STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2018-000854

Tyrone DeShawn Davis,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S QUESTION PRESENTED

Did the post-conviction relief court correctly find Counsel was not constitutionally ineffective where Counsel articulated a reasonable trial strategy for declining the trial court's offer of a curative instruction, even though it rendered his objection to the solicitor's testimony regarding the previous use of the CI unpreserved for appellate review, because Petitioner was not reasonably likely to prevail on the issue on appeal?

STATEMENT OF THE CASE

Tyrone DeShawn Davis (Petitioner) is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Marion County Clerk of Court. In November 2008, the Marion County Grand Jury indicted Petitioner for distribution of cocaine base and distribution of cocaine base within the proximity of a school or park (2008-GS-33-291). Jack W. Lawson, Jr., Esquire, (Counsel) represented Petitioner. On November 12, 2009, Petitioner was tried in his absence before the Honorable William H. Seals, Jr., and a jury. On November 13, 2009, the jury found Petitioner guilty as indicted, and Judge Seals issued a sealed sentence. On February 22, 2010, Petitioner was brought before the court, and Judge Seals pronounced concurrent sentences of twenty years for distribution of cocaine base and fifteen years for distribution of cocaine base within the proximity of a school or park.

Petitioner filed a timely notice of appeal, and Wanda H. Carter, Esquire, (Appellate Counsel) of the South Carolina Commission on Indigent Defense - Appellate Defense Division perfected the appeal. The South Carolina Court of Appeals found the sole issue raised was not preserved and affirmed Petitioner's conviction on May 9, 2012. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012). The remittitur was returned to the circuit court on May 25, 2012.

Petitioner then filed an application for post-conviction relief (PCR) on August 17, 2012.[1] Respondent made its return on or about April 24, 2014. An evidentiary hearing into the matter was convened on March 16, 2017, at the Florence County Courthouse. Tristan Shaffer, Esquire, represented Petitioner. Lindsey A. McCallister, Esquire, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Petitioner testified on his own behalf. Counsel did

[1] Respondent did not receive Petitioner's application until September 24, 2013.

not testify, as he is now deceased. However, Appellate Counsel testified via telephone. After hearing testimony and the arguments of counsel, the Court requested post-trial briefs on the issue of whether refusing a curative instruction at the expense of preserving an issue for appellate review can be a valid trial strategy. The Court then issued an order denying relief and dismissing the action with prejudice on March 23, 2018.

Petitioner filed a timely notice of appeal from the denial of his application for relief. Through appellate counsel, Petitioner filed a Petition for a Writ of Certiorari on January 7, 2019. This Return to the Petition for a Writ of Certiorari follows.

STATEMENT OF THE FACTS

Petitioner's charges arose out of a controlled drug buy which was captured on video by a confidential informant (CI). The CI testified at trial about the transaction and asserted Petitioner was the person on the video who sold her the crack. App. pp. 104-06, 108. The video was admitted into evidence. App. p. 55. It appears from the record Petitioner is identifiable on the video, and his identity was not contested at trial. App. pp. 59, 78-79, 102-03, 105.

The State also called Lieutenant Bryan Wallace, one of the officers who helped conduct the controlled buy. App. pp. 88-89. During redirect, the solicitor asked the officer whether the CI had previously testified in court for Counsel during Counsel's time working a prosecutor. App. p. 95. At the end of the solicitor's redirect questioning, Counsel made a motion for a mistrial on the basis of improper bolstering. App. pp. 96-97. The trial judge "overruled" the objection (i.e. the motion for a mistrial), but offered to give a curative instruction anyway. App. pp. 97-98. Counsel refused the curative instruction several times, stating, "[I]f you're overruling the objection, I'm not sure a curative instruction would cause more problems.... I would rather not have a curative instruction if the objection is overruled." App. p. 98. The denial of Counsel's motion for a mistrial was the only issue raised on direct appeal, and the Court of Appeals found Counsel waived the objection when he refused the curative instruction. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012).

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 (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, 810 S.E.2d at 839. (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. Id. 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).

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; 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). When an applicant alleges ineffective assistance of counsel as a ground for relief, he or she must prove "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813. 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). The applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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." Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

ARGUMENT

The post-conviction relief court correctly found Counsel was not constitutionally ineffective where Counsel articulated a reasonable trial strategy for declining the trial court's offer of a curative instruction, even though it rendered his objection to the solicitor's testimony regarding the previous use of the CI unpreserved for appellate review.

Petitioner alleges Counsel provided ineffective assistance because he waived his objection to the solicitor's bolstering of the CI by refusing a curative instruction and rendering the issue unpreserved for appeal. However, Counsel articulated a reasonable trial strategy for declining the curative instruction and Petitioner was not reasonably likely to prevail on this issue on appeal, so Counsel was not constitutionally ineffective. This Court should therefore deny certiorari and affirm the PCR court's decision.

A. Because Counsel articulated a reasonable trial strategy for rejecting the curative instruction, the PCR court correctly found he was not constitutionally ineffective.

During redirect of the officer in charge of setting up the controlled drug buy, the solicitor asked the officer if he knew whether the CI had previously testified in court for Counsel during Counsel's time working a prosecutor. App. p. 95. At the end of the solicitor's redirect questioning, Counsel objected and made a motion for a mistrial on the basis of improper bolstering. App. pp. 96-97. The trial judge stated he was overruling the objection, and Counsel responded, "[I]f you're overruling the objection, I'm not sure a curative instruction would cause more problems. . . . I would rather not have a curative instruction if the objection is overruled." App. p. 98. The Court of Appeals found the issue was not preserved because Counsel refused the curative instruction, not based on the timing of the objection. State v. Davis, Op. No. 2012-UP-289 (S.C. Ct. App. filed May 9, 2012).

Because trial counsel was deceased at the time of the evidentiary hearing, and there was no testimony regarding trial counsel's strategy in this case, the PCR court had to rely on the record in

making its determination of this issue. The PCR court appropriately presumed trial counsel acted reasonably in his refusal of the curative instruction. "Counsel's performance is accorded a favorable presumption, and a reviewing court proceeds from the rebuttable presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" Strickland, 466 U.S. at 690. There is a strong presumption trial counsel's decisions are based on tactical strategy rather than neglect, and "[t]hat presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive.'" Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (quoting Massaro v. United States, 538 U.S. 500 (2003)).

In this case, the trial judge's ruling is confusing because he offered to give a curative instruction and directed the solicitor not to pursue the line of questioning further, indicating he had sustained Counsel's objection to the testimony. However, the judge also repeatedly said he was *overruling* the objection (which was framed as a motion for a mistrial), in which case there would be no need for a curative instruction or further objection. See State v. Wilson, 389 S.C. 579, 583–84, 698 S.E.2d 862, 864 (Ct. App. 2010) ("When an objecting party is *sustained*, the trial court has rendered a favorable ruling, and therefore, it becomes necessary that the sustained party move to cure, or move for a mistrial if such a cure is insufficient, in order to create an appealable issue. . . . On the other hand, when an objection has been *overruled*, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error.") (internal citations omitted) (first emphasis added). Counsel responded to the trial court's offer of a curative instruction, saying "if you're overruling the objection, I'm not sure a curative instruction would

case more problems. . . . I would rather not have a curative instruction if the objection is overruled." App. p. 98.

Regardless of whether Counsel thought the trial court was overruling his objection or sustaining it, refusing a curative instruction was a reasonable trial strategy in this situation. In interpreting the Strickland standard discussed above, this Court has repeatedly held "when counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Smith v. State, 386 S.C. 562, 567, 689 S.E.2d 629, 632 (2010) (citing Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000)). See also Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992) (holding where counsel articulates valid reasons for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel); Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (holding counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy). Counsel's strategy is reviewed under "an objective standard of reasonableness." Magazine v. State, 361 S.C. 610, 617, 606 S.E.2d 761, 764 (2004). "The United States Supreme Court has cautioned that 'every effort be made to eliminate the distorting effects of hindsight' and evaluate counsel's decisions at the time they were made. Accordingly, we must be wary of second-guessing trial counsel's tactics." Edwards v. State, 392 S.C. 449, 456–57, 710 S.E.2d 60, 64 (2011) (quoting Strickland, 466 U.S. at 689).[2]

[2] Petitioner argues Counsel's decision to forego the curative instruction was unreasonable because the solicitor continued to bolster the CI's credibility throughout trial, most notably during closing arguments. PWC p. 8. This argument was never raised to the PCR court. Petitioner focused solely on this particular objection and Counsel's decision to decline the curative instruction. Petitioner never raised other instances of bolstering in the trial. Counsel, for his part, had no way of knowing how the rest of the trial would unfold at the time he had to decide whether to accept the curative instruction. So not only is Petitioner's argument in this regard not preserved because it was not raised below, it is also an unfair application of the Strickland standard. See, e.g., Thornes v. State,

Strickland itself recites that there are countless ways to provide effective assistance and even the best lawyers would not defend a particular client in the same way. 466 U.S. at 689. While some attorneys may have accepted the trial judge's offer of a curative instruction, Counsel's decision not to do so was not unreasonable. Petitioner argues Counsel could not have had any reasonable trial strategy in mind because the law assumes a curative instruction corrects any error. PWC p. 9. However, this issue has been squarely addressed in post-conviction relief, and this Court found refusing a curative instruction to be a reasonable trial strategy.

In Caprood v. State, this Court reversed the PCR court's finding that trial counsel was ineffective for failing to move to strike or request limiting instructions after his objection to hearsay was sustained. 338 S.C. 103, 108-09, 525 S.E.2d 514, 516-17 (2000). During the evidentiary hearing, trial counsel testified he did not request curative instructions "as a trial strategy... because they tend to bring into focus precisely the item the objector has kept out." Id. at 110, 525 S.E.2d at 517. This Court held because trial counsel "articulated a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." Id.; see also Deck v. State, 381 S.W.3d 339, 356 (Mo. 2012) ("In many instances, seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. It is feared that frequent objections irritate the jury and highlight the statements complained of, resulting in more harm than good.").

Here, Counsel gave nearly identical reasoning for declining the curative instruction – because he felt it would do more harm than good. App. p. 98. Thus, just as in Caprood, Counsel believed a curative instruction would draw attention to an issue he did not want to highlight further,

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310 S.C. 306, 309-10, 426 S.E.2d 764, 765 (1993) ("This Court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of the trial.").

which suggests this was a strategic choice, rather than simply neglect. Counsel's decision to forego a curative instruction was a reasonable trial strategy which precludes a finding his performance was deficient. Because Counsel was not deficient, he cannot be constitutionally ineffective, and this Court should deny Petitioner's request for certiorari on this issue.

B. Petitioner was not prejudiced by Counsel's decision to decline the curative instruction, even though it rendered the issue unpreserved for appeal, because Petitioner was not reasonably likely to prevail on this issue upon appellate review.

This Court has previously held an issue raised on direct appeal but found to be unpreserved may be raised in the context of a post-conviction relief claim alleging ineffective assistance of counsel. McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 47 (2013) (citing McLaughlin v. State, 352 S.C. 476, 575 S.E.2d 841 (2003); Foye v. State, 335 S.C. 586, 518 S.E.2d 265 (1999)). However, to be entitled to relief on such a claim, an applicant must establish the underlying claim is meritorious and would have resulted in a reversal on appeal to a reasonable probability. McHam, 404 S.C. at 475–76, 746 S.E.2d at 47 ("Since the Fourth Amendment issue was not considered on direct appeal because it was unpreserved, an examination of the merits of the issue is appropriate in analyzing the prejudice prong in McHam's PCR claim.") Therefore, for Petitioner to prevail on a claim of ineffective assistance of trial counsel for failing to preserve a ground for appellate review, the reviewing court must determine the underlying claim was meritorious and there was a reasonable probability it would have resulted in reversal and a new trial.

On appeal, Petitioner would have to meet the high bar of showing the Court's denial of the motion for a mistrial amounted to an abuse of discretion. "The decision to grant or deny a motion for a mistrial is a matter within the sound discretion of the trial judge, whose decision will not be disturbed on appeal absent an abuse of discretion amounting to an error of law. A mistrial should be granted only when absolutely necessary. Further, before a defendant may receive a mistrial, he

or she must show both error and resulting prejudice." State v. McEachern, 399 S.C. 125, 145-46, 731 S.E.2d 604, 614 (Ct. App. 2012) (internal citations omitted). "The power of the court to declare a mistrial ought to be used with the greatest caution and for plain and obvious causes stated into the record by the trial judge. The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Kelsey, 331 S.C. 50, 69-70, 502 S.E.2d 63, 73 (1998) (internal citations omitted).

Although the question asked by the solicitor was objectionable, improper bolstering constitutes reversible error only if Petitioner was unfairly prejudiced. Vaughn v. State, 362 S.C. 163, 171 n. 3, 607 S.E.2d 72, 76 n. 3 (2004) (In deciding the prejudice prong of a PCR action, the PCR court "is to examine the same factors as those analyzed in deciding on direct appeal whether a similar error is harmless beyond a reasonable doubt."). While the CI's credibility was at issue in Petitioner's trial, the jury also had the benefit of independent, direct evidence – the video and audio recordings of the drug transaction – which they could use to evaluate the CI's veracity and determine Petitioner's guilt. See, e.g., Brown v. State, 383 S.C. 506, 680 S.E.2d 909 (2009) (finding no prejudice from solicitor's improper closing argument where there was other direct evidence of defendant's guilt).

In addition, in order for Counsel to preserve this claim for appellate review, he would have been required to accept the trial court's offer of a curative instruction. Wilson, 389 S.C. at 583–84, 698 at 864. Here, in responding to Counsel's motion, the trial judge stated, "[q]uite frankly, I didn't hardly catch, I imagine most of the jury didn't catch it, but I'll give them a curative instruction." App. p. 98. The trial court clearly felt the reference was fleeting and did not inject such unfairness as to render Petitioner's trial constitutionally deficient, although the court offered

to instruct the jury to disregard the remarks. "Generally, a curative instruction to disregard the testimony is deemed to have cured any alleged error." State v. Herring, 387 S.C. 201, 216, 692 S.E.2d 490, 498 (2009). Thus, on appeal, if Counsel had preserved his objection, Petitioner would have to argue against a presumption the curative instruction had cured the error complained of.

Because Petitioner has failed to meet his burden of proving prejudice resulting from Counsel's decision to decline the curative instruction, this Court should deny certiorari and affirm the PCR court's denial of relief.

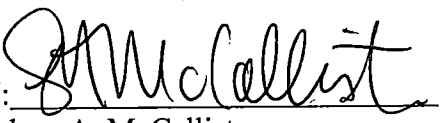
CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR court's finding Counsel was not constitutionally ineffective where Counsel articulated a reasonable trial strategy for declining the trial court's offer of a curative instruction, even though it rendered his objection to the solicitor's testimony regarding the previous use of the CI unpreserved for appellate review. Should this Court grant certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

ALAN WILSON
Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

BY: 
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ATTORNEYS FOR RESPONDENT

5/24, 2019

STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO FLORENCE COUNTY
Court of Common Pleas

The Honorable Paul M. Burch, Circuit Court Judge

Appellate Case No. 2018-000854

Tyrone DeShawn Davis,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the **Return to Petition for Writ of Certiorari**, has been served upon opposing counsel by hand delivering (2) copies addressed to:

Victor R. Seeger, Esquire
S.C. Commission on Indigent Defense
Post Office Box 11589
Columbia, South Carolina 29211

This 24th day of May, 2019

KASEY KNOX
Legal Assistant

ALAN WILSON
ATTORNEY GENERAL

RECEIVED
MAY 24 2019
S.C. SUPREME COURT

May 24, 2019

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

Re: **Tyrone DeShawn Davis v. State of South Carolina**
Appellate Case No. 2018-000854
Lower Court Case No. 2012-CP-33-590

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the Return to Petition for Writ of Certiorari. By copy of this letter we are serving opposing counsel today.

Sincerely,

Lindsey A. McCallister
Assistant Attorney General
SC Bar No. 79054

LAM/kk
Enclosures

cc: Victor R. Seeger, Esquire (2 copies)