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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Greenville County

The Honorable Edward W. Miller, Trial Judge
The Honorable Perry H. Gravely, PCR Judge

Appellate Case No. 2021-001436

RONNIE C. SWOFFORD,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

**AMENDED RETURN TO PETITION FOR WRIT OF CERTIORARI
PURSUANT TO *AUSTIN V. STATE***

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON CERTIORARI.....2

STATEMENT OF THE CASE.....3

STATEMENT OF FACTS.....5

STANDARD OF REVIEW.....19

ARGUMENT.....20

CONCLUSION.....25

STATEMENT OF ISSUE ON CERTIORARI

PETITIONER'S ISSUE PRESENTED

Was Petitioner denied effective assistance of counsel where counsel failed to challenge the prosecution's claim that Petitioner's fresh blood was splattered on the wall, where SLED found there was no blood on the wall, and where the freshness of the (nonexistent) blood was used to discredit Petitioner's alibi?

RESPONDENT'S COUNTERSTATEMENT OF ISSUE

Did the PCR court correctly deny the application when Petitioner has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel ensured that it was clear that the State did not find any evidence that Petitioner's blood was on the victim's kitchen wall?

STATEMENT OF THE CASE

Petitioner Ronnie C. Swofford, Jr., is presently imprisoned in the South Carolina Department of Corrections. On May 14-17, 2012, Petitioner proceeded to a jury trial with the Honorable Edward W. Miller, (“trial court”) presiding for the following charges: first-degree burglary (2009-GS-23-09403), assault and battery with the intent to kill (2009-GS-23-09404), assault with intent to kill (2011-GS-23-07263), possession of a weapon during the commission of a violent crime (2009-GS-23-09404), and possession of a pistol by a person convicted of a violent crime (2009-GS-23-09405). Andrew J. Johnston and Gerald G. Wilson represented him at that trial. The jury convicted Petitioner as indicted. The trial court sentenced him as follows: for first-degree burglary, to imprisonment for life without the possibility of parole; for assault and battery with the intent to kill, to imprisonment for life without the possibility of parole; for possession of a pistol by a person convicted of a violent crime, to imprisonment for five years; and for assault with intent to kill, to imprisonment for ten years.

Petitioner’s lawyers filed a timely notice of appeal. The South Carolina Court of Appeals dismissed his direct appeal at his request by an order issued on June 28, 2013, after he unsuccessfully moved to relieve as his counsel LaNelle C. DuRant of the South Carolina Commission on Indigent Defense. The remittitur was issued on July 24, 2013. Petitioner filed a pro se motion for a new trial based on after-discovered evidence on July 23, 2013. His motion was denied by the Honorable Letitia H. Verdin on December 9, 2013. Judge Verdin also denied his subsequent motion to reconsider. Petitioner filed a notice of appeal, and the Court of Appeals later dismissed that appeal on June 23, 2014, at Petitioner’s request. The remittitur was issued on July 9, 2014.

On July 8, 2014, Petitioner filed an application for post-conviction relief (2014-CP-23-3763). On October 21, 2015, an evidentiary hearing was convened at the Greenville County Courthouse before the Honorable Perry H. Gravely (“PCR court”). The PCR court denied the application with prejudice in an order issued on December 30, 2015. On February 2, 2016, Petitioner moved to alter of amend the judgment pursuant to Rule 59(e), SCRPC, and some pro se filings from Petitioner were attached to that motion. Respondent filed a return to the motion, arguing that the motion should be “dismissed” because it was a mere conduit for Petitioner’s pro se filings, and thereby prohibited as hybrid representation, and because the PCR court had properly and fully reviewed and ruled upon all issues. In an order issued on February 17, 2016, the PCR court denied Petitioner’s motion.

On March 3, 2016, Petitioner’s counsel served a notice of appeal, which was filed with this Court on March 10, 2016. Deputy Chief Appellate Defender Wanda H. Carter of the Commission on Indigent Defense filed a petition to be relieved as counsel and a petition for a writ of certiorari pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), arguing that one of Petitioner’s trial lawyers had erred in admitting during his opening statement that Petitioner’s blood had been found at the crime scene because no blood evidence “within its traditional meaning” had been found at the scene. Petitioner filed a pro se *Johnson* petition, raising multiple arguments. The Court of Appeals dismissed the appeal, finding that Petitioner’s PCR lawyer had not timely served the notice of appeal from the PCR court’s denial of relief when he filed a motion for reconsideration outside of the required ten-day window, which then did not toll the deadline for filing a notice of appeal.

This successive application for post-conviction relief followed. The Honorable G. D. Morgan, Jr., granted the application with Respondent's concession to the claim raised pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 392 (1991), and granted Respondent's motion to dismiss as to all other claims. This appeal follows.

STATEMENT OF FACTS

Curtis Wooten ("the victim") met Petitioner while the two were in prison when they were housed in the same room for a year or more, and the two became friends. App. 59-61, 113. They lost touch with each other when the victim was released from prison, but they reconnected a few months before the shooting in the underlying criminal case when they bumped into each other at a gas station. App. 61-62. They began seeing each other about four to five times a week at that point, usually spending time together at the victim's home. App. 62-63. The victim and his girlfriend Danielle Edwards cohabitated at the time and were both living on government assistance checks of various types. App. 63-64. The victim kept all his money on him in the form of cash and did not have a bank account. App. 65-66. He testified at trial that he lent about \$750 to Petitioner about two days before the shooting, expecting to be repaid a few days later. App. 67-68, 88. Instead of meeting the victim to repay him, though, Petitioner set up meetings with the victim by text message and then failed to keep them. App. 68-69.

Sometime after 2:00 a.m. of the morning following the night at which Petitioner was supposed to repay the victim, the victim returned to his home after having gone to the grocery store. App. 69-70, 86. Petitioner had texted the victim to say that he would not meet him that night, as they had originally planned. App. 94. When the victim sat his groceries on his kitchen counter, he saw a man behind him; the victim recognized the intruder's .40 caliber Hi Point pistol and saw

“his eyes and stuff” because the intruder wore a mask that only partially covered his face. App. 70-73. The victim characterized the mask as ski mask that lacked a nose bridge covering, which allowed him to see the intruder’s eyes. App. 114-15. He knew the pistol because the intruder had shown it to him a few days beforehand and said that it was his brother’s.¹ App. 73, 125-27. The intruder called out the victim’s name and then shot him when the victim turned towards him. App. 71. Edwards ran away and the victim saw the intruder shooting at her she did so. App. 71. He shot the intruder once with a pistol, and the intruder fled. App. 71-72. He called 911 and he and Edwards drove to the hospital, with Edwards making a call to 911, too, once they were on their way. App. 74-75, 83.

The victim recognized the intruder. App. 71. He told a law enforcement officer at the hospital that Petitioner shot him and about the pistol that Petitioner had used. App. 84-85. Almost two months after the shooting, when the victim woke up from his post-shooting coma, he signed a statement for officers that identified Petitioner as the shooter. App. 112-13. He testified that Petitioner was the intruder and that the pistol that Petitioner used had been the same one Petitioner had shown to him the day before the shooting. App. 85-87. He recognized Petitioner’s voice when Petitioner called out his name before shooting him. App. 131. He assumed that Petitioner had shot him to take his money. App. 86. On cross-examination, he agreed that he had left a voicemail for someone shortly before the shooting in which he may have threatened to cut his or her head off over some snack cakes. App. 122-24. He also admitted that he had taken 75 milligrams of

¹ The victim clarified that he could not tell that the pistol that Petitioner was using during the shooting was a .40 caliber one, but he recognized Petitioner and saw that Petitioner was holding a Hi Point, and made an assumption that it was the same .40 caliber Hi Point that Petitioner had shown him the day before. App. 127.

methadone about fifteen hours before the shooting, but denied that he had been taking any other medications at the time. App. 129-30.

Sergeant David Hayes of the Greenville County Sheriff's Office responded to Wooten's 911 call, arriving at the hospital at approximately 2:45 a.m. on the morning of the shooting. App. 142-43. Sgt. Hayes was able to speak briefly with Wooten at the hospital, and Wooten told him that an unknown assailant in dark clothing entered his home and started shooting at him, and then identified Petitioner as the shooter, explaining that Petitioner owed him money. App. 143-44. Wooten told Sgt. Hayes that he was not "totally certain" that Petitioner was the intruder, but said that Petitioner owned the .40 caliber handgun used to shoot him. App. 144. Wooten had lost over thirty to forty percent of his blood from the gunshot wound, was intubated, had his spleen and one of his kidneys removed, had a portion of his small intestine and of his colon removed, underwent a tracheostomy due to his going into respiratory failure, and had to have his abdomen kept open for multiple days; additionally, Wooten suffered complications from his injuries, like having open wounds that needed tending, getting infected with a fungus in his blood stream, and developing pneumonia. App. 136-39.

Officer John Derby of Greenville County Forensics went to Wooten's home to collect evidence. App. 151-53. Officer Derby collected three spent cartridge casings on the floor. App. 160, 168, 189. Officer Derby located a projectile hole in the wall in Wooten's kitchen and was able to recover a projectile and a projectile jacket from the area underneath a kitchen cabinet. App. 162-64. That projectile jacket was admitted into evidence as State's exhibit 48. App. 173. It was a fired bullet jacket, which the State's expert firearms examiner testified was consistent with a .380 auto caliber projectile. App. 226. The projectile was admitted as State's exhibit 49. App.

173-74. It was a fired bullet specimen, which the firearms examiner identified as having been a .40 caliber projectile, which was more than likely manufactured by Hi Point.² App. 226-27. Officer Derby found what appeared to be a wad of fabric next to the projectile hole, and noted that the area around the hole had “stains” that he did not see appearing anywhere else on the wall. App. 164-65. He cut away that section of the wall so that he could collect it for the investigation due to the fact that that section contained “suspected blood” and fabric that could be seen on it. App. 165-66, 177-78. Officer Derby testified that he determined that the projectile had “blood and possible tissue” and “possible suspected tissue or fabric” inside of it. App. 172, 184.

Sergeant Darwin Shaw of the Department of Public Safety’s Forensics Division went to the victim’s home at the request of Investigator Christopher Miller of the Greenville County Sheriff’s Office to see if he could further the investigation. App. 198-203. Sgt. Shaw went to the scene with the portion of wall that Officer Derby had already removed so that he could put it back in place to see if that helped him gather more information or evidence. App. 204-05. Sgt. Shaw cut away an even-larger piece of the wall, at which point he found a projectile between some black fiber board and a brick wall that divided the kitchen from the bathroom. App. 209. He collected that projectile, which was admitted into evidence as State’s exhibit 64. App. 210-11. He then saw that there was another projectile hold leading from the kitchen wall into a bathroom, he went into the bathroom and found another projectile that had entered the bathroom next to a toilet. App. 212-13. He collected that projectile, which was admitted into evidence as State’s exhibit 55. App. 213-

² The firearms examiner testified that the rifling characteristics imprinted on State’s exhibit 49 when it was fired matched Hi Point only, according to a rifling characteristics database maintained by the Federal Bureau of Investigation and the Bureau of Alcohol, Tobacco, Firearms and Explosives, but admitted that it was possible that there were other manufacturers with those characteristics of which the agencies were not aware. App. 230-31.

14. He testified that the fact that this projectile was still jacketed indicated that it had not hit anything hard enough to cause the jacket to separate from the remainder of the projectile. App. 214.

Sergeant David Weiner of the Greenville County Sheriff's Office searched the victim's home right after 4:00 a.m. on the morning of the shooting. App. 233-34. He observed that there was a hole in the wall between the living room and kitchen that had a "little bit" of fabric next to it and what appeared to be blood around it. App. 235. He also saw that the victim's mobile phone had been exchanging text messages after or around midnight with another number that was attributed to "Ronnie" in the victim's phone. App. 236, 241-42. He called the number for "Ronnie," but received no response until Petitioner returned his call two days later, at which point Petitioner admitted that he had been communicating with the victim that night, but said that he could not remember why he had been looking for the victim so early in the morning, denied having any involvement in the shooting of the victim, and did not express any concern about the victim or inquire about the victim's condition. App. 237-39, 306.

Verona Gibson, an evidence processing technician in the DNA Department at the South Carolina Law Enforcement Division ("SLED"), testified that she performed a test for the presumptive presence of blood on the section of wall cut out of the victim's home and collected a possible hair and what appeared to be fibers from it. App. 246, 252. The test was negative for the presence of blood. App. 253. Ila Simmons, a trace evidence examiner at SLED, determined that the fibers collected from the wall cutout were black polyester fibers, App. 255-261. Adrian Hefney, a forensics DNA analyst with SLED, compared the DNA profile she was able to take from the swab of the projectile jacket admitted as State's exhibit 48, which she characterized as "suspected

blood tissue from the kitchen floor,” to the DNA sample taken from Petitioner. App. 265-70. She determined that the two DNA profiles matched, and that the probability of randomly selecting an unrelated individual with a matching DNA profile was approximately one in 24 quadrillion. App. 270-71. She also determined that the DNA profile of the hair collected from the wall cutout matched Petitioner’s DNA profile, and with the same one-in-24-quadrillion probability as the projectile swab. App. 274.

Inv. Miller was the Sheriff’s Office’s lead investigator into the shooting. App. 297-98. Edwards told him at the hospital after the shooting that a masked intruder dressed in black entered the victim’s home and shot him, that she ran for the door and heard a shot, and that she learned afterwards that the victim had shot the intruder. App. 301. She could not identify the intruder. App. 301. Describing the scene at the victim’s home, Inv. Miller testified that there was blood near a phone line in the kitchen and blood and tissue “splattered” on the wall near a “gunshot projectile on the paneling” App. 302. He tried to contact Petitioner using the phone number with which Sgt. Weiner had done so, but Petitioner never called him back. App. 306-07. He sent to SLED for blood DNA analysis, among other things, a swab from the projectile found on the floor of the victim’s kitchen. App. 311. He tried again to make contact with Petitioner by going to his residence. App. 314-16. He secured arrest warrants for Petitioner after SLED’s preliminary analysis showed that Petitioner’s DNA matched the DNA taken from one of the items he submitted for testing. App. 316-17.

Jeffrey Hunter Smalley testified as a defense witness. App. 363. He had been working for Petitioner on various metal fabrication jobs for about two to three years prior to the shooting, but he probably went to high school with Petitioner and had known him for about twenty years before

he started working on Petitioner's fabrication jobs. App. 363-65. He agreed that he had been friends with Petitioner for some years. App. 370-71. He testified that, when Petitioner was working with him on then July 22, he noticed that Petitioner's arm was injured and covered with a gauze bandage, which looked as if it had been put on by Petitioner himself. App. 369-70. He said that the wound was on Petitioner's left arm and it consistent of two pierce marks that looked as if something had passed through the arm. App. 370. Petitioner told him that he had gotten the injury when a friend's gun had discharged. App. 372-73. He did not know what Petitioner was doing in the early morning hours of July 22. App. 373.

Petitioner's mother Phyllis Swofford testified that Petitioner's birthday is on July 25. App. 374. She noticed a bandage on Petitioner's left arm on July 23, and described the bandage as a "band-aid." App. 377-79. She applied an antibiotic ointment to it and replaced the "band-aid," and thought that the wound, which looked like a "burnt place," must have been caused by Petitioner's pressure washing wand. App. 378-79. On cross-examination, she testified that she knew that Petitioner had had "the place" on his arm on July 23, and then said after a follow-up question from the solicitor that Petitioner had two "places" on his arm. App. 385. She agreed that she had not told law enforcement officers or the solicitor about her recollection of the injury to her son's arm before trial, even though she had learned that that was an important fact in the case; she explained her failure to do so by testifying that she does not drive and was unable to drive herself to Greenville, although she admitted that she had a phone. App. 383-86.

Charlie Duffie testified as a defense witness, saying that he had known Petitioner since they worked together in the late 1980s and that he and Petitioner had become "fairly close" friends

over the past seven or eight years.³ App. 390-91. He later agreed that he and Petitioner were “real close.” App. 396. He testified that he noticed a bandage on Petitioner’s left arm on July 23 when they were celebrating Petitioner’s birthday. App. 391-93. He said that the bandage consisted of two band-aids, one of the front of Petitioner’s forearm and another on the rear. App. 393. He testified that Petitioner peeled off the front bandage to show him the wound, which he characterized as a round, cigarette-like burn. App. 394. Duffie admitted to his criminal record, which included convictions for failure to stop for a blue light, assault and battery of a high and aggravated nature, shoplifting, financial transaction card fraud, and forgery. App. 394-95. On cross-examination, Duffie testified that he learned immediately after Petitioner was arrested that the injury to Petitioner’s arm was significant, but he did not go to police with that information at any point because he did not think that the fact that he knew that Petitioner had suffered an arm injury before the shooting at issue was relevant and because he figured that Petitioner and Petitioner’s lawyer would come to him if they had questions about it. App. 397-99. He did not know Petitioner’s location in the early morning hours of July 27, 2009. App. 399.

Lawter testified that she and Petitioner had been in a relationship with Petitioner for six years, and that she and Petitioner shared a two-and-a-half-year-old child. App. 405. She agreed that she had a previous conviction for filing a false police report. App. 419. She testified that Petitioner’s birthday is July 25, and that she was with Petitioner at a birthday meal for him at a Japanese restaurant on July 25, 2009. App. 406-08. She said that she first noticed an injury to

³ The solicitor’s investigator reported during trial that he had seen Petitioner’s girlfriend Shannon Lee Lawter and Duffie whispering outside the courtroom despite the sequestration order that was in effect. Lawter denied that she had communicated with Duffie. The trial court warned defense counsel that witnesses would go to jail if they defied the order. App. 400-04.

Petitioner's left arm around July 22, testifying that she saw "a place" on the arm. App. 408-10. She described it as appearing as a burn or a graze wound. App. 410. She testified that Petitioner had arrived home from work at about 1:30 a.m. on July 27, 2009, and that it was not unusual for Petitioner to get home from work early in the morning. App. 413-14. She said that Petitioner did not leave once he arrived at home, until he left to go to Charlotte that same morning at about 6:00 a.m. App. 416-17. She said that she told the law enforcement officers who came to the house investigating the shooting that Petitioner had not been shot because she thought that the injury looked like a burn. App. 418-19. She testified that she told Petitioner that the officers had come to the home to ask to speak to him, and that Petitioner told her that he did not know why they were looking for him. App. 426-27. Petitioner was still driving her to work and she admitted that she would experience financial hardship if he were to go to prison. App. 424-25. She said that Petitioner told her initially that he had injured his arm on a lawn mower. App. 428-29. She said that she believed his explanation because the injury was not a big wound and looked "like a graze to [her], like a scratch pretty much." App. 444. She said that Petitioner later told her that the victim had accidentally shot him on July 21 and that he had not reported it to the police so that the victim would not have to go to jail; she testified that she did not relay that information to police because she did not trust them. App. 445-47. She explained her statement to officers that Petitioner was working in Columbia when they came to the house to speak to him by saying that he had actually been in Atlanta and that she had been confused when she talked to the officers. App. 430. She denied that she told her former neighbor Deborah Martinez that Petitioner had confessed to her that he shot a man in Greer and that she could use that information to "bury him." App. 442. She denied that she told Martinez that Petitioner told her details about the shooting. App. 442. She also

denied that she told Martinez that she would lie for Petitioner at his trial. App. 442. She denied sending text messages to Stephen Parham saying that he needed to be at Petitioner's trial. App. 443. She denied that she and Petitioner had discussed what they would say while on the witness stand at trial, but later admitted, at least to some extent, that she had discussed the case with Petitioner. App. 443, 447-48.

Lawter's son Jordan, and Petitioner's step-son, testified, too, and said that Petitioner was like his father. App. 449. He testified that Petitioner was in Petitioner's bedroom at 2:20 a.m. on July 27, 2009, and that he went to Charlotte with Petitioner later that morning at 6:00 a.m. App. 452-53. He said that he saw a bandage on Petitioner's arm when they went to Charlotte, but he did not know the details of Petitioner's injury. App. 459. Jordan still lived with Petitioner. App. 455. He said that he did not tell the officers when they showed up to arrest Petitioner that Petitioner had been at home at the time of the shooting because he did not want to talk to officers who were not there for him and because he did not know why they were there. App. 461-62. He agreed that he wanted Petitioner to be at home with him and testified, "I'll do whatever I can for him." App. 462.

Otis Pullen testified that he had known Petitioner for twelve or thirteen years, or maybe more; Petitioner testified that he met Pullen when they were both imprisoned together. App. 463, 603-04. He said that he saw Petitioner's vehicle drive by him at about 1:15 a.m. on July 27, 2009, and he called Petitioner and had a phone conversation with him. App. 465-68. He put that phone call between 1:30 and 1:35 a.m. App. 469. He said that he did not share his information with officers even though he was aware that Petitioner had been arrested. App. 471-72. He did not know Petitioner's location at the time of the shooting. App. 472.

Stephen Parham, who has a learning disability and is Martinez's son and Petitioner's

former neighbor, testified that he is friends with Petitioner. App. 472-73, 482, 628. He claimed to have talked to Petitioner right outside Petitioner's home at 1:36 a.m. on July 27, 2009, and that Petitioner went inside his house afterwards and did not leave again. App. 478-79. Lawter sent a text message to him on the night before his testimony telling him that a warrant would be issued for his arrest if he did not come to trial. App. 481. Lawter drove him to court for his testimony and asked him as she exited the courtroom after her testimony if he had been talking to the prosecution. App. 481-82. He admitted that he told the solicitor's investigators the week before trial that he was not "100 percent certain" that Petitioner had gone into his house that night. App. 482. When he met with trial counsel, Petitioner had driven him to the appointment and bought him breakfast along the way, and told him that, when the case was over, he and Petitioner would "hang out together, catch up on lost time," and that Petitioner would get a gym membership and show him how to work out. App. 483. He agreed that Petitioner had shown his entire case file to him and said that he wanted him to testify that he saw Petitioner walk into his house at a specific time. App. 483. He admitted that he had told the solicitor's investigator the week before trial that he wanted the case to be over because he "[could not] stand being in front of anybody, trying to put somebody away, not knowing what the person may or may not do," and that he told the investigator that he was scared. App. 486. He agreed that he told the investigator that he was feeling threatened and wanted the case over. App. 486-87. He agreed that he had started to feel as if Petitioner had been trying to manipulate him in order to get him to say certain things. App. 487.

Petitioner's brother James B. Swofford testified that he was at the Japanese restaurant with Petitioner and others on Petitioner's birthday. App. 497-98. He identified some photographs as those that he took with his mobile phone while at that birthday party. App. 499-500. He explained

that one of the photographs showed the bandage on Petitioner's arm. App. 499.

Petitioner testified in his own defense. After admitting to a redacted version of his own criminal record, Petitioner testified that he became friends with the victim in prison and then reconnected with him on the outside. App. 500-18. He testified that the victim had exaggerated the number of times on which they met, though. App. 520-22. He denied that he had borrowed money from the victim, but said that he had reluctantly accepted a gift of \$850 from the victim and deposited \$750 of it into his account. App. 530, 549-50, 594. He said that he stopped by the victim's home on July 21, that the victim appeared to be high at that time, that the victim accidentally shot him in the arm, and that he did not seek medical attention for the wound so that the victim would not get in criminal trouble for having the firearms, even though he has acquired immunodeficiency syndrome ("AIDS"). App. 532-42. He went to his home, cleaned it, and wrapped it in gauze bandages. App. 542. Since he and Lawter owned dogs, he had medical supplies for dogs at home. App. 542. He did not seek medical attention other than to ask a veterinarian's advice. App. 542. He would not have been surprised to know that his blood was in the victim's home due to the accidental shooting. App. 542.

Petitioner said that he originally told Lawter that he had injured his own on the lawnmower and that he told the version from his trial testimony with her right before he had been arrested. App. 544-45. Petitioner testified that he went to his birthday dinner on July 25, and that the photographs taken there show the injury to his arm and that others saw his injury. App. 552-53. He kept the wounds covered because they looked like burns, and he was wearing a butterfly bandage at some point. App. 553. He said that, on the morning of the shooting, he left work at 12:05 a.m., dropped an employee off at the employee's home at 12:35 a.m., received a call from

Pullen, arrived at home at 1:35 a.m., and stayed there until 5:55 a.m. App. 557-65. He said that he did not return the officer's phone call because he forgot to do so and was not thrilled to talk to officers. App. 566-67. He denied that he shot the victim. App. 569.

Petitioner testified that, when he saw his AIDS counsellor on July 21, his counsellor did not raise concerns about the bandage on his arm and told him later that he had not noticed the bandage. App. 576-78. He said that he initially told three people about the accidental shooting: Hunter Smalley, Duffie, and a co-worked named Terry. App. 581. He did not seek medical attention for his wound, despite his medical condition, out of "loyalty" to the victim due to their friendship and because he could see that the bullet had exited his arm. App. 582-83. He said that he rinsed his arm with a garden hose in front of the victim's house after the accidental shooting, and decided then that he did not need to seek medical attention because "it was just an incident in the arm." App. 592. While Petitioner was testifying about the mechanics of the accidental shooting, the solicitor asked him if he was crafting a narrative to explain the bullet hole and his DNA splattered on the victim's wall. App. 589. He could not remember what happened to the clothes he was wearing during the accidental shooting. App. 590-91. He knew that officers wanted to talk with him and check him for a gunshot wound after the victim was shot, and he was unsure if the victim had told them about the accidental shooting. App. 601. Even after the officers arrested him for shooting the victim and were taking photographs of the gunshot wound on his arm, he did not tell the officers about any of the witnesses who allegedly saw him during the early morning hours of the shooting or about the alleged accidental shooting because he wanted to exercise his right to remain silent, although he was making statements to the officers. App. 615-18.

Martinez testified during the State's case-in-reply that she was Petitioner's and Lawter's

neighbor. App. 625. She testified that Lawter had visited her in February of 2019 after having had an argument with Petitioner and said that Petitioner told her that he had shot the victim in self-defense, and that Lawter said that she did not want to testify against Petitioner because they had a son together and that she would not say in court what Petitioner had told her. App. 629-33.

Inv. Miller also took the stand again. He testified that Petitioner's witnesses had not told him the things about which they testified. App. 635-36. After trial counsel said outside the presence of the jury that the determination of whether a blood smear on a wall is "fresh" was a matter within lay knowledge, Inv. Miller testified before the jury that a photograph of the victim's wall appeared to show "fresh blood, tissue, [and] hair." App. 639-42. He believed that the blood was "fresh" because it was red and still in a liquid state. App. 642, 645.

During closing arguments, the issue of the suspected blood on the wall came up again. Trial counsel admitted that Petitioner's DNA was in the victim's home, but argued that the State had not performed analysis to determine the length of time that the blood had been on the victim's wall, disagreed with Inv. Miller's opinion that the blood was fresh, and said that the officers must have told the victim about the presence of Petitioner's blood on the wall before the victim gave his written statement. App. 654-55, 665. The solicitor argued that Petitioner's allegation that his body tissue, hair, and suspected blood had been in the victim's home for the six days between the alleged accidental shooting and the shooting of the victim was not credible, argued that the body tissue and blood were fresh because the blood on the wall had not yet turned brown when the photograph of it had been taken, and said that the State had tissue, hair, and blood DNA that put Petitioner at the crime scene. App. 691, 703. The jury found Petitioner guilty as indicted on all counts, and the trial court issued the mandatory life sentences. App. 725-26, 731.

STANDARD OF REVIEW

The standard of review for post-conviction relief matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court’s factual findings and will uphold them if there is probative evidence in the record to support them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, at 180-81, 810 S.E.2d at 839-40 (citing *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016); *Jordan v. State*, 406 S.C. 443, 448, 752 S.E.2d 538, 540 (2013)). The PCR court’s findings regarding prejudice are based on a thorough review of the record as a whole and, accordingly, are inherently fact-based and must be afforded deference by a reviewing appellate court. *See Briggs v. State*, 421 S.C. 316, 334, 806 S.E.2d 713, 723 (2017) (“The PCR court found the case ‘came down to the victim’s believability and credibility.’ The PCR court found the most damaging testimony to Briggs . . . was not reliable because [the witnesses] ‘credibility is highly suspect.’ Finally, the PCR court found ‘there is a reasonable probability that the result of the Applicant’s trial would have been different’ if Singleton had not allowed Arroyo-Staggs to improperly bolster the victim. Giving to the factual findings by the PCR court the deference we are required by law to give, we affirm the court’s finding that Briggs proved prejudice, satisfying the second prong *Strickland*.”). However, pure questions of law will be reviewed de novo without deference to the lower court. *Smalls*, at 180-81, 810 S.E.2d at 839-40. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The PCR court was correct to deny the application because Petitioner has failed to prove that there is a reasonable likelihood that the outcome of his trial would have been different had trial counsel ensured that it was clear that the State did not find any evidence that Petitioner's blood was on the victim's kitchen wall.

Trial counsel was the first person to tell the jury that Petitioner's blood was on the victim's kitchen wall. The solicitor said in her opening statement that the intruder left behind "[a] splatter on the kitchen wall and body tissue and hair," and that the DNA matched Petitioner's. App. 48. She did not say then that Petitioner's blood was on the wall; in fact, she did not reference Petitioner's blood at all at that time. It was trial counsel who said in his opening statement that the blood and tissue found at the scene belonged to Petitioner, and said that it would be the meaning of their presence that would make the difference. App. 49. During the State's case-in-chief, the victim testified that he had been informed that the projectile found inside his wall had Petitioner's blood on it and, responding to a question from trial counsel, testified that he may have heard about the blood before giving his written statement. App. 133-34. Officer Derby and Sgt. Weiner were careful to say that the substance on the wall appeared to be blood, was suspected blood, or possibly was blood; at that point, no forensic analysis had been performed in order to know the true makeup of the substance. App. 177-78, 196-97, 235. SLED Agent Gibson then clarified that the swabbed portion of the wall tested negative for the presence of blood. App. 252-53. Inv. Miller then, when describing the victim's kitchen upon his arrival, testified that blood and tissue were splattered on the wall. App. 302. Petitioner conceded during his testimony that his blood may have been in the victim's home due to the fact that he had been shot while there. App. 543, 591. The solicitor then asked Inv. Miller if the suspected blood in a photograph of the victim's wall appeared to show fresh blood, and he testified that the blood was fresh, and explained on cross-examination that it

looked fresh because it appeared to be a liquid and not a dried substance. App. 640-42. Then the parties addressed the issue again in closing.

In evaluating allegations of ineffective assistance of counsel, the post-conviction relief court applies the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). First, the applicant must prove that the performance of his lawyer was deficient. *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, at 117, 386 S.E.2d at 625 (quoting *Strickland*). Petitioner argues that trial counsel should have objected to the solicitor's examination of Inv. Miller regarding the "fresh" blood on the wall and of her examination of Sgt. Weiner about his observation that there was blood on the wall when he was in the kitchen. Sgt. Weiner was explicitly testifying about his visual observations at the scene, and it was clear from his testimony that he was describing what *appeared* to him be blood. Apparently, the substance on the wall did look like blood and Sgt. Weiner would not have known otherwise at that point in the investigation, so there was nothing improper about his qualified description. The fact that even trial counsel and Petitioner seem to have conceded that the substance looked like blood mitigates any reason to think that the witnesses' descriptions of the substance as blood were insincere; in fact, trial counsel offered a reasonable explanation that, at some points in the trial, the technical terms for the biological substances found at the crime scene may have been used interchangeably. It is unclear from the record if the photograph that Inv. Miller was looking at when he testified about the freshness of the blood depicted the substance that the SLED agents had tested or if it depicted some other substance on the wall that was not specifically identified in a way that would be illuminating to one studying the trial transcript. For that reason, Petitioner has

failed to prove that the solicitor's witness examination and closing argument were intentionally misleading. Admittedly, though, it does seem as if the lawyers on *both* sides conducted themselves at trial as if the substance on the wall was blood—and Petitioner's blood at that—despite the SLED agent's testimony that the wall swab had tested negative for the presence of blood.

The second prong of the *Strickland* analysis is that the deficient performance must have prejudiced the applicant such that “there is a reasonable probability that, but for [the lawyer'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. “Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985) (quotation omitted). The PCR court correctly found that Petitioner failed to prove that he suffered prejudice from his lawyer's performance. App. 866. Regardless of their exact locations in the victim's kitchen, samples of DNA found in the kitchen matched Petitioner's DNA. The State's DNA expert matched Petitioner's DNA to a sample taken from a projectile collected from the floor of the victim's kitchen and to a hair taken from the victim's kitchen wall. Even if trial counsel had prevented all references at trial to the blood-like substance on the wall, there would have remained overwhelming evidence that Petitioner had been in the victim's home and that he had been shot there with a .380 caliber firearm.

The greatest challenge to Petitioner's defense was that he had to contend with the victim's identification of him as the intruder while also explaining away the gunshot wound in his arm. This challenge would have been present even if trial counsel and the solicitor had not conducted

the trial as if Petitioner's blood was present on Petitioner's wall. Petitioner has not proven that there is a reasonable likelihood that but for any deficiency in trial counsel's performance for trying the case as if Petitioner's blood was on the victim's wall that the jury's verdict would have been any different. First, Petitioner's witnesses' stories about his actions on the night of the shooting and about his explanations for his injury were not credible. Petitioner's first witness had known him for about twenty years and had been his friend for some years, and had also worked for Petitioner on fabrication jobs. Petitioner's next witness was his mother, who gave a description of the dressings on Petitioner's alleged wounds that differed from his own, who gave a non-credible explanation for her not telling law enforcement officers of the existence of Petitioner's wound before the crimes at issue in the case, and who had impeachable criminal convictions on her record. Petitioner's third witness was a man who had known Petitioner for decades and been close friends with him for almost a decade, who gave a description of Petitioner's wound dressing that differed from Petitioner's own, who gave a non-credible explanation for his pre-trial silence about the timing of Petitioner's alleged arm wound, and who had impeachable criminal convictions on his record. Petitioner's fourth witness was his ex-girlfriend and mother of his child, who gave a non-credible explanation for her pre-trial silence about the alleged wound on Petitioner's arm, whose testimony was cast in doubt by (among other things) another witness's rebuttal testimony that the girlfriend had talked about an incriminating statement made by Petitioner and had said that she would not reveal the truth of the matter at trial, who had made threatening statements to another of Petitioner's witnesses in an apparent attempt to secure his favorable testimony for Petitioner, and who had an impeachable criminal conviction on her record. Petitioner's fifth witness was his step-son who gave non-credible testimony about the reason that he did not inform officers of the

alleged wound on Petitioner's arm and who testified that he would do whatever he could to help Petitioner. Petitioner's sixth witness was someone who had known Petitioner for a long time, who had at least one criminal conviction serious enough to justify a prison sentence, and who gave non-credible testimony that he did not inform officers that he had seen Petitioner on the night of the shooting for which Petitioner had been arrested. Petitioner's seventh witness was a special needs young man who backtracked his alibi testimony while on the stand and ended up testifying that his initial testimony had been a recitation of what Petitioner wanted him to say, that Petitioner's girlfriend had communicated with him in advance of trial about his testimony in a way that made him feel threatened, that he felt that Petitioner was trying to manipulate him, and that he felt scared to testify against Petitioner.

Second, Petitioner's testimony that he did not seek medical attention for or report the alleged accidental shooting because he wanted to protect the victim and because he did not think the wound serious enough was absurd. Petitioner downplayed his relationship with the victim to the extent that it is not believable that he would have felt such loyalty to the victim that he would have tried to conceal the alleged accidental shooting. And Petitioner, who has AIDS, would not have merely rinsed his arm with a garden hose and doctored it up himself with veterinarian supplies from home that was meant for dogs had he not had some personal reason for the wound to go undetected, like needing to avoid law enforcement scrutiny following the attempted murders of the victim and Edwards.

Third, the jury could not have accepted Petitioner's contention that days went by between the alleged accidental shooting and the shooting at issue in the case while the biological matter

that Petitioner left behind in the victim's kitchen was undisturbed and still useful for forensic analysis.

CONCLUSION

Even if there had been no errant testimony or arguments at trial that suggested that Petitioner's blood was on the victim's kitchen wall, Petitioner has failed to prove that there is a reasonable likelihood that his parade of criminals, family members with absurd testimony, and a coerced and impressionable witness would have been able to rebut the State's evidence such that the jury's verdict would have been any different. The PCR court was correct to deny the application and this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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