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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2017-002002

RASHAUN JAMINE SOBERS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the post-conviction relief court properly denied relief on grounds that Petitioner: (1) failed to prove any deficiency on the part of trial counsel in his handling of excluded "gang" evidence and testimony at trial and (2) failed to prove ay prejudice from the alleged deficiency, where Petitioner offered no credible evidence to establish the relevancy of such "gang" evidence and where Counsel acknowledged his underlying purpose in seeking admission of "gang" evidence was to attack the character of the victim and State's witnesses by utilizing the negative connotation of the term "gang."

STATEMENT OF THE CASE

Petitioner was indicted at the November 2009 term of the Spartanburg County Grand Jury for murder (2009-GS-42-6427). (App.p.603-p.604). He was represented by N. Douglas Brannon (Counsel), Timothy Ryan Langley, and the late Brac H. Turnipseed, Esquires. Respondent (the State) was represented by former Solicitor for the Seventh Judicial Circuit, Harold W. "Trey" Gowdy, III, and current Solicitor for the Seventh Judicial Circuit, Barry J. Barnette. On September 7-9, 2010, Petitioner proceeded to trial by jury pursuant to which he was found guilty of murder. He was sentenced by the Honorable J. Derham Cole to imprisonment for a term of life. (App.p.595-p.600; p.605).

Petitioner timely filed a notice of intent to appeal his conviction and sentence and a direct appeal was perfected by Chief Appellate Defender Robert M. Dudek, Esquire, of the South Carolina Commission on Indigent Defense. Petitioner raised the following issues on appeal:

> The court erred by excluding the testimony of Travoiris Gentry, Ricky Smith, Quitha Gentry, Joshua Fuller, and Phoenix Fielder about gangs and gang signs being made at the scene of the shooting since this was relevant to appellant's self-defense case because appellant's fear, his apprehension, and his state of mind at the time he fired the gun was affected by the fact of gang involvement.
>
> The court erred by refusing to allow former veteran Greenville County Narcotics Officer Rocky Watts to testify as an expert witness, where he was qualified by experience and education and his testimony that gangs typically now videotape their gang activity and that he was familiar with the north side gang and the south side gangs after his investigation since this evidence was relevant and probative in this case.

(App.p.606-p.627). The State submitted a brief in response and the parties proceeded to oral arguments on June 4, 2014. (App.p.628-p.658). In a published opinion filed June 26, 2013, the South Carolina Court of Appeals affirmed Petitioner's conviction and sentence. *State v. Sobers*, 404 S.C. 263, 744 S.E.2d 588 (2013) (Op. No. 5146, filed June 26, 2013). (App.p.658-p.663). The Remittitur was issued on July 15, 2013.

On February 21, 2014, Petitioner filed an application for post-conviction relief (PCR) alleging he was being held unlawfully for the following reasons:

1. Ineffective assistance of trial counsel, in that;
    a. Counsel failed to properly object to the prosecution's prejudicial and continued attempts to mislead the jury with references to implied malice,
    b. Counsel failed to object to the burden shifting jury instructions regarding inferring malice from use of a deadly weapon,
    c. Counsel failed to fully investigate and present evidence for self-defense,
    d. Counsel failed to properly object and preserve for appellate review the court's refusal to allow defense's expert to testify,
    e. Counsel failed to properly object to State's evidence,
2. Ineffective assistance of appellate counsel, in that;
    a. Appellate counsel failed to present issues of trial counsel's ineffectiveness in the appeal,
    b. Appellate counsel failed to act as the State's adversary at a critical state of the proceedings,
3. Denial of due process, in that;
    a. "Prosecutorial Misconduct for shifting the burden and misrepresenting the facts to the court,"
    b. "Allowed the state to lesson burden or shift the burden to prove elements of crime."

(App.p.664-p.681). The State filed its Return on September 8, 2014, requesting an evidentiary hearing be held. (App.p.682-p.687).

On August 12, 2016, Petitioner filed an Amendment to his PCR application to include the following allegations:

1. Ineffective assistance of trial counsel for failure to conduct a reasonable investigation prior to trial.
2. Ineffective assistance of trial counsel for the handling of the motion to dismiss related to and the admissibility of the video evidence obtained from the State's witness's phone.
3. Ineffective assistance of trial counsel for failure to present a reasonable defense at trial.
4. Ineffective assistance of trial counsel for failure to properly prepare Petitioner to testify both in camera and in front of the jury at trial.
    a. Ineffective assistance of trial counsel for failure to utilize Petitioner's testimony at the Jackson v. Denno hearing and during the in camera hearing regarding the gang testimony and evidence.
    b. Ineffective assistance of trial counsel for failure to properly prepare and utilize Petitioner while on the stand at trial.
5. Ineffective assistance of trial counsel for failure to utilize witnesses and/or request a continuance to locate all necessary witnesses.
6. Ineffective assistance of trial counsel related to matters concerning the testimony and evidence related to gang activity and/or gang affiliation of the victim and the State's witnesses, including but not limited to:
    1. Ineffective assistance of trial counsel for failure to obtain a duly qualified expert to assist both pre-trial and during the trial on matters related to gang affiliation, evidence of gang activity and the specific evidence and/or testimony in the case at hand.
    2. Ineffective assistance of trial counsel for failure to properly prepare Petitioner to testify to matters related to his knowledge of the gang activity and gang affiliation as it related to self-defense.
    3. Ineffective assistance of trial counsel for failure to make the use of the term "gang" or the testimony and evidence regarding gang activity and gang affiliation relevant through the in camera or direct testimony of PetitioneApp. Specifically, failure to establish that Petitioner was "more fearful because the mob was part of a gang," as held by the South Carolina Court of Appeals.
7. Ineffective assistance of trial counsel for failure to object to the Court's opening comments to the jury and closing charge. Transcript p. 90, lines 16-21, 561, lns. 16-20, 568, lns. 14-18. See State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012).
8. Ineffective assistance of trial counsel for failure to fully cross-examine and impeach the State's witnesses.
9. Ineffective assistance of trial counsel for failure to request all reasonable jury charges in favor of the defense.
10. Ineffective assistance of appellate counsel for failure to raise all meritorious issues on appeal.
    1. Motion for Dismissal regarding the phone video evidence: Transcript pp. 45-55.

2. Objection to burden shifting during the State's closing argument. Transcript pp. 551-2.

11. Pursuant to Rule 15(b), SCRCP, Petitioner would move to amend to conform to the evidence and testimony presented at the evidentiary hearing.

(App.p.688-p.689). On September 8, 2016, Petitioner made another Amendment to his PCR application to include the following allegation:

1. Ineffective assistance of trial counsel for failure to object to the State's closing argument.

(App.p.690-p.691).

An evidentiary hearing into the matter was convened on June 27, 2017, at the Spartanburg County Courthouse before the Honorable Robin B. Stilwell. Petitioner was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Assistant Attorney General Valerie G. Giovanoli, Esquire, of the Office of the Attorney General. At the evidentiary hearing, Petitioner first provided a summary of his allegations. (App.p.696-p.702). He then explained he would proceed on all of his claims except the allegation of ineffective assistance of trial counsel for failure to utilize witnesses and/or request a continuance to locate all necessary witnesses, which he withdrew on the basis that Petitioner could not locate the alleged witness, Greg *****. (App.p.700).

At the hearing, Petitioner called Dr. Marjie T. Britz and Counsel to testify. He also testified on his own behalf. The State briefly called Solicitor Barry J. Barnette, Esquire, in response. The PCR Court had before it a copy of the Spartanburg County Clerk of Court records, Petitioner's records from the South Carolina Department of Corrections, the trial transcript, Petitioner's direct appeal records, the PCR application, Respondent's return, Petitioner's PCR exhibits 1-12 and Respondent's PCR exhibit 1. At the conclusion of the

evidentiary hearing, the PCR court took the matter under advisement. On August 2, 2017, Judge Stilwell issued a written order denying relief, finding counsel provided effective assistance in this case. Petitioner filed a motion to alter or amend and by Order dated August 29, 2017, that motion was denied. (App.p.882-p.886).

On September 29, 2017, Petitioner filed a Notice of Appeal, appealing the PCR court's denial of his application for PCR. Petitioner filed his Petition for Writ of Certiorari and the Appendix on September 24, 2018. This Return on behalf of the State now follows.

STATEMENT OF FACTS

Trial

At trial, the State presented testimony and evidence regarding Petitioner being charged with murder for shooting Sebastian Jaramillo. On April 21, 2009, a group of young adults were gathered at Catina Smith's home. Ms. Smith's son, Ricky, and her nephew, Phoenix Fielder, lived in her home.[1] Phoenix testified that friends Travoiris "Trey" G*****, Shaquila "Quita" G*****, Jayquan Hardy, Devon D****, and Sebastian Jaramillo were at the Smith home along with Phoenix and Ricky. (App.p.117, line 23-p.119, line 15). Phoenix testified that Devon hit Sebastian "in a playful way," then a short chase ensued with several people in the Smith car driving to a nearby cul-de-sac in the same general area. (App.p.119, line 20-p.121, line 9). (See also State's Exhibit 4).* Devon and Sebastian, now near the cul-de-sac, decided to "tap box." Phoenix used his cell phone to video record what he considered a harmless fight. (App.p.121, line 9-p.122, line 22; p.125, lines 21-24; p.147, lines 18-25). A crowd of approximately fifteen

[1] Because there are individuals such as the Smiths who share a last name, Respondent will use first names to avoid confusion and identify the individuals clearly while also remaining in compliance with court redaction rules.

(15) peopled gathered to watch the fight. (App.p.149, lines 15-22). Petitioner Rashaun Jamine Sobers, a/k/a "RaRa," was in a burgundy Impala parked in the cul-de-sac. (App.p.127, lines 4-11). Petitioner was not involved with the fight, and did not participate in the fight. (App.p.127, lines 12-21; p.152, lines 17-22). Devon and Sebastian's fight began to turn " a little serious," with Sebastian besting Devon, (App.p.126, line 10; p.147, lines 1-3), but no one was "knocked down." (App.p.152, lines 4-8). The two boys walked away from each other, but some members of the group encouraged both Devon and Sebastian to shake hands to put the fight behind them, and they did. (App.p.126, line 18-p.127, line 3; p.152, lines 2 - 15). Phoenix testified that after the expression of no-hard feelings and reconciliation, and in the midst of everyone laughing and leaving, he, Ricky, Sebastian, Quita and Trey got in the Smith car. Again according to Phoenix, as he was adjusting the music in the car, he heard a gunshot. Ricky "said to get down," prompting Phoenix to look up. Phoenix saw Petitioner pointing a gun at the car. Phoenix testified that he ultimately heard "[t]hree to four" shots. Phoenix also testified that he knew Petitioner prior to the shooting and was "a hundred percent" sure that it was him in the Impala, and that it was Petitioner who fired a gun at the Smith car. (App.p.127, line 25-p.129, line 25). Sebastian was hit just above the left ear, and "slumped over behind ... the driver's seat." (App.p.131, lines 4-12; p.318, line 2-p. 319, line 17).

Phoenix's video was shown to the jury. (See State's Exhibit 4). In addition to the fight, the video shows that someone sat on Petitioner's car prior to Sebastian and Devon's scuffle, but there was no incident from that action. (App.p.145, lines 3-7). Further, Phoenix testified (and the video demonstrates) that Sebastian and Trey approached Petitioner, while Petitioner was in his car, prior to the scuffle between Sebastian and Devon. Testimony established that Trey asked

why Petitioner had called Trey's sister a name "a week or two weeks before...." (App.p.124, line 25-p.125, line 20; p.145, line 23-p.147, line 10; p.420, lines 16-25). However, both Trey and Sebastian walked away without incident, the scuffle between Sebastian and Devon occurred, and both Sebastian and Trey were in the Smith car before Petitioner began shooting. (App.p.124, line 25-p.125, line 20; p.128, lines 9-25; p.152, line 23-p.153, line 7). (See also State's Exhibit 4).

"Quita" also testified that there were no threats to defendant. She testified that the group in the car was simply talking among themselves when she heard Petitioner shout "bust what, ask what," then he began shooting at them. Just prior to the shooting she had heard Jayquan "say now I'm ... going to ask him." (App.p.166, line 2-p.169, line 17).

Devon testified that he saw Jayquan walk up to Petitioner's car after the scuffle between Trey and Sebastian, but before the shooting. Devon testified that Jayquan "was talking to him for a second. And then he walked back... then I seen - - I just seen fire coming out of" the burgundy vehicle. (App.p.181, lines 2-23).

Trey testified that, prior to the fight between Sebastian and Devon, he and Sebastian walked over to Petitioner's car and questioned Petitioner about comments to Trey's sister. Trey testified that he saw Petitioner had a gun in his car. Trey testified that Petitioner denied calling Trey's sister a name, so the two shook hands and Trey and Sebastian walked away. Petitioner was not involved at all in the subsequent scuffle between Sebastian and Devon. (App.p.194, line 10-p.195, line 16; p.214, lines 16-25). Trey testified that, after the fight, while the group was in the car, he saw Petitioner actually back up and shoot toward the car. Petitioner fired three or four times. (App.p.195, line 17-p.197, line 20).

Jayquan testified that he approached Petitioner after the scuffle between Sebastian and Devon, and just before the shooting. Petitioner was in his car. Jayquan asked "what was up with him and Trey getting into it. And he told me there wouldn't be any fighting." (App.p.230, lines 21-25). Jayquan testified that he saw Petitioner "reach[] to his right." Petitioner stated for a second time that "there wouldn't be fighting ... then he pulled a gun out." Jayquan ran. Petitioner fired several times. Jayquan testified he "heard about three gunshots." Jayquan did not believe the initial exchange with Petitioner to be confrontational, and, in fact, thought they were "cool." However, according to Jayquan, "it just led from that to a bad situation quickly." (App.p.231, line 1-p.233, line 23).

Ricky also testified that Petitioner was not involved in the scuffle between Sebastian and Trey, and that Sebastian and Trey were already in the car before the shots were fired. He also confirmed that Petitioner was the only one with a weapon, and that Petitioner fired the shot that killed Sebastian. Further, he testified he heard Petitioner's "car speed off" after the shooting. (App.p.245, line 3-p.250, line 16).

Sebastian's body was still in the back seat of the Smith car when officers arrived. (App.p.102, lines 1-6; p.271, lines 7-20; State Exhibits 12 and 13). He had been shot "just above the external" canal of his left ear, indicating he was likely not even looking at the gun when he was shot. (App.p.318, line 2-p.319, line 17). Officers found no evidence of any weapon in the Smith car. (App.p.272, lines 9-16). There was no gunshot residue detected on Sebastian's hands. The lack of particles indicated he was not close to the weapon when Petitioner fired the shot. (App.p.308, line 9-p.309, line 17). Examination of the Smith car and scene revealed indications that multiple shots were fired, including markings on the driver's side

of the vehicle and on the asphalt near the car on the same side. (App.p.284, line 9-p.287, line 13; p.265, line 16-p.267, line 16). (See also State's Exhibits 8, 9, 15, 16, 20, 21, 23, 24).

Petitioner fled the jurisdiction after the shooting. He was apprehended by federal marshals several days later in Charlotte, North Carolina. (App.p.304, line 10-p.305, line 7). Petitioner testified at trial and admitted the shooting. He testified, however, that after the Sebastian/Devon scuffle, Trey approached his car and attempted to engage him in a fight. Petitioner testified that Trey "grabbed his shirt" through the driver's side window and others swarmed the car, opening the passenger side doors. He testified he shot out the front passenger door "because Trey had me." He denied shooting at anyone. (App.p.338, line 6-p.343, line 22). Petitioner testified that he was not scared of Trey after the initial confrontation about Trey's sister, and did not leave the cul-de-sac. He testified: "I didn't think they were going to do anything. Greg told them to leave me alone the first time ... They walked away. So I thought maybe everything was okay." (App.p.344, lines 14-19; p.355, lines 12-17). Greg was a friend of Petitioner's who was also in the cul-de-sac. (App.p.333, line 4-p.336, line 14). Petitioner admitted speaking with officers after he was apprehended in Charlotte. He did not, however, tell them that he was mobbed or that Trey attempted to pull him from the car. Instead, he, admittedly, falsely stated to the officers that Trey had a gun. He also admitted in his testimony at trial that he made up that story "trying to protect" himself. (App.p.352, line 9-p.354, line 22; p.397, line 12-p.398, line 20). No other witnesses at trial corroborated Petitioner's claim that a mob of people swarmed his car and tried to forcibly remove him from that car.

PCR Hearing

At the June 27, 2017 evidentiary hearing Petitioner first summarized the allegations, placing particular focus on his claims of ineffective assistance of trial counsel in regard to his failure to convince the trial court to admit "gang evidence" by explaining: "It came down to the issue that the defense, essentially, seemed to be that this was a gang and activity and this was a gang approaching Mr. Sobers and his shooting and his reactions that night was because he was in fear of his life as a result of this gang and their activities." (App.p.696-p.702). Petitioner then presented telephone testimony from Dr. Marjie T. Britz, a sociology, anthropology, and criminal justice professor at Clemson University. Over the State's objections, the PCR court qualified Dr. Britz as an expert in sociology and generally in the area of gangs, but not specifically as to the Northside and Southside gangs in Spartanburg. (App.p.704-p.717). Based on her review of the entire record, including photos from the autopsy; photos appearing on the Facebook pages belonging to eye-witnesses who testified for the State including Jay Red Fuller, Trey Gentry, Phoenix Fielder, and Quita Gentry; the video recording of the fight that preceded the crime; and the testimony from certain witnesses at trial, Dr. Britz opined, similar to the opinion Counsel attempted to introduce from proffered expert witness Rocky Watts, that "these individuals are associated and are active in gang life." She did not offer any opinion or testimony whatsoever to suggest that a mob comprised of gang members is more dangerous or likely to cause fear than any other mob when it is trying to forcibly remove an individual from a car in the course of an attack. (App.p.718-p.727). On cross-examination Dr. Britz acknowledged she had been compensated for her research and preparation in Petitioner's case. (App.p.732).

Next, Petitioner called trial Counsel to the stand. He testified he and Brac Turnipseed were both actively handling Petitioner's case and proceeded to describe aspects of their investigation and preparation for trial. Counsel testified they prepared Petitioner to testify and remembered specifically telling Petitioner "don't lie on the witness stand." (App.p.734-p.745). He then recounted the facts and the defense theory of the case and explained:

> . . . my client's story to me, and it stayed consistent the entire time, was that there was a gang of individuals trying to pull him out of his car. Pretty much through the window. The driver's side window of his car. That somebody opened the passenger side door. And that in an effort to get away from the people on the driver's side, he laid down, the gun was either under the seat or between the seats. And that he fired without aiming at anybody specifically, our the passenger side of his car. We were - - I mean, it was a self-defense case, it was an accidental shooting case.

(App.p.745-p.748, line 19). He said: "I believe my client was responding out of fear." (App.p.749, line 12). Counsel then repeated his testimony in regard to putting Petition on the stand, by twice emphasizing: "We told him not to lie." (App.p.750, line 24; p.752, line 3).

In regard to "gang evidence" Counsel testified he was surprised by the State's motion to exclude such evidence, believing everybody knew the defense intended to make gang activity an issue in the case and the State knew the defense had a gang expert on their witness list. (App.p.753-p.754). When asked how exclusion of gang evidence affected the defense he opined:

> Well, it obviously weakened the self-defense defense. I mean, that was it. I mean, look, I was told, If the word gang comes out of your mouth, I will declare a mistrial and sanction you. I changed the word gang for mob. I got screamed at one time because I said, What does it mean that everybody's got the same color t-shirt on? The same color t-shit on. I mean, it - - the exclusion of gang activity, dramatically weakened the self-defense case.

(App.p.754, lines 10-21). Despite this opinion, Counsel initially offered no explanation as to why, under his theory of defense, evidence that the attackers in the mob were members of a gang would have been more useful or effective than the evidence he was allowed to offer at trial, wherein Petitioner was able to describe the attack by an angry mob and his fear during that attack. Instead, Counsel simply noted that he "believed that [Petitioner] was afraid of these people." (App.p.755). When asked why he did not proffer Petitioner's testimony outside the presence of the jury where he could use the word "gang" instead of "mob" Counsel testified that he did not think it was necessary in the face of the judge's ruling that the gang evidence was irrelevant. He believed he had already demonstrated relevance through the four or five witnessed he did proffer, but the judge did not agree. Critically, Counsel also testified: "And I believe that the more I had [Petitioner] testify, the weaker he was going to get." (App.p.756). Using the opinion of the Court of Appeals as a guidepost, Petitioner continued to press Counsel on why he did not have Petitioner specifically testify by way of proffer "that he was more fearful because the mob was part of a gang." (App.p.757). Counsel maintained he did not so this because he believed he had established relevancy with the other witnesses. (App.p.758). Counsel acknowledged that most of his conversations with Petitioner were "gang related" and involved how Petitioner's knowledge of gang activity and affiliation of his attackers led to his fear; however, he maintained he was still able to get Petitioner to tell his story about the attack itself by using the word "mob" instead of "gang." (App.p.762-p.769).

On cross-examination, Counsel acknowledged various problems or weaknesses with Petitioner's defense, including Petitioner giving blatantly different versions of his story at different times. He admitted Petitioner initially told law enforcement he was attacked only by

Trey, not a mob, and he acknowledged no other witnesses were able to corroborate Petitioner's story. (App.p.769-p.778). Counsel acknowledged there is a line between preparing a defendant and coaching a defendant, and he was not willing to cross that line. He emphasized he does not tell a witness what to say, other than to tell the truth, which he told Petitioner over and over again. (App.p.784-p.785). Counsel testified: "I believe that [Petitioner] was afraid that day. And I believe that was a gang. I don't know much else matters, okay?" (App.p.786, lines 17-19). When asked for clarification on why gang membership was relevant to self-defense, Counsel explained: "It makes that mob of people significantly more fear causing." Counsel ultimately revealed his underlying reason for wanting to introduce gang evidence was simply because he wanted it to serve as "character evidence" about the victim and other witnesses in an effort to benefit from the "negative connotation" that comes with the word "gang." Counsel concluded: "Gangs are lawless, gangs are dangerous." (App.p.793, lines 5-18). On redirect, Petitioner attempted to rehabilitate Counsel in the face of his revelation by eliciting testimony that his inability to focus on the gang issue at trial would "hedge greatly" on Petitioner's credibility at trial. Petitioner also got Counsel to say the gang testimony and evidence was "vital" to the defense of self-defense in this case, which is why he fought so hard to get it admitted. (App.p.796-p.797).

Petitioner then testified on his own behalf. He said Counsel never told him he needed to testify he knew these were gang members, and that this knowledge is what put him in fear of his life, but Petitioner explained this was because he and Counsel believed the pictures would speak for themselves. Petitioner then confirmed Counsel's primary directive in regard to all of his testimony was to tell the truth and not lie. Petitioner testified his fear during the incident came

from the fact that the people in the mob were known gang members and he knew what they were capable of; however, he then testified that what really put him in fear was being "ambushed from the opposite side" and the fact that the attackers were not letting the prior incident with Trey's sister go. (App.p.798-p.826). With prompting from PCR counsel, Petitioner again testified his fear was connected to his knowledge the attackers were gang members and the fight he had just witnessed. (App.p.827-p.828). On cross-examination, however, Petitioner acknowledged it was the bad blood between himself and Trey that led Trey to attack him, and that he got scared and pulled out his gun when the crowd rushed in to assist Trey. He testified he was scared of the crowd itself, but this time did not say he was more scared of that crowd because the members of that crowd were in a gang. (App.p.832-p.836). This is likely because, as revealed by Counsel, the only reason to dub the crowd a "gang" would be to try to reap the improper benefit of the "negative connotation" that comes from the word.

After hearing arguments from both parties on the claims of ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and denial of due process, the PCR court took the case under advisement. (App.p.843-p.851). In an Order of Dismissal dated August 2, 2017, and filed August 7, 2017, Judge Stilwell denied and dismissed Petitioner's PCR Application with prejudice. The PCR court grouped Petitioner's allegations of ineffective assistance of trial counsel into those involving: (1) "gang evidence," (2) counsel's "failure to object," (3) counsel's "trial preparation," and (4) counsel's "trial performance," and addressed the individual allegations, finding each to be without merit. The PCR court also addressed Petitioner's allegations of ineffective assistance of appellate counsel. Ultimately, the PCR court concluded: "[Petitioner] has failed to prove any deficiencies on the part of trial or appellate

counsel and further, [Petitioner] has failed to prove any prejudice from any alleged deficiencies . . ." It held: "Therefore, as Applicant has failed to meet his burden of proof in this post-conviction relief action, his application is denied and dismissed with prejudice. . . . Based on all of the foregoing, this Court finds and concludes that [Petitioner] has not established any violations that would require the Court to grant his application." (App.p.853-p.881).

STANDARD OF REVIEW

The standard of review in post-conviction relief cases depends on the specific issue before the reviewing court. It will defer to a post-conviction relief court's findings of fact and will uphold them if there is evidence in the record to support them; but will review questions of law *de novo*, with no deference to trial courts. *Smalls v. State*, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839-40 (2018). In criminal cases, the appellate court sits to review errors of law only. *State v. Broadnax*, 414 S.C. 468, 473, 779 S.E.2d 789, 791 (2015). The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. *Id.*; *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); *State v. Howard*, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2011) An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); *Howard* at 178, 720 S.E.2d at 514. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); *Howard* at 178, 720 S.E.2d at 514.

ARGUMENT

The post-conviction relief court properly denied relief on grounds that Petitioner: (1) failed to prove any deficiency on the part of trial counsel in his handling of excluded "gang" evidence and testimony at trial and (2) failed to prove ay prejudice from the alleged deficiency, because Petitioner offered no credible evidence to establish the relevancy of such "gang" evidence and because Counsel acknowledged his underlying purpose in seeking admission of "gang" evidence was to attack the character of the victim and State's witnesses by utilizing the negative connotation of the term "gang."

Petitioner asserts the PCR court erred in finding Counsel was not ineffective in his handling of the "gang" evidence and testimony at trial, and therefore the PCR court erred in failing to grant a new trial. (Petition, p.5). Specifically, he complains Counsel failed to establish Petitioner was more fearful because the mob was part of a gang, because Counsel did not proffer Petitioner's testimony in this regard. Petitioner argues Counsel's deficiency unfairly removed the "gang element" from Petitioner's defense in a case Counsel opined "hinged on the gang activity involvement in the case." (Petition, p.22). The State disagrees and submits Petitioner's argument should be rejected for a number of reasons. First and foremost, the PCR court's ruling is supported by probative evidence in the record and therefore, certiorari should be denied.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in his or her application. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (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. "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). An Applicant must overcome this presumption in order to receive relief. *Cherry*, 300 S.C. 115, 386 S.E.2d 624. 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. In assessing counsel's performance, counsel's decisions must be evaluated at the time in which they were made and "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. 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 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. 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. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Strickland*, 466 U.S. 668.

Moreover, *Strickland* does not require a finding of ineffectiveness merely for deviation from some rigid rule of representation. Rather, *Strickland* requires the post-conviction relief Applicant to prove "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 697. Therefore, the function of the post-conviction relief court is to determine if "in light of all the circumstances, the identified acts or omissions were outside *the wide range* of professional competent assistance" required of a criminal defense attorney." *Id.* at 690 (emphasis added).

Here, the PCR court found Petitioner failed to meet his burden in proving Counsel was deficient or that he was prejudiced by any deficiency. This finding was supported by ample evidence in the record. Counsel testified he had been instructed multiple times by the trial judge that he was not permitted to say or elicit from a witness the word "gang" before the jury and doing so would result in a mistrial. Under this order, it was reasonable for Counsel to advise his client to use the word "mob" in lieu of "gang" during his testimony, especially where Petitioner's alleged fear emanated from being attacked by a crowd, not what that crowd was called. Counsel was not deficient in this regard. Furthermore, the PCR court disagreed with Petitioner's assertion that membership in a gang would have strengthened his testimony in support of self-defense that he was attacked by a mob of people, despite Counsel's opinion to the contrary. The jury was presented with evidence that:

- After firing his gun, Petitioner immediately fled the scene of the shooting, never calling 911.
- Petitioner fled South Carolina to Charlotte, North Carolina.
- Petitioner claimed he lost his cell phone at the scene of the shooting. Petitioner's phone was turned off and never located after a search of the scene. Petitioner did not help law enforcement locate the phone either.
- Petitioner testified that he used the phone of a friend's neighbor to call his friend after the shooting. Petitioner did not know the name of the owner of the phone he used. Therefore, law enforcement did not have the ability to corroborate this story with phone records.
- Petitioner did not know the name of the two men who he claimed chauffeured him to Charlotte, North Carolina. Nor did he remember what kind of car he rode in to North Carolina.
- Petitioner testified he turned himself in, but was impeached during cross examination based on the fact that the US Marshall Service and Spartanburg County Police went to North Carolina, found and arrested him on the street.
- Petitioner testified he threw the murder weapon out the window of his friend's uncle's car somewhere in Charlotte, North Carolina. However, he never helped law enforcement locate it or show them where he threw it out.
- Petitioner testified that he left his car, from which he fired the fatal shot, in a restaurant parking lot with the keys in the ignition. The car was found by law enforcement in a desolate power line field, abandoned with no license plate. Petitioner testified that he assumed someone stole it and took it to the field, however, the only thing missing from his abandoned car was the license plate and not his aftermarket stereo or 22" chrome rims.
- Petitioner gave an inconsistent statement to law enforcement following his arrest. At the time of the statement, Petitioner instructed the investigator to draw a diagram of the scene to his specifications. When the investigator began to ask why his story and diagram did not match the evidence, Petitioner requested an attorney.
- Petitioner's first story to law enforcement was that Trey attacked him with a gun and the gun accidentally went off.
- At trial, Petitioner testified that a "mob" attacked him so he reached for his illegally purchased gun and fired through his passenger door, which had been opened by a member of the mob. The bullet did not hit a member of the mob that presumably would have been coming into the passenger side or around his vehicle, but travelled out his passenger side door, across the cul-de-sac, into the car in which the victim sat and into the victim's head.
- Petitioner claimed his friend, Greg ***** (Little Greg) was there and had witnessed everything. However, Little Greg, could not be located to testify at trial.[2]

[2] Likewise, Little Greg could not be located to testify at the PCR hearing.

- Petitioner admitted, numerous times, that he lied to law enforcement to avoid going to jail.
- Petitioner testified the victim accompanied Trey in approaching his vehicle to confront Petitioner about calling Trey's sister a bad name. Thereafter, the two walked away and the victim proceeded to have a physical fight with another boy. Petitioner testified he was not part of this other fight. Petitioner claimed the same mob surrounding the fight then attacked his car as Trey tried to pull him out of his car. However, the victim, who showed a propensity for violence in confronting Petitioner the first time and engaging in a physical fight with someone else, then went back to sit in the car while the rest of mob attacked Petitioner.
- Six eye-witnesses testified Petitioner shot at the car in which the victim sat with no provocation. Petitioner was the only person who testified he reacted in self-defense from an attack.

Petitioner's self-defense claim as a whole was simply not credible. Petitioner failed to prove how presenting evidence that the members of the alleged mob were in a gang would have made his self-defense story more credible. Petitioner asserts that the gang membership strengthened the reasonableness of his fear of being attacked, however, as properly found by the PCR court, this argument is not persuasive. The claimed mob attack was determined to not be credible, regardless of gang membership or affiliation. Petitioner failed to prove prejudice resulting from any alleged deficiency.

The PCR court noted that not only was Counsel not deficient in his attempts to admit gang evidence, he scrupulously attempted to admit gang evidence on three separate occasions during the trial even though he did so on an improper basis due to the "negative connotation" that comes with the word "gang." First, Counsel made a pre-trial argument for admitting evidence of gang activity. (App.p.71-p.81). Second, on the following day, Counsel submitted a "Memo in Opposition to the State's Motion in Limine Regarding Gang Activity and Specific

Instances of Gang Character Evidence of the Victim"[3] with supporting case law and a brief argument to the trial court. (App.p.157-p.158). Third, Counsel requested an *in camera* hearing in which he proffered the testimony of six witnesses, including an attempt to qualify a very qualified witness as an expert in gangs, and further argued for the admission of gang evidence. (App.p.430-p.492). The PCR court found Counsel fought long and hard on this issue and went above and beyond the representation that is minimally required of a criminal defense attorney. Evidence supports this finding.

In his Petition for Writ of Certiorari, Petitioner's specific complaint is that Counsel failed to establish relevancy for the introduction of the "gang element" by not proffering testimony from Petitioner. The record demonstrates that Counsel clearly attempted to articulate the basis for relevancy. The trial judge simply disagreed that it was relevant in the matter. The PCR court took note of the Court of Appeals' language in affirming the conviction; however, it also noted that language does not suggest that Counsel was deficient in establishing relevancy. That language simply suggests that one basis for argument was not properly before the appellate court, not that if Petitioner had proffered his testimony, it would have changed the decision on appeal. On the contrary, Petitioner failed to establish that additional proffered testimony would have changed either the trial or appellate courts' ultimate rulings. His claims otherwise are belied by the jury verdict rejecting his factual claim of being attacked by a mob. In fact, given the amount of evidence proffered, the amount of evidence entered, and the attempts to establish relevancy by Counsel, it is dubious to suggest that the trial judge would have allowed the evidence under any argument, with or without a proffer of Petitioner's testimony. This is

[3] This memo was admitted during the PCR hearing as one of Petitioner's exhibits.

particularly true where the only evidence to support Petitioner's unreasonable claim that his fear was heightened because the alleged attackers were in a "gang" was his own testimony at the PCR hearing, and that testimony was found to be self-serving and not credible.

In his Petition, Petitioner complains about this credibility finding because it "is in complete contrast to trial counsel's testimony regarding his belief in Petitioner's veracity and fear resulting from the "mob." But the PCR court is not required to agree with Counsel regarding credibility. Instead, it must make credibility determinations on its own. Indeed, under South Carolina law, the trial judge is in the best position to make credibility findings, not an appellate court. *See State v. Smith*, 383 S.C. 159, 167-168, 679 S.E.2d 176, 181 (2009) ("Clearly, the trial judge was in the best position to assess the credibility of the witnesses that testified at the hearing on the motion for a new trial."); *State v. Cutro*, 332 S.C. 100, 117, 504 S.E.2d 324, 332 (1998) ("The trial judge, not this Court, is in the best position to be arbiter of [the witness'] credibility."); *State v. Tutton*, 354 S.C. 319, 325, 580 S.E.2d 186, 190 (Ct. App. 2003) ("The determination of a witness's credibility must be left to the trial judge who saw and heard the witness and is therefore in a better position to evaluate his or her veracity."). The PCR judge was in the best position to weigh Petitioner's credibility and conclude that his claims about his heightened fear were not believable. Given this finding, there is no evidence in the record to support the dubious claim that gang membership has any relevance to Petitioner's defense.

Petitioner also takes issue with the PCR court opinion that it "does not believe Dr. Britz was any more qualified to testify as an expert on gangs in this case than was Rocky Watts." He argues this serves to attempt to overrule the findings of another trial court judge. The State strongly disagrees. The PCR court did not overrule the trial court's decision regarding Watts,

either directly or indirectly. Instead, it merely indicated disagreement with the ruling. This was not improper and had no impact on the PCR court's finding Petitioner failed to carry his burden of proof in this PCR case.

The PCR court found that Petitioner failed to prove any deficiencies on the part of Counsel and failed to prove any prejudice from any alleged deficiencies in Counsel's representation of him. Evidence supports these findings where Petitioner failed to offer probative evidence at the PCR hearing establishing the relevancy of the gang evidence Counsel sought to introduce at trial. Without the benefit of the subsequent opinion from the Court of Appeals, and in apparent contrast to the focused trial skills employed by PCR counsel at the evidentiary hearing, trial Counsel refused to tell Petitioner specifically what to say, through leading questions or otherwise, in an attempt to establish relevancy where none existed. Instead, Counsel instructed Petitioner to tell his story, but also to tell only the truth. The PCR court found this was not ineffective representation. Petitioner was able to offer, to the jury, his story of being attacked by an angry mob and his abject fear as he was being forcibly pulled from his car. Counsel was unable to establish the relevancy of labeling the angry mob a "gang" at trial, and Petitioner was similarly unable to establish the relevancy of labeling the angry mob a "gang" at the PCR hearing. As Petitioner failed to meet his burden of proof in this PCR action, his application was properly denied and dismissed with prejudice.

Strategic Decision

As an alternative sustaining ground, the PCR court's denial of relief was proper where Counsel articulated a valid trial strategy for not proffering Petitioner's testimony. Trial counsel must be given leeway to make reasonable strategic decisions. Indeed, "no particular set of

detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland*, 466 U.S. at 689. Moreover, "representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in anotheApp." *Id.* at 693. Where counsel articulates a valid strategic reason for his action or inaction, counsel's performance should not be found ineffective. *Roseboro v. State*, 317 S.C. 292, 454 S.E.2d 312 (1996); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992). "Courts must be wary of second guessing counsel's trial tactics; and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel." *Whitehead v. State*, 308 S.C. 119, 417 S.E.2d 529 (1992). In fact, *Strickland* requires extreme deference to counsel's strategic judgments that are adequately investigated. *Strickland* explains "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable. . . ." *Strickland*, 466 U.S. at 690-91.

Here, Counsel testified he strategically chose not to proffer Petitioner in regard to the gang evidence saying: "And I believe that the more I had [Petitioner] testify, the weaker he was going to get." (App.p.756). This strategy must be considered in the context of Petitioner having already testified in his own defense, where anything he said during the proffer could be additional fodder for the Solicitor to use in focusing his attack on Petitioner's credibility during closing arguments. Because Counsel articulated a valid strategic reason for his failure to proffer Petitioner testimony, his performance was properly found not to be ineffective.

CONCLUSION

For the foregoing reasons, the State respectfully submits this Court should deny the Petition for a 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

J. BENJAMIN APLIN
S.C. Bar No. 8729
Senior Assistant Deputy Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

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January 18, 2019.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas
Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2017-002002

RASHAUN JAMINE SOBERS, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

PROOF OF SERVICE

I, J. Benjamin Aplin, certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
Post Office Box 2147
Leesville, South Carolina 29070

I further certify that all parties required by Rule to be served have been served. This 18th day of January, 2019.

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General
S.C. Bar No. 7829
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
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RECEIVED
JAN 22 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO SPARTANBURG COUNTY
Court of Common Pleas

Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2017-002002

Rashaun Jamine Sobers,.....Petitioner,

v.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, J. Benjamin Aplin, certify that I have today served the within **Return to Petition for Writ of Certiorari** upon Appellant by depositing a copy of the same in interagency mail and in the United States mail, postage prepaid, addressed to:

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
Post Office Box 2147
Leesville, South Carolina 29070

This 18th day of January, 2019.

J. Benjamin Aplin
S.C. Bar # 8729
Office of Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT

ALAN WILSON
ATTORNEY GENERAL

January 18, 2019

RECEIVED
JAN 22 2019
S.C. SUPREME COURT

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

Re: **Rashaun Jamine Sobers, #342645 v. State of South Carolina**
Appellate Case No.: 2017-002002
Lower Court Case: 2014-CP-42-0640

Dear Mr. Shearouse:

Enclosed for filing please find an original and six copies of the **Return to Petition for Writ of Certiorari** in the above-captioned case.

Sincerely,

J. Benjamin Aplin
Senior Assistant Deputy Attorney General
SC Bar #8729

JBA/ck
Enclosures

cc: Tricia A. Blanchette, Esquire
Trisha Allen, Director - Victim Advocacy Division