STATE OF SOUTH CAROLINA
In The Supreme Court

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SC Court of Appeals

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S.C. SUPREME COURT

CERTIORARI TO WILLIAMSBURG COUNTY
Court of Common Pleas

The Honorable Steven H. John, Circuit Court Judge

Appellate Case No.: 2015-002248

KELVIN BOWEN,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
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ATTORNEYS FOR RESPONDENT

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PETITIONER'S ISSUE PRESENTED

1. Did the PCR judge err in refusing to find that appellate counsel was ineffective for failing to raise the issue of whether the trial judge abused his discretion in admitting State's Exhibit #82, a composition notebook, attributed to co-defendant Ronald Mack, containing irrelevant and prejudicial gang language?

2. Did the PCR judge err in stating that he would not speculate as to the contents of the notebook, State's Exhibit #82, because Petitioner did not introduce the notebook at the PCR hearing when the notebook was admitted into evidence at trial and discussed at length prior to admission?

STATEMENT OF THE CASE

Petitioner (Kelvin Bowen) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Williamsburg County Clerk of Court. Petitioner was true bill indicted at the July 2009 term of the Williamsburg County Grand Jury for murder, burglary—first degree, conspiracy, and possession of a weapon during a violent crime (2009-GS-45-180). William E. Jenkinson, III, Esquire, and Amanda Shuler, Esquire, represented Petitioner. Petitioner proceeded to a jury trial and was convicted as indicted. The Honorable Clifton Newman sentenced Petitioner to ninety-nine year term of imprisonment for murder, a thirty year term of imprisonment for burglary—first degree, five year term of imprisonment for possession of a weapon during violent crime, and five year term of imprisonment for criminal conspiracy with all charges running consecutively.

A timely Notice of Appeal was filed on Petitioner's behalf. The South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. State v. Bowen, 2013-UP-452 (Filed December 11, 2013). The Remittitur was issued on December 30, 2013.

Petitioner filed an application for post-conviction relief on March 4, 2014[1]. Petitioner filed amendments to the application on September 9, 2014, September 26, 2014, February 9, 2015, and February 10, 2015. Respondent filed its Return and Motion for a More Definite Statement on December 2, 2014. An evidentiary hearing was held on July 13, 2015, before the Honorable Steven H. John, at the Sumter County Courthouse. Petitioner was represented by Charles T. Brooks, III, and Respondent was represented by Assistant Attorney General Daniel Gourley. The PCR Court denied relief in an order dated August 4, 2015. On October 27, 2015,

[1] The application for post-conviction relief was received by Respondent on July 11, 2014.

Petitioner filed a timely notice of appeal. The Petition for Writ of Certiorari was filed in this Court on June 23, 2016. This Return follows.

STANDARD OF REVIEW

The proper standard for reviewing 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, 386 S.E.2d 624 (1989). In a PCR proceeding, the Petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. Probative evidence supports the PCR Court's finding that Appellate Counsel was not ineffective.

Petitioner's argument that the PCR Court erred in finding that appellate counsel was not ineffective for failing to raise the issue of whether the trial judge abused his discretion in admitting State's Exhibit #82 is meritless because the PCR Court's holding was based on probative evidence.

In a PCR action, the petitioner bears the burden of proving the allegations in his 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 petitioner 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, supra.

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

To prevail on a claim of ineffective assistance of appellate counsel, an applicant must establish both deficiency and prejudice. Southerland, 337 S.C. at 616, 524 S.E.2d at 836. If an applicant can establish both deficiency according to professional norms and prejudice to the extent that he would have been successful on appeal, he is entitled to a new trial. See Ezell v. State, 345 S.C. 312, 316, 548 S.E.2d 852, 854 (2001); Southerland, 337 S.C. 615-16, 524 S.E.2d at 836. See also Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991) (post-conviction relief

of a new trial granted based on appellate counsel's failure to raise an issue on appeal that constituted reversible error).

"Although it is possible to bring a successful ineffective assistance of appellate counsel claim based on failure to raise a particular issue on direct appeal, the Supreme Court has reiterated that it is 'difficult to demonstrate that counsel was incompetent.'" United States v. Mason, No. 3:06–607–CMC, 2012 WL 5845807 at 1 (D. S.C. Nov. 19, 2012) (quoting Smith v. Robbins, 528 U.S. 259, 288, 120 S. Ct. 746, 765 (2000)). While appellate counsel is required to provide effective assistance of counsel, "appellate counsel is *not* required to raise every non-frivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990), citing Jones v. Barnes, 463 U.S. 745 (1983). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . ." Jones, 463 U.S. at 754. Additionally, our Supreme Court has expressly rejected the notion that appellate counsel has an obligation to raise all meritorious issues on appeal. Tisdale v. State, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004).

"'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" Smith v. Robbins, 528 U.S. at 288, 120 S. Ct. at 765 (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones, 463 U.S. at 753. Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not deficient performance. Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985).

The PCR Court correctly held that Petitioner's allegations failed to satisfy the standard set forth in Strickland. First, the PCR Court found that Appellate Counsel's actions were reasonable under the circumstances and did not fall below professional norms of reasonableness. The PCR Court examined the entire lower court record, including the trial transcript and the appellate court records from Petitioner's direct appeal. The PCR Court analyzed the issues raised on appeal as well as the issues Petitioner claimed should have been raised on appeal and ruled upon the strength of the arguments. The Order of Dismissal states that the issue of the composition notebook was not clearly stronger than the issue of the photograph array that was argued on appeal. App. 1005. This analysis clearly demonstrates the probative evidence used to support the PCR Court's finding that Appellate Counsel was reasonable under the circumstances and did not fall below professional norms of reasonableness.

Therefore, since the PCR Court's findings were supported by probative evidence, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's denial of post-conviction relief.

II. The PCR Court correctly held that it could not speculate as to the contents of State's Trial Exhibit #82 because Petitioner failed to meet his burden of proof by failing to produce the exhibit for the PCR Court's review.

Petitioner asserts that the PCR Court should have considered the contents of Exhibit #82 based on the trial transcript and the fact that it was admitted as an exhibit in the criminal trial. This assertion is meritless, as the PCR Court correctly ruled that Petitioner failed to meet his burden of proof when he did not move to admit the composition notebook as an exhibit in the evidentiary hearing.

In order to meet his burden of proving prejudice, Petitioner was required to show exactly how Exhibit #82 prejudiced him, and how it would have changed the outcome of the proceeding

if Appellate Counsel had briefed the issue of its admissibility on direct appeal. Petitioner did not present Exhibit #82 at the evidentiary hearing, and the PCR Court could not speculate as to its contents even if it was technically a part of the lower court record.

South Carolina courts have long held that PCR applicants are required to produce the testimony or the exhibits that they wish to challenge from the perspective of ineffective assistance of counsel. See Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998) (Trial counsel's failure to investigate backgrounds of victims and witnesses to determine if they had criminal records or were involved in illegal activities did not prejudice defendant, and thus, counsel was not ineffective; even if eyewitnesses or victims had criminal record, no evidence was presented to show crime was one of moral turpitude which could be used for impeachment purposes). See also Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998); Glover v. State, 318 S.C. 496, 458 S.E.2d 538 (1995).

Under South Carolina case law, Petitioner failed to meet his burden of proof. Therefore, the PCR Court correctly held that Petitioner could not prove prejudice based on the merely speculative observations of State's Exhibit #82.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, the Respondent requests permission under the rules to brief the issues discussed above fully.

[Signature page to follow]

Respectfully submitted,

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Attorney General

JULIE A. COLEMAN
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SC Bar # 102214

By:

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Certiorari to Williamsburg County
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S.C. SUPREME COURT

Appellate Case No. 2015-002248

KELVIN BOWEN, #344725

Petitioner,

STATE OF SOUTH CAROLINA

Respondent.

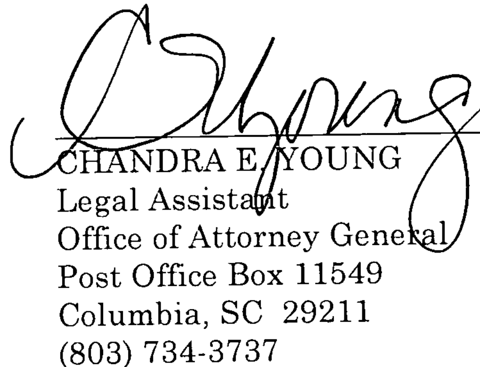
PROOF OF SERVICE

I, CHANDRA E. YOUNG, certify that I have served the Return to Petition for Writ of Certiorari on opposing counsel by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Kathrine H. Hudgins, Esquire
Post Office Box 11589
Columbia, SC 29211

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

This 9th day of October 2016.



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ALAN WILSON
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S.C. SUPREME COURT

November 9, 2016

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

RE: **Kelvin Bowen, #344725 v. State of South Carolina**
2015-002248

Dear Mr. Shearouse:

I am enclosing the original and six (6) copies of the Return to Petition for Writ of Certiorari in the above case.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC:cey
Enclosures

cc: Kathrine H. Hudgins, Esquire
Trisha Allen, Victim Services (letter only)

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