STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO BERKELEY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman Jr., Circuit Court Judge

Appellate Case No. 2016-001228

Clarence Fishburne, ... Petitioner,

v.

State of South Carolina, ...Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the PCR judge correctly find that Petitioner failed to prove that Counsel was ineffective for not objecting to the interpreter where the interpreter was qualified under S.C. Code Ann. § 17-1-50, and the evidence against Petitioner was overwhelming?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Berkeley County Grand Jury in October 2010 for two counts of armed robbery, two counts of kidnapping, and one count of first-degree burglary. In November 2011, the Berkeley County Grand Jury re-indicted him for the same offenses. Chad Shelton, Esquire, and David Schwacke, Esquire, represented Petitioner. Petitioner proceeded to trial November 7-11, 2011, before the Honorable Kristi Lea Harrington and a jury. At the conclusion of trial, the jury convicted Petitioner and his co-defendant, Monray Thompson, as indicted. Judge Harrington sentenced Petitioner to concurrent terms of imprisonment for twenty years each conviction.

Petitioner filed a timely notice of appeal and an appeal was perfected. In an unpublished opinion, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Fishburne, Op. No. 2014-UP-133 (Ct. App. filed April 2, 2014). The case was remitted to the circuit court on April 18, 2014.

On April 14, 2014, Petitioner filed an application for post-conviction relief (PCR). Respondent made its return April 20, 2015. An evidentiary hearing was held on September 9, 2015 before the Honorable Larry B. Hyman, Jr. Judge Hyman issued an order taking the matter under advisement and directing both parties to submit proposed orders. Thereafter, Judge Hyman denied and dismissed Petitioner's application by written order signed April 19, 2016, and filed May 3, 2016.

Facts

Adam Marcus Olivera testified he lived in an apartment with Paulo Silva, and sometime around 10:00PM, he and Paulo were outside on the porch. (App. p. 287). A short time later, three men walked up, one armed with a gun, started asking Olivera and Paulo for money and then began choking them. (App. p. 287-88). The men forced them into the home. (App. p. 288). Once inside, Paulo saw his wife, Paulino Silva, and told her in Portuguese to get help. (App. p. 288). She ran to the apartment of her neighbor, Lucineia Rodriguez, and knocked on the door until Rodriguez answered. (App. pp. 503-504; p. 512). Paulino told Rodriguez what had happened, and Rodriguez immediately went next door to the Silvas' apartment to rescue Carrie, Paulino's daughter. (App. p. 512). Once there, Rodriguez encountered a man with a gun, and he told her to come inside. (App. p. 512). She then entered the apartment, headed upstairs, saw a man holding Olivera and Paulo in one of the bedrooms, and went into the other bedroom to retrieve the Silvas' daughter. (App. pp. 512-513). The men had forced Paulo and Olivera upstairs to look for Paulino and made them get onto their knees. (App. pp. 289). One of the men pistol-whipped Paulo. (App. p. 289). The man with the gun threatened to kill Paulo when he would not tell him where his wife was and began counting down. (App. p. 289). While he was counting, Rodriguez arrived and upon seeing her, the robbers became panicked and rapidly fled. (App. pp. 259-260; pp. 442-443; p. 513).

Paulo testified the men took a computer, telephone, Olivera's phones, a computer pal unit, and a flash drive. (App. p. 290). The men also took approximately $600 in cash. (App. pp. 259-260; p. 282; p. 286). Paulo identified the suspects in a show-up very shortly after the incident. (App. p. 293). Paulo also testified they found a telephone in the home after the assailants left that did not belong to the victims. (App. p. 294-95).

Afterwards, Paulo and Olivera went outside and met up with some of their neighbors. (App. p. 260; p. 443). Paulo then briefly looked around for the robbers, went to the apartment manager's home, was unable to locate the apartment manager, encountered a Brazilian man, and spoke with him about the robbery. (App. pp. 260-261). While speaking with the Brazilian man, he saw two people walking down the road in clothing different from what the robbers were wearing and told the Brazilian man that he thought they were the robbers. (App. pp. 261-262).

At approximately 11:35PM, someone from the apartment complex called 911 and reported that two black males wearing red-and-white-striped shirts committed a robbery at gunpoint.[1] (App. p. 173; p. 443). Deputy Jason Charlton of the Berkeley County Sheriff's Office was dispatched and arrived four minutes later. (App. pp. 173-174; pp. 301-303; p. 329). Charlton briefly spoke with people standing in the parking lot of the apartment complex, who informed him the robbers were walking along the side of a nearby road, and Deputy Charlton left to try and locate them. (App. p. 307).

Deputy Charlton observed three black males walking away from the apartment complex about one-quarter of a mile from the entrance to the complex.[2] (App. p. 175; pp. 307-308; p. 358). One of them had a laptop. (App. p. 308). Deputy Charlton stopped his vehicle and approached the group. (App. p. 309). However, upon seeing the officer, the man who was carrying the laptop, Douglas Monray Thompson, dropped the computer and looked as if he was

[1] During trial, Theresa Barnett, the operations supervisor at the Berkeley County 911 call center, indicated that there was a language barrier between the 911 operator who received the call and the caller who reported the robbery. (R. p. 173).

[2] Deputy Charlton arrived at the location of the men only seconds after leaving the apartment complex. (R. p. 312). The men were the first black males Deputy Charlton encountered, and they were the only black men in the area at the time. (R. pp. 335-336).

about to run, while Petitioner told the others not to run, and the third man fled. (App. pp. 309-310; pp. 359-360).

A few minutes later, Deputy Robert Ollic arrived and secured Petitioner and Thompson while Deputy Charlton returned to the apartment complex to speak with the victims. (R. pp. 108-110; p. 176; pp. 311-312). After briefly speaking with Paulo and Olivera, Deputy Charlton advised the men that he had detained some people and told them he wanted them to see if they could identify them. (App. p. 263; pp. 273-274; p. 293; pp. 314-315; pp. 337-338; pp. 444-445; p. 455). Without hesitation, Paulo and Olivera quickly identified them as the robbers and indicated they were certain of their identifications. (App. p. 263; pp. 294-297; pp. 315-316; p. 445).

Petitioner and Thompson were then arrested and searched incident to their arrests. (App. p. 317). The search revealed two cellphones in Petitioner's pockets, a cellphone in Thompson's pocket, and $442 in cash in Thompson's possession. (App. p. 317; p. 319; p. 322; p. 373). Deputy Charlton then asked Paulo and Olivera to identify the items, and they identified the two cellphones recovered from Petitioner's pockets as those belonging to Olivera and identified the laptop as the one taken from their home during the robbery. (App. p. 263; pp. 267-269; pp. 297-298; p. 319; pp. 321-322; pp. 445-447). The victims then provided Deputy Charlton with the cellphone that Paulino found in the apartment after the robbery, and the officer looked inside and found a picture of Petitioner stored in the phone. (App. p. 264; pp. 323-326).

At the outset of trial, Petitioner's defense counsel objected to the admission of any identification evidence, and the trial judge conducted an in camera hearing on the motion. (App. p. 19; pp. 30-31; p. 35). Deputies Charlton and Ollic testified about the details of the show-up. (App. pp. 35-125). Olivera and Paulo then testified about the circumstances of their

identifications of the robbers. (App. pp. 132- 70). After considering the arguments of counsel, the trial judge denied Petitioner's motion to suppress the identification evidence. (App. p. 215). The trial judge found the identification procedure was not unduly suggestive considering that it occurred within an hour of the incident and close to the scene and that the suspects matched the limited description that was provided and were still in possession of the victims' belongings. (App. p. 214). The trial judge further found the victims had an opportunity to view the suspects and expressed certainty in their identifications. (App. pp. 214-215).

Thereafter, during trial, Deputy Charlton and the victims testified about the robbery, the ensuing law enforcement investigation into the robbery, and the identifications of Petitioner and Thompson as two of the assailants. (App. pp. 255-269; pp. 302-326; pp. 439-448; pp. 502-505; pp. 512-513). Petitioner was convicted of all charges as indicted. He stated in sentencing "I'm truly sorry for what happened to these people. . . . I ask God to forgive me for whatever happened[.]" (App. p. 672, lines 21-25).

STANDARD OF REVIEW

This Court must affirm the post-conviction relief ("PCR") court's factual findings if there is any evidence of probative value in the record to support them. Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005) (citing Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This Court should reverse the PCR court only where there is no probative evidence to support the decision or the decision was controlled by an error of law. Kolle v. State, 386 S.C. 578, 589, 690 S.E.2d 73, 79 (2010). Furthermore, this Court "gives great deference to the [PCR] court's findings of fact and conclusions of law." Id. (quoting Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)).

ARGUMENT

Petitioner failed to prove that Counsel was ineffective for not objecting to the interpreter where the interpreter was qualified under S.C. Code Ann. § 17-1-50, and the evidence against Petitioner was overwhelming.

Petitioner argues the PCR judge erred in finding Counsel had no reason to object to the interpreter and that Petitioner was not prejudiced by Counsel's failure to object. The record fully supports the PCR judge's finding that Petitioner failed to establish deficiency or prejudice.

Petitioner had 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 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 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). First, the applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. 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." Cherry, 300 S.C. at 117-18, 386

S.E.2d at 625. A reasonable probability is a probability to sufficient to undermine the confidence in the outcome of trial. Id.

Chad Shelton ("Counsel") noted pretrial that he would have an objection to the interpreter, Theodore Wright, but the State substituted a different interpreter—John Rock—for Wright, and Counsel indicated he had no objection. (App. p. 64). Counsel stated "I have talked with [the interpreter] and Ms. Cornwell has given me his information. I have no objection. . . . He is unbiased" (App. p. 66, lines 1-5). The interpreter was sworn, (App. p. 158; 284), and he interpreted for Paulo Enrique Silva (App. pp. 284-329); Adao Marquez Olivera (App. pp. 468-95); Paulino Silva (App. pp. 531-40); and Lucineia Rodriguez. (App. pp. 540-45). During trial, the jury was excused for several minutes while the trial judge ensured that the interpreter was repeating the questions and testimony word-for-word. (App. p. 306). No specific questions or responses were referred to, but the trial judge told the interpreter his purpose was to simply "be the converter of language." (App. p. 307). In the PCR hearing, no evidence was presented to show that any of the interpreter's interpretations were inaccurate. Petitioner stated at the PCR hearing that he did not know exactly what the interpreter said to the victims at trial because he did not know Portuguese. (App. p. 715). He stated that he had "to trust that he translated exactly what the victims were testifying to." (App. p. 715).

Counsel acknowledged at the PCR hearing that "[t]here were a couple of times that it seemed like the interpreter was not repeating exactly what the person had said or would ask a question, the person would not respond, and the other witness wouldn't respond and the interpreter would say the question again. So we had some sidebars talking about that." (App. p. 718, lines 11-17). Counsel further agreed that he could not "affirmatively say that [the interpreter] was saying anything other than what he was saying in Portuguese," "but it did seem

like there was some extra stuff. But I don't know." (App. p. 727, lines 14-18). However, Counsel also acknowledged that the trial judge addressed this with the interpreter. (App. p. 727, lines 19-21). Upon questioning by the PCR judge, Counsel testified he did not know whether the translator did anything improper and that he would have objected had he known the translator did something improper. (App. p. 730, lines 10-18). Counsel also acknowledged that he challenged the show-up identification of Petitioner at trial. (App. p. 730, lines 20-21). In addition, whether the Court properly admitted the identification was the sole issue of Petitioner's direct appeal, and his convictions and sentences were affirmed. (App. p 732, lines 18-25; pp. 784-94; p. 797-98). Counsel also confirmed that he challenged the length of detention of Petitioner, the stop, and the seizure of Petitioner. (App. p. 52; p. 61-62; pp. 213-56; p. 733, lines 2-8).

> A "qualified interpreter" in a criminal proceeding is a person who is:
>
> (a) is eighteen years of age or older;
> (b) is not a family member of a party or a witness;
> (c) is not a person confined to an institution; and
> (d) has education, training, or experience that enables him to speak English and a foreign language fluently, and is readily able to interpret simultaneously and consecutively and to sight-translate documents from English into the language of a non-English speaking person, or from the language of that person into spoken English.

S.C. Code Ann. § 17-1-50(A)(4). See also Nichols & Sanders, Trial Handbook for South Carolina Lawyers, § 21:3 Competency of Witnesses (2016). The PCR judge found that though Counsel was "arguably ineffective" for not objecting to the interpreter, *the interpreter nevertheless met the qualifications* of section 17-1-50 of the South Carolina Code of Laws. (App. p. 764) (emphasis added). The PCR judge found that for that reason, Counsel had no good-faith basis upon which to object to the interpreter's translation of the victim's testimony. (App. p.

764). The PCR judge found that Petitioner set forth no evidence at the PCR hearing to show that the interpreter incorrectly translated the victim's testimony. (App. p. 764). Petitioner neither knew Portuguese, nor presented any other Portuguese-speaking witnesses to establish that the translator inaccurately translated the victims' testimony. (App. p. 764).

The record supports the PCR judge's finding that Petitioner failed to satisfy his burden of proving deficiency. Petitioner failed to even point to specific misstatements made by the interpreter and failed to show that the interpreter did not meet the qualifications set forth in section 17-1-50 had Counsel objected to his qualifications. Furthermore, the record reflects that Counsel knew who the interpreter was, had discussed it with the assistant solicitor and discussed it with the interpreter himself. See Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984) ("counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment"). Lastly, Counsel testified he did not know of anything improper that the interpreter had done and that if he had, he would have objected. Accordingly, the record supports the PCR judge's finding that Counsel was not deficient for not objecting to the interpreter.

Regardless, Respondent submits that the evidence against Petitioner was overwhelming and the record, therefore, fully supports the PCR judge's finding that he was not prejudiced by the alleged error of Counsel. After the verdict, during sentencing, Petitioner expressed remorse to the victims and asked for forgiveness. See Whetsell v. State, 276 S.C. 295, 297, 277 S.E.2d 891, 892 (1981) ("[R]eview of a trial error is unnecessary where a defendant admits in open court after his conviction that he is guilty."). Additionally, Petitioner was found walking with Thompson and a third man along the road in close proximity of the apartment complex soon after the incident occurred. Thompson was carrying the laptop later identified as that stolen from the

victims' home. The search of Petitioner also revealed he had two of Olivera's cellphones in his pockets. See McNamara v. Henkel, 226 U.S. 520, 525 (1913) ("Possession of [recently stolen property] in these circumstances tended to show guilty participation in the burglary. This is but to accord the evidence, if unexplained, its natural probative force."). Further, Petitioner's cellphone was found in the victims' apartment shortly after the robbery. Lastly, Olivera and Paulo's identification of Petitioner was admitted at trial and upheld on appeal. Moreover, as the PCR judge found, Petitioner produced no evidence to show that the interpreter failed to properly interpret any testimony, nor did he produce any Portuguese-speaking witnesses to establish any inaccuracy in the translation. See Glover v. State, 318 S.C. 496, 499, 458 S.E.2d 538, 540 (1995) (holding applicant's mere speculation what witnesses' testimony would have been cannot, by itself, satisfy applicant's burden of proving prejudice). Because Petitioner failed to point to specific testimony that was incorrectly translated, Petitioner has failed to show that testimony had any effect on the outcome of trial. Accordingly, given the weight of the evidence against Petitioner, the record fully supports the PCR judge's finding that there is no reasonable probability that but for Counsel's lack of objection to the interpreter, either the objection would have been sustained, or the outcome of trial would have been different.

Therefore, the record supports the PCR judge's findings and the PCR judge correctly found that Counsel was not ineffective, and this Court should deny review.

CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issues discussed above.

Respectfully submitted,

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Lower Court Case No. 2014-CP-08-0809

CLARENCE FISHBURNE, #264287,

PETITIONER,

v.

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **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:

LaNelle C. Durant, Esquire
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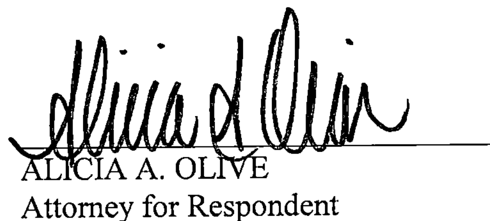
This 1st day of May, 2017.



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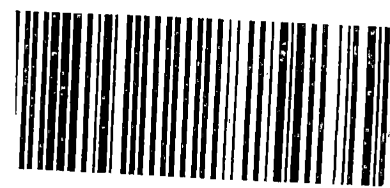

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