Jennifer Abbott to testify that about the applicant's connection with a gang. She testified that she heard the Applicant make some comments about being a part of a gang known as The Bloods.[3]

11. Immediately thereafter, the solicitor asked Ms. Abbott what comments the Applicant had made about what he was going to do to the victim, and she replied that the applicant said he was going to shoot the victim (or have someone shoot the victim) if the victim ever hurt Crystal, the Applicant's girlfriend.

12. Trial counsel did not object to any of Jennifer Abbott's testimony regarding the Applicant's gang connections, and her testimony was admitted into evidence along with the testimony of the gang expert.

13. The Court rejects the Attorney General's argument that trial counsel, for valid strategic reasons, failed to object to the solicitor's cross-examination of the Applicant. The trial transcript reveals that trial counsel elicited no testimony on direct examination of the applicant

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[2] There has been no argument at the PCR stage and there was no argument at trial that the testimony of the gang expert served to impeach the applicant on a collateral matter. The trial judge would have likely and properly sustained a timely objection to the gang expert's testimony on this ground as well. See *State v. Williams*, 409 S.C. 455, 761 S.E.2d 770 (Ct. App. 2014) (other citations omitted).

[3] Trial Tr. 520.

that he was in a gang, and the transcript does not reveal the introduction of any evidence of gang affiliation before the applicant was cross-examined by the solicitor. Trial counsel testified at the PCR hearing that he knew the "gang stuff" was going to come out at trial and that he thought it would be a good thing for the jury to hear that the applicant had been in a gang at one time but had been able to get out of the gang. The Attorney General argues this demonstrates that trial counsel weighed the benefits of letting the gang testimony in against the potential detriments, including the potential detriment that the jury would not believe the applicant had actually left the gang lifestyle. The Attorney General argues that pursuant to that strategic determination, trial counsel "allowed Applicant to testify as to his past gang affiliation, thereby leaving the door open to impeachment by the State." The Attorney General contends this was a valid strategic decision and that the Applicant has not met his burden of proving that this strategy was objectively unreasonable and has therefore failed to establish the first prong of *Strickland*. However, this argument ignores several simple facts. First, the transcript reveals that trial counsel elicited no testimony on direct examination of the Applicant that he was in a gang, and the transcript does not reveal the introduction of any evidence of gang affiliation before the Applicant was cross-examined by the solicitor. Second, even if the trial transcript reveals any such evidence being offered before the solicitor cross-examined the Applicant, trial counsel should have objected to such evidence, and the objection would likely have been sustained. Third, there is nothing in the record to support the conclusion that the "gang stuff" was going to come out during trial, save for trial counsel's failure to timely object to the evidence. The evidence was simply irrelevant, as stipulated by the State. Finally, a timely objection to the initial introduction of gang affiliation would have resulted in the reply testimony of both Jennifer Abbott and the gang expert being excluded on the basis that it was not proper reply testimony.

Again, there is nothing in the record to support the conclusion that the "gang stuff" was going to come out during trial, save for trial counsel's failure to timely object to the evidence.

14. The testimony elicited from the Applicant during cross-examination at trial regarding bandanas, graffiti, and the Applicant's prior gang membership and subsequent withdrawal from the gang was irrelevant to the circumstances of the shooting.

15. Evidence of a criminal defendant's past gang affiliation is undeniably prejudicial, and when evidence of such past affiliation has no evidentiary relevance to the determination of guilt or non-guilt, a timely objection should be made.

16. Had trial counsel objected to the solicitor's questioning on cross-examination regarding the irrelevant gang evidence, the trial judge would have been compelled to sustain the objection and totally exclude the evidence on SCRE rules 401, 402, and 404 grounds.

17. Even if somehow relevant, the trial judge would have likely excluded the evidence on Rule 403 grounds, as any probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.[4] In *Dawson v. Delaware*, 503 U.S.

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[4] *See U.S. v. Santiago*, 643 F.3d 1007 (7th Cir. 2011) ("We recognize that a jury is likely to associate gangs with 'criminal activity and deviant behavior,' such that the admission of gang evidence raises the specter of guilt by association or a verdict influenced by emotion. *United States v. Irvin*, 87 F.3d 860, 865 (7th Cir.1996). In recognition of the prejudicial nature of gang affiliation evidence, 'we examine the care and thoroughness with which a district judge considered the admission or exclusion of gang-involvement evidence.' *United States v. Westbrook*, 125 F.3d 996, 1007 (7th Cir.1997). But the risk of prejudice associated with gang evidence does not render it automatically inadmissible. In numerous cases, we have upheld the admission of gang evidence as more probative than prejudicial." *See United States v. Montgomery*, 390 F.3d 1013, 1018 (7th Cir.2004) (admission of gang evidence proper to help establish motive); *United States v. King*, 627 F.3d 641, 649 (7th Cir.2010) (admission of gang-related evidence is appropriate "to demonstrate the existence of a joint venture or conspiracy and a relationship among its members") (citation omitted); *Clark v. O'Leary*, 852 F.2d 999 (7th Cir.1988) (witness' membership in rival gang admissible for purposes of impeachment to show bias); *United States ex rel. Garcia v. Lane*, 698 F.2d 900 (7th Cir.1983) (evidence of defendant's gang affiliation admissible to explain earlier inconsistent statement of witness due to fear of retaliation.).

159, 166 (1992), the United States Supreme Court addressed the introduction of gang membership in the penalty phase of a death penalty case. The Court determined that evidence of the defendant's membership in the Aryan Brotherhood was not admissible because the gang membership had no relevance to any issue to be decided during the penalty phase. In vacating the death sentence and remanding for new proceedings, the Court observed that it appeared that the gang evidence was used simply because the jury would find it "morally reprehensible." 503 U.S. at 167. In my view, the same scenario is present in the instant case.

18. If trial counsel had immediately objected to the solicitor's line of questioning on cross-examination at trial and the trial judge had properly sustained the objection and excluded the gang evidence, then the Applicant could not have been questioned about current or past gang membership.

19. If the Applicant could not have been questioned about current or past gang membership, then the solicitor would never have been able to call Jennifer Abbott and the gang expert in rebuttal in order to impeach the Applicant's testimony about his current or past gang membership. Consequently, the solicitor's opportunity to call these rebuttal witnesses arose solely from trial counsel's failure to object to the solicitor's cross-examination of the applicant on the irrelevant and unfairly prejudicial gang issues.

20. Therefore, because trial counsel's failure to timely object during cross-examination of the Applicant at trial directly led to the improper admission of irrelevant and unfairly prejudicial evidence against the Applicant, the Court concludes that trial counsel's performance

was deficient, falling below standards of "reasonableness under professional norms,"[5] thus satisfying the first *Strickland* prong.[6]

21. Furthermore, notwithstanding the evidence adduced at trial that the Applicant's testimony was inconsistent with the testimony of other witnesses to the shooting, as well as the evidence that the Applicant fled the scene, the Court concludes that the cloud of gang affiliation, which hung over the Applicant as a result of his trial counsel's deficient performance, inescapably tainted the jury's evaluation of the Applicant's credibility and raised in the jury's mind the specter of criminal activity and deviant behavior. As was the case in *Dawson, supra*, the evidence was used to brand the Applicant as morally reprehensible.

22. Consequently, the admission of the wholly irrelevant gang evidence likely led the jury to decide the case on an improper basis, basing their guilty verdict upon the Applicant's purported gang affiliation instead of the relevant evidence surrounding the shooting, thereby unfairly prejudicing the Applicant.[7]

23. Therefore, trial counsel's deficient performance prejudiced the Applicant such that it most likely precluded the jury from deciding the case on a proper basis. This deprived the Applicant of a fair and reliable result, thereby satisfying the second *Strickland* prong.[8]

24. Based on the foregoing, the Court finds and concludes that the Applicant has established a violation of his Sixth Amendment right to effective assistance of counsel that entitles him to a new trial. Counsel was deficient in failing to object to irrelevant and unfairly

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[5] *Cherry* at 118, 386 S.E.2d at 625.

[6] *Strickland*, 466 U.S. at 687.

[7] *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis").

[8] *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989) (citing *Strickland*, 466 U.S. at 688).

prejudicial testimony, and there is a reasonable probability that the outcome of the trial would have been different had the proper objections been made.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief is granted and the matter is remanded for a new trial.

AND IT IS SO ORDERED this 15 day of Aug, 2016.

George C. James, Jr.
Presiding Judge
Thirteenth Judicial Circuit

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 13 2016
S.C. SUPREME COURT

September 13, 2016

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

Re: **Robert M. Jones, Respondent v. State of South Carolina, Petitioner**
Case No. 2015-CP-23-3450

Dear Mr. Shearouse:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. A copy of the order which is to be challenged on appeal.
2. Proof of service of notice of appeal on the Respondent.
3. A letter ordering the PCR transcript from the court reporter.

Sincerely,

Patrick Schmeckpeper
Assistant Attorney General

PLS/jacc
Enclosures

cc: William G. Yarborough, III, Esquire
South Carolina Department of Corrections
Greenville County Clerk of Court
Solicitor W. Walt Wilkins
Office of Appellate Defense
Trisha Allen, Victim Services