IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM MARION COUNTY
Court of Common Pleas

RECEIVED
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S.C. SUPREME COURT

Appellate Case No. 2022-001735

The Honorable George M. McFaddin Jr., Circuit Court Judge

Tyrell Woods……...……Petitioner,

v.

The State of South Carolina ……..…Respondent.

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

I. Appellate counsel was ineffective for failing to appeal the trial court's denial of Petitioner's motion to exclude Detective James Lee's testimony identifying Applicant from surveillance footage.

II. Appellate counsel was ineffective for failing to file a merits brief on appeal addressed to the trial court's denial of Petitioner's motion to dismiss the criminal conspiracy indictment.

III. Trial counsel was ineffective for failing to object to the fingerprint evidence based on the quality of the standards used for identification.

STATEMENT OF THE CASE

Procedural background

Petitioner and his uncle, Marco Sanders, were indicted in May 2013 for murder, armed robbery, first-degree burglary, attempted murder, possession of a weapon during the commission of a violent crime, and conspiracy. App. 17, 836–37. They proceeded to a jury trial May 19-22, 2014, before the Honorable D. Craig Brown. App. 5. They were convicted and sentenced to five years' imprisonment for possession of a weapon, five years' imprisonment for conspiracy, thirty years' imprisonment for the attempted murder charge, thirty years' imprisonment for armed robbery, life imprisonment for murder, and life imprisonment for first-degree burglary, with the sentences to be served consecutively. App. 775–76.

Petitioner appealed. His appointed counsel filed an appellate brief with a motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing the trial court erred in refusing to dismiss appellant's conspiracy charge because he was never served with a warrant or the indictment for this charge. App. 841–854. Petitioner filed a pro se appellate brief arguing ineffective assistance of appellate counsel for failing to fully brief the issue raised and that the proper relief is to vacate all his convictions and sentences. App. 859–869. The court of appeals dismissed the appeal. *State v. Woods*, Unpublished Op. 2016-UP-030 (S.C. Ct. App. filed Jan. 20, 2016); App. 872–73. Petitioner filed the underlying application for post-conviction relief (PCR) March 8, 2017, which was denied after an evidentiary hearing. App. 874–892; 1084–1138.

Relevant factual background

Eddie Godbold, Jr., a neighbor of the decedent, Sam Rowell, went to Rowell's house around 9:00 p.m. on July 4, 2012, to get a deep fryer. App. 198. Godbold knocked at the front

door, and when there was no answer, he went to the back door. App. 199. Hearing nothing, he started walking back around the house and has he passed Rowell's side door, Godbold heard Rowell's voice: "Eddie. They're trying to rob me. Open the door." App. 199. When Godbold reached for the door, he heard three to five gunshots. App. 199, 200, 205, 208. Godbold ran to the front of the house and hid behind the steps. App. 199–200.

After waiting for a short period, Godbold got into his car and drove to a neighbor's house and called the police. App. 200–202. Godbold drove back to the direction of the house, parked, and waited for the police. App. 202. He never saw who was in Rowell's house or who fired the shots; however, he told the police there were two people. App. 235–36. He did not see any vehicles in Rowell's yard except Rowell's pickup truck, but he did see a white Cadillac Escalade parked near the house of another neighbor, Lafayette Reed. App. 202, 212–13.

Reed lived next door to Rowell and heard three shots while he was standing in his yard. App. 410. Reed retrieved his gun, got in his car, and drove towards Rowell's house. App. 411. As he approached Rowell's house, he noticed Godbold's car parked in the yard and saw him "kind of squatting down." App. 411. A light-colored sport utility vehicle (SUV) without its lights on approached Reed's car. App. 428, 413. On the night of the shooting, Reed told the police he thought the car was either a Cadillac or a Navigator; however, later at trial he indicated he told the detectives the car "looked like it was an Expedition or a Ford Explorer." App. 413; 433–34. Reed admitted he could not tell "what or who was in the car." App. 413, 415. Reed tried to follow the vehicle but ultimately could not keep up with it. App. 417, 420.

Police eventually discovered Petitioner had a girlfriend and that she owned a white Ford Expedition. App. 482–83. Levern Nichols, who used to work for the police department, heard

they were looking for a white SUV and he told law enforcement that he had seen Petitioner and Sanders the day before the shooting in one. App. 446–47. He did not know Petitioner personally and had only seen him from time to time over the past year or two. App. 453–54. He could not remember the last time he had seen him prior to allegedly seeing him July 3, 2012. App. 454–55.

Officer Gregory Pike was the first to arrive at the scene. App. 222. He observed Rowell on the floor unresponsive and called for emergency medical services. App. 226. Rowell had been bound with brown fiber rope and duct tape around his wrists and legs. App. 271–72. A pair of brief underwear had been duct taped across his mouth as an ineffective gag. App. 272. Rowell died from a gunshot wound to the head. App. 280, 274–75.

Two surveillance cameras were at Rowell's house and the monitor was found near the foot of his bed with the cords cut. App. 305. A digital video recorder was found on a sofa with its cords cut. App. 329. Detective James Lee took the equipment to South Carolina Law Enforcement Division (SLED) for analysis, but it had been damaged. App. 485–86. A SLED agent informed Detective Lee where he could obtain the same type of equipment. App. 486. Detective Lee purchased another video player, and they were able to view the video. App. 486.

Prior to the start of trial, the trial court held a hearing on the admissibility of Detective Lee's testimony identifying Petitioner as one of the suspects on the surveillance video. In the hearing, Detective Lee testified that after he watched the surveillance video, he recognized Petitioner and Sanders as the two men walking towards the house with guns. App. 94. He stated he knew Petitioner from incidents in the past at the Sheriff's Office. App. 95. Detective Lee clarified he

had met him once in 2007 as a juvenile when he was being interviewed by Detective Neil Rouse.[1] App. 105. Sanders was at the station with Petitioner regarding the same incident. App. 99–100. That was the only time he met Petitioner or saw him in person, and he was with Sanders at the time. App. 105, 107. He stated he had seen photographs of him in other cases where he was of interest but was ultimately not arrested. App. 107.

Petitioner argued the testimony should be excluded because there was no basis for him to make the identification. App. 113. Specifically, Petitioner noted there was only evidence of a single interaction in 2007 when he was a teenager. App. 113. Detective Lee was not even working on the case. App. 113. The trial court denied the motion, finding the "testimony was that he knew Woods from previous incidents in the past since '07." App. 118. He further noted Detective Lee indicated he recognized the defendants "in no time." App. 118. Over objection, Detective Lee was allowed to testify he recognized Petitioner on the video. App. 512–13.

Before the jury was sworn, the defendants argued the State should not be permitted to proceed on the conspiracy charge because they were never served with the indictment, and they did not receive proper notice of the charge. App. 170. Counsel noted they received the indictment from the clerk, not the State, at some point the month before. App. 170. The State argued that there was notice from the clerk, the defendants had all the evidence, and there was no prejudice. App. 171. The trial court noted the objection and deferred ruling to some later date. App. 171. At the close of evidence, the defendants sought a ruling from the trial court, reminding it that it had never ruled. App. 670-71. The trial court simply stated "I previously ruled

[1] The hearing also involved the admissibility of Detective Rouse's identification testimony, but he could only identify Sanders from the video. App. 79, 112.

on that. My ruling remains the same on that . . .." App. 672.

Evidence was adduced at trial that Rowell's house was prone to heavy traffic of people coming through. Godbold acknowledged that Rowell's house was like a "little club" used for parties where people would pay a fee to attend. App. 208–10. He testified the parties could be up to twenty or thirty people. App. 209. Officer Clemson Legette, who had responded to the scene, agreed with defense counsel's characterization that the house was "some kind of a business, a juke joint or a club," and that inside the rooms were tables, chairs, liquor, beer, and cigarettes. App. 255–56. Rowell's brother also testified about the home being used for events, although he stated the space was rented and no liquor was provided. App. 386. He testified he had been to a party there with forty-five to fifty people. App. 387. Agent Sabrina Fellers, who processed the scene, indicated that she "would assume that social activities took place there." App. 352. Agent Fellers also testified over sixty items were submitted to SLED, although not all were analyzed. App. 353. The items submitted included samples for fingerprint analyses. App. 630–31.

Agent Thomas Darnell analyzed the prints and testified as an expert in latent print identification. App. 624. He indicated he had been working eighteen to twenty years as an independent latent print examiner. App. 623. Although he indicated his work was reviewed by a second examiner, he noted that in a hypothetical situation where there was a difference in opinion, it may come down to experience level. App. 659. He testified that once latent prints were retrieved, they were compared with a fingerprint card. App. 627. He identified Petitioner's major case prints card, which had been retrieved by Mr. Hardee following the

Schmerber[2] hearing. App. 629, 520. He then identified Petitioner's prints on two different cigar boxes, a box of liquor, a cardboard box, and the adhesive side of duct tape that had been removed from Rowell's head and ankles. App. 626-31. Petitioner and Sanders were convicted on all counts. App. 756.

Petitioner then filed an application for PCR alleging "Sixth Amendment violation based on Ineffective Assistance of Counsel," "Lack of Subject-Matter-Jurisdiction, 'to include conspiracy at trial,'" "Fifth and Fourteenth Amendment Double Jeopardy violations in sentencing." App. 874–892. He later amended his application with the assistance of counsel to allege:

1. The trial court abused its discretion in failing to suppress the in-court lay opinion identification testimony be Detective James Lee identifying Tyrell Woods from surveillance footage, pursuant to Rule 701 SCRE.

2. Appellate counsel's assistance was ineffective there he failed to appeal the trial court's denial of Tyrell Wood's motion in limine to exclude the in-court lay opinion identification testimony by Detective James Lee identifying Tyrell Woods from video surveillance footage, pursuant to Rule 701 SCRE.

3. Trial counsel was ineffective for failing to argue that the in-court lay opinion identification testimony by Detective James Lee identifying Tyrell Woods [from] video surveillance footage should be suppress[ed] or excluded pursuant to Rule 701 SCRE.

4. Trial counsel was ineffective for failing to move to suppress fingerprint analytical reports by SLED on the ground that the [*Schmerber*[3]] order requiring the production of Tyrell Wood's fingerprints for analytical comparison to prints found at the crime scene and on the victim did not comply with SC Code Ann. 17-13-140

5. The trial court abused its discretion in failing to dismiss the conspiracy charge pursuant to Tyrell Wood's pre-trial motion.

6. The trial counsel was ineffective in failing to move to exclude and or suppress or object to testimony by Detective James Lee and Neil Rouse that Shawn Bart Davis identified

[2] The hearing was held November 16, 2012, before the Honorable William H. Seals, Jr., and the prints were obtained that same day. App. 520, 779, 784.
[3] *Schmerber v. California*, 384 U.S. 757 (1966).

Tyrell Woods in a pretrial photograph lineup where Shaw[n] Bart Davis was not present at trial in violation of the Confrontation Clause to the United States Constitution[].

7. Counsel was ineffective for failing to object to the jury charge where the jury was instructed that malice element of murder could be inferred from conduct that showed a total disregard for human life.

App. 903–04. Petitioner further amended his application to allege "Counsel was ineffective for failing to move to squash the indictment on the ground that the indictment was fatally defective because it did not sufficiently allege the place of the crime." App. 905. An evidentiary hearing was held before the Honorable George M. McFaddin on April 21–22, 2022. App. 906, 1011. At the hearing, the PCR court heard testimony from trial counsel, the prosecuting attorney, Petitioner, and appellate counsel.

In questioning trial counsel on his failure to move to suppress the fingerprint analysis, Petitioner argued the fingerprint standard used by Agent Darnell was insufficient for comparison purposes and therefore trial counsel should have sought to have the analysis excluded. Specifically, Petitioner introduced the SLED Forensic Services Laboratory Report on the fingerprint analysis, which noted that one of the items, 3.1 (latent print on Item 3, a "Black & Mild" cigar box,) indicated "NO CONCLUSION" as the result of the analysis based on "the quality of Item 64/ Woods, Tyrell." App. 929, 1139. Trial counsel testified he did not object to the analysis because he did not view the report as grounds for objection, observing his reading of the report indicated that the latents off the *box* were inconclusive, not the standards. App. 926–28; 974.

Petitioner also questioned appellate counsel on his failure to brief the improper identification testimony and his failure to submit a merits brief addressed to the issue of the criminal conspiracy indictment. Appellate counsel explained he had chosen not to brief the

improper identification issues because he believed the objection was addressed to the weight not the admissibility and would be controlled by the standard of review. App. 1065, 1079. He further stated that although it was undisputed that the State had never served Petitioner with the criminal conspiracy indictment, the attorneys received it at some point. App. 1067–68. He noted that in reviewing that issue, he discovered *Magazine v. State*, 361 S.C. 610, 606 S.E.2d 761 (2004), and concluded his argument was essentially undone by that case. App. 1068. Based on that conclusion, he determined a merits brief was not appropriate. App. 1078. The PCR court ultimately denied PCR and dismissed Petitioner's application. App. 1084–1138. The petition follows.

ANALYSIS

Standard of Review

"In a PCR case, this Court will uphold the PCR court's factual findings if there is any evidence of probative value in the record to support them." *Mack v. State*, 433 S.C. 267, 272, 858 S.E.2d 160, 162 (2021). Conversely, the Court "will not uphold the findings when there is no probative evidence to support them [and] will reverse the PCR judge's decision when it is controlled by an error of law." *Pierce v. State*, 338 S.C. 139, 145, 526 S.E.2d 222, 225 (2000).

Under the Sixth Amendment of the United States Constitution, the "'right to counsel is the right to effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). "A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel." *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). When reviewing a claim of ineffective assistance of appellate counsel, the court applies the same test from *Strickland* that it would employ in a claim of ineffective assistance of trial counsel. *Id.*

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

"To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained prejudice as a result of counsel's deficient performance." *Thompson v. State*, 423 S.C. 235, 239,

814 S.E.2d 487, 489 (2018). To establish prejudice, the defendant is required "to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Smith v. State*, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

I. Appellate counsel was ineffective for failing to appeal the trial court's denial of Petitioner's motion to exclude Detective James Lee's testimony identifying Applicant from surveillance footage.

Appellate counsel's representation fell below an objective standard of reasonableness because he failed to file a merits brief on a viable issue and instead filed an *Anders* brief. While appellate counsel need not raise *every* meritorious claim and winnowing down an appeal to the most promising issues is undeniably a best practice for appellate lawyers, *Jones v. Barnes*, 463 U.S. 745, 752 (1983), this truism means little when no merits brief was filed.

It appears appellate counsel misunderstood the nature of the actual objection lodged before the trial court and therefore erroneously dismissed the issue as without merit. Appellate counsel testified he chose not to raise the improper identification testimony as an issue because his "memory of the issue is that the objections really went to the weight of the testimony and not its admissibility." App. 1065. He further testified that he chose not to bring the issue because it was controlled by the standard of review. App. 1079.

The objection raised was addressed to the foundation for the identification, not the weight. Trial counsel argued that Detective Lee had testified his last encounter with Petitioner was 2007 when Petitioner was still a teenager and the interaction had only been in passing; therefore, there was not sufficient basis for the in-court identification. App. 113. The PCR court

recognized at much in its order, noting trial counsel "attempted to use the limited nature of [Detective Lee's encounter with Petitioner when Petitioner was a teenager] to convince the trial judge Detective Lee did not have an adequate foundation to be able to accurately identify [Petitioner] from the footage such that his testimony on the matter should be ruled inadmissible." App. 1103–04.

Appellate counsel was deficient in failing to raise this issue on appeal. In explaining his decision not to address it, appellate counsel testified that the objections were addressed to the weight, not the admissibility. However, trial counsel specifically argued that there was no foundation for this identification based on the limited nature of Detective Lee's encounters with Petitioner. *See* App. 113. Therefore, the issue of the admissibility was raised and preserved for appellate review.

Appellate counsel further testified that the issue was controlled by the standard of review and would likely not be meritorious. This could, of course, be said of many issues that are raised in a criminal trial. "In criminal cases, appellate courts sit to review errors of law only." *State v. Cross*, 427 S.C. 465, 473, 832 S.E.2d 281, 285 (2019). Generally, "the conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had." *State v. Heath*, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958). However, even an abuse of discretion can be shown to reverse a trial court ruling where the trial court's conclusions are based on unsupported factual conclusions or controlled by an error of law. *State v. Prather*, 429 S.C. 583, 598, 840 S.E.2d 551, 559 (2020).

And the trial court abused its discretion in allowing Detective Lee to identify Petitioner as the individual on the video because it was not rationally based on the perception of the witness

as required by Rule 701, SCRE. In holding the opposite, the trial court relied on *State v. Mitchell*, 399 S.C. 410, 731 S.E.2d 889 (Ct. App. 2012) and *State v. Fripp,* 396 S.C. 434, 721 S.E.2d 465 (Ct. App. 2012). In both of those cases, the contact between the witness and the defendant was significant. In *Mitchell*, the officer had known the defendant *over twenty years* of living in Newberry. 399 S.C. at 419, 731 S.E.2d at 894. *Fripp* involved a challenge to the testimony of two employees of a store that was robbed. 396 S.C. at 438, 721 S.E.2d at 467. The two women had both identified the defendant as the perpetrator in a surveillance video. *Id.* In holding the testimony was properly admitted, the court of appeals found both witnesses had substantial interactions with the defendant upon which to base their identification:

> Brown indicated she knew Fripp "very well" and "saw him all the time" and he came into the Store frequently—"once a day. Sometimes twice a day." She further testified the videotape contained a "good shot of his face" "on one of the angles on the tape." In her statement to police, Young testified she had worked at the Store for several years and also knew Fripp through his family. Therefore, the witnesses' testimonies were rationally based on their perceptions of Fripp's appearance including his physical appearance, mannerisms, and clothing.

Id. at 439, 721 S.E.2d at 467. Here, Detective Lee testified he had a single face-to-face encounter with Petitioner in 2007, when Petitioner would have been roughly fourteen years old. App. 95, 105. Petitioner and his co-defendant had been brought into the Marion County Sheriff's Office for a prior incident, but Detective Lee was not the individual who interviewed him. App. 105. Detective Lee had only otherwise only seen him in photographs and had never seen him out in the community. App. 107. Petitioner was nineteen at the time of the alleged incident. App. 771. Significant differences in physique and carriage generally occur as a boy of fourteen grows into a man of nineteen.

The trial court therefore abused its discretion in allowing Detective Lee to identify Petitioner on the video. The gateway to admissibility cannot be so easy to pass through—there must be a rational basis for the witness's perception. Both *Fripp* and *Mitchell* involved extensive in-person encounters with the defendants, which allowed for a broad range of familiarity—not simply a face and physical appearance, but mannerisms and demeanor. Those human nuances change into adulthood and cannot be gleaned from photographs. Detective Lee had none of that. He had not seen Petitioner since Petitioner was a child some *five years* prior to the incident and had only ever seen him in person that once. Although Detective Lee testified he had seen pictures of Petitioner over the years related to other offenses, the video is brief and is predominantly profile of the alleged perpetrator. *See* State's Ex. 1. Those facts do not support a conclusion the testimony was rationally based on his perception.

Accordingly, there is a reasonable likelihood an appellate court would have found the error was not harmless and therefore would have reversed. "Error is only harmless when it could not reasonably have affected the result of the trial." *State v. Davis*, 371 S.C. 170, 181–82, 638 S.E.2d 57, 63 (2006) (internal quotation marks omitted); *Smalls v. State*, 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018) ("[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice[ ]the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability . . . the factfinder would have had a reasonable doubt' cannot possibly be met."). That cannot be said about this testimony. There was limited physical evidence against Petitioner and no DNA evidence. Although his fingerprints were found on items at Rowell's house, including duct tape used to bind

Rowell, several witnesses testified that Rowell's home was like a club or some place for social gathering, and he often hosted parties. App. 208–10; 255–56, 352, 386. The video was vital to placing Petitioner at the scene of the crime at the time of the incident and an identification to the jury by a detective has significant weight. The State did not produce conclusive evidence of his guilt and therefore the evidence was not so overwhelming that it categorically precluded a finding of prejudice. *See Martin v. State*, 427 S.C. 450, 455, 832 S.E.2d 277, 280 (2019).

II. Appellate counsel was ineffective for failing to file a merits brief on appeal addressed to the trial court's denial of Petitioner's motion to dismiss the criminal conspiracy indictment.

Similarly, appellate counsel's representation fell below an objective standard of reasonableness because he failed to file a merits brief addressed to the improper criminal conspiracy charge and instead filed an *Anders* brief, giving little to no weight to the persuasive force of the issue.

At the PCR hearing, appellate counsel testified that factually it was undisputed that the State had never served Petitioner with the criminal conspiracy indictment, but the attorneys had gotten it at some point. App. 1067–68. Appellate counsel stated that during his research, he determined that *Magazine v. State*, 361 S.C. 610, 606 S.E.2d 761 (2004), undercut any argument and therefore the issue was not viable. App. 1068. This supposition was error.

"An indictment is a critical document in criminal defense preparation that is grounded in constitutional and statutory principles." *State v. Baker*, 411 S.C. 583, 588, 769 S.E.2d 860, 863 (2015) (citing S.C. Const. art. I, § 11; S.C. Code Ann. § 17–19–10). "The primary purposes of an indictment are to put the defendant on notice of what he is called upon to answer, i.e., to apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand

trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted." *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005). "This required notice is a component of the due process that is accorded every criminal defendant." *Id.* (citing U.S. Const. amend. V; S.C. Const. art. I, § 3).

The facts of *Magazine* and the case law that had proceeded since it was filed reveal the fallacy of appellate counsel's conclusion the issue was not viable. *Magazine* involved a defendant who had been notified at his first trial that he was also being tried on four other charges. That case ended in a mistrial, but he was convicted at the second trial on all charges. *Magazine,* 361 S.C. at 616, 606 S.E.2d at 764. For him to prevail at PCR, then, he would have to prove he did not have notice at the second trial, the one where he was convicted and where his counsel may or may not have been ineffective and certainly, having lived through one trial, he knew about the charges. That did not happen here. Petitioner was never notified by the State of his charges and was certainly never afforded the opportunity to run through a trial and see exactly how the State intended to prove the charges.

As our appellate courts have emphasized since *Magazine*, an indictment is not "just" a notice document, it is a notice document specifically required in our state both statutorily and constitutionally and it is directly tied to a defendant's right to due process under the state and federal constitutions. *Magazine* cannot possibly be taken for the proposition that telling a defendant the morning of his trial about another charge satisfies due process as adequate notice to "apprise him of the elements of the offense and to allow him to decide whether to plead guilty or stand trial." *See Evans*, 363 S.C at 508, 611 S.E.2d at 517. That is neither what can be inferred by the facts before the Court in *Magazine* nor could such a holding be squared with the Court's

subsequent pronouncements. Finding a single, decade old case that *seems* problematic and therefore declining to address the issue as meritorious (and instead essentially telling the appellate court that it also need look no further than *Magazine*) is deficient performance.

So, the PCR court's conclusion that counsel was not ineffective is not supported by the record. It simply found that Petitioner "admitted he did receive a copy of the indictment and acknowledged he heard the trial judge read all the charges." App. 1135. But Petitioner testified he only saw the indictment a week prior to trial and was not aware of the additional charge until trial. App. 1039–41. Even if he knew of the charge a week in advance is insufficient time for him to prepare a defense in light of the additional charge, which has unique elements to combat. He had already proceeded through discovery based on the five charges only, so the addition of a sixth crime with no time to delve into defense was prejudicial. Accordingly, there is a reasonable likelihood that the result of the appeal would have been different had appellate counsel fully researched and briefed the issue. The PCR court therefore erred in concluding appellate counsel did not provide ineffective assistance.

III. Trial counsel was ineffective for failing to object to the fingerprint evidence based on the quality of the standards used for identification.

Trial counsel's performance fell below an objective standard of reasonableness in failing to object to the fingerprint evidence on the basis that the fingerprint standard be used for comparison.

At the PCR hearing, Petitioner presented evidence that the fingerprint standard used by Agent Darnell was insufficient for comparison purposes and therefore trial counsel should have objected to the fingerprint analysis. Specifically, Petitioner introduced the SLED Forensic Services Laboratory Report on the fingerprint analysis, which noted that one of the items, 3.1 (latent print

on Item 3, a "Black & Mild" cigar box,) indicated "NO CONCLUSION" as the result of the analysis based on "the quality of Item 64/ Woods, Tyrell." App. 1139. As the report illustrates, Item 64 was the standard used for the analysis on the other items, including prints found on the duct tape, which was the most incriminating evidence presented. *See* App. 1148–50.

In rejecting this claim, the PCR court essentially dismissed Petitioner's claim as speculative without testimony from an expert otherwise explaining or contextualizing the portion of the report that Petitioner deemed problematic. App. 1119. Essentially, the PCR court held Petitioner failed to meet his burden of proof as to the objectionable nature of the analysis and therefore failed to demonstrate prejudice because there was no way of knowing what the result of the challenge would be. App. 1120.

This conclusion was in error. When questioned at the PCR hearing, trial counsel testified he did not object to the analysis because he did not view the report as grounds for objection. App. 926–27; 974. Specifically, he stated he read the report to indicate that "what [PCR counsel was] pointing out as far as item 3.1, is that the latents submitted were not suitable; they were referring to the latents that were taken off the box." App. 928. However, that is not what the report states. Specifically, it mentions the quality of Item 64. App. 1139. Furthermore, that latent print was subsequently identified with the fingerprints from Petitioner obtained after the *Schmerber* hearing. App. 1161. So it was not, as supposed by trial counsel, that the latent print was unusable, it was that the fingerprint standard Item 64 was inadequate and could not be identified but with the new standard obtained after the report was submitted. App. 1161. Clearly, there was some defect in the quality of Item 64, which calls into question the validity of all the identifications made with that standard. App. 1139–52. Had trial counsel objected to the

quality of the fingerprint analysis at trial, there is a reasonable probability that the court would have ruled the testimony and fingerprint analysis inadmissible. Not only was the print used in the analysis of poor quality, but Agent Darnell also only presented the new standard to the jury and testified that is what he used in comparison, which is not what was used to prepare the report. App. 629; 1139–52.

Because this objection would have resulted in the suppression of the only forensic evidence incriminating Petitioner, the deficient performance was prejudicial, and the PCR court should have granted relief on this ground. *See Smith v. State*, 386 S.C. 562, 565–66, 689 S.E.2d 629, 631 (2010).

CONCLUSION

Petitioner was denied his constitutional right to effective assistance of both trial and appellate counsel. Petitioner therefore asks that this Court grant his petition.

Respectfully submitted,

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