ALAN WILSON
ATTORNEY GENERAL

RECEIVED
SEP 09 2019
S.C. SUPREME COURT

September 9, 2019

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

RE: Joey Clark v. State of South Carolina
Appellate Case No.: 2018-001627

Dear Mr. Shearouse:

Enclosed please find the original and six copies of the **Return to Petition for Writ of Certiorari** in the above matter for filing. Please let me know if anything additional is needed.

Sincerely,

Johnny E. James, Jr.
Assistant Attorney General
S.C. Bar # 101260

JEJ/my
Enclosures

cc: Katherine H. Hudgins, Esquire
Victim Advocacy Division

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas
Grace Gilchrist Knie, Circuit Court Judge

Appellate Case No. 2018-001627

Joey Clark,

Petitioner,

v.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S ISSUE PRESENTED

Did the PCR judge err in refusing to find trial counsel ineffective for asking the investigator about statements made by five jail house snitches, who did not testify at trial, claiming that Petitioner confessed to killing the deceased and then not objecting when the State moved to introduce the written copies of the statements because these decisions by trial counsel cannot be part of a valid, treasonable trial strategy and resulted in prejudice?

RESPONDENT'S ISSUE PRESENTED

Did the PCR judge properly deny post-conviction relief where trial counsel strategically drew the sting of five jailhouse informants to first expose to the jury potentially harmful evidence of adverse statements made by Petitioner through a State's witness who was ill-equipped to respond on cross-examination, such that the State thereafter declined to call the inmates in favor of focusing on other aspects of its case against Petitioner?

STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. Petitioner was indicted at the November 2013 term of the Cherokee County Grand Jury for murder (2013-GS-11-01167). H. Chase Harbin, Esq. represented Petitioner. Kimberly L. Leskanic and Jennifer A.J. Jordan, Esqs., of the Seventh Circuit Solicitor's Office, prosecuted the case. On March 17, 2014, Petitioner proceeded to trial before the Honorable Howard P. King and a jury. The jury found Petitioner guilty as indicted on March 20, 2014. Judge King sentenced Petitioner to imprisonment for a term of 45 years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak, Esq., filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which offered the following issue:

> Whether the trial court erred in failing to give a correct and complete jury instruction on circumstantial evidence?

The South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Clark, Op. No. 2015-UP-433 (S.C. Ct. App. filed Aug. 19, 2015). The Remittitur was issued on September 9, 2015.

Petitioner filed his application for post-conviction relief on July 20, 2016 (2016-CP-11-00509). He alleged the following grounds for relief in his application, (summarized and excerpted):

1. Ineffective Assistance of Counsel
    a. Counsel's cross examination of Detective Burgess "sabotaged any chance that [Applicant] had in getting a fair trial."
    b. Counsel's "closing argument reinforced the jury's impression that [Applicant] had confessed to the murder of [the victim]."
    c. Counsel failed to move to suppress or object to inmate statements being admitted into evidence.
    d. Allowed inadmissible hearsay statements to be admitted during the trial.

e. "[Counsel's] failure to object left [Applicant's] direct appeal attorney no alternative other than to file an Anders brief because no issues were preserved for appellate review."
f. Counsel failed to request a directed verdict.
g. Counsel failed to object to State's improper closing argument.
h. "[Counsel] failed to either request that the State test the fingernail clippings or request funding from the State to have the clippings DNA tested."
i. Counsel "failed to either request that the State DNA test the cigar butts or request funding from the State to have the cigar butts tested."
j. Counsel failed to call a DNA expert to testify.
k. Counsel failed to develop trial strategy or adequately communicate to Applicant the theory of defense.
l. Counsel "failed to request that Judge King add voluntary murder as a lesser included charge to the substantive law, as well as adding voluntary manslaughter, guilty or not guilty, to the verdict form."
m. Counsel failed to present any evidence of manslaughter/heat of passion.
n. Counsel offered improper advice to Applicant "about whether to accept or reject the State's voluntary murder plea offer."
o. Counsel mailed Applicant a letter advising him of the plea offer, but Applicant never received the letter and never discussed the plea offer with Counsel.
p. Counsel failed to request a pre-trial hearing to determine whether sufficient probable caused existed to arrest Applicant for murder.
q. Counsel failed to object to the jury charge that malice could be implied by the use of a deadly weapon.
r. Counsel failed to renew his request to withdraw after Judge Kelly refused his initial request to withdraw, even after receiving a threat of great bodily harm from Applicant.
s. Counsel failed to put on a defense in order to have the last closing argument.
t. Counsel failed to request a mistrial.
u. Counsel failed to object to the excessive use of graphic pictures that went beyond and were not necessary for the proof of the State's case.
v. Counsel failed to request a change of venue based on the highly publicized murder in Cherokee County.
w. Counsel failed to retain a "expert witness soil scientist" to compare and analyze the red dirt found on the victim's body.
x. Counsel failed to request sequestration of the State's witnesses.
y. Counsel failed to request a jury view of the crime scene.
z. Counsel failed to investigate or present mitigating evidence.
aa. Counsel failed to strike juror who Applicant claims was present during his polygraph examination.

2. Prosecutorial Misconduct
   a. "The Assistant Solicitor committed prosecutorial misconduct when she impermissibly bolstered and impermissibly vouched for the credibility of

the crime scene investigators and again told the jury that [Applicant] confessed."

b. "The State committed prosecutorial misconduct when it impermissibly allowed Detective Burgess to read the inmate statements into evidence.
c. "The State also committed prosecutorial misconduct in its closing argument when it impermissibly referenced the statements of the inmates, as well as, impermissibly bolstering the credibility of the State's investigators and offering improper state of mind speculations regarding [Applicant's] reasons about why he would cooperate with the police investigators. [Assistant Solicitor] Leskanic offered no foundational support for these improper state of mind speculations."
d. "The State committed prosecutorial misconduct when it failed to perform DNA testing of fingernail clippings found underneath the fingernails of the victim."
e. "The State committed prosecutorial misconduct when it failed to perform DNA testing of cigar butts found in the yard at the victim's house, even though neither [Applicant], nor the victim and residents of the house smoked cigars."

3. The trial transcript does not reflect the actual order of testimony of the State's witnesses.

Respondent made its return on May 16, 2017, and an evidentiary hearing into the matter was convened on June 19-21, 2018, before the Honorable Grace Gilchrist Knie. Petitioner was present at the hearing and represented by Joel F. Stroud, Esq. Megan H. Jameson and Jordan A. Cox, Esqs., of the South Carolina Attorney General's Office, represented Respondent. By written order dated August 24, 2018, and filed August 29, 2018, Judge Knie denied and dismissed the application.

Petitioner filed a notice of appeal on September 7, 2018, and thereafter on April 24, 2019, a Petition for Writ of Certiorari. This Return follows.

STANDARD OF REVIEW

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

ARGUMENT

THE PCR COURT PROPERLY DENIED POST-CONVICTION RELIEF BECAUSE COUNSEL ARTICULATED A REASONABLE AND COMMON TRIAL STRATEGY TO "DRAW THE STING" OF FIVE JAILHOUSE INFORMANT STATEMENTS ADVERSE TO PETITIONER, AND BECAUSE THE RECORD REFLECTS COUNSEL EXECUTED A DEFENSE CONSISTENT WITH THE STRATEGY ARTICULATED IN HIS QUESTIONING OF DETECTIVE BURGESS, AND IN HIS CLOSING ARGUMENTS.

Petitioner cannot prevail against the well-supported finding of the lower court by asking this Court to supplant Counsel's strategic thinking with a constrictive model of how a trial defense *must* be strategically conducted. Petitioner demands this Court do precisely that, in a post-conviction proceeding that mirrors the nightmare scenario the United States Supreme Court sought to prevent in the foundational holding of Strickland v. Washington, 466 U.S. 668 (1984). Counsel deliberately and daringly shocked the prosecution by tearing down potentially damaging jailhouse informant evidence during the cross-examination of a witness who was not prepared to answer such questions, evidence that would have otherwise been introduced through multiple other witnesses. Counsel articulated his thinking and reasoning which led him to do so, and the trial record reflects performance consistent with the strategy so articulated. Because Counsel articulated his strategic reasoning, and compellingly executed his strategy, the petition for writ of certiorari must be denied.

a. The Strickland Court Warned Against Trials-After-Trials to Second Guess the Strategic Reasoning of Defense Attorneys

The United States Supreme Court, in setting forth the test for measuring constitutionally effective performance of counsel, recognized the innumerable ways in which attorneys may seek to defend those accused of crimes. "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 688-89. "Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Id. at 689 (citing United States v. Decoster, 624 F.2d 196, 208 (D.C. Cir. 1976)). "Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause." Id.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Id. "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." Id.

The Supreme Court thereafter thoughtfully opined on what might come to pass if it did not afford attorneys broad deference:

> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Id. at 690. Thus, "[a] convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Id. "In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Id. "At the same time, the court should recognize

that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id.

Petitioner's three day proceeding, and the relief demanded, represents exactly what the Supreme Court hoped to avoid. Notwithstanding the rapidly sprawling mechanism of applying Strickland, the appellate courts of this state have *repeatedly* recognized the Strickland court's mandate of deference, and held that where defense counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel. Edwards v. State, 392 S.C. 449, 456 710 S.E.2d 60 (2011) (quoting Lounds v. State, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008)); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000) (citing Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992)); Vail v. State, 402 S.C. 77, 89, 738 S.E.2d 503, 509 (Ct. App. 2013) (citing Watson v. State, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006)).

b. Counsel's Strategic Treatment of the Jailhouse Informants Reflects Extraordinary Performance of Counsel, And He Succeeded in Accomplishing His Stated Goals of Dissuading the State from Calling the Informants, Which He Then Used as a Point of Argument In Closing.

Petitioner excerpts portions of Counsel's explanation of his strategic reasoning, but excludes the uniquely rich details showing precisely how it was Counsel reached his decisions. At the PCR hearing, Counsel explained how he discussed the inmate statements with Petitioner prior to trial, how Petitioner denied making them, and their collective theory that the details of the statements "were kind of implanted either into the general population or specifically to these guys." (Appx. 948, ll. 14-22).

Either personally or through a private investigator, Counsel managed to locate and contact three of the informants. (Appx. 949-51). One inmate, housed in North Carolina, "was not going to be a witness that we wanted to put on the stand[,]" and warned the investigator to

that effect. (Appx. 950, ll. 3-10). Counsel located the trailer home of a second informant, and went to visit him, only to encounter belligerence and shouting through the door that Counsel was somehow committing a crime by attempting to speak with him; Counsel determined he would not be helpful. (Appx. 950, ll. 12-20). Counsel visited a third informant at his parents' home, and initially found him helpful, but determined his only usefulness would be to craft a conspiratorial narrative of police misconduct, and that he was too reluctant, inconsistent, and "wishy washy" to rely upon for so bold a strategy. (Appx. 950-51).

Counsel then considered the substance of the statements, and noted that they were all inconsistent with one another and with the provable facts of the case. (Appx. 951-52). For example, Counsel noted, one of the inmate statements "basically said [Petitioner] said he killed his wife, and he stabbed her in the kitchen." (Appx. 951, ll. 18-20). The detective similarly asserted as much at a preliminary hearing, relying upon the statement, but absolutely no forensic evidence existed to support such a theory of the case. (Appx. 951-52). Counsel then considered that if the informant had no opportunity to rehabilitate himself, "that particular informant would look like just a flatout liar 'cause he was provably a liar because even . . . the State, at that point, admitted that nothing occurred, at least not a violent stabbing, inside the house." (Appx. 952, ll. 3-10). Following that line of thinking to the other informants, Counsel assessed: "if I could pick apart their words on a statement, and avoid the ability for them to rehabilitate themselves, that that might be the biggest win that we could get." (Appx. 952, ll. 11-14).

Counsel preferred the prospect of challenging the written statements over live testimony, and the shock he could impose on the prosecution:

> So, it puts me in the position of doing something that the State would completely not, not, not expect at all. And I, and I remember. I went to law school with Jennifer. I, I didn't know Kim, but I, I got to know her over the course of us – and I think they were as shocked as anybody in the courtroom that I

> opened the door. And, and I'll admit, if it's something wrong, then, you know, the Court can tell me I did it wrong, but I did it on purpose.
>
> I baited them . . . into putting those statements in so that that's all I had to deal with. They were boxed in. I knew what their statements were. I could pick it apart. I had it ready for closing. This guy was a liar. This guy didn't tell the [same] story as this guy didn't tell the same story as this guy.

(Appx. 952-53). Thus, Counsel reasoned that if he could surprise the prosecution by engaging with and dismantling the potentially damaging evidence on his own terms, before they could bring it out, he could potentially limit the scope of the evidence put the State on its back foot.

Counsel's reasoning came into applicable play during the testimony of Detective Richard Burgess. (Appx. 389-423; Appx. 434-55). Counsel kindly described the detective's testimony as "not the best direct testimony I've ever heard from an officer[,]" and described it as bumbling and lacking in confidence. (Appx. 953-54). Having already considered that he wanted to bring in the inmate statements before the State could, Burgess presented the opportunity to do so with a faltering law enforcement witness, and roll out the theory that "the cops had already made up their mind that [Petitioner] killed her . . . and really didn't bother to do any significant investigation thereafter[.]" (Appx. 954, ll. 5-15). Counsel did so, cast doubt on the inmates either explicitly or implicitly as not credible, framed Burgess' trust of the inmates as misplaced, framed the investigation as sloppy, and argued the same in his closing argument. (Appx. 954-61).

Counsel explained that he wanted the inmate's statements to come in because he did not want them to testify, and because the statements represented a known quantity he could confront and address, whereas he could not know what the inmates would fabricate on the witness stand. (Appx. 961-62). Counsel further explained that he endeavored to make the point that Detective Burgess failed to talk to the people that Phillips identified as witnesses, which seemed to Counsel

"to be a pretty gaping hole in his, in his investigation." (Appx. 962, ll. 6-13). He very much did so both throughout his questioning of Detective Burgess, and thereafter in closing arguments.

In closing arguments at trial, the State briefly touched on the statements, framing them as confessions. (Appx. 624-25; Appx. 628, ll. 22-24; Appx. 633, ll. 11-15; Appx. 636, ll. 20-22). Most of the argument was spent discussing the circumstantial evidence: text messages, motive, the personal nature of the killing, the prints, and the DNA evidence. (Appx. 624-638).

Counsel, in the latter part of his own closing, drew attention to the absence of the informants: "If the State's [sic] honestly believed that these were reliable people, wouldn't they have put them on the stand? Why didn't they put them on the stand?" (Appx. 646, ll. 11-17). Counsel then questioned how Detective Burgess could have possibly forgotten how "Skeet" came to inform law enforcement of the supposed statement, and all but characterized the detective as a liar. (Appx. 646-47). Counsel opined the statement didn't read like an informant's statement, but rather read 'like a newspaper report or a police officer[,]" and strongly implied the statements were fabricated by law enforcement and the informant, speculating that "[m]aybe everybody wasn't on the same page initially about how much information was being given out to informants[.]" (Appx. 647-48). He further noted how Detective Burgess, after supposedly receiving "this earth shattering piece of news," failed to locate and interrogate the other three persons who supposedly witnessed the statement by Petitioner. (Appx. 648, ll. 4-15). Counsel then discredited all of the informant statements, pointing out that the coroner had already published a press release "that contained almost every detail that the statements had, except the stabbing[,]" and argued based on Detective Burgess' testimony that he may have let the stabbing detail slip. (Appx. 648-49); see also (Appx. 482-83) (testimony showing the local news reported on a press release from the coroner issued prior to any of the statements). Counsel summarily

dispensed with three of the statements as lacking in any substance, and then further noted how one of them indicated that "Skeet Phillips came in here screaming he stabbed her up[,]" such that all of the statements were irreparably tainted. (Appx. 649, ll. 8-21). Dealing with the fifth statement, that of Michael Stillwell, Counsel explained how the specific details he provided failed to match the known facts of the cast, and how Detective Burgess agreed that Stillwell was wrong, but then attempted to explain the error away. (Appx. 649-51). Counsel again suggested the detective planted information with the informants to support and otherwise unsupported theory. (Appx. 652, ll. 12-19). Summarizing his treatment of the statements, Counsel argued:

> In sum total, the informants at the jail, their testimony is entirely without merit. And if it was, they would have put them on the stand. You don't know whether they got the oath, whether they didn't. We don't know that. They didn't put them on the stand. You don't know how they sounded, whether or not they were intelligent enough to put two words together. You don't know. You do know that the statements sounds [sic] suspicious somewhere along the way, especially with the police type.

(Appx. 651-52). Counsel concluded his treatment of the informant statements by decrying the absurdity of Petitioner's being jailed for wont of a driver's license, and the greater absurdity that he would immediately confess to murder to multiple informants immediately after being so jailed. (Appx. 652-53).

Ultimately, Counsel successfully performed on a grand scale a universally understood and encouraged trial strategy: he "drew the sting" and framed evidence in a light most favorable to his client. Where an attorney knows that potentially harmful evidence or information is likely or certain to be introduced later in trial, he or she may choose, if not be obliged, to elicit the information at an earlier point in the trial in an effort to ameliorate its prejudicial effect. See State v. Campbell, 629 S.E.2d 345 (N.C. Ct. App. 2006) (finding no deficiency where defense counsel "shared with the jury the fact [Campbell] lied to his defense counsel" to draw the sting from damaging evidence to show he lied to everyone, and convert his lies into a basis for a

conviction for a lesser-included offense); see also L. Timothy Perrin, Pricking Boils, Preserving Error: On the Horns of a Dilemma After Ohler v. United States, 34 UCDLR 615, 616-17 (2001) (describing the advice to disclose weaknesses before the other side as "ubiquitous for at least three reasons: (1) the trier of fact is more likely to trust and respect an advocate or a witness who 'volunteers' harmful information; (2) the disclosure avoids the risk that the trier of fact will believe that the party or witness concealed the damaging material; and (3) the advocate retains a measure of control over the disclosure of the perceived weaknesses and can couch the disclosure as sympathetically as possible."); Thomas A. Mauet, Trial Techniques 114 (Vicki Been et. al. eds., 8th ed. 2010) (in the context of single witnesses, explaining the conventional wisdom that weaknesses should be volunteered before the other party can effectively use them); Reyes v. Missouri Pac. R. Co., 589 F.2d 791, 793 n. 2 (5th Cir. 1979) (in the context of resolving an issue preservation question, concluding a plaintiff had no choice but to elicit information regarding his own prior convictions on direct examination in an effort to ameliorate its prejudicial effect). Petitioner's sole complaint is that Counsel should have instead silently waited for the State to run him over with each of the informants in turn, and attempted to impeach each of them in turn without truly knowing ahead of time the substance of their testimony. Instead, Counsel impeached them collectively while cross-examining a lead detective caught unawares, limited the State to statements that he was able to show were flawed, and then pursued arguments in closing thatcould have been diminished by the informants taking the stand: frame the informants as plants and condemn the State for not calling them.

c. Petitioner's Complaints of Prejudice Are Short-Sighted, and Fail to Recognize Either the Value in How Counsel Managed to Save "Last Word," or How Non-Legal Questions May Influence the Course of a Trial.

Petitioner complains that Counsel's treatment of the informant statements, and the State's subsequent introduction of the statements in their entirety was harmful and prejudicial, but he

actually benefited from the prosecution's use of them. First, by bringing up the statements through cross-examination of Detective Burgess, and by not introducing the statements themselves, Counsel pushed the "burden" of introducing the statements onto the State, such that he did not have to introduce evidence and risk the advantage of speaking to the jury last. Counsel fully availed himself of "last word". Had Counsel waited until the informants took the stand and testified, Counsel likely would have been obliged to introduce the prior statements himself in an effort to impeach them, losing his right to "last word." See State v. Beaty, 423 S.C. 26, 42, 813 S.E.2d 502, 510-11 (2018) (citing State v. Brisbane, 2 S.C.L. (2 Bay) 451 (1802); State v. Garlington, 90 S.C. 138, 72 S.E. 564 (1911)) (explaining the "patchwork" governing the order of closing arguments, including that where a defendant introduces no evidence, he or she has the right to open and close in closing arguments); (Appx. 619, ll. 10-13) (the trial court's ruling granting "last word" to Counsel because he introduced no evidence). Had the prosecution known the full substance of Counsel's closing argument before its own closing, the State almost certainly would have had more to say on the subject of the informants' statements than it did in its summary treatment of the subject in the closing given.

Petitioner is correct that the admission of the written statements did not foreclose the possibility that the State might call the witnesses who made the statements, but fails to recognize that Counsel's gambit fundamentally changed the State's calculus in making that decision, despite prosecutor Kimberly Leskanic's testimony explicitly stating as much:

> Detective Burgess had testified first, one of our first witnesses. And, frankly, Mr. Harbin had done a very effective cross-examination on him, and had shown some inconsistencies – not so much inconsistencies, but had been able to lead Detective Burgess, I guess, down the road he wanted to lead him on.
>
> He was able, also with Detective Burgess, to get in to the statements, and point out inconsistencies in these statements. And we were not anticipating that. We have – you know, when you prosecute a case, you have sort of a roadmap. Ms. Jordan and I met numerous times to say what's the order of our witnesses,

how do we want to present our case. And so, when that came up in that way, that was not how we had planned on presenting the State's case.

So we were then faced with the statements have to come in. Do we still want to call the inmates to testify?

And, frankly, Mr. Harbin had been able to point out their inconsistencies. Although we would have possibly, and if they testified they, they told me, gained additional information, he would have had yet another opportunity, right after our lead investigator had not done great on cross-examination, have an opportunity to point out the inconsistencies again in these inmates' statements. We felt that the strongest part of our case had to do with the DNA, the crime scene, and the forensics. And we decided to just head down that road in our case.

(Appx. 1141-42). Petitioner argues that the inmate statements must not have needed rehabilitation or the State would have called them as witnesses, but that (1) runs contrary to Leskanic's explicit testimony that Counsel wrecked the credibility of the statements, (2) runs contrary to Leskanic's explicit testimony that the State scuttled an entire prong of its prosecution strategy in light of Counsel's daring gambit,[1] and (3) simultaneously presumes and speculates a rigid "if-then" structure to the conduct of criminal trials that does not and has never existed. Petitioner's argument also ignores the repeated thrust of Counsel's closing argument taking advantage of their absence: that the State must not have called the informants because they were not credible.

Petitioner repeatedly insists that Counsel should have endeavored to suppress the statements, but offers no reason to exclude their admission into evidence. As Counsel noted, three of the statements were objectionable on hearsay grounds as they were derived in whole or in part from Skeet Phillips. (Appx. 1064, ll. 11-19). But the statements to which Counsel could have objected were the less substantive ones, such that they did not offer much to hurt Petitioner,

---

[1] Petitioner takes issue with the State's reasoning in deciding not to call the witnesses, but whether Petitioner agrees with Leskanic's reasoning or not is wholly immaterial. The fact is that it was her reasoning, and it was reasoning predicted by Counsel in making his strategic determinations.

whereas their admission despite their hearsay character permitted Counsel another means of arguing that all of the informant statements were derived in whole or in part from Skeet Phillips, who Counsel argued was a plant. Put another way, Counsel let bad apples come in alongside the fresher fruit and argued the whole bushel was rotten to the core. No basis for objection and exclusion existed for the statements of either Skeet Phillips or Michael Stillwell.

Petitioner also argues that *if* the jailhouse snitches had taken the stand and testified, he could have had another opportunity to impeach them. First, the informants would have only taken the stand but for Counsel's questioning of Detective Burgess, and so they would not have represented "another" opportunity for impeachment, but rather the only opportunity to impeach. Second, Petitioner's assertion that Counsel could have impeached them with their pending charges ignores that explicitly doing so would be a double-edged sword. The record is devoid of any information to show the reason for the incarceration of the five men—their charges could have been most severe or petty and minor. Counsel instead enjoyed the benefit of leaving the detail to the jury's imagination, and broadly imply that they were planted by law enforcement. Third, Petitioner presumes Counsel would have achieved a perfect impeachment had the informants taken the stand, but as Counsel noted at length, he had no way of knowing what additional information the informants might have brought in around the statement.

Cross-examination is indeed a standard tool to show bias and challenge the reliability and credibility of the testimony of an adverse witness. Counsel utilized the tool of cross-examination by dumping an entire class of evidence onto a witness who was unprepared to address it, and performed so capably that the persons who could have done better were never called to testify. Furthermore, a witness may be discredited while not on the stand. Evidence, including

statements, may be impeached by the introduction of contradictory facts, and evidence of bias or motive through other witnesses and argument thereupon. Counsel so challenged the statements.

CONCLUSION

Petitioner has already received all that which the Court in Strickland opined should never come to pass: a trial after a trial. Petitioner still demands more that should never come to pass: that this Court simply toss aside the extraordinarily thoughtful and researched strategic determinations of original trial counsel simply because another attorney would do things differently without any evident overarching theory to do things differently. The law is clear that the Court must not so cast aside the thoughtful judgment of attorneys in the trenches.

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

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: _____
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

9 Sept., 2019

RECEIVED
SEP 09 2019
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO CHEROKEE COUNTY
Court of Common Pleas
Grace Gilchrist Knie Circuit Court Judge

Appellate Case No. 2018-001627

JOEY CLARK, 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 the applicant by hand-delivering two copies addressed to:

Kathrine Haggard Hudgins
S.C. Commission on Indigent Defense
1330 Lady St., Ste.401
Columbia, SC 29201

This 9th day of September, 2019.

Johnny E. James Jr., AAG
Attorney for Respondent