

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2019-000948

Robert Harbuck,

Petitioner,

v.

State of South Carolina,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Did the PCR Court violate the separation of powers doctrine by adopting the State's proposed order of dismissal when this independent judicial function cannot be delegated to an executive agency without providing specific rationale for denying each claim and for omitting relevant testimony, findings of fact, and conclusions of law?

- II. Did the PCR Court err by finding in the Order of Dismissal that Dr. Nicholas Batalis's opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise when the PCR Court properly overruled the State's objection and allowed this expert testimony at the PCR hearing?

- III. Did the PCR court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial by not consulting expert witnesses to review Petitioner's mental health records and Officer Lindler's medical records based on the expert testimony presented at the PCR hearing?

- IV. Did the PCR Court err in finding Trial Counsel provided effective assistance of counsel when Trial Counsel had an objectively unreasonable trial strategy and failed to subject the Prosecution's case to meaningful adversarial testing?

STATEMENT OF THE CASE

Arrest Warrants / Indictments

On September 6, 2015, the Laurens County Sheriff's Office arrested Petitioner Robert Clinton Harbuck for four counts of attempted murder, assault on an officer while resisting arrest, and failure to stop for a blue light. (App. 639 – 644). The Laurens County Grand Jury indicted Petitioner for the above-referenced charges on October 30, 2015. (App. 627 – 638).

Trial

On August 24, 2016, Petitioner proceeded to trial before the Honorable Donald B. Hocker and a jury. (App. 1 – 334). Thomas Quinn represented Petitioner, and Assistant Solicitors Dale Scott and Jim Todd prosecuted the case on behalf of the State. The jury returned guilty verdicts for the lesser included offenses of assault and battery of a high and aggravated nature (ABHAN) and three counts of assault and battery in the third degree (AB3D), resisting arrest (RA), and failure to stop for a blue light (FTSBL). (App. 318, line 19 – 319, line 19). The Trial Court sentenced Petitioner to nine (9) years imprisonment for the ABHAN conviction, three (3) years imprisonment for the FTSBL conviction, one (1) year imprisonment for the RA conviction, and thirty (30) days imprisonment for each of the AB3D convictions. (App. 331, line 15 – 333, line 10). The Trial Court imposed the service of those sentences concurrently.

Direct Appeal

Petitioner did not appeal his conviction or sentence.

PCR Application and Allegations

On August 7, 2017, Petitioner filed his application requesting Post-Conviction Relief (PCR). (App. 335 – 344). The State filed its Return to the PCR application on December 18, 2017. (App. 345 – 351).

On June 14, 2018, Petitioner filed an amended PCR application. (App. 352 – 362). The State filed its amended Return on September 21, 2018. (App. 363 – 371). Applicant ultimately raised the following allegations of ineffective assistance of counsel in his PCR applications and without objection at the hearing:

- (A) Trial Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 3 and 14 of the South Carolina Constitution. *See* S.C. Code § 17-27-20(A)(1), (4), and (6). Trial Counsel's unreasonably deficient performance prejudiced Applicant because there is a reasonable probability that, but for Trial Counsel's errors, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, Trial Counsel's acts or omissions included, but not are not limited to the following allegations:
- (1) Trial Counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible or mitigating evidence in preparation for trial. *See Wiggins v. Smith*, 539 U.S. 510 (2003). Specifically, Trial Counsel failed to obtain and review all of Applicant's psychiatric and mental health counseling records. Trial Counsel further failed to consult with an expert witness for an independent review of Applicant's mental health records in preparation for trial.
 - (2) Trial Counsel failed to call an expert witness to testify at trial regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence based on Trial Counsel's unreasonable trial strategy.
 - (3) Trial Counsel failed to call an expert witness during the mitigation phase of the sentencing hearing to testify regarding Applicant's diagnosis of Post-Traumatic Stress Disorder (PTSD) and history of mental health treatment when it was reasonable and necessary to present this evidence.
 - (4) Trial Counsel failed to hire an expert witness to conduct an independent review of Corporal Steven Lindler's medical records to determine whether those injuries met the definition of "Great Bodily Injury", or whether the act that caused those injuries was likely to produce "Great Bodily Injury" to satisfy that element of Assault and Battery of a High and Aggravated Nature when it was reasonable and necessary in preparation of trial.
 - (5) Trial Counsel failed to call an expert witness at trial to testify in rebuttal of the State's argument that Applicant was guilty of Assault and Battery of a High and Aggravated Nature because Corporal Steven Lindler's injuries did not meet the definition of "Great Bodily Injury" when it was reasonable and necessary to present this evidence.

- (6) Trial Counsel failed to preserve for appellate review his motion for a mistrial by not obtaining a final ruling after his objection to the Trial Court's curative instruction regarding Corporal Steven Lindler's testimony of medical injuries that were not disclosed by the State
- (7) Trial Counsel failed to object to the Trial Court's curative instruction and move for a mistrial after the Solicitor told the jury in the State's closing argument that the jury could infer malice from Applicant's use of his vehicle as a deadly weapon.
- (8) Trial Counsel failed to object to the Solicitor's improper comments during closing argument and failed to move for a curative instruction and/or mistrial based on the undue prejudice created by those comments. Specifically, the Solicitor made numerous disparaging comments attacking Trial Counsel's credibility. The Solicitor also argued facts that were not in evidence. The Solicitor repeatedly argued that Applicant was on drugs despite that there was no corroborating evidence presented at trial.
- (9) Trial Counsel failed to file a Motion for Reconsideration based on the critical mitigation evidence not presented to the Trial Court during the sentencing phase. Specifically, Trial Counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence.
- (10) Trial Counsel failed to subject the prosecution's case to meaningful adversarial testing by not adequately preparing for trial and having an unreasonable trial strategy. *See United States v. Cronin*, 466 U.S. 648 (1984).

PCR Evidentiary Hearing

On March 1, 2019, Petitioner appeared before the Honorable Brian Gibbons for an evidentiary hearing on the allegations of ineffective assistance of counsel. (App. 372 – 466). Dayne Phillips represented Petitioner, and Assistant Attorney General Janell Gregory represented the State. The following witnesses testified at the evidentiary hearing: Dr. Nicholas Batalis, Dr. Donna Schwartz Maddox, Petitioner, and Trial Counsel.

Dr. Nicholas Batalis's Expert Testimony

Dr. Nicholas Batalis testified as to his education, training, experience, and publications as a Board-Certified Forensic Pathologist and Professor in the department of pathology and laboratory medicine at the Medical University of South Carolina. (App. 380, line 20 – 383, line 11). The PCR Court admitted Dr. Batalis's curriculum vitae into evidence without objection as

Applicant's exhibit number one. (App. 384, lines 5-13; App. 467 – 481). Dr. Batalis further testified that he had been qualified as an expert witness in forensic pathology "somewhere between 50 and 75 times." (App. 384, lines 14-18). PCR Counsel then moved to qualify Dr. Batalis as an expert in forensic pathology. (App. 385, lines 4-5).

During *voir dire* by the Respondent, Dr. Batalis acknowledged that he does not have training or experience in accident reconstruction or estimating the speed of vehicles. (App. 385, lines 11-23). The PCR Court qualified Dr. Batalis as an expert in forensic pathology without objection. (App. 386, lines 1-6).

On direct-examination, Dr. Batalis testified that he had completed "around 300 performed autopsies or reviewed records on individuals who have died in . . . motor vehicle accidents." (App. 386, line 23 – 387, line 3). Dr. Batalis also testified that he has received and reviewed "full accident reports" when performing an autopsy on a traffic related fatality. (App. 387, lines 4-12). Dr. Batalis further testified that, as a forensic pathologist, he determines cause and manner of death by "identify[ing] all injuries possible and then look to identify the injuries considered most severe that led to the death." (App. 387, lines 13-22).

Dr. Batalis then explained that he reviewed Officer Lindler's dashboard camera video recording from September 6, 2016; Officer Steven Lindler's medical records; the relevant portions of Applicant's trial transcript; and Section 16-3-600 of the South Carolina Code of Laws. (App. 388, line 8 – 390, line 25; App. 392, line 8 – 394, line 11). The PCR Court admitted the disc containing the video recording and paper medical records into evidence without objection as Applicant's exhibit numbers two and three. (App. 392, lines 8-14; App. 482 – 493). The PCR Court also took judicial notice of S.C. Code Section 16-3-600 as Applicant's exhibit number four. (App. 394, lines 12-21).

Dr. Batalis confirmed PCR Counsel had retained him to review and “compare the injuries that were discussed in the medical records of Officer Steven Lindler”, the video recording, and testimony presented during Petitioner’s trial with the “definition of great bodily injury”. (App. 394, lines 4-11). Dr. Batalis noted Officer Lindler’s injuries as “acute traumatic lumbar back strain” and “two probable compression fractures that were thought to be chronic.” (App. 394, line 22 – 385, line 2). Dr. Batalis also testified, “in reviewing the [great bodily injury definition] statute those [injuries] did not seem to be - - fall in line with what I would consider great bodily injury.” (App. 395, lines 4-6). Dr. Batalis further noted that possible chronic compression fractures are “something that’s been more longstanding and not anything that happened within those last couple of hours” as “[t]hat would be more considered an acute fracture.” (App. 395, ll. 7-17).

In his expert opinion, Dr. Batalis testified that he did not believe Officer Linder’s injuries met the definition of great bodily injury as defined by the South Carolina Code of Laws. (App. 395, line 25 – 396, line 7). Specifically, Dr. Batalis further explained:

[E]ssentially what the physicians that night or the examining officer could say definitively what happened as a result of the accident was a muscle strain of the back.

Again, there were the fractures that were thought to be more likely chronic or occurred previously. So, essentially, **he had back pain or a strain of the back muscle which would not fit in with the definition of . . . permanent disfigurement, impairment of function of the body or an organ.**

(App. 396, line 8-19) (emphasis added). The PCR Court interjected after the Respondent’s objection regarding the scope of expertise, “**Doctor, what is your opinion on whether or not this was a great bodily injury?**” Dr. Batalis replied, “**I don’t believe the injuries [Officer Lindler] suffered were great bodily injury.**” (App. 398, lines 20-23) (emphasis added).

Dr. Batalis continued, “I believe also asking about the - - if the collision would likely to cause great bodily injury”, and the Respondent objected. (App. 398, line 24 – 399, line 399). The Court interjected again and asked, “**Is that based upon a reasonable degree of medical certainty?**”, and Dr. Batalis responded, “**Yes**”. (App. 399, lines 2-5) (emphasis added). The PCR Court then stated, “All right. Thank you. **Objection noted; objection overruled.**” (App. 399, lines 6-7) (emphasis added). Dr. Batalis also testified that, if peer reviewed, he believed the medical community would agree with his opinion. (App. 399, lines 9-12).

The Respondent objected to PCR Counsel’s questions regarding the probability of the act causing great bodily injury or death. (App. 399, line 19 – 400, line 7). PCR Counsel argued in rebuttal:

The [Petitioner’s] argument is because [Dr. Batalis has] reviewed that many motor vehicle accidents - - earlier we went through his testimony. As a forensic pathologist it was hundreds [of autopsies], and in looking at the specific injuries and looking at the MAIT reports, he ultimately - - the state has allowed him to make a determination about cause and manner of death based on injuries. Because of that we believe that allows - - that opens the scope that he can make a determination on what type of injuries would ultimately lead to cause and manner of death.

(App. 400, lines 10-19). The PCR Court responded, “**All right. I agree with you, Mr. Phillips. I’m going to overrule the state’s objection . . . I’m going to let it in.**” (App. 400, lines 20-25) (emphasis added).

On cross-examination, Dr. Batalis acknowledged that he does not know the speed of the vehicle before the crash, he did not review photographs of skid-marks or the vehicles, and he did not personally examine Officer Linder. (App. 401, line 19 – 402, line 16). However, Dr. Batalis testified that he did not believe his determination warranted a personal examination due to the medical records and that he has testified as an expert in cases where he performed the autopsy

and has been a consultant for the prosecution, defense, and civil litigation cases. (App. 402, line 15 – 403, line 8).

Dr. Donna Schwartz Maddox's Expert Testimony

The PCR Court immediately qualified Dr. Donna Schwartz Maddox as an expert in forensic psychiatry without objection. (App. 404, line 10 – 405, line 12). Dr. Maddox's curriculum vitae was marked as Applicant's exhibit number five. (App. 404, line 24 – 405, line 18; App. 497 – 506). The PCR Court also admitted Dr. Maddox's report into evidence without objection as Applicant's exhibit number six. (App. 406, lines 6-21; App. 507 – 511). Dr. Maddox testified that she reviewed Petitioner's mental health records, examined him, and prepared a report with her findings. (App. 405, line 20 – 406, line 2).

Dr. Maddox testified that she diagnosed Petitioner with Post-Traumatic Stress Disorder (PTSD), noting his military service of "two tours in Afghanistan". (App. 407, lines 12-17). Specifically, Dr. Maddox noted Petitioner's "exposure to trauma and life-threatening injuries" and provided specific events Petitioner experienced during combat service. (App. 407, lines 18-25). Dr. Maddox further testified that, in addition to Petitioner's PTSD diagnosis, he also has gender identity disorder. (App. 408, lines 7-10).

Dr. Maddox testified that Petitioner had experienced marital and substance abuse problems. (App. 408, line 19 – 409, lines 5). Dr. Maddox testified that Petitioner was addicted to methamphetamine, was intoxicated, and psychotic at the time of the offense. (App. 409, lines 6-15). Dr. Maddox explained Petitioner's mental health status during the incident:

[Petitioner] believed he had been followed . . . He had gone three days without sleep. He thought the people in the apartment complex were trying to kill him. He even called his mother during this period of time telling her that he was in fear for his life . . . He drove 100 miles per hour because he thought someone was shooting at him . . . He stated while he was being pulled he heard

voices telling him this is a government training exercise, ram the vehicle in front of you . . . So, unfortunately, even though he was psychotic - - and it's my opinion that the substance abuse he had is commonly seen in persons with P.T.S.D., that he was - - he was mentally ill at the time of the offense. **And in my opinion this information should have been considered as part of his sentencing.**

(App. 409, line 19 – 410, line 17) (emphasis added). Dr. Maddox testified that this information should have been presented to the Trial Court as mitigation evidence during the sentencing hearing. (App. 411, lines 2-19).

On cross-examination, Dr. Maddox acknowledged that she met with Petitioner one time and it was an “adequate time to perform [her] evaluation.” (App. 417, lines 17-24). Dr. Maddox also acknowledged that Petitioner was voluntarily intoxicated at the time of the incident.

Petitioner's Testimony

Petitioner testified that he discussed his military service and mental health history with Trial Counsel on multiple occasions. (App. 419, lines 9-17). Specifically, Petitioner testified, “I disclosed the history of the deployments and also the gender identity thing.” (App. 420, lines 4-7). Applicant also testified that Trial Counsel never discussed hiring an expert witness to conduct an independent review of any evidence (i.e., mental health records or the alleged injuries of the complaining witnesses), to testify at his trial in rebuttal of the State's evidence, or to present mitigation evidence at sentencing. (App. 422, lines 1-19).

On cross-examination, Petitioner acknowledged that his testimony regarding intoxication at trial contradicts his statements to Dr. Maddox. (App. 423, lines 7-15).

Trial Counsel Thomas Quinn's Testimony

Trial Counsel maintained that in preparation for trial, “I reviewed the evidence, spoke with my client . . . rode the scene . . . That was pretty much the investigation.” (App. 430, lines

7-11). Trial Counsel admitted that he discussed the mental health issues with Petitioner and that he did not obtain Petitioner's psychiatric records. (App. 430, lines 15-25). Trial Counsel claimed Petitioner never informed him of being intoxicated at the time of the incident. (App. 431, lines 14-16). However, Trial Counsel admitted that Petitioner may have told him that he was "tripping" during the incident. (App. 434, lines 5-7).

Trial Counsel also explained his trial strategy: "To try to prove, to convince the jury, that [Petitioner] was unable to form the intent necessary to commit the offenses." (App. 431, lines 17-19). Trial Counsel stated that Dr. Maddox's report would not have been helpful because it contradicts Petitioner's trial testimony, but admitted, "the diagnosis of P.T.S.D may have been helpful." (App. 433, lines 2-6). Trial Counsel further noted that Dr. Maddox's report would have "eliminated the trial strategy . . . So we would have had to have chosen a different trial strategy." (App. 433, lines 7-16).

Trial Counsel maintained that hiring an expert to review Officer Lindler's injuries was not necessary because the Trial Court submitted the lesser-included offenses to the jury. (App. 435, line 19 – 436, line 4). Trial Counsel noted his objections to testimony and the State's closing argument. (App. 436, line 5 – 438, line 21). Trial Counsel then explained the mitigation evidence he presented during the sentencing phase. (App. 440, line 21 – 441, line 22). Trial Counsel also admitted that he failed to file a Motion for Reconsideration of Petitioner's sentence. (App. 443, lines 7-11).

On cross-examination, Trial Counsel admitted that he never discussed consulting an expert to review Officer Lindler's injuries and that his trial strategy was Petitioner did not have the specific intent to kill. (App. 444, line 10 – 445, line 22). Trial Counsel later admitted, "It would have been helpful perhaps to have had an expert testify as to that [the injuries]." (App.

446, lines 8-13). Trial Counsel also specifically agreed that it would have been helpful for the jury's determination for an expert witness to have testified that Officer Lindler's injuries did not satisfy the definition of great bodily injury. (App. 446, lines 4 – 448, line 2).

Trial Counsel admitted that he never discussed consulting an expert in forensic psychiatry with Petitioner. (App. 448, lines 3-5). Trial Counsel also admitted that, had he obtained all the mental health records, he would have a better understanding of Petitioner's mental health history and might have changed his opinion on whether to consult an expert. (App. 448, line 6 – 449, line 14).

Trial Counsel testified that he would have changed his trial strategy based on the information contained in Dr. Maddox's report and **"it certainly would have been helpful for mitigation."** (App. 449, lines 12 – 450, line 4) (emphasis added). Trial Counsel admitted that his trial strategy was not reasonable and noted, **"I agree with you completely that I should have had an expert in P.T.S.D. testify."** (App. 450, lines 5-22) (emphasis added). Trial Counsel further acknowledged that this could have changed the outcome of the trial "because I believe the jury found their verdict based on the question of intent." (App. 450, line 23 – 451, line 2).

Trial Counsel agreed that providing expert testimony in mitigation would have been helpful, "I certainly think it's reasonable to say the more information you give a judge, the more likely it is you're going to get a fair and reasonable sentence." (App. 452, lines 1-3). Trial Counsel did not object to the State's comments during closing arguments disparaging the credibility of Trial Counsel. (App. 453, lines 1-13). Trial Counsel acknowledged that he had an obligation to object to the curative instruction to preserve the motion for a mistrial for appellate review. (App. lines 2-18). Trial Counsel also admitted that he could have "tried to bolster my

arguments with experts.” (App. 454, line 23 – 455, line 9).

Briefs in Support

At the close of evidence, the PCR Court allowed the parties to submit briefs instead of presenting arguments in support of or against the allegations of ineffective assistance of counsel. Respondent filed its brief in support of dismissal on March 13, 2019. (App. 515 – 536). Petitioner subsequently filed a memorandum in support of granting PCR on March 18, 2019. (App. 537 – 556).

Order of Dismissal

On May 17, 2019, the PCR Court’s law clerk notified the parties via email that “Judge Gibbons signed the order this past week with no changes and mailed [it] to the clerk for filing.” (App. 580). The Lauren’s County Clerk of Court’s Office either never received this order or did not file it. To correct this error, the PCR Court filed the signed Order on June 28, 2019. (App. 581 – 606).

In the Order of Dismissal, the PCR Court ruled that Petitioner failed to prove Trial Counsel provided ineffective assistance of counsel and denied each of Petitioner’s PCR claims. (App. 557 – 579). The PCR Court found Trial Counsel’s and Dr. Maddox’s testimony credible and found Petitioner’s testimony not credible. (App. 593).

As for Dr. Maddox’s expert testimony, the PCR Court found Petitioner “failed to establish how Counsel was deficient or any resulting prejudice from the alleged deficiency as Counsel testified Dr. Maddox would not have been helpful at trial because he told her a completely different story than what he testified to at trial.” (App. 593). The PCR Court found Petitioner “was afforded mitigation from the information Counsel presented” and “credible Counsel’s testimony that he would not have been able to use Dr. Maddox’s report for mitigation as it would have destroyed their

trial strategy in negating [Petitioner's] intent.” (App. 604).

As to Trial Counsel's strategy, the PCR Court found Petitioner “failed to establish had Counsel was deficient as Counsel articulated a valid trial strategy to show [Petitioner] could not formulate intent, which would have been destroyed had Counsel presented the case through Dr. Maddox.” (App. 594). The PCR Court also found Petitioner “failed to show that the outcome of his trial would have been different had Counsel's trial strategy acknowledge[d] [Petitioner's] voluntary intoxication because he lied about it during his trial.” (App. 594).

As for Dr. Batalis's testimony, the PCR Court found that, in spite of its prior ruling during the PCR hearing, “Dr. Batalis' opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise as he testified he did not have any training or experience in estimating the speed of a vehicle, accident reconstruction, or how much force would be necessary to cause great bodily injury.” (App. 603). The PCR Court also found Petitioner “failed to meet his burden to show Counsel was deficient for failing to call an expert on great bodily injury because, as Counsel testified, Dr. Batalis' report was speculative and would not have been admissible at trial.” (App. 603).

Petitioner's Motion to Alter or Amend / Order Denying Petitioner Motion to Alter or Amend

On May 17, 2019, Petitioner mailed and served the Motion to Alter or Amend Judgment (filed on May 20 and June 3, 2019). (App. 607 – 617). The PCR Court signed an Order Denying the Motion to Alter or Amend on May 28, 2019 (filed on June 3, 2019). (App. 618).

Notable Pages in the Trial Transcript

Trial Counsel's opening statement: App. 37, line 16 – 41, line 21. Officer Steven Linder's testimony: App. 71 – 117; App. 90, line 14 – 97, line 22. The testimony related to Trial Counsel's motion for a mistrial: App. 91 – 94; App. 164 – 176. Closing arguments: App. 249 –

289; App. 263, lines 12-24; App. 272; App. 275; App. 279 – 283; App. 286; App. 288 – 291; App. 293. The relevant jury instructions: App. 305 – 308. Trial Counsel’s mitigation presented during the sentencing hearing: App. 327 – 331.

Petitioner seeks a writ of certiorari to review this denial of post-conviction relief.

STANDARD OF REVIEW

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI. To establish ineffective assistance of counsel, an applicant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the standard for ineffective assistance of counsel claims). “First, an [applicant] must show that counsel's performance was deficient. Under this prong, [t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989) (internal citations omitted). “The second prong of the *Strickland* test requires a showing that the deficient performance prejudiced the defendant to the extent that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 118, 386 S.E.2d at 625 (internal citations omitted). Therefore, an applicant must prove that “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result” when seeking relief based on ineffective assistance of counsel. *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 692).

In a PCR action, “[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.” *Frasier v. State*, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRPC). Strategic “[d]ecisions made [by counsel] in ignorance of relevant, available information cannot be characterized as strategic.” *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014). “Ordinarily, the existence of ‘overwhelming evidence’ does not automatically preclude a finding of prejudice.” *Smalls v. State*, 422 S.C. 174, 189, 810 S.E.2d 836, 844 (2018). Notably, our Supreme Court has held that “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.* 422 S.C. at 191, 810 S.E.2d at 845.

ARGUMENT

I. THE PCR COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE BY ADOPTING THE STATE’S PROPOSED ORDER OF DISMISSAL BECAUSE THIS INDEPENDENT JUDICIAL FUNCTION CANNOT BE DELEGATED TO AN EXECUTIVE AGENCY WITHOUT PROVIDING SPECIFIC RATIONALE FOR DENYING EACH CLAIM AND FOR OMITTING RELEVANT TESTIMONY, FINDINGS OF FACT, AND CONCLUSIONS OF LAW.

Article I, Section 8 of the South Carolina Constitution provides, “In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.” Section 17-27-80 of the South Carolina Code of Laws provides, in relevant part: “The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented.”

In this case, the procedure followed by the PCR Court denied Petitioner an opportunity to have his PCR claims adjudicated by an independent judicial officer in violation of the separation of powers doctrine. *See* S.C. Const. art. I, § 8. Specifically, the PCR Court did not provide the State with any specific basis for denying Petitioner’s claims other than delegating the responsibility of drafting a proposed order of dismissal. (App. 607 – 617). The PCR Court impermissibly adopted a slightly modified version of the State’s adversarial proposed Order Denying Post-Conviction Relief because this independent judicial function cannot be delegated to an executive agency without providing its rationale for denying each claim and for omitting

relevant testimony, findings of fact, and conclusions of law. *See Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, “Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.”).

Notably, the Order Denying Post-Conviction Relief omits relevant testimony by Petitioner’s expert witnesses, Dr. Nicholas Batalis and Dr. Donna Schwartz Maddox, at the PCR hearing. (App. 380, line 20 – 423, lines 15). The Order of Dismissal also includes a finding that is directly contradicted by the PCR hearing transcript. Specifically, the PCR Court found in the Order of Dismissal that Dr. Batalis’s opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise when the PCR Court specifically overruled the State’s objection and allowed the expert testimony at the PCR hearing. (App. 398, line 20 – 400, line 25). Fundamental fairness also requires that the PCR Court’s Order contains all relevant findings of fact and conclusions of law for an objective, independent review of the evidence presented at the evidentiary hearing and to preserve all issues for appellate review. Therefore, PCR Court erred in adopting the State’s adversarial proposed Order in violation of the separation of powers doctrine. *See* S.C. Const. art. I, § 8; S.C. Code Ann. § 17-27-80.

II. THE PCR COURT ERRED BY FINDING IN THE ORDER OF DISMISSAL THAT DR. NICHOLAS BATALIS’S OPINION ON WHETHER THE COLLISION COULD HAVE CAUSED GREAT BODILY INJURY IS OUTSIDE THE SCOPE OF HIS EXPERTISE BECAUSE THE PCR COURT PROPERLY OVERRULED THE STATE’S OBJECTION AND ALLOWED THIS EXPERT TESTIMONY AT THE PCR HEARING.

In this case, the PCR Court erred by finding in the Order of Dismissal that Dr. Batalis’s opinion on whether the collision could have caused great bodily injury is outside the scope of his expertise because the PCR Court properly overruled the State’s objection and allowed this expert testimony at the PCR hearing. (App. 395, line 25 – 400, line 25); *See Marlar v. State*, 375 S.C.

407, 408, 653 S.E.2d 266 (2007) (citing S.C. Code Ann. § 17-27-80). Specifically, the PCR Court interjected during direct-examination and asked Dr. Batalis, “**Doctor, what is your opinion on whether or not this was a great bodily injury?**” Dr. Batalis replied, “**I don’t believe the injuries [Officer Lindler] suffered were great bodily injury.**” (App. 398, lines 20-23) (emphasis added).

Dr. Batalis continued, “I believe also asking about . . . if the collision would likely to cause great bodily injury”, and the Respondent objected. (App. 398, line 24 – 399, line 1). The Court again questioned Dr. Batalis, “**Is that based upon a reasonable degree of medical certainty?**”, and Dr. Batalis responded, “**Yes**”. (App. 399, lines 2-5) (emphasis added). The PCR Court then stated, “All right. Thank you. **Objection noted; objection overruled.**” (App. 399, lines 6-7) (emphasis added). Dr. Batalis also testified that, if peer reviewed, he believed the medical community would agree with his opinion. (App. 399, lines 9-12).

The Respondent also objected to PCR Counsel’s questions regarding the probability of the act causing great bodily injury or death. (App. 399, line 19 – 400, line 7). PCR Counsel argued in rebuttal:

The argument is because [Dr. Batalis has] reviewed that many motor vehicle accidents - - earlier we went through his testimony. As a forensic pathologist it was hundreds [of autopsies], and in looking at the specific injuries and looking at the MAIT reports, he ultimately - - the state has allowed him to make a determination about cause and manner of death based on juries. Because of that we believe that allows - - that opens the scope that he can make a determination on what type of injuries would ultimately lead to cause and manner of death.

(App. 400, lines 10-19). The PCR Court responded, “**All right. I agree with you, Mr. Phillips. I’m going to overrule the state’s objection . . . I’m going to let it in.**” (App. 400, lines 20-25) (emphasis added). Notably, Dr. Batalis’s expert opinion on assessing injuries and determining

cause and manner of death is a basic component of his occupation as a pathologist and is in the best position to determine what injuries are likely to produce great bodily injury or death. Therefore, the PCR Court erred in changing its prior ruling from the hearing without providing a any specific rationale to justify the Court's decision except for adopting the Respondent's adversarial proposed Order of Dismissal.

III. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL FAILED TO CONDUCT A REASONABLE INVESTIGATION AND TO DEVELOP ALL AVAILABLE, RELEVANT, AND ADMISSIBLE OR MITIGATING EVIDENCE IN PREPARATION FOR TRIAL BY NOT CONSULTING EXPERT WITNESSES TO REVIEW PETITIONER'S MENTAL HEALTH RECORDS AND OFFICER LINDLER'S MEDICAL RECORDS BASED ON THE EXPERT TESTIMONY PRESENTED AT THE PCR HEARING.

The United States Supreme Court has held "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691; *See Wiggins v. Smith*, 539 U.S. 510, 527 (2003). "In assessing the reasonableness of an attorney's investigation, . . . a court must not only consider the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. Notably, our Supreme Court has also held, "A criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State." *McKnight v. State*, 378 S.C. 33, 46, 661 S.E.2d 354, 360 (2008).

Furthermore, "while the scope of a reasonable investigation depends on a number of issues, at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Lounds v. State*, 380 S.C. 454, 460, 670 S.C. 646, 649 (2008) (quoting *Ard*, 372 S.C. at 331-32, 642 S.E.2d at 597). The

duty to conduct a reasonable investigation extends to consulting and possibly presenting expert witnesses. *See McKnight*, 378 S.C. at 46, 661 S.E.2d at 360-61; *see also Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004) (“Petitioner has demonstrated his attorneys erred in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder.”).

In *McKnight*, 378 S.C. at 46, 661 S.E.2d at 360, our Supreme Court found that “[a] criminal defense attorney has the duty to conduct a reasonable investigation to discover all reasonably available mitigation evidence and all reasonably available evidence tending to rebut any aggravating evidence introduced by the State” and that the duty to conduct a reasonable investigation extends to consulting and possibly presenting expert witnesses. *See Lounds v. State*, 380 S.C. 454, 462, 670 S.E.2d 646, 650 (2008) (finding it “was not objectively reasonable given the defense theory of the case” for trial counsel not to call witnesses who would have “added significantly to the credibility of petitioner’s case”); *see also Hicks v. State*, 314 S.C. 280, 443 S.E.2d 907 (1994) (finding ineffective assistance of counsel when there is a reasonable probability the result would have been different had trial counsel introduced relevant and favorable evidence at trial).

Deficient Performance

In this case, Trial Counsel’s performance was deficient, as it fell below an objective standard of reasonableness “under prevailing professional norms.” *See Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel’s failure to consult with independent expert witnesses to obtain and review Petitioner’s mental health records and Officer Lindler’s medical records is objectively unreasonable for three reasons. First, Trial Counsel failed to obtain Petitioner’s psychiatric records despite his knowledge of Petitioner’s PTSD diagnosis and mental health history.

See Wiggins, 539 U.S. at 527. Second, Trial Counsel had a duty to discover the severity of Officer Lindler's injuries based on his unreasonable trial strategy and the definitions provided in Section 16-3-600 of the South Carolina Code of Laws. Finally, the expert testimony presented at the PCR hearing by Dr. Batalis and Dr. Maddox illustrated that it was reasonable and necessary to present this critical evidence at trial and in mitigation during the sentencing hearing.

At the PCR hearing, Trial Counsel explained his preparation for trial: "I reviewed the evidence, spoke with my client . . . rode [to] the scene . . . That was pretty much the investigation." (App. 430, lines 7-11). Trial Counsel admitted that he knew about Petitioner's mental health diagnosis and issues related his combat service prior to trial but did not obtain Petitioner's psychiatric records. (App. 430, lines 15-25). Trial Counsel also failed to obtain Officer Lindler's medical records prior to trial. (App. 92, line 1 – 93, line 17). Dr. Batalis testified that Officer Lindler's injuries did not meet the definition of great bodily injury and the act could not have caused great bodily injury or death. (App. 395, line 25 – 400, line 25). Dr. Maddox testified about her examination and review of Petitioner's mental health history and substance abuse problems: "[I]n my opinion this information should have been considered as part of his sentencing. (App. 405, line 20 – 411, line 19).

Prejudice

Trial Counsel's deficient performance prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). Specifically, Trial counsel's deficient performance adversely affected Petitioner's right to a fair trial because his failure to investigate prevented Petitioner from presenting a full and complete defense and critical mitigation evidence during the sentencing hearing. Trial Counsel admitted

that, had he obtained all of Petitioner's mental health records, he would have a better understanding of Petitioner's mental health history and might have changed his opinion on whether to consult an expert. (App. 448, line 6 – 449, line 14).

Trial Counsel testified that he would have needed to change his trial strategy based on the information contained in Dr. Maddox's report and "**it certainly would have been helpful for mitigation.**" (App. 449, lines 12 – 450, line 4) (emphasis added). Trial Counsel admitted that his trial strategy was not reasonable and noted, "**I agree with you completely that I should have had an expert in P.T.S.D. testify.**" (App. 450, lines 5-22) (emphasis added). Trial Counsel also acknowledged that this could have changed the outcome of the trial "because I believe the jury found their verdict based on the question of intent." (App. 450, line 23 – 451, line 2). Trial Counsel further agreed that providing expert testimony in mitigation would have been helpful, "I certainly think it's reasonable to say the more information you give a judge, the more likely it is you're going to get a fair and reasonable sentence." (App. 452, lines 1-3).

On cross-examination, Trial Counsel admitted that he never discussed consulting an expert to review Officer Lindler's injuries and that his trial strategy was Petitioner did not have the specific intent to kill. (App. 444, line 10 – 445, line 22). Trial Counsel also admitted that it would have been helpful for the jury's determination for an expert witness to have testified that Officer Lindler's injuries did not rise to the level of great bodily injury. (App. 446, lines 4 – 448, line 2). Therefore, the PCR court erred in finding Trial Counsel provided effective assistance of counsel because "there is a reasonable probability that, but for [trial] counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

IV. THE PCR COURT ERRED IN FINDING TRIAL COUNSEL PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL HAD AN OBJECTIVELY UNREASONABLE TRIAL STRATEGY AND FAILED TO SUBJECT THE PROSECUTION’S CASE TO MEANINGFUL ADVERSARIAL TESTING.

In *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995), our Supreme Court held that “counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness, and where counsel articulates a strategy, it is measured under an objective standard of reasonableness”. See *Stacy v. Solem*, 801 F.2d 1048, 1051 (8th Cir. 1986) (finding that “labeling counsel's actions as “trial strategy” does not automatically immunize an attorney's performance from sixth amendment challenges.”).

Furthermore, the United States Supreme Court has held “prejudice is presumed” when defense counsel “entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 659 (1984); See *Nance v. Ozmint*, 367 S.C. 547, 548-52, 626 S.E.2d 878, 878-80 (2006) (holding that “pre-se prejudice occurs if there has been a constructive denial of counsel,” which arises when defense counsel’s deficient performance constitutes “a classic example of a complete breakdown in the adversarial process”); see also *Green v. State*, 351 S.C. 184, 196, 569 S.E.2d 318, 324 (2002) (holding that although an applicant “must ordinarily show actual prejudice, he may be relieved of that burden if counsel’s ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary”).

Deficient Performance

In this case, Trial Counsel’s performance was deficient, as it fell below an objective standard of reasonableness “under prevailing professional norms.” See *Strickland*, 466 U.S. at 687-88. Specifically, Trial Counsel’s strategy of proving “no intent” is objectively unreasonable given the evidence presented by the State, Petitioner’s mental health history, Officer Lindler’s

injuries, the definition of great bodily injury, the evidence known to Trial Counsel, and Trial Counsel's lack of investigation and preparation for Petitioner's trial. *See Roseboro*, 317 S.C. at 294, 454 S.E.2d at 313; *Solem*, 801 F.2d at 1051.

At the evidentiary hearing, Trial Counsel explained his trial strategy: "To try to prove, to convince the jury, that [Petitioner] was unable to form the intent necessary to commit the offenses." (App. 431, lines 17-19). The Respondent argues that Dr. Maddox's report and testimony conflicts with Trial Counsel's "strategy" and would not have been relevant or helpful to the Petitioner's defense. Trial Counsel and the State should not benefit from an unreasonable trial strategy simply because Trial Counsel failed to conduct a reasonable investigation in preparation for trial. In other words, Trial Counsel's unreasonable trial strategy would have been different had he consulted with expert witnesses in preparation for trial.

Prejudice Presumed

Trial counsel "abandoned his role as defense counsel" and "failed to act as an adversary to the prosecution" when comparing Trial Counsel's objectively unreasonable trial strategy and his failure to conduct a reasonable investigation and to present critical expert witness testimony during Petitioner's trial and in mitigation during the sentencing hearing. *See Cronin*, 466 U.S. at 659; *Nance*, 367 S.C. at 557-58, 626 S.E.2d at 883.

However, even if trial counsel's deficient performance does not amount to *per se* prejudice, Trial Counsel's deficient performance prejudiced Applicant because it "so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Butler*, 286 S.C. at 442, 334 S.E.2d at 814 (quoting *Strickland*, 466 U.S. at 692). The outcome would have been different had presented this expert witness testimony to the jury, and if necessary, the Trial Court in mitigation during the sentencing hearing. Therefore,

the PCR court erred in finding Trial Counsel provided effective assistance of counsel because “there is a reasonable probability that, but for [trial] counsel’s unprofessional errors, the result of the proceeding would have been different.” *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625 (internal citations omitted).

CONCLUSION

Based on the foregoing reasons, Petitioner Robert Harbuck respectfully requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,



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October 18, 2019

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Appellate Case No. 2019-000948

Robert Harbuck,

Petitioner,

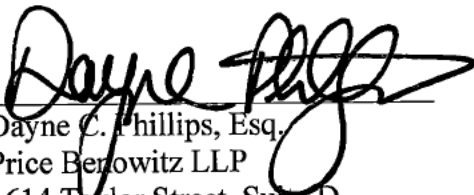
v.

State of South Carolina,

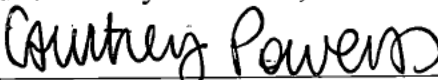
Respondent.

CERTIFICATE OF SERVICE

The undersigned Counsel certifies that a true copy of the Petition for Writ of Certiorari and Appendix (Volumes I and II) have been served upon Assistant Attorney General Janell H. Gregory, at 1000 Assembly Street, Room 519, Columbia, SC 29201, and upon Mr. Robert Harbuck, at Allendale Correctional Institution, on October 18, 2019.


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SUBSCRIBED AND SWORN TO before me
this 18th day of October, 2019.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: May 2, 2027.