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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO DORCHESTER COUNTY
Honorable Robert J. Bonds, Circuit Court Judge

Appellate Case No. 2023-001432

TYRONE D. ELLISON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF QUESTIONS

- I. Whether a remand is unwarranted where the issues in Petitioner's PCR were raised and ruled on by the PCR court in its Order of Dismissal, thereby preserving the issues for appellate review, and the PCR court did not abuse its discretion in denying Petitioner's Rule 59 motion upon finding no appropriate grounds to alter or amend its judgment.
- II. Whether the PCR court correctly found Petitioner failed to prove prejudice by showing that but for Counsel's conduct, there is a reasonable probability he would have accepted a plea offer if presented, instead of proceeding to trial, where Counsel credibly testified that Petitioner wanted a trial and was not interested in a guilty plea.
- III. Whether the PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's trial preparation and advice by showing a reasonable probability the result of trial would have been different where Petitioner gave informed consent to Counsel's limited preparation time and the risks thereof, and Counsel testified that he was properly prepared for trial despite the limited preparation.
- IV. Whether the PCR court correctly found Petitioner failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's trial strategy where Counsel articulated reasonable strategic decisions in attempting to cast doubt in the jury by (1) arguing a lack of financial incentive for Petitioner to commit the robbery; (2) calling Petitioner's mother to testify regarding the sale of Petitioner's car used in the robbery; (3) calling an expert witness to testify to the State's DNA evidence; and (4) calling alibi witnesses.
- V. Whether the PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's failure to argue double jeopardy for the indictments of armed robbery and entering a bank with the intent to steal where the argument is without legal merit because each offense requires proof of an additional fact that the other does not and thus, constitute separate offenses.
- VI. Whether the PCR court correctly found Petitioner failed to prove he was entitled to a presumption of prejudice under *Cronic* because Petitioner failed to show that Counsel's performance failed to subject the State's case to a meaningful adversarial test or that circumstances of such magnitude existed that no competent lawyer could have provided effective assistance.

STATEMENT OF THE CASE

In December 2013, the Dorchester County Grand Jury indicted Tyrone D. Ellison (“Petitioner”) for entering a bank with the intent to steal (2013-GS-18-1271). In April 2014, the Dorchester County Grand Jury indicted Petitioner for armed robbery (2014-GS-18-0325). On May 13, 2014, the State served Petitioner with its notice of intent to seek life without parole (“LWOP”) pursuant to S.C. Code Ann. § 17-25-45.

On October 20, 2014, Petitioner proceeded to a jury trial before the Honorable D. Craig Brown. Assistant Solicitors Don Sorenson and Phil Giese prosecuted the case. James K. Falk, Esq. (“Counsel”) represented Petitioner. The jury convicted Petitioner as indicted. Judge Brown sentenced Petitioner to a concurrent sentence of life for armed robbery and thirty (30) years for entering a bank with intent to steal.

On November 3, 2014, a notice of appeal was filed. On appeal, Petitioner was represented by Appellate Defender David Alexander. Following briefing and oral argument, the Court of Appeals affirmed Petitioner’s convictions, determining the Petitioner’s right to a fair and impartial jury was not violated by the trial court’s denial of his motion for a mistrial. *State v. Ellison*, Op. No. 2017-UP-014 (S.C. Ct. App. filed Jan. 11, 2017). The Remittitur was sent on February 7, 2017.

On January 11, 2018, Petitioner filed an application for post-conviction relief (“PCR”). On April 23, 2018, the State filed its Return. On May 20, 2022, an evidentiary hearing was convened before the Honorable Robert J. Bonds. Assistant Attorney General Samantha J. Weidauer represented the State, and Tricia A. Blanchette, Esquire, represented Petitioner at the hearing.

On October 6, 2022, Judge bonds denied Petitioner PCR relief. On October 28, 2014, Petitioner filed a Rule 59(e) motion to reconsider. On August 4, 2023, Judge bonds denied Petitioner’s motion, finding no appropriate grounds to alter or amend the Order denying PCR.

STATEMENT OF THE FACTS

Quinn Rustin and Robert Bass, employees of SunTrust Bank, testified that on the morning of April 1, 2023, a man wearing a wig, sunglasses, and a visor entered the bank, pulled out a gun, and demanded money. (App. 107- 08; 121-22). Bonnie Weeks, another employee, testified that after robbing the bank, the man fled into a wooded area. (App. 136-37). David Lewis, a bank customer, testified that he got into his truck and pursued the robber, which led Lewis to an apartment complex where he observed a green Honda. (App. 157-58). Lewis observed someone, appearing to be the same person he saw run into the woods, come out of the woods and get into the Honda. (App. 159). Lewis testified that the person was no longer dressed the same way he entered the woods and did not have the same hair. (App. 159). Lewis testified the Honda had a license plate of either 153 or 193. (App. 162-63).

Kenneth Sharp, a K-9 unit officer, testified that he conducted a search of the woods with a K-9 and found a hat, glove, a wig, and a pistol. (App. 175). The items seized were swabbed and sent to be processed by SLED. (App. 265-69; 277-82). Catherine Leisy, a DNA analysis expert, testified that Petitioner was the major contributor of DNA located on the wig, visor, and glove but was not a major contributor of DNA located on the gun. (App. 295-300; 297).

Terrence Bryant testified that on the afternoon of April 1st, Petitioner sold him a green Honda. (192-94). Clarissa Mack, records custodian for the DMV, testified that the license plate history for the Honda included 1533 FX and was registered to Petitioner from November 14, 2012, until Petitioner returned it to the DMV on April 13, 2023. (Ap. 257-58). Jason Monroe, a forensic investigator, testified that he reviewed the surveillance footage from the bank and observed a green vehicle used as a getaway vehicle that matched the description given to law enforcement by Lewis. (App. 331).

STANDARD OF REVIEW

Appellate courts give great deference to the PCR court's factual findings and will uphold them if there is any evidence of probative value in the record to support them. *Sellner v. State*, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). However, appellate courts will review the PCR court's conclusions of law *de novo* and will reverse if the PCR court's decisions are controlled by an error of law. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

To establish ineffective assistance of counsel, the PCR applicant must prove (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms (i.e. deficient performance), and (2) the applicant sustained prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984); *Cherry v. State*, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). To establish prejudice, the applicant must prove "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 (quoting *Strickland*, 466 U.S. at 694).

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625. When evaluating a claim for ineffective assistance of counsel, the court is to examine counsel's conduct by the law available at the time of trial and "every effort be made to eliminate the distorting effects of hindsight." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (quoting *Strickland*, 466 U.S. at 689).

ARGUMENT

- I. A remand is unwarranted because the issues raised in Petitioner's PCR were ruled on by the PCR court in its Order of Dismissal, thereby preserving the issues for appellate review, and the PCR court did not abuse its discretion in denying Petitioner's Rule 59 motion upon finding no appropriate grounds to alter or amend its judgment.**

Petitioner alleges this case should be remanded to the PCR court so the court can address matters raised in the Rule 59 motion. However, the PCR court did not abuse its discretion in denying Petitioner's Rule 59 motion where it had previously ruled on the issues raised by Petitioner in an Order of Dismissal and did not find appropriate grounds to alter or amend its judgment. As a result, the issues raised by Petitioner were properly preserved for appellate review, and a remand is unnecessary. To preserve issues for appellate review, the issue must have been (1) raised and ruled upon by the trial court, (2) raised by the appellant, (3) in a timely manner, and (4) raised with sufficient specificity. *State v. Rogers*, 361 S.C. 178, 183, 603 S.E.2d 910, 912-13 (Ct. App. 2004).

In a PCR, the court shall make specific findings of fact and conclusions of law relating to each issue in an order, which is a final judgment. S.C. Code Ann. § 17-27-80 (2014). If a PCR order fails to set forth the findings of fact and reasons for those findings, counsel must file a motion to alter or amend the order under Rule 59. *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992) (finding a PCR judge's order which failed to address issues raised in the applicant's application and the evidentiary hearing was insufficient and should be remanded); *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019) (ruling a PCR judge erred by making general denial of all claims and not specifically addressing the issues in its order and should be remanded). Grant or denial of a Rule 59 motion rests within the discretion of the trial court and will not be disturbed on appeal unless it is unwholly unsupported by the evidence, or the conclusions reached are in error of law. *Brinkley v. South Carolina Dept. of Corrections*, 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App.

2009); *see also* Rule 59(a), SCRCF (stating a court “may” open the judgment to amend its finding of fact or conclusions of law, make new findings and conclusions, or enter a new judgment).

Here, the PCR court issued a final Order of Dismissal, in which the court specifically addressed all of the issues raised by Petitioner in his PCR, unlike the judge’s orders in *Pruitt* and *Fishburne*. (App. 1036-68). PCR counsel filed a Rule 59(e) motion, asking the court to alter or amend its judgment. (App. 1105-12). The PCR court held a hearing on the motion and, ultimately, denied the motion upon finding there were no appropriate grounds to alter or amend the judgment rendered in the Order of Dismissal. (App. 1141-69; 1171). Accordingly, it was within the PCR court’s discretion to deny the Rule 59 motion without re-addressing, amending, or making new findings of fact or conclusions of law. Thus, the PCR court’s Order of Dismissal constitutes the final judgment and ruling on all issues raised by Petitioner in his PCR, and those issues are properly preserved for appellate review rendering a remand unnecessary.

II. The PCR court correctly found Petitioner failed to prove prejudice by showing that but for Counsel’s conduct, there is a reasonable probability he would have accepted a plea offer if presented, instead of proceeding to trial, where Counsel credibly testified that Petitioner wanted a trial and was not interested in a guilty plea.

Petitioner alleges that but for Counsel’s conduct, there is a reasonable probability Petitioner would have accepted a plea offer, if presented. However, the PCR court correctly found Petitioner would not have accepted a plea offer because Petitioner wanted a trial and was not interested in pleading. In *Lafler v. Cooper*, the Supreme Court held a criminal defendant was prejudiced by his attorney’s advice where the defendant expressed a willingness to accept a favorable plea offer but rejected the offer and proceeded to trial based on his attorney’s advice. *Lafler v. Cooper*, 566 U.S. 156 (2012). The defendant received a favorable offer from the prosecution. *Id.* at 160. In a communication with the court, the defendant admitted guilt and expressed a willingness to accept

the plea offer. *Id.* at 161. However, the defendant rejected the plea offer and proceeded to trial based on his attorney's advice that an element of the offense could not be proven. *Id.* The defendant was convicted at trial and received a harsher sentence than that offered in the plea bargain. *Id.* at 160-61. The Court held the defendant was prejudiced by his attorney's conduct because he relied on his attorney's advice in rejecting a plea offer he would have accepted otherwise. *Id.* at 164.

Petitioner cites *Lafler*. However, Petitioner's case is distinguished from *Lafler*. Here, Counsel testified that Petitioner wanted a trial and, after firing his previous lawyer, did not seek new counsel to negotiate a plea agreement. (App. 947). Counsel testified that it was his understanding that Petitioner fired the previous lawyer because Petitioner wanted to go to trial. (App. 961). Counsel testified that Petitioner hired Counsel for the purpose of preparing the case for trial. (App. 947). Based on Counsel's testimony, the record reflects Petitioner insisted on going to trial and was uninterested in a guilty plea, unlike the defendant in *Lafler*. The PCR court found *credible* Counsel's testimony that Petitioner was not interested in plea negotiations or a guilty plea and wanted to go to trial. (App. 1057). Thus, the PCR Court correctly found that Petitioner failed to prove that but for Counsel's conduct, he would have accepted a plea offer instead of proceeding to trial.

III. The PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's trial preparation and advice by showing a reasonable probability the result of trial would have been different where Petitioner gave informed consent to Counsel's limited preparation time and the risks thereof, and Counsel testified that he was properly prepared for trial despite the limited preparation.

Petitioner alleges Counsel failed to adequately prepare for trial and properly advise Petitioner on the strengths and weaknesses of his case. However, the PCR court correctly found that Counsel's preparation was reasonable under prevailing professional norms and thus, was not

deficient. Further, Petitioner failed to prove he was prejudiced by Counsel's preparation and advice.

In order to prevail upon a claim that counsel did not adequately prepare or investigate a case, an applicant must present evidence of what counsel could have discovered or what other defenses applicant could have requested counsel develop if counsel had more fully prepared. *Jackson v. State*, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998). The applicant must prove prejudice by presenting evidence that demonstrates how additional preparation, and the discoverable matters or defenses, would have resulted in a different outcome. *Harris v. State*, 377 S.C. 66, 73-76, 659 S.E.2d 140, 144-46 (2008), *abrogated on other grounds by Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018).

In *Harris*, the Supreme Court determined an applicant failed to prove he was prejudiced by his attorney's preparation where the attorney testified that he reviewed discovery materials, developed a defense strategy, and was prepared for trial. *Id.* The applicant's first trial resulted in a mistrial, and the applicant was represented by the same attorney in his second trial which resulted in a conviction. *Id.* at 71-72, 659 S.E.2d 143-44. The applicant alleged counsel was not prepared for the second trial. *Id.* The applicant's attorney testified that in preparing for the second trial, he received and reviewed discovery materials and met with the solicitor to engage in plea negotiations. *Id.* at 74-75, 659 S.E.2d 144-45. The attorney testified that he did not meet with the applicant in between the first and second trials but he mastered a defense and was prepared for the second trial. *Id.* The applicant did not offer any evidence as to how the attorney's preparation or lack thereof prejudiced him. *Id.* at 75, 659 S.E.2d at 145. The Court held the applicant's allegation that counsel's preparation was inadequate was merely speculative, and applicant failed to prove he was prejudiced by counsel's preparation. *Id.* at 75-76, 659 S.E.2d 145-46.

Here, the Petitioner was fully aware of the time constraints Counsel was under in preparing for trial and the risks thereof. Counsel testified that, when approached by Petitioner and his mother, Counsel informed Petitioner that the case was a date certain that was unlikely to be continued and had to be prepared for in five (5) weeks. (App. 962). Counsel testified that he explained to Petitioner the pitfalls of trying to prepare a case for trial in five (5) weeks. (App. 962; 943-44). Aware of the short and limited time Counsel had to prepare for trial, Petitioner and his mother retained Counsel to prepare the case for trial. (App. 947).

Counsel testified that although he had shorter preparation time, Counsel was properly prepared for trial. (App. 951-52). Counsel testified that although it was not his normal practice to prepare a case with such short time, Counsel spent eighty percent (80%) of the five (5) week span preparing. (App. 965-66). Counsel testified that in preparation, he reviewed the file from Petitioner's previous attorney and had a conversation with the previous attorney. (App. 944; 946; 964). Counsel also testified that he reviewed Rule 5 materials and met with the solicitor. (App. 963-64). Counsel testified he reviewed discovery materials with Petitioner, who was familiar with the case. (App. 963-64). Counsel testified he advised Petitioner that his strongest argument was to dispute the identity of the robber, although the State could prove identity through witnesses and DNA evidence. (App. 967). Counsel further testified that based on his preparation, he developed a trial strategy that was based on creating doubt in the jury by presenting an alibi defense, arguing lack of evidence and lack of forensic evidence, and arguing lack of a financial incentive to commit the robbery. (App. 963; 968-69). Counsel testified that he discussed this strategy with Petitioner. (App. 946).

The record reflects Counsel's preparation and advice were reasonable under prevailing professional norms and thus, was not deficient. Further, Petitioner's allegation that Counsel was

not adequately prepared and did not adequately advise him on the strengths and weaknesses of the case is merely speculative as Petitioner failed to present evidence to show that the result of trial would have been different if Counsel had more fully prepared. Thus, the PCR court correctly denied relief.

IV. The PCR court correctly found Petitioner failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's trial strategy where Counsel articulated reasonable strategic decisions in attempting to cast doubt in the jury by (1) arguing a lack of financial incentive for Petitioner to commit the robbery; (2) calling Petitioner's mother to testify regarding the sale of Petitioner's car used in the robbery; (3) calling an expert witness to testify to the State's DNA evidence; and (4) calling alibi witnesses.

Petitioner alleges Counsel was ineffective for (1) arguing a lack of financial incentive, where this defense strategy had been discussed on recorded phone calls; (2) calling Petitioner's mother as a witness with knowledge that she was subject to cross-examination regarding statements she made in phone calls and an interview with law enforcement; (3) calling an expert witness to testify to the State's DNA evidence; and (4) calling alibi witnesses whose testimonies could be impeached. However, the PCR court correctly found Counsel did not take an approach that no competent lawyer would have taken because Counsel articulated reasonable strategic decisions for calling the witnesses and making the arguments, and Petitioner failed to prove prejudice by showing a reasonable probability the result of trial would have been different but for Counsel's performance.

Strickland requires that trial counsel be given leeway to make reasonable strategic decisions. *Strickland*, 466 U.S. at 688-89 (stating "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant"). Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. A fair assessment of

counsel's performance requires the court to eliminate the distorting effects of hindsight, reconstructing the circumstances of counsel's challenged conduct, and instead, evaluate the conduct from *counsel's perspective* at the time of trial. *Id.* at 689 (emphasis added).

At the PCR hearing, Counsel testified that he believed there was room for doubt in Petitioner's trial. (App. 947). Counsel testified that Petitioner wanted a trial, and Counsel's trial strategy was to cast doubt in the jury's mind regarding the State's identification and evidence. (App. 963; 968-69).

- A. The PCR court correctly found Counsel's decision to argue Petitioner lacked financial incentive to commit the robbery, although was discussed in recorded phone calls between Petitioner's mother and an inmate, was reasonable under prevailing professional norms because Counsel articulated a reasonable strategic decision in making the financial incentive argument to cast doubt in the jury's mind about Petitioner's motive, and Petitioner failed to prove the result of trial would have been different if Counsel did not make this argument.**

The PCR court correctly found Counsel's conduct was reasonable under prevailing professional norms where Counsel articulated a reasonable strategy in arguing Petitioner's lack of financial incentive. Counsel testified he reviewed Rule 5 materials provided by the State, which included recorded jail calls between Petitioner's mother, Annette McKinney, and an inmate, Shawn Keitt. (App. 944; Appl.'s Ex. 4). Counsel testified that, due to time constraints in his preparation, he did not review all of the recorded tapes provided. (App. 944). In the calls, Petitioner's mother discussed Petitioner's financial situation with the inmate, stating she told Petitioner's lawyer that Petitioner had money and the inmate did not have the money. (App. 967). At trial, Counsel elicited testimony from Petitioner's mother about Petitioner's finances, and the solicitor cross-examined Petitioner's mother regarding statements she made to the inmate. (App. 377-383; 390-94). Counsel admitted the phone call was not helpful to the case and testified that if he had listened to the recordings, he would not have argued Petitioner lacked a financial incentive

to commit the robbery. (App. 945; 967). Counsel testified that he elicited the testimony to cast doubt in the jury's mind about Petitioner's financial incentive, i.e. motive, but did not think Petitioner's mother would tell Counsel one thing and tell Petitioner, and another inmate, something else. (App. 968-69; 944). Counsel further testified that, looking back, although he still would have called Petitioner's mother as a witness, he would not have elicited testimony about Petitioner's financial incentive. (App. 946). The PCR court found *credible* Counsel's testimony that even if he had listened to the jail phone calls, Counsel still would have called Petitioner's mother as a witness because her testimony was necessary to establish facts on the sale of Applicant's car. (App. 944-45; 1056).

Although Counsel testified that he would not have elicited testimony from Petitioner's mother about the financial incentive, Counsel's conduct is not to be evaluated in hindsight and must be viewed from Counsel's perspective at the time of trial. *Strickland*, 466 U.S. at 689. Counsel testified that his defense strategy was to cast doubt in the jury's mind by arguing that Petitioner lacked a financial incentive to commit the crime. (App. 946). The PCR court correctly found this strategy is reasonable under prevailing professional norms because it is not an approach that no competent lawyer would have taken. Further, Petitioner failed to prove he was prejudiced by Counsel's strategy. Considering the evidence at trial of Petitioner's DNA on the disguise used by the robber, Petitioner failed to show a reasonable probability that the result of trial would have been different if Counsel had not elicited testimony regarding Petitioner's lack of financial incentive. Thus, the PCR court correctly denied relief.

B. The PCR court correctly found Counsel's decision to call Petitioner's mother to testify at trial, where she was subject to cross-examination on statements made to law enforcement in which she identified Petitioner as the robber, was reasonable under prevailing professional norms because Counsel articulated a reasonable strategic decision in calling Petitioner's mother to cast doubt on Applicant's possession of the getaway vehicle on the day of the robbery, and Petitioner failed to prove a reasonable

probability the result of trial would have been different if Counsel did not call his mother as a witness.

The PCR court correctly found Counsel's conduct was reasonable under prevailing professional norms where Counsel articulated a reasonable strategy for calling Petitioner's mother as a witness. Counsel called Petitioner's mother, Annette McKinney, as a witness at trial. (App. 370-428). The solicitor cross-examined Petitioner's mother about statements she made to law enforcement in which she told police she was seventy-five percent (75%) certain Petitioner was the robber in a photo shown to her by police. (App. 408-416; Appl.'s Ex. 5). The PCR court found *credible* Counsel's testimony that he attempted to negate Petitioner's mother's testimony by arguing that Petitioner's mother may have been flustered and mothers don't typically say they're 75% sure it's their child: a mother identifies a person as their child or not. (App. 968; 1058-59). Counsel also testified that he attempted to elicit testimony from Petitioner's mother to show that at the time of the identification, she believed Petitioner had been involved in an automobile accident and identified Petitioner because she was worried about his safety. (App. 968; 1059). Counsel articulated a reasonable strategic decision in attempting to cast doubt in the jury's mind about the reliability of Petitioner's mother's identification.

Additionally, the PCR court found *credible* Counsel's testimony that he still would have called Petitioner's mother as a witness because her testimony was necessary to discuss the sale of Petitioner's car. (App. 1056). Counsel articulated a reasonable strategic decision for calling Petitioner's mother to testify as the testimony was intended to cast doubt in the jury's mind regarding Applicant's possession of the getaway vehicle on the day of the robbery. (App. 944-46; 371-72). Further, considering the evidence at trial confirming Petitioner's DNA was on the disguise used by the robber, Petitioner failed to show a reasonable probability the result of trial

would have been different if Counsel had not called his mother to testify. Thus, the PCR court correctly denied relief.

C. The PCR court correctly found Counsel's decision to call an expert witness to testify to the State's DNA evidence was reasonable under prevailing professional norms because Counsel articulated a reasonable strategic decision in calling the expert to cast doubt in the jury's mind about the State's consumption of the available DNA evidence, and Petitioner failed to prove a reasonable probability the result of trial would have been different if Counsel had not called the expert.

The PCR court correctly found Counsel's conduct was reasonable under prevailing professional norms where Counsel articulated a reasonable strategic decision for calling Dr. Robert Bennett, forensic science expert, to testify regarding the State's DNA evidence. Counsel testified he called Dr. Bennett to support the defense strategy to "put the state on trial" by arguing the State consumed all of the potential DNA evidence and, as a result, the defense was not able to repeat the results through analysis. (App. 948). Counsel testified that before Dr. Bennett testified at trial, Counsel and Dr. Bennet thoroughly discussed Dr. Bennett's testimony. (App. 952). Counsel testified that he thought Dr. Bennett's testimony established the State did not have to scrape the entire band away and could have used a smaller portion of the DNA. (App. 948). Counsel testified that when a motion to suppress the DNA evidence was denied, his strategy was to get a spoliation charge for the State's consumption of the DNA evidence and cause the jury to be upset at the State's investigation. (App. 948-50). Counsel also testified that his strategy was to create doubt in the mind of the jury regarding the DNA evidence. (App. 952). The PCR court found *credible* Counsel's testimony that Dr. Bennett offered the most advantageous opinion regarding the DNA evidence that Counsel could find. (App. 1061). The PCR court found that Counsel articulated a reasonable strategic decision in attempting to cast doubt in the jury's mind regarding the State's investigation and consumption of the available DNA evidence. Further, Petitioner failed to prove

a reasonable probability the result of trial would have been different but for Counsel calling Dr. Bennett to testify. Thus, the PCR court correctly denied relief.

D. The PCR court correctly found Counsel's decision to call alibi witnesses, whose testimonies were impeached by the State, was reasonable under prevailing professional norms because Counsel articulated a reasonable strategic decision in calling the witnesses to attempt to establish an alibi defense and cast doubt in the mind of the jury regarding Petitioner's whereabouts on the day of the robbery, and Petitioner failed to prove a reasonable probability the result of trial would have been different if Counsel had not called the witnesses.

The PCR court correctly found Counsel's conduct was reasonable under prevailing professional norms where counsel articulated a reasonable strategic decision for calling Petitioner's coworkers as alibi witnesses. Counsel testified he believed two alibi witnesses would be helpful and decided to call Petitioner's coworkers, Chunte Green and Candida Payne, to testify that Petitioner was at work at the time of the robbery. (App. 952-53). Counsel testified that Petitioner needed an alibi defense, and Counsel had discussions with the witnesses about their testimonies prior to trial and believed the witnesses were credible because they remembered Petitioner was at work on April 1st, the day of the robbery. (App. 954:1-4; 971). Counsel testified that his defense strategy for calling the witnesses was to create doubt in the mind of the jury regarding Petitioner's whereabouts on the day of the robbery. (App. 953; 971). Counsel testified that although he knew the State had business records that could refute the witnesses' testimonies, Counsel believed the records would be excluded as inadmissible hearsay. (App. 953-54; 972).

The PCR court found *credible* Counsel's testimony that although he knew the State would attempt to use the business records to refute the witnesses' testimonies, Counsel believed the witnesses to be credible. (App. 1061). Further, considering the evidence presented, Petitioner failed to prove a reasonable probability the result of trial would have been different if Counsel had not called the witnesses to testify. Thus, the PCR court correctly denied relief.

- V. The PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's failure to argue double jeopardy for the indictments of armed robbery and entering a bank with the intent to steal because the argument did not have legal merit since each offense requires proof of an additional fact that the other does not and thus, constitute separate offenses.**

Petitioner alleges Counsel was ineffective for failing to raise a double jeopardy argument for Petitioner's indictments for armed robbery and entering a bank with intent to steal. However, the PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's failure to argue double jeopardy for the indictments because the offenses are separate offenses. The Double Jeopardy Clause of the United States Constitution protects a person from second prosecution for the same offense after acquittal or conviction and protects against multiple punishments for the same offense. *Stevenson v. State*, 335 S.C. 193, 198, 516 S.E.2d 434, 436 (1999); *see also* U.S. Const. amend V. A defendant may be indicted and punished for separate offenses without a double jeopardy violation where a single act consists of two "distinct offenses." *State v. Brandt*, 393 S.C. 526, 538, 713 S.E.2d 591, 538 (2011). To determine whether a single act constitutes two offenses or only one is whether each statutory provision requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299 (1932).

Armed robbery requires the State to prove a person: (1) commits a robbery; (2) while armed with a weapon (pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon) or while alleging, in either actions or words, he was armed with a weapon or any object which the person present during the commission of the robbery reasonably believed to be a deadly weapon. S.C. Code Ann. § 16-11-330(A). Entering a bank with intent to steal requires the State to prove a person: (1) entered a building or part of a building occupied as a bank, depository, or building and loan association; (2) with the intent to steal money, securities for money, or property; (3) either by force, intimidation, or threats. S.C. Code Ann. § 16-11-380(A).

The PCR court correctly found armed robbery and entering a bank with intent to steal are separate, distinct offenses. Armed robbery requires proof of that a person commits a robbery *while armed* or while the person present at the scene reasonably believes the robber is armed. By contrast, entering a bank with the intent to steal does *not* require proof that the robber is *armed*. Further, entering a bank with the intent to steal is a *location specific offense*, requiring proof of intent to steal while entering a bank (or other building defined by the statute), which is distinct from armed robbery *which is not a location specific offense*. Thus, armed robbery and entering a bank with intent to steal are separate and distinct offenses because both offenses require proof of a fact that the other offense does not.

The PCR court correctly found Petitioner failed to prove he was prejudiced by Counsel's failure to make a double jeopardy argument because the argument was devoid of legal merit, citing *Basham v. United States*, 109 F.Supp. 3d 753, 776 (D.S.C. 2013) (noting if the claim counsel failed to raise is devoid of legal merit, the defendant suffers no prejudice and cannot establish an ineffective assistance of counsel claim) (citing *Strickland*, 466 U.S. at 687), *aff'd*, 789 F.3d 358 (4th Cir. 2015). Although Counsel testified that he did not see a double jeopardy issue and would have looked at the issue (App. 954-55; 975), as a matter of law, Counsel's failure to raise the argument cannot be deficient under prevailing professional norms where the argument was without legal merit. Thus, the PCR court correctly denied relief.

VI. The PCR court correctly found Petitioner failed to prove he was entitled to a presumption of prejudice under *Cronic* because Petitioner failed to show that Counsel's performance failed to subject the State's case to a meaningful adversarial test or that circumstances of such magnitude existed that no competent lawyer could have provided effective assistance.

Petitioner alleges Counsel's performance was so deficient as to result in a complete breakdown of the adversarial process, such that prejudice should be presumed under *Cronic*.

However, the PCR court correctly found that Petitioner failed to prove he was entitled to a presumption of prejudice. The relevant inquiry for whether a defendant is entitled to a presumption of prejudice without inquiring into the actual conduct of counsel is (1) whether counsel *entirely* failed to subject the prosecution's case to a meaningful adversarial test, or (2) whether circumstances of such a magnitude are present that *no competent lawyer* could provide effective assistance under the circumstances. *United States v. Cronin*, 466 U.S. 648 (1984) (emphasis added). To determine whether the circumstances surrounding the defendant's representation justify a presumption of prejudice, the court may consider criteria such as the (1) lawyer's investigation and preparation, (2) lawyer's experience, (3) gravity of the charge, (4) complexity of the possible defenses, and (5) accessibility of witnesses. *Id.* at 662-66. Although the criteria are relevant in an evaluation of the lawyer's effectiveness, they neither separately nor in combination provide a basis for concluding that a competent lawyer was not able to provide effective assistance of counsel. *Id.* at 663.

In *Cronin*, the Supreme Court held an attorney did not provide ineffective assistance that so undermined the adversarial process when the attorney was a young lawyer that had never tried a criminal case and was only allowed twenty-five (25) days to prepare for trial. *Id.* at 666. The attorney was appointed by the court after the defendant's retained counsel withdrew. *Id.* at 649. The attorney was young and was only given twenty-five (25) days to prepare for trial, although the government had taken four and a half (4.5) years to investigate the case and review documents. *Id.* The case was not complex because the only issue for trial was the defendant's intent to commit fraud. *Id.* at 664-65. Although the attorney had never tried a criminal case, the Court stated that "every experienced criminal defense attorney had to try their first criminal case" at some point. *Id.* at 665. The Court also reasoned that where there was no reason to dispute the underlying historical

facts, the twenty-five (25) day preparation period was not so short as to justify a presumption that *no lawyer* could have provided effective assistance. *Id.* (emphasis added). The Court determined the defendant's case was not one in which the surrounding circumstances were of such magnitude as to make it unlikely that the defendant received effective assistance of counsel. *Id.* at 666.

In reversing the Court of Appeals' ruling that inferred ineffective assistance of counsel due to the circumstances, the Court compared the defendant's case to *Powell v. Alabama*, 287 U.S. 45 (1932). The Court noted that the trial in *Powell* was inherently unfair, and the ineffectiveness of counsel was presumed where the defendants were appointed an out of state attorney six (6) days before trial, and the attorney had not prepared the case, failed to familiarize himself with local procedure, and was unwilling to represent the defendants with short notice. *Id.* at 659-61. The Court reasoned that the circumstances in *Powell* made it unlikely that the attorney, or *any lawyer*, could have provided effective assistance. *Id.* (emphasis added). The Court distinguished the circumstances in *Cronic* from the facts of *Powell*.

Petitioner cites *Cronic*. However, Petitioner's case is distinguishable from *Cronic* and *Powell*. Here, Petitioner fired his first attorney and retained Counsel a few weeks before trial with an awareness of the short preparation time, unlike the defendants in *Cronic* and *Powell*. (App. 947; 965). Counsel had five (5) weeks to prepare for trial, which is significantly more time than that afforded to the attorneys in *Cronic* and *Powell*.

Further, application of the factors from *Cronic* support the PCR court's ruling that Counsel proved effective assistance under prevailing professional norms by subjecting the State's case to a meaningful adversarial test. (App. 1052). Here, Counsel testified that he had been practicing criminal defense since 1996 and was experienced, unlike the attorney in *Cronic*. (App. 943). Counsel testified that although he had shorter preparation time, he reviewed trial materials and was

properly prepared for trial, unlike the attorney in *Powell*. (App. 951-52). Petitioner's charges for armed robbery and entering a bank with intent to steal were not complex charges. The sole issue for the jury was identity and whether Petitioner was identified as the robber and thus, a possible defense that casts doubt on whether Petitioner was the robber is not a complex defense. Regarding the accessibility of witnesses, Petitioner's mother and coworkers were accessible and utilized as defense witnesses. (App. 945-46; 951-53). Counsel articulated a reasonable defense strategy for trial by testifying that his strategy was to cast doubt on the State's case specifically Petitioner's identity as the robber, whereabouts on the day of the robbery, and reliability of the State's DNA evidence. (App. 968-69). Additionally, the PCR court correctly found that Petitioner's case did not fit into one of the structural errors or circumstances identified by the Court in *Cronic* to warrant a presumption of prejudice from Counsel's performance. (App. 1052). Thus, the PCR court correctly denied relief.

CONCLUSION

Based on the foregoing argument, the PCR court correctly found Petitioner failed to meet his burden. Accordingly, the State respectfully requests this court to affirm the PCR court's rulings and deny Petitioner's writ for certiorari.

Respectfully submitted,



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