STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Certiorari to Berkeley County
Court of Common Pleas
The Honorable Deadra L. Jefferson, Trial Judge
The Honorable Michael G. Nettles, Post-Conviction Relief Judge

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Appellate Case No. 2018-002216

SHANA ROBINSON, PETITIONER,

v.

STATE OF SOUTH CAROLINA, RESPONDENT.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

Rules:

STATEMENTS OF ISSUE ON CERTIORARI

Petitioner's Statement of Issues of Certiorari

Whether the post-conviction court erred by finding defense counsel was not ineffective for calling Dr. Robert Bennett as an expert in forensic toxicology, where Bennett unexpectedly testified petitioner would have had a five to ten percent "impairment rate" at the time of the accident, which was directly counter to petitioner's defense that she was not impaired, where defense counsel admitted the state "completely destroyed [Bennett] on cross-examination," where Bennett also admitted his license expired in 1999, and that the Board of Pharmacy had issued him a cease and desist order to stop holding himself out as a registered pharmacist, since it was defense counsel's failure to adequately investigate Bennett's background which led to this "horrible" trial debacle?

Respondent's Counterstatement of Issues of Certiorari

The post-conviction relief court correctly found Petitioner failed to establish trial counsel was constitutionally ineffective for reasonably relying upon his prior experience and Dr. Robert Bennett's positive reputation in the legal community in choosing to retain Dr. Bennett, was justifiably surprised by elements of Dr. Bennett's testimony only after reasonable preparation, and where Dr. Bennett's Testimony was still consistent with Petitioner's theory of defense and provided useful testimony in support of Petitioner's defense.

STATEMENT OF THE CASE

Petitioner Shana Robinson is confined in the South Carolina Department of Corrections. .During its April 2014 term, the Berkeley County Grand Jury indicted Petitioner for felony driving under the influence resulting in death (2014-GS-08-00313). Aaron C. Mayer, Esquire, represented Petitioner. Assistant Solicitors Mason West and Bryan Alfaro of the Ninth Circuit Solicitor's Office, prosecuted the case. On June 2, 2014, the State called the case to trial before the Honorable Deadra L. Jefferson and a jury. The jury found Petitioner guilty as indicted on June 6, 2014. Judge Jefferson sentenced Petitioner to imprisonment for a term of seventeen years.

Petitioner filed a timely notice of appeal and a direct appeal was perfected by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense -Office of Appellate Defense, by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), along with a petition to be relieved as counsel. The South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. *State v. Robinson,* Op. No. 2016-UP-036 (S.C. CT. App. filed Jan. 20, 2016). The Remittitur was issued on February 5, 2016.

Petitioner filed his application for post-conviction relief on February 5, 2016 (2016-CP-08-00300). In Petitioner's application, amended by and through counsel by filing dated September 27, 2018, he alleged the following grounds for relief in his application:

1. Ineffective assistance of trial counsel, in that:
    a. "Prejudicial testimony was allowed that should have been disregarded and prejudicial asst [sic] prosecution atty [sic] with hx [sic] of family matter"
    b. "Counsel was in failing to subpoena the records custodian from Verison Wireless in order to introduce cell phone records of decedent showing that [sic]"
    c. "Counsel was ineffective in his calling of an expert witness."
    d. "Applicant believes counsel was ineffective for failing to secure and preserve a final ruling as to the questioning of a witness regarding marijuana when there [was] an agreement between the State and the Defendant to not discuss this information."
    e. "Applicant believes counsel should have challenged the chain of custody of the blood samples."

f. "Counsel failed to highlight throughout trial the presence of marijuana in the other driver's system and that the driver was otherwise distracted."
g. "Applicant believes counsel should have requested that the prosecuting attorney be removed due to a conflict of interest."
h. "Applicant believes counsel should have objected to jury instructions regarding a motorist's duties. (App. p. 1104-1107)."

Respondent made its return on June 13, 2016, requesting an evidentiary hearing to resolve the issues set forth in the application. An evidentiary hearing into the matter was convened on October 1, 2018, before the Honorable Michael G. Nettles. Petitioner was present at the hearing and represented by Lance S. Boozer, Esquire.By written order dated December 5, 2018, and filed December 13, 2018, Judge Nettles denied and dismissed the application. This Court granted the petition for writ of certiorari in its order dated November 23, 2021.

STATEMENT OF THE FACTS

On the night of November 10, 2011, after drinking at least three vodka cranberries with a friend at Applebee's and Geronimo's Bar and Grill, and after picking up more beer on the way home, Petitioner drove out of her lane into oncoming traffic and collided with Candy S. Zoll ("Victim"), killing her.

At trial, the State presented a number of witnesses in their presentation of the case. First, the State called Jason Twitty, a witness who lived three houses down from the area where the accident took place. He testified that he heard the accident take place, and went to the scene of the accident shortly after it took place. He described the condition of both of the vehicles involved in the accident, stating that one of the cars was completely crushed and that emergency personnel carried the individual out of the car into the ambulance. On cross-examination, he testified that he never saw the car of the victim, and he could not see where the other car was traveling.

The State next called Christopher Sansett, who testified that Petitioner's vehicle was following him at a speed of sixty or more before passing him. He briefly testified to the appearance of the individuals in the Silver BMW, indicating the passenger was completely unconscious and the driver was a little conscious. On cross, Mr. Sansett testified that the BMW was in the correct lane of travel, and he did not see the car swerve.

The State then called Allen Myers, another witness of the Silver BMW. He testified that he saw the Silver BMW pass by his front porch at a high rate of speed, and he was concerned for his daughter, who was leaving his home. He testified that the Silver BMW was not going to likely to make it around the curve. He testified he didn't see the accident, but he heard "screeching tires and brakes" and a loud sound. He further testified that there was only a few second between him seeing the Silver BMW and the crash, and the BMW was going eighty miles or faster.

The State called Brittany Harley, an individual who was with Petitioner during the accident. She testified she asked Petitioner to take her to Trident Tech to take a test, and she didn't drive there because she didn't know how to drive a stick shift. She described they went to Applebee's after her test from 4:45 to 7:00 PM, "catching up because they didn't live together at the time." She testified she has lost amount of memory due to the injury sustained from the accident, and that she does not remember the actual collision. On cross-examination she testified Petitioner wasn't intoxicated, but she had no further memory.

Next, the State called Scott Lee, Chief of the Moncks Corner Fire Department, who responded to the scene of the accident. He described both cars had "heavy damage" and that the passenger was laid over the driver in the Silver BMW, and the Saturn was in the right lane. He further testified that the emergency respondent team had to cut the roof off of victim's car. He testified that there were two individuals that needed to be airlifted. He further testified that there was in fact a dog a present in the car as well.

Next, the State called, Chelsea Arrowood, who is a paramedic that responded to the scene. She further testified that there was heavy front end damage on both vehicles. She described the car in the roadway as having a patient that is pretty entrapped, which in her opinion took a lot of force. She further testified that a person identified themselves as a nurse and they began to triage the patient to see if she was responsive, and she did not respond. Arrowood also began caring for Petitioner, in which she testified that she did not administer any drugs to Petitioner, before turning her care over to individuals who would be airlifting her. On Cross-examination she testified that she asked Petitioner several questions to orient her, and that she didn't give her a reason to think she was intoxicated. Another paramedic, Montorony Jenkins, testified similarly to Ms. Arrowood, that Ms. Robinson was not given drugs, and that there was specific process in which paramedics

use to determine if a patient should be administered drugs. The State elicited further testimony from Mark Garrick, that Petitioner was given three drugs and saline through an IV fluids.

Heather Onezine, the paramedic that handled victim at the scene, testified that she was non responsive and Victim's heart stopped as soon as she was retrieved from the vehicle.

The State presented the testimony of South Carolina Highway patrolman Stephen Southerland. He testified that Petitioner was extremely incoherent, and that nothing she said made a lot of sense. He further testified that he did smell the odor of an alcoholic beverage coming off of her person, and reported back to his supervisor. He ordered that blood be drawn from Petitioner, and read her rights pursuant to *Miranda v. Arizona*, and let her know she was under arrest. He further testified he witnessed the nurse draw blood from Petitioner with an iodine prep pad.

William Young, a state's witness testified that Petitioner was given a blood transfusion at the hospital.

Tracy McKinnon, was qualified as an expert in toxicology for the State. She testified to the storage of the Petitioner's blood before testing, stating that it was properly stored. She further went into the methods of testing, and results from the report generated in this case. She testified that there was a .09 percent ethanol finding- which she described as "drinking alcohol." She testified that the analysis done by SLED is able to differentiate between ethanol and isopropyl alcohol. She further testified that Benadryl or Diphenhydramine was likely was not given to Applicant before the hospital, but the other drugs found in her system were likely given there. She further testified to her opinions on an individual's ability to operate a motor vehicle given the amount types of what drugs were found Petitioner's system.

The State also presented witness testimony from David Lee, who was qualified as an expert in the field of collision reconstruction. He testified that one vehicle had cross left of center and struck another vehicle head on.

Petitioner's own version of events conceded a significant amount of drinking prior to the collision, which Dr. Robert Bennett opined would have only imperceptibly impaired Petitioner at the time of the collision, whereas Victim was high on marijuana.

Petitioner took the stand in her own defense at trial. (Appx. 823-72). Petitioner testified that she met with a friend at Applebee's and ordered drinks starting "just before 5 o'clock[.]" (Appx. 832-33). Petitioner ordered two vodka cranberries. (Appx. 833-34). Petitioner ordered a third vodka cranberry around 7:15 P.M. at Geronimo's Bar and Grill, but could not recall much else of what she did there. (Appx. 835, ll. 1-17). Despite the three drinks in two hours, Petitioner asserted she was not impaired at all after the third drink. (Appx. 835-36). Petitioner and Victim's vehicles collided at around 8:30 P.M. (Appx. 237-42).

Counsel called Dr. Bennett as a witness in Petitioner's defense. (Appx. 872-927). Dr. Bennett testified to receiving a pharmacy degree from the Medical University of South Carolina in 1980 and that he worked full time as a forensic toxicologist. (Appx. 873, ll. 6-16). Dr. Bennett noted he had been qualified as an expert in [m]any, many other cases." (Appx. 873, ll. 17-22). Upon voir dire by the State, Dr. Bennett indicated he regularly read "toxicology and scientific journals as a regular part of my practice" but that he had not attended any classes since graduating in 1991. (Appx. 876-77). The State asked if Dr. Bennett's work had been subject to peer review and, after some initial confusion, Dr. Bennett offered that anybody could review his work. (Appx. 877-78). Dr. Bennett offered that he speaks at seminars and trainings, most commonly to lawyers. (Appx. 878-89). The State did not object to Bennett's qualification as an expert in forensic toxicology, and he was so qualified. (Appx. 879, ll. 12-17).

Dr. Bennett denied specifically testing Petitioner's blood alcohol level, but approximated her BAC at the time of the collision to be "anywhere between zero and .01, .015" given the number of drinks she had consumed, her size, and the time that had passed. (Appx. 880-84). Asked how such a blood alcohol content (BAC) would impact a person, Dr. Bennett testified "[i]t would make them impaired to a slight degree. Any amount of alcohol is going to cause some amount of impairment." (Appx. 884, ll. 9-14). Dr. Bennett thereafter testified that on "an impairment scale of zero to 100 percent" where zero is full function and 100 is comatose, Petitioner would have clocked in at a "five, ten percent impairment rate level at that amount of alcohol." (Appx. 884-85). Counsel asked if a person would even notice such a low impairment, and Dr. Bennett agreed that a person's "self-perception of impairment would be that they feel not impaired because the level of impairment is not that high." (Appx. 885, ll. 10-14). Asked if Petitioner would be capable of safely driving a vehicle at that level of impairment, Dr. Bennett declined to answer conclusively as to Petitioner specifically, but offered that most people would be able to drive a vehicle, and noted the legal limit for intoxication was set at .08. (Appx. 886, ll. 8-20). Counsel noted SLED's testing produced a different BAC result, and Dr. Bennett noted Petitioner had a cyst on her liver, that SLED may have swabbed the blood draw site with ethanol, and that Petitioner received blood transfusions at the hospital after the accident. (Appx. 886-90). Dr. Bennett also postulated Petitioner's blood could have fermented in the vial. (Appx. 890-95).

After a successful proffer, Counsel elicited through Dr. Bennett that Victim's blood tested positive for marijuana. (Appx. 910-13). Dr. Bennett testified Victim would have been impaired by her level of marijuana intoxication at the time of the collision. (Appx. 913, ll. 6-22).

The State challenged Dr. Bennett's credibility with a newspaper article, a circuit court ruling, and a pharmacy board letter, each of which Dr. Bennett rejected as unfair or motivated by pecuniary interest.

On cross-examination, Dr. Bennett testified he did not prepare any report pursuant to Counsel's request, and that though he had not yet produced a bill, that he charges $300 per hour for his services. (Appx. 915, ll. 3-22). Dr. Bennett agreed the elimination rate of alcohol through the body is somewhere between .015 and .02 per hour. (Appx. 916, ll. 17-22). Dr. Bennett agreed that a person with a blood alcohol content of .15 would be significantly impaired. (Tr. 916-17). Dr. Bennett agreed his conclusions as to Petitioner's intoxication were based on her reporting the consumption of three standard drinks, and that where mixed drinks were involved, the amount of vodka in the drink would dramatically affect the accuracy of his calculations. (Appx. 917, ll. 6-18). Dr. Bennett, upon prompting by the State, explained that alcohol, as well as all of the other drugs found in Petitioner's system, were depressants, which reduce a person's ability to respond to stimuli. (Appx. 917-18). Dr. Bennett agreed the use of a Betadine wipe to clean the draw site would not impact the accuracy of SLED's blood draw. (Appx. 918-19).

Dr. Bennett admitted to having never worked in law enforcement or attending the South Carolina Criminal Justice academy, and the State noted his curricula vitae indicated experience in crime scene analysis, fingerprinting, and gunshot residue. (Appx. 919-20). Dr. Bennett admitted to representing himself as a registered pharmacist for a decade despite the expiration of his license in 1999. (Appx. 920-21). Dr. Bennett admitted the South Carolina Board of Pharmacy had issued him a cease and desist order to stop calling himself a registered pharmacist, but offered that he was still registered with the South Carolina Board of Pharmacy, inactive though his license may be. (Appx. 921, ll. 8-17). Dr. Bennett acknowledged an article from the Charleston Post and Courier describing the reliability of his findings as suspect or controversial, and that most of his training in other fields was self-taught from reading journals and books. (Appx. 921-22). The State

confronted Bennett with a case where a mother temporarily lost custody based upon his findings, which were later contested by a physician. (Appx. 922, ll. 7-11). Bennett testified "[t]here are constantly questions about the practice that I have. Questions do not implicate a wrong doing; it's just questions." (Appx. 923, ll. 2-4). Dr. Bennett rejected the condemnation of the Post and Courier, arguing the newspaper's job was "to sell newspapers." (Appx. 923, ll. 9-11).

On redirect, Counsel emphasized SLED performed the tests in question and did so in an accurate fashion. (Appx. 924-25). Dr. Bennett again asserted that "keeping up with the licensure is necessary if you fill prescriptions at a pharmacy and that's all." (Appx. 926, ll. 1-8). Dr. Bennett noted that subsequent to his training as a pharmacist, he had studied and received a Ph.D. "in pharmaceutical drug sciences, which includes toxicology and pharmacology." (Appx. 926, ll. 16-22).

> In closing arguments, Counsel laid blame for the collision upon Victim:
> The State drew Ms. Zoll's blood immediately after the accident. She was not given any substances. She was not operated on. She did not receive six plus liters of fluid. She did not receive 28 different medications and fluids. She did not receive an injection of THC. That was in her system when she was driving that car. She was high when she was driving that car.

(Appx. 1030, ll. 4-10).

> **At the PCR evidentiary hearing, both Petitioner and Counsel testified that Counsel put considerable effort into the case, and Counsel explained Dr. Bennett's shortcomings as a witness at trial were a surprise.**

At the evidentiary hearing, Petitioner testified she very frequently met with Counsel but that they did not much discuss Dr. Bennett, and that Counsel had found him to testify in her defense. (Appx. 1163-64; Appx. 1168-69). Petitioner testified the defense strategy for trial was that she was not intoxicated at the time of the collision. (Appx. 1167, ll. 9-21). Petitioner recalled the cross-examination of Dr. Bennett was a train wreck, and that he was completely discredited. (Appx. 1169-71). Nonetheless, Petitioner expressed her opinion that Counsel "put his heart and

soul into this case." (Appx. 1178-79). Separately, Petitioner recalled that Grover Seaton, Esq., briefly assisted Counsel in her defense but left the case at an early stage due to a conflict of interest. (Appx. 1175-76).

Respondent called Counsel as a witness at the PCR evidentiary hearing. Counsel testified that at the time of trial, he possessed about three years of experience as a practicing criminal attorney, and otherwise represented clients in family court, some personal injury cases, and the occasional immigration case. (Appx. 1183-84). Counsel was retained by Petitioner after meeting her through one of his family court clients. (Appx. 1184, ll. 12-17). Counsel received voluminous discovery in the case, including the MAIT report and hospital records, and discussed "all the main portions of the different things that came out." (Appx. 1184-85). Counsel demonstrated a strong command of the facts of the case, and noted Petitioner's memory of the collision was very, very bad, such that she had a very limited recollection of what occurred the night of the collision. (Appx. 1186-87). Counsel described his strategy as "reasonable doubt," and that he felt strongly that he could show both that Petitioner was not intoxicated while Victim was under the influence of Marijuana, and was further distracted by a phone call and her dog. (Appx. 1187-92).

Counsel testified he knew of Dr. Bennett from his work in family court, and described Dr. Bennett as a heralded expert witness in family court matters, such that he commands the respect of the family court bench and is often specifically requested by judges. (Appx. 1192, ll. 8-21). Counsel explained that his background investigation of Dr. Bennett was circumscribed by the doctor's sterling reputation, but noted that he did speak to others before hiring Dr. Bennett, and that he may have used Dr. Bennett in the past in his family court practice. (Appx. 1192-93). Counsel vaguely recalled Seaton telling him not to use Dr. Bennett as an expert, but that Seaton did not articulate a reason why he should not do so, only telling him "don't." (Appx. 1193-94).

Nonetheless, Counsel acknowledged Dr. Bennett was a "terrible choice." (Appx. 1193, line 1). On cross-examination, Counsel again acknowledged the scope of the State's impeachment of Dr. Bennett, and described the experience as "horrible." (Appx. 1202-03). Counsel noted that despite preparing with Dr. Bennett multiple times prior to trial, Dr. Bennett had never brought up the percentage-scale portion of his testimony, and that it was very confusing when he did bring it out at trial. (Appx. 1203-05). On redirect, Counsel explained that Bennett's testimony at trial, as compared to their pre-trial discussions, was new, "supplemental" testimony. (Appx. 1207-08). Counsel agreed that the testimony he had expected Dr. Bennett to give at trial, based upon their preparation, would have made more sense. (Appx. 1208, ll. 6-14).

STANDARD OF REVIEW

The standard of review for PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give [] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Further, a PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). Courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

The post-conviction relief court correctly found Petitioner failed to establish trial counsel was constitutionally ineffective for reasonably relying upon his prior experience and Dr. Robert Bennett's positive reputation in the legal community in choosing to retain Dr. Bennett, was justifiably surprised by elements of Dr. Bennett's testimony only after reasonable preparation, and where Dr. Bennett's Testimony was still consistent with Petitioner's theory of defense and provided useful testimony in support of Petitioner's defense.

The PCR court did not err as a matter of law in finding that Petitioner was not constitutionally ineffective for retaining Dr. Robert Bennett to serve as an expert witness in Petitioner's trial when he reasonably relied on his prior experience with Dr. Bennett and his positive reputation in the legal community. Furthermore, The PCR Court's finding of no deficiency is proper because trial counsel was justifiably surprised about the "percentage" testimony elicited from Dr. Bennett because it differed from his prior conversations with him in preparation for his testimony. Furthermore, the testimony in which Dr. Bennett gave during trial was still consistent with Petitioner's defense as trial counsel relied heavily on his findings in his closing argument.

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "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 v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to effective assistance of counsel. *Strickland v.*

Washington, 466 U.S. 668 (1984); *Taylor v. State*, 404 S.C. 350, 359, 745 S.E.2d 97, 101 (2013). Ordinarily, post-conviction relief allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in post-conviction relief actions). The allegation of denial of such representation sets forth a prima facie violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. First, the applicant must show that counsel's performance was deficient; and second, that the deficient performance prejudiced the applicant. *Id*. at 668; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation[—]only a 'reasonably

competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland*, 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential[, as] it is all too tempting for a defendant to second-guess counsel's assistance after conviction or [an] adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; see also *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Id*. (quoting *Strickland*, 466 U.S. at 690).

Thus, a fair assessment of attorney performance requires every effort to be made to eliminate the distorting effects of hindsight, reconstruct the circumstances of counsel's challenged conduct, and evaluate the conduct from counsel's perspective at the time. *Id*. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Reviewing courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed [at] the time of counsel's conduct." *Strickland*, 466 U.S. at 690. An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington*, 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial). Even under de novo review, the standard for judging counsel's representation is a most deferential one. *Harrington*, 562 U.S. at 105.

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id*. At 691–92. In order to prove prejudice, an applicant must demonstrate 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. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Thus, it is not enough "to show that the errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a

fair trial." *Id*. at 693 (emphasis added).

The performance and prejudice standards, however, "do not establish mechanical rules . . . [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Id*. at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

The post-conviction relief court properly found that Counsel was not ineffective for retaining Dr. Robert Bennett to testify as an expert witness in Petitioner's defense, when Dr. Bennett had a stellar reputation in the legal community and was used repeatedly as toxicology expert. Furthermore, trial counsel thoroughly and reasonably prepared and interviewed Dr. Bennett prior to trial, and was surprised at any testimony or impeachment evidence that was outside of the scope of their prior conversations and preparation. Furthermore, petitioner was not prejudiced because Dr. Bennett's testimony still contained elements critical to Petitioner's defense.

"A criminal defense attorney has a duty to investigate, but this duty is limited to a reasonable investigation." *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 597 (2007) (quoting *Thompson v. Wainwright,* 787 F.2d 1447, 1450 (11th Cir. 1986)). The scope of a reasonable investigation depends on a number of issues, but at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." Id., 372 S.C. at 331-32, 642 S.E.2d at 597. As noted by the lower court, "strategic choices

made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation." *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)); *Strickland*, 466 U.S. at 690-91. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

Calling a witness where said witness contradicts the defense's theory of the case may constitute ineffective assistance. *See, e.g. Ingle v. State*, 348 S.C. 467, 560 S.E.2d 402 (2002) (finding counsel ineffective for calling a witness whose testimony contradicted the defense's theory of the case, where counsel never interviewed the witness but relied only on his client's insistence and the witness' absence from the state's case-in-chief); *McKnight*, 378 S.C. at 43-46, 661 S.E.2d at 359-60 (finding counsel ineffective for calling an expert whose testimony contradicted the defense's theory of the case, where counsel knew or should have known she would do so given her testimony from the prior mistrial).

A. Counsel was not deficient for calling Dr. Bennett because his "percentage testimony" was a surprise to Counsel, because he had gone over the doctor's anticipated testimony before trial, and it did not include the percentages of impairment and Dr. Bennett's reputation in the legal community was stellar before trial.

The PCR court properly denied relief because counsel was not deficient for calling Dr. Bennett's when his reputation in the legal community was stellar, and his testimony given at trial was a surprise to counsel, who had interviewed him and prepped him several times before trial. Petitioner relies heavily on *McKnight* and *Ingle* to display that Counsel was ineffective. However, this matter is distinguishable from those cases. In *McKnight*, the South Carolina Supreme Court

held that counsel was ineffective for calling an expert whose testimony contradicted the defense's theory of the case, where counsel knew or should have known would do so given the testimony.

In *McKnight*, there were two trials in which the expert witness testified, and counsel knew that the expert witness' testimony would serve to bolster the State's theory of the case that cocaine use was a substantial cause of death in the stillborn fetus of Applicant. In the first trial, Defense counsel called two expert witnesses to rebut the State's expert witnesses, who concluded that the use of cocaine attributed to the stillbirth and death of the fetus. The defense called their first expert witness, Dr. Karch, who testified that he could not determine the underlying cause of the death, and that absent a pure-form cocaine in the system of the fetus, he could only determine that the mother was a cocaine user. Dr. Karch also testified although cocaine was potentially dangerous drug, it was not as dangerous as medical community once believed, where included recent studies that couldn't link stillbirth to cocaine. Defense Counsel also called Dr. Conradi, who similarly rebutted the State's testimony regarding the harmful effects of cocaine by pointing to a medical study showing fetal exposure to levels of cocaine higher than Applicant's fetus was not more likely to cause stillbirth than other adverse conditions. However, she later eliminated all potential natural cause of death through further testimony, seemingly testifying that she could not rule out cocaine as cause of death. Ultimately, this case ended in mistrial and Applicant was retried. In the second trial, defense counsel only called Dr. Conradi as an expert witness, as Dr. Karch was unavailable on a trip abroad. Dr. Conradi gave similar testimony in ruling out other potential causes of death, in which the State highlighted in their closing argument. The jury convened for thirty minutes and delivered a guilty verdict. At the evidentiary hearing, trial counsel testified that she felt that Dr. Conradi was sufficient, and that due to her caseload as a public defender, that she could not find another expert. The Supreme Court held defense counsel was ineffective for calling

a witness who testimony was *known to have been used previously* to bolster the State's case. Here, however, trial counsel had no reason to know that Dr. Bennett's testimony at trial would have differed from their earlier conversations and preparation or that his testimony would have seemingly helped the State unlike counsel in *McKnight*, who had heard the testimony of the expert witness in a prior trial. Conversely, trial counsel testified that throughout his conversations and preparation with Dr. Bennett, none of the "percentage" testimony was presented to him and that he had not discussed that with him prior to trial. Furthermore, Petitioner failed to present any evidence that there would have been another expert witness that would be able to testify to the specific findings of Dr. Bennett in this instance including his testimony that the victim was likely impaired on marijuana, like specific testimony was able to provide Dr. Collins in *McKnight.* As petitioner testified at the post-conviction relief hearing, trial counsel poured his heart and soul in this case, and it was Dr. Bennett, who differentiated away from the agreed upon trial strategy after reasonable preparation.

Furthermore, this case is easily distinguishable from Ingle. In *Ingle*, the South Carolina Supreme Court held that counsel was ineffective for failing to interview or speak to a witness to determine what her testimony would be after relying on his client's insistence and the witnesses' absence in the State's case-in-chief. In Ingle, Applicant Lee Roy Ingle was charged with first degree criminal sexual conduct and lewd act upon a child, which stemmed from allegations from the nine years old daughter of Ingle's live-in girlfriend. Ingle denied having intercourse with the minor at trial and testified that the minor entered the bedroom shortly after he had intercourse with his girlfriend and semen transferred to victim's shorts when she sat on the bed. Trial counsel for Ingle called his girlfriend as his defense witness, where she testified that it was not correct that he had sex with Ingle the morning of the alleged abuse. At the PCR evidentiary hearing, trial counsel

testified that he did not interview his girlfriend before trial, relying on representations from Ingle that she was honest and would admit to having intercourse with Ingle on the morning of the assault as well as his presumption of favorable testimony since she was not called by the State. The South Carolina Supreme Court held counsel was ineffective for calling Ingle's girlfriend without interviewing her prior to trial. Conversely, in the instant case, Trial counsel testified repeatedly at the post-conviction relief hearing that he had spoken with Dr. Bennett regarding his testimony and findings, unlike the trial counsel in *Ingle* who had never spoken with his witness. Although trial counsel remembers that another attorney, Beau Seaton, who was briefly on petitioner's case, told trial counsel to not hire Dr. Bennett with no further explanation, it was not sufficient warning or indication that Dr. Bennett would not testify as previously discussed. Accordingly, Counsel performed well within the standard of reasonable attorneys, and the PCR court's denial of relief is justified.

Additionally, Trial counsel was not deficient in calling Dr. Bennett as a witness in the Petitioner's defense. Counsel testified, and the PCR Court found credible, that Dr. Bennett was the go-to person in the area for proceedings regarding toxicology. Dr. Bennett testified at trial that he regularly provided continuing legal education classes to lawyers in the areas of DNA testing and forensic toxicology. Only one person, Beau Seaton, expressed a warning to trial counsel to not use Dr. Bennett. However, the warning was wholly nonspecific, and would insufficient to put trial counsel on notice as to any issues surrounding Dr. Bennett's credibility or any specific reason not to call him as a witness. Counsel's investigation of Dr. Bennett was reasonably based upon his prior experiences with him in other proceedings, as well as his positive reputation among the bench and the bar. *See, e.g. Hall v. Desert Aire, Inc.,,* 276 S.C. 338, 354-56, 656 S.E.2d 753, 761-62 (Ct. App. 2007) (noting in a worker's compensation case the great weight afforded to Dr. Bennett's opinion as to intoxication, to the benefit of the injured worker who offered him).

Accordingly, Counsel was not deficient for calling Dr. Bennett at Petitioner's trial because he had a stellar reputation in the legal community and that he reasonably prepared Dr. Bennett for trial and was surprised by his testimony that was not elicited to him.

B. Petitioner cannot show that Dr. Bennett's testimony at trial prejudiced her because he provided substantial information that was essential to the Petitioner's defense.

Petitioner cannot show that she was prejudiced by Dr. Bennett being called as witness in her defense, as Dr. Bennett provided substantial information that was essential to the Petitioner's defense. As noted above, in order prove prejudice, an Applicant must show**,** an applicant must demonstrate 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." Dr. Bennett testified to many things what were beneficial to Petitioner's defense. First, Dr. Bennett testified that a people generally metabolize a glass of alcohol within an hour, and that the spacing between Petitioner's drinks, she likely had very minimal impairment. Furthermore, while Dr. Bennett could not make a determination to Petitioner's specific physiology, he testified that most people with a blood alcohol level of .01 or five to ten percent impairment would feel "little to no impartment" and would likely be able to drive a car. Secondly, Dr. Bennett gave several possibilities as to why her elevated blood-alcohol content that was revealed from SLED's testing could have been inaccurate, such as: improper blood sample storage causing potential alcohol fermentation within the sample, the use of an ethanol-alcohol based cleanser to clean the site of the blood draw, possibility of presence of alcohol in the blood given to Petitioner during a transfusion. Furthermore, it was Dr. Bennett's testimony alone that put before the jury that the Victim herself was likely under the influence of marijuana. None of this testimony was harmful to Petitioner defense. At worst, the State's cross-examination

could have discredited Dr. Bennett, causing the jury to minimalize the weight of his testimony. Petitioner cannot show prejudice under *Strickland* because without Dr. Bennett's testimony none of the favorable testimony would have come in before the jury, which have obliterated trial counsel' theory of defense.

Furthermore, Petitioner argues that "any toxicologist, without the baggage of Dr. Bennett could have rendered the available evidence." However, Petitioner never offered another expert witness at the evidentiary hearing who would have been able to testify to the same or better conclusions at the time of trial. Petitioner relies on *Reeves v. State*, 415 S.C. 366, 782 S.E. 2d 747 (2015) to support his argument, but the Applicant in *Reeves* provided the support of claim through the testimony of Dr. Frederick Morris Thompson. Petitioner, however, does not offer any support or comparable testimony. Accordingly, there is no evidence that any other expert outside of Dr. Bennett would have been able to provide such helpful and crucial testimony for the State, and that they would be willing to testify before this Court. Therefore, Petitioner has failed to show that she was prejudiced by trial counsel calling Dr. Bennett as a witness.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the lower court.

Respectfully submitted,

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