STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Trial Judge
The Honorable George C. James, Post-Conviction Relief Judge

Appellate Case No. 2016-001885

Robert M. Jones .....Respondent,

v.

State of South Carolina, ...Petitioner.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the PCR Court's finding that counsel was ineffective for failing to adequately object to the introduction of Respondent's prior gang affiliation supported by any probative evidence or controlled by an error of law?

   A. Is the PCR Court's finding that counsel was deficient controlled by an error of law or supported by any probative evidence in the record where it improperly relies on hindsight in making its ruling, and counsel's testimony indicates he was acting pursuant to a valid trial strategy?

   B. Is the PCR Court's finding that Respondent was thereby prejudiced controlled by an error of law or supported by any probative evidence in the record where 1) it erroneously applied the incorrect standard in support of its decision; and 2) the evidence was such that there is no reasonable probability that but for counsel's purported deficiency the outcome of the proceeding would have been different?

STATEMENT OF THE CASE

Respondent 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 Respondent 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 Respondent.

Respondent was tried by a jury and found guilty. On February 10, 2011, the Honorable Edward W. Miller sentenced him 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 Respondent'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 Respondent's subsequent petition for writ of certiorari on August 7, 2014. The Remittitur was sent on August 27, 2014.

Respondent filed an application for post-conviction relief (PCR) on May 29, 2015. A hearing was held at the Greenville County Courthouse on June 14, 2016, before the Honorable George C. James. Respondent was present and represented by William G. Yarborough, Esquire. Patrick Schmeckpeper, Esquire, of the South Carolina Attorney General's Office represented the

State. Following the hearing, both parties submitted memoranda of law. In an order filed August 18, 2016, Judge James granted post-conviction relief and ordered a new trial. The State filed a timely Notice of Appeal on September 13, 2016. This Petition for Writ of Certiorari follows.

STATEMENT OF THE FACTS

At 9:15 AM on March 25, 2009, Robert Jones ("Respondent") and his girlfriend, Crystal Stone, drove to Sharon Hamby's[1] house to drop off Crystal's youngest daughter, Vianna, and pick up her older daughter, Alexia. App. p. 378. Shortly after Respondent and Crystal appeared, Vincent Campbell – Vianna and Alexia's father – arrived with his brother, Kevin. Inside the house, Crystal and Vincent got into an argument as to whether Crystal could take Alexia that morning. App. p. 349. Ms. Hamby eventually asked everyone to leave, at which point the argument continued on the back porch. App. p. 189.[2]

According to multiple eyewitnesses, Respondent then returned to his vehicle and sat down in the driver's side seat. App. p. 151-52; 191. Crystal began to get into the passenger seat of Respondent's vehicle, but then went around to the driver's side, apparently trying to keep Respondent from getting out. App. p. 153; p. 194. Respondent pushed Crystal out of the way and began shooting, striking both Vincent and Kevin. App. p. 153; p. 196. Vincent was killed, and Kevin was injured. Other than Respondent, each eyewitness testified that they did not believe either of the victims was armed or "showed a gun." App. p. 155; 195-96; 381-82.

According to Respondent, the deceased victim had previously threatened him and, at the time, mentioned "something about getting a pistol, getting a gun, getting a weapon or whatnot." App. p. 400. At that time, Respondent said he got to his car and sat down. App. p. 400. He further added that at that point in time, Crystal, who was previously on the passenger side of the vehicle, came around and placed herself between Vincent and himself. App. p. 400. Respondent

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[1] Crystal refers to Ms. Hamby, her biological great-aunt, as her grandmother.

[2] Although the testimony differs somewhat, one witness indicated that Crystal slapped Ms. Hamby prior to leaving the house. App. p. 148-49; p. 171. Crystal denied slapping anyone. App. p. 349.

then said:

> I seen him – he had went to his car he had reached up under his seat and came back out like with a gun, yes, sir. And so then after that that's whenever I had seen him walk over to Crystal. So like I was – I was scared that he was going to do something to me or to Crystal because he was coming towards my way. So I didn't know, I was just scared.

App. p. 434-35. Respondent confirmed that he then fired the gun at Vincent. Crystal – who also testified she never saw anyone else with a gun – said that while she was afraid Respondent and Vincent were going to get into a fistfight, she was never afraid for her life or believed Vincent "would ever" kill her. App. p. 353; 380; 384-85.

When asked on direct what Kevin "was doing when he came out and got in the car and Vincent said something about pistols," Respondent explained:

> I seen him standing like at the back of the Expedition like on the right side or the passenger side towards the back. And so whenever I had started shooting at Vincent or whatnot out of fear and like he had – he had ran so I stopped behind the back of the Expedition. And so I had looked around to see what he was doing. And I had seen him, he was at the front of the Expedition. And I had seen Kevin, he looked like he was opening up the passenger door and reached like he was getting a weapon. So I didn't know what he was doing. I just figured he was getting a weapon because what I had seen Vincent with. So I shot at him too.

App. p. 435. Thereafter, Respondent fled; first to his residence in Belton, where he dropped off Vianna; and then to Broadway Lake where he and Crystal were apprehended. App. p. 438-39. While at his house in Belton, Respondent got a knife and later cut Crystal's ankle monitor off, intending to throw it into the lake. App. p. 458-59. He had already thrown the gun out his car window following the shooting. App. p. 457.

STANDARD OF REVIEW

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 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). However, appellate courts review questions of law *de novo*, and will reverse the decision of the PCR Court when it is controlled by an error of law. Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013) (citing Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012)).

ARGUMENT

I. The PCR Court's finding that counsel was ineffective for failing to adequately object to the introduction of Respondent's prior gang affiliation is unsupported by any probative evidence and controlled by an error of law.

The PCR judge erred in granting relief. In order to prove ineffective assistance of counsel, Respondent bore the burden of showing at the evidentiary hearing that his attorney was ineffective. A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its reasonableness under professional norms. Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, (citing Strickland v. Washington). 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 v. Washington. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In other words, where ineffective assistance of counsel is alleged 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 (1984); Butler v. State, 286 S.C.

441, 334 S.E.2d 813 (1985). For the reasons discussed below, certiorari should be granted and the PCR Court's ruling should be reversed.

A. The PCR Court's finding that counsel was deficient is controlled by an error of law and unsupported by any probative evidence in the record where it improperly relies on hindsight in making its ruling; and counsel's testimony indicates he was acting pursuant to a valid trial strategy.

There is no probative evidence in support of the PCR Court's deficiency finding where counsel acted pursuant to a valid trial strategy. See 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"). Inasmuch as the PCR Court's ruling relies on the distorting effects of hindsight, it is also controlled by an error of law. Strickland, at 689, 104 S.Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct rom counsel's perspective at the time.").

The PCR Court found counsel was deficient in failing to make a proper objection to testimony regarding Respondent's prior gang affiliation, rejecting the State's argument that trial counsel acted pursuant to a valid strategy. App. p. 703. It found as follows:

> First, the transcript reveals that trial counsel elicited no testimony on direct examination of the [Respondent] that he was in a gang, and the transcript does not reveal the introduction of any evidence of gang affiliation before the [Respondent] was cross-examined by the solicitor. Second, even if the trial transcript reveals any such evidence . . . 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. Finally, a timely objection would have resulted in the reply testimony of Jennifer Abbot and the gang expert being excluded on the basis that it was not proper reply testimony.

App. p. 704.

The PCR Court erred in failing to apply the proper standard in a post-conviction relief hearing, and allowing the distorted effects of hindsight to infect its analysis. Counsel's testimony at the evidentiary hearing established a reasonable basis for his decision to allow testimony concerning Respondent's prior gang affiliation. Counsel did not think the killing had anything to do with gangs, and – crucially – he thought it was "admirable" that Respondent was able to get out of a gang. App. p. 666. Counsel further explained that he had thought it was important for the jury to hear that Respondent had been able to get out of a gang. App. p. 666.

Rather than address the reasonableness of counsel's decision at the time it was made – as the law requires[3] – the PCR Court erroneously honed in on the results during its deficiency analysis,[4] noting that a timely objection would have resulted in the exclusion of subsequent reply testimony. This is exactly the type of backwards-looking, hindsight-oriented approach that Strickland and its progeny have expressly and repeatedly rejected. Id. at 689, 104 S.Ct. at 2065. Counsel testified, for example, that he was not expecting a gang expert to come in because at that time he had "never heard of a gang expert in South Carolina," and that this trial was before "everybody [knew] about them." App. p. 663. Defense attorneys have never been required to anticipate or discover changes in the law, or facts which did not exist, at the time of trial. Thornes v. State, 310 S.C. 306, 310, 426 S.E.2d 764, 765 (1993) ("The relevant time frame for analysis is when the alleged ineffectiveness occurred, not several years later. . . .").

Undoubtedly, Respondent's alleged prior gang affiliation was not a central pillar of

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[3] See, e.g., Strickland at 689, 104 S.Ct. at 2065.

[4] The PCR Court also appears to have focused on whether counsel *could have* excluded the gang information, similarly failing to address the reasonableness of his decision not to do so.

counsel's defense theory. Allowing the information was, nevertheless, a calculated, strategic decision based on how counsel thought the case was going at the time of the actual trial, and how he thought the evidence would play out. Stripped of the distorting effects of hindsight, the decision was reasonable under the circumstances. Respondent therefore respectfully requests certiorari be granted, and the PCR Court's decision be reversed.

B. The PCR Court's finding that Respondent was thereby prejudiced is controlled by an error of law and unsupported by any probative evidence in the record where 1) it erroneously applied the incorrect standard in support of its decision; and 2) the evidence was such that there is no reasonable probability that but for counsel's purported deficiency the outcome of the proceeding would have been different.

The PCR Court's prejudice finding is also controlled by an error of law and unsupported by any probative evidence.

i) Error of law

The PCR Court's finding was controlled by an error of law where it confused the standards of prejudice as pronounced in Strickland and its progeny with the concept of "unfair prejudice" as it relates to Rule 403 in the South Carolina Rules of Evidence.

Crucial to the ineffective assistance of counsel analysis is the focus on whether or not a reasonable probability exists that the *outcome* of the proceeding was affected. As discussed above, in order to prove prejudice, an applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland at 694, 104 S.Ct. 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

Rather than using Strickland's outcome based approach, the PCR Court instead focused on the assumption that the evidence in question "likely led the jury to decide the case on an

improper basis." App. p. 707. This is not the appropriate standard for determining prejudice in a post-conviction relief proceeding. Its reference to State v. Wiles, 383 S.C. 151, 679 S.E.2d 176 (2009), as the applicable rule highlights the error. In Wiles, the Supreme Court reaffirmed on direct appeal that even relevant evidence must be excluded pursuant to Rule 403, SCRE, if "its probative value is substantially outweighed by the danger of unfair prejudice." Id. at 158, 679 S.E.2d at 176. Given the reasoning in its order, the PCR Court appears to have mistakenly concluded that simply because the evidence in question may have been subject to exclusion at trial under Rule 403 – notwithstanding whether, as discussed above, counsel had a valid reason for allowing it in anyway – it was automatically prejudicial under Strickland.

Such a misapprehension of the applicable standard represents an incomplete analysis. The PCR Court failed to take into account the *effect* the alleged inappropriate evidence had on the outcome of the proceeding. Whether or not counsel *could* have prevented the evidence from coming in is an entirely different question than whether his failure to do so affected the outcome of the proceeding. The PCR Court's failure to appreciate the distinction constitutes a clear error of law, and warrants reversal. Respondent respectfully requests that certiorari be granted.

ii) No probative evidence

Respondent failed to meet his burden to prove that but, for counsel's failure to object to questions regarding gang affiliation, a reasonable likelihood exists that the outcome of the proceeding would have been different. Given the eyewitness testimony presented at trial and the serious irregularities in Respondent's testimony, no such probability exists.

The first problem for Respondent was that every other eyewitness that testified directly refuted or otherwise contradicted his version of events. No other witness testified that they saw

either of the victims with a weapon. Donald Stone and Kevin Campbell both testified that no one else had or was reaching for a gun when Respondent started shooting. App. p. 155; p. 196. Instead, they each said that following a verbal altercation between Crystal and Vincent, Respondent and Crystal both got into their car to leave. App. p. 153; p. 191. Prior to pulling out of the driveway, however, they saw Crystal run over to Respondent's side and attempt to hold him back. App. p. 153; p. 194. They said Respondent pushed Crystal out of the way and started shooting. App. p. 153; p. 196. Crystal, Respondent's girlfriend at the time and a witness for the defense, testified that she never saw either of the victims with weapons and elaborated – to Respondent's detriment – that she never felt like her life was in danger from the victims. App. p. 380-85.

Additionally, Respondent's version of events, even standing alone, suffered from serious discrepancies and irregularities that he was unable to adequately explain when subjected to cross-examination. Respondent's self-defense claim depended entirely on Vincent reaching for and pulling out a gun from his car. There is no evidence in the record – other than Respondent's testimony – that Vincent was ever armed. Further, there is unrefuted evidence that Respondent fled in an attempt to evade capture immediately following the shooting. See State v. Thompson, 278 S.C. 1, 10, 292 S.E.2d 581, 587 (1982) (overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)) (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension). Much of that evidence indicates that Respondent knew what he had done was wrong, and that he would be faced with arrest and prosecution. Kevin testified that he heard Respondent tell Crystal "let's go, let's go" before taking off. App. p. 202. By his own admission, Respondent threw the weapon he used out of the

window on the way back to his home in Belton. App. p. 440. It was never recovered. App. p. 527. Upon returning home with Crystal, Respondent cut her ankle monitor off because he thought it had a GPS tracking device on it. App. p. 395. They were then apprehended en route to a lake, where they planned on disposing of the ankle monitor. App. p. 459. Respondent was unable to satisfactorily explain *any* of these post-shooting actions, testifying that he wanted to get away, and disposed of the gun so that his grandfather – its owner – would not get in trouble. App. p. 460.

The difficulty for Respondent in trying to press his case was not the references to his former gang affiliation; rather, the factual assault on his version of events by **every other eyewitness to the shooting**, in addition to the irregularities within his own testimony, made his self-defense claim completely unviable. As a result, there is no reasonable possibility that the outcome of the proceeding would have been different but for counsel's failure to object earlier to the solicitor's gang references.[5] Certiorari should therefore be granted, and the PCR Court's ruling should be reversed.

[5] While the PCR Court acknowledged the evidence against Respondent, its reasoning appears to be that the gang affiliation evidence so tainted the jury that he was relieved of his obligation to show actual prejudice. App. p. 707. Petitioner submits this was an error, as discussed more thoroughly above.

CONCLUSION

For the reasons stated above, this Court should grant the Petition for Writ of Certiorari and reverse the lower court's ruling.

Respectfully submitted,

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January 17, 2017

STATE OF SOUTH CAROLINA
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The Honorable George C. James

Appellate Case No. 2016-001885

Robert M. Jones, ...Respondent,

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CERTIFICATE OF SERVICE

I, Patrick Schmeckpeper, certify that I have today served the within Petition for Writ of Certiorari upon Respondent by depositing a copy of same in the United States Mail, postage prepaid, addressed to his attorney of record:

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

I further certify that all parties required by Rule to be served have been served. This 17th day of January, 2017.

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