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 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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the PCR Court properly applied the *Strickland v. Washington* standard in finding that counsel was ineffective for failing to timely object to the admission of Respondent's alleged prior gang affiliation or whether there is any evidence of probative value to support its findings.

A. Whether the PCR Court's conclusion that counsel was deficient and not acting pursuant to a valid trial strategy is supported by any evidence of probative value rather than hindsight.

B. Whether the PCR Court properly applied the *Strickland v. Washington* standard to find that Respondent was prejudiced by counsel's deficient performance.

STATEMENT OF CASE

For the purposes of this Return, Respondent adopts Petitioner's Statement of the Case contained in the Petition for Writ of Certiorari.

STATEMENT OF FACTS

The shooting at issue at trial in this case occurred on March 25, 2009 in Greenville County. App. p. 718. Respondent, Robert M. Jones, was 17 years old at the time. App. p. 414: 22-25. Respondent's girlfriend, Crystal Stone, was present on the day of the shooting. App. p. 346: 13-20. Respondent and Crystal started dating in 2007, App. p. 337: 16-20, and have one child together. App. p. 419: 12-21. Crystal and her children were living with Respondent in Belton at the time of the shooing. App p. 340: 9-14. Vincent Campbell is the victim of the shooting and was the father of Crystal's daughters, Alexia and Vianna. App. p. 176: 4-10. Crystal moved in with Respondent to get away from Vincent's physical abuse. App. p. 426: 6-8. Crystal and Vincent split up not too long after the birth of their daughter, Vianna. App p. 334: 18-22. The couple ended their relationship because Vincent was violent. App. p. 335: 2-5. Crystal testified that Vincent hit her during the relationship and had been charged with criminal domestic violence (CDV) twice. App. p. 338: 11-22. Crystal also testified that Vincent was under a restraining order while he was on bond for the CDV charges. App. p. 33:8 22-25; 339:1-13.

Respondent was aware of the abuse Vincent previously inflicted on Crystal at the time of the shooting. App. p. 426: 2-12. Respondent testified that he had even seen injuries inflicted by Vincent on Crystal. App. p. 426: 3-5. Crystal testified that Respondent had seen her with a black eye. App. p 391: 18; 392: 9. Crystal had also told Respondent that Vincent would beat her and threaten her with weapons and had put a gun to her head in front of Alexia during their relationship. App. p. 364: 3-24; 365: 1-19. Respondent testified that Vincent did not like Crystal or his daughter living with

Respondent in Belton and would even make Crystal leave Respondent's home. App. p. 422: 19-25.

Not long before the shooting, Respondent overheard a phone conversation between Crystal and Vincent. App. p. 428: 3-16. Crystal testified that she had asked Vincent to buy diapers for their baby and that Vincent refused. App. p. 341:19-25; 342:1-8. Respondent testified that during this conversation, he told Crystal to hang up and not to worry about it. App. p. 428: 16-21. Respondent testified that Vincent must have overheard him because Vincent responded by saying that Respondent should mind his business and that he would beat him. App. p. 428: 21-25.

On the day of the shooting, Respondent and Crystal drove to her great aunt, Sharon Hamby's house in Greenville to drop off Vianna, and pick up Alexia. App. p. 345: 21-25; 346: 1-12. Shortly after Respondent and Crystal arrived at Ms. Hamby's house, Vincent and his brother, Kevin Campbell, arrived at the house. App. p. 348 6-7. Inside the house, Vincent argued with Crystal about taking Alexia for the day, as Crystal testified: "Well when we got in the house Vincent was saying something about I couldn't take Alexia with me." App..p. 349: 7-10. Crystal and Ms. Hamby also argued about visitation and the swapping of the children. App. p. 349: 11-15. Kevin testified that Respondent eventually asked Vincent: "Why can't she get her kids, she's got custody of them too." App. p.188: 12-13; 177: 24-25. Kevin and Crystal testified that Vincent told Respondent to "mind his business and play his part" in response. App. p. 188: 15-16; 212: 2.

Kevin testified that Ms. Hamby asked everyone to leave after the argument inside the house. App. p. 189: 3-21. Crystal testified that Vincent and Kevin followed she and

Respondent onto the house's screened-in back porch. App. p. 350: 9-22. Crystal also testified that Vincent blocked Respondent from the door that let out of the back porch. App. p. 350: 18-22. Respondent testified that Vincent and Kevin confronted him on the back porch about the earlier telephone argument Respondent heard between Vincent and Crystal. App. p. 433: 17. During this time, Crystal was still arguing with Ms. Hamby. App. p. 189: 15-16.

Crystal testified that she and Respondent decided to leave shortly after and as both pairs got to their respective vehicles, Vincent opened his driver side door, took off his shirt, and threw it on the ground "acting like he was ready to fight." App. p. 352: 13-25; 380: 3-12. According to Kevin, Crystal put Vianna in the car and stated that she was going to get her baby, referring to Alexia. App. p. 192: 23-25; 193: 1-7. Kevin testified that Vincent then told Crystal she was not taking his baby back to Belton. App. p. 193: 1-2. Kevin testified that the environment was heated. App. p. 193: 22-23. Crystal testified that Vianna was present during this time. App. p. 352: 20-21. Crystal testified that Respondent and she were at their car to leave "[b]ut Vincent and Kevin--Vincent had started at Robert." App. 352: 23-25; 353:1-2. Crystal testified that she then saw Vincent reach down into the driver side of his car but was unable to see what he was reaching for. App. p. 353: 3-7. Crystal confirmed that Vincent was coming at Respondent in a threatening way with his hand in his pocket after he had just reached down into his vehicle. App. p. 353: 11-12. Respondent testified that when Vincent had went to his car, he said something about getting a gun. App. p. 434: 12-16. Respondent testified that Vincent reached under the seat of his car, pulled out a gun and walked over to Crystal, who was pregnant at the time with Respondent's child. App. p. 434: 21-25; 354: 2-3.

According to Crystal, she was between Vincent and Respondent to prevent them from fighting when shots were fired. App. p. 354: 1-15. Respondent testified that as Vincent moved closer to him, he was scared for his and Crystal's life and shot first. App. p. 434: 25; 435: 5; 442: 1-6. Vincent was also larger than Respondent, Vincent stood at five feet ten inches tall and weighed 260 pounds. App. p. 130: 24-25. Respondent testified that he shot at Kevin as well because he saw Kevin reach into the passenger side of the car, and thought he had gotten a weapon. App. 435: 19-22. Respondent testified that he was not aware he had actually injured anyone until after his arrest. App. 439: 8-12.

Respondent testified that on the day of the shooting, he initially did not bring a gun to Greenville, but decided to arm himself with his grandfather's pistol because of Vincent's previous threats about beating him up and "gun play". App. p. 429: 11-25; 430: 1-7. Crystal had also shown Respondent a video Vincent posted on Myspace of Vincent brandishing a pistol in front of the camera. App. p. 320: 2-25; 321: 1-14.

The police were unable to locate any guns. Respondent and Crystal disposed of the gun used and were arrested in Belton. App. p. 439: 8-12; App. 440: 3-5.

STANDARD OF REVIEW

Upon review, the PCR judge's findings of fact are given great deference and the Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). Questions of law are reviewed de novo. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Further, the PCR court's findings on matters of credibility are given great deference by this Court. *Simuel v. State,* 390 S.C. 267, 270, 701 S.E.2d 738, 739 (2010).

ARGUMENT

I. The PCR Court properly applied the *Strickland v. Washington* standard and there is sufficient evidence of probative value to support its conclusion that counsel was ineffective for failing to timely object to the admission of Respondent's alleged prior gang affiliation.

The PCR Court properly granted relief and properly applied the *Strickland v. Washington* standard. A criminal defendant has the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. U.S. Const. amend. VI. Relief is warranted for violation of this right when counsel's performance was deficient and the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1985). Counsel is deficient when his performance falls below an objective standard of reasonableness according to prevailing professional norms. *Id.* at 688, 104 S.Ct. at 2065; *see also Rutland v. State*, 415 S.C. 570, 577, 785 S.E.2d 350, 353 (2016) ("Regarding the deficiency prong, the proper measure of counsel's performance is whether he has provided representation within the range of competence required by attorneys in criminal cases.") (quoting *McHam v. State*, 404 S.C. 465, 474, 746 S.E.2d 41, 46 (2013)). The prejudice prong is satisfied when there is a reasonable probability that but for counsel's errors, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *see also Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) ("A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.") (citing *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068). However, "[w]hen counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel. *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). The validity of counsel's strategy is viewed under an 'objective

standard of reasonableness.'" *Lounds v. State,* 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008).

For the reasons discussed herein, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's order granting relief.

A. The PCR Court's finding that counsel was deficient and not acting pursuant to a valid trial strategy is supported by sufficient evidence of probative value and was not founded on hindsight.

i.) Deficiency Finding

The PCR Court did not rely on hindsight in finding that counsel was deficient, and there is sufficient evidence of probative value to support its finding. *Cherry* 300 S.C. at 119, 386 S.E.2d at 626 (recognizing that the PCR Court's findings will be affirmed if *any* evidence of probative value in the record exists to support them) (emphasis added).

The failure to object to the solicitor's line of questioning about Respondent's previous gang affiliation was unreasonable in light of prevailing norms. *See Id.* at 117, 386 S.E.2d at 625 ("'The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.'") In *Strickland,* the Supreme Court warned against hindsight when assessing counsel's performance, "[j]udicial scrutiny of counsel's performance must be highly deferential....it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." 466 U.S. at 689, 104 S.Ct. at 2065. Instead, courts are to "reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* There is sufficient

evidence of probative value to support the PCR Court's conclusion that counsel's errors were unreasonable *at the time he made them.*

At the PCR hearing, counsel testified that at the time, he anticipated that the solicitor would try to admit evidence of Respondent's alleged gang affiliation and cross-examine him on the subject:

> Q: Okay. And -- prior to trial, did the -- did this gang information come up?
> A: Yeah, when they searched -- when they searched the -- defendant's house, I think it was under the mattress they found some -- some red bandannas. They found some -- in the storage room there, they found some gang graffiti I think.
> . . .
> Q. All right. Did -- did you know they were going to try to put in evidence of it?
> A. Well, you know, I knew he was going to take the stand.

App. p. 659: 13-21, 24-55; 660: 1-2. At the PCR hearing, counsel also admitted that he put Respondent on the stand knowing that it was *absolutely* a possibility that the gang testimony would come out on cross-examination. App. p. 665: 12-15 (emphasis added). Counsel also explained that he believed at the time that the solicitor would only ask a few questions about it and that Respondent would say he was once a gang member but no longer was. App. p. 663: 5-9. Counsel indicated that he believed that that would be the end of it, App. p. 663: 5-9, and also testified that he thought the solicitor was going to "just mention it" and counsel would "just kind of let it die." App. p. 663: 5-9; 665: 1-2, 5.

Hence, the conclusion that counsel was deficient was not based on what hindsight now shows to be counsel's mistaken belief about how far the solicitor would take this questioning. Instead, the unreasonableness in counsel's failure to object is evident in how much of this testimony counsel let in before he did object. Counsel did not object until

after the solicitor had already: (1) elicited from Respondent that he had gang-related graffiti at his home; (2) elicited from Respondent that his tattoo was indeed gang-related; (3) elicited from Respondent that he had friends that were gang members; (4) asked Respondent several times whether he was currently a gang member; (5) elicited from Respondent that he was no longer a gang member; (6) questioned Respondent several times about his departure from the gang, particularly asking "Well aren't gangs for life?"; (7) and asked other particulars about his previous gang affiliation. App. p. 466: 1-23; 467: 17-25; 468: 125; 469: 1-25; 472: 22-25; 473: 1-25. Thus, it became clear at the time that the solicitor was going to cross-examine Respondent much more heavily on his gang affiliation than just a few questions. Yet, regardless of how many questions counsel anticipated the solicitor to ask, counsel watched it go farther without objecting even though he stated gang affiliation had nothing to do with the case at trial and at the PCR hearing. App. p. 474: 7-11; 659: 22-23; 660: 13-14; 666: 20-21.

Moreover, South Carolina courts have repeatedly held that the failure to object constitutes deficient performance when the evidence is inadmissible under the South Carolina Rules of Evidence. *See Smalls v. State*, 415 S.C. 490, 498, 783 S.E.2d 817, 820 (Ct. App. 2016) (holding trial counsel deficient for failing to object to testimony regarding a previous, unrelated burglary applicant was alleged to commit); *Gilchrist v. State,* 350 S.C. 221, 227-228, 565 S.E.2d 281, 285 (2002) (finding counsel deficient for failing to object to State's opening statement that improperly vouched for a witness's credibility); *Sanchez v. State*, 351 S.C. 270, 275, 569 S.E. 363, 366 (2002) ("Since mother's and father's testimony was inadmissible hearsay, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness.");

Dawkins v. State, 346 S.C. 151, 156, 551 S.E.2d 260, 263 (2001) ("Since the testimony was inadmissible hearsay, counsel's failure to object to the introduction of that evidence fell below an objective standard of reasonableness."); *German v. State*, 325 S.C. 25, 26-27, 478 S.E.2d 687, 688 (1996) (finding counsel deficient for failure to object to references regarding the tips police received that applicant was a crack cocaine dealer); *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) ("Counsel's failure to object to the introduction of this character evidence constituted ineffectiveness.").

Here, the record demonstrates, as the PCR Court found, that counsel elicited no testimony from Respondent regarding his past or current gang affiliation during direct examination. App. p. 702: 2. Thus, counsel did not open the door to allow the State to admit photographs of red bandanas, bullets, and graffiti or allow the State to extensively cross-examine Respondent on those items and his previous gang affiliation. App. p. 702: 2; 448: 15-21; 449: 1-6; 466-473. Moreover, the PCR judge found that the shooting of the victim was unrelated to gang activity. App. p. 702: 1. This finding is supported by counsel's delayed objection when he argued that the shooting had nothing to do with gang affiliation. App. p. 474: 7-11. Counsel also repeatedly testified at the PCR hearing that the case had nothing to do with gang affiliation or activity. App. p. 659: 22-23; 660: 13-14; 666: 20-21.[1] Hence, the testimony failed to establish or make any fact at Respondent's trial more or less probable, and is thus irrelevant and inadmissible. *See* Rule 401, SCRE (""Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more

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1 Petitioner stipulated to this at the PCR hearing. App. p. 657: 11-14; 668: 24-25; 669: 1.

probable or less probable than it would be without the evidence"); Rule 402, SCRE ("Evidence which is not relevant is not admissible.")

Thus, counsel's failure to object constituted deficient performance; the PCR Court did not improperly rely on hindsight in making this finding because it is clear from the record and counsel's objection at trial that the gang affiliation testimony was irrelevant.

As the PCR Court recognized, counsel's failure to object to the gang testimony was deficient not just because the evidence was irrelevant, but also because its admission violated Rule 403 of the South Carolina Rules of Evidence. Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."). Additionally, as the PCR Court recognized, it is axiomatic that gang affiliation carries negative connotations. App. p. 705-706 (citing *Dawson v. Delaware*, 503 U.S. 159, 166, 112 S.Ct. 1093, 1098 (1992)). In a trial setting where the crime charged is an act of violence, this evidence is morally reprehensible the jury. *See Daw*son, 503 U.S. at 167 ("[T]he present record one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible."). Counsel's failure to recognize the prejudicial nature of the gang testimony fell below the objective standard of reasonableness. *See Gallman v. State, 307 S.C. 273, 277, 414 S.E.2d 780, 782 (1992)* ("[W]e hold that trial counsel's failure to discern the prejudicial effect of the judge's comments and interpose the appropriate objections downgrades his representation to a level below an objective standard of reasonableness.").

ii. Invalid Trial Strategy

The PCR Court's finding that counsel's errors cannot be excused as a tactical strategic decision was not based in hindsight and is supported by sufficient evidence of probative value.

Because the gang related testimony was irrelevant, counsel's failure to object cannot be justified as a valid trial strategy. *Holman v. State* is instructive here. 381 S.C. 491, 674 S.E.2d 171 (2009). In *Holman*, the PCR applicant was charged with multiple offenses arising from a shooting and was alleged to be the shooter. *Id.* at 492, 674 S.E.2d at 172. At trial, the State admitted into evidence a handgun seized from the applicant's home; this pistol was not connected in any way to the shooting incident at issue. *Id.* This Court held that trial counsel's failure to object to this irrelevant and clearly inadmissible evidence was deficient and explained, "We are troubled by the State's effort to admit the unrelated firearm in evidence. More troubling is Petitioner's trial counsel's failure to object to the admission of the unrelated pistol." *Id.* at 493. Moreover, because the evidence was "clearly inadmissible", this Court "reject[ed] the suggestion that the failure to object to the unrelated pistol can be justified as a valid trial strategy." *Id.* Thus, pursuant to *Holman,* Petitioner's argument that counsel's failure to object was a strategic tactic fails on the lack of relevance of the gang testimony.

Regardless, at the PCR hearing, counsel did not testify that his failure to object was pursuant to any strategy. Counsel did testify vaguely about his decision-making at the time, "I mean, I figured that, you know, just mention it and let it go on and no use to be raising cane in front of a jury and -- really pounce -- on the gang stuff." App. p. 665: 1-4. However, this testimony cannot constitute as counsel's articulation of a valid

strategy unless it is heavily misconstrued. The standard to preclude a finding of ineffectiveness based on counsel's articulation of a valid strategy is much higher than misconstruing vague testimony. In *Gilchrist v. State*, the PCR applicant claimed that counsel was ineffective for failing to object to the solicitor's comments that vouched for a witness's credibility during opening statements. 350 S.C. 221, 225-26, 565 S.E.2d 281, 284 (2002). At the PCR hearing, counsel testified that he "'thought very seriously about making a mistrial motion and objection to all of that at the time. However, based upon the strategy of the case, [he] decided not to.'" *Id.* at 226. Counsel did not elaborate on what his particular "strategy of the case" was. *Id.* This Court held that this testimony was not counsel articulating a strategy; instead, "counsel never **articulated** any strategy at all." *Id.* at 228, 565 S.E.2d at 284 n. 2 ("[a] blanket statement by counsel [] that he employed a "strategy" does not automatically insulate the lawyer from being found ineffective.") (emphasis in original). Therefore, counsel's vague testimony at the PCR hearing is insufficient to insulate him from being deemed ineffective.

Even if this was counsel's strategy, it does not preclude a finding of ineffectiveness. To preclude a finding of ineffectiveness, the reasons given for employing a certain strategy must be *valid. Brown v. State*, 375 S.C. 464, 481, 652 S.E.2d 765 (2007) (emphasis added) ("[W]here counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.") (citations omitted). Further, counsel's strategy will be evaluated under "an objective standard of reasonableness." *Id.* (quoting *Ingle v. State,* 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002)). *See also Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066 ("[C]ounsel is

strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of *reasonable* professional judgment.") (emphasis added). This Court has held that reasons—similar to counsel's testimony here—are not valid reasons for employing a certain strategy. *See Stone v. State*, —S.E.2d—, 2017 WL 511077 at *4 (2017) (holding that counsel's reason that "'he didn't want to be perceived by the jury as—as jumping up and objecting to everything like [he] was trying to hide something'" was not a sound strategic reason for failing to object to improper testimony); *Dawkins v. State,* 346 S.C. 151, 157, 551 S.E.2d 260, 263 (2001) ("Counsel's failure to object to prejudicial hearsay because he did not want to 'confuse or upset the jury' was not valid strategy"); *Gallman v. State,* 307 S.C. 273, 276-77, 414 S.E.2d 780, 782 (1992) (holding that trial counsel's failure to object because he did not want to "give the jury the idea that something was being hidden" was not a valid strategy and it an error of law for the PCR Court to find that it was).

Petitioner argues that counsel allowed admission of the gang testimony because "he thought it was 'admirable' that Respondent was able to get out of a gang" fails as a valid strategy. Petitioner is mistakenly interpreting counsel's "admirable" comment in isolation from the rest of counsel's testimony. Counsel repeatedly asserted that the gang information was irrelevant to the case. App. p. 659: 22-23; 660: 13-14; 666: 20-21. Thus however admirable counsel thought Respondent's withdrawal was, counsel did not testify that this admirable ability to withdraw from a gang was his strategic reason for not objecting. Even if counsel had so testified, under the precedent cited above and *Holman*, it would not be deemed a valid strategy that would preclude a finding of ineffectiveness.

Still, Petitioner asserts that counsel's decision not to object was a valid strategy that counsel decided to employ after weighing the advantages and disadvantages of the testimony, including the possibility that the jury would disbelieve that Respondent actually withdrew from gang membership. App. p. 694: 10-11. Petitioner seems to argue that counsel decided that Respondent's admirable ability to get out of a gang was the advantage in allowing the testimony, and that this advantage outweighed the disadvantages. However, counsel's testimony does not demonstrate that he balanced such advantages and disadvantages against one another. At the PCR hearing, counsel also never indicated that he considered the possibility that the jury would disbelieve Respondent was no longer in a gang. There is simply insufficient evidence in counsel's testimony that this was his strategy.

Thus, the PCR Court did not improperly rely on hindsight when concluding that counsel was not acting pursuant to a valid strategy.

B. The PCR Court properly applied the *Strickland v. Washington* standard to find that Respondent was prejudiced by counsel's deficient performance.

The PCR Court properly concluded that Respondent met the burden to show that he was prejudiced by counsel's deficient performance. *See Strickland,* 466 U.S. at 687, 104 S.Ct. at 2052. *See also Dawkins*, 346 S.C. at 156, 551 S.E.2d at 262 ("To show prejudice, the applicant must show, but for counsel's errors, there is a reasonable probability the result of the trial would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.") (citations omitted).

Petitioner asserts that the PCR Court failed to apply or misapplied the *Strickland* standard in ordering relief for several reasons. Petitioner first asserts that the PCR Court confused the *Strickland* prejudice standard with the "unfair prejudice" standard contained in Rule 403 of the South Carolina Rules of Evidence. Petitioner specifically argues that the PCR Court reasoned that because the testimony would have been excluded under Rule 403, it was automatically prejudicial under the *Strickland* standard. Petitioner too narrowly interprets the PCR Court's phrasing and misconstrues its findings.

The PCR Court concluded that counsel's deficient performance prejudiced Respondent by properly applying the *Strickland* standard. The PCR Court's references to the evidence's unfair prejudice and its finding that the trial judge would have been compelled to sustain a 403 objection merely support the conclusion that counsel was deficient: "Therefore, because trial counsel's failure to timely object during cross-examination of the Applicant at trial directly led to improper admission of irrelevant and unfairly prejudicial evidence against the Applicant, the Court concludes that trial counsel's performance was deficient." App. p. 706-07. After all, if the evidence had been relevant and its probative value was not substantially outweighed by unfair prejudice, counsel would not be deficient for failing to object. Moreover, the PCR Court did not supplant the *Strickland* standard with the 403 standard; instead, the PCR Court found that had counsel prevented the admission of the unfairly prejudicial evidence by timely objecting, the result of the trial would have been different: "Counsel was deficient in failing to object to irrelevant and unfairly prejudicial testimony, and there is a reasonable probability that the outcome of the trial would have been different had the proper objections been made." App. p. 707-08.

Petitioner further argues that the PCR Court failed to take into account the *effect* the evidence had on the outcome of the proceeding and instead focused on whether or not counsel *could have* prevented the evidence from coming in. In so arguing, Petitioner disregards the support for the PCR Court's prejudice finding:

> [T]he 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.

App. p. 702:21. The PCR Court also explained how the gang evidence likely led the jury to decide the case on irrelevant and prejudicial gang evidence rather than the relevant issues before it. App. p. 702: 22. Petitioner seems to take issue with the "likely led" phrasing in the PCR Court's conclusions as well. Petitioner is again misconstruing the phrasing in the PCR Court's order. It is merely elaboration of the effect the prejudicial evidence had on the jury, hence the effect on the outcome of trial.

Therefore, the PCR Court did not make an error of law and properly applied the *Strickland* standard to conclude that counsel's deficient performance prejudiced Respondent.

Moreover, there is sufficient evidence of probative value to support the PCR Court's prejudice finding. *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (recognizing that upon review, the Court will affirm the PCR Court's findings if *any* evidence of probative value in the record exists to support them) (emphasis added).

Here, it was not just the admission of irrelevant, alleged gang-related evidence and testimony on cross-examination that prejudiced Respondent. Counsel's failure to object allowed the State to call witnesses that reinforced the notion to the jury that Respondent was still a gang member, as well as reinforced the morally reprehensible connotations inherent in such testimony. Had counsel timely objected to the gang testimony on cross-examination, the State would not have been permitted to call Jennifer Abbot in rebuttal to convey to the jury that Respondent was lying about his gang withdrawal. Ms. Abbott testified that Respondent told her he was a member of the Bloods gang and that Respondent would shoot the victim if he hurt Crystal. App. p. 520: 21-25; 521: 1-10.

Further, had counsel timely objected, the State would not have been allowed to call Brandon Brown, an expert on gang affiliation to further damage Respondent's credibility and exacerbate the prejudice to Respondent and his self-defense claim. Mr. Brown testified that in order to become a gang member—hence explain how Respondent must have become a gang member—one must be beaten, commit a criminal act, have a reputation for being a "tough guy" or large scale drug dealer, or have a reputation as "a trigger man"—"somebody that will use a gun quickly." App. p. 537: 2-25. Further, even if the jury had believed that Respondent truly left the gang, Mr. Brown testified that someone cannot really leave a gang, but can stop "representing" the gang by "putting enough work in" or by committing a criminal act. App. p. 538: 1-13. Mr. Brown's testimony regarding gang colors and clothing, App. p. 538: 16-23, which happened to match the red bandanas found under Respondent's mattress, further reinforced to the jury the negative connotations inherent in gang

evidence. What's more, the last piece of testimony the jury heard was Mr. Brown's testimony that "you're never going to become a gang member than quit being a gang member but still live the gang lifestyle. It simply doesn't exist." App. p. 539: 19-22.

In arguing that Respondent failed to meet his burden, Petitioner disregards how the prejudice from the gang testimony snowballed with each witness. Petitioner also disregards, as the PCR Court concluded, how this prejudiced Respondent's self-defense claim. The jury was charged on the elements of self-defense, a defense that relies on the jury believing that Respondent did not initiate the violence: "The Defendant must be without fault in bringing on the difficulty. If the Defendant's conduct was the type which was reasonably calculated to and did provoke a deadly assault, the Defendant would be at fault in bringing on the difficulty and would not be entitled to an acquittal." App. p. 596: 19-25. Ms. Abbott's testimony that Respondent was a Bloods member and would shoot the victim and Mr. Brown's "trigger man" testimony prejudiced Respondent regarding this element of self-defense. Further, the rebuttal witnesses' testimony that Respondent was still and would essentially always be a gang member portrayed Respondent as a liar. The resulting prejudice to Respondent's credibility hindered the jury from believing his testimony that at the time of the shooting, Respondent believed he was in imminent danger.

Petitioner argues that despite the gang testimony and rebuttal witnesses, Respondent's self-defense claim was doomed to fail. Petitioner specifically points to Crystal's testimony that she was not afraid for her life before the shooting and that eyewitnesses did not see the victim with a gun. Contrary to Petitioner's assertions, the PCR Court properly concluded that notwithstanding the inconsistencies in the

testimony and evidence of flight, the gang testimony prejudiced Respondent. App. p. 707. First, as the trial judge charged the jury, an actual danger does not need to exist in order to obtain an acquittal on self-defense: "[t]he second element is that the Defendant was actually in danger of death or serious bodily injury. Or that the Defendant *believed* that he was in imminent danger of death or bodily injury." App. 597: 1-5 (emphasis added). Thus, Crystal's lack of fear or any other witnesses' perspective on whether the victim actually had a pistol does not defeat Respondent's self-defense claim.

Therefore, the PCR Court properly concluded that Respondent met the burden to prove that counsel's deficient performance prejudiced him.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling.

Respectfully submitted,

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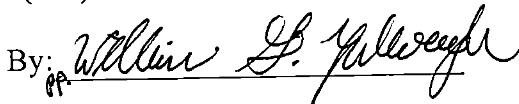
By: 

ATTORNEY FOR RESPONDENT

February 16, 2017

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
FEB 16 2017
S.C. 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.

CERTIFICATE OF SERVICE

I, William G. Yarborough, certify that I have today served the within Return to Petition for Writ of Certiorari upon Petitioner by hand-delivering a copy of same to attorney for Petitioner:

Patrick Schmeckpeper, Assistant Attorney General
Office of Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, S.C. 29201

I further certify that all parties required by Rule to be served have been served. This 16th day of February, 2017.

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