

STATE OF SOUTH CAROLINA  
In the Supreme Court

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On Writ of Certiorari to Charleston County  
Thomas A. Russo, Post-Conviction Relief Judge

Appellate Case No. 2018-001847

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ALLEN STONE,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

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**PETITION FOR WRIT OF CERTIORARI**

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ATTORNEYS FOR PETITIONER

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## STATEMENT OF ISSUE ON CERTIORARI

I. Did the post-conviction relief court err by finding probation revocation counsel was constitutionally ineffective for failing to advise the court of the administrative hearing officer's recommendation of a one-year partial revocations; failing to advise the court that Applicant was not arrested on a felony charge while on probation; and failing to supply the court with mitigating information regarding Applicant's two arrests for failure to appear because counsel provided strategic reasons for her decisions and the allegations were directly refuted by the record?

A. Did the post-conviction relief court err by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to advise the court of the Administrative Hearing Officer's recommendation of a one-year revocation because the court refused to consider counsel's articulated strategy and this allegation is directly refuted by the record?

B. Did the post-conviction relief court err by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to advise the court that Stone had not been arrested for any felony charges while on probation because this allegation is directly refuted by the record?

C. Did the post-conviction relief court err by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to explain why Stone failed to appear in court because this allegation is directly refuted by the record?

## STATEMENT OF THE CASE

During its June 2014 term, the Charleston County Grand Jury indicted Respondent Allen Stone for second-degree burglary (violent) (2014-GS-10-03141). The charge stemmed from an incident on January 17, 2014, where law enforcement officers with the North Charleston Police Department responded to a dental office at approximately 1:30 a.m. and witnessed Stone carrying a bag containing drugs and other items from inside the dental office. Assistant Public Defender Patricia Kennedy of the Charleston County Public Defender's Office represented him. Assistant Solicitor Thomas R. Waring, II, of the Ninth Circuit Solicitor's Office prosecuted the case.

On July 15, 2014, Stone appeared in the Charleston County Court of General Sessions before the Honorable Roger M. Young, Sr., circuit court judge, and pled guilty as indicted. Judge Young sentenced Stone to fifteen years' imprisonment suspended on service of five years' imprisonment and three years of probation. Later that same day, Stone and counsel reappeared before Judge Young and requested that the plea be vacated to allow Stone time to enter a treatment program in the hope of avoiding an active term of imprisonment. Judge Young vacated the guilty plea.

On August 11, 2014, Stone again appeared in the Charleston County Court of General Sessions to enter a guilty plea, this time before the Honorable J.C. Nicholson, circuit court judge. Judge Nicholson sentenced Stone to fifteen years imprisonment suspended on the service of five years of probation, with special terms of probation to include a requirement that Stone complete the Turning Leaf outpatient program and continue medication for various mental health conditions. Stone did not appeal his conviction.

On July 26, 2016, Stone appeared in the Charleston County Court of General Sessions

before Honorable Kristi L. Harrington, circuit court judge, for a probation violation hearing. Assistant Public Defender Kelly Solar of the Charleston County Public Defender's Office represented Stone. Probation Agent Keisha Holmes of the South Carolina Department of Probation, Parole, and Pardon Services (SCDPPPS) appeared on behalf of the State. Agent Holmes informed the court that Stone had failed to report since December 2015, changed his address without notifying his probation agent, failed to provide proof of employment, and was arrested eight times ("One by Hanahan Police Department on February 8th of 2015, for violating town ordinance. He was also arrested on June 30th for public disorderly conduct. He was arrested again on July 8th of 2015 for public drunk; on July 20th of 2015, for failure to appear for court; November 13th of 2015, for burglary third charge, which he was originally arrested for back in October 11th of 2013. He was also arrested on November 15th of 2015, for failure to appear as well; and an open container on March 20th of 2016.") (App. 53-54). Agent Holmes informed the court "the agent is recommending a revocation and terminate" along with credit for time served. (App. 54). Stone responded to the court that he had violated his probation. (App. 54, 56). In mitigation, counsel Solar informed the court that Stone had stopped reporting (and presumably failed to update his address) because he was homeless and living in Tent City downtown. (App. 54). She also informed the court that Stone had physical and mental health problems, as well as alcohol dependency. (App. 54). She also informed the court that Stone was seeking treatment for substance abuse. (App. 55-56). She also highlighted to the court that Stone did not owe any restitution and believed he could successfully fulfill the requirements of probation if given the chance. (App. 56). Stone addressed the court and stated he knew he was in violation of the terms of his probation and that he needed help for mental health and substance abuse issues. (App. 57). Agent Holmes informed the court that Stone would traditionally be a

“perfect candidate” for mental health court, but was not eligible based on the charge. (App. 58-59). Agent Holmes also informed the court that Stone did complete the Turning Leaf program. (App. 59). Thereafter, Judge Harrington revoked Stone’s probation in full. (App. 59).

Counsel Solar filed a timely motion to reconsider the probation revocation, and, on December 5, 2016, the parties reappeared before Judge Harrington for a hearing on this motion. Stone was again represented by counsel Solar and Agent Holmes appeared on behalf of SCDPPPS. At the hearing, counsel Solar presented the court with an affidavit from the victim stating he did not oppose a reduction of the sentence if Stone received treatment for his alcohol dependency. (App. 64). She also highlighted that SCDPPPS did not oppose the reduction and the original recommendation was a one-year revocation with credit for time served and continued probation. (App. 65). Stone highlighted to the court that he did not commit any felonies while on probation, but did acknowledge he had been arrested numerous times while on probation for a variety of offenses. (App. 65-66). Agent Holmes responded that Stone was arrested eight times while on supervision. (App. 67-68). Counsel Solar then reminded the court for a third time that the SCDPPPS hearing officer had only recommended one year of revocation. (App. 68). The court took the matter under advisement and ultimately denied the motion for reconsideration.

On February 22, 2017, Stone filed an application for post-conviction relief, alleging ineffective assistance of plea counsel and probation revocation counsel. On August 7, 2017, the State served its return, requesting an evidentiary hearing on Stone’s claims of ineffective assistance of probation revocation counsel and moving for summary dismissal of his claims of ineffective assistance of plea counsel because the application was filed beyond the one year statute of limitations as set forth in S.C. Code Ann. § 17-27-45.

An evidentiary hearing was convened in the Charleston County Court of Common Pleas

on March 1, 2018, before the Honorable Thomas A. Russo, circuit court judge.<sup>1</sup> Stone was present at the hearing and represented by James K. Falk, Esquire. The State was represented by then-Assistant Attorney General Rasheeda N. Cleveland. At the start of the hearing, Stone acknowledged his allegations of ineffective assistance of plea counsel were untimely and he did not intend to proceed forward on those grounds.

Stone and his former counsel Solar both testified. At the conclusion of the hearing, this Court orally granted relief, finding counsel Solar was ineffective in her handling of Stone's probation revocation and granted Stone a new probation revocation hearing. The court requested Stone draft a proposed order. By written order filed June 25, 2018, the post-conviction relief court granted the post-conviction relief, vacated the revocation of Stone's probation, and remanded the matter to the Charleston County Court of General Sessions for a probation revocation hearing before a different circuit court judge, finding probation revocation counsel was ineffective for failing to advise the Court of the administrative hearing officer's recommendation of a one year partial revocations; failing to advise the court that Stone was not arrested on a felony charge while on probation; and failing to supply the court with mitigating information regarding Stone's two arrests for failure to appear. The State received copy of the order on June 27, 2018, and on July 9, 2018, filed its motion to reconsider the grant of post-conviction relief pursuant to Rule 59(e), SCRPC, arguing the post-conviction relief court erred in refusing to consider counsel's articulated strategic decisions and ignored the lower court record that directly refuted these allegations. On October 1, 2018, the post-conviction relief court issued a summary order denying the motion without a hearing.

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<sup>1</sup> The order granting relief erroneously lists the hearing date as "during the January 29, 2018 PCR term of court for the 9<sup>th</sup> Circuit." The Honorable Maite Murphy presided over this term and Applicant's case did not proceed forward.

## STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). On appellate review, courts defer to a post-conviction relief court's findings of fact and will uphold them if there is any evidence in the record to support them. Id. at 180-81, 810 S.E.2d at 839-40 (citing Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); Jordan v. State, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). However, pure questions of law will be reviewed *de novo* without deference to the lower court. Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

## ARGUMENT

- I. **The post-conviction relief court erred by finding probation revocation counsel was constitutionally ineffective for failing to advise the court of the administrative hearing officer's recommendation of a one-year partial revocations; failing to advise the court that Stone was not arrested on a felony charge while on probation; and failing to supply the court with mitigating information regarding Stone's two arrests for failure to appear because counsel provided strategic reasons for her decisions and the allegations were directly refuted by the record.**

In granting relief, the post-conviction relief court found probation revocation counsel was constitutionally ineffective for: (1) failing to advise the court of the administrative hearing officer's recommendation of a one year partial revocations; (2) failing to advise the court that Stone was not arrested on a felony charge while on probation; and (3) failing to supply the court with mitigating information regarding Applicant's two arrests for failure to appear. Certiorari is proper to review this finding because the post-conviction relief court ignored counsel's strategic basis for her decisions and disregarded evidence in the record that directly refuted the grounds on which relief was granted. In light of a review of the record in its entirety, the post-conviction relief court erred by determining counsel was constitutionally ineffective and granting Stone a new probation revocation hearing. This Court should grant certiorari and ultimately reverse the post-conviction relief court's grant of relief.

In the present case, Stone had the burden of proving the allegations in his application. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1(e), SCRPC. "In South Carolina . . . all persons charged with probation violations have a right to counsel and must be informed of this right pursuant to court rules and case law." Turner v. State, 384 S.C. 451, 454, 682 S.E.2d 792, 793 (2009) (citing Barlet v. State, 288 S.C. 481, 483, 343 S.E.2d 620, 621 (1986); Rule 602(a), SCACR). Although a probationer does not have a Sixth Amendment right to counsel, the same traditional Strickland

standard applies, requiring an applicant asserting his probation revocation counsel was ineffective to establish both that counsel's performance was deficient and that he was prejudiced by this deficiency. Turner, 384 S.C. at 455, 682 S.E.2d at 794 ("We now hold that because a probationer has a right to counsel, albeit not a Sixth Amendment right, the same analysis for ineffectiveness that applies in other PCR proceedings involving claims against counsel should, by analogy, apply in PCR proceedings involving claims against probation counsel."). Under Strickland, an applicant must first prove that counsel's performance was deficient as measured by its "reasonableness under professional norms." Id. Second, an applicant must establish that counsel's deficient performance 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.

As explained in Strickland,

Judicial scrutiny of counsel's performance must be highly deferential. 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. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

466 U.S. at 689 (citations omitted). Therefore, counsel's strategic decisions will not be found to be deficient performance if he or she articulates a valid reason for employing the strategy. E.g.,

Stone v. State, 419 S.C. 370, 384, 798 S.E.2d 561, 569 (2017); Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

In its Order of Dismissal, the post-conviction relief court found probation revocation counsel was ineffective in three distinct ways: first, for failing to advise the court of the administrative hearing officer's recommendation of a one year partial revocations; second, for failing to advise the court that Stone was not arrested for a felony charge while on probation; and third, for failing to supply the court with mitigating information regarding Stone's two arrests for failure to appear.

These findings are based on numerous legal and factual errors. This Court should grant certiorari and ultimately reverse the grant of post-conviction relief.

- A. The post-conviction relief court erred by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to advise the court of the Administrative Hearing Officer's recommendation of a one-year revocation because the court refused to consider counsel's articulated strategy and this allegation is directly refuted by the record.**

In its order granting relief, the post-conviction relief court found, "Attorney Solar failed to advise the Court at Applicant's probation revocation hearing that the administrative Hearing Officer recommended a partial one year revocation and that Applicant thereafter continue on probation. At the July 26, 2016 hearing, Agent Holmes of South Carolina's Office of Probation, Parole and Pardon advised the Court that *the agent is recommending a revocation and terminate*. (July 26, 2018 transcript p. 3 1. 6-7). Neither Agent Holmes nor Attorney Solar advised the Court of the Hearing Officer's substantially more lenient recommendation." (App. 201) (emphasis in original).

This ruling is legally erroneous because it fails to consider the reasonable strategic decision made by counsel at Stone's request. At the evidentiary hearing, counsel Solar testified Stone specifically asked her not to inform the court of the Administrative Hearing Officer's recommendation because he was hoping for a time served sentence rather than the one year of active incarceration as was recommended by the Administrative Hearing Officer. Counsel Solar testified:

I did not -- I didn't intentionally -- I did not tell her that for two reasons. No. 1, she gets all the paperwork in front of her so she gets a copy of the administrative hearing summary. The reason I think that I would not have mentioned is because we were not asking for a year. We were asking for just a continuation of probation. He did not want to -- I asked him would you be willing to say we have agreed upon the year. **He said no, see if we can get less than a year.** Time served and continue. So I didn't necessarily want the year so I didn't mention it. But it was right there in front of her. She had the paperwork in front of her and when you give a probation violation, the packet you get, the violation report, the administrative hearing summary, the judge also get records. So it was there in front of her. But I didn't tell her that.

(App. 164-65).

That's why I wouldn't -- didn't necessarily mention it. Because if we were agreeing to a year I would tell the judge, Judge, the recommendation is one year. We are in agreement, everybody is in agreement and we would ask that you go along with it. I didn't necessarily mention it because we were asking for a continuance, just to have his probation continued. In addition, she has the recommendation in front of her. It's not that she wouldn't have known it. Obviously the judge would have looked through the violation report and the administrative hearing. It is right in front of her so she would have had that recommendation.

(App. 170).

In granting relief, the post-conviction relief court erroneously failed to account for counsel's reasonable trial strategic decision in not informing the court of this recommendation—her strategy was to try to avoid **any** term of imprisonment for Stone. “A PCR court’s analysis of counsel’s strategic decisions must be ‘highly deferential to counsel’s judgment, and “a fair

assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Buckson v. State, 423 S.C. 313, 320-21, 815 S.E.2d 436, 440 (2018) (citing Strickland) (internal citations and quotations omitted). By failing to consider counsel's reasonable trial strategy, the post-conviction relief court erred as a matter of law.

Moreover, the post-conviction relief court's finding that counsel was constitutionally ineffective is also incongruent with the record before the Court that directly refutes this allegation. As counsel Solar mentioned numerous times at the evidentiary hearing, Judge Harrington had a full copy of Stone's records, including the administrative hearing report that recommended terminating one year and continuing with probation. At the December 5, 2016, motion to reconsider hearing, counsel informed the court **three** times that the Administrative Hearing Officer only recommended one year of revocation. (App. 65, 68). The post-conviction relief court erroneously ignored the transcript of the motion to reconsider hearing. See Suber v. State, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007) ("In determining guilty plea issues, it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing."). The post-conviction relief court's finding counsel was constitutionally ineffective for failing to inform the court of the Administrative Hearing Officer's recommendation is not supported by the full record which establishes that counsel did so inform the court numerous times. Additionally, Stone cannot establish any resulting prejudice, as the court was made aware of this multiple times at the subsequent motion to reconsider hearing and the result of the proceeding was the same—revocation in full. Accordingly, the post-conviction relief court erred in granting relief.

**B. The post-conviction relief court erred by granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to advise the court that Stone had not been arrested for any felony charges while on probation because this allegation is directly refuted by the record.**

In its order granting relief, the post-conviction relief court found, “Attorney Solar was ineffective for failing to clarify to the Court that Applicant was not arrested for on a felony charge while he was on probation.” (App. 201). This ruling is erroneous, as a clear reading of the unambiguous transcript from the July 26, 2016, establishes the court was aware Stone was originally arrested for third-degree burglary on October 11, 2013—ten months before he was placed on probation. (App. 53-54). Because the court was correctly advised that the original arrest occurred well before Stone was on probation, counsel cannot be deemed deficient for failing to advise the court of something of which it was already aware. Additionally, Stone cannot establish prejudice, as there is no reasonable probability the outcome would have been different because the court was already aware the third-degree burglary arrest was based on conduct occurring before he was placed on probation.

Moreover, counsel highlighted to the court during the December 5, 2016, motion to reconsider hearing that Stone was not arrested for any felonies while on probation. (App. 65-66). Again, the post-conviction relief court overlooked or ignored this in granting relief. Because counsel did, in fact, remind the court that Stone was not arrested for any felonies while on probation, her performance cannot be deemed deficient for failing to do something she actually did do. Moreover, Stone cannot establish any resulting prejudice, as the court was made aware of this at the subsequent motion to reconsider hearing and the result of the proceeding was the same—revocation in full. Accordingly, the post-conviction relief court erred in granting relief.

**C. The post-conviction relief court erred in granting relief where Stone failed to establish probation revocation counsel was constitutionally ineffective for failing to explain why Stone failed to appear in court where this allegation is directly refuted by the record.**

In its order granting relief, the post-conviction relief court found, “Attorney Solar also failed to provide the Court with an explanation of why Applicant failed to appear in Court on the two occasions leading to his arrest on those charges. The Court is satisfied that Applicant’s failure to appear was the result of either his incarceration on other charges or his hospital admissions related to his alcoholism.” (App. 202). This ruling is erroneous as it is conclusively refuted by the record. During the July 26, 2016, probation revocation hearing, counsel informed the court that Stone had stopped reporting (and presumably failed to update his address) because he was homeless and living in Tent City downtown. (App. 54). She also informed the court that Stone had physical and mental health problems, as well as alcohol dependency, and had been in and out of treatment and the hospital. (App. 54-56). As the record conclusively refutes this allegation, the post-conviction relief court’s ruling to the contrary is erroneous and not supported by any evidence of probative value. Accordingly, the post-conviction relief court erred in granting relief.

## CONCLUSION

In conclusion, the post-conviction relief court erred by granting relief because it ignored counsel's strategic decision and the record directly refutes the allegations. For all the foregoing reasons, the State requests that this Court grant this petition for writ of certiorari and reverse the post-conviction relief court's grant of relief.

Respectfully submitted,

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2/7, 2019

STATE OF SOUTH CAROLINA  
In the Supreme Court

On Writ of Certiorari to Charleston County  
Thomas A. Russo, Post-Conviction Relief Judge

Appellate Case No. 2018-001847

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S.C. SUPREME COURT

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THE STATE OF SOUTH CAROLINA,

Petitioner.

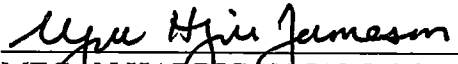
**PROOF OF SERVICE**

I, Megan Harrigan Jameson, certify that I have served the within Petition for Writ of Certiorari and Appendix on Respondent by depositing two copies of the same interagency mail to be delivered to the address below on today's date:

Chief Appellate Defender Robert Dudek  
S.C. Comm. on Indigent Defense – Division of Appellate Defense  
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I further certify that all parties required by Rule to be served have been served.

This 7<sup>th</sup> day of Feb., 2019.

  
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RECEIVED

FEB 07 2019

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

February 7, 2019

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

Re: Allen Stone v. State – Appellate Case No. 2018-001847

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the Petition for a Writ of Certiorari and Appendix, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Megan Harrigan Jameson  
Senior Assistant Deputy Attorney General  
S.C. Bar No. 100108

MHJ/  
Enclosures

cc: Appellate Defender Robert Dudek  
Victim Advocacy Services