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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO BEAUFORT COUNTY
Carmen T. Mullen, Trial Judge
Robert J. Bonds, PCR Judge

Appellate Case No. 2023-001613

EARNEST STEWART DAISE,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's Questions

I. Whether the PCR court erred in concluding that trial counsel was not ineffective for failing to inadmissible hearsay testimony by EMT that they had questioned the minor child about who hurt him and he responded by saying something that "sounded like Daddy."

II. Whether the PCR court erred in concluding trial counsel was not ineffective by failing to object to the inadmissible testimony by Frank Mullen that the victim was afraid of Petitioner?

III. Whether the PCR court erred in concluding that appellate counsel was not ineffective for failing to raise any argument on appeal regarding the trail court's denial of trail counsel's motion to suppress the search warrant executed at 43 Poppy Hill Road and for Petitioner's clothes he was wearing when interviewed by law enforcement?

Respondent's Counterstatement of Questions

I. Did the PCR court properly find counsel was not ineffective for not raising a hearsay objection to Child 1's statements because (1) counsel articulated a valid reason for not objecting in that the State had Child 1 available to testify, and the defense team did not want him to testify in this capital case due to the emotional impact it would have on the jury; (2) the statement fit the excited utterance exception to the rule against hearsay; and (3) the State presented overwhelming evidence of Petitioner's guilt without considering Child 1's statement?

II. Did the PCR court properly find Petitioner did not demonstrate prejudice from counsel's failure to object to Frank Mullen's fear testimony because, as noted by the Court of Appeals in its opinion on direct appeal, the State presented overwhelming evidence of guilt without considering fear testimony by another witness?

III. Did the PCR court properly find appellate counsel was not ineffective for not raising the Franks issue when it is not reasonably likely the conviction would have been reversed on appeal based on that issue? Further, did Petitioner overcome the presumption that appellate counsel was effective when counsel raised *six* meritorious issues in his brief, two which the Court of Appeals found constituted trial court error?

STATEMENT OF THE CASE

Procedural History

Petitioner is confined in the South Carolina Department of Corrections serving a life sentence. In December 2009, the Beaufort County Grand Jury indicted Petitioner for two counts of murder (2009-GS-07-02636; -02639), assault and battery with intent to kill (ABWIK) (2009-GS-07-02637), possession with intent to distribute (PWID) marijuana, 3rd or subsequent (2009-GS-07-02595), and trafficking in cocaine 10g – 28g, 3rd or subsequent (2009-GS-07-02594). These charges arose from the fatal shooting of Jeanine Mullen (Victim), who was Petitioner's girlfriend; the fatal shooting of Victim's four-year-old son (Child 2); and the non-fatal shooting of Victim and Petitioner's two-year-old son (Child 1).

On October 8, 2013, Petitioner proceeded to a capital jury trial before the Honorable Carmen T. Mullen. Petitioner was represented by William McGuire, Casey Secor, and S. Boyd Young, all of the Division of Capital Trial Defense; Mark McDougall, Catherine Creely, and Jessica Fitts, all of Akin, Gump, Strauss, Hauer Feld, LLP; and Micah Leddy of The Leddy Law Firm, LLC. Solicitor Isaac McDuffie Stone, III, Chief Deputy Solicitor Sean Thornton, and Deputy Solicitor Carra Henderson prosecuted the case. The jury convicted Petitioner as indicted, and the capital penalty phase began October 21, 2013. On October 23, 2013, the jury sentenced Petitioner to life on the murder charges. Judge Mullen sentenced him to consecutive sentences of twenty years for ABWIK, thirty years for trafficking cocaine, and twenty years for PWID marijuana.

Petitioner filed a timely notice of appeal, which was perfected by A. Mattison Bogan, Esquire, and Chief Appellate Defender Robert M. Dudek. On appeal, Petitioner argued the trial court erred in (1) allowing hearsay violative of the Confrontation Clause, (2) permitting a witness to comment on the credibility of another witness, (3) admitting testimony that a victim feared

Petitioner, (4) failing to require the State to produce materials that allegedly amounted to a "handbook" on circumventing a Batson challenge, (5) admitting a photograph of Petitioner in a custodial pose, and (6) admitting two photographs in which a child victim's birthday cake was visible. Petitioner also argued the court's cumulative errors denied him a fair trial. The Court of Appeals affirmed. State v. Daise, 421 S.C. 442, 807 S.E.2d 710 (Ct. App. 2017). Petitioner filed a petition for rehearing, which was denied. The remittitur was sent January 22, 2018.

On March 13, 2018, Petitioner filed an application for post-conviction relief (PCR). On March 17, 2023, an evidentiary hearing convened before the Honorable Robert J. Bonds. Petitioner appeared pro se.[1] Assistant Attorney General Danielle Dixon represented Respondent. On October 4, 2023, Judge Bonds issued an order denying PCR and dismissing the claims with prejudice.

Pertinent Trial Testimony

At trial, Victim's father Frank Mullen testified he arrived at Victim's home between 6:30 and 7:00 p.m. on November 15, 2009, to drop off Victim's two oldest children. When they arrived, the doors to Victim's van were open and it appeared "ransacked." Inside the home, Frank discovered Child 2's deceased body in the kitchen, and Victim's deceased body and Child 1's body in Victim's bedroom.[2] Although two-year-old Child 1 was still alive, he had been shot. (App. 2102-2119). According to paramedics, Child 1 indicated "Daddy"[3] did this when questioned in the ambulance on the way to the hospital. (App. 1922-23, 1937).

Around 2:00 a.m. on November 16, police located Petitioner at the home of Janelle Jay Simmons, located at 43 Poppy Hill Road. (App. 2365, 2374-76). Law enforcement searched

[1] Petitioner was previously appointed counsel, but his prior counsel was relieved at Petitioner's request and Petitioner was permitted to proceed pro se.
[2] Victim and Child 2 died from gunshot wounds to the head. The pathologist opined Victim's head wound was caused by a gun being placed directly against her head.
[3] Petitioner is Child 1's biological father.

Petitioner's bedroom in that home and found 221.39 grams of marijuana, an electronic scale, ammunition commonly associated with an AK-47, a set of keys for Victim's van, 23.26 grams of cocaine base, and Petitioner's cell phone. (App. 2259-61, 2266-2283, 2305-06, 2311, 2359-60, 2281). Law enforcement also documented a red smear on the door to the bedroom, noted what appeared to be fresh blood on the front pocket of Petitioner's jeans, and photographed a cut on Petitioner's hand. (App. 2277-78, 2356-58, 2376-77). A DNA expert testified the DNA from blood on the door matched Petitioner's DNA, and blood from Petitioner's pants matched Petitioner's and Victim's DNA. (App. 2482-83, 2485-86). A trace evidence expert testified Petitioner's jeans contained gunshot residue. (App. 2455).

During his initial interview, Petitioner denied being at Victim's home or driving her van the day of the murders. (App. 2384-85). However, video surveillance from a gas station showed Petitioner with Victim's van between 11:45 a.m. and 12:18 p.m, and Michael Wilson testified he saw Petitioner driving a "white soccer mom van" around dusk that evening. (App. 2138-44, 2147-48). Wilson testified he overheard Petitioner on the phone say, "Who the f*** you think you talking to?" prior to hanging up. (App. 2147).

Phone records from the day of the murders indicated Victim's phone called Petitioner's phone eighteen times between 11:39 a.m. and 3:52 p.m. Although most of the calls went to voicemail, the 3:52 p.m. call lasted twenty-eight seconds. (App. 2337-44). Other records showed Petitioner's phone placed nine calls to Simmons's phone between 6:00 p.m. and 6:18 p.m. (App. 234-47). At 6:04 p.m., Simmons's phone sent Petitioner's phone a text indicating he was "on the way." (App. 2347-51). At trial, Simmons testified he picked up Petitioner on the side of the road and gave him a ride sometime after 6:00 p.m. (App. 2195-96). Simmons also admitted he sent the text that said "On the way." (App. 2198).

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. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). "Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses." Foye v. State, 335 S.C. 586, 589, 518 S.E.2d 265, 267 (1999). However, pure questions of law are 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 PCR court properly found counsel was not ineffective for not raising a hearsay objection to Child 1's statements because (1) counsel articulated a valid reason for not objecting in that the State had Child 1 available to testify, and the defense team did not want him to testify in this capital case due to the emotional impact it would have on the jury; (2) the statement fit the excited utterance exception to the rule against hearsay; and (3) the State presented overwhelming evidence of Petitioner's guilt without considering Child 1's statement.

Petitioner first contends trial counsel was ineffective for not objecting to hearsay testimony by paramedics that Child 1 told them "Daddy" hurt him. Petitioner avers the PCR court erred in finding counsel articulated a valid strategy for not objecting because (1) counsel could not remember the discussions the defense team had with the solicitor or the specifics of any agreement with the prosecution, and (2) counsel objected based on Crawford, which violated any agreement the defense team had with the prosecution. Petitioner further contends the statement did not fit the excited utterance exception because no evidence was presented that Child 1 "was under the excitement of the events causing his injury" when he made the statement. Petitioner also asserts the statement did not fit any other exception to the rule against hearsay. He thus contends counsel was deficient for not objecting, and his failure to object prejudiced him because Child 1's statement went to the ultimate issue in the case.

Contrary to this assertion, however, counsel *did* articulate a valid reason for not objecting to this hearsay testimony in that the State had Child 1 available to testify, and the defense team did not want Child 1 to testify due to the emotional impact it would have on the jury in this capital case. Further, the PCR court properly found the statement fit the excited utterance exception because Child 1 was in the ambulance on the way to the hospital after his father shot him, his mother, and his brother—making counsel's failure to object based on hearsay reasonable, and making it not reasonably likely the testimony would have been excluded based on hearsay. Finally,

as the Court of Appeals noted in its opinion on the direct appeal, the State submitted overwhelming evidence of guilt without consideration of Child 1's statement to paramedics, making it not reasonably likely the outcome would have been different *without* this testimony.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). In a PCR action, an applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). When the application alleges ineffective assistance of counsel, the applicant must prove "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." Strickland, 466 U.S. 668. Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, an applicant must prove counsel's performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (citing Strickland, 466 U.S. at 690). The applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, a PCR applicant must prove counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

At trial, paramedic Shayna Orsen testified she and Crew Chief Danny Tinnel transported Child 1 to the hospital. She stated Child 1 was initially unresponsive but became more responsive in the ambulance. (App. 1921). During her testimony, the following exchange occurred:

> A Crew Chief Tinnel was asking [Child 1] who hurt him.
> Q Okay.
> Mr. McGuire: Your Honor, I hate to interrupt, but for the record, we need to renew our Crawford objection.
> The Court: Thank you. It's noted for the record, sir.
> By Mr. Stone:
> Q So, I'm sorry. Crew Chief Tinnel—start that over. I'm sorry.
> A Crew Chief Tinnel was asking him questions, basically just to keep him awake and talking, and one of the questions he did ask him was who had hurt him.
> Q And did he answer?
> A It sounded like he said *Daddy*.

(App. 1922-23). Later, paramedic Tinnel testified, "I was asking [Child 1] who hurt him, and when I asked him who hurt him, he responded *Daddy*." (App. 1937). Prior to this testimony, counsel renewed the Crawford objection. (App. 1936).

At the PCR hearing, Petitioner averred counsel was ineffective for not objecting to this hearsay testimony. He stated appellate counsel raised this issue in his brief, but the Court of Appeals found it was not preserved. (App. 2999-3001). Petitioner further averred the excited utterance exception was inapplicable because no testimony indicated Child 1 "was under the excitement of the events causing his injury. This is because [Child 1] was not under the stress of excitement, rather [Child 1] was groggy, nonresponsive and uttering complete nonsense." He also contended the present sense impression exception did not apply. (App. 3003-06).

William McGuire testified he was lead counsel during the guilt phase. He stated Child 1—who was Petitioner's biological son—was two years old at the time of the shooting and six years

old at the time of trial. McGuire stated the State planned to call Child 1 as a witness, which was a concern for the defense team. He testified the defense team consulted with an expert on memory issues, who indicated research showed young children could remember traumatic events. McGuire explained "having a young child testify that his father was the assailant that . . . shot him in the head would be pretty emotional and pretty damning evidence"—especially in a capital trial. He stated the defense team discussed strategies to keep Child 1 from testifying. McGuire testified, 'I can't remember if we forged an agreement with the prosecutor, or if we just had a strategy decision to soft-pedal our objections to the statements that were already—that were coming in the record through Danny Tinnel." He recalled having a conversation with the deputy solicitor about whether the State would call Child 1 if his statements came in through another witness. McGuire stated, "I don't know if we forged an agreement, or how specific that was, but, ultimately, [Child 1] did not take the stand." He averred the jury would have been sympathetic to Child 1 if he had testified, which would have prejudiced Petitioner. McGuire recalled raising a Crawford objection to the testimony. He did not believe a hearsay objection would be a strong objection because the testimony would likely fit the excited utterance exception. (App. 3080-85, 3091-93).

a. Counsel articulated a valid strategic reason for not objecting in that the defense team did not want Child 1 to testify in this capital case due to the emotional impact it would have on the jury.

The PCR court properly found McGuire articulated a valid, reasonable strategy for not objecting to Child 1's statements based on hearsay and thus was not deficient. Specifically, McGuire testified the State planned to call Child 1 as a witness, which would have had a strong emotional impact on the jury. McGuire testified extensively about the considerations the defense team had to make due to the fact this was a capital case. (App. 3081-85). McGuire also testified the State had relayed that Child 1 would testify. (App. 3082-85). Ultimately, counsel's strategy

was to keep Child 1 from testifying, which was especially reasonable considering this was a capital case. The PCR court found McGuire's foregoing testimony credible, and this Court should defer to that finding. See Foye, 335 S.C. at 589, 518 S.E.2d at 267 ("Where matters of credibility are involved, this Court gives great deference to a judge's findings, because this Court lacks the opportunity to directly observe the witnesses."). Because this was a capital case and the State had relayed Child 1 was available to testify, counsel articulated a valid reason for not objecting to the testimony based on hearsay and thus was not deficient.

b. Child 1's statements fit the excited utterance exception to the rule against hearsay.

The PCR court properly found it is not reasonably likely the outcome would have been different had counsel raised a hearsay objection because Child 1's statements fit the excited utterance exception to the rule against hearsay.[4] "A statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition" is not excluded by the rule against hearsay. Rule 803(2), SCRE. "The rationale behind the excited utterance exception is that the startling event suspends the declarant's process of reflective thought, reducing the likelihood of fabrication." State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999). "In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances." Id.

Here, Child 1 was leaving in an ambulance after his father shot him. Although he was initially groggy and unresponsive (due to gunshot injuries), he regained consciousness once paramedics began treatment. It is incredulous to suggest that Child 1 was not under the stress of excitement caused by a startling event when he was *en route* to the hospital after his father shot

[4] Counsel *did* raise and renew a *Crawford* objection to the testimony. (Tr. 1806, 1820).

him. Based on the trauma Child 1 experienced and the fact he was undergoing emergency medical treatment as a result of this startling, traumatic event, this statement falls under the excited utterance exception to hearsay.[5]

In asserting this statement does not meet the excited utterance exception, Petitioner relies on State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006). Davis, however, is distinguishable because no evidence showed the person making the statement witnessed the shooting or was in the house at the time of the shooting. Id. at 181, 638 S.E.2d at 63. Here, Child 1 was clearly in the home when the murders occurred, and Child 1 was also shot. It would strain credibility to suggest no evidence showed Child 1 witnessed his own shooting. Further, unlike the person making the statement in Davis, Child 1 was under the stress of the event because he was in an ambulance after being so severely shot that it was unclear if he would survive.[6]

The facts here are more akin to Dennis, where the Supreme Court of South Carolina found a statement fit the excited utterance exception to hearsay. There, the witness testified he saw "Otis" shortly after the shooting, and Otis said "his brother had shot [the victim] because [the victim] had taken a swing at his brother." 337 S.C. at 283, 523 S.E.2d at 176-77. Unlike the speaker in Davis,

[5] Petitioner's contention that "When asked his name, [Child 1] responded with the wrong name" is taken out of context. Admittedly, the paramedics indicated it sounded like Child 1 said his name was "Doug"—which was not his name. However, Child 1's grandmother and older brother both testified Child 1's nicknames were Dub, Little Dub, and J-Dub. (App. 1921, 1942, 1944-45, 2129).

[6] Petitioner's reliance on Thompson v. State, 423 S.C. 235, 814 S.E.2d 487 (2018), is likewise misplaced. Thomson dealt with hearsay statements that corroborated a minor victim's testimony in a sexual abuse case. There, the Court did not analyze the excited utterance exception because the statements were made during subsequent interviews by a DSS caseworker and a clinical psychologist, and nothing suggested they occurred while the victim was under the stress of the excitement caused by the sexual assault. The statements were further improper because they improperly bolstered the victim's testimony. Here, Child 1 made the statement in the ambulance on the way to the hospital after his father shot him, his mother, and his brother. Medically, Child 1 was under the stress of the gunshot wound and paramedics were actively attempting to keep him alive. This is a vastly different situation than an interview that occurs days or weeks after the event.

Otis witnessed the shooting. Here, not only did Child 1 witness the shooting of himself and presumably his mother (whose body was discovered in the room with him), he made this statement while under the trauma of being shot. See Dennis, 337 S.C. at 284, 523 S.E.2d at 177 ("Appellant's argument that the State failed to show the statement was an excited utterance argument is unpersuasive. *Otis allegedly had just seen his brother shoot an unarmed man*, abruptly ending a fistfight. Horlback testified *Otis made the statement to him when he saw Otis one to two minutes after the shooting*, tucking a gun beneath his shirt as he walked between apartment buildings. The statement was an excited utterance admissible under Rule 803(2), SCRE." (emphasis added)).

Because this testimony clearly fit the excited utterance exception to hearsay, counsel's failure to object on this basis was reasonable under prevailing professional norms and not deficient. In fact, McGuire explained at the PCR hearing his basis for believing this testimony fit the excited utterance exception:

> [Child 1] had just been shot. The entrance wound was in the head area, and the bullet ricocheted and went into his torso, and I think exited around his rib cage, so he would have been—it would have been a significant injury. And I mean he was in a home where his—[Victim] was shot and killed. [Child 2] was—I think he was four at the time was also shot and killed. And then [Child 1] was scooped up and rushed out of the house into an ambulance. And we—we thought a hearsay objection to that would be pretty weak given the fact that it was a pretty traumatic event. And we expected the statement to come in as an excited utterance, despite any objection we made.

(App. 3084-85). Based on the foregoing, McGuire articulated a valid reason for raising a hearsay objection. Finally, because the testimony fit a hearsay exception, it is not reasonably likely it would have been excluded *had* counsel raised a hearsay objection.

c. Petitioner cannot demonstrate prejudice because the State presented overwhelming evidence of Petitioner's guilt that did not include Child 1's statement.

Finally, the PCR court properly found the State presented overwhelming evidence of guilt such that it is not reasonably likely the outcome would be different had Child 1's statement been excluded. Critically, our Court of Appeals reached the same conclusion in analyzing this case on direct appeal. There, the Court of Appeals found the State presented overwhelming evidence of guilt that did *not* include this hearsay testimony. See State v. Daise, 421 S.C. 442, 461, 807 S.E.2d 710, 719-20 (Ct. App. 2017) ("Phone records revealed that between 11:39 a.m. and 3:52 p.m. on November 15, 2009, Jeanine called Daise eighteen times. Child 1[[7]] testified Daise drove the white van away from Jeanine's home on the morning of November 15. Video surveillance shows Daise had the van at a gas station shortly before noon, and he was seen driving the van near Eddie's Disco around dusk. Frank, Child 1, and Child 2 arrived back at Jeanine's around 7:00 p.m., where they saw the "ransacked" van in the driveway. Inside the home, Frank discovered Jeanine, John Doe 1, and John Doe 2. Contrary to Daise's claim that he was not in the vicinity of the residence on the evening of the incident, Simmons testified he picked up Daise about a mile from Jeanine's and dropped him off near the tracks on Poppy Hill Road. Further, when Daise was arrested, gunshot residue and traces of Jeanine's blood were found on his jeans. Thus, we find the State presented overwhelming evidence of guilt such that any error in the admission of the "fear" statements was harmless."). (App. 2891-2900). Thus, the PCR court properly denied this claim.

[7] Child 1 in the Court of Appeals' opinion referenced an older child of Victim—not the two-year-old child that is identified as Child 1 in the PCR court's order.

II. The PCR court properly found Petitioner did not demonstrate prejudice from counsel's failure to object to Frank Mullen's fear testimony because, as noted by the Court of Appeals in its opinion on direct appeal, the State presented overwhelming evidence of guilt without considering fear testimony by another witness.

Petitioner next contends the PCR court erred in concluding counsel was not ineffective for not objecting to inadmissible testimony by Frank Mullen regarding Victim's fear of Petitioner. However, as the South Carolina Court of Appeals found, the State presented overwhelming evidence of Petitioner's guilt without considering fear testimony.[8] Because the State presented overwhelming evidence of Petitioner's guilt, it is not reasonably likely the outcome would be different had counsel preserved an objection to Mullen's fear testimony. Thus, the PCR court properly found Petitioner did not prove prejudice.

At trial, counsel vigorously argued against Mullen's testimony, and the State proffered his testimony outside the jury's presence. Following the proffer, the Court determined Mullen could testify that Victim said she was afraid of Petitioner. (App. 1972-73, 2054-67). After the jury returned, Frank testified Victim had recently told him she was leaving Petitioner because she "couldn't deal with him anymore." When asked if Victim was afraid of Petitioner, Frank responded, "Yeah, and that's—oh, yeah." (App. 2119). Counsel did not renew the objection.

Admittedly, counsel did not preserve the objection to Mullen's testimony about Victim's fear. State v. Daise, 421 S.C. 442, 461, 807 S.E.2d 710, 719 (Ct. App. 2017). However, the PCR court properly found Petitioner did not prove prejudice. First, given the lengthy argument against the admissibility of Mullen's statement, which was premised on State v. Garcia, 334 S.C. 71, 76, 512 S.E.2d 507, 509 (1999), it is not reasonably likely the trial court would have excluded the

[8] The Court of Appeals examined fear testimony by Victim's friend Aileen Porter concluded that although it was improperly admitted, any error in its admission was harmless due to the other overwhelming evidence of guilt.

testimony had counsel further objected. Further, and critically, it is not reasonably likely the Court of Appeals would have reversed on this issue had it been preserved. Notably, in ruling that the trial court erred in admitting Aileen Porter's testimony about Victim's fear of Petitioner, the Court of Appeals found the error harmless due to other overwhelming evidence of guilt:

> Phone records revealed that between 11:39 a.m. and 3:52 p.m. on November 15, 2009, Jeanine called Daise eighteen times. Child 1 testified Daise drove the white van away from Jeanine's home on the morning of November 15. Video surveillance shows Daise had the van at a gas station shortly before noon, and he was seen driving the van near Eddie's Disco around dusk. Frank, Child 1, and Child 2 arrived back at Jeanine's around 7:00 p.m., where they saw the "ransacked" van in the driveway. Inside the home, Frank discovered Jeanine, John Doe 1, and John Doe 2. Contrary to Daise's claim that he was not in the vicinity of the residence on the evening of the incident, Simmons testified he picked up Daise about a mile from Jeanine's and dropped him off near the tracks on Poppy Hill Road. Further, when Daise was arrested, gunshot residue and traces of Jeanine's blood were found on his jeans. Thus, we find the State presented overwhelming evidence of guilt such that any error in the admission of the "fear" statements was harmless.

State v. Daise, 421 S.C. 442, 461, 807 S.E.2d 710, 719–20 (Ct. App. 2017). In light of the foregoing, it is not reasonably likely this issue would have been reversed on appeal had it been preserved. Thus, the PCR court properly found Petitioner did not prove prejudice.

III. The PCR court properly found appellate counsel was not ineffective for not raising the Franks issue because it is not reasonably likely the conviction would have been reversed on appeal based on that issue. Further, Petitioner did not overcome the presumption that appellate counsel was effective when counsel raised *six* meritorious issues in his brief, two which the Court of Appeals found constituted trial court error.

In his final question, Petitioner contends the PCR court erred in not finding appellate counsel ineffective for failing to raise the Franks issue. However, the PCR court properly found it is not reasonably likely the conviction would have been reversed based on the Franks issue, and

thus Petitioner did not show prejudice. Further, appellate counsel raised *six* meritorious issues in his brief and thus was not deficient for not raising this additional issue.

A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "***appellate counsel is not required to raise every non-frivolous issue that is presented by the record***." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (emphasis added). "For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy . . . . " Jones v. Barnes, 463 U.S. 745, 754 (1983).

Courts apply Strickland when analyzing a claim of ineffective assistance of appellate counsel. Thus, courts consider (1) whether appellate counsel's performance was deficient, and (2) whether the applicant was prejudiced by appellate counsel's deficient performance. Bennett v. State, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal. Anderson v. State, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

Prior to trial, Petitioner filed a motion to suppress evidence seized during the execution of search warrants of (1) his bedroom at 43 Poppy Hill Road and (2) the clothes he wore when he spoke to law enforcement. (App. 2701-03, 2706-07). Petitioner argued the warrants were defective because "each warrant was presented containing inaccurate and misleading information and material omissions." (App. 2701-03, 2705-07). He also filed a memorandum in support of the motion. (Supp. App. 47-87).

On February 4, 2013, the trial court held a hearing on Petitioner's motion. (Supp. App. 89). At the hearing, Magistrate Orville G. Chase testified he did not receive any evidence outside the

affidavit itself. (Supp. App. 98-99). Master Sergeant Jefferey Purdy testified about the affidavit supporting the search warrant of Petitioner's clothes, and Sergeant Wilson testified about the affidavit supporting the search warrant of 43 Poppy Hill Road. (Supp. App. 102-09, 136-42). During the hearing, defense counsel Casey Secor cross-examined the officers about whether the affidavits adequately provided the source of their information. (Supp. App. 113-35, 142-58). Counsel also called the victim's neighbor, Rebecca Nation, to establish she told law enforcement that she saw the victim's boyfriend pull into her home the evening of the shooting but did not know his name. (Supp. App. 163-69). On May 6, 2013, the trial court issued an order finding the affidavits contained sufficient probable cause and denying the motion to suppress.

Prior to trial, counsel again raised the motion to suppress and specifically cited Franks. The court acknowledged it had previously determined the search warrants contained sufficient probable cause. (App. 2262-63, 2265). Thereafter, counsel renewed the Franks objection when the State entered evidence from the search warrants. (App. 2478, 2481). Appellate counsel, however, did not raise this issue on appeal.

a. The PCR court correctly found Petitioner did not demonstrate prejudice because it is not reasonably likely the appellate courts would have reversed the conviction had this issue been raised.

"In Franks v. Delaware, the United States Supreme Court held that the Fourth and Fourteenth Amendments gave a defendant the right in certain circumstances to challenge the veracity of a warrant affidavit after the warrant had been issued and executed." State v. Missouri, 337 S.C. 548, 553, 524 S.E.2d 394, 396 (1999). The Franks court set forth the following test:

> 1) To mandate an evidentiary hearing, the challengers' attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof; and

> (2) If these requirements are met, and if, when material that is subject of the alleged falsity or recklessness disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Id. at 554, 524 S.E.2d at 397. "Franks addressed an act of commission in which false information had been included in the warrant affidavit. However, the Franks test also applies to acts of omission in which exculpatory material is left out of the affidavit." Id. "To be entitled to a Franks hearing for an alleged omission, the challenger must make a preliminary showing that the information in question was omitted with the intent to make, or in reckless disregard of whether it made, the affidavit misleading to the issuing judge." Id. "There will be no Franks violation if the affidavit, including the omitted data, still contains sufficient information to establish probable cause." Id.

At the PCR hearing, Petitioner focused on two alleged omissions of the affidavits supporting the search warrants: the warrants did not (1) sufficiently indicate the age and circumstances under which the two-year-old identified his father as the shooter or (2) explain that the neighbor who indicated she saw Petitioner identified him as the victim's boyfriend rather than by his name. In his pretrial memo, Petitioner suggested the following modifications:

> That on November 15, 2009 three people were shot at a residence 20 Player Road in Dale within Beaufort County South Carolina. Two of the people died at the scene. During the investigation information was revealed that Ernest [sic] Daise was the possible shooter in the incident. Witnesses placed ~~the subject~~ a black male at the scene at the time of the incident. The surviving victim is the victim's two-year-old son who told EMS personnel that his "daddy" ~~Ernest Daise~~ was the one who shot him. When asked to identify his father, the child did not respond. The child was severely injured at the time he made the statement and, when asked his own name, said the wrong name. A red in color substance was observed on the subjects [sic] clothing at the time of his interview and the substance appears to be blood. The substance appears as a small spot. The

> clothing the subject was wearing during his interview is inconsistent with a witness's description of the possible shooter's clothing.[9]

(Supp. App. 67). Petitioner likewise suggested the following modifications for the other affidavit:

> Shortly before 7:00 PM on November 15, 2009, BCSO responded to 20 Player Rd, Dale, SC, regarding the report of three gunshot victims inside the residence. Two of the victims, a woman (Jeanine Mullen), and her four-year-old son, were pronounced dead at the scene; her two-year-old son also sustained a gunshot wound and was transported the [sic] hospital. A witness reported that earlier in the afternoon, ~~Ernest [sic] Daise, who is Jeanine Mullens boyfriend~~, a black male was observed pulling into the driveway of 20 Player Rd in Ms. Mullen's van, and getting out of the vehicle. ~~Following the shooting incident, while being treated for his injuries, the two-year-old child said, "Daddy did it."~~ The surviving victim is the victim's two-year-old son who told EMS personnel that his "daddy" ~~Ernest Daise~~ was the one who shot him. When asked to identify his father, the child did not respond. The child was severely injured at the time he made the statement and, when asked his own name, said the wrong name. Even though the child's name is Jeremiah, he told EMS personnel that his name was Doug. These are conflicting witness accounts concerning whether the child was able to accurately answer any other questions, or if he was able to answer at all. Ernest [sic] Daise is the child's father. Shortly after 2:00 AM on November 16, 2009, Ernest [sic] Daise was located at 43 Poppy Hill Rd, Burton, SC, where he lives, ~~which is a residence he frequents~~. He was wearing blue jeans, on which a read stain that appeared to be dried blood was observed just below the left front pocket opening. The substance appears as a small spot. The clothing the subject was wearing during his interview is inconsistent with a witness's description of the possible shooter's clothing. It is believed that based on the foregoing information, evidence of the murder will be located at the premises to be searched.

(Supp. App. 82).

The PCR court properly found it is not reasonably likely the appellate court would have reversed had this issue been raised on appeal. Initially, Petitioner did not present evidence of

[9] The stricken portions are portions Petitioner believed should be deleted, whereas the underlined portions are portions Petitioner believed should be added. Notably, the modified version does not indicate the witness/neighbor stated she saw Victim's *boyfriend* at the scene. Further, evidence at trial showed Petitioner and Victim were romantically involved and had a child in common.

"deliberate falsehood or of a reckless disregard for the truth." Further, even if the affidavits were rewritten in the manner set forth in Petitioner's memo to the trial court, they contain sufficient probable cause for the warrants. Critically, both affidavits aver that Child 1 indicated "Daddy" was the shooter. Regardless of Child 1's young age, this is sufficient to meet the *very low* threshold of probable cause for a search warrant. Based on the foregoing, appellate counsel was not deficient for not raising this issue, and Petitioner likewise has not shown prejudice. Thus, the PCR court properly denied this claim.

b. Appellate counsel was not deficient because he raised six meritorious issues—two of which the Court of Appeals agreed constituted trial court error.

Finally, counsel was not deficient because he briefed *six* meritorious claims on appeal—two of which the Court of Appeals found constituted trial court error (but concluded the errors did not prejudice Petitioner).[10] In evaluating claims under Strickland, an applicant must overcome the presumption that counsel's decisions were reasonable under prevailing professional norms. See Strickland, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, ***a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance***; that is, ***the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy***." (emphasis added)). Further, and critically, appellate counsel is not required to raise every non-frivolous claim to be effective. See Thrift, 302 S.C. at 539, 397 S.E.2d at 526 ("[A]ppellate counsel is not required to raise every

[10] Although the PCR court did not address deficiency, this Court can affirm for any reason appearing in the record. Rule 220(c), SCACR.

non-frivolous issue that is presented by the record.”).

Here, counsel raised and briefed six issues. Of those issues, the Court of Appeals concluded the trial court erred in its decision in two issues but found the errors were not prejudicial. Ultimately, counsel raised and briefed six non-frivolous issues, and Petitioner has not overcome the presumption that counsel was effective or shown counsel was deficient for not raising this additional issue. Thus, the PCR court properly denied this claim.

CONCLUSION

Based on the foregoing, this Court should deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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This 17th day of April, 2024.