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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Certiorari to Colleton County
Edgar W. Dickson., Post-Conviction Relief Judge
Perry M. Buckner, III, Trial Judge
Appellate Case No. 2021-000107

DERRICK FISHBURNE,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF ISSUE ON CERTIORARI

Did the post-conviction relief court erroneously find Fishburne established trial counsel was constitutionally ineffective when the lower court's findings were premised on errors of law and fact since the record conclusively establishes: (1) trial counsel employed an objectively reasonable trial strategy to undermine the quality of the investigation and suggest law enforcement possessed unwarranted bias against Fishburne in an attempt to explain why Fishburne lied to law enforcement, which precluded a deficiency finding as a matter of law; and (2) there was no reasonable probability the result of Fishburne's trial would have been different but for counsel's performance such that no prejudice could properly be found?

STATEMENT OF THE CASE

During the early morning hours of April 10, 2009, Respondent Derrick Fishburne fatally shot Donald Green at the Spirits Nightclub in Walterboro, South Carolina. The scene following the killing was busy and chaotic, but two eyewitnesses ultimately came forward to identify Fishburne as having shot Green multiple times, including as he stood over Green's body once it hit the ground. The Colleton County Sheriff's Office sought and obtained an arrest warrant against Fishburne for Green's killing and Fishburne was taken into custody. Fishburne was subsequently indicted by the Colleton County Grand Jury for murder and possession of a weapon during the commission of a violent crime.

Assistant Public Defender David S. Matthews of the Colleton County Public Defender's Office represented Fishburne. Deputy Solicitor Sean Thornton of the Fourteenth Circuit Solicitor's Office prosecuted the case. On July 19, 2010, Fishburne proceeded to a jury trial before the Honorable Perry M. Buckner, III, circuit court judge. Fishburne, through trial counsel, moved to suppress his statement to law enforcement where he categorically denied being at Spirits Nightclub at all during the hours surrounding the incident along with the out-of-court identifications of him; both motions were dismissed following pre-trial hearings. Thereafter, the matter proceeded to a jury trial, and, at its conclusion, the jury convicted Fishburne as indicted. On July 21, 2010, Judge Buckner sentenced Fishburne to concurrent terms of imprisonment for forty years for murder and five years for possession of a weapon during a violent crime.

Fishburne filed a timely notice of appeal and was represented on appeal by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. Appellate counsel submitted a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and a petition to withdraw as counsel for Fishburne. The South Carolina Court of

Appeals dismissed the appeal and granted counsel's petition to be relieved in an unpublished opinion filed June 20, 2012. State v. Fishburne, Op. No. 2012-UP-363 (Ct. App. 2012). The remittitur was issued on July 6, 2012.

On October 16, 2012, Fishburne filed an application for post-conviction relief, asserting "ineffective assistance of counsel" and "illegal sentence enhancement in violation of S.C. Code Ann. § 16-3-10" without any supporting facts or otherwise providing support for his vague allegations. The State made its return to the application, seeking an evidentiary hearing on his claim of ineffective assistance of counsel. A hearing on the application was convened October 27, 2014, before the Honorable Edgar W. Dickson, circuit court judge. Fishburne was represented by counsel Tristan M. Shaffer. The State was represented by then-Assistant Attorney General Ashleigh R. Wilson of the South Carolina Attorney General's office. At the start of the hearing, Fishburne stated he was proceeding forward on claims that counsel failed to properly investigate, counsel introduced evidence of prior bad acts, and counsel characterized him as a "usual suspect." The State objected to these claims, citing Fishburne's failure to formally amend his application to provide these specific allegations. The post-conviction relief court allowed Fishburne to proceed forward on these claims over the State's objection. Testimony was taken from Fishburne and trial counsel. At the conclusion of the hearing, the post-conviction relief court took the matter under advisement. Thereafter, the court denied relief and issued a written order, filed on December 21, 2015, finding Applicant failed to establish ineffectiveness of counsel.

Fishburne then appealed and was again represented by counsel Shaffer. On appeal, Fishburne argued for the first time that the post-conviction relief court's order did not make sufficient findings of fact or conclusions of law in violation of S. C. Code Ann. § 17-27-80 and requested the matter be remanded back to the post-conviction relief court. The South Carolina

Supreme Court granted certiorari, and, following briefing, remanded the matter back to the post-conviction relief court for a supplemental order addressing the claims not addressed in the initial order of dismissal. Fishburne v. State, 427 S.C. 505, 832 S. E.2d 584 (2019). A subsequent petition for rehearing was denied, and the remittitur was issued on September 27, 2019.

On remand, the post-conviction relief court issued a supplemental order of dismissal, finding trial counsel made a strategic decision to refer to Fishburne as a “usual suspect” as part of his broader defense theory that Fishburne was present at the club, as was reported by witnesses, but had left the nightclub prior to the shooting and lied to law enforcement about ever being at the club on the day in question due to his pre-existing distrust of law enforcement. The court also found Fishburne could not establish any prejudice based on the strong evidence of his guilt, including the testimony of two eyewitnesses identifying him as the shooter. This order was filed December 2, 2019.

Fishburne then filed a motion to alter or amend, arguing the post-conviction relief court erred in finding trial counsel’s strategy was objectively reasonable because a variety of other arguments could have been made to explain his lie to law enforcement and that trial counsel did not have a duty to explain Fishburne’s lie to the jury.

Thereafter, on January 11, 2021, the post-conviction relief court issued a new order granting Fishburne’s motion to alter or amend and granting post-conviction relief. In this new order, issued without any additional testimony or evidence, the post-conviction relief court puzzlingly found trial counsel’s trial strategy was now “objectively unreasonable” because it was premised on a faulty assumption that Fishburne needed to explain his statement to law enforcement, thereby “unconstitutional[ly] shift[ing] [] the burden of proof.” (App. 613). The post-conviction relief court also perplexingly summarized the State’s case as weak and premised on the

credibility of two witnesses, and therefore, erroneously found Fishburne suffered prejudice. The State now challenges this erroneous grant of post-conviction relief. Following the submission of the State's petition for writ of certiorari and Fishburne's return to the petition to the South Carolina Supreme Court pursuant to Rule 243, SCACR, the Supreme Court transferred the case to this Court pursuant to Rule 243(l), SCACR. This Court granted certiorari and requested further briefing. This brief follows.

STANDARD OF REVIEW

In post-conviction relief cases, the standard of review to be applied on appeal is directly dependent on the specific issues raised. Smalls v. State, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing a post-conviction relief judge’s factual findings on appeal, the appellate court will defer to those findings and uphold them if they are supported by any evidence of probative value appearing in the record. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); see Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018) (“Under the proper standard of review, the appellate court’s ‘view’ must be limited to whether there is probative evidence to support the PCR court’s factual findings.”). Meanwhile, when reviewing a pure question of law, an appellate court will consider such a matter de novo and is not required to give deference to the post-conviction relief judge’s rulings. Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014). Ultimately, if the post-conviction relief judge’s decision is controlled by an error of law, an appellate court will reverse that decision on appeal. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court erroneously found Fishburne established trial counsel was constitutionally ineffective because the lower court's findings were premised on errors of law and fact since the record conclusively establishes: (1) trial counsel employed an objectively reasonable trial strategy to undermine the quality of the investigation and suggest law enforcement possessed unwarranted bias against Fishburne in an attempt to explain why Fishburne lied to law enforcement, which precluded a deficiency finding as a matter of law; and (2) there was no reasonable probability the result of Fishburne's trial would have been different but for counsel's performance such that no prejudice could properly be found.

In granting relief, the post-conviction relief court erroneously found Fishburne established trial counsel was constitutionally ineffective for referring to him as a "usual suspect" and referencing his prior dealings with law enforcement, which the court found was based on trial counsel's faulty belief that a defendant must explain his lies to law enforcement to the jury. The post-conviction relief court perplexingly concluded this unconstitutionally shifted the burden of proof from the State to Fishburne, and, accordingly, could not be part of a reasonable trial strategy such that trial counsel's performance was deficient. The post-conviction relief court further found Fishburne established the requisite prejudice necessary for relief, finding the State's case "was built almost entirely on the credibility of two witnesses," and, accordingly, the result of the proceeding would have been different but for counsel's "efforts to explain his arrest." (App. 613). Reversal is warranted because the post-conviction relief court wholly failed to give the required deference to trial counsel's articulated objectively reasonable trial strategy and improperly concluded trial counsel was deficient according to professional norms and the result of the trial would have been different but for counsel's actions. The record is abundantly clear that counsel utilized an objectively reasonable trial strategy based on his investigation and the evidence available to focus on attacking the investigation into the murder based on law enforcement biases against Fishburne, which led to a hastily and erroneously constructed case against Fishburne. This Court should reverse the post-conviction relief court's flawed grant of relief.

In every criminal case tried in South Carolina, the defendant has a constitutional right to a fair trial. State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001); see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) (“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and indifferent jurors.”). Pursuant to that right, the defendant is entitled to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970); see Strickland v. Washington, 466 U.S. 668, 685 (1984) (“An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.”). Significantly though, effective assistance of counsel does *not* mean perfect or mistake-free representation. See Weaver v. Massachusetts, 137 S. Ct. 1899 (2017) (“[A] defendant has a right to effective representation, not a right to an attorney who performs his duties ‘mistake-free.’ ” (citation omitted)); Burt v. Titlow, 571 U.S. 12, 24 (2013) (“[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]”); Yarborough v. Gentry, 540 U.S. 1, 8 (2003) (“The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.”). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. Strickland, 466 U.S. at 687-688. Meanwhile, counsel’s assistance is considered to be constitutionally ineffective only when “counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Id. at 686; see Harrington v. Richter, 562 U.S. 86, 110 (2011) (“Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.” (citation and internal quotations omitted)).

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). When faced with a claim of ineffective assistance of counsel, a reviewing court must conduct a two-pronged analysis. Franklin v. Catoe, 346 S.C. 563, 570, 552 S.E.2d 718, 722 (2001). Pursuant to that two-pronged analysis, an applicant raising an ineffective assistance of counsel claim must establish: (1) counsel’s representation fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel’s deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005). Thus, the applicant has the heavy burden of establishing both deficiency and prejudice in order to be entitled to relief. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); *see* United States v. Balzano, 916 F.2d 1273, 1292 (7th Cir. 1990) (characterizing the required showing a defendant must make in order to successfully establish an ineffective assistance of counsel claim as a “high mountain a defendant must climb”); Stone v. State, 419 S.C. 370, 380, 798 S.E.2d 561, 566 (2017) (instructing “the law requires [a reviewing court to] presume counsel rendered adequate assistance and exercised reasonable professional judgment” and only find to the contrary when the applicant has overcome that presumption by establishing both deficiency and prejudice); *see also* Weaver, 137 S. Ct. at 1912 (explaining “the rules governing ineffective-assistance claims must be applied with *scrupulous care*” (emphasis added and citation and internal quotations omitted)).

Regarding the deficiency prong of the analysis, the proper measure of performance is whether counsel provided representation within the objectively reasonable range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); *see* Richter, 562 U.S. at 110 (instructing the proper analysis “calls for an inquiry into the *objective*

reasonableness of counsel’s performance, not counsel’s subjective state of mind” (emphasis added)). When analyzing counsel’s performance, the reviewing court will strongly presume counsel provided adequate assistance, and the applicant is responsible for overcoming that presumption. Butler, 286 S.C. at 442, 334 S.E.2d at 814; see Dunn v. Reeves, 141 S. Ct. 2405, 2410 (2021) (noting counsel’s strategic decisions are to be afforded “ ‘strong presumption’ of reasonableness that the defendant must overcome); Cullen v. Pinholster, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Furthermore, the reviewing court will scrutinize counsel’s performance in a highly deferential manner, will make every effort “to eliminate the distorting effects of hindsight,” and will “evaluate the conduct from counsel’s perspective at the time” in light of the then-existing circumstances. Strickland, 466 U.S. at 689. In order to establish counsel’s performance was deficient, the applicant must demonstrate “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Id. at 687. Thus, counsel’s performance will be considered to be deficient only when it objectively amounted to incompetence under prevailing professional norms and *not* when it simply “deviated from best practices or most common custom.” Richter, 562 U.S. at 105; see State v. Woullard, 813 N.E.2d 964, 971 (Ohio Ct. App. 2004) (“Defense counsel’s strategy must have been outside the realm of legitimate trial strategy so as ‘to make ordinary counsel scoff’ before a conviction will be reversed on the basis of ineffective assistance.” (citations omitted)). “In fact, even if there is reason to think that counsel’s conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.” Dunn, 141 S. Ct. at 2410 (citation and internal quotation and brackets in original omitted).

Beyond satisfying the burden required by the deficiency prong, an applicant also bears the burden of establishing prejudice in order to be entitled to relief as “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.”¹ Strickland, 466 U.S. at 691. In order for that burden to be met, counsel’s deficient performance must have prejudiced the applicant to such an extent there is a reasonable probability the result of the proceeding would have been different but for counsel’s unprofessional errors. Cherry v. State, 300 S.C. 115, 117-118, 386 S.E.2d 624, 625 (1989); see Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (“To establish a claim of ineffective assistance of trial counsel, a PCR applicant has the burden of proving counsel’s representation fell below an objective standard of reasonableness and, but for counsel’s errors, there is a reasonable probability the result at trial would have been different.”). Importantly, “[t]he likelihood of a different result must be *substantial*, not just conceivable.” Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 (“A reasonable probability is a probability sufficient to undermine confidence in the outcome.”).

In the present case, Fishburne complains, and the lower court erroneously agreed, that trial counsel was constitutionally ineffective for referring to him as a “usual suspect” based on his prior involvement with law enforcement. However, trial counsel’s arguments to the jury were part of a calculated trial strategy designed to undermine the strength of the State’s case by calling the quality of the investigation into question and suggesting it was singularly focused on Fishburne to the

¹ Notably, “a 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.” Strickland, 466 U.S. at 697. In fact, a reviewing court ordinarily should dispose of an ineffective assistance of counsel claim on the grounds of lack of sufficient prejudice “[i]f it is easier” to do so. Id.

exclusion of other plausible suspects without due investigation. This trial strategy is readily apparent from the trial record and is objectively reasonable based on the facts of Fishburne's case.

At trial, trial counsel argued in the defense's opening and closing arguments that law enforcement had an unwarranted and prejudicial bias against Fishburne based on prior interactions, which led to Fishburne being characterized as a "usual suspect" by local law enforcement. Counsel further argued this prejudicial bias ultimately resulted in law enforcement conducting a shoddy investigation into Green's murder culminating in Fishburne being prematurely arrested and charged without a thorough investigation of all possible leads or possible defenses Fishburne may have had. Trial counsel also argued it was law enforcement's blinding bias against Fishburne that led Fishburne to initially lie to law enforcement about his presence at the nightclub prior to the murder, which counsel knew at that time was going to be presented to the jury following the denial of his motion to suppress his statement, along with other evidence clearly indicating that Fishburne was indeed at the club in the hours before the shooting. (App. 131-37, 372-87). These arguments align with the defense witnesses called at trial, which supported the defense theory that Fishburne had already left the nightclub and was misidentified as the shooter. (App. 351-368). Again, counsel's trial strategy is readily apparent from the trial record.

Moreover, trial counsel also explicitly articulated his trial strategy at the evidentiary hearing, which centered around gaining credibility with the jury while elaborating on flaws in law enforcement's investigation based on their prejudicial bias against Fishburne. At the evidentiary hearing, counsel testified the central issue at trial was the identity of the shooter and the defense needed to establish that while evidence showed Fishburne was there prior to the shooting, he was not present for the shooting and was not the shooter. He explained Fishburne gave a statement to law enforcement denying he was at the nightclub the evening and early morning hours of the

shooting—a blatant lie that was incongruent with not only the evidence the State would present at trial but his own defense theory that Fishburne was misidentified by witnesses who saw him at the nightclub earlier in the evening and, based on that, later misidentified him as the shooter at a dark and chaotic scene. Accordingly, counsel testified he felt—as a practical matter—he needed to explain Fishburne’s lie to the jury because juries do not like liars and as part of his trial strategy to show the investigation was flawed based on law enforcement’s inherent prejudice against Fishburne. Counsel testified he argued to the jury that Fishburne lied about his presence at the nightclub prior to the shooting because Fishburne did not trust law enforcement based on their inherent bias against him to explain Fishburne’s blatant lie to the jury, which was obvious based on the witnesses who established Fishburne was at the nightclub prior to the shooting. Counsel elaborated that he had credible evidence to show Fishburne left the nightclub before the shooting, and, therefore, he wanted to explain why Fishburne would lie to law enforcement when the truth would not have implicated him in the crime. (App. 492-501).

The record from trial and the evidentiary hearing establish counsel employed a valid, objectively reasonable trial strategy, thereby precluding a deficiency finding as a matter of law. As the United States Supreme Court explained in Strickland,

Judicial scrutiny of counsel’s performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel’s defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

“might be considered sound trial strategy.” There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

466 U.S. at 689 (internal citation and quotation omitted). Our Supreme Court has consistently held valid, strategic decisions made by counsel preclude a finding of deficiency on collateral review. Stone, 419 S.C. at 384, 798 S.E.2d at 569; Smith v. State, 386 S.C. 562, 567-68, 689 S.E.2d 629, 632-33 (2010); Caprood v. State, 338 S.C. 103, 110, 525 S.E.2d 514, 517 (2000); Roseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1996); Underwood v. State, 309 S.C. 560, 425 S.E.2d 20 (1992); Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992).

Recently, in Dunn, the United States Supreme Court again cautioned courts reviewing convictions on collateral review to give the proper deference to strategic decisions made by trial counsel:

As to counsel, we have often explained that strategic decisions . . . are entitled to a strong presumption of reasonableness. Defense lawyers have limited time and resources, and so must choose from among countless strategic options. Such decisions are particularly difficult because certain tactics carry the risk of harming the defense by undermining credibility with the jury or distracting from more important issues.

The burden of rebutting this presumption rests squarely on the defendant, and it should go without saying that the absence of evidence cannot overcome it. In fact, even if there is reason to think that counsel's conduct was far from exemplary, a court still may not grant relief if the record does not reveal that counsel took an approach that no competent lawyer would have chosen.

Dunn, 141 S. Ct. at 2410 (citation and internal quotations omitted).

Here, Fishburne did not and could not meet that high burden of establishing trial counsel's strategic approach was one “no competent lawyer would have chosen.” Dunn, 141 S. Ct. at 2410. By granting relief, the post-conviction relief court erroneously failed to account for counsel's

reasonable trial strategic decisions and erroneously refused to apply the strong presumption of reasonableness required for counsel's actions. See Buckson, 423 S.C. at 320-21, 815 S.E.2d at 440 (“A PCR court’s analysis of counsel’s strategic decisions must be highly deferential to counsel’s judgment, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight. A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”) (citations and internal quotations omitted). By failing to consider counsel’s reasonable trial strategy, the post-conviction relief court erred as a matter of law.

Despite a clear record demonstrating an objectively reasonable trial strategy and consistent precedent requiring reviewing courts to give counsel’s strategic decisions a presumption of reasonableness, the post-conviction relief court incorrectly determined trial counsel’s strategy was “objectively unreasonable” because it was premised on a faulty assumption that Fishburne needed to explain his statement to law enforcement, thereby “unconstitutional[ly] shift[ing] [] the burden of proof.” (App. 613). The post-conviction relief court’s finding that counsel thought he was compelled to explain Fishburne’s lie to law enforcement as a matter of law is both legally erroneous and inconsistent with the evidence presented. Counsel never testified he believed he must explain the lie, as the order of dismissal incorrectly found. Rather, counsel testified he made a strategic decision to explain Fishburne’s statement to law enforcement—which he knew would be presented to the jury following the denial of his motion to suppress. This approach was part of his larger trial strategy to show that the State’s case was the result of an erroneous, singular focus with an investigation bound to lead to Fishburne rather than a pursuit of all possible suspects based on all available leads and evidence. Trial counsel’s decisions were objectively reasonable based

on the evidence, and the post-conviction relief court erred as a matter of law by finding trial counsel deficient.

Aside from the flawed deficiency finding, the post-conviction relief court also erroneously concludes Fishburne established the requisite prejudice needed for relief by perplexingly summarizing the State's case as weakly premised on the credibility of two witnesses. When initially denying relief, the post-conviction relief court found that very same evidence "strong," noting "[t]wo eyewitnesses identified Applicant as the shooter. These eyewitnesses first identified Applicant by name and subsequently identified him in a lineup." (App. 606). However, in its revised order granting relief, the lower court uses the exact same evidence to demonstrate a lack of strength in the State's case without any explanation for this dramatic reversal.

The court was correct the first time—the evidence against Fishburne is strong. At trial, Sonja Grant testified she observed the shooting from "a car length" away and unequivocally identified Fishburne as the shooter. (App. 182-185, 186-88, 189). She elaborated that after Fishburne initially shot Green and Green fell to the ground, Fishburne stood over his body and continued to shoot. (App. 185). She testified she knew Fishburne before she was shown a photographic lineup by law enforcement. (App. 187-88, 200). Fatima Washington also testified with certainty that she watched Fishburne shoot Green. (App. 205-07, 209-10). She testified she knew Fishburne prior to the shooting and knew his identity before she was shown a photographic lineup. (App. 209-11).

These two witnesses knew Fishburne before the shooting, observed him shoot Green from nearby, and identified him by name and sight as the shooter in independent lineups shown by law enforcement. Any sort of purported error in trial counsel referring to Fishburne as a "usual suspect" based on his prior dealings with law enforcement as part of a larger trial strategy to highlight bias

against Fishburne and errors in law enforcement's investigation is not linked to the strong evidence of these two eyewitnesses. See Smalls, 422 S. C. 174, 810 S.E.2d 836 (finding trial court's errors must be balanced against the strength of the State's case to determine whether these errors significantly undermine confidence in the outcome of trial necessary to establish prejudice). Accordingly, the post-conviction relief court erred as a matter of law in finding Fishburne suffered the requisite prejudice to warrant a reversal of his conviction.

Based on the foregoing, the post-conviction relief court erred in granting Fishburne relief and remanding his case to the court of general sessions for a new trial. Therefore, the State asks this Court to reverse the lower court's grant of post-conviction relief.

CONCLUSION

For all the foregoing reasons, the State requests that this Court reverse the post-conviction relief court's grant of relief and a new trial.

Respectfully submitted,

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Sep 27 2022

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Certiorari to Colleton County
Edgar W. Dickson., Post-Conviction Relief Judge
Perry M. Buckner, III, Trial Judge
Appellate Case No. 2021-000107

DERRICK FISHBURNE,

Respondent,

v.

THE STATE OF SOUTH CAROLINA,

Petitioner.

CERTIFICATE OF SERVICE

Pursuant to Rule 262(b)(3), SCACR, the undersigned hereby certifies a true copy of the Brief of Petitioner has been served upon opposing counsel by sending to opposing counsel's primary e-mail address as listed in the Attorney Information System (AIS):

Tristan Shaffer, Esquire
Tristan M. Shaffer, Attorney at Law
PO Box 1027
Chapin, SC 29036
tristan@shafferlawsc.com

This 27th day of September, 2022.

s/ Megan Harrigan Jameson

Megan Harrigan Jameson
Senior Assistant Deputy Attorney General
Office of the Attorney General
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From: [Megan Jameson](#)
To: [Tristan Shaffer](#)
Cc: [Jennifer Jennison](#)
Subject: Derrick Fishburne v. State, Appellate Case No. 2021-000107
Date: Tuesday, September 27, 2022 4:39:00 PM
Attachments: [Fishburne.Derrick Brief of Petitioner w- COS \(03112644xD2C78\).PDF](#)
[image001.png](#)

Tristan,

Attached for service please find the State's Brief of Petitioner in the Derrick Fishburne v. State, Appellate Case No. 2021-000107, PCR appeal. I will be filing the same momentarily using the Court of Appeals OneDrive system.

Please let me know if you need anything additional.

Sincerely,

MEGAN HARRIGAN JAMESON, Senior Assistant Deputy Attorney General
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