

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

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

STATE OF SOUTH CAROLINA

PETITIONER

V.

ANTHONY MARKALE PORTERFIELD,

RESPONDENT

APPELLATE CASE NO. 2022-001409

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S 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 the trial?

RESPONDENT'S QUESTIONS PRESENTED

I.

Whether certiorari should be denied because the PCR court's order adequately contained specific findings of fact and express conclusions of law?

II.

Whether certiorari should be denied because there is probative evidence in the record to support the PCR court's findings of deficient performance where counsel failed to object when the prosecutor took Respondent's laptop bag from the defense table and used it during her examination of Investigator Clarke, and where Respondent has shown prejudice?

III.

Whether certiorari should be denied because there is probative evidence in the record to support the PCR court's finding of deficient performance where counsel failed to cross-examine the complainants regarding their prior inconsistent statements and impeach them with those statements if necessary, and where Respondent has demonstrated prejudice?

STATEMENT OF THE CASE

Trial

On October 10, 2012, a Richland County Grand Jury indicted Anthony “Amp” Porterfield, Respondent, for first-degree burglary, armed robbery, and two counts of kidnapping. Respondent was tried before the Honorable R. Knox McMahon, from February 23 – 27, 2015. Luck Campbell and Meghan Walker prosecuted the case. Respondent was represented by Anastasia Walker and Robert Bank, Jr.¹

At approximately two-o’-clock on the afternoon of June 27, 2012, two black men entered the home-based business of Gulzar Nathani, and they stole electronics. Nathani, a Pakistani man, sold and repaired computers, cellular telephones, and televisions at the flea market on the Augusta Highway. Nathani’s teenage daughters (eighteen-year-old Rabia and fourteen-year-old S.N.) were home during the burglary. Nathani was not. The girls said they arrived home from Chick-fil-A to find two men and a car outside the house. One of the men asked to speak with the girls’ father. Rabia said that man pulled a gun out of a black laptop bag, pushed the door open, and pointed the gun at them.²

The gunman forced the girls to sit in the hallway with their heads down. The second robber took the gun from the first and he continued to point it at the girls while the first robber stole electronic devices. The girls thought the event took about ten to twenty minutes. The robbers left in a gold or champagne-colored car. After they left, Rabia called her father before

¹ App. 1125 – 1126; App. 1130 – 1131; App. 1135 – 1136; App. 1140 – 1141; App. 6.

² App. 191, l. 20 – 216, l. 22; App. 286. ll. 2-7; App. 74, l. 16 – 75, l. 4; App. 230, ll. 18-21; App. 260, l. 11 – 264, l. 24; App. 231, l. 15 – 243, l. 14; App. 504, l. 19 – 505, l. 6.

she called 911. Rabia described the robbers as five foot seven or eight and “skinny.” Rabia did not identify either of the robbers while she was on the telephone with 911.³

It was undisputed that Rabia only said the robbers were her father’s “regular customers.” She called the robber a “customer” when she spoke to 911, before her father arrived.⁴

Police officers responded to the 911 call, and Nathani drove towards his home. Nathani and Rabia spoke on the telephone three times before Nathani or police officers arrived. After Nathani got home, he told police officers that Rabia had identified one of the robbers as “Amp.” (Similarly, Rabia said during the *Neil v. Biggers* hearing, “That is how I remember his name, because my dad told me.”) Respondent’s initials are A.M.P., and he went by the nickname Amp. Police on scene spoke with Nathani and Rabia but did not speak with S.N. Nathani gave police officers Respondent’s telephone number. Nathani told law enforcement he thought Respondent was the robber since Respondent had been trying to arrange to meet him that day, and Respondent made arrangements to meet Nathani but then did not show up.⁵

³ App. 201, l. 16 – 203, l. 9; App. 212, l. 21 – 213, l. 1; App. 217, l. 16 – 221, l. 3; App. 231, l. 15 – 244, l. 5.

⁴ Notably, Respondent was Nathani’s parts supplier, not his customer. However, Solicitor Campbell characterized Respondent as a “customer” when she directly examined the S.N. before the jury. During pretrial motions, when the solicitor did not lead the girls in this manner, both girls referred to Respondent as a man who “had business with” their father, not as a customer. Similarly, Nathani did not refer to Respondent as a customer, although the solicitor used that term when she led Nathani on direct. No one pointed out this critical discrepancy to the jury: that Rabia originally called the robber a “customer,” but no one in the family referred to Respondent that way; instead family members called Respondent someone who had “business with” Nathani. Defense counsel made no objection to the solicitor’s leading, compound questions. Although this problem was not alleged as an error in Respondent’s PCR case, it is relevant to the prejudice analyses discussed *infra*, given that this case came down to identity. App. 262, l. 17 – 263, l. 17; App. 73, l. 21 – 74, l. 10; App. 84, l. 23 – 85, l. 3; App. 237, l. 18 – 238, l. 12; App. 521, ll. 5-6.

⁵ App. 244, ll. 3-11; App. 265, l. 20 – 282, l. 11; App. 521, ll. 8-22.

Investigator Joe Clarke was assigned to the case, and he got SLED to generate a photographic lineup. The lineup was black and white, not color, and it contained Respondent's image. Clarke showed the lineup to the girls separately on July 2nd, and he said Rabia picked out Respondent "almost instantaneously." Rabia said she had seen Respondent bringing her father electronic components "more than ten times." However, Rabia admitted that just prior to trial she expressed doubts about being able to identify Respondent again. Clarke stated S.N. also picked Respondent out of the lineup. Clarke acknowledged the lineup contained photographs of five people the girls did not know and one photograph of a person they did: Respondent. The lineup was therefore highly suggestive.⁶

This was a close case for the jury, which deliberated for four hours. The jury asked to rehear testimony and it was recharged on reasonable doubt. Respondent presented expert testimony on eyewitness identification and memory. Dr. Dawn McQuiston, a psychology professor at Wofford, testified that people have a more difficult time "recognizing and identifying faces that are of a different race or ethnicity than of their own." (The Nathani girls were from Pakistan, and they had been in the United States for between two to four years. Respondent was black.) McQuiston also testified that "people tend to focus their attention on a weapon during a crime. And so people on average are less accurate in their identification when there is a weapon present versus when there is not." Finally, McQuiston opined that "at very high levels of stress we find that people can be less accurate in their identification."⁷

⁶App. 458, l. 24 – 471, l. 17; App. 721, ll. 4-20; App. 225, l. 14 – 226, l. 10; App. 522, l. 18 – 523, l. 5; App. 194, ll. 18-25.

⁷ App. 1019, l. 8 – 1024, l. 3; App. 886, l. 15 – 890, l. 21; App. 896, l. 9 – 901, l. 10; App. 191, l. 24 – 192, l. 9; App. 230, ll. 1-21; App. 260, ll. 11-19.

Respondent presented an alibi defense. Several alibi witnesses testified that Respondent was at work during the robbery. Respondent worked at Creative Recycling, an electronics recycling center. Respondent's former coworkers, Adrian Deberry and Hakeem Coffeil, both testified that they recalled a day when Respondent was gone for longer than normal at lunchtime because his roommate, "TK," was moving out. Deberry stated a woman in a tan or champagne-colored Impala picked Respondent up to go to home for lunch. Deberry recalled that Respondent returned approximately five to twenty minutes late from their 12:00 lunch break, which would have put him back at work at roughly 12:45. Similarly, Hakeem Coffeil recalled that Respondent was back at work no later than 1:00 or 1:30. Coffeil said Respondent was picked up to go home for lunch by a woman in a champagne-colored or tan Impala.⁸

The defense introduced Respondent's timecard. The timecard had three entries the day of the robbery: 8:07, 11:12, and 4:32. Respondent's former supervisor, Aaron Griffin, testified that Respondent asked to leave early for lunch to deal with someone "taking something from his home." Griffin stated Respondent left around 11:30 a.m., and he was back in less than an hour and a half. Griffin remembered a woman picked Respondent up when he left around 11:30. Griffin said Respondent returned and worked until 4:30 p.m. that day. Griffin stated his (Griffin's) signature on Respondent's timecard was consistent with these events. Griffin said he had to sign off on the timecards if someone took more than thirty minutes for lunch. Because Respondent did not clock in after lunch, having taken extra time during lunch, Griffin signed off on the card. Likewise, Hakeem Coffeil confirmed that if an employee did not "clock out" or "punch in right," Griffin had to verify the card. Griffin clarified that the business did not get an actual time clock until some months after the robbery. Apparently, prior to that, at the time of the

⁸ App. 661, l. 12 – 683, l. 6; App. 803, l. 19 – 814, l. 7.

robbery, Griffin had one timecard that he repeatedly photocopied. The employees' names and dates were handwritten in on a new card every week and the cards were submitted for payroll purposes. A copy of the timecard is located at page 1036 of the Appendix.⁹

Nazirah Gale, who was Respondent's romantic interest and drove a gold Chevy Impala, also testified. Gale said the day that TK was moving out of Respondent's apartment, she picked Respondent up from work around 12:00 or 12:20 p.m. and dropped him back off around 1:00 or 1:30 p.m. However, Gale stated it could have been later than that. Gale said Respondent did not borrow her car that day.¹⁰

Respondent testified that on the day in question, he went home midday to make sure his former roommate, TK, did not take anything that did not belong to him. Respondent said TK had moved out but left some things there, and had contacted Respondent to say he wanted to get his things back: "So he wanted to collect that stuff. And I didn't trust him in my home by himself. He was a rolling stone." Respondent said TK picked him up from Creative Recycling around 12:00, and took him home where they moved out some of TK's things. Respondent stated that while they were home, Nazirah Gale came by. Gale took Respondent back to work at roughly 12:45. Respondent had talked to Griffin about the need to leave a little early. Upon returning to work, Respondent again spoke with Griffin and gave Griffin his timecard, since he was a few minutes late getting back.¹¹

⁹ App. 829, l. 12 – 832, l. 18; App. 835, l. 21 – 843, l. 1; App. 844, ll. 16-24; App. 847, l. 13 – 851, l. 14; App. 816, ll. 2-7.

¹⁰ App. 505, ll. 15-22; App. 588, ll. 10-15; App. 589, l. 13 – 594, l. 8.

¹¹ App. 700, l. 21 – 709, l. 15.

Additional information that came out at trial included the following. No stolen items were recovered. Respondent was excluded from DNA evidence at the scene. Rabia did not wear eyeglasses at the time of the robbery, but she got eyeglasses the following year. Respondent made no calls on his telephone between 1:38 p.m. and 2:26 p.m. the day of the robbery. The State introduced jail telephone recordings between Respondent and his girlfriend that it argued were incriminating and the defense argued had an innocent explanation. Respondent was arrested a couple of weeks after the robbery, hiding in the crawl space under a friend's house, after police officers sent in their K-9, Chico, and after the dog bit him.¹²

In addition to the above evidence, the prosecutor had a Columbo moment in front of the jury. Although defense counsel was aware that the complainants said the robber pulled a gun out of a black laptop bag, counsel did not advise Respondent against bringing a black laptop bag to court and setting it beside him counsel table. (Respondent was not using a laptop in court, the bag contained pen and paper.) The following exchange occurred while Solicitor Campbell was directly examining Inv. Clarke.

Q And, finally, you were also aware of the victims giving a description of the gun that was produced by the Defendant that he pulled from a case?

A Yes.

Q And you have been here in court today?

A I have.

Q Have you ever been able to observe the Defendant in possession of a case?

A I have. It actually was handed to him.

¹² App. 419, l. 19 – 420, l. 3; App. 473, ll. 23-25; App. 446, ll. 14-19; App. 210, ll. 15-22; App. 382, l. 12 – 394, l. 11; App. 633, l. 3 – 635, l. 13; App. 734, l. 21 – 738, l. 9; App. 339, l. 20 – 340, l. 24; App. 982, l. 4 – 985, l. 2.

Q By whom?

A Someone behind him. A witness.

Q And what does the case look like?

A It looks like a laptop case or a bag, satchel.

Q And that was handed to the Defendant in court?

A Yes, ma'am. We made mention of it in court.

Q And is that the description of what the young ladies described, or Ms. Rabia Nathani described him pulling the gun from?

A From a laptop case. Exactly.¹³

Defense counsel made no objection to the solicitor's use of Respondent's bag or to the related questions and testimony. The judge did not rule or comment about it either. Defense counsel later elicited from Respondent's girlfriend that the bag belonged to her, not to Respondent.¹⁴

During closing argument, defense counsel unsuccessfully attempted to address the laptop bag problem by using additional black laptop bags as demonstrative exhibits to show how common they were. However, the trial judge *sua sponte* ruled defense counsel could not do so since the items were not in evidence. Defense counsel's failed attempt to rehabilitate the laptop bag problem went as follows.

MS. A. WALKER: Ladies and gentlemen, I think at some point during this trial the State mentioned a laptop bag, that Mr. Porterfield had brought a black laptop bag with him that had his notes. And if anybody bought a laptop over the years, you have got a black laptop bag that you have received from any number of laptops that have been received from work or any personal items that you order

¹³ App. 505, ll. 23-25; App. 511, ll. 1-16.

¹⁴ App. 643, l. 23 – 644, l. 2.

from computers over the years. Black laptop bags. And this is just what I've been able to obtain this morning.

THE COURT: Those aren't in evidence. You can't present anything to the jury that is not in evidence. They would have to disregard that.

MS. A. WALKER: Certainly, Your Honor.

THE COURT: Remove those, please, Mr. Tate.

MS. A. WALKER: Certainly, Your Honor. (Complies.)¹⁵

Respondent was convicted as indicted. He was sentenced to serve concurrent terms of imprisonment of thirty years on each charge.¹⁶

Post-conviction relief hearing

After exhausting his direct appeal remedies, Respondent timely filed an application for post-conviction relief (PCR), on December 11, 2017. The State made its return on May 31, 2018. An amended PCR application was filed on May 24, 2022. A hearing was held on the matter before the Honorable George M. McFaddin, Jr., from May 24 – 26, 2022. Lir Derieg represented Respondent. Scott Matthews and Russell Barlow, II, represented the State.¹⁷

The hearing was extensive. It spanned three days and comprised roughly four hundred pages of testimony. Regarding the laptop bag, Respondent testified the bag was “directly to my left when we were in trial.” Respondent stated it was to the side of the desk, situated in the same manner as PCR counsel had a bag on the table at the PCR hearing. Respondent that the solicitor “picked up the bag and walked to the center of the court and she held it up . . . she kept

¹⁵ App. 963, l. 24 – 964, l. 15.

¹⁶ App. 1025, l. 24 – 1026, l. 16; App. 1081, l. 16 – 1082, l. 5.

¹⁷ App. 1121 – 1123; App. 1155 – 1166; App. 1167 – 1172; App. 1174 – 1175; App. 1176.

questioning him [the investigator] as if that was actually the bag in fact . . . she put it right back beside me and then they carried on, and it went without objection.” Defense counsel agreed the laptop bag was beside or behind Respondent when the solicitor grabbed it and “paraded” it around. Both defense counsel testified they were caught off guard by the solicitor taking and using Respondent’s laptop bag. Counsel A. Walker admitted she did not object, and should have. “I was not expecting that at all.” “I was caught off guard.” “I probably—as it wasn’t in evidence, I should have objected to keep reference of it out when she—when she grabbed it from our table.” Similarly, Counsel Bank agreed he was “caught off guard.” “[W]e screwed up by not objecting.” Counsel Bank said it did not occur to them they should suggest Respondent not use the bag in court. All three of these witnesses also testified about defense counsel’s unsuccessful attempt to use laptop bags as demonstrative exhibits during her closing argument, which, as seen, was foreclosed by the court’s ruling that the bags could not be used because they were not in evidence.¹⁸

Regarding the inconsistencies in the complainants’ statements, first, as to Nathani, there was evidence presented that complainants originally told law enforcement only \$2,000 worth of electronics were stolen, but several days later Nathani claimed over \$10,000 worth of electronics were stolen. Without objection, Respondent admitted the initial incident report written by Deputy Stone which notes that on the day of the robbery, \$2,000 worth of electronics were stolen. However, Inv. Clarke’s notes, which were also admitted at the PCR hearing without objection, state that Nathani said in excess of \$10,000 worth of electronics were stolen. *See* App. 1557 – 1559.

¹⁸ App. 1231, ll. 12-23; App. 1408, ll. 23-25; App. 1495, l. 7 – 1496, l. 4; App. 1229, l. 25 – 1230, l. 5; App. 1236, l. 1 – 1237, l. 1; App. 1409, ll. 4-15; App. 1495, l. 19 – 1496, l. 4; App. 1453, l. 13 – 1458, l. 8; App. 1533, ll. 1-3.

Although these documents were in discovery, defense counsel did not question Nathani or the girls about the discrepancy in dollar amounts and so their credibility in this regard was not called into question at trial. When questioned why she did not cross-examine complainants about the discrepancy between the dollar amounts, defense counsel testified that the dollar amount did not go to an element of the crimes. However, counsel admitted that “a prior inconsistent statement may have gone to credibility.”¹⁹

Regarding the failure to cross examine Rabia on the inconsistencies in her statements, PCR counsel asked defense counsel about their failure to expose the inconsistency in Rabia’s statement to law enforcement that the car was a gold Hyundai Sonata even though it was the State’s theory of the case that Respondent used a gold Chevy Impala during the robbery. As seen, Respondent entered without objection Deputy Stone’s incident report which stated that Rabia said the perpetrators drove a gold Hyundai Sonata. *See App. 1557*. This was an entirely different make and model from Nazirah Gale’s gold Chevy Impala, but this inconsistency was not exposed—both girls testified at trial the perpetrators’ car was a gold or champagne-colored sedan. Neither girl was cross-examined about the make or model. Defense counsel stated her general practice would have been to “go through and flag any inconsistencies but it’s it – I could have missed inconsistencies as well.”²⁰

Finally, Rabia and S.N. both testified at trial they had gone out to Chick-fil-A and when they arrived home, the perpetrators’ car was in the driveway, and the robbery proceeded from there. However, Deputy Stone’s incident report states that Rabia told him “she and her sister were at home and heard something outside. Vict stated she was at the door and observed “Amp”

¹⁹ App. 1397, l. 23 – 1398, l. 21; App. 1438, l. 25 – 1439, l. 10.

²⁰ App. 1484, ll. 23 – 1485, l. 2; App. 1557; App. 203, ll. 22-24; App. 234, ll. 9-19; App. 1447, l. 23 – 1448, l. 4; App. 505, ll. 9-22.

at the door.” *See* App. 1557. Counsel failed to cross-examine Rabia about this discrepancy: whether the girls were already at home when they first noticed the perpetrators, or whether they were just arriving home from Chick-fil-A when they noticed the robbers.²¹

Order granting post-conviction relief

The PCR court granted Respondent relief in an order filed August 17, 2022. On August 30, 2022, the State filed a motion to alter or amend the judgment. On September 9, 2022, the State filed a memorandum in support of its motion. On September 26, 2022, the PCR court issued an order denying the State’s motion.²²

As to the first allegation upon which Respondent prevailed, counsels’ failure to attack the complainants’ credibility, the order stated the following specific findings of fact and conclusions of law. “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.” The order continued that, Respondent had “shown” “prejudice” because: “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.” The order cited Rule 613, SCRE, and *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989), in support of its findings and conclusions on this issue.²³

²¹ App. 196, ll. 19-24; App. 212, l. 19 – 213, l. 1.

²² App. 1616 – 1640; App. 1641 – 1656; App. 1657.

²³ App. 1620.

As to the second allegation upon which Respondent prevailed, counsels' failure to object to the solicitor's use of Respondent's laptop bag, the order stated the following specific findings of fact and conclusions of law. "Trial counsel failed to object to the State's use of an Applicant's laptop bag during the direct examination of Investigator Joseph Clarke." The order continued that, "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." The PCR court explained,

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.

App. 1621. The order cited *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019), in support of its findings and conclusions on this issue.²⁴

The State appealed, and on July 13, 2023, it filed a petition for writ of certiorari with this Court. This return follows.²⁵

ARGUMENT

I.

Certiorari should be denied because the PCR court's order adequately contained specific findings of fact and express conclusions of law.

The PCR court's final order in this case properly reflected the court's specific findings of fact and conclusions of law. The State cites § 17-27-70 in its petition for writ of certiorari as

²⁴ App. 1620 – 1621.

²⁵ App. 1616 – 1640; App. 1641 – 1656; App. 1657.

authority for the requirement that final PCR orders must contain specific findings of fact and conclusions of law. However, that is not what § 17-27-70 requires: § 17-27-70 instead deals with amendments to PCR applications and summary dismissal of PCR applications. However, § 17-27-80 requires that the PCR court's final order contain specific findings of fact and express conclusions of law. *See* S.C. Code Ann. § 17-27-80 (“If the court finds in favor of the applicant, it shall enter an appropriate order . . . The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented. This order is a final judgment.”). The PCR court's final order in this case complied with § 17-27-80. The issues were thoroughly fleshed out in this exhaustive record and adequately addressed in the order.

Regarding the laptop issue, the State argues in its petition that it is unclear from the order 1) what comment the solicitor made that the PCR court found improper; 2) how this prejudiced Respondent; and 3) how an objection would have made it more likely an appellate court would reverse on appeal. *See* State's Petition for Writ of Certiorari (PWC) at 15 – 16. These arguments are refuted by the order. As to point 1), it is clear what the PCR court found objectionable. The order cited the transcript page number of the objectionable questions and answers, which were the solicitor's improper references to Respondent's laptop bag with Inv. Clarke. The order cited to page 501 of the trial transcript, which is where the solicitor questioned Inv. Clarke about Respondent's bag, walked over to defense counsel's table, picked up Respondent's bag, and showed it off to the jury. (*See* App. 505; App. 511.) These references sufficiently identified the comments the PCR court found were improper.

As to point 2), the PCR court's order expressly identified how Respondent was prejudiced. The court stated its basis for finding prejudice was because counsel's error allowed

Solicitor Campbell to elicit testimony from Inv. Clarke that: “Applicant’s laptop bag in court was the same laptop bag alleged to have been used in the crime.” App. 1621.

As to point 3), it is plain how an objection would have made it more likely an appellate court would reverse on appeal. An objection would have preserved the issue so the error could be corrected on direct appeal. The appellate courts of this state have strict error preservation rules. *See* Jean Hofer Toal et al., *Appellate Practice in South Carolina* 57 (3d ed. 2012) (“In order for an issue to be preserved for appellate review, the issue must have been (1) raised to and ruled upon by the trial court, (2) raised by the appellant, (3) raised in a timely manner, and (4) raised to the trial court with sufficient specificity.”); *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593 (2010) (Error preservation rules require a litigant to “fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue.”). Absent a timely objection, the matter could not be addressed on direct appeal, as evidenced by Respondent’s counsel on direct appeal submitting a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), rather than a brief on the merits raising this issue. *See* App. 1097 – 1120.

Regarding the issue of counsel’s failure to expose prior inconsistent statements of the complainants, the State argues in its petition that the order was insufficient because the order does not set forth the inconsistencies in the victims’ statements or clarify the witnesses that counsel should have called to combat the inconsistent statements. *See* State’s PWC at 15. The order refutes this argument.

The order specifically identified which witnesses should have been cross-examined with their inconsistent statements (“the alleged victims and their father”), and noted that because they were not cross-examined, they could not be impeached. *See* App. 1620. Clearly the order referred to the inconsistencies about which there were extensive testimony at the hearing, and

about which exhibits were entered: 1) Counsel's failure to cross-examine Rabia and S.N. about the make and model of the perpetrators' car since Rabia told Deputy Stone the robbers drove a gold Hyundai Sonata but the State's theory of the case was that Respondent drove a gold Chevy Impala (and to put up Deputy Stone as a witness if Rabia denied this). 2) Counsel's failure to cross-examine Rabia and S.N. about whether they were already home when the perpetrators' arrived or whether they were just arriving home themselves when they noticed the perpetrators' car in the driveway (and to put up Deputy Stone as a witness if Rabia denied her earlier statement to him that the girls were already home). And, 3) Counsel's failure to cross-examine Nathani and the girls regarding the widely-varying dollar amounts they reported to the police of the items stolen (first it was \$2,000; later \$10,000), and to put up Deputy Stone and Inv. Clarke if they denied providing law enforcement with these inconsistent amounts.

II.

Certiorari should be denied because there is probative evidence in the record to support the PCR court's findings of deficient performance where counsel failed to object when the prosecutor took Respondent's laptop bag from the defense table and used it during her examination of Investigator Clarke, and where Respondent has shown prejudice.

Certiorari should be denied because there is evidence to support the PCR court's finding that counsel was ineffective, since counsel did not object when the solicitor grabbed Petitioner's bag off the defense table and "paraded" it before the jury, despite the fact that the bag was not in evidence. The jury's lengthy deliberations (four hours), its request to rehear Rabia's testimony, and its request to be recharged on reasonable doubt support the PCR court's finding of prejudice in this close case. "The appropriate scope of review of this Court is that 'any

evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citing *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)).

Deficient performance

Defense counsel did not object when Solicitor Campbell walked up to the defense table, picked up Respondent's black laptop bag from beside him, showed it to the jury, and elicited testimony from the investigator that the bag used by Respondent in court was "[e]xactly" like what "Ms. Rabia Nathani described him pulling the gun from." App. 505, ll. 23-25; App. 511, ll. 1-16. This was not a strategic decision. Counsel admitted she was "caught off guard" by the solicitor's actions. Counsel testified that she "should have objected" because the bag "wasn't in evidence." App. 1409, ll. 1-9; App. 1495, l. 7 – 1496, l. 4.

It was improper to present the bag to the jury since the bag was not in evidence. "In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." Rule 103(c), SCRE. *See also Chandler v. People's Nat. Bank of Greenville*, 140 S.C. 433, 138 S.E. 888, 890 (1927). "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court[.]" Rule 104, SCRE.

The PCR judge's finding this was deficient performance is supported by probative evidence. Counsel should have objected to the solicitor's outrageous conduct²⁶ in taking an item from defense table that was not in evidence and then presenting the item to the jury. A party may

²⁶ Consider a reversal of the circumstances: Had a defense lawyer walked up to a prosecutor's table, picked up a victim's purse from beside the victim, waved it around in front of the jury, and talked about it with a witness, it is inconceivable that the prosecutor would not have objected. And yet, defense counsel inexplicably did not do so here under nearly identical circumstances.

not show something to the jury until it has been admitted. Rule 103(c), SCRE; Rule 104, SCRE. The judge obviously would have sustained the objection on the ground that Respondent's bag was not in evidence, as evidenced by his later ruling during closing argument that the defense could not present to the jury other laptop bags that were not in evidence.

The State argues in its petition for writ of certiorari that it is unclear what objection the PCR court believed counsel should have made at trial. *See* State's PWC at 23. However, the order clearly refers to the objection that the item was not in evidence. Defense counsel testified at the PCR hearing she should have objected because the bag was not in evidence. Defense counsel's hindsight on the proper objection is confirmed by the trial judge's ruling during closing arguments that defense counsel could not present laptop bags that were not in evidence.²⁷

Secondly, the State argues the use of Respondent's bag by the prosecution was not foreseeable. *See* State's PWC at 23. It certainly should have been foreseeable, given that defense counsel had discovery which mentioned the perpetrator carried a gun in a laptop bag, and counsel heard testimony from Rabia that the perpetrator pulled a gun out of a black laptop bag. Regardless, once the solicitor picked up the bag, counsel should have objected. Part of being a competent trial lawyer is dealing with matters as they arise—jury trials are inherently unpredictable.

Next, the State argues there was no deficiency because counsel "articulated a strategy" (i.e., counsel's unsuccessful attempt to use other laptop bags that were not in evidence

²⁷ Another objection that could have been made was a Rule 403, SCRE, objection, since the prosecutor's conduct and her exchange with the investigator were likely to unfairly prejudice Respondent, mislead the jury, and confuse the issues, and the bag had no probative value since it had not been admitted into evidence. *See* Rule 403, SCRE: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

during closing argument). *See* State’s PWC at 23 – 24. This argument is without merit and is not supported by the record. Counsel did not articulate a strategy. Counsel testified she should have objected, and she testified her failure to do so was not strategic: “I was caught off guard.”

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). “In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel’s deficient performance prejudiced the applicant’s case.” *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687-88.

“The appropriate scope of review of this Court is that ‘any evidence’ of probative value is sufficient to uphold the PCR judge’s findings.” *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989); *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984). The Supreme Court “will uphold the findings of the PCR judge when there is any evidence of probative value to support them.” *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007).

There is evidence of probative value to support the judge’s decision that counsel’s performance fell below the range of required competence when she failed to object to the solicitor’s outrageous conduct of using an item not in evidence as if it were in evidence before the jury. Trial counsel admitted she should have objected. Rule 103, SCORE; *Strickland*, 466 U.S. at 687-88; *Cherry*, 300 S.C. at 119, 386 S.E.2d at 626.

Prejudice

Under the second prong of *Strickland*, a PCR applicant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial.” *Johnson v. State*, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

“In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel’s error had on the outcome of the trial.” *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96). “In addition, the PCR court should consider the strength of the State’s case in light of all the evidence presented to the jury.” *Id.*, citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998). “In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice.” *Id.*, citing *Strickland*, 466 U.S. at 696.

This case came down to identity. The lineup shown to the girls was highly suggestive, since it admittedly contained five photographs of strangers and one photograph of a person the girls knew: Respondent. The defense argued the identifications were tainted by the girls speaking with their father before identifying the robber as “Amp” to law enforcement. Also, although Rabia called the perpetrator a “customer” of her father’s to 911, she and the other complainants all referred to Respondent as a man who did “business with” Nathani rather than as a customer when they were not being led by the solicitor. (Respondent sold things to Nathani rather than bought them.)

Respondent put up several alibi witnesses who said he was at work when the robbery was committed. Dr. Dawn McQuiston, an expert in eyewitness identification from Wofford, provided

the jury with factors that could result in erroneous identifications and those factors were present in this case: cross-racial identification, the presence of a weapon, and high-stress circumstances. The jury deliberated for four hours, it asked to rehear Rabia’s testimony, and it asked to be recharged on reasonable doubt. On these facts, it would not have taken much to tip the scales. *See Martin v. State*, 427 S.C. 450, 457, 832 S.E.2d 277, 280 (2019) (citing *Lounds v. State*, 380 S.C. 454, 463, 670 S.E.2d 646, 651 (2008), to illustrate that “a jury’s questions during deliberations—asking to rehear testimony and jury charges—indicated they were struggling with several aspects of witnesses’ accounts,” and supported a finding of prejudice).

Considering the strength of the State’s case, there is a reasonable likelihood the impact of counsel’s error affected the outcome of the trial. *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. “Any evidence” of probative value is sufficient to uphold the PCR judge’s findings. *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Webb*, 281 S.C. 237, 314 S.E.2d 839. Respectfully, certiorari is not warranted here.

III.

Certiorari should be denied because there is probative evidence in the record to support the PCR court’s finding of deficient performance where counsel failed to cross-examine the complainants regarding their prior inconsistent statements and impeach them with those statements if necessary, and where Respondent has shown prejudice.

Certiorari should be denied because there is evidence to support the PCR court’s finding that counsel was ineffective, since counsel failed to bring to the jury’s attention inconsistencies regarding the make and model of the perpetrators’ car, whether the girls were already home or just returning home when they spotted the robbers, and the value of the items stolen. The record also supports a finding of prejudice in this close case. “The appropriate scope of review of this

Court is that ‘any evidence’ of probative value is sufficient to uphold the PCR judge’s findings.” *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (citing *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984)).

Deficiency

First, counsel failed to cross-examine Rabia and S.N. about the make and model of the perpetrators’ car. Although Rabia told the responding officer, Deputy Stone, the robbers drove a gold Hyundai Sonata, the State’s theory of the case was that Respondent drove a gold Chevy Impala. If Rabia had denied this, defense counsel could have put up Deputy Stone as a witness, since Rabia stated the car was a gold Hyundai Sonata to Stone.

Second, counsel failed to cross-examine Rabia and S.N. about whether they were already at home when the perpetrators’ arrived, or whether they were just arriving home themselves when they noticed the perpetrators’ car in the driveway. If Rabia denied making the statement that the girls were already at home when the perpetrators arrived, counsel could have put up Deputy Stone as a witness, since Rabia stated to Stone that the girls were already at home.

Third, counsel failed to cross-examine Nathani and the girls regarding the widely-varying dollar amounts of the items stolen they reported to the police (first it was \$2,000; later \$10,000). If the complainants denied providing law enforcement with these inconsistent amounts, counsel could have put up Deputy Stone and Inv. Clarke, since these statements were made to Stone and Clarke.

The State argues in its petition that counsel’s approach to attacking the complainants’ testimony was strategic (i.e., counsel used an expert witness to call the girls’ identifications into question), and that Nathani’s inconsistencies about the value of the stolen items were of no import. *See* PWC at 16 – 18. However, counsel did not testify to any strategic reason for her

failure to cross-examine Rabia and S.N. on the inconsistencies above. Counsel instead said her strategy was to bring out any inconsistencies, but she may have missed some. Moreover, counsel's failure to cross-examine Nathani was unreasonable and deficient under prevailing professional norms, since the defense's theory of the case was that Nathani influenced the girls into falsely accusing and identifying Respondent. Anything that went to Nathani's credibility thus ultimately went to the accuracy of the identifications of the perpetrator, which was the ultimate issue in the case.

Counsel's failure to cross-examine the complainants about these inconsistencies left a lot on the table. These inconsistencies would likely have given the jury pause about the accuracy and truthfulness of the complainants' testimony. It is permissible to impeach a witness for the opposing party by showing prior statements which are inconsistent with or contradictory of trial testimony. *Mays v. Mays*, 267 S.C. 490, 229 S.E.2d 725 (1976). "South Carolina has . . . always followed the traditional rule that inconsistent statements are admissible to impeach a witness' credibility." *Hunter v. Staples*, 335 S.C. 93, 99, 515 S.E.2d 261, 264 (Ct. App. 1999).

The State also argues Respondent did not introduce any prior inconsistent statements that could permissibly be used for impeachment. *See* State's PWC at 18 – 20. This argument is simply unsupported by the record: pages 1557 – 1559 contain the relevant exhibits entered at the PCR hearing; exhibits entered without objection. These documents were the complainants' statements as made to Officer Stone and Inv. Clarke, and memorialized by those officers in the form of an incident report and typed investigative notes. Page 1557 contains Deputy Stone's incident report in which he notes that Rabia said the girls "were at home and heard something outside," before looking out to see the perpetrator at the door. Page 1557 also contains the initial report that the car was a gold Hyundai Sonata (not a gold Chevy Impala), and that \$2,000 worth

of electronics were stolen. Page 1559 contains Inv. Clarke's note that Nathani told him \$10,000 worth of electronics were stolen, and pages 1564 – 1566 are handwritten estimates of the value of each item purportedly stolen. Complainants could have been impeached with extrinsic evidence of these prior inconsistent statements. *See* Rule 613(b), SCRE ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible."). There is no requirement in this rule that only a person's own written statement may be used—the complainants' verbal statements to the officers, memorialized in their reports, were fair game for impeachment under Rule 613(b), SCRE.

The Sixth Amendment to the United States Constitution guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). "In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) counsel's deficient performance prejudiced the applicant's case." *McKnight v. State*, 378 S.C. 33, 40, 661 S.E.2d 354, 357 (2008) (citing *Strickland*, 466 U.S. at 687). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Strickland*, 466 U.S. at 687-88.

"The appropriate scope of review of this Court is that 'any evidence' of probative value is sufficient to uphold the PCR judge's findings." *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d

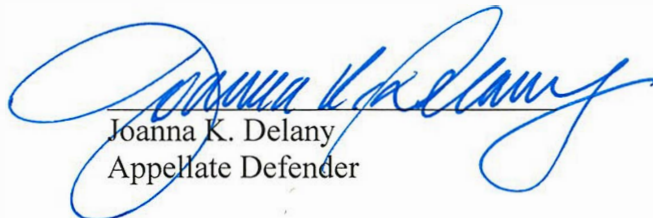
624, 626 (1989); *Webb v. State*, 281 S.C. 237, 314 S.E.2d 839 (1984); *see also Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). There is evidence of probative value to support the judge's decision that counsel's performance fell below the range of required competence when she failed to cross-examine complainants on the above inconsistencies and impeach the credibility of their testimony. Rule 613(b), SCRE; *Strickland*, 466 U.S. at 687-88.

Prejudice

Respondent hereby incorporates the prejudice discussion from Issue II, above. As to these specific errors, this case came down to identity. The credibility of the testimony of those persons that identified Respondent (Rabia and S.N.), and those the defense contended influenced their identifications (Nathani), was thus a critical issue in the case. Attacking the credibility of the identifying witnesses' testimony would have further weakened the State's case on the ultimate issue. It would not have taken much to tip the scales: There is a reasonable likelihood that attacking the credibility of the complainants' testimony on the matters discussed above would have done so. *See Smalls*, 422 S.C. at 188, 810 S.E.2d at 843. "Any evidence" of probative value is sufficient to uphold the PCR judge's findings. *Cherry*, 300 S.C. 115, 386 S.E.2d 624; *Webb*, 281 S.C. 237, 314 S.E.2d 839. Respectfully, certiorari is not warranted.

CONCLUSION

For the reasons above, the petition for writ of certiorari should be denied.



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ATTORNEY FOR RESPONDENT

This 25th day of September, 2023.