

STATE OF SOUTH CAROLINA  
In The Supreme Court

---

**RECEIVED**

**SEP 15 2016**

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**S.C. SUPREME COURT**

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

---

Appellate Case No. 2015-002511

---

Lemond C. Holland, .....Petitioner,

v.

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

---

**RETURN TO PETITION FOR  
WRIT OF CERTIORARI**

---

ALAN M. WILSON  
Attorney General

JESSICA E. KINARD  
Assistant Attorney General  
S.C. Bar No. 77889

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

STANDARD OF REVIEW .....1

QUESTIONS PRESENTED.....2

STATEMENT OF THE CASE.....3

ARGUMENT .....5

I. The post-conviction relief judge properly found that defense counsel was not ineffective in his cross-examination of Dr. Edward Proctor, Jr., the pathologist who conducted the autopsy of the victim, nor was trial counsel ineffective in his decision not to recall Dr. Proctor after the eyewitness, Jeffrey Bennick, testified.....5

CONCLUSION.....10

## STANDARD OF REVIEW

The Court gives great deference to the post-conviction relief (“PCR”) court's findings of fact and conclusions of law. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005). In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision. Smith v. State, 369 S.C. 135, 138, 631 S.E.2d 260, 261 (2006). This Court will uphold the findings of the PCR judge “if there is any evidence of probative value sufficient to support them.” Dempsey, 363 S.C. at 368, 610 S.E.2d at 814. “If no probative evidence exists to support the findings, the Court will reverse.” Id. at 368–69, 610 S.E.2d at 814. Holden v. State, 393 S.C. 565, 573, 713 S.E.2d 611, 615-16 (2011).

## QUESTIONS PRESENTED

### I.

Did the PCR Court err in reversing its original decision to grant Petitioner a new trial where the record below supported Petitioner's allegation that Trial Counsel was ineffective for failing to adequately cross-examine State witness, Dr. Edward Proctor, Jr., the pathologist who conducted the autopsy of the Victim?

### II.

Did the PCR Court err in reversing its original decision to grant Petitioner a new trial where the record below supported Petitioner's allegation that Trial Counsel was ineffective for failing to recall State witness, Dr. Edward Proctor, Jr., the pathologist who conducted the autopsy of the Victim, after the testimony of eyewitness Jeffrey D. Bennick where the testimony of witness Bennick provided factual information which would have been instrumental in soliciting opinion testimony from this expert witness which would have been substantially favorable to the defense?

## STATEMENT OF THE CASE

Petitioner was indicted during the April 2006 term of the Horry County Grand Jury for murder (2006-GS-26-2014), assault and battery with intent to kill (“ABWIK”) (2006-GS-26-2013), and possession of a weapon during the commission of a violent crime (2006-GS-26-2014). App.p. 551-562. Petitioner was represented by Robert Richardson and Jeffrey Johnson, Esquires.<sup>1</sup> On June 11, 2007, Petitioner proceeded to trial before the Honorable John L. Breeden, Jr. and a jury. He was found guilty of all charges. Judge Breeden sentenced Petitioner to fifty (50) years’ imprisonment for murder, twenty (20) years’ imprisonment for ABWIK to run consecutively to the murder sentence, and five (5) years’ imprisonment for possession of a weapon during the commission of a violent crime, to run consecutively to the other sentences. App.p. 551-562. Petitioner filed a timely appeal, which was perfected by Robert M. Dudek, Esquire of the South Carolina Division of Appellate Defense. App.p. 379. Petitioner’s conviction was affirmed by the Court of Appeals in an order dated August 18, 2009. State v. Holland, 385 S.C. 159, 682 S.E.2d 898 (Ct.App. 2009). App.p. 453. A petition for rehearing was filed on August 28, 2009, and denied on September 17, 2009. App.p. 466; App.p. 479. Remittitur was returned on February 10, 2010. App.p. 480. A petition for writ of certiorari was filed with the Supreme Court on December 18, 2009, with a return filed by the state on February 25, 2010. App.p. 481; App.p. 505. The petition for writ of certiorari was denied on February 9, 2012. App. p. 531.

Petitioner filed an application for post-conviction relief on January 18, 2013 by and through his attorney Ralph J. Wilson. App. p. 533. The State filed its return on or about April 16, 2013. App. p.546. The Honorable G. Thomas Cooper, Jr. (“the post-conviction relief judge”)

---

<sup>1</sup> Respondent will use the term “trial counsel” to refer to Mr. Richardson, as he was first chair counsel.

convened an evidentiary hearing on the application at the Horry County Courthouse on February 2, 2015. App. p. 570. The post-conviction relief judge granted relief in an order filed May 19, 2015. App. p. 633. A motion to reconsider was filed by the Respondent on or about June 8, 2015. App. p. 646. A response to this motion was filed July 10, 2015. App.p.653. In an order of dismissal signed August 28, 2015 and filed September 2, 2015, Judge Cooper reversed his grant of relief.

A timely notice of intent to appeal was filed on or about December 1, 2015. App.p. 671. Petitioner submitted his petition for writ of certiorari on May 18, 2016. This return to petition for writ of certiorari follows.

## ARGUMENT

### Questions I and II

**The post-conviction relief judge properly found that defense counsel was not ineffective in his cross-examination of Dr. Edward Proctor, Jr., the pathologist who conducted the autopsy of the victim, nor was trial counsel ineffective in his decision not to recall Dr. Proctor after the eyewitness, Jeffrey Bennick, testified.**

Petitioner asserts that plea counsel was ineffective because he did not adequately cross-examine the pathologist who performed the autopsy of the victim, nor did he recall Dr. Proctor after the Court received eyewitness testimony. This was not the finding of the post-conviction relief judge and, due to his unique ability to hear testimony and observe credibility, his finding should not be disturbed. It is well-settled law in this state that “[g]reat deference is given to the PCR court’s findings on matters of credibility, as the reviewing court lacks the opportunity to observe witnesses. Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 cert. denied, 510 U.S. 1014, 114 S.Ct. 607, 126 L.Ed.2d 572 (1993). See Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); see also Harris v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor, 3 F.3d 103, 106-07 (4th Cir. 1993) (Appellate courts are ill-suited “to overturn a factfinder on a question on which two views of the evidence are possible. . . . Fact finders routinely resolve discrepancies between evidentiary sources, and by being able to observe testimony first-hand, they are in the best position to do so.”).

In a post-conviction relief proceeding, 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) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where ineffective assistance of counsel is alleged as a ground for relief, 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 (1984); Butler, 286 S.C. 441.

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. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its “reasonableness under professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland, 466 U.S. 668). Second, counsel's deficient performance must have prejudiced 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. Petitioner’s allegations that Counsel was ineffective for the stated reasons fail to show either deficiency or prejudice.

As argued by Respondent in the motion for reconsideration and adopted by the PCR Court in its revised order of dismissal, the nature and extent of cross-examination is an area left to the sound discretion of trial counsel. See, e.g. Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996) (“In hindsight, there are few, if any cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster.”); Yarrington v. Davies, 779 F.Supp, 1304, 1308 (D. Kan. 1991) (“The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel.”). The PCR court found credible trial counsel's testimony that he

did not believe further cross-examination of Dr. Procter was necessary to the case. Trial counsel clearly articulated a theory of attempting to place as much distance between the shooter and the victim as possible. Trial counsel believed Dr. Procter's trial testimony that he could not determine the distance between the victim and the weapon (App. p. 122;14-25) was the most beneficial testimony he could get from Dr. Procter. The PCR Court found trial counsel articulated a valid strategic reason for not further cross-examining Dr. Procter. See Legare v. State, 333 S.C. 275, 281, 509 S.E.2d 472, 475 (1998) ("Where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective." (citing Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992))).

The PCR court further found Petitioner had not demonstrated that further cross-examination of Dr. Procter would have changed the outcome of his trial. Petitioner presented testimony from Dr. Procter to demonstrate the impossibility of the Petitioner being the person who shot the victim. However, Dr. Procter also testified that any number of small changes in the body position of either Petitioner or the victim could have explained the State's theory that Petitioner shot the victim. Ultimately, Dr. Procter concluded at trial that he could not make a determination of whether Petitioner could have shot the victim without witnessing the shooting. In light of the uncertainty of Dr. Procter's testimony regarding how the shooting could have happened, the trial court found Petitioner did not demonstrate prejudice from trial counsel's lack of further cross-examination. See, e.g., Skeen v. State, 325 S.C. 210, 216-17, 481 S.E.2d 129, 133 (1997) ("[One can only speculate whether a 'better' cross examination would have helped Skeen."); Simpson v. Moore, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial

for the sole purpose of presenting a 'fancier' case." (citing Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998))).

Respondent further submits that there is no basis in case law for Petitioner's argument that the alternate theories of the incident presented at the PCR evidentiary hearing should not be considered by this Court because they were not in evidence at the time of trial. Just as trial counsel made use of the availability of an expert as he saw fit, so did PCR counsel use the expert's testimony to make his case.

Specifically regarding trial counsel's his alleged failure in not re-calling Dr. Proctor after the testimony of Jeffrey Bennick<sup>2</sup>, the eyewitness, Respondent avers that this matter is not preserved for appellate review. The testimony of Mr. Bennick was discussed at length during the PCR evidentiary hearing and rulings regarding it were made in the original order of dismissal. However, the second order of dismissal that resulted after Respondent prevailed on its Rule 59(e) motion makes no mention of Mr. Bennick, nor does it attempt to relate back, supplement, or amend the original order of dismissal. Had Petitioner wished to preserve this argument for appeal, he could have filed a second Rule 59(e) motion to ensure that it would probably be before this Court. For these reasons, any argument regarding Mr. Bennick's testimony or the alleged ineffective assistance of trial counsel for his failure to recall Dr. Proctor after Bennick's testimony is not preserved.

Without waiving the above objection, Respondent submits that Petitioner's argument regarding recalling Dr. Proctor is without merit. As discussed above, it was entirely within trial counsel's discretion and strategy to make the decisions that he did regarding examining Dr. Proctor. This same logic and line of cases applies to trial counsel's decision not to recall Dr.

---

<sup>2</sup> This witness is referred to as "Bennett," rather than "Bennick," in the PCR transcript.

Proctor. In fact, these arguments apply with even more vigor, as recalling Dr. Proctor would have meant that the defense put up a case, thus ending the Petitioner's right to remain silent and losing the opportunity for the final closing argument. These are weighty considerations that were made by trial counsel, who testified credibly and competently at the PCR hearing to his logic in not recalling Dr. Proctor. App. p. 622;24-623;11 and p.612;23-613;9.

Petitioner has failed to show either deficiency of counsel or prejudice arising from the issues discussed above and, as such, Petitioner has failed to satisfy either prong of Strickland with respect to his claims of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON  
Attorney General

JESSICA E. KINARD  
Assistant Attorney General  
S.C. Bar No. 77889

Post Office Box 11549  
Columbia, South Carolina 29211  
(803) 734-3737

By:   
ATTORNEYS FOR RESPONDENT

September 15, 2016

**RECEIVED**

**SEP 15 2016**

**S.C. SUPREME COURT**

STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

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

Appellate Case No. 2015-002511

Lemonde C. Holland, .....Petitioner,

v.

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

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

**Tara Dawn Shurling  
Law Office Of Tara Dawn Shurling, PA  
3614 Landmark Drive, Suite A  
Columbia, SC 29204**

This 15th day of September, 2016



FELICIA V. HAYES  
Legal Assistant For Respondent