STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
Jul 30 2024
S.C. SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Berkeley County
Deadra L. Jefferson, Trial Judge
Michael G. Nettles, PCR Judge

SHANA ROBINSON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

APPELLATE CASE NO. 2024-000857

RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General
S.C. Bar No. 73999

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-2875

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED

Petitioner's Question

Whether the Court of Appeals erred by affirming the PCR's order finding defense counsel was not ineffective for calling Dr. Robert Bennett as an expert witness in forensic toxicology in a felony DUI case, where Bennett testified Petitioner would have had a five to ten percent "impairment rate" at the time of the accident, which was directly counter to the testimony of defense witnesses that she was not impaired, where defense counsel admitted the State "completely destroyed [Bennett] on cross-examination," where Bennett also acknowledged 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 defense counsel's failure to adequately investigate Bennett's background constituted deficient performance which prejudiced Petitioner?

Respondent's Counterstatement of Question

Did the Court of Appeals properly find Petitioner did not prove counsel was ineffective for calling Dr. Bennett as an expert when (a) counsel's investigation of Dr. Bennett—when viewed without the distorting effects of hindsight—was reasonable under prevailing professional norms and not deficient and (b) Petitioner did not show by a reasonable probability the outcome would have been different without Dr. Bennett's testimony when (1) Petitioner did not present an alternate expert at the PCR hearing; (2) the State presented compelling evidence that Petitioner's blood-alcohol level was above the legal threshold; and (3) Dr. Bennett's testimony, viewed in context, did not undermine the defense.

STATEMENT OF THE CASE

Petitioner Shana Robinson is currently confined in the South Carolina Department of Corrections serving a seventeen-year sentence. In April 2014, the Berkeley County Grand Jury indicted Petitioner for felony driving under the influence resulting in death (2014-GS-08-00313). On June 2, 2014, Petitioner proceeded to a jury trial before the Honorable Deadra L. Jefferson. Aaron C. Mayer, Esquire, represented Petitioner, and Assistant Solicitors Mason West and Bryan Alfaro prosecuted the case. The jury convicted Petitioner as indicted, and Judge Jefferson sentenced her to seventeen years.

Petitioner filed a timely notice of appeal, which was perfected by Appellate Defender Kathrine H. Hudgins through the filing of a brief pursuant to Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal pursuant to Anders. State v. Robinson, Op. No. 2016-UP-036 (filed Jan. 20, 2016). The remittitur was sent February 5, 2016.

On February 5, 2016, Petitioner filed this application for post-conviction relief (PCR) raising various grounds of ineffective assistance of counsel. On October 1, 2018, an evidentiary hearing convened before the Honorable Michael G. Nettles. On December 13, 2018, Judge Nettles issued an order denying and dismissing the application.

Petitioner filed a timely notice of appeal, and Chief Appellate Defender Robert M. Dudek, filed a petition for writ of certiorari. After the matter was transferred to the Court of Appeals, the Court of Appeals granted certiorari. Following briefing, the Court of Appeals issued an order on April 10, 2024, affirming the PCR court. Petitioner filed a petition for rehearing, which was denied. This petition for a writ of certiorari followed.

Summary of State's Evidence at Trial

At trial, the State proceeded on a theory that Petitioner was driving impaired when she crossed the center lane on a curve and hit the victim's Saturn head-on, killing the victim. The State called two witnesses, Christpher Sansett and Allen Myers, who testified to seeing Petitioner's silver BMW traveling at a high rate of speed shortly before the collision. In fact, Myers stated the BMW was traveling so fast when it passed his home that he was concerned about his daughters, who were leaving at the same time. Myers testified he did not believe the BMW would make it around the nearby curve, and he heard "screeching tires and brakes" a few seconds later. Myers averred the BMW was travelling eighty miles per hour or faster. (App. 237-40, 245-47).

State witness Brittany Harley, Petitioner's friend and roommate, testified she and Petitioner had been at Applebee's that evening having drinks (but no food). Although Harley claimed she had lost some of her memory due to the collision, she testified on cross-examination that Petitioner was not intoxicated. (App. 253-57, 260-61). Officer Stephen Southerland, however, testified Petitioner was incoherent when he responded to the hospital after the collision, he smelled alcohol on her, and nothing she said made a lot of sense. As a result of the investigation, police ordered a blood draw, which occurred at 12:45 a.m. on November 11.[1] (App. 330-37).

Tracy McKinnon, an expert in forensic toxicology, testified **the ethanol (alcohol) level of Petitioner's blood was .09 percent**, whereas the legal limit under South Carolian law is .08 percent. (App. 377). McKinnon explained that due to the body's metabolization and elimination of alcohol, **the rate of alcohol in Petitioner's blood was likely higher at the time of the collision than at the time of the blood draw four hours later**. Using average elimination rates, McKinnon opined **Petitioner's ethanol concentration could have been .15 percent four hours before the**

[1] The collision itself occurred around 8:48 p.m. on November 10. (App. 265).

blood draw. (App. 385-89). McKinnon further explained a blood transfusion and an IV-saline drip (both of which Petitioner received after the collision but prior to the blood draw) could dilute alcohol in the blood, making the percentage of alcohol in the blood *lower* than it would be without the transfusion or IV. (Tr. 389-91). Finally, McKinnon opined that other prescription and over-the-counter substances in Petitioner's blood (that were not likely to have been administered in the hospital)—Benadryl (Diphenhydramine), Trazadone, and Clonazepam[2]—would have increased the ethanol's sedative effects. (App. 382-85). She further opined that the combination of alcohol and these drugs would cause someone to not be able to safely operate a vehicle.[3] (App. 386).

As its final witness, the State called David Lee, a former police officer who was qualified as an expert in collision reconstruction. (App. 565). Based on the physical evidence, Lee concluded Petitioner's BMW crossed into the victim's lane of travel prior to the collision and struck the victim's Saturn head-on. (App. 576, 580). He testified the Saturn's A-C-M (or black box) indicated the victim was traveling forty-two miles per hour, and he calculated Petitioner's speed at 79 miles per hour. (App. 587). Finally, Lee testified there was no indication from the physical evidence that the collision occurred anywhere other than the victim's lane of travel. (App. 602).

Petitioner's defense

Petitioner presented six lay witnesses who testified to seeing her at Geronimo's Bar before the collision; each testified she did not appear intoxicated.[4] (App. 689-91, 695-97, 700-02, 706-

---

[2] On cross-examination, McKinnon clarified he only found the active metabolite of Clonazepam (7-aminoclonsaepam) in Petitioner's blood and not the parent drug itself. (App. 422).

[3] Defense counsel conducted a thorough, zealous, and effective cross-examination of McKinnon. (App. 394-436).

[4] Petitioner's mother also testified that after the collision, she removed a full case of beer from Petitioner's car—none of which had been opened. (App. 783-88).

08). Petitioner testified she met Harley at Applebee's just before 5:00 p.m. that evening and ordered two vodka-cranberries. After leaving Applebee's, she went to Geronimo's and ordered a third vodka-cranberry around 7:15 p.m. Petitioner asserted she was not impaired after the third drink. Petitioner did not remember several details of the evening, although she attributed that to the concussion rather than being impaired. (App. 833-46).

In addition to Petitioner and the lay witnesses, trial counsel called two experts: David Hill, an accident reconstruction expert, and Dr. Robert Bennett, an expert in forensic toxicology. Dr. Bennett estimated that based on Petitioner's testimony of the drinks she consumed that evening and average blood-alcohol concentrations, Petitioner's blood-alcohol level at the time of collision would be very minimal—"anywhere between zero and .01, .015; a very minimal amount remaining at that time." He further opined a person with that blood-alcohol level would be "impaired to a slight degree." (App. 884). Dr. Bennett elaborated,

> A. Impairment can be judged on a scale. We can use for example an impairment scale of zero to 100 percent. If someone has zero impairment they are fully functional at their full capacity as far as being awake, alert, have their mental and physical capabilities about them.
>
> They would be able to respond. They will be able to react. At zero impairment they are fully capable to be—to have what is called cognitive abilities. If they are 100 percent impaired then they are comatose or near death in which they have no ability to function mentally because they are 100 percent impaired. So getting back to your original question trying to quantify that level of impairment a blood alcohol concentration of .01 is going to have an impairment rating on the lower end of the scale.
>
> It would be a scientific estimation as to what that would be five, ten percent impairment rate level at that amount of alcohol.
>
> Q. Would it be such a low impairment that the person may not even feel impaired at all?

> A. That's correct. Their self-perception of impairment would be that they feel not impaired because the level of impairment is not that high.

(App. 884-85). Dr. Bennett opined that although the impairment level affects people differently,

> for most people a blood alcohol level of .01 the person would feel very little to no impairment and most likely would be able to function in the capacity of driving a vehicle. Therefore that's why the laws allow a .01 to not be considered too impaired to operate a motor vehicle if the level is .08.

(App. 886). Additionally, he offered several explanations about why McKinnon's testing showed a higher blood-alcohol level than his estimation of .01 percent. Specifically, he opined that if an ethanol-based wipe had been used to sterilize the site for the blood draw, that could have hypothetically elevated the blood-alcohol level. (App. 888-89). Additionally, he opined that if the blood in the transfusion contained alcohol, that could have elevated Petitioner's blood-alcohol level. (App. 889-90). Finally, he opined that if the blood was not properly stored and Candida yeast was present in the blood, it could have converted blood-sugar into alcohol—thereby increasing the blood-alcohol level. (App. 890-91).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

Reasons Certiorari Should be Denied

This Court should deny certiorari because Petitioner is asking this Court to engage in a hindsight analysis of counsel's performance, in contravention of Strickland v. Washington, 466 U.S. 668, 687 (1984). Further, Dr. Bennett's testimony, viewed as a whole, supported Petitioner's defense and provided the jury an alternate scientific basis to conclude she was not impaired even though the States's expert testified her blood-alcohol level was over the legal threshold. Finally, it is not credible to argue Dr. Bennett's testimony completely undermined Petitioner's defense while also arguing the State destroyed Dr. Bennett's credibility on cross-examination.

ARGUMENTS

The Court of Appeals properly found Petitioner did not prove counsel was ineffective for calling Dr. Bennett as an expert when (a) counsel's investigation of Dr. Bennett—when viewed without the distorting effects of hindsight—was reasonable under prevailing professional norms and not deficient and (b) Petitioner did not show by a reasonable probability the outcome would have been different without Dr. Bennett's testimony when (1) Petitioner did not present an alternate expert at the PCR hearing; (2) the State presented compelling evidence that Petitioner's blood-alcohol level was above the legal threshold; and (3) Dr. Bennett's testimony, viewed in context, did not undermine the defense.

Petitioner contends counsel was ineffective for calling Dr. Bennet as an expert because (1) Dr. Bennett's testimony discredited her impairment defense and (2) the State destroyed Dr. Bennett on cross-examination. However, counsel's decision to call Dr. Bennet as an expert must be judged by its reasonableness at the time of trial—not in hindsight. Further, based on (1) the State's compelling expert testimony that Petitioner's blood-alcohol level was above the legal threshold four hours after the collision, (2) counsel's investigation into and pretrial discussions with Dr. Bennett, and (3) the fact Dr. Bennett's testimony as a whole did not undermine the defense, counsel's decision to call Dr. Bennett was reasonable under prevailing professional norms. Likewise, Petitioner failed to show by a reasonable probability the outcome would have been different without Dr. Bennett's testimony when (1) Petitioner did not present an alternate expert, (2) the State presented compelling evidence that Petitioner's blood-alcohol level was above the legal threshold, and (3) Dr. Bennet's testimony, in context, did not undermine the defense. Thus, the Court of Appeals properly found Petitioner did not prove counsel was ineffective in this regard.

"There is a strong presumption trial counsel provided adequate assistance." Green v. State, 351 S.C. 184, 192, 569 S.E.2d 318, 322 (2002). To prove ineffective assistance of counsel, an applicant must show counsel was deficient, and that deficiency prejudiced the applicant. Strickland v. Washington, 466 U.S. 668, 687 (1984). In other words, "the applicant must show

trial counsel's performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability the result at trial would have been different." Green, 351 S.C. at 192, 569 S.E.2d at 322. "A reasonable probability is one sufficient to undermine confidence in the trial's outcome."

a. The Court of Appeals properly concluded Petitioner did not prove deficiency when counsel's investigation of Dr. Bennett—when viewed without the distorting effects of hindsight—was reasonable under prevailing professional norms.

In assessing the reasonableness of counsel's decision to call Dr. Bennett as an expert, it is important to remember the clear mandate of Strickland:

> 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.

466 U.S. at 689. It is also important to differentiate counsel's investigation of Dr. Bennett's *background* from his investigation of Dr. Bennett's *opinion.* Ultimately, counsel's performance in both regards was reasonable under prevailing professional norms and not deficient.

Regarding his investigation of Dr. Bennett's background, trial counsel testified:

> [H]e is so high regarded in the family court bar as the toxicologist to use. He is the guy, he does the tests right, from what other family court lawyers say and have expressed to me before and since, he has the respect of the family court judges, and if a judgy orders an independent—if a judge around her, family court judge around here orders an independent toxicology test or alcohol test or drug test, there's a very good chance they're gonna send those litigants to Dr. Bennett.

(App. 1192). Although counsel stated he did not do "much of a background investigation" on Dr. Bennett, he testified Dr. Bennett had a stellar reputation, counsel spoke to others in the legal field about him, and Dr. Bennett was an expert he was already familiar with. (App. 1192-93). Counsel's reliance on the opinion of other attorneys in selecting an expert was reasonable under

prevailing professional norms and not deficient. Although counsel acknowledged he had "a vague memory" of one attorney—Grover Seaton—"saying something like, why are you using that guy or don't use that guy," counsel testified Seaton never offered an alternative expert or a specific reason why counsel should not use him. (App. 1193-94). In light of Dr. Bennett's otherwise "stellar" reputation, Seaton's inability to articulate a specific reason why counsel should not call Dr. Bennett, and the fact counsel did not have an alternate expert to rebut the State's expert testimony that Petitioner's blood-alcohol level was over the legal threshold, counsel's decision to call Dr. Bennet was reasonable under prevailing professional norms and not deficient.[5]

Regarding counsel's investigation of Dr. Bennett's opinion, trial counsel testified:

> I recall that his testimony on the impairment stuff was so confusing, I don't—I don't think that we had talked about that aspect of what he was gonna say. **I asked him about all his opinions ahead of time** and I do not believe that that was in there. I could be mistaken, but I recall myself being confused while he was on the stand if he was talking five to 10 percent impairment out of a hundred percent or was he talking about blood alcohol levels impairment stuff which, you know, also could be read as percentages, and would mean very different things.

(App. 1204, emphasis added). Critically, based on counsel's testimony, counsel *did* discuss with Dr. Bennett his expert opinion on this matter, but Dr. Bennett supplemented his testimony on the stand. Just as it is not reasonable to expect attorneys to be clairvoyant about changes in the law, it is not reasonable to expect attorneys to be clairvoyant about a witness's decision to testify differently at trial than to what he said during interviews. Cf. Gilmore v. State, 314 S.C. 453, 457,

[5] Even if counsel's investigation of Dr. Bennett's background was deficient, Petitioner cannot show prejudice from counsel's failure to further investigate Dr. Bennett's background, as any further investigation into his background would have only uncovered the information the State used to impeach him. As set forth more fully below, to the extent Dr. Bennett's testimony was discredited by the State's cross-examination of him, the jury would have discounted his testimony—making it not reasonably probable his testimony contributed to the verdict itself.

445 S.E.2d 454, 456 (1994), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999) ("We have never required an attorney to be clairvoyant or anticipate changes in the law which were not in existence at the time of trial."). Ultimately, counsel acted within prevailing professional norms in interviewing Dr. Bennett, and his decision to call Dr. Bennett should be judged by its reasonableness at the time of trial—not in hindsight.

Further, counsel's decision to call Dr. Bennett as an expert should be judged in the context of Dr. Bennett's entire testimony and its benefit to Petitioner's defense—not one isolated sentence. As discussed below, Dr. Bennett offered the only expert testimony to contradict McKinnon's expert testimony that Petitioner's blood-alcohol level was above the legal limit *four hours after* the collision. Dr. Bennett likewise gave the jury alternative reasons about why Petitioner's blood-alcohol level was higher than Dr. Bennett's estimation, including improper storage that could cause alcohol to ferment within the sample; the potential use of an ethanol-based cleanser to clean the site of the blood draw; or the possibility of alcohol being in the blood given to Petitioner during a transfusion. Counsel's decision to introduce an expert to contradict the State's compelling expert testimony was reasonable under prevailing professional norms. Petitioner did not introduce any expert at the PCR hearing that counsel should have used instead and thus did not prove deficiency in this regard.

Petitioner's reliance on McKnight v. State, 378 S.C. 33, 661 S.E.2d 354 (2008) is patently misplaced. In McKnight, the trial attorney had the benefit of a prior trial that ended in a mistrial where he could assess the expert's opinion testimony in court and subject to cross-examination. Likewise, the trial attorney there had a second—and better—expert at the first trial that he did not call at the second trial. Here, counsel did not have the benefit of a prior trial where he could preview Dr. Bennett's testimony about Petitioner's impairment in court and subject to cross-examination.

He likewise did not have another expert he could have used instead, and Petitioner herself did not call any such expert at the PCR hearing. (Tr. 1194). Thus, McKnight is distinguishable.

Likewise, Ingle v. State, 348 S.C. 467, 560 S.E.2d 401 (2002) is distinguishable. Petitioner cites it for the proposition that counsel is ineffective for calling a witness he has not first spoken with. That is not, however, what occurred here. Trial counsel testified at the PCR hearing that he discussed Dr. Bennett's testimony with him prior to trial. (Tr. 1203). This is not a situation like Ingle where he put up a witness without first speaking to him; rather, he spoke to Dr. Bennett about his opinion, but Dr. Bennett added additional information at trial that he did not discuss with counsel in advance. Ultimately, viewed at the time of trial and not in hindsight, counsel's investigation into and decision to call Dr. Bennett as an expert to provide the jury a scientific basis to believe Petitioner's testimony that she wasn't impaired (even though her testimony contradicted the State's expert) was reasonable under prevailing professional norms and not deficient.

b. The Court of Appeals properly concluded Petitioner did not prove prejudice when (1) Petitioner did not present an alternate expert at the PCR hearing; (2) the State presented compelling evidence that Petitioner's blood-alcohol level was above the legal threshold, making it not reasonably probable the outcome would have been different without Dr. Bennett's testimony; and (3) Dr. Bennett's testimony, viewed in context, did not undermine the defense.

Critically, Petitioner did not present an alternate expert at the PCR hearing on the issue of her impairment. In the absence of an alternate expert, the only way to evaluate prejudice is to assess whether it is reasonably probable the jury would have acquitted Petitioner if Dr. Bennett had *not* testified. In other words, Petitioner did not offer a different course that trial counsel should have followed other than not calling an expert on this issue at all.

In the absence of Dr. Bennet's testimony, the jury had before it the following testimony related to Petitioner's impairment:

- Petitioner's admission she had, in fact, been drinking the evening of the collision;

- McKinnon's expert testimony that Petitioner's blood-alcohol level was .09 percent and was ethanol-based—which McKinnon clarified was different than isopropyl used in hospital settings;

- McKinnon's expert testimony that a blood transfusion and IV-saline drip (both of which Petitioner received after the collision and before the blood draw) would dilute the percentage of alcohol in the blood, making the blood-alcohol level *lower* than it would otherwise be;

- McKinnon's expert testimony that a person's blood-alcohol level (assuming that person stopped drinking) would be lower four hours later due to the body's metabolism and elimination of alcohol;

- McKinnon's calculation, based on average metabolic and elimination rates, that Petitioner's blood-alcohol level could have been around .15 percent four hours before the blood draw (which was, incidentally, the time of the collision);

- The testimony of six lay witnesses who saw Petitioner sometime before the collision and testified she did not appear impaired; and

- Petitioner's self-serving testimony that she was not impaired (although she acknowledged she could not remember large details of the evening, including leaving Applebee's and going to Geronimo Bar).

In the absence of Dr. Bennett's testimony, the only evidence that Petitioner was *not* impaired was the testimony of six lay-witnesses and Petitioner's self-serving testimony. Based on McKinnon's expert testimony that Petitioner's blood alcohol level was .09 percent—above the legal limit—when it was drawn four hours after the collision, it is not reasonable to conclude that had Dr. Bennett *not* testified, the jury would have determined Petitioner was not impaired. The Court of Appeals thus properly concluded Petitioner did not meet her burden of proving prejudice.

Further, Petitioner cannot show prejudice because Dr. Bennett's testimony, viewed in context, did not undermine her defense. Critically, Dr. Bennett opined Petitioner's blood-alcohol level at the time of the collision was very minimal—"**anywhere between zero and .01, .015.**"

(App. 884, emphasis added). This was the *only* expert testimony that contradicted McKinnon's testimony that Petitioner's blood-alcohol level was .09 percent at the time of the blood draw, and likely .15 percent at the time of the collision. In the absence of Dr. Bennett's testimony, the jury would have been confronted with weighing expert testimony that Petitioner's blood-alcohol level was .09 percent four hours after the collision against lay-testimony that she did not *appear* intoxicated and her own self-serving testimony that she was not intoxicated (although she candidly admitted she could not remember several large details of the evening). Ultimately, Dr. Bennett offered expert testimony from which the jury could have concluded Petitioner's alcohol level was ***as low as zero*** at the time of the collision. (App. 884).

In addition to being the only expert testimony to contradict McKinnon's testimony about Petitioner's blood-alcohol level, Dr. Bennett provided the jury a scientific basis for concluding there were reasons *other than* impairment that caused Petitioner's blood-alcohol level to test at .09 percent. These reasons included improper storage that could cause alcohol to ferment within the sample; the potential use of an ethanol-based cleanser to clean the site of the blood draw; or the possibility of alcohol being in the blood given to Petitioner during a transfusion. These scenarios provided the jury a basis to conclude there was an alternate reason that Petitioner's blood-alcohol level was above the legal threshold. In the absence of Dr. Bennett's testimony, it is not reasonable to conclude the jury would have found Petitioner was *not* impaired.

Overall, Dr. Bennet's testimony benefited Petitioner's defense. Dr. Bennett testified that due to the spacing between Petitioner's drinks, she likely had very minimal impairment, and most people with a blood-alcohol level of .01 would feel "little to no impartment" and would likely be able to drive a car. Further, Dr. Bennett testified that the victim herself was likely under the influence of marijuana. Viewed in context, Dr. Bennett's passing statement of a five to ten percent

impairment rating—which he never conclusively stated Petitioner actually had—did not undermine her defense.

In addition to arguing that Dr. Bennett undermined her defense, Petitioner contends she was prejudiced by the State destroying Dr. Bennett on cross-examination. Assuming the State *did* in fact destroy Dr. Bennett's credibility, it is not credible to then argue that Dr. Bennett completely undermined Petitioner's defense. In other words, if the jury found Dr. Bennett not credible (based on the State's cross-examination), then there is no reasonable probability that Dr. Bennett's testimony impacted the jury's final decision. Dr. Bennett's testimony would not have prejudiced Petitioner if the jury did not believe it; thus, this is not a proper measure for evaluating prejudice.

Ultimately, based on the State's evidence of Petitioner's blood-alcohol level *four hours after the collision* and Petitioner's own admission she had been drinking, Petitioner cannot show a reasonable probability that the outcome would have been different if Dr. Bennett had *not* testified and provided the jury an alternate expert opinion about to her blood-alcohol level. Likewise, because Dr. Bennett's testimony was favorable to the defense, and because the State vigorously impeached him on cross-examination, Petitioner cannot show a reasonable probability that Dr. Bennett's testimony itself somehow tipped the jury into finding Petitioner guilty. Finally, Petitioner did not offer an alternate expert at the PCR hearing that counsel should have used instead. Thus, the Court of Appeals properly concluded Petitioner did not prove prejudice.

CONCLUSION

Based on the foregoing, this Court should deny certiorari.

Respectfully Submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

DANIELLE DIXON
Assistant Attorney General

Danielle Dixon
Assistant Attorney General
S.C. Bar No. 73999

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803)734-2875

ATTORNEYS FOR RESPONDENT

This 30th day of July, 2024.