STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
R. Knox McMahon, Trial Judge
George M. McFaddin, Jr., PCR Judge

Appellate Case No. 2022-001409

ANTHONY PORTERFIELD,

RESPONDENT,

v.

STATE OF SOUTH CAROLINA,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does the portion of the Order granting relief contain adequate findings of facts and conclusions of law as required by Section 17-27-70 of the South Carolina Code?

II. Does probative evidence support the PCR court's finding that counsel was ineffective in cross-examining and impeaching the victims when (1) trial counsel employed a valid strategy for impeaching the child-victims' identification of Respondent and effectively cross-examined them, and (2) Respondent did not enter evidence of any statement that could have been used for further impeachment of any of the victims?

III. Does probative evidence support the PCR court's finding that counsel was ineffective in responding to the solicitor's unexpected use of Respondent's laptop bag when (1) Respondent never articulated the objection he believed counsel should have made, (2) counsel formulated a reasonable strategy to counteract the solicitor's unexpected use of Respondent's bag, and (3) it is not reasonably likely the solicitor's use of Respondent's ubiquitous, common black laptop bag changed the outcome of trial?

STATEMENT OF THE CASE

Procedural History

Respondent Anthony Porterfield is presently confined in the South Carolina Department of Corrections serving a thirty-year sentence. In October 2012, the Richland County Grand Jury indicted Respondent for two counts of kidnapping (2012-GS-40-5294, 2012-GS-40-5297), one count of first-degree burglary (2012-GS-40-5295), and one count of armed robbery (2012-GS-40-5296). These charges arose from a home invasion and robbery of Gulzar Nathani's home-business.

On February 23, 2015, Respondent proceeded to a jury trial before the Honorable R. Knox McMahon. Anastasia Walker and Robert Bank, Esquires, represented Respondent. Assistant Solicitors Luck Campbell and Meghan Walker prosecuted the case. On February 27, 2015, the jury found Respondent guilty as indicted. Judge McMahon sentenced Respondent to concurrent terms of thirty years' imprisonment for each offense.

Respondent filed a direct appeal. Appellate Defender Susan B. Hackett filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing the court erred in allowing the solicitor to question witnesses regarding Respondent not calling an alibi and argue during closing about the alibi witness's absence, which unconstitutionally shifted the burden of proof. The Court of Appeals dismissed the appeal pursuant to Anders, and the remittitur was sent on April 21, 2017.

On December 14, 2017, Respondent filed this application for post-conviction relief (PCR). On May 24-26, 2022, an evidentiary hearing convened before the Honorable George M. McFaddin, Jr. Lir Patrick Derig represented Respondent, and Assistant Attorney General Scott Matthews represented the State. On August 17, 2022, the PCR court issued an order granting Respondent relief on two grounds and denying relief on all other grounds. Petitioner filed a timely motion for reconsideration pursuant to Rule 59(e), SCRCP, and a memo in support of its motion.

On September 26, 2022, the PCR court issued an order denying Petitioner's motion to reconsider. This petition for a writ of certiorari follows.

Brief Summary of Pertinent Trial Testimony

At trial, the State presented evidence that Respondent and another unidentified man robbed Gulzar Nathani's home on June 27, 2012. Nathani's daughters, Rabia and S.N.,[1] were home when the robbery occurred. At trial, Rabia testified she and S.N. were returning from Chick-fil-A when they noticed a car parked in their driveway. (App. 196). Rabia described the car as "a sedan, gold or champagne." (App. 203, 212). She testified she recognized one of the men as "Amp," who did business with her father. (App. 194-95, 199). Rabia testified Amp asked to talk to her dad, who wasn't home, so she and her sister went inside to get the phone. (App. 199-200). She testified,

> When I was standing by the door holding it open, he was standing by his car. But then he came upstairs and he had a bag in his—like a laptop bag in his hand.
>
> . . . .
>
> And he took out the gun. And I saw the gun. I was trying to close the door, but—

(App. 200-01). Rabia clarified Amp was the person who pulled out the gun. (App. 201). She stated Amp forced his way into the house and held them at gunpoint in a hallway for what felt like fifteen or twenty minutes. (App. 201-03). Rabia stated she called 911 after the men left; she later spoke to Investigator Joseph Clarke and identified Respondent from a photographic lineup.[2] (App. 205-07). During her testimony, Rabia identified Respondent in court as the perpetrator. (App. 208-09). During cross-examination, the following exchange occurred:

> Q Okay. And you remember there is two black males in the car?

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[1] In its order, the PCR court refers to Rabia as "Child 1" and S.N. as "Child 2."

[2] Investigator Clarke testified Rabia and S.N. both identified Respondent as Amp from photographic lineups. (App. 460, 464-71).

A Yes

Q Okay. And the driver gets out?

A Yes.

Q He has a laptop? Or a laptop bag?

A Yes. At first he was standing on our porch by the door when we parked. When we get out he came down—he came downstairs. And he was like, he wants to talk to my dad. And I told him that my dad is at the flea market.

And he—then me and my sister went inside the house to get the phone. Then he had the laptop bag. He—yes, then he had the laptop bag.

Q So did he go back to the car?

A Yes.

Q At some point?

A Yes.

Q Okay. So when you drive up he is already standing at the door?

A Yes.

Q And then you say he goes back to the car?

A Yes.

Q And then has the laptop bag?

A Yes.

(App. 213-14). She agreed that once they went inside, the other man held them at gunpoint while Amp removed items from the home. (App. 216). She further agreed she called her father before calling 911, she was very scared, and she did not have glasses at that time although she wore them at the time of trial. (App. 210, 217). Likewise, Rabia agreed she told 911 the car was a gold sedan

and both men were customers of her father, but she did not identify the perpetrator by the name Amp during the 911 call. (App. 218-21). Later, the following exchange occurred:

> Q . . . Do you remember walking in a courtroom like this about two weeks ago?
>
> A Yes.
>
> Q And do you remember speaking with your sister as you were walking into the courtroom?
>
> . . . .
>
> A I'm not sure.
>
> Q Do you recall having doubts [about] being able to pick out Anthony Porterfield as the person?
>
> A Oh. We—it [had] been a long time we didn't see him.
>
> Q Uh-huh.
>
> A But once when—the first time I saw him I could recognize it was him. It was just that his hair style was different other—before. Now it is different. So we were confused a little bit.

(App. 220-21). She agreed her father told her "his name was Amp." (App. 227). When asked, "And that is the reason you knew his name was Amp because your father told you?", she replied, "Not only that—yes." (App. 227).

S.N. testified she and Rabia were returning from Chick-fil-A when they saw a car with two black men in their driveway. (App. 233). S.N. described the car as a "golden," "gold or champagne color" sedan—a "small car, four door." (App. 234). As they were parking, S.N. testified one of the men was on the porch by their door; he came down the steps and spoke to them. (App. 235-37). S.N. testified she recognized the man as Amp—one of their father's customers; Amp asked to speak to their father, and Rabia told S.N. to get the phone. (App. 237-38, 240). S.N. stated Rabia was standing by the door when S.N. went inside to get the phone. (App. 239). She

testified, "I dialed my dad's number and I was about to call when I saw the gun pointed at my sister. And he told me to put the phone down. So I did." (App. 239). S.N. testified Amp gave the gun to the other man, who pointed it at the two girls while Amp took items from the home. (App. 241-42). S.N. testified the encounter lasted about ten to twenty minutes. (App. 243). After they heard the car speed away, S.N. called their father, who told them to call 911. (App. 243). S.N. did not recall whether she told police that day that Amp was the person who robbed them; she explained, "It was my sister talking to the cops." (App. 244). However, she stated she told her father that Amp was the person who robbed them. (App. 247-28). S.N. testified she did not recognize the second person. (App. 244). She testified she identified Amp from a photo lineup; she also identified Respondent in court as the person who robbed her. (App. 245-46, 248-49).

On cross-examination, S.N. agreed her father was the person who told her the names of people he did business with. (App. 250). When asked whether the two men were in the car when she and Rabia returned, she replied, "Not—one was in the car and then the other one was like at the door." (App. 250). S.N. agreed she was very scared. (App. 252). She could not recall whether she or Rabi called their father, but she recalled Rabia called 911. (App. 253). S.N. testified she did not give law enforcement a written statement. (App. 254).

Respondent testified in his defense. Additionally, he called five alibi witnesses to attempt to establish he was working at the time of the robbery. Respondent also called Dr. Dawn McQuiston, an expert in eyewitness identification and memory. (App. 890). Dr. McQuiston testified memory is "filled with gaps," and individuals "naturally fill in [those gaps] with stuff from all kinds of sources." (App. 891-92). She stated familiarity does not guarantee accuracy; rather, "people tend to think that they can remember the details of someone with whom they are familiar better than they really can," and it can become problematic when a perpetrator looks

similar to a person the victim is familiar with. (App. 895-96). Dr. McQuiston averred individuals have a more difficulty identifying persons of a different race, and people are "less accurate in their identification when there is a weapon present versus when there is not." (App. 896, 899-900).

Brief summary of PCR testimony

At the PCR hearing, Respondent testified he did not receive discovery until after he was convicted, and while reviewing discovery, he noticed inconsistent statements from Rabia and S.N. (App. 1184). Specifically, he testified that the day of the incident, Rabia and S.N. told Officer James Stone that they were at home when they heard something outside; they looked out the window and saw a man. (App. 1184, 1189). He testified the following day, Rabia and S.N. told police they were returning home from a restaurant when they noticed two guys sitting in a car in their driveway; however, they previously told law enforcement that Amp was standing outside the door. (App. 1185-86).

Respondent testified Rabia gave another statement on July 2, 2012, where she stated for the first time that they were returning from Chick-fil-A when they saw two black men sitting in a car; "one got out of the car and had a laptop bag in hand." (App. 1192). Respondent stated that at trial Rabia and S.N. testified they were returning from Chick-fil-A when they noticed one guy at their door and one at the car. He further testified they did not testify about their first statement to Officer Stone (that they were home when the men showed up in their yard). Respondent recounted the differences between Rabia's stories: initially, she said she was in the house when the men arrived; later, she said two black men were sitting in the car; and in a final statement provided to a private investigator, Detective B.G. Watkins, in August of 2012, Rabia said "she noticed one guy standing by the door and one guy in the car, she didn't know which one."[3] (App. 1192).

[3] Respondent entered Detective Watkins' report as part of Exhibit 1. (App. 1562-63).

Respondent averred Rabia's story changed from the man "saying he wanted to come in to he wanted to see her daddy." (App. 1193). Finally, Respondent asserted the victims described the car as gold, whereas one of Respondent's witnesses at trial testified she drove a Champagne-colored Impala.

Respondent stated trial counsel did not cross-examine anyone about these inconsistent statements, and Deputy Stone was not called as a witness either by the State or the defense. (App. 1187-88). In support of this claim, Respondent entered as Exhibit 1 the incident report prepared by Officer Stone; Investigator Joe Clarke's investigative notes; Rabia's written statement dated July 2, 2012; Detective Watkins' Investigative Statement of an interview with Rabia, S.N., and Nathani on August 16, 2012; and a handwritten note listing various items and their value. (App. 1557-66).

In addition to inconsistencies with Rabia and S.N. statements, Respondent relayed that Nathani provided inconsistent statements about the value of stolen items. According to Respondent, on the day of the crime Nathani alleged he was missing four items valued at a total of $2,000. However, "somewhere down the line after the investigation the father alleged that $10,000—a little over $10,000 worth of merchandise had been stolen from his home-based business." (App. 1191). Respondent stated Nathani handwrote these items on a sheet of notebook paper, but trial counsel did not cross-examine Nathani about the change in the value of stolen merchandise. (App. 1191-1202). Respondent also testified that Nathani testified at trial that Respondent never called him after the crime, "then he said yes, and then he said that yeah, he called a couple of days later saying that he didn't—he wasn't involved with anything, and which was really July 17th when I called him back." (App. 1193). Finally, Respondent stated Nathani told Investigator Watkins that he received a voicemail from Respondent on July 17, 2012, and

Detective Watkins listened to the voicemail.[4] (App. 1193-94). He stated Nathani later lied and said he did not have the voicemail when "he did have it all the way up until August 16th." (App. 1196). Respondent stated the jury never heard Nathani's statement to Investigator Watkins; however, Respondent stated Investigator Watkins was deceased at the time of trial. (App. 1197).

Respondent also testified counsel was ineffective for not objecting to the State's use of his laptop bag during its direct examination of Investigator Clarke. Respondent stated his girlfriend Diana had a vinyl black laptop bag that he took to court to carry paper and pens for trial, and Walker was aware he was taking the laptop bag to trial. (App. 1229). He averred one of the victims stated the perpetrator pulled a weapon from a laptop bag, but Respondent was not aware of that statement until trial. (App. 1227-28). Respondent contended counsel should have been aware that the victim said the perpetrator used a laptop bag. (App. 1229). He stated the solicitor asked Investigator Clarke if he was "aware that the victim said something to the nature of a laptop bag" and he responded yes. (App. 1231). The solicitor then asked Investigator Clarke if he was aware that Respondent had a black laptop bag during trial, and he responded yes. (App. 1231). Respondent stated the solicitor then picked up Respondent's bag,

> walked to the center of the court and she held it up and said is this the bag that you said the defendant had been bringing back and forth to trial and he said yes. She said is this the bag that looked like the victim has been alleging that the suspect had produced a weapon out of and he was like yes. And . . . she kept questioning him as if that was actually the bag in fact and she said is this the bag that the victims was talking about and he said yes. She walked around—and how this is so memorable is she looked in my eyes and she put it right back beside me and then they carried on, and it went without objection.

[4] Detective Watkins' report stated the caller (who sounded like Respondent) "question[ed] Mr. Nathani about having heard that the police wanted to question him and the caller [was] concerned that Mr. Nathani did not call him before calling the police and accusing him of the offense. (App. 1563).

(App. 1231).[5] Respondent stated his uncle was sitting behind him at trial yelling "objection, objection" when the solicitor asked questions about the bag. He stated counsel told him, "I've got something for that, . . . we don't have to object, your uncle's making a big scene about it." (App. 1235). Respondent stated prior to closing, counsel went to her office and collected random laptop bags to demonstrate how common laptop bags are. However, when she pulled them out during closing argument, the solicitor objected, and the judge instructed the jury not to consider the bags because they were inadmissible evidence. (App. 1236). On cross-examination, Respondent agreed the laptop bag he used at trial was a plain black, vinyl bag that did not have any identifying characteristics. (App. 1343). He further stated, "I'm assuming that was her trial strategy when she told me to just hold on or whatever like that," but her tactic did not work. (App. 1345).

Respondent testified the transcript did not reflect the solicitor's physical movements during that line of questioning. He also asserted she asked additional questions that were not in the transcript. (App. 1233-34). Respondent stated he wrote trial counsel about missing portions of the transcript, and counsel "wrote back and [said] I see where it's missing out of the transcripts and that she admits it's missing the physical actions." (App. 1233-34). When asked on cross-examination what additional questions were not included in the transcript, Respondent replied,

> [S]he spent some time, a little minute, asking the—Investigator Clarke is this, in fact, the bag that the victims said that the defendant had produced a handgun out of and he said yes, that's the one right there, and she said does it look like this, is this the one, and she kept repeating that over and over and all the while while she was asking him she was holding it up high in the air and walking around, turning around in circles to explain it to the jury.

(App. 1344).

Dianna Addison testified she was engaged to Respondent at the time of trial, and he used

[5] This line of questioning is on page 511 of the appendix.

her laptop bag at trial. (App. 1386-87). She stated she and Respondent did not live together when the crime occurred, and the "bag was in [her] possession the whole time."[6] (App. 1387).

Anastasia Walker testified she was appointed to represent Respondent at the end of 2013, and his trial occurred in February 2015. (Tr. 220). She testified the State's primary evidence was the statements of Rabia and S.N. and their identification of Respondent from a lineup. (Tr. 222). Walker stated that as part of her regular practice she would have reviewed the witness statements with Respondent prior to trial. (Tr. 249). Walker recalled retaining an expert that testified about "[w]eapon blindness, cross-racial identification, and then issues regarding short-term and longterm memory." (Tr. 225). Walker stated she emphasized in closing that although Rabia and S.N. had seen Respondent prior to this offense, their identification "was a misidentification based on this theory because they'd known him before but then experienced weapon blindness." (Tr. 225).

Walker stated the value of the merchandise stolen would not go to an element of the offense, but inconsistencies in Nathani's statement could have affected his credibility. (Tr. 222-24). Robert Bank, who assisted Walker in Respondent's trial, agreed with Walker's testimony that the value of items stolen did not go to an element of the crime, but inconsistencies in Nathani's statement could have been used for impeachment. (Tr. 306, 309).

Walker testified Respondent used a laptop bag during trial. She recalled the solicitor grabbing Respondent's bag and "essentially arguing that that laptop bag was like the one that had been used." (Tr. 233, 279-80). Walker stated she was caught off guard and was not expecting the solicitor to grab Respondent's bag. (Tr. 233-34). She stated she attempted to remedy the situation by showing that laptop bags are common, but the judge would not allow the additional bags to be

[6] At Respondent's trial, Addison likewise testified the bag belonged to her and Respondent did not have access to it in 2012. (App. 643-44).

used during her closing argument. (Tr. 234). Walker stated the victims only described the bag as a black laptop bag, and the bag itself was not a very big issue at trial prior to the solicitor making it an issue. (Tr. 234, 278).

Bank likewise stated he and Walker were both caught off-guard by the solicitor's use of Respondent's black laptop bag and recalled it was just a plain laptop bag. (Tr. 320). Bank testified Walker attempted to show the solicitor's argument was ridiculous with demonstrative evidence, but the judge did not allow it. (Tr. 321).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 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 any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. 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

I. The portion of the Order granting relief does not contain adequate findings of facts and conclusions of law and thus does not comply with section 17-27-70 of the South Carolina Code.

Although the portion of the Order denying relief contains adequate findings of fact and conclusions of law, the portion of the Order granting relief contains only conclusory statements.

Following an evidentiary hearing, the PCR court "shall enter an appropriate order with respect to the conviction or sentence in the former proceedings . . . . The court shall make specific findings of fact, and state expressly its conclusion of law, relating to each issue presented." S.C. Code Ann. § 17-27-70.

Here, in granting relief, the PCR Court found:

> 1. **Trial counsel failed to adequately cross-examine the victims and their father regarding prior inconsistent statements and failed to call witnesses regarding prior inconsistent statements. Rule 613 SCRE, "Prior Statement of Witness."**
>
> The failures, omissions, and absences of effective counsel during the Applicant's trial, as listed above, prejudiced 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 at 625. That prejudice can be shown for the following reasons:
>
> 1. The failure to adequately cross-examine the alleged victims and their father, as well as a failure to call witnesses regarding those prior inconsistent statements prevents the Applicant from any chance to impeach the testimony of the victims and their father. If those witnesses had been properly impeached and their veracity questioned by the jury, it is reasonable to believe the result of the trial would have been different.
>
> 5. **Trial counsel failed to object to the State's use of an Applicant's laptop bag during the direct examination of Investigator Joseph Clarke.**
>
> Where an assistant solicitor's improper remarks are not objected to by trial counsel, and where trial counsel fails to request a curative

> instruction regarding the assistant solicitor's improper remarks, trial counsel's representation is found to be ineffective and that relief under a PCR action should be granted. Fortune v. State, 428 S.C. 545, 837 S.E.2d 37 (S.C. 2019).
>
> During Applicant's trial, an assistant solicitor was allowed to make improper remarks regarding the laptop bag that Applicant had with him during trial (R. 501) without an objection by trial counsel, nor was a curative instruction to the jury asked for.
>
> By not objecting to the State's use of Applicant's laptop bag during the testimony of Inv. Clarke, the State could never have made the inference or argument that Applicant's laptop bag in court was the same laptop bag alleged to have been used in the crime. Had the State not been able to make that argument or inference to the jury, it is reasonable to believe the result of the trial would have been different. Failing to object also cost Applicant the ability to argue the issue on appeal.

The forgoing sections do not contain adequate findings of fact and conclusions of law and thus do not comply with section 17-27-70. The section of the Order addressing trial counsel's cross-examination of the victims does not contain any findings of fact. Although it references "the failures, omissions, and absences . . . as listed above," nothing above that portion of the Order explains what the failures, omissions, and absences were. Likewise, the Order does not explain or set forth the inconsistencies in the victims' statements or clarify the witnesses counsel should have called to combat these allegedly inconsistent statements. Without clarifying what the alleged inconsistent statements were or what witness testimony would have contradicted the victims' allegedly inconsistent statements, it is impossible to determine what the PCR court relied on in finding counsel ineffective.

Further, the portion of the Order addressing counsel's alleged ineffectiveness in responding to the State's use of Respondent's laptop bag does not contain sufficient findings of fact. Specifically, it is unclear from this Order what comment the solicitor made that this Court found improper, how this prejudiced Respondent, or how an objection would have made it more likely

an appellate court would reverse on appeal. Because this Order does not contain adequate findings of fact and contains only conclusory legal conclusions, it does not comply with section 17-27-70.

II. Probative evidence does not support the PCR court's finding that counsel was ineffective in cross-examining the victims when (1) trial counsel employed a valid strategy for impeaching Rabia and S.N.'s identification of Respondent and effectively cross-examined them, and (2) Respondent did not enter a statement that could have been used for further impeachment of the victims.

Probative evidence does not support the PCR court's finding that trial counsel was ineffective in cross-examining the victims. Based on the trial transcript and counsel's testimony, Respondent has not overcome the presumption that counsel was effective. Initially, because the Order does not comply with section 17-27-70, it is unclear what specific testimony or evidence the PCR court believed trial counsel should have used to impeach the victims. It is also unclear what witness the PCR court believed trial counsel should have called to undermine the victims' credibility. The only thing that could feasibly be gleaned from this sparse Order is that the PCR court believed the victims could have been impeached using prior statements. However, only Rabia provided a written statement, and Respondent did not set forth any inconsistency between that statement and Rabia's trial testimony.[7] Further, although Respondent avers counsel should have further cross-examined Nathani about inconsistencies in his valuation of stolen goods, Nathani was not home when the home invasion occurred and thus his testimony was not critical to the identification of Respondent as the perpetrator. Ultimately, Respondent has not overcome the presumption that counsel's strategy and cross-examination of the victims was within prevailing professional norms and thus has not shown deficiency. Likewise, Respondent did not submit any statement counsel could have used for further impeachment that would have reasonably changed

[7] At trial, Investigator Clarke testified he did not take a statement from S.N. (App. 471). Likewise, Respondent did not enter a written statement from S.N. at the PCR hearing.

the outcome of trial and thus has not shown prejudice.

"There is a strong presumption trial counsel provided adequate assistance." Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, "the applicant must show trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Green, 351 S.C. at 192, 569 S.E.2d at 322. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome." Id.

1. Counsel employed a valid strategy for impeaching Rabia and S.N.'s identification of Respondent and effectively cross-examined them; thus, Respondent did not overcome the presumption that counsel was reasonable within prevailing professional norms.

Critically, the primary evidence presented by the State identifying Respondent as the perpetrator was the testimony of Rabia and S.N. and their identification of Respondent from photo-lineups. However, counsel employed a valid strategy to undermine Rabia and S.N.'s identification that included calling an expert in eyewitness identification and cross-examining Rabia and S.N. Thus, Respondent did not overcome the presumption that counsel's representation was within prevailing professional norms. See Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."); Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 625, 625 (1989) (providing a PCR applicant must overcome this presumption to receive relief).

Here, counsel effectively used an expert to effectively impeach Rabia's and S.N.'s identification. Dr. McQuiston testified individuals have a more difficult time identifying persons

of a different race; here, the victims were Pakistani whereas Respondent was African-American. (App. 900). Dr. McQuiston also testified "[s]tudies show that people tend to think that they can remember the details of someone with him that they are familiar better than they really can"—directly undermining Rabia's and S.N.'s identification of Amp as someone they were familiar with. (App. 895). Finally, Dr. McQuiston testified people are "less accurate in their identification when there is a weapon present versus when there is not"; notably, Rabia and S.N. both testified to being held at gunpoint during this encounter. (App. 899-900).

Further, counsel effectively cross-examined Rabia and S.N. During cross, Rabia admitted she called her father before calling 911, she did not identify the preparator by the name Amp during the 911 call, and she only knew his name was Amp because her father told her. (App. 210, 216-21). Rabia also admitted she was scared during the encounter and did not have glasses at the time although she wore them at trial. (App. 210, 216-21). Finally—and critically—Rabia admitted she and S.N. were initially confused when they previously saw Respondent in court—suggesting her identification of Respondent was not confident. (App. 220-21).

Likewise, counsel effectively cross-examined S.N. Notably, on cross, S.N. agreed her father was the person who told her the names of the people he did business with, she was very scared during the encounter, and she could not remember whether she or Rabia called their father. (App. 250-53). Overall, counsel engaged in an effective cross-examination of Rabia and S.N. Likewise, she called an expert to further impeach their identification of Respondent. Probative evidence does not support a finding that counsel's impeachment of Rabia and S.N. fell below prevailing professional norms. Thus, Respondent did not prove deficiency.

2. Respondent did not enter any statement that could have been used to further impeach Rabia and S.N. and thus did not prove deficiency or prejudice.

During the PCR hearing, Respondent contended counsel was ineffective for not

cross-examining Rabia and S.N. about prior inconsistent statements related to (1) whether Rabia and S.N. were home or returning from Chick-fil-A when they saw the men; (2) whether the men were both inside the car or whether one of them was outside the car and/or at their door when the Rabia and S.N. saw them; and (3) the description of the perpetrator's car. However, as stated, trial counsel effectively impeached Rabia and S.N. through cross-examination and an exert in eyewitness identification and memory. Thus, it is not reasonably likely the outcome would be different had counsel *further* impeached Rabia and S.N. by questioning them about whether they were returning from Chick-fila or at home; whether the men were both in the car or one was outside; and the description of the perpetrators' car. Further, Respondent did not enter into evidence any statement that could have been used to further impeach Rabia and S.N. on these points. Thus, Respondent did not prove deficiency or prejudice in this regard.

First, Respondent did not enter any statement that could have been used to impeach testimony that Rabia and S.N. were returning from Chick-fil-A when they saw the men. Of the four documents entered by Respondent, the only one that indicated the children were home when the men arrived was the incident report prepared by Officer James Stone. Importantly, this was Officer Stone's interpretation; it was not a statement of either of Rabia or S.N. It is speculative what Rabia and S.N. would have said had they been questioned at trial about whether they initially told officers they were home before the robbery occurred. Likewise, the incident report itself was not admissible as impeachment evidence under Rule 613(b), SCRE. See id. (setting forth circumstances when a prior inconsistent statement *by a witness* is admissible for impeachment). Further, had Rabia and S.N. been presented with this statement and denied making it, Respondent would not have been able to solicit this statement through Officer Stone himself for impeachment. See State v. McLeod, 362 S.C. 73, 606 S.E.2d 215 (finding no error in excluding officer's

testimony that lieutenant agreed to consider the cooperation of a witness with pending charges to impeach lieutenant's denial that he had made an agreement).

The only written statement from a victim that Respondent entered into evidence at the evidentiary hearing was Rabia's July 2, 2012 statement, wherein she stated—consistent with her trial testimony—that she and S.N. were returning from Chick-fil-A when they noticed the men. The remaining investigative reports—the notes of Investor Clarke and Detective Watkins—consistently indicate the children said they were returning from a restaurant or from Chick-fil-A. (App. 1558, 1562). These statements were not inconsistent with Rabia and S.N.'s trial testimony; thus there was no basis to impeach them using these statements. As a result, Respondent did not prove deficiency or prejudice from counsel's failure to further cross-examine Rabia and S.N. about whether they were inside the home or returning from Chick-fil-A when they noticed the men.

Additionally, Respondent has not shown counsel was ineffective for not further cross-examining Rabia and S.N. about whether the men were inside the car or outside the car when the victims first saw them. Notably, Rabia initially testified—consistent with her written statement—that the two men were inside the car when she returned home. (R. 208-09). She then stated, "At first he was standing on our porch by the door when we parked. When we got out he came down—he came downstairs." (R. 208). Thus, the very inconsistency Respondent points out was before the jury. Further, counsel *did* cross-examine Rabia on this issue:

> Q Okay. And you remember there is two black males in the car?
>
> A Yes
>
> Q Okay. And the driver gets out?
>
> A Yes.

(R. 213-14). Rabia's testimony here is consistent with her written statement; thus, there was no

basis for trial counsel to further attempt to impeach Rabia using the statement. Finally, the inconsistency in Rabia's testimony here was not material to the overall question of whether Respondent committed this crime. Thus—as evidenced by the fact the jury convicted Respondent notwithstanding the fact the jury *heard* this inconsistent testimony—it is not reasonably likely the outcome would have been different had counsel further cross-examined Rabia on this point.[8]

Finally, Respondent did not prove counsel was ineffective for not calling a witness to impeach Rabia and S.N's testimony about the color or make of the perpetrator's car. Initially, consistent with Rabia's written statement, Rabia and S.N. both described the car as a gold or champagne sedan. (App. 203, 212, 234, 1560). Respondent did not present any witness at the PCR hearing on this point or explain how the testimony would have undermined Rabia and S.N.'s testimony in a material way. Thus, Respondent did not meet his burden of proof.[9]

3. Respondent did not submit any statement that could have been used to further impeach Nathani that would have reasonably changed the outcome of trial.

Additionally, probative evidence does not support the PCR court's finding that counsel was ineffective for not further impeaching Nathani with prior inconsistent statements. Although the PCR court's sparse Order does not set forth the statement it believed counsel should have used to impeach Nathani, it appears the initial "statement" Respondent relied on as "evidence" of

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[8] Respondent has not submitted any evidence of a prior statement from S.N. regarding whether the individuals were in the car or outside the car when Rabia and S.N. returned home; thus, he has not proved counsel was ineffective for not further cross-examining S.N. on this point.

[9] Although not clear, it seems Respondent believed trial counsel should have used Nazirah Gale's testimony that she drove a gold Impala to impeach the victims' testimony that the perpetrators drove a gold or champagne-colored car. (R. 584). Notably, Gale testified at trial that Respondent sometimes drove her gold Impala. (R. 584). Although she claimed he did not use her car that day, she testified she picked Respondent up from work in that car for his lunch break and later dropped him back off at work; the timeframe for this was near the timeframe of the robbery. (R. 580-84). It strains credibility to suggest it would somehow strengthen Respondent's case to further highlight the victims' testimony that the car in their driveway was a gold sedan when the person who picked Respondent up that day drove a gold sedan.

Naithani's inconsistent statement is the incident report prepared by Officer Stone, where Officer Stone indicated the victims told him the perpetrators took two laptops valued at $1,000 and two televisions valued at $500 each.[10] (App. 1557). However, this incident report was not a prior statement of Nathani and thus would not have been admissible to impeach Nathani's testimony. See Rule 613. (setting forth circumstances when a prior inconsistent statement *by a witness* is admissible for impeachment). Importantly, Nathani did not testify about the value of the items at trial, and thus there was nothing to impeach him about on this issue. (R. 254-77). Further, as trial counsel testified, this evidence did not go to any elements of the crime. Finally—and critically—Nathani was not home when the robbery occurred; thus, his testimony was not critical to the identification of Respondent as the perpetrator, and it is not reasonably likely the outcome would have been different had counsel further impeached Nathani. Respondent did not submit any other statement of Nathani that could have been used for impeachment and thus did not meet his burden of showing deficiency or prejudice. Accordingly, probative evidence does not support the PCR court's finding that counsel was ineffective in this regard.[11]

[10] Investigator Clarke's investigative notes indicate Nathani provided a list of stolen items valued at $10,000 on July 2, 2012—just four days after the robbery. Respondent's exhibit includes a handwritten list of electronic items and their value.

[11] To the extent Respondent argued counsel should have further impeached Nathani about whether Respondent called him and/or left a voice message after the robbery, Nathani testified—consistent with Investigator Watkins report—that Respondent called him after the robbery and left a voice message. (App. 269, 1563). Nathani further testified someone stole his phone, "so [he] didn't get that voicemail again." Because this trial occurred more than two years after Investigator Watkins' report, Investigator Watkins' report would not have necessarily impeached Nathani even if it could have been used at trial. Respondent did not show what statement counsel should have used to further impeach Nathani or how counsel should have further impeached Nathani and thus did not prove this claim..

III. Probative evidence does not support the PCR court's finding that counsel was ineffective in responding to the solicitor's unexpected use of Respondent's laptop bag when (1) Respondent never articulated the objection he believed counsel should have made, (2) trial counsel formulated a reasonable strategy to counteract the solicitor's unexpected use of Respondent's bag, and (3) it is not reasonably likely the solicitor's use of Respondent's ubiquitous, common black laptop bag changed the outcome of trial.

At the PCR hearing, Respondent asserted trial counsel was ineffective for not objecting to the State's demonstrative use of his black laptop bag during Investigator Clarke's testimony. Initially, because the Order does not contain sufficient findings of fact, it is unclear what objection the PCR court believed counsel should have made at trial. Further, probative evidence does not support the PCR court's finding that counsel was ineffective in this regard.

Initially, Respondent did not set forth what legal basis he believed counsel should have objected to the solicitor's unexpected use of his bag. He merely testified his uncle was yelling "objection"; however, without a valid, legal basis, counsel was not deficient for not objecting. Applicant has not set forth the legal objection counsel should have made and thus did not meet his burden of proof.

Further, the use of Respondent's bag was unexpected, and counsel articulated a valid strategy to combat it. At the PCR hearing, Walker and Bank testified Respondent carried a black laptop bag to trial each day; the bag was a plain black bag with no identifying characteristics or marks. They explained they did not expect the solicitor to use Respondent's bag as a demonstrative exhibit. Because the solicitor's use of Respondent's black laptop bag was not foreseeable, counsel's failure to be prepared to object did not fall below prevailing professional norms. See Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989) ("[T]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (quoting Strickland v. Washington, 466 U.S. 668 (1984))).

Although counsel acknowledged—in hindsight—that they should have objected, trial counsel also testified they formulated a plan to show the jury multiple black laptop bags in closing argument to emphasize how ubiquitous such bags are.[12] See Buckson v. State, 423 S.C. 313, 320–21, 815 S.E.2d 436, 440 (2018) ("A PCR court's analysis of counsel's strategic decisions must be 'highly deferential' to counsel's judgment, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight."). Counsel articulated a strategy to combat an unexpected maneuver by the State and thus was not deficient. See Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) ("When counsel articulates a valid reason for employing a certain strategy, such conduct generally will not be deemed ineffective assistance of counsel."). Further, during Respondent's case, counsel elicited testimony from Addison that the bag belonged to her and Respondent did not have access to it in 2012. (R. 633-34). Counsel employed a reasonable strategy to combat the State's unexpected maneuver and was not deficient.

Finally, it is not reasonably likely the outcome would have been different had they objected. Notably, the bag was not a critical piece of evidence. Although Rabia testified Respondent had a laptop bag at the time of the robbery, she never specified what color it was or provided a description of it. Likewise, S.N. did not testify about a laptop bag at all. Neither victim specified any identifying characteristics of the bag that would connect the bag used at trial with the bag used during the robbery. (Tr. 195, 224-52). As counsel attempted to demonstrate, a black laptop bag is ubiquitous and common. It is not reasonably likely the jury convicted Respondent because of the solicitor's demonstrative use of a nondescript bag; rather, Respondent was convicted because two eyewitnesses who knew him identified him. Thus, Respondent did not prove prejudice.

[12] Counsel's plan was thwarted when the judge ordered them to remove the bags. (R. 954).

CONCLUSION

Based on the foregoing, the PCR court's order did not contain adequate findings of fact and conclusions of law and thus did not comply with section 17-27-70 of the South Carolina Code. Further, probative evidence does not support the PCR court's finding that counsel was ineffective in (1) cross-examining and impeaching the victims and (2) responding to the solicitor's unexpected use of Respondent's laptop bag during trial. Thus, this Court should grant Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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This 13 day of July, 2023