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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Berkeley County
Court of Common Pleas
The Honorable R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2021-001382

DONTE SAMAR BROWN, #314818,

PETITIONER,

vs.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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b. The post-conviction relief court correctly held that trial counsel was not ineffective for failing to object to the State’s DNA expert’s remarks surrounding an alibi and Petitioner’s failure to present evidence, as the remarks did not prejudice Petitioner when trial counsel was able to elicit useful testimony for the defense.

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ISSUE RAISED ON PETITION FOR WRIT OF CERTIORARI

Petitioner's Question on Petition for Writ of Certiorari

1. Did the post-conviction relief (PCR) court err by finding trial counsel were not ineffective when they failed to move to exclude testimony from the state's DNA expert pursuant to Rule 702, SCRE and Rule 403, SCRE, where the expert was allowed to testify that 97.8 percent of the black population of the United States could be excluded as a possible contributor to the mixture of DNA found on the gun that was used during the armed robbery or the shooting, but Petitioner could not be excluded, since such testimony was unfairly prejudicial, confusing, and misleading and where Petitioner was prejudiced since there is a reasonable probability the outcome of his trial would have been different if counsel had objected and the evidence was properly excluded?
2. Did the post-conviction relief (PCR) court err by finding trial counsel were not ineffective when they failed to object to the state's DNA expert's repeated inadmissible remarks that implicated Petitioner's lack of an alibi during the timeframe of the armed robbery and Petitioner's overall failure to present evidence, since such testimony was an improper comment on Petitioner's right to remain silent, was burden shifting, and undermined Petitioner's right to rely on insufficiency of the state's evidence at trial, and where Petitioner was prejudiced since there is a probability that the outcome of his trial would have been different had counsel properly objected?

Respondent's Counter-Statement of Question on Petition for Writ of Certiorari

1. Did the post-conviction relief court properly hold that trial counsel was not ineffective where counsel moved to exclude testimony from the state's DNA expert pursuant to Rule 403, and *State v. Bostick* and where counsel did not determine an objection based on 702 was necessary due to the expert's qualifications, and that Petitioner was not prejudiced by allowing the testimony regarding the exclusion of the African American population was helpful to Petitioner's defense?
2. Did the post-conviction relief court correctly hold that trial counsel was not ineffective for failing to object to the State's DNA expert's remarks surrounding an alibi and Petitioner's failure to present evidence, while outside the expert's qualification, did not prejudice Petitioner when trial counsel was able to elicit useful testimony for the defense?

STATEMENT OF THE CASE

The convictions in this case stem from the robbery of a Zaxby's restaurant which occurred around midnight on December 24, 2011, committed by Brown and his co-defendant, Christopher Wilson.

Jeffrey Taylor was the first witness for the State. He testified he was sitting in his car outside Zaxby's, having just got off duty. He made some phone calls and listened to music in his car. Taylor then saw two men wearing black outfits, one of them with a gun, walking toward the back door of the restaurant. Taylor promptly called 911 to tell them Zaxby's was being robbed. Appx. pp. 220-25.

Riley Kemp was a cook at Zaxby's. Kemp was taking trash out to the dumpster behind Zaxby's when he heard footsteps. Two men in dark clothes and ski masks took hold of him and smashed his cell phone. He testified one had a knife, and the other had a gun. Appx. pp. 232, 238-39.

One of the men checked out a noise from the other side of the dumpster and came back with Kemp's co-worker, Vincent Riley, known as V.J. The robbers searched V.J. but allowed him to leave. One robber took Kemp's wallet by ripping the pocket of Kemp's pants with a knife. Appx. pp. 240-242. The robbers then directed Kemp to let them in the restaurant. Kemp rang the buzzer, and someone let them in the back of the restaurant. The robbers made Kemp and another co-worker, Kevin Lane, lie on the ground. Kemp heard his manager plead, "Don't hurt us." Then Kemp heard a gunshot. Kemp heard the robbers dropping change as they left. Kevin called the police. Appx. pp. 243-45.

V.J. testified his mother, Linda Williams, was the manager of Zaxby's. V.J. was not working that night but happened to be riding by the restaurant on his bike when he saw his co-

worker's car and decided to ask for a ride. He heard voices behind the dumpster and called out his friend's name. Instead, a man came out with a gun. The robbers took V.J.'s cell phone but gave it back and ordered him at gunpoint to take the battery out, which he did. V.J. identified the gun used in the robbery in court. The men told V.J. to leave, and he went home. Appx. pp. 252-57. The robbers warned him not to "snitch." Appx. pp. 260.

Kevin Lane was working at Zaxby's the night of the robbery. While carrying dishes into the back of the restaurant, Lane heard the buzzer and opened the door. Lane turned around to see the two robbers approaching, one with a gun. The robbers ordered Lane to the ground. Andre, another co-worker, was also on the ground. Lane testified heard a smacking noise, which he surmised was the gunshot, and then the robbers left. Lane called 911. Appx. pp. 264-68.

Daniel Auman also was working at Zaxby's that night as a dishwasher. He testified he was likewise ordered to get on the ground by two men wearing black clothes and ski masks, one of whom had a gun. Auman testified the robbers took his cell phone which they gave back to him when they left. He also testified one of the men hit him with the gun. Appx. pp. 273-75.

Gerlinda Williams testified she was on duty at Zaxby's when two gunmen came into her office wearing black clothes, hoodies, and masks. They made her stand up from her seat and then lie on the floor. They rifled through her pants and took \$18. They also shot her. She testified the robbers stole approximately \$3,600 to \$3,800. Appx. pp. 277-81. As the robbers were leaving, they argued over the bag of stolen money and dropped some of it. Appx. pp. 286-87.

Melvin Powell and his wife were driving nearby the restaurant when Powell noticed a commotion. He testified his wife was driving, and she changed lanes to allow police cars to pass. He explained there was a moment of darkness after the blue lights of the patrol vehicles passed by, and about that time his wife slammed on the brakes to avoid hitting two men in dark clothing running out of the woods. The two men ran down the road in between a fence and some bushes. Appx. pp. 294- 95. Powell and his wife stopped at Zaxby's and spoke with police about what they had seen. Appx. pp. 296-97.

Sergeant Scott Cook of the K-9 Unit for the Berkeley Sheriff's Department brought Gotcha, his German shepherd, to the scene. After being advised by officers that the two suspects were seen running across Highway 176 and entering the Foxborough subdivision, Sergeant Cook put Gotcha into action. Gotcha followed a scent trail and led Sergeant Cook to a cul-de-sac, where he found some money lying on the ground in front of the house at 310 Swamp Fox Lane. The trail ended in front of 318 Swamp Fox Lane. Appx. pp. 307-15, 321-23. Sergeant Cook testified investigators later found additional money and a mask in the woodline by the Zaxby's. Appx. pp. 322-23.

Marteeka Hamilton testified she was in an off-and-on relationship with Brown for six years. She received a call from Brown on Wilson's cell phone around midnight on December 23-24. Hamilton testified Wilson's street name is "Dolla." Brown asked Hamilton to pick him and Wilson up, but she could not do so right away because she was at a salon. After some back and forth with Applicant, Hamilton ultimately picked up him and Wilson at the entrance of the Foxborough subdivision. She testified she saw a police car in front of someone's house in the neighborhood. She told Brown and Wilson that she needed gas money, and they gave her \$40.

While Hamilton was driving, she heard Wilson talking on the phone about shooting someone and said he did not mean to do it, and Brown called Wilson a “stupid motherfucker.”

Hamilton testified she dropped Brown and Wilson off at a mall parking lot between 1:00 a.m. and 2:00 a.m. even though the mall was closed. At first, they wanted her to drop them off at a pawn shop to get another ride. Hamilton testified she spoke with Brown on his own phone several times in the days following the robbery. She also saw Brown and Wilson at the Motel Six on Ashley Phosphate Road. She noticed two or three shopping bags in the room. Appx. pp. 375-85; pp. 388-89.

Cynthia Garrett started dating Brown around November 2011. Brown’s parents put him out of the house, so Garrett let Brown stay with her and her three kids. They had a fight, so Garrett told Brown to leave after he accused her of “being slick with another guy.” Appx. pp. 411-

13. Brown moved out about a week before Christmas. Garrett testified Brown would call her using Wilson’s phone. Appx. p. 414.

Prior to kicking Brown out of the house, Garrett tried to convince him to get a job and offered to drive him back and forth to the job site. However, Garrett testified Brown told her he would “rather rob than work,” and declined the job offer. Appx. p. 415. Garrett also testified Brown asked her to let him use her car to do a “lick,” which Garrett understood as a slang term for a robbery. Brown told Garrett he was planning to do the lick with Wilson. Garrett refused. Garrett testified that one time her daughter saw Brown cleaning a gun in the kitchen. Garrett told Brown he needed to get the gun out of the house. Appx. pp. 416-17.

Initially, Garrett testified she had seen the gun herself and identified it from a picture showed to her by the solicitor. However, on cross-examination, Garrett admitted she had not

personally seen the gun, but her daughter had told her about it and described it to her. Appx. pp. 435-37.

Garrett testified she picked up Brown from the area between Zaxby's and the Hess gas station sometime before Christmas. Brown was staying across the street with Wilson in a subdivision near the Zaxby's. Garrett testified Brown often used Wilson's phone until Brown got his own. Around midnight on December 23-24, Brown called her on Wilson's phone asking her to pick him and Wilson up. Brown tried to entice her to do this by offering to pay her light bill, which was about \$175, and to pay to fix the vent in her car. Garrett declined. Appx.. pp. 417-421.

The next time Garrett heard from Petitioner, he offered to take her out for her birthday in December. Garrett again declined. Then around the beginning of the year, she saw Petitioner because she wanted to have Wilson cut her son's hair before he went back to school. During this meeting, Petitioner told her about the robbery and how Wilson had shot someone. According to Garrett, Petitioner said they had been scoping out the scene for a while. Petitioner also told her he and Wilson went shopping with the stolen proceeds and bought shoes, clothes, and cell phones. Garrett noticed Brown was wearing new clothes. Petitioner told her how they dropped some of the money but kept running because the police were coming.

Petitioner further told Garrett that his ex-girlfriend picked him and Wilson up after the robbery. He and Wilson then rented a car and went out of town for a while. Brown said he was staying in a hotel. Garrett reported what Brown had told her to the police because she felt it was the right thing to do. Appx. pp. 422-26.

Captain David Sodeberg participated in the execution of the search warrant at 318 Swamp Fox Lane. Petitioner was found in the home at the time the search warrant was executed. Law enforcement located a blue Ruger Mark II semi-automatic .22 caliber pistol in a suitcase

sitting outside the exterior door to the garage. Law enforcement also seized a knife from the

residence. Appx. pp. 478-483. Additionally, the social security card of one of the victims of the robbery was found in a drawer in one of the bedroom's at Wilson's home. Tr. pp. 486-94.

Investigator Powell testified he received a tip on December 29, 2011, from Cynthia Garrett. Investigator Powell verified that Petitioner stayed at the Motel Six and corroborated the approximate amount of money stolen from Zaxby's. Appx. pp. 486-94.

Sonia Wilson, Christopher Wilson's mother, testified she arrived home to discover a search warrant being executed at her house at 318 Swamp Fox Lane. Christopher Wilson was not at the house when the search warrant was executed. She testified Ramen noodles had been left out on the table, and neither she nor her husband eat Ramen noodles. Appx. pp. 557-58. Sonia testified she had previously found Petitioner inside her house when her son was not there. Appx. p. 559.

Lanier Daniels was in the Berkeley County Detention Center with Petitioner in January 2012. Daniels testified Petitioner talked about the Zaxby's robbery, and he was mad because the other guy shot someone during the robbery. Daniels testified Petitioner told him he had been arrested while having Ramen noodles at someone else's house. Petitioner told Daniels he was at the house to get rid of the gun. Brown also told Daniels that his "baby mama" picked Brown and Brown's accomplice up after the robbery. Appx. pp. 560-64, 567.

Law enforcement obtained cell phone records for Dolla, Petitioner, Hamilton, and Garrett. ROA. p. 503. Law enforcement also obtained the GPS records for Dolla, who was on probation and wearing an ankle bracelet. The GPS records and phone records indicate the following:

- On 12/23/15, Dolla's phone is used to call to Hamilton at 10:54 p.m. GPS records

show that at that time Dolla was at 431B St. James Avenue (Zaxby's is at 433 St. James Avenue). Appx. pp. 508-510. According to Powell's records, 431B is actually in the woods. Appx.p. 522, lines 2-5.

- Dolla's phone records indicate a call to Hamilton at 12:16 a.m. on 12/24/15. Zaxby's was robbed at four minutes after midnight. Appx. pp. 510-511.
- There was a seven-minute gap from 12:01 to 12:08 in the phone records and the Zaxby's robbery lasted roughly two and a half to three minutes. Appx. p. 511. GPS records show that at 12:07 a.m., Dolla was located at Zaxby's. There is a gap in records from 12:07 a.m. until 12:53 a.m. Appx.. p. 511, line 21 – p. 512, line 4.
- The records show outbound calls from Dolla's phone to Garrett at 12:20 a.m., 12:21 a.m., and 12:22 a.m. Appx. p. 514, lines 19-21.
- More phone calls were made to Hamilton at 12:22 a.m. and 12:28 a.m. Appx. pp. 512-513. There were several more calls until 12:50 a.m. Appx. p. 513.
- GPS records indicate Dolla was at 310 Swamp Fox Lane at 12:53 a.m. At 12:57 a.m., he was at 318 Swamp Fox Lane. Then Dolla starts progressively moving down St. James Avenue, corresponding to the cell phone records and Hamilton's testimony that she picked the robbers up at about 1:00 a.m. Appx.. pp. 513-514.

SLED Agent Kenneth Whitler, who had retired by the time of trial, testified the cartridge case submitted to him was fired by the gun submitted to him by Goose Creek investigators for testing. Appx. pp. 568-70, 575.

Daniel Demers was qualified as an expert in forensic testing of DNA. He testified DNA found on the recovered ski mask matched Christopher Wilson's DNA. Appx. 605-06. He also

testified Petitioners and Wilson were in the 2.2% of the African-American population who could not be excluded as contributors of the DNA on the handle of the gun recovered by investigators.

Appx. pp. 608-10

At the end of trial, the jury convicted Petitioner on all counts of armed robbery and kidnapping, as well as burglary and criminal conspiracy. However, the jury found Petitioner not guilty of attempted murder and possession of a weapon during a violent crime. Judge Young sentenced Petitioner to an aggregate sentence of sixty years' imprisonment – thirty years for each count of kidnapping, fifteen years for second-degree burglary, and five years for criminal conspiracy, all to be served concurrently to each other, plus a consecutive sentence of thirty years for the armed robbery.

Petitioner filed a timely notice of appeal and was represented by John Strom and Tiffany Butler of the Office of Appellate Defense. Applicant the sole issue of the admissibility of the GPS tracking evidence. The Court of Appeals affirmed in an unpublished Rule 220(b) opinion. *State v. Brown*. 2016-UP-447 (filed November 2, 2016). The Court of Appeals then denied Petitioner's subsequent petition for rehearing. Petitioner filed a petition for writ of certiorari, which the South Carolina Supreme Court granted by order dated October 19, 2017. After briefing, the Supreme Court affirmed the result on August 28, 2018, and the remittitur issued on September 26, 2018.

Petitioner then filed an application for post-conviction relief on February 28, 2019. Respondent made its return and partial motion to dismiss on July 1, 2019. Applicant amended his application on March 23, 2021 and March 25, 2021. An evidentiary hearing into the matter convened on September 9, 2021 before the Honorable R. Kirk Griffin via WebEx virtual platform.

At the hearing, Petitioner alleged his constitutional rights were violated and counsel was ineffective for the six claims expressed in his amended allegations, such as 1) failing to object to the “search for the truth” language in the trial courts opening jury instructions, (2) failing to object to Marqueeta Hamilton’s testimony regarding Christopher Wilson’s statement that he shot someone, (3) failure to object to bad character /bad act evidence from Cynthia Garrett (4) failing to object to the DNA expert’s testimony regarding an alibi; (5) failing to object to the trial court’s Allen charge and (6) failing to object to the admissibility of the DNA expert and the reliability of the DNA evidence on the basis of Rules 702 and 403, SCRE.

At the hearing, Petitioner testified on his behalf. Trial Counsels, Debra Littlejohn and David Schwacke also testified. When discussing her decision to not object to the qualification of the state’s DNA expert Demers, Littlejohn testified that the objection would be futile as he was qualified and testified as an expert in several states including South Carolina, and that she was still able to cast doubt on his qualifications through voir dire. See Appx. Pp. 972-973. In response to Applicant’s allegations that counsel did not object to Demer’s testimony, she explained that she did object to the testimony based on Rule 403, SCRE, citing *State v. Bostick*, which was ultimately denied by the court. Appx. Pp. 988-989 Trial Counsel David Schwacke also testified regarding DNA evidenced elicited from Demers. It is his testimony that the DNA evidence presented helped his client’s case, because it was his goal to show the jury” how low those numbers were.” Appx. p 1027. He further testified that while he could have objected to the “alibi” remarks, he felt that the testimony was still helpful to Brown, because the words “falsely accused” likely helped the jury, and he was able to cross-examine Demers to get him to admit that there were several ways that Applicant’s DNA could have gotten on the gun, and that there were over 980 individuals in Berkeley County that could not be excluded from this DNA Sample. Appx. pp. 1022-1029. He

further testified that the DNA evidence was a “low factor” in the evidence due to the type of testing that was done. *Id.*

Following testimony, the Court directed the parties to submit memoranda of law to support their respective positions. By written order on October 27, 2021 Judge Griffith denied Applicant’s application for post-conviction relief on all grounds raised. Applicant filed a timely notice of appeal. Counsel for Applicant submitted Petition of Writ of Certiorari on June 28, 2022. This return follows.

STANDARD OF REVIEW

The standard of review for PCR 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”, *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRPC; *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). 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 evidence 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 at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- a. **The post-conviction relief court properly held that trial counsel was not ineffective where counsel moved to exclude testimony from the state’s DNA expert pursuant to Rule 403, and *State v. Bostick* and where counsel did not determine an objection based on 702 was necessary due to the expert’s qualifications, and that Petitioner was not prejudiced by allowing the testimony regarding the exclusion of the African American population was helpful to Petitioner’s defense.**

The post-conviction relief court properly found Counsel was not ineffective for deciding not to object the qualification of Demers as he had been an expert and testified in matters in several states and used repeatedly as an expert in DNA. Counsel was not ineffective for moving to exclude testimony based on Rule 403, as counsel moved to exclude testimony based on Rule 403, SCRE and *State v. Bostick*, and did not further object to testimony as a reasonable trial strategy. Furthermore, Petitioner was not prejudiced because the testimony elicited was critical to Petitioner’s defense.

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show “counsel’s conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, 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).

Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

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), SCRPC; *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 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). 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.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S.

at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential[, as] it is all too tempting for a defendant to second-guess counsel's assistance after conviction or [an] 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." *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id.* (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. *Id.* Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this

presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed [at] the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. *Harrington*, 562 U.S. at 105.

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. *Id.* 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 that 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 693 (emphasis added).

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. 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. 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.*

Here, Applicant argues trial counsel were constitutionally ineffective for failing to object to the DNA expert, Demers, and the reliability of his tests and evidence under Rules 702 and 403, SCRE. This court should uphold the decision of the PCR Court.

As an initial matter, counsel did object to the admission of the DNA evidence on the basis of Rule 403 and cited to *State v. Bostick*, 392 S.C. 134 (2011), in support of her argument. The trial court considered her argument, but eventually ruled that the testimony and evidence were admissible, further stating that any argument could be made during cross-examination. Furthermore, trial counsel requested and was allowed to voir dire the expert. Additionally, Counsel testified that she did feel that based upon the qualifications for Demers presented and in her experience, that an objection as to his qualifications would be futile.

In support of his position, petitioner repeatedly points to *State v. Phillips*, 430 S.C. 319, 844 S.E.2d 651 (2020), in which the Supreme Court expressed concern with the use of touch DNA evidence and testing. However, *Phillips* was decided six years after petitioner's trial, and trial counsel nor the Court did not have the benefit of its guidance in making arguments and

decisions in Petitioner's case, and should not be considered in assessing counsel's effectiveness at the time of trial.

However, even if this court considers *Phillips*, the instant case is easily distinguishable from *Phillips*. First, the DNA evidence and testimony has considerably more probative value of DNA in petitioner's matter than in *Phillips*. In *Phillips*, Phillips admitted to being at the crime scene and holding the gun. Accordingly, the fact of Phillips DNA being on the gun or not excluded from the gun was much less relevant in his case than in Petitioner's where his defense relied heavily on the fact that he was not involved nor at the scene. *Id.* at 327, 844 S.E.2d at 655. Moreover, the statistical probabilities cited in *Phillips* were much larger than those in Applicant's case. In *Phillips*, the DNA expert testified half of the population could not be excluded from some of the DNA samples. *Id.* at 328, 844 S.E.2d at 655. In petitioner's case, the DNA expert testified 97.8% of the black population of the United States could be excluded from the butt of the gun. Tr. p. 608.

Secondly, in *Phillips*, there were drastic misstatements of the evidence and testimony presented by the DNA expert by the Solicitor. *Id.* at 342-43, 844 S.E.2d at 663. Conversely, in the instant case, Demers testified that Applicant's DNA could not be excluded from the DNA mixture found on the handle of the gun. He further explained that this was a different scenario than one in which a person would be deemed unequivocally included in the DNA mixture. The DNA expert went on to say he could not say it was Applicant's DNA on the gun. Moreover, the expert repeatedly explained it was possible that the DNA of "falsely accused person" could not be excluded in this scenario. Tr. pp. 608-10. Also, in closing argument, the solicitor did not misstate the DNA expert's testimony to the jury as in *Phillips*, but asked the jury to consider the DNA along with any other evidence.

Accordingly, this testimony was different than that of the testimony in *Phillips*, as it assisted the trier of fact regarding the DNA probability, and had significantly more probative value to the trial than the testimony in *Phillips*, as required admission of evidence under Rule 702¹. Additionally, trial counsel was not ineffective for failing to object to the qualifications of Demers' as she credibly testified that considered him to be qualified based upon her experience at the time.

Furthermore, trial counsel objected to the DNA evidence on the basis of Rule 403, SCRE, asking the court to consider the DNA evidence as prejudicial to her client and cited to *State v. Bostick*, 392 S.C. 134 (2011), in support of her argument. The trial court considered her argument, but eventually ruled that the testimony and evidence were admissible. Furthermore, trial counsel requested and was allowed to voir dire the expert.

Nonetheless, Petitioner argues that counsel should have objected again based on Rule 403, SCRE. However, counsel testified that the testimony from Demers was helpful to Petitioner's defense. He articulated a strategic reason for allowing further testimony, as the statistical probability was helpful to Petitioner because when compared to the African American population of Berkeley County alone, there were more than 980 people in addition to Applicant who could not be excluded, which was essential to Petitioner as evidenced by the use of this fact in the closing argument to the jury. Additionally, trial counsel used the cross-examination and testimony from Demers to further diminish the reliability of the DNA testing and display that the DNA evidence could have been transferred to the gun in a number of ways that did not include

¹ In order to admit scientific evidence under rule 702 SCRE, the trial court must find: (1) the testimony will assist the trier of fact, (2) the witness is qualified, (3) the underlying science is reliable, and (4) the testimony's probative value is not outweighed by its prejudicial effect. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999).

Applicant's involvement with the crime.

The PCR Court correctly found that trial counsel credibly testified that she did not believe a Rule 702, SCRE, objection would have been successful as Demers was clearly qualified as an expert. Additionally, the extreme and repeated overstatements of the DNA testing by the State that caused significant concern in *Phillips* were not present in Applicant's case, and these statements helped petitioner's case as it shed light on how unreliable this type of DNA testing may have been, making an additional objection based on Rule 403 injudicious. Accordingly, the PCR court correctly held that trial counsels were not deficient, as they testified to not objecting to the expert qualifications based on rule 702 as counsel credibly testified that she deemed he was qualified. Further, Petitioner prejudiced by trial counsels' lack of an additional Rule 403 objection as counsel strategically chose not to object to elicit crucial testimony to the defense, nor was Petitioner unfairly prejudiced by the testimony elicited because it was helpful and crucial to the defense of the Petitioner.

- a. The post-conviction relief court correctly held that trial counsel was not ineffective for failing to object to the State's DNA expert's remarks surrounding an alibi and Petitioner's failure to present evidence, as the remarks did not prejudice Petitioner when trial counsel was able to elicit useful testimony for the defense.**

Petitioner alleges trial counsels were constitutionally ineffective for failing to object to the DNA expert's references to an alibi during the course of his testimony. Petitioner alleges the expert instructed the jury to consider whether Petitioner provided an alibi and to draw negative inferences from his inability to do so, which they characterizes as unfair burden-shifting. However, Petitioner cannot show that he was prejudiced by the testimony of DNA Expert Demers' testimony as it aided in his defense.

As noted above, in order prove prejudice, a Petitioner must demonstrate counsel's deficient

performance prejudiced the Petitioner 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. 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 that 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 693 (emphasis added).

The State concedes that this testimony was objectionable as outside the scope of the expert's qualifications. However, Petitioner failed to prove he was prejudiced by Demers' testimony. First, while Demers' remarks during his exchange with the Solicitor may have been outside of the scope of his qualifications, trial counsel was able to elicit testimony that countered or clarified any prejudice petitioner may have encountered from the statement. On cross-examination, the expert explicitly clarified he did not know if there was any other evidence in this case, and clarified that he was not trying to suggest that an alibi factored into the statistically probabilities that he provided. Appx. pp. 628-29.

Moreover, Demers' testimony actually admits that the DNA of a "falsely accused person" could be unable to be eliminated from the sample. Trial Counsel testified that he believed this was helpful to his defense due to the numbers being so low and useful for the jury to hear. In his opinion, the words "falsely accused person" draws good attention to his client because there were "going to be people on that jury that have known people who have been falsely accused." Appx. pp. 1010. Furthermore, Schwacke agreed that he felt that due to the amount of contributors to the sample on the gun that any language about a falsely accused individual would be beneficial to Petitioner, because he could one of the individuals falsely accused.

Importantly, it was the testimony of DNA Expert Demers that displayed that there could

have been at least 980 other individuals in Berkeley County alone that could not be excluded from the mixture, and that falsely accused individuals that could be included in the DNA mixture.

Furthermore, Petitioner cannot prove that the outcome of the trial would have been different but for the actions of trial counsel in not objecting to this testimony. There was other evidence elicited that tied Petitioner with the crime scene. The State elicited testimony from a number of individuals in addition to the DNA evidence, including Marteeeka Hamilton and Cynthia Garrett, who were the largest hurdles in Applicant's defense, according to credible testimony of trial counsel Debra Littlejohn. It was her testimony that the DNA was largely unimportant as there was nothing saying without a doubt that Petitioner DNA was found. *See* Appx. 955.

Marteeeka Hamilton, who was in an on and off again relationship with Petitioner, had extensive testimony regarding the night of the robbery and Petitioner's whereabouts following the incident as she saw the Petitioner following the robbery. It was Hamilton's testimony that she received a call from Petitioner shortly after midnight on December 24 from Petitioner's co-defendant, whom she identified as "Dolla's" phone. She further testified that she picked up Petitioner and his co-defendant from a subdivision and took them to a mall that was closed. Hamilton also testified that she had been promised nothing in exchange for her testimony.

Furthermore, Garrett testified she began dating Petitioner in November 2011, and they lived together. She testified that Petitioner had expressed interest in planning to commit a robbery with Wilson and asked to use her car to do so prior to this date. Petitioner left Garrett's apartment about a week before Christmas. She further testified the night of the robbery that Petitioner often used his co-defendant's phone and Petitioner called from his co-defendant's

phone to ask for a ride, to which she refused. Garrett further testified that Applicant admitted to committing the robbery with Wilson and using the money to purchase items. Garrett testified she contacted “law enforcement because it was the right thing to do.”

There was a third witness, Lanier Daniels that testified that he was the cellmate of Petitioner while at the Berkeley County Detention Center, where he admitted to him robbing the Zaxby’s. He further testified that he received no benefit in testifying or providing a statement.

In addition to three separate accounts of Petitioner confessing his involvement in the robbery, the State presented GPS evidence, cellphone records and other witness testimony that further corroborated the State’s theory of the case. The testimony of individuals who Petitioner allegedly called upon to assist him following the robbery, confided in, or had significant relationships paired with the presentation of the other evidence presented is substantial. Conversely, testimony surrounding the DNA evidence, where Demers stated repeatedly that he could not say it was one hundred percent match to Applicant’s DNA on the butt of the gun, and that it was “statistically possible” that 980 other individuals in Berkeley County as well as “falsely accused” people could not be excused from the sample. Furthermore, this testimony helped Petitioner’s defense and could only be at most corroborative to the evidence presented at trial as it is not the defining evidence of identity.

Accordingly, because the testimony of the DNA expert did not unfairly prejudice Petitioner, the PCR court correctly held that trial counsel was not ineffective for not objecting to his remarks.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the lower court and deny certiorari.

Respectfully submitted,

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