

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
COURT OF COMMON PLEAS
Honorable Benjamin H. Culbertson, General Sessions Judge
Honorable William H. Seals, PCR Judge

Appellate Case No. 2020-001364

JAMIE L. GILES, #324946

Petitioner

V.

STATE OF SOUTH CAROLINA

Respondent

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Petitioner's Statement of the Issue Presented

Whether Petitioner's Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated when trial counsel failed to argue evidence of Daniea Kelly's pending charges and his sentencing exposure on those charges was admissible pursuant to the Confrontation Clause of the Sixth Amendment and Rule 608(c), SCRE, as evidence of bias, where there is a reasonable probability the outcome of Petitioner's trial would have been different since Kelly's credibility was crucial to the state's case given the state alleged Petitioner shot Kelly with malice and Petitioner asserted he acted in self-defense?

Respondent's Counterstatement of the Issue Presented

Did the PCR Court properly find that Petitioner's counsel was not ineffective for failing to impeach a shooting victim for bias by introducing evidence of his sentencing exposure on unrelated charges where counsel impeached the victim on other grounds, the victim's testimony was corroborated by other witnesses, and the State presented very strong evidence of Petitioner's guilt?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections. Petitioner was indicted for attempted murder (2015-GS-22-00170), possession of a weapon during the commission of a violent crime (2015-GS-22-00171), and discharging a firearm into an occupied conveyance (2015-GS-22-00172) by the Georgetown County Grand Jury at its February, 2015 term. Petitioner was represented by Attorney Ronald Hazzard and Assistant Solicitor Ricky Todd, of the Fifteenth Circuit Solicitor's Office, prosecuted the case. On February 1, 2016, Petitioner proceeded to a jury trial before the Honorable Benjamin H. Culbertson. On February 4, 2016, the jury convicted Petitioner of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). The jury also convicted Petitioner, as indicted, of possession of a firearm during the commission of a violent crime, and discharging a firearm into an occupied vehicle. Judge Culbertson sentenced Petitioner to twenty years' imprisonment for ABHAN, five years' imprisonment for possession of the firearm, and ten years' imprisonment for discharging a the firearm into an occupied vehicle. All sentences were ordered to be served concurrently.

Petitioner filed a timely notice of appeal and the appeal was perfected by Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense. Petitioner, through counsel, filed an *Anders* brief and presented the following issue:¹

Whether the trial court erred in refusing to allow defense counsel to impeach/cross-examine the victim, Daniea Kelly, about his reputation in the community for violence and weapon charges because it was essential to determining the credibility of that witness in a case where credibility was the key issue?

The Court of Appeals affirmed the conviction. *State v. Giles*, Op. No. 2017-UP-128 (Ct. App. Filed March 22, 2017).

¹ *Anders v. California*, 386 U.S. 738 (1967).

Petitioner filed his application for post-conviction relief on July 7, 2017. In his application, he alleged he was being held in custody unlawfully for the following reasons:

1. “Ineffective assistance of trial counsel”
 - a. “My trial attorney, Mr. Ronald W. Hazzard, was ineffective because he failed to address my prior medical conditions leading up to the incident, Dec. 03, 2014, knowing that if he had subpoenaed my emergency room records and my medical records from my primary care physician, Dr. Mattox, at St. James Medical Clinic in Andrews, S.C., it would have established that I was previously assaulted and threatened by the victim and his friends in a manner that which lead me to believe that my life was in jeopardy.”
 - b. “Also, my trial attorney failed to establish that my actions in this incident was in self-defense.”
 - c. “My attorney failed to subpoena the SLED forensic analysis to show that Daniea Kelly and Tuvera McCrea did fire a weapon in that they had gunshot residue on their hands.”
 - d. “My trial attorney was in violation of my due process, my 6th Amendment and I do believe if these matters were brought forth at trial, my trial outcome would have been different.”
2. “Self Defense / Stand Your Ground”
 - a. “My trial attorney, Mr. Hazzard, failed to establish my self-defense/stand your ground defense. Upon finding by the State Law Enforcement Division (SLED), they found and established that Daniea Kelly and Tuvera McCrea did in fact fired a weapon the night of the incident in retaliation. The SLED analysis showed and proved the gunshot residue was found on Mr. Kelley’s hand and Ms. McCrae’s hand. Mr. Hazzard should have brought this important and crucial piece of evidence to the Court’s attention. I do believe if this matter was brought forth, the outcome of my trial would have been different.”
3. “Due Process Violated”
 - a. “The South Carolina Rules of Criminal Procedure, and the Constitutional rules that govern our country, states that every Defendant is protected and is assured that the Due Process clause is mandated and in effect, and should be established in every criminal proceeding. I do believe that my Trial Counsel, Mr. Hazzard violated my due process and prohibited me from having a fair and just trial. I do believe if these/this right of my due application had been applied, my trial outcome would have been different.”

Respondent made its return on October 5, 2017 and requested that Petitioner be appointed counsel and an evidentiary hearing be held on the allegations. Petitioner, through counsel, amended the application on August 23, 2018, and further alleged the following:

1. The trial court's decision to prevent defense counsel from cross examining the alleged victim, Dania Kelly, regarding his pending charges was an appellate issue worthy of a merits brief. Appellate Counsel provided ineffective assistance of appellate counsel by filing an *Anders* brief on the issue.
2. Trial counsel provided ineffective assistance of counsel by failing to present all meritorious arguments in opposition to the State's suppression motion. Trial counsel failed to argue that since Kelly had pending charges before the 15th Circuit Solicitor's office trial counsel should have been able to impeach Kelly for bias. Additionally, trial counsel failed to argue that preventing cross examination of Kelly on his pending gun charge violated Defendant's rights under the 6th and 14th Amendments to present a defense.

An evidentiary hearing was convened on March 25, 2019, before the Honorable William H. Seals, Jr., at the Georgetown County Courthouse. Judge Seals signed an order dismissing the application and denying post-conviction relief on September 6, 2020. This appeal follows.

STATEMENT OF THE FACTS

On the night of July 15, 2014, Daniae Kelly was at a cookout with Tavera McCrae, Rodney Kinloch, Petitioner, Petitioner's girlfriend Brenda Brown, and others in Andrews, South Carolina. (App. 175, 3-15). At some point Petitioner and Brown got into a fight, which led to Petitioner "beating her up badly" before Kelly and two other men intervened. (App. 175, 3-9). Months later, on a cold December night, Kelly went with McCrae and Kinloch to the home of "Punchy" Burroughs, who was operating a "little juke joint" in his trailer where music was played, drinks and loose cigarettes were sold out of the kitchen, and friends would gather to hang out. (App. 176, 6 – App. 178, 10). The group arrived in Kelly's truck and parked in the yard, parallel to the road, with the driver's door facing the trailer. (App. 179, 10 – App. 180, 11). Kelly explained that he parked where he did because he did not want to block the driveway, given the presence of other vehicles. (App. 179, 12-21; App. 195, 4 – App. 197, 1).

Kelly never got out of the vehicle. (App. 178, 10-13). Instead, he stayed in the truck with the tinted windows up, talking to McCrae, while Kinloch went inside to get drinks and cigarettes. (App. 178, 15 – App. 179, 9). Kinloch made two trips inside, and returned to the truck with his items after about five minutes. (App. 180, 18 – App. 181, 18). At that point Kelly stated Petitioner followed Kinloch out and began firing shots at his truck without warning. (App. 181, 21 – App. 182, 5). Kelly was hit in the chest, hip, and leg, before blacking out from blood loss. (App. 182, 7-16). He was able to regain consciousness and, believing he was dying, attempted to call his children and 911, despite being in extreme pain and covered in blood. (App. 183, 12-25). McCrae drove him to safety, called paramedics, and he was transported to the hospital. (App. 184, 4-20).

On cross-examination, Petitioner's trial counsel questioned Kelly about prior convictions for armed robbery, disorderly conduct, giving false information to police, writing fraudulent

checks, unlawful possession of a weapon, and possession of cocaine. (App. 185, 18 – App. 186, 24). Kelly said that he “had a past” and admitted to the robbery, disorderly conduct, weapons charge, and possession of cocaine, but denied writing bad checks or giving false information to the police. (App. 185, 18 – App. 186, 24). Kelly denied having a gun on the night of the shooting, or any time other than when he was charged for unlawful possession in May, 2007. (App. 187, 10-25). Trial counsel then questioned him about an additional weapons charge he had incurred after to the shooting, in October, 2015. (App. 188, 1-3). Kelly explained that the weapons giving rise to that offense were not his, but admitted they were in his vehicle. (App. 188, 6-8). Trial counsel did not pursue further questions regarding Kelly’s pending charges, but did question him about when he stopped taking barber classes in October, 2015, and also questioned him about whether he got rid of guns and drugs in his truck before calling police. (App. 189, 12 – App. 190, 9; App. 203, 10-23). Kelly again denied having, or disposing of, a gun on the night of the shooting. (App. 203, 17 – App. 204, 1; App. 208, 21-22). Finally, trial counsel questioned Kelly about how often he had discussed his testimony with the prosecutor, and Kelly stated that he had only given one statement, several months prior to trial. (App. 207, 4-17).

Tuvera McCrea confirmed Kelly’s story that they had gone to Punchy’s house that night with Kinloch, and Kinloch had gone inside while her and Kelly remained in the vehicle. (App. 212, 23 – App. 213, 8). She testified that the truck’s windows had dark tint and were rolled up while they sat in the cold, waiting for Kinloch to return. (App. 214, 5-17). She stated that she did not see Kelly with a gun, but that she heard gunshots when she saw Kinloch coming outside. (App. 213, 9-12; App. 215, 3-13). She jumped out of the truck when the driver side window shattered and she saw Petitioner standing on the porch firing a gun. (App. 215, 3-16). She hid under the truck until she heard the shooting stop and the gun click. (App. 215, 18-21). Petitioner then

approached the driver's side of the truck, attempted to fire another shot, but the gun did not fire. *Id.* When Petitioner left, she helped Kelly move to the passenger seat before getting behind the wheel and driving to safety. (App. 216, 8 – App. 217, 13).

Rodney Kinloch testified that he was present in July, 2014, when Petitioner got in a fight with his girlfriend. (App. 237, 21 – App. 238, 7). He stated that Petitioner had a screwdriver in his hand and was “trying to go after the woman” when he intervened. (App. 238, 10-25). He stated that he was also with Kelly and McCrea in December at Punchy's house, and confirmed that they went to get loose cigarettes and a drink. (App. 239, 4-18; App. 245, 19 – App. 246, 2). He disagreed with Kelly and McCrea on how cold it was that night, but did confirm that he went inside two or three times while they remained in the truck. (App. 240, 13 – App. 241, 7; Ap. 243, 4-5). Kinloch stated that neither he, nor Kelly, nor McCrae had a gun on them that night. (App. 242, 18 – App. 243, 3).

He said he greeted everyone upon entering, but Petitioner would not acknowledge him. (App. 240, 20 – App. 241, 4). He denied knowing Petitioner would be present, and did not argue with him despite Petitioner and another man making him feel nervous. (App. 242, 2-9; App. 246, 8-14). He claimed that after he went in the first time he came back outside and told Kelly that he had a “bad vibe about something” but Kelly told him not to worry. (App. 249, 24 – App. 250, 18). He did not see who got shot, because he took off running as soon as he heard the gun cock behind him as he was leaving. (App. 241, 10-25; App. 253, 13-23).

Punchy Burroughs testified that Petitioner came to his house with Barney Wilson, Brenda Brown, and Chakana Brown on the night of the shooting.² (App. 257, 17-24; App. 260, 14-20). He

² Barney Wilson did not testify at Petitioner's trial. However, he was indicted for attempted murder and pled guilty to assault and battery of a high and aggravated nature in March, 2016. The charge

stated that Kinloch came in and asked for a drink and a cigarette, but that he did not see Kelly or McCrae. (App. 258, 14 – App. 259, 6). Instead, he noticed a truck parked outside his trailer with windows tinted so dark that he could not see anyone inside. (App. 265, 17-21). He explained that he did not see the shooting but saw Petitioner talking with Wilson before walking outside, at which time Punchy stated he heard six or seven gunshots. (App. 257, 17 – App. 258, 9).

Chakana Brown testified that she was present the night of the July confrontation between Petitioner and Brenda Brown. (App. 268, 8-12). She stated that she did not recall Kelly or Kinloch being involved. (App. 269, 3-8). She stated that she was also present at Punchy's on the night of the shooting, along with Petitioner, Barney Wilson, and Brenda Brown. (App. 270, 3-10). She saw Kinloch enter, order a drink and cigarette, and then leave. (App. 270, 15 – App. 271, 4). She then saw Petitioner follow him out the door and shoot at Kelly's vehicle before leaving the scene. (App. 271, 20-23). She explained that when Petitioner saw Kinloch he turned to Wilson, told him "I'm going to jail tonight", and left the room to make a phone call before the shooting. (App. 272, 13-20). She noted that Petitioner did not say anything during the shooting, did not appear to be afraid, and did not speak with Kinloch at the scene. (App. 271, 20 – App. 272, 20; App. 277, 1-3).

Petitioner testified that the July incident with Brenda Brown began as an argument, and escalated when she hit him with a shoe and he retaliated by striking her in the face. (App. 343, 9 – App. 344, 12). He denied ever having a weapon, but stated that several people intervened before he was attacked by Kelly and Kinloch. (App. 344, 13 – App. 345, 24). They beat him, Kelly brandished a gun and cocked the hammer, and Petitioner explained that he was able to flee the scene before it escalated further. (App. 346, 1 – App. 347, 24). He sought treatment for his injuries

arose from a March 29, 2015 incident where Wilson shot at witness Chakana Brown outside of Punchy Burrough's house in an attempt to prevent her from testifying at Petitioner's trial.

at the hospital, but did not tell the doctors what the cause of the injuries were. (App. 348, 16 – 349, 17). He primarily complained of blood in his stool.³ *Id.*

He stated that he knew Kelly from a previous stint in prison, where Kelly had cut his hair. (Tr. 346, 12-18). The two of them were “cool” with each other up to this point, even though he believed that Kelly was one to “always deal with guns.” (App. 346, 12-18; App. 348, 4-9). He explained that the animosity between them did not last long, however, as they met up to apologize outside of Punchy’s trailer just a month later. (App. 351, 8 – App. 352, 17). Nevertheless, the two did not become friends, because Petitioner did not believe he would like to be friends with a man like Kelly. (App. 352, 18-20).

Petitioner stated that the next time he saw Kelly was the night of December 3, at Punchy’s house. (App. 353, 6-9). He went there and met up with Wilson, Brenda, and Chakana Brown. (App. 357, 24 – App. 362, 6). Kinloch arrived, stood behind him and ordered a drink, which was “weird acting” according to Petitioner. Petitioner did not speak with him while Kinloch left and reentered the trailer. (App. 362, 19 – App. 363, 5). He watched Kinloch leave and saw Kelly’s truck parked outside. (App. 363, 5 – App. 365, 22). He stated that he could not see inside the truck from inside the trailer because the tinted windows were partially rolled up, but believed it was Kelly. (App. 384, 5-23; App. 391, 25 – App. 392, 2). Believing that he saw Kelly hand Kinloch a gun and was about to be ambushed, Petitioner stated that he got a gun from Wilson, left the trailer, and shot at Kelly two or three times. (App. 370, 5-9; App. 386, 9-19). He stated that he saw Kelly “pulling what appear[ed] to be a gun” but no words were spoken. (App. 370, 24 – App. 371, 6). He then left the scene, left the gun at a friend’s house, and turned himself in the next day. (App. 373, 20 – App. 274, 20). He admitted on cross-examination that he did not see Kelly or Kinloch with a gun,

³ Petitioner had previously been diagnosed with colon cancer. (App. 379, 11-24).

but that he “could tell” that Kelly handed Kinloch a revolver before the shooting. (App. 385, 10-17). He stated that he knew Kelly had a gun from his reputation and their track record together. (App. 392, 9-12).

Prior to trial the State moved to exclude evidence of Kelly’s pending charges as irrelevant because the charges were incurred over a year after the shooting. (App. 142, 14 – App. 143, 21). The State conceded that Kelly’s prior record would be relevant, but sought to prevent cross-examination on the pending drug and weapons charges. (App. 144, 7-12). Trial counsel responded that Kelly’s character as a witness was in question, and that the charges could show his “turbulence and violence in the community.” (App. 145, 3-19). Counsel suggested that the Court give a limiting instruction to the jury because the charges were still pending, and stated that it would be misleading for the State to have Kelly testify in street clothes as a common man when he was actually incarcerated at the time. (App. 145, 19 – App. 146, 9). In response the State asserted that the law requires victims to be treated with the same protections as criminal defendants, yet the State may not be able to ask Petitioner about pending charges to the same extent. (App. 146, 24 – App. 147, 16). Furthermore, the State argued that it had not offered Kelly anything for his testimony. (App. 148, 11-23).

The Court took the matter under advisement before granting the State’s motion to suppress questioning of the victim regarding his pending charges. (App. 153, 1-11). The Court reasoned that the pending charges did not arise until ten months after the shooting and therefore were of little relevance. *Id.* Counsel again asserted that the evidence should be admissible under Rule 404(A)(2), SCRE, because it shows his reputation for turbulence and violence in the community. (App. 154, 15 – App. 155, 22). The Court stated that “the major reason for [its] ruling is the fact

that these alleged bad acts didn't occur until 10 months after the alleged incident.” (App. 157, 19-24).

At the PCR hearing, Petitioner's counsel stated that his argument is that “trial counsel could have tried to impeach the prosecuting witness based on bias” under Rule 608(c), SCRE, but only argued that the evidence was admissible to show a reputation for violence in the community. (App. 523, 20 – App. 524, 22). Trial counsel testified that Kelly was facing significant time on charges he had incurred prior to Petitioner's trial. (App. 532, 9 – App. 534, 4). He stated that he wanted to be able to show the jury that Kelly was a “bad guy” and he felt that he could do so by showing his record before and after the shooting. (App. 534, 7-10). He stated that he did not argue that evidence of pending charges would be admissible under Rule 608(c) at a pretrial hearing, but did argue that a gun charge would be admissible because it could show Kelly's turbulence in the community. (App. 534, 24 – App. 535, 6). He acknowledged that he questioned Kelly about whether he had possessed a gun as well as his pending gun charge. (App. 536, 22 – App. 537, 6). He explained that he wanted the evidence about the gun charge to show that Kelly “always had guns on him and was willing to use them.” (App. 537, 6-13). However, he was unable to paint Kelly as an “armed drug dealer” because he was unable to “get into any of his drug activities at the time.” (App. 544, 4-9).

Trial counsel stated that Kelly did not receive any benefit on his pending charges in exchange for his testimony against Petitioner because the State “really felt he was a bad actor.” (App. 541, 22 – App. 542, 3). The charges were dismissed, not because of Kelly's cooperation with the State, but because Kelly died shortly after Petitioner's trial, possibly due to the lingering effects of the gunshot wounds. (App. 542, 4-16).

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). Overall, reviewing courts give “great deference to the post-conviction relief court’s findings of fact and conclusions of law,” with the applicant shouldering the burden of proof. *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005); *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. Further, a PCR court’s findings will be upheld if there is “any evidence of probative value sufficient to support them.” *Id.* Reversal of the lower court’s findings occurs when there is no probative value to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

Petitioner has failed to show that the PCR Court erred in finding that Petitioner’s counsel was not ineffective for failing to impeach the shooting victim for bias by introducing evidence of his sentencing exposure on unrelated charges where counsel impeached the victim on other grounds, the victim’s testimony was corroborated by other witnesses, and the State presented very strong evidence of Petitioner’s guilt.

Petitioner claims that trial counsel was ineffective in failing to argue that evidence of the victim, Daniea Kelly’s, pending charges could be introduced to show bias under the Confrontation Clause and Rule 608, SCRE. Petitioner argues that he was prejudiced by his trial counsel’s failure to make the jury aware of the charges and sentences Kelly was facing because Kelly’s credibility was crucial to the state’s case. Kelly’s testimony refuted Petitioner’s claim of self-defense, and had the jury known that Kelly was facing significant prison time for subsequent offenses, they would have assumed he was biased against Petitioner and would not have believed his story. This argument is without merit.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Petitioner, like all other defendants, the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel’s performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id.* at 669, 2056; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In order to prove deficient performance, the applicant must show counsel’s representation fell below an objective standard of “reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Judicial scrutiny of trial counsel’s performance must be highly deferential, and 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. *Strickland*, 466 U.S. at 689.

Trial counsel is required during any trial to make split-second decisions on many subjects, including whether to object to testimony. *Stone v. State*, 419 S.C. 370, 383, 798 S.E.2d 561, 568 (2017). Trial counsel may employ a strategy of not objecting—even when there is a good argument for exclusion—if counsel reasonably perceives the benefits of doing so are outweighed by some other consideration. *Id.* See *Watson v. State*, 370 S.C. 68, 72-73, 634 S.E.2d 642, 644 (2006) (overruled on other grounds by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836). Counsel’s strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing the strategy. *Stone*, 419 S.C. at 384, 798 S.E.2d at 569.

The second, or “prejudice” prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Strickland*, 466 U.S. at 691-92. In order to prove prejudice, an applicant must demonstrate 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. A

reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Thus, it is not enough “to show the errors had some conceivable effect” on the outcome of the proceeding—counsel’s errors must be “so serious as to deprive the defendant of a fair trial.” *Id.* at 687

The performance and prejudice standards, however, “do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Id.* at 696, at 2069. Moreover, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.* at 697, at 2069. The court “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

Rule 608(c), SCRE states that “bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced.” A criminal defendant is entitled to cross-examine a witness about the specifics of pending criminal charges the witness faces to show that the witness has given biased testimony in the hopes that the solicitor will highlight his cooperation to a future trial judge. *State v. Sims*, 348 S.C. 16, 558 S.E.2d 518 (2002). Counsel’s performance may be deficient if they fail to cross-examine a witness regarding pending charges. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). The deficient failure to cross-examine the witness on this point is magnified when the charges are actually dismissed prior to trial in a quid pro quo exchange for the testimony being given. *Id.* 422 S.C. at 183-84, 810 S.E.2d at 841.

Failure to cross-examine a witness about pending charges and sentencing exposure can be harmless. *State v. Williams*, 432 S.C. 515, 854 S.E.2d 166 (Ct. App. 2021). To determine whether such a failure prejudices a defendant, it is proper to consider:

- (1) the importance of the witness's testimony in the prosecution's case,
- (2) whether the testimony was cumulative,
- (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points,
- (4) the extent of cross-examination otherwise permitted, and, of course,
- (5) the overall strength of the prosecution's case.

Id. (citing *State v. Gracely*, 399 S.C. 363, 731 S.E.2d 880 (2012)).

As an initial matter, any reasonable jury would have assumed Kelly was biased against Petitioner, regardless of whether any evidence of his pending charges was introduced, due to the very nature of the allegations. Kelly took the stand and accused Petitioner of shooting him multiple times without provocation. Petitioner admitted it by arguing self-defense. No reasonable juror would ever view Kelly as a neutral, unbiased witness. The fact that trial counsel did not specifically impeach Kelly for bias with evidence of sentencing exposure on pending charges cannot be deficient or prejudicial because the jury could infer that he was biased from the rest of his testimony.

Petitioner's argument that the jury would have believed Kelly was misrepresenting his testimony in exchange for leniency if it had heard more information about his charges is improbable. There is no reasonable probability that the outcome of his trial would have been different with that additional information. At most it would have just added to what the jurors already knew; Kelly was interested in providing valuable testimony for the State to convict Petitioner. The jury nevertheless convicted Petitioner, not because it misjudged Kelly's credibility, but because the State presented strong evidence of Petitioner's guilt with ample evidence corroborating Kelly's story.

The jury heard testimony from ten witnesses, including Petitioner himself. McCrea corroborated almost every piece of Kelly's testimony, including the tint of the windows, the fact that neither of them had a weapon, and the fact that Petitioner followed Kinloch out of the trailer before opening fire. Kinloch confirmed that there had been a prior altercation months earlier, that Kelly did not have a gun on the night of the shooting, and that he was sitting in his truck with McCrea when he was shot without warning. Punchy Burroughs confirmed Kelly's testimony that Kinloch was inside the house with Petitioner prior to the shooting. Burroughs also confirmed that Kelly's truck with dark tinted windows sat outside his trailer. Every material point of Kelly's testimony was corroborated by other witnesses. The only evidence that contradicted Kelly's story on any material points came from Petitioner, who himself even admitted that Kelly did not point a gun at him before he shot. Petitioner's argument that Kelly lied on the stand to receive a favorable offer on his pending charges is clearly not the case given the abundance of evidence the State presented backing up his story.

Furthermore, Petitioner's counsel *did* impeach Kelly's credibility with the pending charges. He questioned Kelly about when he was charged with the crimes, whether he possessed the guns giving rise to the offense, and whether he stopped taking classes to become a barber after the date of his arrest. He questioned him on whether he possessed, or disposed of, a firearm on the night in question. The jury heard about Kelly's extensive prior record, much of which he admitted was true. Kelly stated that he had only discussed the case with the prosecution one time, making clear that he had not been offered any sort of a deal in exchange for his testimony. A jury could conceivably view this evidence and determine that his testimony was not credible, or that the shooting was done in self-defense. However, the jury was not persuaded. Adding an additional question about pending drug charges or how much time he was facing would have added nothing

to the jury's credibility determinations. It knew Kelly was a criminal facing serious charges. It could reasonably infer he was also facing significant time. Admitting evidence of just how much time would not have affected his credibility whatsoever.

Finally, the Sixth Amendment requires that counsel pursue a valid, reasonable trial strategy. It does not require that counsel pursue *every* trial strategy. Trial counsel did cross-examine Kelly about his prior record and pending charges. Kelly admitted on cross-examination that he had incurred a weapons charge months after the shooting. The jury also heard questions about whether he disposed of any guns or drugs on the night in question. Finally, the jury heard that Kelly had only discussed his testimony with the State on one occasion. Impeaching Kelly on these grounds to show his turbulence and violence in the community was an objectively reasonable, albeit unsuccessful strategy. Post-conviction relief is not appropriate under such circumstances.

The record clearly shows that Petitioner's counsel was permitted extensive cross examination, all material points of Kelly's testimony were corroborated by other witnesses, and the prosecution presented very strong evidence of Petitioner's guilt. Furthermore, as a factual matter, Kelly was never offered any leniency in exchange for his testimony against Petitioner. Instead, he died before his pending charges could be resolved, quite possibly because of the injuries Petitioner inflicted upon him. Counsel's failure to introduce additional evidence of potential bias was clearly harmless. In other words, Petitioner has not shown prejudice from his counsel's performance, the allegation is without merit, and this Court should deny certiorari.

CONCLUSION

For the reasons stated above, this Court should deny certiorari. However, should this Court grant certiorari, Respondent requests permission to fully brief the issues discussed herein.

Respectfully submitted,

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