STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO HORRY COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2018-000053

RECEIVED
SEP 05 2019
S.C. SUPREME COURT

Robbie Lee Bufkin, Jr.,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S ISSUES PRESENTED

Did the PCR court properly deny post-conviction relief where Counsels Morgan Martin and Mary Ashley Martin articulated valid strategic reasons for not filing an additional motion to suppress, articulated reasons why such a motion would be unsuccessful, and where Petitioner pled purposefully and strategically?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court. Petitioner was indicted at the January 2016 term of the Horry County Grand Jury for trafficking cocaine, between 10 and 28 grams (2016-GS-26-00176). Petitioner waived presentment of an additional indictment for trafficking cocaine, between 28 and 100 grams (2016-GS-26-02357).[1] Morgan Martin, Esq. ("Morgan"), and Mary Ashley Martin, Esq. ("Mary Ashley"), represented Applicant. Joshua Holford, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On May 17, 2016, Petitioner pled guilty to the above two counts of trafficking cocaine. Upon recommendation by the State that Petitioner be sentenced to between 15 and 20 years, the Honorable Thomas W. Cooper, Jr. sentenced him to imprisonment for concurrent terms of 16 years for each crime. Petitioner did not appeal his plea or sentence.

Petitioner filed his application for post-conviction relief on October 4, 2016 (2016-CP-26-06494). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel pursuant to Strickland v. Washington due to retained counsel failing to adequately prepare for the case, failing to properly inform Applicant by sharing the State's discovery with him, and appearing at Applicant's plea hearing with no knowledge of Applicant's case."
    a. "Ineffective assistance of counsel pursuant to Strickland v. Washington. Retained counsel was ineffective by failing to prepare at all for Applicant's case, instead relying on his younger daughter to prepare Applicant's case so that counsel could work on other cases. Instead of familiarizing himself in any way with Applicant's case, counsel appeared at Applicant's plea hearing having no knowledge of Applicant's case. Applicant was prejudiced because he desired to go to trial, but when he

[1] Applicant was additionally indicted for murder (2015-GS-26-01733); trafficking cocaine, between 100 and 200 grams (2016-GS-26-00084); trafficking cocaine, between 10 and 28 grams (2016-GS-26-00177); unlawful possession of a firearm by a person convicted of a violent offense (2016-GS-26-00185); and possession of a stolen pistol (2016-GS-26-00186). These indictments were dismissed *nolle prosequi*.

realized his attorney was completely unprepared, Applicant decided to plead guilty rather than risk a trial with an unprepared attorney. Applicant's attorney allowed his other case load to interfere with his zealous advocacy for Applicant, and denied Applicant the opportunity to go to trial as he wished."

2. "Applicant's counsel was also ineffective by failing to properly inform Applicant by sharing the State's discovery with him."
   a. "Applicant's counsel was also ineffective by failing to properly inform Applicant by sharing the State's discovery with him. Applicant was prejudiced because he did not know that there was a suppression issue in his case due to counsel's errors. Had Applicant known about the suppression issue, he would not have pled guilty but would have gone to trial."
3. "Applicant's guilty plea was involuntary since Applicant desired to go to trial but decided to plead guilty when he realized counsel knew nothing of his case, relying instead on his younger daughter to do all the work on Applicant's case and allowing his other cases to interfere with Applicant's case."
   a. "Applicant's guilty plea was involuntary because Applicant pled in order to avoid the risks of going to trial with his unprepared counsel. Applicant desired for his counsel to try the case and expressed this to his counsel, but when counsel appeared at the plea hearing unprepared, Applicant made an involuntary plea to avoid having to try an unprepared case."
4. "Denial of due process because Applicant was unable to get a continuance so that he could remedy his counsel's unprofessional mistake, instead having to plead guilty."
   a. "Denial of due process because Applicant was unable to get a continuance so that he could remedy his attorney's unprofessional mistake and instead had to plead guilty. Though alerted to Applicant's attorney's unprofessionalism in not being adequately prepared for trial, the trial judge refused to grant Applicant a continuance to remedy his attorney's unprofessional error, violating Applicant's due process rights guaranteed by the 4th and 14th Amendments."
5. "Ineffective assistance of counsel pursuant to <u>Strickland v. Washington</u> due to counsel failing to challenge the unlawful search and seizure of Applicant's possessions by moving for a suppression hearing."
   a. "Ineffective assistance of counsel pursuant to <u>Strickland v. Washington</u>, due to counsel failing to challenge the unlawful search and seizure of Applicant's possessions or making a motion for a suppression. The officers in Applicant's case entered his home without a warrant and with no justifiable exception to the warrant requirement. Although this issue is

> clear from the police reports, counsel failed to make a motion to suppress or challenge the search and seizure. Applicant was prejudiced by this since the illegally seized evidence was the only evidence the State had against Applicant and there is a reasonable probability that had it been challenged, the evidence stemming from the illegal search would have been suppressed."

Respondent made its return on August 3, 2017, and an evidentiary hearing into the matter was convened on Tuesday, September 19, 2017, before the Honorable William H. Seals, Jr. Petitioner was present at the hearing and represented by William G. Yarborough, III, Esq. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, (Undersigned) represented Respondent. By written order dated December 19, 2017, and filed January 5, 2018, Judge Seals denied and dismissed the application.

This appeal follows.

STATEMENT OF THE FACTS

On October 22, 2014, agents with the Drug Enforcement Unit of the Horry County Sheriff's Office, through a confidential informant, staged a controlled purchase of illicit narcotics from Petitioner at the Sea Mist Hotel. (Appx. 110, ll. 11-19; Appx. 129-30). At around 7:30 P.M., the DEU provided an amount of money to the CI sufficient to purchase an ounce of cocaine from petitioner. (Appx. 110, ll. 19-23). A video camera attached to the CI displayed Petitioner, along with another co-defendant, cooking crack cocaine in the Sea Mist Hotel room. (Appx. 110-11). The CI completed the controlled purchase, and field testing confirmed the substance was cocaine. (Appx. 111, ll. 5-9). Upon speaking with the CI, the DEU determined a large amount of cocaine was in the Sea Mist room and executed a search warrant; after knocking three times, law enforcement heard movement within the room and breached the door, discovering Petitioner in the bathroom with additional cocaine. (Appx. 111, ll. 10-19; Appx. 138-40). The following day, law enforcement found a very large quantity of crack cocaine, some 143 grams, on a landing below the room; law enforcement surmised Petitioner threw it out of the window. (Appx. 111, ll. 20-25; Appx. 151).

On March 24, 2015, law enforcement obtained a warrant for Petitioner's arrested on charges that Petitioner hired an individual to kill Saquan Green on February 15, 2015, who appeared on the CI video and who Petitioner suspected of being the CI in the October 2014 bust.[2] (Appx. 112, ll. 1-8; Appx. 147-150). On March 27, 2015, law enforcement executed warrants on Petitioner at an apartment, where they found a stolen handgun and additional cocaine. (Appx. 112-13).

[2] He wasn't the CI. (Appx. 112, ll. 7-8).

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE COUNSELS ARTICULATED VALID STRATEGIC REASONING, ARTICULATED AN ACCURATE READ OF THE LIKLIHOOD OF PREVAILING ON THE MOTIONS NOW DEMANDED, AND EXPLAINED THEIR THINKING TO PETITIONER

This Court should see through Petitioner's sleight of hand in assuming the success of the motions he demands, and in arguing there is no evidence to support the PCR court's order, and deny the Petition for Writ of Certiorari because evidence exists to support the PCR court's denial of relief.

In a post-conviction relief action, an applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she 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, 686 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814. The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Strickland at 687. "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." Ard v. Catoe, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Judicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second guess counsel's assistance after conviction or adverse sentence, and 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.

Strickland, 466 U.S. at 689. "[E]very effort be made to eliminate the distorting effects of hindsight" and to evaluate counsel's decisions at the time they were made. Id. Accordingly, courts must be wary of second-guessing counsel's tactics. Whitehead v. State, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992).

Courts use a two-pronged test 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, 300 S.C. at 117, 385 S.E.2d at 625 (citing Strickland). 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. The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. Strickland at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. Id. at 697. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Id.

a. Petitioner's dismissal of Morgan's tactical reasoning is unjustified.

Petitioner argues there is insufficient evidence in the record to support the denial of relief and primarily bases his argument on contesting the testimony of Morgan at the evidentiary hearing. At the evidentiary hearing, when pressed on why he did not file motions to suppress, Martin explained:

> I challenged in the manner I thought was best to do it. There wasn't any way to get that evidence suppressed. It's easy to talk about filing suppression motions; it's very difficult to win them. . . . [I]f we'd gone to trial, I may well have filed them in the midst of trial. By that same token, just so you understand now, I don't

> remember in this particular case or not, but I can tell you that the solicitor's office here has taken the position on multiple occasions that if they have to go through a suppression hearing, they'll withdraw any offer they're making to you, which I don't think that's a good way to do things but I'm telling you it's a fact that occurs in some cases. So, sometimes, what you have to do is to – if you don't want to poison any plea-making ability you have is to wait till they swear a jury and then start making your motions because it's still not too late to make them.

(Appx. 49-50). Mary Ashley offered a similar explanation. (Appx. 61-62).

Petitioner, for the first time on appeal,[3] contests this reasoning by pointing out Mary Ashley did in fact file on May 16, 2016,[4] a motion to suppress evidence recovered in the October 22, 2014, search of the Sea Mist Hotel room, and argues that the strategic reasoning articulated by Martin is therefore invalid. (PWC at 13; Appx. 98). If anything, Mary Ashley's filing goes to support Counsels' arguments that the motions demanded would have been made as trial approached—both attorneys indicated the Sea Mist bust was on the trial roster. (Appx. 53, ll. 12-18; Appx. 60-61). Furthermore, a motion without a hearing and/or ruling is but a piece of paper and rarely of consequence to anything. Martin and Mary Ashley's reasoning, that insisting on *resolution* of the motions in pre-trial hearings would diminish Petitioner's plea bargaining position, is entirely reasonable and valid whether they filed one motion or a hundred. That reasoning is overarching, and applies broadly to Counsels' handling of all of Petitioner's charges, not narrowly to the October 2014 search.

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[3] To the contrary, Petitioner's questioning during the evidentiary hearing reflected his belief that no suppression motions had been filed. (Appx. 61-62).

[4] The day before Petitioner pled guilty.

b. Counsels articulated a reasonable basis for why they believed they would not be successful in seeking suppression of the results of the March 27, 2015, search of the high-rise apartment in which Petitioner was arrested.

Petitioner thereafter takes issue with Morgan's testimony regarding the likely merits of seeking suppression of the results of the March 27, 2015, search. Petitioner misconstrues Morgan's testimony at the evidentiary hearing. At the evidentiary hearing, Morgan explained that law enforcement got an arrest warrant, then found Petitioner and arrested him in the apartment, which they subsequently searched. (Appx. 41-42). Despite the lack of any confidence in moving to suppress the results of the search on March 27, 2015, Martin opined he probably would have moved to suppress anyway had the case gone to trial. (Appx. 42, ll. 4-9). When confronted with an observation that the search warrant for the high-rise apartment was approved by the magistrate after the time of Petitioner's arrest, Martin replied "that don't surprise me. . . . [T]hey can take somebody in custody, they can sit there and wait before they search waiting on a magistrate to sign a search warrant." (Appx. 52, ll. 19-25). Mary Ashley similarly testified to her belief that although their chances were slim, had the case gone to trial they would have fought to suppress the evidence of each and every search. (Appx. 62-63).

Petitioner latches onto the warrant's approval after arrest as dispositive proof that the search was invalid, ignoring Martin's rational explanation of how a basic law enforcement investigation is supposed to function, and offers nothing else to support his assertion. Bald assertion is but the bolder cousin of mere speculation and is not enough to sustain a grant, let alone reverse a denial of relief.

Petitioner also argues that all Counsels had to do was make a true billed murder indictment just go away and everything would have been peachy. Petitioner latches on to Martin's aggressive statements in mitigation that the State lacked probable cause to arrest

Petitioner on the murder charges to begin with. (Appx. 116, ll. 4-9). Petitioner additionally misconstrues Martin's testimony at the evidentiary hearing as belief there was no probable cause, when in fact he reached the opposite conclusion:

> Q: And Mr. Bufkin has always said he didn't have anything to do with the murder case, right?
>
> A: Correct.
>
> Q: And did you feel like that should be pursued at least at that point in getting down to the searches of these two different locations?
>
> A: Well, when a magistrate – in my opinion, with the magistrate signed the warrant that there was probable cause and the police execute that warrant, that's sufficient to justify the arrest of the defendant.

(Appx. 47-48). Petitioner thereafter asked why Martin didn't investigate the validity of the search after the murder charge was dismissed without prejudice,[5] to which Martin replied in deadpan "[b]ecause they had a warrant." (Appx. 48, ll. 4-13). Martin further explained that the fact the warrant was later dismissed was not relevant to the validity of its execution. (Appx. 48, ll. 15-17). Martin is correct—that they managed to secure the dismissal of the murder indictment as part of the plea is irrelevant to the question of the validity of the original arrest warrant and its subsequent execution. There is no evidence in the record to show any deficiency in the arrest warrant and, as such, Petitioner's assertions of its invalidity are without merit.

c. Counsels testified they explained discovery to Petitioner.

Petitioner alleges there is no evidence to support the Court's finding that Counsels explained to Petitioner the evidence obtained in discovery, the arrest warrants, or the elements of the charges against him. First, at the plea proceeding, Petitioner's constitutional rights and the

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[5] The State indicated the murder indictment would be dismissed without prejudice during the plea proceeding. (Appx. 113-14). On May 19, 2016, two days after the plea, is was dismissed *nolle prosequi*. (Appx. 147).

charges against Petitioner were thoroughly explained to him. (Appx. 104-09). At the evidentiary hearing, when asked if he reviewed discovery personally and with Petitioner, Martin affirmed he reviewed discovery materials but was hazy as to the division of labor between himself and Mary Ashley. (Appx. 54-55). Martin testified he visited Petitioner at the jail multiple times, and although he could not recall precisely what was and was not discussed in each of those meetings, Martin affirmed he discussed the case with his client and whether to plead or go to trial as the first trial date neared. (Appx. 46, ll. 15-23; Appx. 50-52). Mary Ashley was similarly asked if she reviewed discovery personally and explained it to Petitioner; she affirmed in no uncertain terms that she did. (Appx. 63-64).

Petitioner misconstrues Morgan's ability to remember specifics about the charges, ignoring extensive testimony by Martin at the evidentiary hearing going over the details of the charges against Petitioner. (See, e.g. Appx. 38-45). Petitioner also hangs his hat on Mary Ashley's bewildered response to his question of whether she discussed with Petitioner the possibility of suppressing the March 2015 search if only they could "beat the murder case[.]" (Appx. 58-59). Petitioner dings Mary Ashley for not speculating as to the State's motivations in the timing of its indictments. (Appx. 65, ll. 10-14). Petitioner's zealous ferreting of every "I don't know" expressed by the witnesses at the evidentiary hearing does not amount to "no evidence of probative value," nor does it provide a basis for chucking the PCR court's proper finding of Counsels' credibility where their memories were firm.

d. Petitioner pled strategically—purposefully and voluntarily.

Finally, it bears noting that Petitioner himself asserted in his amended application that he tactically "pled in order to avoid the risks of going to trial with his unprepared counsel." (Appx. 23). If that is taken as true, then he blatantly lied to the plea court in affirming his satisfaction

with counsel. (Appx. 109-10). At the evidentiary hearing, Applicant gave a different explanation, offering instead that he was ignorant. (Appx. 88, ll. 1-16). These varying statements are irreconcilable, provide support for the PCR court's credibility finding, and consequently foreclose any possible prejudice finding because there's no credible testimony that "but for" anything Petitioner would not have pled guilty, but would have proceeded to trial.

CONCLUSION

For the foregoing reasons, this Court should deny this Petition for Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

ALAN WILSON
Attorney General

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Senior Assistant Deputy Attorney General

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By:
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5 Sept, 2018

STATE OF SOUTH CAROLINA
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William H. Seals, Jr., Circuit Court Judge

Appellate Case No. 2018-000053

ROBBIE L. BUFKIN, JR.,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

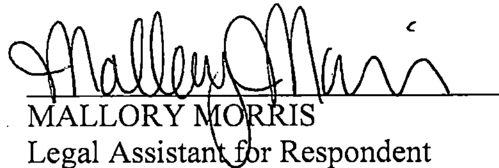
Respondent.

CERTIFICATE OF SERVICE

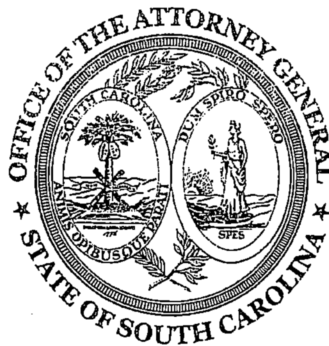
The undersigned hereby certifies that a true copy of **Return to Petition for Writ of Certiorari** has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

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

This 5th day of September, 2018.



MALLORY MORRIS
Legal Assistant for Respondent



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SEP 05 2018
S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

September 5, 2018

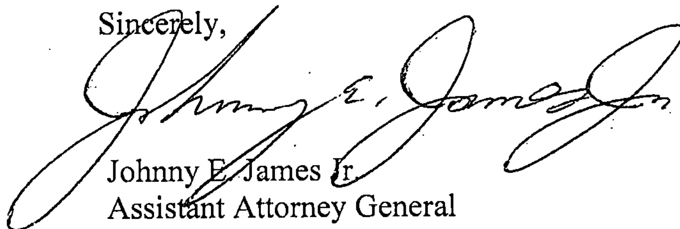
The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RE: **Robbie L. Bufkin, Jr. v. State of South Carolina**
Appellate Case No. 2018-000053
Lower Court Case No. 2016-CP-26-6494

Dear Mr. Shearouse:

Enclosed for filing are the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-referenced case. By copy of this letter we are serving opposing counsel today.

Sincerely,



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JEJ/mm
Enclosures

cc: William G. Yarborough, III, Esquire