

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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SEP 12 2019

CERTIORARI TO KERSHAW COUNTY  
G. Thomas Cooper, Jr., PCR Judge

S.C. SUPREME COURT

Appellate Case No. 2018-001643

MITCHELL LOGAN HINSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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<sup>1</sup> *Allen v. United States*, 164 U.S. 492 (1896).

**RESPONDENT'S STATEMENT OF ISSUES ON APPEAL**

- I. The PCR court correctly found no prejudice resulted from the jury seeing Petitioner in leg shackles because, in this case, there is no evidence whatsoever the jury would have rendered a different verdict had the error not been made.
- II. The PCR court correctly found trial counsel was not ineffective for failing to object to the State's entry of Petitioner's prior conviction for receiving stolen goods for impeachment purposes because at the time of Petitioner's trial, his prior conviction was admissible for such purpose.
- III. The PCR court correctly found trial counsel was not ineffective for failing to object to the *Allen* charge because the trial court's charge was proper and the trial court did not abuse its discretion in giving an *Allen* charge in this case.
- IV. The PCR court's factual finding that Petitioner knowingly and voluntarily waived his right to a direct appeal is supported by the record where Petitioner prematurely filed an initial PCR application before his motions to reconsider and for a new trial had been ruled on, and then filed a second application once the trial court denied his motions.
- V. The PCR court correctly found trial counsel was not ineffective for not attempting to negotiate a plea deal for Petitioner's burglary charge and probation revocation to run concurrently because trial counsel acted reasonably in his attempt to negotiate a plea deal for Petitioner.

## STATEMENT OF THE CASE

Petitioner was indicted at the March 2011 term of the Kershaw County Grand Jury for first-degree burglary (2011-GS-28-0220). Public Defender Cornelius J. Riley represented Petitioner. Assistant Solicitor Ron Moak prosecuted the case. On June 27–29, 2011, Applicant proceeded to a jury trial before the Honorable L. Casey Manning. The jury convicted Applicant as indicted. The trial court sentenced Petitioner to fifteen years' imprisonment. Thereafter, trial counsel filed a motion to reconsider the sentence, or in the alternative, a new trial on July 8, 2011.

On November 3, 2015, while his post-trial general sessions' motion was still pending, Petitioner filed an initial post-conviction relief (PCR) application. However, because the motion to reconsider was still pending, the State moved to summarily dismiss without prejudice the first PCR application as not ripe for consideration. On January 12, 2016, the Honorable Alison Renee Lee, acting in her capacity as Chief Administrative Judge for Common Pleas for the Fifth Judicial Circuit, dismissed Petitioner's first PCR application without prejudice, with leave for Petitioner to refile for PCR within a year from the date the pending motion to reconsider was ruled on. The trial court denied Petitioner's motions on April 4, 2016. Petitioner did not appeal his conviction or sentence.

However, on November 4, 2016, Petitioner timely commenced this current PCR action. An evidentiary hearing into the matter convened on July 19, 2017, before the Honorable G. Thomas Cooper. Petitioner was present at the hearing and was represented by Kristy Goldberg. Assistant Attorney General Jessica E. Kinard represented the State. Applicant and his trial counsel, Cornelius Riley, testified at the hearing, as did Jason Kirincich, Esquire. After reviewing the record and evidence presented at the evidentiary hearing, the PCR court denied relief and dismissed the action with prejudice. Petitioner filed a notice of appeal and subsequently petitioned this Court for a writ of certiorari on April 26, 2019.

## STATEMENT OF THE FACTS

It is undisputed Petitioner entered a home at night and stole a video game system. (App. 234). On the evening of January 14, 2011, Petitioner broke into James "Raymond" and Amy Eubanks' home while the Eubanks family were away. (App. 57-60; 76-77). Several items were stolen from the home, including a PlayStation 3 console, a PlayStation 3 controller, three PlayStation 3 games, and a watch. All the stolen items were eventually returned to the Eubanks by Corbin Bailey, Petitioner's codefendant. (App. 67; 89-90; 96; 108). After arriving home and entering the house, Raymond noticed the garage door had been forced open, and his dog had been put in its kennel and seemed confused. (App. 57-58). Raymond checked the home and, upon finding it empty, instructed Amy to call 911 to inform law enforcement of the break-in and the missing items. (App. 58). Once law enforcement arrived, Raymond; Amy; their son, Adam; and an officer reviewed the video of the Eubanks' self-installed home surveillance system. (App. 59). On the video, they saw Petitioner and another teenager surveying the house and leaving with the stolen items. (App. 59; 77). Petitioner grew up with and played baseball with Adam, so Raymond and Amy had no doubt as to Petitioner's identity. (App. 65; 77).

Bailey, Petitioner's codefendant, testified to the events that transpired that evening. Bailey admitted he was involved, as was Petitioner, and stated the crime was Petitioner's idea. Bailey further testified they sold the items they stole, other than the watch, which was returned. (App. 82-94). Lindsey Stitzel, Petitioner's girlfriend at the time of the break-in, testified she spent part of the evening with Petitioner, but she gave law enforcement conflicting stories and also admitted to wanting to protect Petitioner. (App. 114-31). Petitioner testified and maintained his innocence. He admitted the Eubanks had been very good to him when he needed help growing up, but he believed they were lying about his involvement in the crime. (App. 132-49).

## STANDARD OF REVIEW

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts give no deference to the PCR court's conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove “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 (quoting *Strickland*, 466 U.S. at 694).

## ARGUMENT

**I. The PCR court correctly found no prejudice resulted from the jury seeing Petitioner in leg shackles because, in this case, there is no evidence whatsoever the jury would have rendered a different verdict had the error not been made.**

The State concedes trial counsel was deficient in allowing the jury to view Petitioner in leg shackles; however, as the PCR court correctly found, no prejudice resulted as there was no evidence the jury would have rendered a different verdict had the error not been made. The PCR court's legal conclusion is based upon its view of the properly admitted evidence presented against Petitioner at trial. The properly admitted evidence against Petitioner at trial was: (1) home security video footage of Petitioner entering the home at night; (2) the victims' in-court identification of Petitioner as the person in the video seen entering and leaving their home; (3) Petitioner's codefendant's testimony he was with Petitioner the night of the burglary, and they were the two individuals on the video; and (4) Petitioner's own testimony at trial he attempted to recover the stolen items and return them so that he would avoid being charged with first-degree burglary. Based on the above referenced properly admitted evidence, it is highly unlikely the jury would have returned a different verdict in this case.

To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694). "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* "[T]he existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id.* at 189, 810 S.E.2d at 844. "In rare cases, using 'overwhelming evidence' as a

categorical bar to preclude a finding of prejudice is not error.” *Id.* at 190, 810 S.E.2d at 844. “However, for the evidence to be ‘overwhelming’ such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of ‘a reasonable probability . . . the factfinder would have had a reasonable doubt’ cannot possibly be met.” *Id.* at 191, 810 S.E.2d at 845.

Petitioner argues the State’s evidence in this case is not such that would bar a finding of prejudice. Additionally, Petitioner argues the inherently prejudicial nature of the jury viewing Petitioner in leg shackles meets the prejudice requirement of *Strickland*. This argument is without merit.

Here, as instructed in *Smalls*, the PCR court did not make a categorical finding of no prejudice because there was “overwhelming evidence” of guilt; rather, the PCR court weighed the specific impact of trial counsel’s error against the properly admitted evidence presented in the case. *See Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (“In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.”). The jury briefly viewed Petitioner in leg shackles, and this was clearly error on trial counsel’s behalf. However, the jury also: (1) viewed the video of Petitioner and Bailey entering the home and leaving with the stolen items; (2) heard the Eubanks’ testimony they immediately recognized Petitioner from the video as Petitioner because their son grew up going to school and playing baseball with him; (3) heard Bailey’s testimony he was with Petitioner the night of the burglary, and they were the two individuals on the video; (4) heard Petitioner’s own testimony at trial that he attempted to recover the stolen items and return them so he would avoid being charged with first-degree burglary; and (5) heard Petitioner’s testimony he knew the Eubanks

family well, which gave credibility to the Eubanks' testimony they immediately recognized Petitioner from the video. Finally, while Petitioner maintained his innocence at trial, he admitted he entered the home and stole the items at the evidentiary hearing.

The PCR court considered all the above-referenced properly admitted evidence at trial, and Petitioner's admission he committed the crime at the PCR hearing, in considering whether Petitioner suffered prejudice from trial counsel's error. The PCR court's conclusion Petitioner suffered no prejudice from trial counsel's error is supported by the facts from trial and from the testimony at the PCR hearing; therefore, the PCR court did not err in finding no prejudice resulted from trial counsel's deficiency. As such, this allegation is without merit and certiorari should be denied on this issue.

**II. The PCR court correctly found trial counsel was not ineffective for failing to object to the State's entry of Petitioner's prior conviction for receiving stolen goods for impeachment purposes because his prior conviction was admissible for such purpose.**

Petitioner testified on his own behalf at trial. (App. 133-52). Petitioner was convicted in 2010 for receiving stolen goods. (App. 112). The trial court ruled Petitioner's conviction for receiving stolen goods was a crime of moral turpitude and was therefore admissible for impeachment purposes, and trial counsel agreed. (App. 113-14). Thereafter, on direct examination, trial counsel asked Petitioner if he had any previous convictions, and Petitioner testified he previously pleaded guilty to receiving stolen goods. (App. 135).

Petitioner asserts trial counsel was ineffective because, at the time of trial, receiving stolen goods was not a crime or moral turpitude. The PCR court rejected Petitioner's argument and correctly found receiving stolen goods was a crime of moral turpitude; therefore, the PCR court found trial counsel was not deficient for eliciting such testimony on direct examination. (App. 335-36). Petitioner asserts trial counsel was deficient for failing to request the trial court conduct

a Rule 403, SCRE, analysis of the prior conviction as directed by Rule 609(a), SCRE. This argument is without merit because trial counsel articulated a reasonable strategy for eliciting Petitioner's prior conviction on direct examination.

Rule 609(a), SCRE, provides:

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
- (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Here, trial counsel testified at the evidentiary hearing he believed he would lose any objection to the previous conviction for receiving stolen goods. (App. 266-67). While trial counsel may have used the term "crime of moral turpitude," the crime of receiving stolen goods still falls under the standard of Rule 609(a)(2), SCRE, as a crime involving dishonesty. Therefore, trial counsel reasonably believed Petitioner would be impeached with his prior conviction.

Trial counsel attempted to mitigate the impeachment by asking Petitioner about the prior conviction on direct examination. This strategy is reasonable in light of the law at the time of Petitioner's trial, and also reasonable as a tactic to protect Petitioner's credibility in front of the jury. Therefore, trial counsel was not deficient because he acted reasonably in attempting to mitigate the State's impeaching evidence by asking Petitioner on direct examination about his prior conviction. *See Whitehead v. State*, 308 S.C. 119, 122, 417 S.E.2d 529, 531 (1992) ("Courts must be wary of second-guessing counsel's trial tactics; and where counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel.").

Because trial counsel acted reasonably by mitigating Petitioner's prior conviction, he was not deficient, and therefore not ineffective. Therefore, certiorari should be denied as to this issue.

**III. The PCR court correctly found trial counsel was not ineffective for failing to object to the *Allen* charge because the trial court's charge was proper and the trial court did not abuse its discretion in giving an *Allen* charge in this case.**

Petitioner does not challenge the substance of the trial court's *Allen* charge; rather, Petitioner argues the trial court improperly gave the *Allen* charge because there was no indication the jury was deadlocked, and therefore the trial court impermissibly *sua sponte* gave the *Allen* charge. Therefore, Petitioner argues trial counsel was ineffective for failing to object to the trial court's decision to give an *Allen* charge without indication the jury was deadlocked. This argument is without merit.

At first glance, Petitioner's argument appears to be a novel issue in South Carolina. However, this Court was presented with a similar situation in *State v. Darr*, 262 S.C. 585, 206 S.E.2d 870 (1974). The PCR court relied on *Darr* in finding trial counsel was not ineffective for failing to object to the trial court's *Allen* charge.

In *Darr*, the appellant argued the trial court erred in urging the jury to reach a verdict. *Darr*, 262 S.C. at 587, 206 S.E.2d at 870. However, this Court found the argument to be without merit because "[i]t is the duty of the trial [court] to urge the jury to agree upon a verdict provided [it] does not coerce them." *Id.* Petitioner attempts to distinguish the instant case from *Darr*, arguing the trial court's *Allen* charge coerced the jury to reach a verdict because the jury reached a verdict shortly after the trial court gave the *Allen* charge. This argument is without merit because Petitioner does not challenge the propriety of the *Allen* charge given. It is disingenuous to agree the wording of the charge was not coercive, but argue the charge was coercive just by being given without indication the jury was deadlocked. See *State v. Bridges*, 278 S.C. 447, 448, 298 S.E.2d

212, 212 (1982) (“The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the presiding judge and this Court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way.”). Therefore, Petitioner’s argument is without merit.

Trial counsel recalled an in-chambers discussion regarding the trial court giving an *Allen* charge, but he could not recall the details of the discussion. Trial counsel stated he must not have objected based on those in chambers discussions. (App. 268-69). It was reasonable for trial counsel not to object to the trial court giving the *Allen* charge, as the conduct of trial is within the sound discretion of the trial court. Therefore, trial counsel was not deficient for failing to object to the trial court giving the *Allen* charge.

However, even if trial counsel had objected to the trial court’s issuance of the *Allen* charge, it is unlikely an appellate court would have found the trial court abused its discretion in issuing the *Allen* charge. *See Bridges*, 278 S.C. at 448, 298 S.E.2d at 212 (“[T]he conduct of a criminal trial is left largely to the sound discretion of the presiding judge.”). Because the trial court controls the conduct of a criminal trial, the trial court did not abuse its discretion in giving the *Allen* charge. Therefore, certiorari should be denied on this issue.

**IV. The PCR court’s factual finding that Petitioner knowingly and voluntarily waived his right to a direct appeal is supported by the record where Petitioner prematurely filed an initial PCR application before his motions to reconsider and for a new trial had been ruled on, and then filed a second application once the trial court denied his motions.**

Petitioner argues the PCR court erred in finding Petitioner knowingly and voluntarily waived his right to a direct appeal. This argument is without merit as the PCR court’s conclusion is based on its observation of the testimony presented at the PCR hearing.

In a PCR case, appellate courts will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527.

Here, the PCR court found Petitioner waived his right to a direct appeal because he filed a PCR application while his motions were still pending. (App. 208; 209; 250; 294). Thereafter, Petitioner filed a second PCR application after the motions were ruled on. The PCR court's findings are supported by the record. *Sellner*, 416 S.C. at 610, 787 S.E.2d at 527 (stating the PCR court's factual findings will be upheld if supported by any evidence in the record). Therefore, certiorari should be denied as to this issue.

V. **The PCR court correctly found trial counsel was not ineffective for not attempting to negotiate a plea deal for Petitioner's burglary charge and probation revocation to run concurrently because trial counsel acted reasonably in his attempt to negotiate a plea deal for Petitioner.**

Petitioner testified at the PCR hearing he did not accept the State's first two plea offers because he was concerned that pleading guilty would lead to his probation being revoked. (App. 240-45). Because Petitioner never accepted the State's plea offers, the State withdrew the offers and indicated its intent to proceed to trial. (App. 315-21). Petitioner argues trial counsel was ineffective for failing to negotiate a plea agreement whereby Petitioner's probation violation would run concurrently to any sentence from the burglary charge. This argument is without merit because Petitioner is not entitled to any specific plea bargain.

A defendant has the right to effective assistance of counsel during the plea bargaining process, even if he ultimately elects to proceed to trial. *Judge v. State*, 321 S.C. 554, 471 S.E.2d 146 (1996). "[I]t is the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced." *State v. Armstrong*, 263 S.C.

594, 597, 211 S.E.2d 889, 890 (1975). “However, a defendant has no constitutional right to plea bargain.” *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (1999).

Here, the uncontroverted testimony established that trial counsel advised Petitioner of favorable plea offers from the State and advised Petitioner it was in Petitioner’s best interest to accept a plea offer due to the strong case the State would present at trial. However, Petitioner never accepted any of these offers due to his own hesitance and unwillingness to make a decision on whether to proceed to trial versus plead guilty. Notably, trial counsel testified at length regarding the difficulties he had with getting Petitioner to understand the consequences of rejecting plea offers, as well as the fact that the charges would not simply disappear as Petitioner wanted. (App. 260-64; 271-72). Trial counsel testified:

I tried to delay the solicitor as long as I could to keep that an active offer. [Petitioner] did not want to go to trial, but he did not want to plead. And I recall we discussed many times, what other choice was there? At any rate, the solicitor ended up pulling that offer off the table after I delayed him for as long as I possibly could.

(App 261).

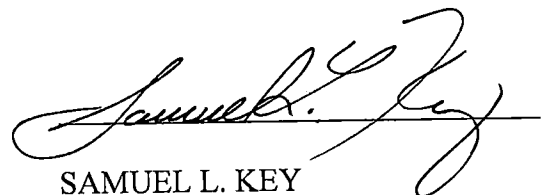
Further, trial counsel knew Petitioner was on probation, and Petitioner was concerned a guilty plea would violate his probation. (App. 261). Trial counsel explained to Petitioner that trial counsel had no control over whether Lancaster County, where Petitioner was on probation, would petition for probation revocation, but he informed Petitioner Lancaster County would most likely move to revoke his probation if he pleaded guilty. (App. 262). Additionally, the solicitor in Kershaw County could not bind Lancaster County to any plea agreement anyway. Further, trial counsel informed Petitioner the probation revocation could possibly run concurrent with his burglary charge; however, trial counsel made clear to Petitioner that a concurrent sentence would only be a possibility, not a guarantee. (App. 262).

The PCR court found trial counsel acted reasonably in representing Petitioner during the plea negotiations. The PCR courts findings are supported by trial counsel's testimony at the PCR hearing. Therefore, the PCR court did not err in concluding trial counsel was not deficient during plea negotiations. As such, certiorari should be denied on this allegation because the PCR court's finding that trial counsel acted reasonably is supported by the record.

## CONCLUSION

Based on the foregoing argument, trial counsel was not constitutionally ineffective in any manner. The State concedes trial counsel rendered deficient performance for allowing the jury to view Petitioner in leg shackles; however, Petitioner suffered no prejudice in light of the properly admitted evidence showing Petitioner was guilty beyond a reasonable doubt. Trial counsel was not deficient, and therefore, not ineffective for eliciting Petitioner's prior conviction for receiving stolen goods on direct examination because trial counsel's reasonably believed the conviction was admissible and chose to mitigate the impeachment evidence by asking about the conviction on direct examination. Trial counsel was also not deficient, and therefore, not ineffective for failing to object to the trial court's *Allen* charge because the issuance of the charge was within the trial court's discretion in controlling the mode of trial. Further, no prejudice resulted from the charge because the province of the charge is not coercive. The PCR court did not err in finding Petitioner waived his right to a direct appeal because the PCR court's factual finding is supported by evidence in the record. Finally, the PCR court correctly found trial counsel acted reasonably during plea negotiations, and therefore, trial counsel was not ineffective during the plea bargaining stage. Therefore, the State requests certiorari be denied as to all issues.

Respectfully submitted,



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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA  
In the Supreme Court

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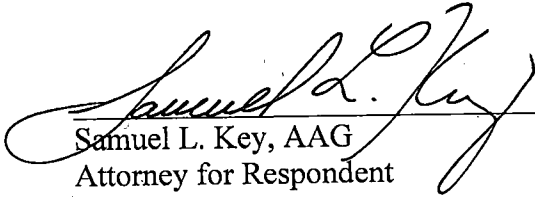
RESPONDENT.

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 placing one copy in the United States Mail, addressed to:

**Ms. Kathrine Haggard Hudgins**  
**1330 Lady St., Ste.401**  
**Columbia, SC 29201**

This 9<sup>th</sup> day of September, 2019.

  
Samuel L. Key, AAG  
Attorney for Respondent



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SEP 12 2019

S.C. SUPREME COURT

ALAN WILSON  
ATTORNEY GENERAL

September 9, 2019

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

**RE: Mitchell Logan Hinson v. State of South Carolina**  
**Appellate Case No.: 2018-001643**

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,

Samuel L. Key  
Assistant Attorney General

SK/em  
Enclosures

cc: Ms. Katherine Haggard Hudgins, Esquire  
Victim Advocacy Division

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